

ANNALES UNIVERSITATIS APULENSIS

SERIES JURISPRUDENTIA

26/2023

ANNALES UNIVERSITATIS APULENSIS
SERIES JURISPRUDENTIA
26/2023

SCIENTIFIC COMMITTEE/REFERENTS
COMITET ȘTIINȚIFIC/REFERENȚI

Associate professor PhD. Hab. **Anna Rytel** Warzocha, University of Gdansk, Poland

Conf. univ. dr. Tudorașcu Miruna	Universitatea "1 Decembrie 1918" din Alba Iulia
Conf. univ. dr. Hurbean Ada	Universitatea "1 Decembrie 1918" din Alba Iulia
Conf. univ. dr. Cetean-Voiculescu Laura	Universitatea "1 Decembrie 1918" din Alba Iulia
Conf. univ. dr. Hodoș Raul-Felix	Universitatea "1 Decembrie 1918" din Alba Iulia
Conf. univ. dr. hab. Lazăr Ioan	Universitatea "1 Decembrie 1918" din Alba Iulia
Conf. univ. dr. hab. Alămoreanu Sorin	Universitatea Babeș-Bolyai din Cluj Napoca
Lect. univ. dr. Rebreanu Veronica	Universitatea Babeș-Bolyai din Cluj Napoca
Prof. univ. dr. Dușu Mircea	Institutul de Cercetări Juridice „Acad. Andrei Rădulescu” al Academiei Române
Prof. univ. dr. Lazăr Augustin	Universitatea „1 Decembrie 1918” din Alba Iulia
Prof. PhD. Lucca Mezzetti	Alma Mater Studiorum Universita Di Bologna Dipartimento di Scienze Giuridiche, Italy
Conf. univ. dr. Pătrașcu Petrișor	Universitatea Națională de Apărare „Carol I”
Prof. univ. dr. Luha Vasile	Universitatea „1 Decembrie 1918” din Alba Iulia
Prof. asoc. tiempo completo Martha Isabel Mejía De Alba	Universidad Distrital Francisco José de Caldas, Bogota, Columbia
Prof. asoc. tiempo completo Elkin Emir Cabrera Barrera	Universidad Distrital Francisco José de Caldas, Bogota, Columbia
Prof. univ. Emerit Piso Ioan	Universitatea Babeș-Bolyai din Cluj Napoca
Conf. univ. dr. Trofimov Igor	Academia „Stefan cel Mare” a MAI, Chișinău, Republica Moldova
Assist. prof. PhD. Ormandzhiev Hristo Atanasov	University of Veliko Turnovo St Cyril and St. Methodius
Prof. PhD. Hab. Raysa Chirino	Private University „Dr. Rafael Belloso Chacín” Venezuela
Prof. asoc. PhD. Hab. Sidart Antonio Rodriguez	Private University „Dr. Rafael Belloso Chacín” Venezuela
Prof. PhD. Hab. Miguel Eduardo Negron Fuenmayoe	

MINISTERUL EDUCAȚIEI NAȚIONALE
UNIVERSITATEA “1 DECEMBRIE 1918” ALBA IULIA
FACULTATEA DE DREPT ȘI ȘTIINȚE SOCIALE
DEPARTAMENTUL DE ȘTIINȚE JURIDICE ȘI ADMINISTRATIVE

ANNALES UNIVERSITATIS APULENSIS

*Series
Jurisprudentia*

26/2023



EDITORIAL COMMITTEE
COLEGIUL REDACȚIONAL

Editor Șef: Conf. univ. dr. Laura CETEAN-VOICULESCU

Editor Șef adjunct: Conf. univ. dr. Ada HURBEAN

Membri: Conf. univ. dr. Miruna TUDORAȘCU,
Conf. univ. dr. Ioan LAZĂR,
Lect. univ. dr. Ioana PLEȘA

ISSN 1454-4075

COPYRIGHT © 2014, UNIVERSITATEA “1 DECEMBRIE 1918” ALBA IULIA
RO - 510009 ALBA IULIA STR. UNIRII, NR. 15-17, COD POȘTAL: 510009
TEL. 00-40-258- 813994; FAX: 00-40-258-812630
E-MAIL: **CATEDRA.DREPT@YAHOO.RO**

Table of Contents

The family booklet – between necessity and lack of use Alexandra TUDOR-TODORAN	9
Damage Caused in The Online Environment by Violating Children's non-Patrimonial Rights George Marius MARA	17
Some Aspects Regarding Organized Crime. Criminology and Criminal Law Perspective Raluca-Clarisa GLIGOR, Ioana-Andra PLEȘA	22
General Considerations on the Possible Legal and Factual Consequences of the Use of Artificial Intelligence on EU Competition Policy Iulian BĂICULESCU	30
International Criminal Justice: ICC towards Ad Hoc Tribunals in the UN System Letitia Mihaela MORAR.....	44
Fititious Insolvency. Demarcation from other Crimes Ana CUCERESCU.....	58
Normative Reflections Regarding the Legal Regulation of Marriage in the Republic of Moldova Evghenia GUGULAN.....	67
Some Reflections on the Separation of the Child from their Parents Cristiana-Mihaela CRĂCIUNESCU	75
Establishment of Parentage by Alternative Means Laura CETEAN-VOICULESCU	91
The Influence of the Matrimonial Regime of the Deceased on the Extent of the Successional Estate and the Utility of Civil Status Documents in the Notarial Succession Procedure Ilioara GENOIU	104
The Result is Destruction Tiberiu-Nicolae TEGLAȘ.....	116
Divorce Certificate in International Matrimonial Matters – Civil Status Document? Oana-Elena BUZINCU	124

The Civil Law Concept of things in the Digital Era – a Hungarian perspective	
Ágnes JUHÁSZ	132
Mediation in Administrative Litigation in France: what Results after Five Years of Implementation and what Possible Lessons for the Republic of Moldova?	
Nataşa DANELCIUC-COLODROVSCHI	
Maria ORLOV	149
Particulars of the Communication Process in the Case of Mass-Media Ethics	
Graţian MOLDOVAN	165
Legal Regime and Legal Aspects Regarding the Lease Agreement	
Maria ALBU	169
The Date of "Starting Construction of the House" Indicated in Art. 6 of Law no. 15/2003 Regarding the Support Granted to Young People for the Construction of a Personally Owned Dwelling is Represented by the Date of Submission of the Application for the Issuance of the Urban Planning Certificate or the Date of Issuance of the Building Permit?	
Raluca Laura DORNEAN PĂUNESCU	177
Considerations on the Institution of Criminal Liability Prescription, with Distinct Mentions on the Particular One, in the Context of Constitutional Jurisprudence and that of the Court of Justice of the European Union	
Aurelian Gheorghe MOCAN	187
Tactical Aspects Regarding the Approach to Drug Consumers During the Criminal Investigation	
Sorin Silviu FINTA	198
Material Object of the Land Register	
Dan-Adrian DOȚIU	
Jurisprudent Markers Regarding the Principles Applicable to Public Procurement Contract Award Procedures	
Marlena BOANCĂ-IVAN	216
The Requirements for Confirming the Restructuring Agreement in Order to Prevent Debtor's Insolvency	
Luiza Cristina GAVRILESCU	240
Legislative Developments in Civil Servants' Remuneration	
Cristina COSTEA	253
<i>Ultima Ratio</i> in Criminal Law – A Brief Analysis	
Gabriel TUDOROAIA	261
Evolution, Jurisprudence and Perspectives of Different Taxation Systems in Romania and the European Union	
Gabriel TAMAS-SZORA	273

Amendment in Labor Contract and the Unpredictability Theory	
Ada HURBEAN.....	290
The Family Booklet – Between Necessity and Lack of use	
Opinions on the Respect of Confidentiality in the Case	
of the Settlement of the Claim for Compensation in the Matter	
of Competition	
Manuela NIȚĂ	297
The People's Advocate, Guarantee of Respecting the Principle	
of the Best Interest of the Child, in the Field of Crimes Against	
Sexual Freedom	
Emil Mihai PAȘOLEA	309
Gender Quotas – A Solution for Guaranteeing Equality between	
Men and Woman Regarding Acces to Public Positions	
and Dignities	
Mihaela SIMION	338

THE FAMILY BOOKLET – BETWEEN NECESSITY AND LACK OF USE

PhD. Alexandra TUDOR-TODORAN*

Abstract

Through this paper I presented certain information regarding the family booklet, which is that "pocketbook" that the newlyweds receive together with the marriage certificate. Comparatively, in my study I also focused on French legislation, as this is a benchmark for the Romanian legislator. The similarities between the two regulations are great, but the differences are even more than obvious, due to the fact that French legislation regulates very well the family booklet and its utility.

Keywords: family booklet, parents, child, family, Romanian legislation, French legislation.

In Romania, according to Art. 1 paragraph (1) from Government Decision No. 495 of September 12, 1997 regarding the content, issuance and updating of the family booklet¹, the family booklet was defined as the document which includes the main data regarding the family compound, the parentage of the children and their legal status vis-à-vis legal representatives.

On the occasion of the marriage, the civil status service issues the family booklet. We mention the fact that the family booklet can also be issued outside of marriage. If they are not married, either the father or the mother receives the family booklet, but only if the conditions stipulated in the provisions of art. 2 paragraph (1) lit. b) from Law No. 119 of 1997² are fulfilled, respectively if they have dependent minors and reside with them.

If after the issuance of the family booklet, situations arise that relate to the birth of a child, change of name and surname as a result of the divorce of the spouses, the provisions of some judicial or administrative decisions that lead to the modification of parental

* Legal Adviser, mediator, Assistant Professor, "1 Decembrie 1918" University from Alba Iulia, Faculty of Law and Social Sciences.

¹ Available on-line at HG 495 12/09/1997 - Portal Legislativ (just.ro), website accessed on 15.06.2023.

² Law No. 119 of July 9, 1997 regarding the additional allowance for families with children, published in the Official Monitor No. 149 of July 11, 1997.

authority relationships, *the family representative* has the obligation to notify the civil status service of the local council in the territorial area of his residence, requesting in this sense the completion of the family booklet, as established by the legislator in the content of art. 8 of Government Decision No. 495/1997.

If we analyze the definition of the family booklet given by the legislator, namely that it is the document that contains the main data regarding the family compound, the parentage of the children and the notion of legal representative, we note an inadvertence of the legislator. Anyone can be the legal representative of the child, natural or legal persons named in accordance with the legal provisions, including people from whom the child's parentage cannot be established, namely the parentage relationship. The ways of establishing parentage are recorded by the legislator in the content of art. 408 Civil Code, respectively parentage to the mother, parentage to the father inside marriage and parentage to the father out of wedlock³. There would also be the parentage of the child resulting from medically assisted human reproduction with a third-party donor, but the present study does not include discussions on this topic.

The civil status service of the local council is the one that ensures the record of family booklets, in a special register, with a permanent retention period, in compliance with the rules regarding records and keeping archives, as stipulated in the provisions of art. 6 corroborated with the provisions of art. 13 of Government Decision No. 495/1997.

It should be noted that, according to the provisions of art. 12 paragraph (1) of Government Decision No. 495/1997, the Romanian legislator provided contraventions for the use of the family booklet with inaccurate or incomplete writings, as well as for the violation of the obligations provided for in provisions of art. 11 of the same Decision⁴,

³ Art. 408 of the Civil Code states the following: "paragraph (1) – Parentage to the mother results from the fact of birth; it can also be established by recognition or by court decision; paragraph (2) – Parentage to the father by marriage is established by the effect of the presumption of paternity; paragraph (3) – Parentage to the father outside of marriage is established by recognition or by court order, as the case may be".

⁴ According to the provisions of art. 11 of Government Decision No. 495/1997, regarding the family booklet, the family representative has the following obligations: to preserve it and prevent its loss, its destruction or damage; not to entrust it to unauthorized persons or to leave it for safekeeping or pledge; not to make changes, additions or mentions on own initiative; to request, in writing, the civil status service of the local council in the territorial area of the residence, for the granting of a duplicate in case of loss, destruction or damage; to notify, in writing, in less than 15 days, the civil status service of the local council in the territorial area of the residence, the changes likely to lead to the modification of the right to the additional allowance for families with children.

but only if the acts were not committed under such conditions so that, according to the criminal law, they constitute crimes and are punishable by a fine from from "100.000 lei to 500.000 lei". We consider that the Romanian legislator should review the amount of the fine provided for in Government Decision No. 495/1997, since the monetary reform took place from the publication of the text until 2023⁵.

If we ask ourselves *what is the utility of the family booklet?* the answer that we receive from the Romanian legislator is established in the content of art. 1 paragraph (2) from Government Decision No. 495 of September 12, 1997 regarding the content, issuance and updating of the family booklet, namely that it serves to grant the rights regulated by law. For example, this is taken into account when granting additional allowances for families with children, for the monthly allowance for raising children, for social assistance, for obtaining nursery vouchers⁶, for granting rights for disabled people a.s.o.

In France

In French law, the family booklet is disposed by Decree No. 74 – 449 of May 15, 1974 regarding the family register and informing spouses and parents about family law⁷. Thus, according to the provisions of art. 1 of the aforementioned decree, the family booklet is drawn up and issued by the civil status office: to the spouses, at the time of the marriage celebration; to the parents or to the one of them with respect to whom filiation is established, when declaring the birth of the first child; to the adopter, during the transcription in the civil status registers of the decision to adopt a child by a single person.

⁵ We refer to the monetary reform of July 1, 2005, when the national currency of Romania, the leu, was denominated, thus 1 leu was equivalent to 10.000 old lei. In this regard, see Circular No. 24 of November 28, 2006, published in the Official Monitor, part I 989, of December 12, 2006 regarding the cessation of circulatory power and the exchange of old monetary signs, available on-line at Banca Națională a României - Act legislativ (bnr.ro),_ website accessed on 21.06.2023.

⁶ According to art. 18 paragraph (1) of Law No. 165 of July 10, 2018 regarding the granting of vouchers, nursery vouchers are vouchers that are given, monthly, to employees who do not benefit from the leave and the allowance granted for raising children up to 2 years old, respectively up to 3 years old in the case of the disabled child. The law is available on-line at the address LEGE 165 10/07/2018 - Portal Legislativ (just.ro),_ website accessed on 22.08.2023. Nursery vouchers are granted on the basis of the family booklet, at the request of one of the parents or the guardian to whom the child was entrusted for upbringing and education.

⁷ Available on-line at Décret n°74-449 du 15 mai 1974 relatif au livret de famille et à l'information des époux et des parents sur le droit de la famille - Légifrance (legifrance.gouv.fr),_ website accessed on 20.06.2023.

The Franch family booklet includes, where applicable, an extract from the marriage certificate, respectively an extract from the birth certificate of the parent(s) with respect to whom parentage is established, as well as an extract from the child's birth certificate.

According to the provisions contained in art. 3 of Decree No. 74-449 of May 15, 1974⁸, the family booklet is completed later, as appropriate, by:

- extract from the parents' marriage certificate;
- extract from the birth certificate of the parent with respect to whom parentage is established after the date of issuance of the family booklet. When there are mentioned several children in the family booklet, this registration is only possible if this parent is common to all children. In other cases, the family booklet is returned and two new booklets are issued, one mentioning the children common to both parents, and the other mentioning the children whose filiation is established with respect to only one of the parents;
- extracts from the birth certificates of the children common to both parents or, when parentage is established only to one parent, of children whose parentage is established only to this parent;
- extracts from the children's death certificates;
- extracts from the death certificates of spouses or parents.

Therefore, the family booklet is drawn up by the civil status office at the place of the child's birth, at the time of its declaration. The child's birth declaration must be made within 5 days of the event, at the town hall of the town where the birth took place. The booklet is issued upon the birth of the first child and contains information about the parents and the child (based on their birth certificates), respectively information on family law⁹. If there are several children, the information about them is included in the order of their birth.

In the situation where the parents are not married, they receive the family booklet with the birth of their first joint child¹⁰, but the rules are different, depending on the place of birth: if it took place on French territory or outside it.

⁸ In accordance with the provisions of art. 5 of Decree No. 2022-290, from March 1, 2022, these provisions apply from the entry into force of the mentioned decree, regardless of the date of the death certificate of the adult child, or the date of the certificate of the child without life (stillborn).

⁹ Marriage, parentage, adoption, parental authority etc.

¹⁰ Information available on-line at Livret de famille: délivrance à la naissance de votre premier enfant | Justice.fr, website accessed on 20.06.2023.

Thus, if the birth took place on the territory of the French state, the family booklet is either sent by post to the residence of one of the parents, or given by the town hall of the town where the child was born, based on the identity card of one of the parents.

In the event of a stillborn child, one of the two parents can apply for the family booklet at the town hall where the child was born.

In the situation where the birth took place outside the territory of the French state, the family booklet is established by the French consular authorities in the country of residence from the respective moment¹¹. Information about the child is only recorded if the child's birth certificate has been recorded by a French civil status officer.

The birth certificate must be registered by the central service within the Ministry of the Foreign Affairs. Thus, the family booklet is only issued if a French authority has registered the birth certificate of the child and at least one of the parents.

If the child is stillborn, one of the parents can apply for the family booklet at the French embassy or consulate in that country.

If a child is adopted, the family booklet is issued when the adoption decision is transcribed in the civil status registers. In this situation, in accordance with the provisions of art. 12-1 of Decree No. 74 – 449 of May 15, 1974, the extract from the birth certificate reproduced in the family booklet of the parents of origin of the adopted person is supplemented with the mention of the simple adoption decision. In addition, the extract from the adoptee's birth certificate is reproduced in the adopter's family booklet and the parentage of the adoptee is mentioned in the margin as well as the reference to the simple adoption decision.

The family booklet must be updated in the event of any change in the marital status of the persons registered in it¹².

Also, within the provisions of art. 7-2 of Decree No. 74 – 449 of May 15, 1974, the French legislator regulated the fact that when issuing the documents instead of civil status documents referred to in art. L 121-9 of the Code for the entry and stay of foreigners and the right of asylum¹³,

¹¹ We refer to the time of the declaration of birth or the time of the request for the issuance of the French birth certificate, by transcribing the foreign birth certificate.

¹² Birth, marriage, adoption, divorce, death.

¹³ Version in force from May 1, 2021, disposes that the French Office for the Protection of Refugees and Stateless Persons is empowered to hand over to refugees and beneficiaries of subsidiary protection or statelessness, after investigation, if necessary, the necessary documents to enable them to carry out the various acts of civil life, or to apply the provisions of domestic legislation or international agreements that affect their protection, especially documents instead of civil status documents. The General Director of the Office authenticates the acts and documents submitted to him. The acts and documents he prepares have the value of authentic acts. These various documents

the director general of the French Office for the Protection of Refugees and Stateless Persons draws up the family booklet which he hands to the spouses or to the one of them who has been recognized as a refugee or stateless person or who has been admitted to the benefit of subsidiary protection. The family booklet includes, as appropriate, extracts from the certificates, instead of the certificate itself¹⁴, but is subsequently completed in accordance with the provisions of art. 3 of the aforementioned Decree. Thus, in the case of parents who are refugees, stateless persons or beneficiaries of subsidiary protection, the documents are submitted to the French Office for the Protection of Refugees, Stateless Persons or Beneficiaries of Subsidiary Protection. At the same time, the French legislator ruled¹⁵ that the facts or decisions that have an impact on an act or on a certificate instead of which the extract appears in the family booklet, must be mentioned, as the case may be, by the French civil officer or by the director general of the French Office the Protection of Refugees, Stateless Persons or Beneficiaries of Subsidiary Protection Beneficiaries.

At the same time, it is regulated that when the marriage is subsequent to the issuance of the family booklet, the extract from the marriage certificate registered in the booklet includes only the information that does not already appear in it. The extracts from the parents' birth certificates are drawn up in accordance with art. 32 of the Decree of May 6, 2017¹⁶, excluding mentions of their gender, marital

compensate for the lack of papers and documents issued in the country of origin. Documents issued by the Office are not subject to registration or stamp duty (*our translation*). The article is available on-line at Article L121-9 - Code de l'entrée et du séjour des étrangers et du droit d'asile - Légifrance (legifrance.gouv.fr), website accessed on 20.06.2023.

¹⁴ In the sense that it can include extracts from certificates – instead of the marriage certificate of the spouses and the birth certificate of the children resulting from this marriage or extracts from the certificates – instead of the birth certificates of the parents and their children.

¹⁵ Within the provisions of art. 9 of Degree No. 74-449 of May, 15, 1974, available on-line at Décret n° 74-449 du 15 mai 1974 relatif au livret de famille et à l'information des époux et des parents sur le droit de la famille - Légifrance (legifrance.gouv.fr), website accessed on 21.06.2023.

¹⁶ Art. 32 provides, among other things, that the extracts, indicating parentage, of birth or marriage certificates specify the surname, first name, date and place of birth of the parents of the person to whom the certificate refers to. They can be issued to the latter if he is an adult or emancipated person, as well as to his ascendants, descendants, spouse, partner bound by a solidarity pact, his legal representative and persons who provide proof of a written mandate or the device of the family authorization decision provided for by art. 494-1 of the French Civil Code. The text of the article is available on-line at Article 32 - Décret n° 2017-890 du 6 mai 2017 relatif à l'état civil - Légifrance (legifrance.gouv.fr), website accessed on 21.06.2023.

status, partner status linked to a civil solidarity pact, as well as the dates and places of birth of their own parents.

There is a possibility that a second family booklet¹⁷ may be issued if one of the parents does not have the first booklet. For example, we mention the situation of a divorce or separation, based on the presentation of a court decision, a divorce agreement.

Also, a new family booklet is issued if there is a change in parentage, or in the surnames or first names of the registered persons. Thus, the new parentage, or the new names and surnames, will be specified, without making any mention of the previous ones.

The French legislator regulated¹⁸ that each of the extracts, as well as each of the entries in the family booklet, has probative force attached to the extracts from the civil status record and the entries in the margin.

In our jurisprudence, by civil sentence no. X, pronounced by the Blaj Court, on May 23, 2023¹⁹, the court partially admitted the request made by the petitioner, authorizing him to represent the minor at the conclusion of some legal acts (in the notarial succession procedure, where to accept under the benefit of inventory, the succession after his deceased father; respectively, when opening an account in the name of the minor, into which the sums resulting from the succession debate should be transferred). The petitioner attached to her application copies of the minor's birth certificate, the father's death certificate, the petitioner's identity card, the marriage certificate, the minor's passport, the family booklet and the power of attorney. Thus, we note the fact that the family booklet is useful in probation, but submitted not as a result of an express request in this regard, but as a will of the petitioner. Moreover, in practice, when the judge is invested with a request for the dissolution of the marriage, he no longer requests the return of the family booklet.

In conclusion, the present study did not start from the substantiation note of the Romanian legislator, but from the practical necessity of the family booklet. We note that the family booklet was intended to be the document that shows proof of the composition of a family. If the birth certificate is the document that certifies the proof of a person's existence, the family booklet is the document that reflects all

¹⁷ On the first page is written "Second booklet".

¹⁸ We refer to the provisions of art. 13 of Decree No. 74-449 of May, 15, 1974.

¹⁹ Available on-line at Sentinta nr. RJ de35g92d3/2023 din 20-apr-2023, Judecatoria Blaj, tutela - autorizari date tutorelui (Minori si familie) - SINTACT_website accessed on 15.06.2023.

the members of that family, seen together. At least this was the intention of the Romanian legislator.

But, in practice, there are extremely rare cases where the family booklet is requested at any public or private institution. Moreover, when the issue of a decision concerning a minor arises, public or private authorities request a psychosocial investigation, which is drawn up to guarantee and respect the principle of the minor's best interests.

Probably the French model was taken into consideration at the time of the regulation in our legislation, but in terms of the transposition of the regulation, we find that things have been partially completed. Thus, at the moment, we can consider two directions: either the legislation regulating the family booklet is adapted, or the Government Decision No. 495 of September 12, 1997, regarding the content, issuance and updating of family booklets, respecting the principle of symmetry, which is an official act, is expressly repealed.

Therefore, a better cooperation of the decision-makers is needed, so that, once placed in the civil circuit, the family booklet must produce concrete legal effects, since at the moment this document is an obsolete one.

Webography:

- 1) HG 495 12/09/1997 - Portal Legislativ (just.ro), website accessed on 15.06.2023.
- 2) Banca Națională a României - Act legislativ (bnr.ro), website accessed on 21.06.2023.
- 3) Décret n° 74-449 du 15 mai 1974 relatif au livret de famille et à l'information des époux et des parents sur le droit de la famille - Légifrance (legifrance.gouv.fr), website accessed on 20.06.2023.
- 4) Livret de famille: délivrance à la naissance de votre premier enfant | Justice.fr, website accessed on 20.06.2023.
- 5) Article L121-9 - Code de l'entrée et du séjour des étrangers et du droit d'asile - Légifrance (legifrance.gouv.fr), website accessed on 20.06.2023.
- 6) Article 32 - Décret n° 2017-890 du 6 mai 2017 relatif à l'état civil - Légifrance (legifrance.gouv.fr), website accessed on 21.06.2023.
- 7) Sentinta nr. RJ de35g92d3/2023 din 20-apr-2023, Judecatoria Blaj, tutela - autorizari date tutorelui (Minori si familie) - SINTACT, website accessed on 15.06.2023.
- 8) LEGE 165 10/07/2018 - Portal Legislativ (just.ro), website accessed on 22.08.2023.

DAMAGE CAUSED IN THE ONLINE ENVIRONMENT BY VIOLATING CHILDREN'S NON-PATRIMONIAL RIGHTS

Lect. Dr. George Marius MARA¹

Abstract

The increase in the use of electronic resources, along with the development of new technologies, has led to negative side effects on children's rights, among which we find particular forms of aggression in the online environment, such as cyberbullying and moral harassment.

In this paper we have analyzed the non-patrimonial damage caused by the forms of psychoemotional violence that manifest themselves in particular in the online environment, emphasizing the importance of increased attention that both parents and teachers and other professionals involved in the process of raising and educating the minor must manifest, in order to safeguard his best interest and ensure a harmonious development of the child.

Keywords: *minor, superior interest, prejudice, cyberbullying, rights, liability*

Internally, the protection of the rights and interests of minors is enshrined at legislative level, the principles being also stated in Law no. 272/2004 on the protection and promotion of children's rights, which transposed into national law a series of rules governing at international and European level the protection of minors.

We will thus note that in accordance with the provisions of art. 27-28 of this normative act, the child has the right to protection of public image and private and family life and actions that harm the child's public image are not allowed. He has the right to seek, receive and disseminate information including in the online environment, being forbidden to harm his physical, mental or emotional well-being.

Despite these regulations, the increase in the use of electronic resources by minors has also led to unwanted negative effects, increasing the risk for their harmonious development, especially from a mental and emotional point of view.

Thus, specific forms of aggression against minors, such as cyberbullying and moral harassment have seen a rapid development in

¹ Judge at the Alba Tribunal, University Lecturer – Faculty of Law and Social Sciences of the "1 Decembrie 1918" University of Alba Iulia - Romania, e-mail george.mara@uab.ro

recent years, representing contemporary methods of violating the non-patrimonial rights of minors, such as their right to benefit from the protection of personality and individuality, to be protected from aggression and violence, the right to benefit from the protection of their image and family or private life.

It was found that the frequent use of mobile phones with internet access by students meant that a percentage ranging between 20-40% of them were victims of a cyberbullying², at least once in life, with a negative impact on the individual's relationship with the external environment, family and social environment, but also on school performance, also affecting the psycho-affective balance of the child.

Electronic harassment can have an even deeper impact on a victim's psyche, even if it does not directly harm their physical integrity as traditional ways of harassment can.

Cyberbullying carried out by generating video or phone calls, or by transmitting photos in the online environment, can generate a much deeper impact on the victim's further development on the psycho-emotionally level.

Among the negative effects that can be caused as a result of violence in the online environment, we will find the creation and amplification of a state of anxiety, even a depressive syndrome, which can lead to an increased risk of suicide. Intense moral suffering, changes in the victim's behavior as a result of feeling the loss of any hope of leading a peaceful and fulfilling life create a specific non-patrimonial damage, of a moral and social nature, which entitles the victim to obtain protection and compensation for this damage.

As a form of non-patrimonial damage, moral damage is in fact an unjust disorder of the psycho-emotional state of the victim, as a result of the illicit act, this disorder taking the form of anguish, of strong inner suffering. The disorder that forms the content of moral damage must not be a lasting one, it must not be permanent, otherwise it will enter the perimeter of biological damage, in the form of damage to the psychological integrity of the victim³.

Another form of non-patrimonial damage that can be caused to minors by specific forms of aggression in the online environment is social damage, school failure, manifested by school dropout, absenteeism, lack of involvement in school and extracurricular activities.

² Cyberbullying (ou cyber harcèlement) et psychopathologie de l'enfant et de l'adolescent: état actuel des connaissances, M. Arsène, J.-P. Raynaud, *Neuropsychiatrie de l'Enfance et de l'Adolescence*, Volume 62, Issue 4, June 2014, pp. 249-256.

³ G. M. Mara, *Non-patrimonial damage caused by judicial error*, Ed Universul Juridic, Bucharest, 2020, p. 221.

The victim is prevented from fully integrating into the school environment, his/her interpersonal relationships with teachers and other colleagues are affected, the chances of making the most of the child's intellectual and creative potential are reduced, essentially affecting his/her right to happiness. Because a large part of the victims of these aggressions end up consuming alcohol, tobacco or drugs, we can consider that their social and moral development risks being affected in the long run, perhaps for life, if measures are not taken to prevent these consequences or to heal the traumas suffered.

Social harm is that which affects the victim's daily life, interpersonal relationships, habits and way of living, in such a way that he finds himself deprived of the opportunity to fully manifest his personality in the outside world. Existential damage does not involve an injury to bodily integrity, as in the case of biological damage, nor does it involve psycho-affective suffering, as in the case of moral damage, but as a form of non-patrimonial damage, it can be cumulated with them⁴.

If the activities of cyberbullying manifests itself over an increased temporal duration, the disturbance of the psycho-affective balance of the victim can be so profound as to lead to a long-term damage to his mental integrity, which takes the form of a mental illness, thus causing biological damage.

Also a form of non-patrimonial damage, biological damage is characterized by damage to the psycho-physical integrity of the person, negative consequences assessable medico-legally, being distinct from suffering representing moral damage, and which can be assessed separately.

Biological damage has its origin in the illicit fact that transforms a normal, physiological condition of the victim into a pathological one, generating a state of illness, respectively an injury to physical or mental integrity, a negative consequence that accompanies a possible moral damage. The state of health needs to be affected and this is to be demonstrated by specific means of evidence. The violation of psychic integrity involves a disturbance of the emotional, psychological balance, which manifests itself not outside the body, but rather in the sphere of psychic, emotional and relational life. The development of medical science has also led to an evolution of the concept of mental illness, so that it cannot be excluded that a state of depression arising from the wrongful act may be of a nature requiring compensation⁵.

⁴ *Id.*, p. 227.

⁵ *Id.*, pp. 213-214.

A study on cyberbullying⁶ concludes that there has been an increase in headache, abdominal pain or sleep disturbances among cybervictims, which demonstrates that biological harm can also manifest itself in terms of damage to the physical integrity, not just the psychological integrity of the victim.

What distinguishes cyberbullying from traditional methods of aggression is that, in the case of online means, violence, a psycho-emotional one, has the ability to take place continuously, throughout the day, because the technical means that facilitate this aggression (mobile phone, tablet) are accessible to the cybervictim at any time of the day, even when he is at school or engaged in other activities. Even when the child is prohibited from using electronic means of communication, he can find ways to circumvent this prohibition, or alternative tools to achieve communication.

Specific to cyberbullying is also that the aggressor feels protected by a certain anonymity that he can benefit from in the online environment, by using a hidden identity or a pseudonym. The victim's fear is amplified in these circumstances, because he cannot know the identity of the aggressor, suspicions can lead to any person in the victim's circle of acquaintances (even a close person) or outside it.

The minor's right to his public image and to the protection of his private life can be harmed by using modern means of cyberbullying such as online posts on social networks, by using the victim's identity (identity theft) in order to compromise him. Posts may be used to blackmail the victim, to induce certain behavior, or sometimes for the purpose of revenge or punishment.

The victim often ends up not communicating with their parents or relatives about this phenomenon, fearing that they will be denied the use of electronic means of communication.

Even if, as we have seen, the aggression carried out on minors in the online environment is not a physical one, but rather takes place in the plan of the victim's psycho-emotional life, its consequences should not be underestimated at all. Given the increasing development of new technologies, the development of a large part of the social life of children and young people in the online environment, the violation of their non-patrimonial rights, through acts of aggression that take place in this environment, requires taking measures to prevent and compensate these sufferings produced to the victim.

⁶ *Ongoing and online: Children and youth's perceptions of cyber bullying.*

F. Mishna, M. Saini, S. Solomon, *Children and youth services review*, vol 31, Issue 12, December 2009, pp. 1222-1228.

Conclusions

Specific methods are needed to prevent and combat modern forms of aggression against minors, such as cyberbullying, a phenomenon that has experienced a particular magnitude in recent years, with the unprecedented development of social networks and the massive migration of communication in the digital area. In order to achieve this goal, the involvement of parents, teachers and other specialists is essential, as is the development of information and awareness campaigns on cyberbullying and the negative consequences it causes.

Cyber aggressors must be sanctioned both by means of criminal law and by civil law, the mechanism of tort civil liability being able to lead to the victim obtaining compensation for various forms of non-patrimonial damage suffered (moral, biological and social).

Bibliography

1. Arsène, M, Raynaud, J-P, *Neuropsychiatrie de l'Enfance et de l'Adolescence*, Volume 62, Issue 4, June 2014
2. Mara, G. M., *Non-patrimonial damage caused by judicial error*, Editura Universul Juridic, Bucharest, 2020, p. 221.
3. Mishna, F., Saini, M., Solomon, S., *Ongoing and online: Children and youth s perceptions of cyber bullying*, - *Children and youth serveis review*, vol. 31, Issue 12, December 2009.

SOME ASPECTS REGARDING ORGANIZED CRIME. CRIMINOLOGY AND CRIMINAL LAW PERSPECTIVE

PhD. Candidate Raluca-Clarisa GLIGOR¹

PhD. Ioana-Andra PLEȘA²

Abstract

Organized crime is defined as a criminal field characterized by illegal activities which are supposed to seriously affect certain sectors of economic, social and political life, carried out by various methods and means, constantly, planned and conspired by organized criminal groups, with an internal hierarchy well determined, with specialized structures and self-defense mechanisms, in order to obtain illicit profits at particularly high rates.³

Crime is a complex phenomenon with significant influences on society, therefore there is a growing concern over it not only in the criminal field but also in the field of criminology.

Crime is one of the objects of Criminology studies along with criminal, crime, victim and anti-criminal practice generically named as a social reaction against crime.

Criminality consists of all acts with criminal significance as well as deviant behaviors generating legal consequences temporally and spatially, committed in a certain period within a certain geographical space.

Any form of crime has bad consequences for society, but even more organized crime, presenting a high degree of social danger.

Keywords: *crime, organized crime, organized criminal group, prevention policies*

1. Organized crime-criminological aspects

We consider that two meanings of the term "organized crime" are significant: a certain number of criminal organizations established or even consolidated in the environment having an illegal object of activity or even if the object of activity is legal, the members of the group systematically commit acts inscribed by the criminal law. Another meaning of the term organized crime is represented by that set of criminal activities with a high gravity committed for the purpose of obtaining profit.

¹ Teaching Assistant, "1 Decembrie 1918" University from Alba Iulia, raluca.gligor@uab.ro, ORCID iD: 0000-0002-1065-8514

² Lecturer, "1 Decembrie 1918" University from Alba Iulia, ioana.plesa@uab.ro, <https://orcid.org/0000-0001-7658-8611>

³ Emilian Stancu, *Criminology Treatise, Revised and Added II Edition*, Editura Universul Juridic SRL, Bucharest, 2002, p. 648.

A perfect illustration of the idea of organized crime can be found in the international doctrine: "Organized crime does not operate in a social vacuum, but interacts with its social environment; consequently, there should be a thorough understanding of social ties and social interactions. Social ties are important because criminals operate in relatively hostile and uncertain environments, primarily as a result of the illegality of their activities.." ⁴

So we return to the idea that, first of all, crime is a social phenomenon, even if criminal acts have legal significance and are criminalized in state legislation.

"Illegality implies that contracts are not enforceable (as in licit business), illegal activities. The world of organized crime could be characterized as a kind of "jungle": the financial stakes are high, yet the rules and mechanisms that regulate transactions in the legal world are absent: the conclusion of contracts, the payment of debts through the official banking system and — in case of disagreement — availability of mediation or courts. Therefore, cooperation in the world of organized crime is not easy to find, and reducing mistrust between criminals is a recurring problem" ⁵.

There are certain specific features of criminal organizations, namely: the establishment of the criminal unit, the existence of a leader of the group and implicitly the establishment of a concretely determined internal hierarchy, the specialization of the members of the organization on specific criminal activities, and last but not least the use of specific mechanisms to neutralize social control ⁶.

According to art. 2 letter a of LAW no. 39 of January 21, 2003 by organized criminal group is understood - the structured group, consisting of three or more persons, which exists for a period and acts in a coordinated manner in order to commit one or more serious crimes, to obtain directly or indirectly a financial benefit or other material benefit; does not constitute an organized criminal group the group formed occasionally for the immediate purpose of committing one or more crimes and which does not have continuity or a determined structure or predetermined roles for its members within the group ⁷.

"Organized crime has been characterized by the scale of the criminal activity, involves a chain of command similar to the military

⁴ Jay S. Albanese, Georgios A. Antonopoulou, Margaret Beare, *The Oxford Handbook of Organized Crime*, Oxford University Press, United States of America, 2014, p. 38.

⁵ *Idem*.

⁶ Augustin Lazăr, *Criminology*, Risoprint Publishing House, Cluj-Napoca, 2008, p. 56.

⁷ <https://legislatie.just.ro/Public/DetaliuDocument/119973>, LEGEA nr. 39 din 21 ianuarie 2003.

pyramid system, planning of actions, threat or use of force, isolation of management from the top of the pyramid and relative immunity for top occupations”⁸.

Analyzing the opinions revealed by specialized writings, we can unequivocally conclude that organized crime is a complex phenomenon with social and legal implications.

Although we are tempted to say that not only profit is the objective of organized crime and we say that the desire for power often acquired through the use of violence could be a goal, we find the clarification of this dilemma in international doctrine, organized crime has only one motive, namely profit. Correct conceptualization in academia has been seriously hampered by a misunderstanding of this point. The purpose of organized crime is neither violence nor power. Violence can be used and a position of power can be achieved, but only as a means of obtaining or securing income streams. Nor is organized crime – in its majority – of an ethnic or territorial nature. It often consists of ad hoc groups, as shown as early as 1974 in the pertinent analysis of organized crime by the then Secretary General of Interpol, Jean Népote”.⁹

Among the most widely used strategies for investigating organized crime groups are electronic surveillance, informants, and undercover policing (the FBI and other investigative agencies are free to infiltrate criminal groups with undercover agents hoping to obtain first-hand intelligence and evidence of certain crimes.)¹⁰

“In terms of electronic surveillance since the 1970s, the FBI has been involved in gathering information about organized crime groups. It initially sought to identify and map the members, hierarchy, criminal activities and business operations of each LCN family. Electronic surveillance was vital to this effort. In the 1960s, the FBI used wiretapping (wiretapping) extensively against the LCN, but wiretapping evidence was not admissible in federal trials.”¹¹

“The actions of mafia-type organizations are carried out on three levels 71:

1. Establishment in the environment. At this level, the members of the association commit various crimes in order to establish themselves in a certain environment or area (debt recovery, kidnapping of people, blackmail, threats, smuggling, robberies, drug trafficking, etc.).

2. Consolidation in the environment. The association continues to carry out the criminal activities characteristic of the first level, shaping

⁸ Augustin Lazăr, *Criminology*, op. cit., p. 57.

⁹ International law and transnational organized crime. Oxford University Press, United Kindom, 2016, p .51.

¹⁰ International law and transnational organized crime, op. cit, p. 533.

¹¹ *Idem*.

the trend of planning future actions. The criminal activities carried out are of a larger scope, reaching the upper socio-economic levels (large-scale trafficking in drugs and weapons, assassinations of public administration officials, policemen, magistrates, politicians, settling scores with other criminal organizations for territorial supremacy).

3. Integration into society. At this level, money from illegal activities is recycled, by investing it in legal businesses. The criminal organization aims to penetrate the structures of society in the most profitable manner and take control over some economic, social and political sectors".¹²

2. Organized crime and criminal law

Crime against public order and peace, the creation of an organized criminal group is regulated in article 367 of the Criminal Code, according to which "the initiation or creation of an organized criminal group, joining or supporting, in any form, such a group is punishable by imprisonment of to 1 to 5 years and the prohibition of exercising certain rights. When the crime falling within the scope of the organized criminal group is punishable by law with life imprisonment or imprisonment of more than 10 years, the penalty is imprisonment from 3 to 10 years and the prohibition of exercising of rights" (art. 367 para. (1) and (2). In para. (4) of the same article, the legislator states that the persons who inform the authorities of the establishment of an organized criminal group will not be punished, provided that the authorities not having previously discovered the existence of the criminal group and not having started the commission of any of the crimes included in the group's purpose. Also, "if the person who committed one of the acts provided for in paragraphs (1)–(3) facilitates, during the criminal investigation, the discovery of the truth and the prosecution of one or more members of an organized criminal group, the limits special features of the punishment are reduced by half" (art. 367 par. (5) Criminal Code).

The legislator defines in para. (6) of art. 367 of the Criminal Code the organized criminal group, as that structured group, made up of at least three people, constituted for a certain period of time and to act in a coordinated manner for the purpose of committing one or more crimes. The following conditions therefore result: there must be a group made up of several people, the group must be formed over a certain period of time, so it must not have an occasional character, the group must have a criminal program and a hierarchical structure in order to commit illegal acts towards which the activity of the group is oriented. Finally, there

¹² To be seen Emilian Stancu, *op. cit.*, p. 647 *apud* Augustin Lazăr, *op. cit.*, p. 56. The criminal organization aims to penetrate the structures of society in the most profitable manner and take control over some economic, social and political sectors.

must also be an understanding between the members of the group regarding the acts that are committed jointly by them and regarding the duties that belong to each member. In a decision of the Court of Appeal, Craiova held back¹³ that the mere existence of some telephone conversations from which it follows that the defendants know each other, is not sufficient ground to establish the existence of an organized criminal group and the quality of leader of any of them, in the context in which the conversations do not reveal the fact that there is an activity of initiation, coordination, organization carried out by one of the defendants on the criminal activity of the others. Therefore, in the absence of concrete elements that prove the understanding of the defendants to submit to a discipline and to act according to a well-determined plan of action,

On the other hand, it was found that the constitutive elements of the offense provided for by art 367 of the Criminal Code are met, in a sentence of the Timiș Court¹⁴, from which results the existence of the organized criminal group with a cross-border character, having as its object the fraudulent transfer or transportation of some groups of migrants, with the purpose of fraudulently crossing the state border of Romania, in exchange for obtaining some patrimonial assets. In this case, the existence of this autonomous crime that harms the rule of law was found, a crime directed against the state as a general passive subject, as the guarantor of the respect and protection of the rights and freedoms of every citizen. The material element of the crime of migrant trafficking consists in the alternative actions carried out by the defendant, his act realizing the objective side in the variant of "transportation of persons", with the aim of fraudulently crossing the border, a goal that must be pursued and not actually achieved, exactly as it follows from the judgment the court. From the subjective aspect, it was held that the defendant committed the act with direct intention, his activity having a double purpose, namely the fraudulent crossing of the state border by some people as well as obtaining a material benefit. Craiova Court of Appeal, Criminal Decision no. 644/2019 of April 23, 2019

Therefore, the court notes, "the material acts related to the activity of migrant trafficking being part of a wider activity of migrant trafficking, committed under the conditions of an organized criminal group, in the form of supporting...". In conclusion, we appreciate that both the main, complementary and accessory penalties as well as the measure of confiscation, ordered in the case, are likely to contribute to the achievement of the purpose of the criminal law sanction in general -

¹³ Craiova Court of Appeal, Criminal Decision no. 644/2019 of April 23, 2019.

¹⁴ Timiș Court, Sentence no. 68/2022 of 04-Feb-2022, Establishment of an organized criminal group (art. 367 NCP) (Criminal), from 01.04.2023, ora 18:14.

prevention and re-education, taking into account the fact that some of the defendants have fully admitted the accusations brought, showing a cooperative attitude in the sense of providing relevant details for solving the case.

Conclusions

Organized crime beyond being a complex phenomenon is a serious problem of contemporary society. At the level of each state as well as at the level of the European institutions and not only, different strategies are adopted and made more efficient for effectively combating this phenomenon.

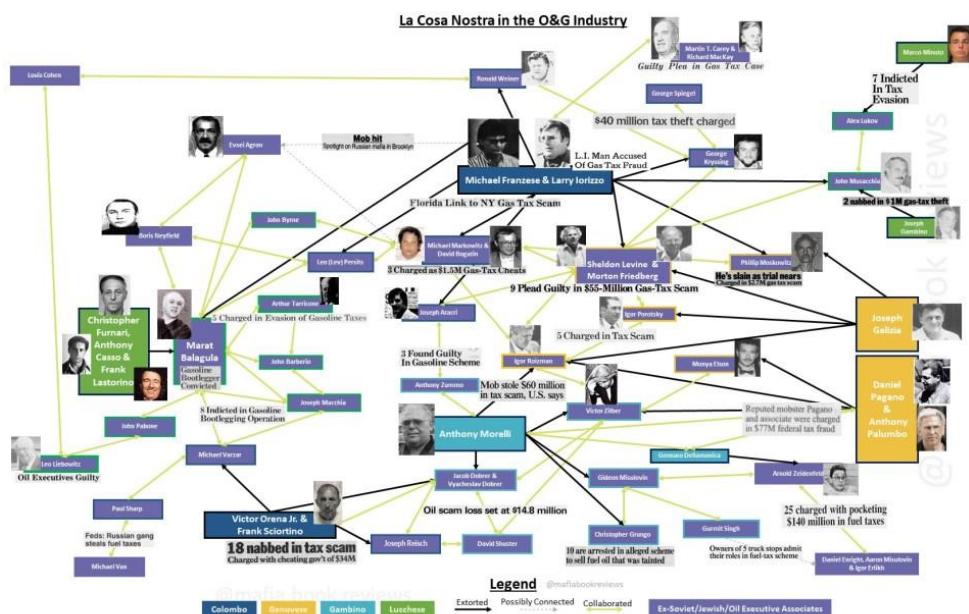
Anti-criminal practice, also called social reaction against crime, involves the adoption of legal or even empirical measures so that the state can control the criminal phenomenon, a fact that also applies to the phenomenon of organized crime.¹⁵

The European Union (EU) Serious and Organized Crime Threat Assessment (SOCTA) 2017 is a detailed analysis of the serious and organized crime threat facing the EU, providing information for practitioners, policy makers and the general public. Europol is the EU's law enforcement agency and helps the 28 EU Member States in their fight against serious international crime and terrorism. For SOCTA 2017, Europol undertook the largest collection of data on serious and organized crime in the EU. Europol drew on thousands of contributions from Member States, Europol's operational and strategic partners outside the EU and our institutional partners, as well as operational information held in Europol's databases to produce the most detailed assessment of the nature and the extent of the criminal threats facing the EU and its Member States.

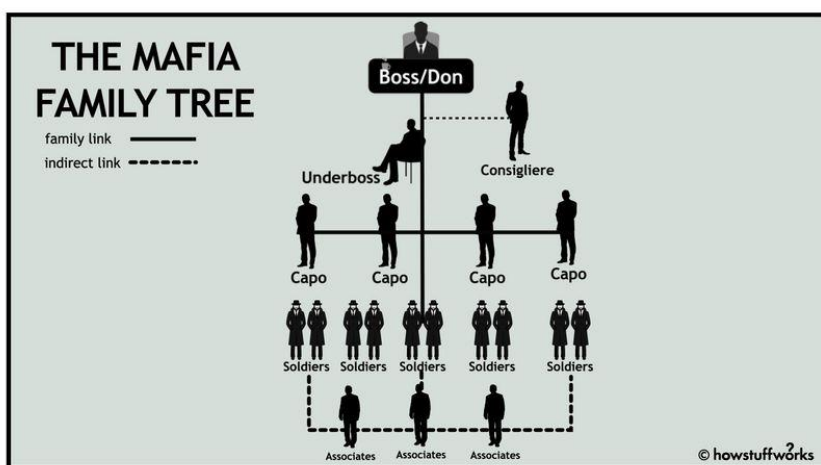
Serious and organized crime in the EU presents a wide variety of criminal activities, which are increasing in complexity and scale. Criminals are rapidly adopting and integrating new technologies into their ways of operating or building new business models around them. The use of new technologies by organized criminal groups (OCGs) has an impact on criminal activities across the spectrum of serious and organized crime. This includes online developments such as the expansion of online commerce and the widespread availability of encrypted communication channels¹⁶.

¹⁵ To be seen V. Cioclei, *Handbook of criminology*, C.H. BECK Publishing House, Bucharest, 2021, p. 30.

¹⁶ <https://www.europol.europa.eu/publications-events/main-reports/european-union-serious-and-organised-crime-threat-assessment-2017>



La Cosa Nostra's involvement in the Oil & Gas industry has fascinated me for over a year. It has everything you'd want in a mob racket: big money, allegations of political corruption, the interconnectivity that makes the Mafia so interesting, cooperation with other criminal organizations, and longevity ¹⁷



<https://people.howstuffworks.com/mafia.htm>

¹⁷ <https://mafiabookreviews.com/2022/01/08/mafiagastaxscheme/>

Bibliography

1. V. Cioclei, *Handbook of criminology*, C.H. BECK Publishing House, Bucharest, 2021.
2. International law and transnational organized crime. Oxford University Press, United Kindom, 2016.
3. Jay S. Albanese, Georgios A. Antonopoulo, Margaret Beare, *The Oxford Handbook of Organized Crime*, Oxford University Press, United States of America, 2014.
4. Augustin Lazăr, *Criminology*, Risoprint Publishing House, Cluj-Napoca, 2008.
5. Remus Ionescu, *Again about the distinction between the offense of constituting an organized criminal group provided for in art. 367 C. pen. and the aggravating circumstance provided for in art. 77 lit. a) C. pen.*, in *Law Magazine* no. 10 of 2019.
6. Craiova Court of Appeal, Criminal Decision no. 644/2019 of April 23, 2019.
7. Timiș Court, Sentence no. 68/2022 of 04-feb-2022, Establishment of an organized criminal group (art. 367 NCP).
8. www.rolii.ro
9. [9.https://legislatie.just.ro/Public/DetaliiDocument/119973](https://legislatie.just.ro/Public/DetaliiDocument/119973) , LEGEA nr. 39 din 21 ianuarie 2003.
10. <https://www.europol.europa.eu/publications-events/main-reports/european-union-serious-and-organised-crime-threat-assessment-2017>

GENERAL CONSIDERATIONS ON THE POSSIBLE LEGAL AND FACTUAL CONSEQUENCES OF THE USE OF ARTIFICIAL INTELLIGENCE ON EU COMPETITION POLICY

Considerații generale privitoare la posibile consecințe juridice și faptice ale utilizării inteligenței artificiale asupra politicii uniunii europene în domeniul concurenței

Drd. Iulian BĂICULESCU¹

Abstract

One of the main policies of the European Union and, according to authors such as Ernst B. Haas, one of the fundamental reasons for its creation and existence, is competition policy. This is because the American legal-economic model of market functioning, centered on free, decartelized competition, was exported with the American influence on Western Europe through the work of the occupation authorities and the conditionality regime associated with Marshall Plan aid, and taken over into both the primary and secondary law of the Communities (and subsequently the European Union) and the domestic law of the Member States, influencing national competition policies. And after the fall of the communist regimes, with the transition of the Eastern European countries to a market economy and a democratic, pluralist political system, the same model entered their legislation, both horizontally, through legislative transplantation, and vertically, through the incorporation of EU rules into national legal systems. Today, however, with the emergence and proliferation of artificial intelligence, the legal model which has been the basis for preventing and combating anti-competitive conduct is under existential pressure. Since the solutions offered by artificial intelligence are, in the case of the most powerful ones, difficult and costly to implement, they are accessible only to economic operators that already have a significant market share. Given the competitive advantages associated with the use of artificial intelligence, these economic operators could adopt conduct and acquire positions in the market which could distort competition by using procedures which are not covered by the current range of acts and deeds which constitute an infringement of free competition. As a result, the very substance of national and EU competition policies may be catastrophically disrupted. It is precisely these possible disruptions that are the subject of the study that we will now submit to your attention.

¹ Lawyer, PhD student of the "Nicolae Titulescu" University of Bucharest, in the field of Competition Law, with a doctoral thesis entitled *Competition Law. Liability procedure in case of violation of competition rules*. Avocat, student-doctorand în cadrul Universității „Nicolae Titulescu” din București, în domeniul Dreptului Concurenței, cu o teză de doctorat intitulată *Acțiunile în despăgubiri pentru încălcarea normelor de concurență – acțiune în răspundere civilă delictuală. Acțiunea în concurență neloială*.

Keywords: artificial intelligence, policy, competition, acts, facts, anti-competitive, market share.

Abstract

Una dintre principalele politici ale Uniunii Europene și, conform unor autori precum Ernst B. Haas, una dintre rațiunile fundamentale ale creării și existenței acesteia, este politica de concurență. Aceasta deoarece modelul juridico-economic american în materia funcționării pieței, centrat pe concurența liberă, decartelizată, a fost exportat, odată cu influența americană exercitată asupra Europei de Vest prin intermediul activității autorităților de ocupație și a regimului condițional asociat cu ajutoarele din cadrul Planului Marshall și preluat atât în dreptul primar și derivat al Comunităților (și, ulterior, Uniunii Europene), cât și în dreptul intern al statelor membre, influențând politicile naționale în materia concurenței. Iar, după căderea regimurilor comuniste, odată cu tranziția statelor din Europa de Est spre economia de piață și spre un regim politic democratic, pluralist, același model a pătruns în legislațiile acestora, atât pe calea orizontală a transplantului legislativ, cât și pe cea verticală, a inserării în ordinile juridice naționale a reglementărilor unionale. Totuși, în prezent, odată cu apariția și proliferarea inteligenței artificiale, modelul juridic care a stat la baza prevenirii și combaterii conduitelor anticoncurențiale este supus unor presiuni existențiale. Întrucât soluțiile oferite de inteligența artificială sunt, în cazul celor mai performante, dificil și costisitor de implementat, ele sunt accesibile doar agenților economici care deja dețin o cotă importantă de piață. Date fiind avantajele concurențiale asociate cu utilizarea inteligenței artificiale, acești agenți economici ar putea adopta conduite și dobândi poziții în piață de natură a distorsiona concurența, utilizând procedee necuprinse în actuala sferă a actelor și faptelor calificate drept atingeri aduse liberei concurențe. Prin urmare, însăși esența politicilor naționale și unionale în domeniul concurenței poate suferi perturbări catastrofale. Tocmai aceste posibile perturbări fac obiectul studiului pe care îl vom supune în continuare atenției dumneavoastră.

Cuvinte cheie: inteligență artificială, politică, concurență, acte, fapte, anticoncurențiale, cotă de piață.

One of the first elements of socio-economic and later legal organization of human societies that we can understand, compare, and integrate into the conceptual framework used today to describe their structure is the so-called division of labor. This is because, as the literature now states², once the nomadic stage of our species' existence, based on the extraction of the resources necessary for subsistence directly from nature, had been abandoned, the new human societies, this time based on agricultural activities, generated in a relatively short time³ a surplus of food sufficient to sustain segments of the population that were not engaged in obtaining food, which before the implementation of agriculture was not possible or, if it was possible, was the absolute exception.

This process, or rather series of processes, has led to specialization. More specifically, this is how the first people specialized in the production of a certain good or service, not directly related to food production, which they could offer to interested parties (the first *customers*) to obtain a consideration which soon⁴ led to the emergence of money as a means of exchange. In other words, the first economic agents emerged.

However, since there are clearly not as many specializations as there are actual or potential economic agents in a community, and since a single economic agent cannot provide the good or service in which it specializes to all actual or potential customers, the development of a plurality of economic agents with the same or at least a very similar activity can be considered natural. However, in this situation, the economic operators were competing, which could lead both to conflicts and to agreements likely to distort competition in favor of the bidders.

With the succession of millennia and the accumulation of human experience, most societies (now state-organized) have adhered to the currently dominant paradigm of considering free competition as the socio-economic-legal mechanism best suited to achieving the highest level of economic satisfaction for the consumer, coupled with the highest level of economic motivation for potential entrepreneurs to develop new productive activities. Thus, to safeguard this ideal, States have, over the years and in the period following the Second World War, adopted a regulatory framework designed to prevent anti-competitive acts and

² See, for example, J.M. Roberts, Odd Arne Westad, *Istoria Lumii. Din preistorie până în prezent*, Editura Polirom, Iași, 2018, passim or David Graeber, David Wengrow, *Zorii tuturor lucrurilor. O nouă istorie a omenirii*, Editura Polirom, Iași, 2022, passim.

³ Even if this term really designates millennia of evolution, we will consider this interval as short, in relation to the existence of the human species.

⁴ See previous considerations on the notion of short time.

facts. However, this regulatory framework was based on an implicit but fundamental premise: all competitive acts or deeds were committed, either directly (as individuals) or indirectly (through legal persons) by human beings. Today, however, artificial intelligence (AI) adds to the possible anti-competitive behavior of human beings a radically different and far superior set of capabilities to those of human beings, a phenomenon that tests the resilience and effectiveness of the regulatory framework developed at a time when such capabilities could at best be the subject of artistic science fiction and not of real economic life.

1. Introductory considerations. Protection of free competition as a multi-layered system of legal rules with concordant objectives and distinct but competing spheres of application

As mentioned in the abstract of our submission, regulating competition in such a way as to ensure that its free character is safeguarded⁵ has been one of the main objectives and one of the main directions of legislation of the European Economic Community and, subsequently, of the Community and the European Union, its successors. In practice, the *"Treaty of Rome itself laid the foundations of a system designed to prevent distortions of competition within the Community"*⁶. However, as will be specified in the course of this paper, the role of the Community was and that of the Union is circumscribed by two fundamental limitations: the first, constituted by the specific nature of the relationship between the legal orders of the Community and, subsequently, the European Union⁷ and those of the Member States,

⁵ In this context, the juxtaposition of the terms *regulatory* and *free* may only appear to be a logical and terminological contradiction. Since the free nature of competition is not only threatened by the actions of the State, but also by the conduct of private economic operators, it can be safeguarded in certain situations (which are not uncommon) precisely by regulation - a regulation designed to prohibit precisely those acts and actions of economic operators (including private operators) which, for example by taking a disproportionately large share of the market, could abuse the advantages acquired in such a way as to suppress or substantially reduce the dynamics of competitive relations which are natural in a market economy. In fact, at present, the free market nature of most of the world's economies makes the distortion of competition because of the actions of private economic agents the absolute exception.

⁶ Ioan Lazăr, *Dreptul Uniunii Europene în domeniul concurenței*, Universul Juridic Publishing House, Bucharest, 2016, p. 19.

⁷ For ease of expression, given that, with the entry into force of the Treaty of Lisbon in 2009, the Union replaced and succeeded the European Community, we shall hereafter use only the expression *European Union* (and its derivatives), unless the correct understanding of the legal situations addressed requires the use of the term European (Economic) Community or its derivatives.

complemented by that between the Member States themselves - governed, at a general level, "by the principle of the equality of the Member States within the organization, referred to in Article 4(2) of the Treaty on European Union". (2)⁸ "9 - and secondly, by the limits of Union action in the field of competition, established by primary law provisions (to which we shall also refer).

a. Boundaries arising from the relationship between the national and the union juridical orders

Thus, regarding the first of these dimensions, that of the relationship between the legal orders of the Union, on the one hand, and the Member States, on the other, the Union's perspective and that of the Member States are, as in many other situations, convergent under the appearance of formal divergences.

More specifically, from the perspective of many Member States' constitutions (a notable example being the Constitution of the French Republic), the priority of the European Union's legal rules (in case of conflict with incompatible domestic legal rules) stems from the provisions of the Constitution itself. This is also the case in the Romanian Constitution, which, in Article 148(2), states that (2), stipulates that *"following accession, the provisions of the constituent treaties of the European Union, as well as other binding Community regulations, shall take precedence over contrary provisions of domestic law, subject to compliance with the provisions of the Act of Accession"*. These provisions mean, in short, that *"where a national authority is faced with a conflict of rules (one domestic and one European Union), priority in application must be given to the rule of European Union law (...) [which] does not mean that the rule of domestic law will be repealed, annulled or invalidated (...) but remains valid and can be applied to factual situations where there is no risk of interference with European Union competence"*¹⁰ From the European Union perspective,

⁸ With the following content: *"The Union respects the equality of the Member States in relation to the Treaties and their national identities, inherent in their fundamental political and constitutional structures, including their local and regional self-government. It respects the essential functions of the State, and in particular those of ensuring its territorial integrity, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."*

⁹ Oana Mihaela Salomia, Augustin Mihalache, *Principiul egalității statelor membre în cadrul Uniunii Europene*, Dreptul Magazine, no. 1/2016, p. 169.

¹⁰ Ioan Muraru, Elena-Simina Tănăsescu (coord.), *Constituția României. Comentariu pe articole*, C.H. Beck Publishing House, București, 2008, p. 1438, apud Roxana Mariana Popescu, *Aspecte constituționale ale integrării României în Uniunea Europeană*, Dreptul Magazine, no. 3/2017, p. 138.

however, Member States cannot even rely on the provisions of their national constitutions to justify non-compliance with the obligations arising from the European Union's fundamental treaties and, therefore, the priority of Union law does not derive from them¹¹.

Declaration No 17 on supremacy, annexed to the Treaty on the Functioning of the European Union¹², summarizing the issues already settled by case-law on the question of the relationship between the rules of national law and those of European Union law, "*recalls that, in accordance with the settled case-law of the Court of Justice of the European Union, the Treaties and legislation adopted by the Union on the basis of the Treaties take precedence over the law of the Member States, under the conditions laid down in that case-law*".

At the same time, the same Declaration also refers to the Opinion of the Council Legal Service - 11197/07 (JUR 260) - according to which "*it is clear from the case law of the Court of Justice that the supremacy of Community law is a fundamental principle of Community law. According to the Court, that principle is inherent in the specific nature of the European Community. At the time of the first judgment in this established case-law¹³ (...), supremacy was not mentioned in the Treaty. The situation has not changed today. The fact that the principle of supremacy will not be included in the future treaty will in no way change the existence of the principle and the existing case-law of the Court of Justice*".

The solution to the dilemma of the priority of the rules of European Union law over national rules, in the event of a legal conflict between them, is as apparently simple as it is fraught with practical consequences. Thus, given the supreme nature of constitutional rules, the latter being endowed with the strongest legal force in the Member States, they are the only ones which can recognize or deny the priority of rules belonging to another legal order in the State in which they produce effects. However, if a Member State, on the basis of constitutional provisions, were to act contrary to the principle of the priority of the rules of Union law, it would thus incur liability arising from the so-called action for failure to fulfil obligations of Member States, governed by Article 258 TFEU, according to which '*if the Commission considers that a Member State has failed to*

¹¹ Interpretation given by the Court of Justice as early as *van Gend en Loos* (Judgment of the Court of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Administration fiscale néerlandaise*, Case 26/62, EU:C:1963:1) and *Costa v ENEL* (Judgment of the Court of 15 July 1964, *Flaminio Costa v E.N.E.L.*, Case 6-64, EU:C:1964:66), reiterated and maintained to the present day.

¹² Treaty on the Functioning of the European Union (consolidated version), Official Journal of the European Union C 326, 26.10.2012 (hereinafter TFEU).

¹³ Prequoted cases.

fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations'. Thus, including in the field of competition, limitations to Union action in this area may stem from the conduct of Member States, based on the provisions of their constitutions, but if this conduct is contrary to their obligations under the Treaties, Member States may respond under Article 258 TFEU.

b. Limits resulting from primary level provisions of European Union law

However, it is not only the relations established between the legal order of the European Union and those of the Member States that are the source of limitations on both Union and State action. Sometimes these arise from the economy of the primary law provisions themselves, but to be able to address this legal issue in a relevant way, we need to make a number of brief but necessary clarifications regarding the hierarchy of the European Union's legal sources. More specifically, this hierarchy is as follows: *"Broadly speaking, the first step of an imaginary pyramid of sources of European Union law is the Treaties and the Charter of Fundamental Rights (conclusions drawn from the conjunction of Article 1 and Article 2 of the Charter of Fundamental Rights)¹⁴ and 6¹⁵ TEU¹⁶). Then, on the next rung (from top to bottom), are the general principles of law (those compatible with the EU legal order), followed, in successive lower rungs of the hierarchy, by international agreements to which the Union is a party¹⁷, secondary law and complementary EU law"¹⁸.*

Thus, Article 3 of the Treaty on the Functioning of the European Union, which sets out the areas in which the European Union has exclusive competence, refers to the fact that this type of competence concerns, inter alia, *'the establishment of the rules on competition necessary for the functioning of the internal market'*. The European Union can therefore exercise its competence (by the notion of exercising

¹⁴ Among other things, it states that *"the Union is founded on this Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). These two Treaties have the same legal value."*

¹⁵ *"The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted in Strasbourg on 12 December 2007, which has the same legal value as the Treaties"*.

¹⁶ Treaty on European Union (consolidated version), Official Journal of the European Union C 326, 26.10.2012 (hereinafter TEU).

¹⁷ Art. 216 para. (2) TFEU states that *"Agreements concluded by the Union shall be binding on the institutions of the Union and on the Member States"*.

¹⁸ Augustina Dumitraşcu, Roxana Popescu, *Dreptul Uniunii Europene. Sinteze și aplicații*, Universul Juridic Publishing House, Bucharest, 2015, p. 53.

competence I mean the possibility to adopt legally binding acts¹⁹ necessary to achieve its objectives²⁰). This results in limitations both on state action in the field of competition and on EU action.

Limits to Union action in the field of competition

The limits on state action are provided by the Treaty provisions themselves, both as regards the exercise of the Union's exclusive competences and the exercise of competence in each component of competition policy. In the first case, we are dealing with substantive limits, while in the second, with predominantly formal limits.

Background limit

Specifically, "*where the Treaties confer exclusive competence on the Union in a given area, only the Union may legislate and adopt legally binding acts, and the Member States may do so only if they are empowered by the Union or for the purpose of implementing Union acts*"²¹. Thus, Member States can only act in the field of adopting competition rules necessary for the functioning of the internal market when empowered by the Union or in implementation of Union acts.

However, from a contrary perspective, even the Union cannot act beyond the limits set by the same Treaty. First of all, it is a question of the limit laid down by the provisions of Article 3 TFEU itself, in its expression relating to the rules on competition '***necessary for the functioning of the internal market***'. Thus, the Union can only adopt rules that are necessary for the functioning of the internal market, and cannot regulate legal situations which, by the scale of their effects, do not impact on the internal market as a whole. However, the Treaty does not elaborate on the meaning of this concept. For this reason, it is set out in detail in the legislative acts implementing Union competition policy, for each aspect of that policy, and these acts contain the indicators needed to classify one or other of the types of conduct

¹⁹ More specifically, the acts listed by Article 288 TFEU (which, in its first paragraph, provides that "*in order to exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions*"), each endowed with the characteristics specified by the same article in subsequent paragraphs.

²⁰ Enumerated in Article 3 TEU, whose para. (3) states that "*the Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It promotes scientific and technical progress*", all these objectives being intrinsically linked to the existence of free and fair competition, the absence of which would be impossible to achieve and would be detrimental to everyone's success.

²¹ Art. 2 para. (1) TFEU.

affecting free competition as affecting or not affecting the functioning of the internal market.

This qualification is of particular importance, as it is the extent to which the thresholds laid down in each individual legislative act are exceeded or not that triggers the regulatory competence of the Union (for the aspects necessary for the functioning of the internal market) or of the Member States (for the others).

Formal limit

Beyond these limitations, which are mainly of a substantive nature (but act concurrently and can therefore only be treated separately for scientific reasons), there are also formal limits to the path of Union action. These provide for the legal acts that may be adopted in each subfield of competition law. This is because, where the Treaties do not provide that a particular type of act must be adopted, the institutions are free to choose it according to their own considerations of expediency, but where the Treaties provide for the type of act that can be adopted, the institutions are bound to adopt that type of act exclusively. For example, Article 103 TFEU²² provides, for the implementation of Articles 101 and 102 TFEU, that regulations or directives must be adopted, listing the objectives pursued by them, while Article 109 TFEU²³ provides, for the implementation of Articles 107 and 108 TFEU, that regulations must be adopted. In other words, its provisions are more restrictive than those of Art. 103 TFEU. In all other situations where the type of adoptable act is not specified by the Treaties, the institutions have a discretionary power of choice.

c. Protection of free and fair competition in the European Union as a multi-layered system of competing legal rules. Main objectives

Thus, as we have observed up to this stage of our study, the free and fair nature of competition in the EU area is protected by a genuine system of legal rules of different but concordant forces and objects of application, which *"provides for measures necessary to ensure the optimal functioning of the internal market from the point of view of the*

²² The para. (1) shall read as follows: *The regulations or directives necessary for the application of the principles set out in Articles 101 and 102 shall be adopted by the Council, acting on a proposal from the Commission and after consulting the European Parliament.*

²³ *"The Council, acting on a proposal from the Commission and after consulting the European Parliament, may adopt any appropriate regulations for the application of Articles 107 and 108, and may in particular lay down the conditions for applying Article 108(3) and the categories of aid exempted from this procedure."*

ultimate objective, the protection of free competition"²⁴ , which can only be achieved through a *multi- level* approach.

In descending order of legal force, at the top of an imaginary pyramid of protection of free and fair-trade competition are the rules of primary EU law, which in turn are made up of the pre-annotated provisions relating to the EU's competence in the field of competition²⁵ and the specific provisions contained, broadly speaking, in Articles 101 to 109 TFEU. The objectives of the latter are broadly as follows: prohibition of agreements *"between undertakings, any decisions by associations of undertakings and any concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market"*²⁶ ; the prohibition (with the limitation offered by **"the extent to which it may affect trade between Member States"**²⁷) of the *"abuse by one or more undertakings of a dominant position held in the internal market or in a substantial part of it"*²⁸ and the prohibition of aid *"granted by States or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods, insofar as it affects trade between Member States"*²⁹.

At a lower level in terms of legal force, these provisions are developed, and their application is detailed by a whole body of secondary Union law. These are divided into legislative acts³⁰ and non-legislative acts - acts which are not adopted through a legislative procedure, such as delegated acts (referred to in Article 290 TFEU) or implementing acts

²⁴ Ioan Lazăr, *Ioan Lazăr, Măsurile financiar-fiscale și politica Uniunii Europene în domeniul ajutoarelor de stat*, Hamangiu Publishing House, Bucharest, 2018, p. 76.

²⁵ As the European Union is a derived subject of international law, it does not enjoy the general competence to act in all areas of social life, like the Member States, but only the competences conferred by the States. Therefore, in order to be able to act in the field of competition, it was necessary to confer such a power through the fundamental Treaties.

²⁶ Article 101 TFEU.

²⁷ Article 102 TFEU.

²⁸ Ditto.

²⁹ Article 109 TFEU.

³⁰ We recall that, according to Art. 289 para. (3) of the TFEU, *"legal acts adopted by legislative procedure constitute legislative acts"*, and legislative procedures can be ordinary - which, according to Art. 289 para. (1) consists of *"shall consist of the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission"* or special - which, according to Art. 289(1) of the Treaty on European Union, *"shall consist of the joint adoption by the European Parliament and the Council of a regulation, a directive or a decision"*. (2) TFEU consists of *"the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council or by the Council with the participation of the European Parliament"*.

(covered by Article 291 TFEU) and aim to regulate the concrete aspects necessary to transpose the provisions of Articles 101 to 109 TFEU into practice.

Several examples belonging to this category are CE Regulation no. 1/2003 of the Council from December 2002 regarding the application of the competition norms provided by articles 81 and 82 from the former TCE (present day TFEU)³¹, EU Regulation np. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty³² Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 on empowering Member States' competition authorities to be more effective in enforcing the law and ensuring the proper functioning of the internal market³³ and more³⁴. In addition to secondary legislation, an important role in the development of competition policy is played by the Commission, which through its decisions has established elements of institutional practice in this area (such as those relating to abuse of power, as for example in the Microsoft case, where "*the Commission found that Microsoft abused its dominant position in PC operating systems by withholding critical interoperability information from its competitors, which meant that competing operating system vendors were not in a position to compete effectively*"³⁵ and the Court of Justice, whose rich case law has made it easier to understand certain key concepts (such as dominance, where the Court's case law is helpful in determining dominance by clarifying that "*a dominant position is examined in relation to the internal market as a whole or at least to a substantial part of it. The size of the market examined depends on the characteristics of the product, the accessibility of alternative products and the behavior or willingness of consumers to choose alternative products*"³⁶).

This system is complemented at national level by the regulatory and administrative acts of each individual country. In general, these acts are designed to prohibit or prevent the same types of anti-competitive conduct by economic operators but which, by virtue of the value or

³¹ OJ L 1, 4.1.2003.

³² OJ L 187, 26.6.2014.

³³ OJ L 11, 14.1.2019.

³⁴ For more details, see Augustin Fuerea, *Dreptul Uniunii Europene. Principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, *passim*.

³⁵ See in this respect Commission Decision 2007/53/EC, *Microsoft*, of 24 May 2004, OJ L 32, 6.2.2007, apud Radostina Parenti, *Competition policy*, www.europarl.europa.eu, April 2023, accessed 16.07.2023.

³⁶ Judgment of the Court of 14 February 1978 in Case 27/76, *United Brands Company and United Brands Continental BV v Commission of the European Communities*, EU:C:1978:22, apud Radostina Parenti, *op.cit.*

market share of each type of conduct to be prevented, do not affect the common market or trade between Member States, but only have an impact at national level. For example, in Romania, the main legal acts governing the competition regime are, in order of adoption, Law No 11 of 29 January 1991 on combating unfair competition³⁷, Competition Law No 21 of 10 April 1996³⁸, Emergency Ordinance No 39 of 31 May 2017 on actions for damages in cases of infringement of the provisions of competition law and amending and supplementing Competition Law No 21/1996³⁹. In addition to these, there are numerous orders and regulations issued by the Competition Council, the autonomous administrative authority in the field of competition in our country³⁹.

2. Potential challenges to competition regulation from the proliferation of artificial intelligence (AI)

But all the mechanisms described above have at least one considerable vulnerability, which was not and probably could not have been considered during their development, however extensive. This is, as I have already said, the fact that they were created by humans, for humans, i.e., by legislators who are human beings, to regulate the action of entities that are also run and represented by human beings, with the qualities and natural limitations conferred by their psycho-physical characteristics.

For example, even in the case of human beings, it is difficult to prove the conclusion of an anti-competitive agreement prohibited by Article 101 TFEU, so the Commission acts, not infrequently, mainly based on indirect evidence that such an agreement has been concluded. What happens, however, in the (increasingly likely) situation where a number of undertakings whose decisions are taken to a sufficiently high degree by computer programs equipped with artificial intelligence act in concert not on the basis of any human decision but as a result of the fact that the artificial intelligence, whose potential for interconnection is so great that we cannot fail to consider that they will act on the basis of sharing a flow of information or access to a *cloud* or *cluster database*, will act in concert because this decision will appear to them to be the most economically efficient? Does this fall under the prohibition of Article 101 TFEU? What preventive measures can be taken? Would it be feasible and monitorable to monitor the activity of artificial intelligence or to require it to be programmed so that it cannot act in breach of Article 101 TFEU?

³⁷ Published in the Official Gazette No 24 of 30 January 1991.

³⁸ Published in the Official Gazette No 88 of 30 April 1996.

³⁹ According to the Rules of Organisation, Functioning and Procedure of the Competition Council, published in the Official Gazette no. 50 bis/25 Mar. 1997.

What about the prohibition of abuse of a dominant position, provided for in Article 102 TFEU? Would an artificial intelligence programmed to maximize the profit of an economic agent be self-limiting if it could become aware that it was abusing its position? Could it be programmed to do so? Or could it distinguish between abuse and competitive conduct? Is the State aid that could consist of direct or indirect support for technology, including through the implementation of IT solutions using artificial intelligence, even if at least in appearance it would not distort competition (at least not in the short term) compatible with the internal market or not? But is the mere use of artificial intelligence, when the highest-performing IT solutions also cost a fair amount, which only the most powerful economic operators can afford, not anti-competitive conduct in itself? These are just a few of the many ethical and legal issues that the proliferation of artificial intelligence may raise in the field of competition policy.

3. Conclusions

Of course, what we have been able to set out above represents only a tiny part of the challenges that the proliferation of artificial intelligence poses to the system of legal safeguards on which virtually our entire human society operates, be it state, supranational or internationally organized. Their true extent and complexity is, however, almost impossible to grasp at present, precisely because the disruptions they may bring concern issues for which we are so unprepared that we are unlikely to be able to identify them at present. What we must remember, however, is that legal solutions are still the preserve of our species. The creation of the European Communities was not, when it happened, a natural step. It did not come by itself. The dismantling of European industry, too. It did not come by itself and, from the point of view of analyses that tend to attribute superhuman forces to the market and to economic agents, it should never have come. And yet it did happen thanks to the political and social will that was given the necessary legal expression. A will of the superpower of the moment on which the Member States of the Communities depended for their own security, it is true. The situation is the same today. The replacement of human beings by computer programs equipped with artificial intelligence, whether in decision-making or executive positions, is not a *fait accompli*. It will only happen if our social and political will does not manifest itself and take on the appropriate legal expression(s). However, this requires awareness before irreversible effects can take place.

Bibliography

1. Dumitrașcu, Mihaela Augustina; Popescu, Roxana Mariana, *Dreptul Uniunii Europene. Sinteze și aplicații*, Universul Juridic Publishing House, Bucharest, 2015.
2. Fuerea, Augustin, *Dreptul Uniunii Europene: principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016.
3. Graeber, David; Wengrow, David, *Zorii tuturor lucrurilor. O nouă istorie a omenirii*, Polirom Publishing House, Iasi, 2022.
4. Lazăr, Ioan, *Dreptul Uniunii Europene în domeniul concurenței*, Universul Juridic Publishing House, Bucharest, 2016.
5. Lazăr, Ioan, *Măsurile financiar-fiscale și politica Uniunii Europene în domeniul ajutoarelor de stat*, Hamangiu Publishing House, Bucharest, 2018.
6. Parenti, Radostina, *Competition Policy*, www.europarl.europa.eu, April 2023.
7. Popescu, Roxana Mariana, *Aspecte constituționale ale integrării României în Uniunea Europeană*, *Dreptul Magazine*, no. 3/2017.
8. Roberts, J.M.; Westad. Odd Arne, *Istoria Lumii. Din preistorie până în prezent*, Editura Polirom, Iași, 2018.
9. Salomia, Oana Mihaela; Mihalache, Augustin, *Principiul egalității statelor membre în cadrul Uniunii Europene*, in "Dreptul" Magazine, no. 1/2016.
10. Judgment of the Court of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Tax Administration*, Case 26/62, EU:C:1963:1.
11. Judgment of the Court of 15 July 1964, *Flaminio Costa v E.N.E.L.*, Case 6-64, EU:C:1964:66.
12. Treaty on European Union (consolidated version), Official Journal of the European Union C 326, 26.10.2012.
13. Treaty on the Functioning of the European Union (consolidated version), Official Journal of the European Union C 326, 26.10.2012.

INTERNATIONAL CRIMINAL JUSTICE: ICC TOWARDS AD HOC TRIBUNALS IN THE UN SYSTEM

Dr. Letitia Mihaela MORAR¹

Abstract

The study has into consideration the present international context, where international criminal law, as a branch of international public law, constitutes an essential part of understanding the mechanisms of trying and establishing liability for individuals guilty of the gravest crimes of concern to the international community, with the consequence of contributing to guarantee the respect for international justice and its enforcement.

The aim is to promote an enhanced understanding of this dual criminal international justice system represented on the one hand by the International Criminal Court and, on the other hand, by the two ad hoc Tribunals created within UN System as a result of the extreme legal situations generated by the military conflicts in former Yugoslavia and Rwanda.

Keywords: *international criminal law, individual responsibility, ad hoc tribunals, International Criminal Court, criminal courts, jurisdiction, procedural aspects, connection with the national legal systems*

Developing of the International Criminal Law Branch – Individual Responsibility

International criminal law evolved differently by the other branches of international law, which is, of course, a law of States.

According to international law, only the State can be the holder of certain rights and obligations, the individual only being the instrument of a crime committed by the State.²

The evolving of international criminal responsibility developed as a different branch of international public law gathering elements of traditional international law with human rights law and humanitarian law, combining also domestic law provisions.³

¹ Universitatea Babes-Bolyai.

² Article 3 of the Convention (IV) respecting the Laws and Customs of War on Land: A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

³ The advisory opinion of the inter-American Court of Human Rights in the *Reintroduction of the Death Penalty in the Peruvian Constitution Case*, noting

Individual responsibility has also been confirmed with regards to serious breaches of the four 1949 Geneva Red Cross Conventions and 1977 Additional Protocols I and II dealing with armed conflicts. In this sense, the High Contracting Party undertake to enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed any of a series of grave breaches.⁴

The International Law Commission in 1991 provisionally adopted a Draft Code of Crimes Against the Peace and Security of Mankind, which was revised in 1996. The 1996 Draft Code provides for individuals criminal responsibility with regard to aggression, genocide, crime against humanity, a Crime against United Nations and associated personnel and war crimes.⁵ The fact that an individual may be responsible for these crimes shall not affect the issue of State responsibility.

The Security Council of the United Nations adopted two resolutions on the Somali situations in the early 1990 unanimously condemning the breaches of humanitarian law, also stating the individual responsibility for the breaches of the humanitarian law.⁶

Thereafter, the Security Council adopted Resolution 808 of 22 February, 1993 approving the establishment of the International Tribunal to Prosecute Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. On 25 May 1993 was approved the Statute of the International Tribunal, by Security Council Resolution 827 of 25 May, 1993 that stipulates: "The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."⁷ Individual responsibility was reaffirmed by the ICTY in the *Tadic jurisdictional decision* with regard to individual criminal responsibility for violations of common article 3 of the Geneva Conventions⁸

"individual responsibility may only be invoked for violations that are defined in international instruments as crimes under international law, such as crimes against peace, war crimes, and crimes against humanity or genocide, which, of course, also affect specific human rights"- https://www.corteidh.or.cr/docs/opiniones/seriea_14_ing.pdf pp. 12.

⁴ Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention and Article 146 of the Fourth Geneva Convention.

⁵ Article 17-20.

⁶ Resolution 794 (1992) and 814 (1993).

⁷ Article 7(4).

⁸ Prosecutor v. Tadic, Case No. IT-94-1-AR 72, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 Oct. 1995, paras. 128-137 (134): "All of these

A similar provisions is included within the Resolution 955 of 8 November 1994 of the Security Council that approved the Statute of the International Criminal Tribunal for Rwanda.⁹

These provisions are similar to Article 8 of the Charter of the International Military Tribunal or Nuremberg Charter, attached to the London Agreement of 8 August 1945.

On 17 July 1998, a diplomatic conference in Rome adopted the Rome Statute of the International Criminal Court (Rome Statute or Statute),¹⁰ individual criminal responsibility being provided by the Article 25.

International Criminal Jurisdiction in the UN System – ICTY, ICTR, The International Residual Mechanism for Criminal Tribunals

The Yugoslav tragic experience of 1991 as well as the Rwanda massacres of 1994 led to the establishment of two specific war crimes tribunals under the authority of the UN Security Council to adopt decisions mandatory upon all member states under Chapter VII of the UN Charter. This procedure was adopted having into consideration the emergency of the situation in both countries as regarding the subject matter of the war crimes.

UN could not establish these tribunals on a basis of an international conference as was to be the case with the International Criminal Court. Firstly because of the above-mentioned emergency involving mass atrocities and secondly because it could not involve the consent of the war crimes alleged countries (as would be necessary in the case of a court established by international agreement).

The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia was established (ICTY) as an *ad hoc* institution, as mentioned about, in May 1993 being the first international war crimes tribunal since the Nuremberg and Tokyo tribunals.

The Security Council states that the situation constitutes a threat to international peace and security, and that it is determined to put an end

factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife".

⁹ Article 6 (4).

¹⁰ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9*, 17 July 1998, as provisionally corrected pursuant to the letter of Hans Corell, Legal Adviser, dated 25 September 1998.

to such crimes and take effective measures to bring to justice the persons who are responsible for them.

Resolution 827 adopted on 25 May 1993, contains the Statute of the ICTY which determined the Tribunal's jurisdiction and organisational structure, as well as the criminal procedure in general terms.

Situated in The Hague, the Netherlands, the ICTY has charged over 160 persons until 31 December 2017, when ICTY officially closed. Those indicted by the ICTY include heads of state, prime ministers, army chiefs-of-staff, interior ministers and many other high- and mid-level political, military and police leaders from various parties to the Yugoslav conflicts. Its indictments address crimes committed from 1991 to 2001 against members of various ethnic groups in Croatia, Bosnia and Herzegovina, Serbia, Kosovo and the Former Yugoslav Republic of Macedonia. The crimes individuals most responsible for appalling acts such as murder, torture, rape, enslavement, destruction of property and other crimes listed in the Tribunal's Statute.¹¹

Articles 2 to 5 of the Statute identify four different categories of crimes, for which the Tribunal has jurisdiction¹². Article 7 incriminates a

¹¹ <https://www.icty.org/en/about/tribunal/establishment>

¹² Article 2 - Grave breaches of the Geneva Conventions of 1949.

Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

Article 3 - Violations of the laws or customs of war

Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

person **who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5** shall be individually responsible for the crime.

The Tribunal consisted of two Trial Chambers and an Appeals Chamber, together with a Prosecutor and Registry servicing both the Chambers and the Prosecutor.

By 2003, ten years after its establishment, the Tribunal was operating at full capacity while the various national judicial systems in the region demonstrated varying degrees of intent to improve their ability to handle war crimes cases. It has transferred cases to competent

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.

Article 4 - Genocide

Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

(a) genocide;

(b) conspiracy to commit genocide;

(c) direct and public incitement to commit genocide;

(d) attempt to commit genocide;

(e) complicity in genocide.

Article 5 - Crimes against humanity

Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation;

(e) imprisonment;

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts.

national jurisdictions. Domestic prosecutors and courts can also initiate cases without any involvement by the ICTY.¹³

*Definitely ICTY did not end the war crime situation in the region, but it greatly developed the law and practices needed to bring war criminals to justice, ensuring the best example of cooperation between international authorities with national judiciaries. It helped **the countries of the former Yugoslavia build the rule of law, demonstrate they can secure meaningful justice for the victims, and show the courage to accept the facts and enhance reconciliation.***

Following events in Rwanda during 1994 and the mass slaughter that took place, the Security Council decided in Resolution 955 from 1994 to establish an International Tribunal for Rwanda (ICTR), with the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the neighboring states between 1 January 1994 and 31 December 1994.

The Statute of this Tribunal was annexed to the body of the Security Council Resolution, having many similarities to the Statute of ICTY, consisting, for instance, of two Trial Chambers, an Appeals Chamber, a Prosecutor and a Registry. Article 2-4 stipulates the crimes over which Tribunal has jurisdiction¹⁴

¹³ <https://www.icty.org/en/about/tribunal/completion-strategy>

¹⁴ Article 2 deals with genocide

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Article 3 – crimes against humanity

crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;

The Tribunal was located in Arusha, Tanzania, and has offices in Kigali, Rwanda. Its Appeals Chamber was located in The Hague, Netherlands.

Since it opened in 1995, the Tribunal has indicted 93 individuals. Those indicted include high-ranking military and government officials, politicians, businessmen, as well as religious, militia, and media leaders. The ICTR registered 62 sentenced, 14 acquitted, 10 referred to national jurisdiction for trial, fugitives referred to the MICT, 2 deceased prior judgement, 2 indictments withdrawn before trial.

For the first time in history, an international tribunal - the ICTR - delivered verdicts against persons responsible for committing genocide. It was the first judicial international institutions that interpret the definition of genocide set forth in the 1948 Geneva Convention. It also is the first international tribunal to define rape in international criminal law, recognizing rape as a means of perpetrating genocide.

Nevertheless, ICTR became the first international tribunal to hold members of the media responsible for broadcasts intended to inflame the public to commit acts of genocide.

(e) Imprisonment;

(f) Torture;

(g) Rape;

(h) Persecutions on political, racial and religious grounds;

(i) Other inhumane acts.

Article 4 - article 4 - Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

The ICTR delivered its last trial judgement on 20 December 2012 in the *Ngirabatware* case. The Tribunal's remaining judicial work now rested solely with the Appeals Chamber. As of October 2014, only one case comprising six separate appeals was pending before the ICTR Appeals Chamber. One additional appeal from ICTR trial judgement was delivered in December 2014 in the *Ngirabatware* case by the appeals chamber of the Mechanism for International Criminal Tribunals, which started assuming responsibility for the ICTR's residual functions on 1 July 2012.¹⁵ ICTR officially closed on 31 December 2015

The International Residual Mechanism for Criminal Tribunals (Mechanism) was established by UN Security Council Resolution 1966 (2010) to complete the remaining work of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia after the completion of their respective mandates. The Mechanism has two branches, one in Arusha, Tanzania, and one in The Hague, Netherlands.

During the initial years of the Mechanism's existence, it operated in parallel with the ICTR and the ICTY. Following the closure of the ICTR (on 31 December 2015) and the ICTY (on 31 December 2017), the Mechanism continued to operate as a stand-alone institution.

In accordance with its mandate, the Mechanism has assumed responsibility for, **inter alia**, the enforcement of sentences, administrative review, assignment of cases, review proceedings, appeal proceedings, contempt, requests for revocation of the referral of cases to national jurisdictions, the variation of witness protection measures, access to materials, disclosure, changes in classification of documents and requests for compensation and assignment of counsel.¹⁶

For the moment, The Mechanism registers some pending cases, such as: **KABUGA, Félicien (MICT-13-38)**¹⁷, **JOJIĆ, Petar and RADETA, Vjerica (MICT-17-111-R90)**¹⁸.

¹⁵ <https://unictr.irmct.org/en/tribunal>

¹⁶ <https://www.irmct.org/en/documents/statute-and-transitional-arrangements>

¹⁷ Félicien Kabuga was the President of the Comité d'initiative of Radio Télévision Libre des Mille Collines ("RTL") during the time of the crimes pleaded in the indictment and President of the Comité provisoire of the Fonds de défense nationale ("National Defence Fund") from about 25 April 1994 to July 1994.

¹⁸ Petar Jojić – a Serbian politician and a lawyer who served on the defence team of Vojislav Šešelj.

Vjerica Radeta – a Serbian politician and a lawyer who served on the defence team of Vojislav Šešelj.

International arrest warrants and orders for surrender of Petar Jojić and Vjerica Radeta are yet to be executed.

International cooperation - Rome Statute, International Criminal Court (ICC)

On 17 July 1998, a diplomatic conference in Rome adopted the Rome Statute of the International Criminal Court (Rome Statute or Statute).¹⁹ This success came a century and a quarter after it was first proposed in 1872 by Gustave Moynier of Switzerland, one of the founders of the International Society of the Red Cross,²⁰ and half a century after the French Government representative on the United Nations (UN) Committee on the Progressive Development of International Law and its Codification, Henri Donnedieu de Vabres, asked the UN to establish a permanent international criminal court.²¹

The idea of creating an international criminal tribunal was not new, dating from 1920. Within the precursor of UN – The League of Nations, the Committee of Jurists prepared a project of establishing a High Court of International Justice as a distinctive body from the Permanent Court of International Justice. The Assembly decided that the idea of this criminal international tribunal was premature. In 1928, the Romanian Jurist Vespasian Pela wrote a Statute of an international criminal tribunal that was approved by the Assembly of the League of Nations. The Statute determined a special Criminal Chamber in the framework of the Permanent Court of International Justice.²² This form of international jurisdiction never became functional, as a result of the dissolution of the League of Nations, but the efforts led by the Romanian diplomat was an extraordinary attempt in imposing an end to the crimes against humanity.

The Rome Statute, The Court's founding treaty, entered into force after 60 states ratify the Statute, on 1 July 2002. As of 23 April 1999, 83

¹⁹ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9*, 17 July 1998, as provisionally corrected pursuant to the letter of Hans Corell, Legal Adviser, dated 25 September 1998.

²⁰ Gustave Moynier, "Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève", *Bulletin international des Sociétés de secours aux militaires blessés*, Comité international, No. 11, avril 1872, pp. 122, 127 (English translation by the International Committee of the Red Cross of the proposal, see Christopher Keith Hall, "The first proposal for a Permanent International Criminal Court", *Int'l Rev. Red Cross*, No. 322, p. 62.

²¹ He made the proposal on 13 May 1947 and submitted a memorandum two days later providing that certain matters would be tried by a special international criminal chamber of the International Court of Justice and others in a permanent international criminal court. Memorandum submitted to the Committee on the Progressive Development of International Law and its Codification by the representative of France, U.N. Doc. A/AC.10/21, 15 May 1947.

²² Dumitru Diaconu, *Curtea penală internațională. Istorie și realitate*, Editura All Beck, București, 1999, p. 4-5.

states had taken the first step towards ratification by signing the Statute and three, Senegal, Trinidad and Tobago and San Marino, have ratified it. Many other states have committed themselves to doing so in the near future.²³ For the time being, 123 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 33 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States.²⁴

All the Member States constitute The Assembly of States Parties. In accordance with article 112 of the Rome Statute, the Assembly of States Parties meets at the seat of Court in The Hague or at the United Nations Headquarters in New York once a year and, when circumstances so require, may hold special sessions.

Each State Party has one representative in the Assembly who may be accompanied by alternatives and advisers. States that are not party to the Rome Statute may take part in the work of the Assembly as observers, without the right to vote.

In accordance with Article 112, The Assembly is further tasked with election of, **inter alia**, the Judges, the Prosecutor and Deputy Prosecutors. The Assembly may also decide, by secret ballot, on the removal from office of a Judge, the Prosecutor or Deputy Prosecutors.

The Assembly is also is the management oversight and legislative body of the International Criminal Court.²⁵

²³ France has amended its Constitution to permit ratification, which is expected this year. Italy has completed all internal steps for ratification and is expected to deposit its instrument of ratification in July 1999. Belgium hopes to be able to ratify later this year and the other EU states hope to do so next year. The 12 members of the Caribbean Community (CARICOM) which have not yet ratified the Rome Statute (Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines), are expected to ratify it in the near future. Argentina hopes to ratify this year and in June Brazil urged all other members of the Organization of American States (OAS) to sign and ratify the Statute promptly. Government representatives from the members of the Southern African Development Community (SADC) at a recent meeting in Pretoria, South Africa renewed their commitment to prompt signature and ratification. The *Assemblée Parlementaire de la Francophonie* (Parliamentary Assembly of the Francophonie) requested parliaments in members states to “act with urgency “ to start work on ratification “as soon as possible and without delay” and called upon leaders of the Francophonie at the Francophone Summit in Monckton, Canada from 3 to 5 September 1999 “to decide upon a joint and solemn initiative by the Francophonie member states in favor of the ratification of [the Rome Statute]”.

²⁴ <https://asp.icc-cpi.int/states-parties>

²⁵ <https://asp.icc-cpi.int/assembly>

The Court is functioning as an independent²⁶, autonomous body²⁷, differently from the situation of the ad hoc tribunals. The headquarters is in The Hague, Netherlands, having 2 working languages: English and French.

According to Article 1 of the Statute, ICC shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute. The same normative acts establish the principle of complementarity of this Court to national criminal jurisdictions. According to this principle, The International Criminal Court can only intervene where a State is unable or unwilling to genuinely carry out the investigation and prosecute the perpetrators.

ICC is composed of four organs: the Presidency, the Chambers, the Office of the Prosecutor and the Registry. Each of these organs has a specific role and mandate.²⁸

Presidency: consists of three judges (the President and two Vice-Presidents) elected by an absolute majority of the 18 judges of the Court for a maximum of two, three-year terms. It conducts external relations with States, coordinates judicial matters such as assigning judges, situations and cases to divisions, and oversees the Registry's administrative work.

Judicial Divisions (Chambers): 18 judges in 3 divisions – Pre-Trial, Trial and Appeals – conduct judicial proceedings.

The judges are persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices. All have extensive experience relevant to the Court's judicial activity. The judges are elected by the Assembly of States Parties on the basis of their established competence in criminal law and procedure and in relevant areas of international law such as international humanitarian law and the law of human rights. The election of the judges takes into account the need for the representation of the principal legal systems of the world, a fair representation of men and women, and equitable geographical distribution, which is a common UN principle.

Office of the Prosecutor: Conducts preliminary examinations, investigations, and prosecutions, being an independent organ of the Court.

Registry: Conducts non-judicial activities, such as security, interpretation, outreach, support to Defence and victims' lawyers, and more.

²⁶ Article 4 par 1 of the Statute grants ICC international legal personality.

²⁷ Article 1 of the Statute.

²⁸ <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>

The Rome Statute grants the ICC subject matter jurisdiction over four main crimes: a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.²⁹

The crime of **genocide** is characterised by the specific intent to destroy in whole or in part a national, ethnic, racial or religious group by killing its members or by other means: causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; or forcibly transferring children of the group to another group.³⁰

Crimes against humanity are defined as serious violations committed as part of a large-scale attack against any civilian population. The 15 forms of crimes against humanity listed in the Rome Statute include offences such as murder, rape, imprisonment, enforced disappearances, enslavement – particularly of women and children, sexual slavery, torture, apartheid and deportation.³¹

War crimes which are grave breaches of the Geneva conventions in the context of armed conflict and include, for instance, the use of child soldiers; the killing or torture of persons such as civilians or prisoners of war; intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, science or charitable purposes.³²

Finally, the fourth crime falling within the ICC's jurisdiction is the **crime of aggression**. It is the use of armed force by a State against the sovereignty, integrity or independence of another State.³³ The definition of the **crime of aggression** was not included in the initial version of the Statute, being adopted through amending the Rome Statute at the first Review Conference of the Statute in Kampala, Uganda, in 2010.³⁴ Currently only 34 of the 123 states parties have ratified the amendment.

This crime involves the planning, preparation, initiation or execution of an act of using armed force by a State against the sovereignty, territorial integrity or political independence of another State. The act of aggression includes, among other things, invasion, military occupation, and annexation by the use of force, blockade of the ports or coasts, if it is considered being, by its character, gravity and

²⁹ Article 5 of the Statute.

³⁰ Article 6 of the Statute.

³¹ Article 7 of the Statute.

³² Article 8 of the Statute.

³³ Article 9 of the Statute.

³⁴ <https://www.icc-cpi.int/about/how-the-court-works>

scale, a manifest violation of the Charter of the United Nations. The perpetrator of the act of aggression is a person who is in a position effectively to exercise control over or to direct the political or military action of a State.³⁵

The Court may exercise territorial jurisdiction in any of these situations over the cases included in the first three categories:

- the crimes were committed by a State Party national, or in the territory of a State Party, or in a State that has accepted the jurisdiction of the Court; or
- the crimes were referred to the ICC Prosecutor by the United Nations Security Council (UNSC) pursuant to a resolution adopted under chapter VII of the UN charter.

As regarding the crime of aggression, from 17 July 2018, if a situation that can be defined as an act of aggression, it could be referred to the Court by the Security Council, acting under Chapter VII of the United Nations Charter, irrespective as to whether it involves States Parties or non-States Parties.

In the absence of a referral of the Security Council, the Prosecutor may initiate an investigation on her own initiative or upon request from a State Party. The Prosecutor shall first ascertain whether the Security Council has made a determination in this regard. Where no such determination has been made within six months after the date of notification to the Security Council by the Prosecutor of the situation, the Prosecutor may nonetheless proceed with the investigation. Consequently, the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments.³⁶

There have thus far been 31 cases before the Court, with some cases having more than one suspect. ICC judges have issued 40 arrest warrants. Thanks to cooperation from States, 21 people have been detained in the ICC detention centre and have appeared before the Court. 16 people remain at large. Charges have been dropped against 5 people due to their deaths. The judges have issued 10 convictions and 4 acquittals.³⁷

Conclusions

International criminal law has developed at an unprecedented rate since the early 1990s. It is too early for us to issue any final judgments, but it was the purpose of this paper to evaluate recent developments as far as possible, and to look to the future of international criminal law.

³⁵ <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>

³⁶ <https://www.icc-cpi.int/about/how-the-court-works>

³⁷ <https://www.icc-cpi.int/about/the-court>

The creation of the ad hoc Tribunals showed that such tribunals could be established in a reasonably short time due to the mass atrocities committed in the contemporary era.

The ad hoc Tribunals have been criticized almost from the start as being expensive and bureaucratic. Nonetheless, these experiments have to be credited with appreciation, having into consideration a reasonable level of success in their own proceedings. In the same time, they provided the basis for the creation of what many thought was a near impossibility in the international legal order, a permanent international criminal court.

Bibliography:

FICTITIOUS INSOLVENCY. DEMARCATION FROM OTHER CRIMES

Doctoral student Ana CUCERESCU*

Abstract

Delimitation of criminal liability for crimes related to insolvency, from the point of view of their delimitation from other related facts. Prejudicial facts that have similar elements in relation to the crimes criminalized in art. 190, 252 and 253 Criminal Code. Following the study carried out, the qualification rules were analyzed, taking into account the specifics of the criminal acts of the crimes related to insolvency, and some explanatory guidelines were elaborated that target the analyzed criminal acts.

Keywords: *fictitious insolvency, intentional insolvency, creditor, debtor, delimitation*

In promoting the policy of the rule of law, the Republic of Moldova aims to achieve the principles of legality, humanism and democracy as effectively as possible. A particular role in the work of achieving these general principles is played by the means of criminal law¹.

Crimes related to insolvency are provided for in Chapter X of the Criminal Code of the Republic of Moldova² - Economic crimes, in particular: - Art. 252 Criminal Code of the Republic of Moldova - (1) Deliberate insolvency and Art. 253 Criminal Code of the Republic of Moldova - (1) Fictitious insolvency.

The normative regulations adopted in this regard by the legislator of the Republic of Moldova attempt, in a certain way, to cover the most complex and extensive areas of fraud against creditors, the aim being namely to protect from bankruptcy, but not - to punish the bankrupt by criminal law.

* Specializing in Criminal Law and Criminal Enforcement, State University of Moldova (Chisinau, Republic of Moldova).

¹ Berliba V. *Incorectitudinea normelor juridico-penale și legalitatea în statul de drept*. În: *Materialele Conferinței internaționale științifico-practice cu genericul „Edificarea statului de drept”*. Chișinău: Transparency International Moldova, 26-27 septembrie 2003, p. 202.

² Codul penal al Republicii Moldova. Nr. 985 din 18.04.2002. În: *Monitorul Oficial al Republicii Moldova*, 2009, nr.72-74.

For the provision of par. (1) of Art.253 of the Criminal Code of the Republic of Moldova, the formula “fictitious insolvency” means the action expressed in the false announcement by the perpetrator of the debtor’s insolvency, although the latter has real possibilities to satisfy the creditors’ claims. It is therefore essentially a specific form of active deception.

First of all, it is necessary to distinguish crimes related to insolvency from each other, and in this regard, we try to identify the criteria of demarcation, by determining the exact elements and signs of crime.

Referring to the special legal object of crimes provided for in Art. 252 of the CC of the RM, it should be noted that it consists of social relations concerning the correctness of payment by the debtor (par. (1) Art. 252 of the CC of the RM) or the debtor bank (par. (2) Art. 252 of the CC of the RM) of the obligations towards creditors, whereas the special legal object of the crimes provided for in Art. 253 of the CC of the RM is constituted by the social relations concerning the correctness of the initiation of insolvency proceedings, which, in our opinion, outlines a demarcation criterion according to the object of the attack protected by the criminal law.

Therewith, remaining in the realm of the objective elements of the crime component, namely the objective side, we note the legislator’s tendency to assign to crimes related to insolvency material structure, which outlines the time of their commission, the occurrence of damage on a large scale (par. (1) Art. 252 and par. (1) Art. 253 CC of the RM) and damage on a particularly large scale (letter b) par. (2) Art. 252 and letter b) par. (2) Art. 253 CC of the RM).

However, in addition to the common aspects that they have in terms of the prejudicial consequences of the objective sides, we note the existence of an optional mark, made mandatory by the legislator’s will - the ambience of crimes incriminated in Art. 252 of the CC of the RM, which we do not find for the crime of fictitious insolvency, i.e., alternatively, either the restructuring procedure or the bankruptcy procedure, or the situation of anticipation of insolvency.

The victim of the crime referred to in par. (1) Art.253 CC of the RM is the creditor within the meaning of Art.2 of Law No.149/2012³.

Therewith, the prejudicial deed designated by the formula “fictitious insolvency” is one of the varieties of using false official documents.

If the conditions allowing the debtor to file the motion to initiate proceedings are missing, the insolvency notice falls under par.(1) Art.253 CC of the RM.

³ Legea insolabilității. Nr. 149 din 29.06.2012. În: Monitorul Oficial al Republicii Moldova, 2012, nr. 193-197.

Insolvency notice takes the form of the filing, by the debtor or on behalf of the debtor, of the documents necessary for the insolvency proceedings to be brought before the court. First, a motion to initiate proceedings must be filed.

Therefore, the perpetrator, by conducting the fictitious insolvency action, submits to the court the documents necessary to initiate the insolvency proceedings, falsifying the evidence supporting the alleged insolvency of the debtor. As a matter of form, the documents required for the insolvency proceedings are drawn up under the rules laid down in the Law on Insolvency No. 149/2012.

Nevertheless, according to their content, these documents are false, because, in reality, the debtor can pay the creditors' outstanding claims within the time limits, or the debtor's assets are not exceeded by its liabilities.

It should be noted that if the documents necessary for the initiation of the insolvency proceedings are not completed under the rules laid down in the Law on Insolvency, the deed must be considered as an attempt to commit one of the crimes provided for in Art.190 of the Criminal Code of the Republic of Moldova (fraud).

The main distinction between the crimes in question and those specified in Art.253 of the Criminal Code of the Republic of Moldova lies in the fact that the latter can only be committed when the perpetrator notifies the insolvency of the debtor, a procedure that is conducted under the above-mentioned Law. In contrast, the presence of the aforementioned circumstance is not mandatory for the crimes referred to in Art. 190 of the Criminal Code of the Republic of Moldova (fraud).

When qualifying the crime as per para. (1) of Art.253 of the Criminal Code of the Republic of Moldova, no additional qualification is required as per Art.361 of the Criminal Code (forgery of public documents). Based on Art.116 of the Criminal Code of the Republic of Moldova, between Art.361 and par. (1) of Art.253 of the CC of the RM there is a competition between the general rule and the special rule. In conclusion, only the special rule, i.e. par. (1) of Art. 253 of the Criminal Code of the Republic of Moldova, shall apply.

If the perpetrator, in addition to using (by submitting to the court) false documents confirming the insolvency of the debtor, also makes them (having at that time the intention to use them later by submitting them to the court), there will be no need for additional qualification under Art. 361 of the Criminal Code of the Republic of Moldova. However, in the circumstances described, the preparation of false documents confirming the debtor's insolvency, if the intention is to use

them later by submitting them to the court, is nothing other than preparation for the crime provided for in par. (1) Art.253 CC of the RM⁴.

If a person prepares false documents confirming the insolvency of the debtor, for them to be subsequently used (by presenting them in court) by another person, the first of these persons shall be liable for complicity in the crime specified in par. (1) Art.253 CC of the RM.

In another context, we note that the crime provided for in par. (1) of Art. 253 CC of the RM is a material crime.

It shall be deemed to have been consumed from the moment the damage occurs on a large scale.

The subjective side of the crime specified in par. (1) Art. 253 CC of the RM shall be characterized by direct intent.

As a rule, grounds for the crime in question are expressed in material interest.

It should be noted that the special purpose of the crime provided for in par. (1) of Art. 253 CC of the RM is to mislead creditors to obtain from them either deferment and/or staggering of payments due to creditors, or reduction of debts.

Thereby, misleading creditors is the perpetrator's immediate aim. In turn, deferring and/or staggering payments due to creditors, or reducing debts, are the two alternative forms of the perpetrator's mediated purpose.

In turn, the purpose of misleading creditors implies that the perpetrator creates an opinion among creditors as to the debtor's serious financial situation, which would manifest itself in the debtor's inability to pay creditors' claims, an inability which is not objectively confirmed.

As regards the purpose of obtaining the postponement and/or staggering of payments due to creditors, this implies that the perpetrator seeks to impose on creditors deadlines for payment of the payments mentioned, unfavourable to them or favourable to the debtor, which may bring him/her patrimonial or other advantages, frustrating the creditors' interests.

Finally, the purpose of debt relief implies that the perpetrator is seeking to force creditors to write off part of their debts, which may bring them patrimonial or other advantages, frustrating the interests of creditors.

We point out that the purpose of the crime provided for in par. (1) Art. 253 of the CC of the RM cannot be to damage the debtor's commercial reputation.

⁴ Stati Vitalie, *Infraacțiuni economice. Note de curs. Ediția a III-a, revizuită și actualizată până la data de 1 mai 2019*. Chișinău: CEP USM, 2019. 600 p.

The subject of the crime specified in par. (1) Art. 253 of the CC of the RM is the responsible individual who has reached the age of 16 years at the time of committing the crime. In addition, the subject must be a special one.

The rules set out in Art. 252, Art. 253 of the CC of the RM unify an extremely principled circumstance: liability for crimes related to insolvency in case of causing large damages.

The delineation between the rules consists of the following features of the crime component.

The deeds provided for by Art. 252 of the CC of the RM are defined as the deliberate creation or increase of the limits of inability to pay (insolvency), committed by the head or owner of the commercial organization or the individual entrepreneur, in personal interests or in the interests of other persons, which caused large-scale damage.

Hence the context that criminal liability for wilful insolvency (wilful bankruptcy) arises where the insolvency of the commercial enterprise arises not as a result of objective conditions of management, but as an effect of the wilful actions of the guilty persons.

Within these limits it is important, to establish the crime of intentional insolvency, to prove the cessation of payments and the conclusion of acts of alienation made in fraud of creditors⁵. Criminal liability for fictitious insolvency arises in the case of a manifestly false declaration by the head or owner of the commercial organisation and by the individual entrepreneur of the state of insolvency, with the aim of misleading creditors with a view to staggering or postponing payments, reducing payment instalments or cancelling them, if a large-scale damage has been caused.

The distinction between the crime of fictitious insolvency (Art. 253 of the CC of the RM) and the crime of intentional insolvency (Art. 252 of the CC of the RM) lies in a single sign of assessment of the normative modality⁶: in case of intentional insolvency (Art. 252 of the CC of the RM) the debtor's inability to pay (in particular, the debtor's over-indebtedness, if the debtor is a legal entity responsible for the claims of creditors within the limits of its assets) is real, but its existence is conditioned by certain violations committed by special subjects, while in the case of fictitious insolvency (Art. 253 of the CC of the RM), although

⁵ Predescu Ovidiu, *Dreptul penal al afacerilor*. București: Editura Continent XXI, 2000. 266.

⁶ Codul penal al Republicii Moldova. Comentariu. Sub red. A. Barbăneagră, Chișinău, Centrul de Drept al Avocaților, Editura ARC, 2003.

the procedure for filing insolvency proceedings is legal, the information submitted for filing such proceedings is false⁷.

An ideal concurrence between the crime of intentional insolvency and fictitious insolvency cannot exist, as there is a delimitation between these crimes. The delimitation of the crimes involves two or more rules which do not coincide or contradict each other in any way. In the competition of criminal rules, however, all the rules contain general signs and the criminal deed committed could fall within the limits of any one of them in the hypothesis of the idea initiated, errors related to the incorrect settlement of competition issues are more difficult to detect and remove.

In this context, only the rules of delimitation can be determined between the crime of fictitious insolvency and the crime of intentional insolvency, without any concretisation and presence of rules of competition, and the admission of assessments of crimes by competition is only possible in the case of real competition.

Therefore, we do not consider justified the solution to qualify in competition the filing of a motion to initiate proceedings based simultaneously on certain unreliable data, completed by certain deliberate facts that caused the debtor's inability to pay. However, the debtor's inability to pay may exist, and criminal liability may be incurred based on certain specific prejudicial facts, or it may not exist, but the submission of a false motion to initiate proceedings, which fictitiously attests to a state of inability to pay, points to the crime of fictitious insolvency.

It should be noted that the crime of intentional insolvency has some similarities with certain socially dangerous acts, inserted in Chapter VI of the Criminal Law, namely - it is appropriate to specify the crimes of fraud (Art. 190), embezzlement of foreign property (Art. 191), causing material damage by deception or breach of trust (Article 196), destruction or waste of bank property by its administrator in the process of administration (Art. 197 par.(3)).

To justify the option of highlighting the importance of demarcating the crime of intentional insolvency from certain crimes against property, it is necessary to point out the moment at which these crimes are consummated and/or exhausted, i.e. the occurrence of prejudicial consequences in the form of damages that can be assessed from a financial point of view, and the perpetrator's desire to increase the amount of his/her own property from the victim's account may create confusion in the assessment of the body empowered to apply criminal law, in terms of the relevant criminal rule.

⁷ Codul penal al Republicii Moldova. Comentariu. Sub red. A. Barbăneagră, Chişinău, Centrul de Drept al Avocaţilor, Editura ARC, 2003.

Nevertheless, the legislator has not by chance avoided including crimes related to insolvency in the category of crimes against property, because of the social values that are harmed by the commission of these socially dangerous deeds, which are generally social-economic relations, and from this reasoning, there is also a desire to attribute the status of victim of crimes related to insolvency, unequivocally, to the legal person against whom the perpetrator directs his/her damaging actions to create a state of insolvency, and not only to the creditor to whom material damage has been caused by the crime.

Conversely, it is not always when social and economic relations are subsequently damaged as a result of the criminal activity that they can be included in the category of crimes related to insolvency, and in this segment we often have to refer to the doctrinal ways of qualifying criminal intent, which refer to initial and supervening intent, as well as determined and undetermined intent.

If two or more identical criminal deeds are committed over a relatively long time, with a single intention, it is not excluded that, initially, before the court has established the state of insolvency, the perpetrator intends to commit one of the crimes referred to in Art. 190, 191, 327, 335, 360, 361 or others of the Criminal Code. In the course of committing one of these crimes, the worsening of the economic and financial situation of the debtor may make the perpetrator's insolvency conditional. In turn, it is this anticipation of the development of events which is to occur that foreshadows the occurrence, the transformation of the criminal intent. This transformation takes place after the court has established the state of insolvency, but before the final criminal act is committed. The supervening intention is expressed in the intention to commit one of the crimes specified in Art. 252 of the Criminal Code⁸.

Elsewhere, we note that the Contravention Code⁹ [2] provides for liability for violations of legislation on insolvency, expressed through the failure of a debtor to file an introductory request if one of the grounds for instituting an insolvency proceeding is present; the filing by a debtor of a request for instituting a fictitious insolvency proceeding; concealing economic and accounting documents by the temporary administrator; publishing or disclosing in another manner information about a debtor's insolvency before the institution of an insolvency proceeding and the deliberate filing by a person, without any grounds for insolvency, of a request for instituting an insolvency proceeding against a debtor to

⁸ Stati Vitalie, *Infrațiuni economice. Note de curs. Ediția a III-a, revizuită și actualizată până la data de 1 mai 2019*. Chișinău: CEP USM, 2019. 600 p.

⁹ Codul contravențional al Republicii Moldova. Nr. 218 din 24.10.2008. În: Monitorul Oficial al Republicii Moldova, 2007, nr. 78-84.

damage the debtor's commercial reputation (Art. 288 of the Contravention Code).

In this regard, we note that the correspondent of par. (1) of Art. 252 and par. (1) of Art. 253 CC is Art. 288 of the Contravention Code. In this case, the criterion for delimitation is the degree of social danger of the deed, based on the extent of the damage caused, which implies that, to be applicable par. (1) Art. 252 or par.(1) Art. 253 of the Criminal Code, it is necessary that the prejudicial deed causes damage in the form of damage on a large scale, which, under Art. 126 CC.

Simultaneously, Art. 288 of the Contravention Code also provides for liability for filing a fictitious application for insolvency proceedings, based on a special purpose, namely - to damage the commercial reputation of the debtor against whom the application for insolvency proceedings has been filed.

Thereby, even if the extent of the damage caused by the deed of false announcement of the debtor's insolvency exceeds the damages on a large scale, but the perpetrator has pursued the purpose of damaging the debtor's commercial reputation, the liability will be applied under Art. 288 of the Contravention Code, and not under Art. 253(1) of the Criminal Code, since the criminal law does not assimilate, under the subjective aspect, the existence of the specific purpose indicated.

In conclusion, we can state that crimes related to insolvency have specific features that need to be highlighted and taken into account when classifying offences, in particular by the setting in which they are committed, the special quality of the subject and, in some cases, the existence of a special purpose.

In essence, the prejudicial consequence is the essential criterion of demarcation between criminal and contraventional wrongdoing in the matter of socially dangerous deeds related to insolvency, and the application of subsidiary liability to the members of the debtor's management bodies for the deeds that caused or aggravated the state of insolvency does not exclude criminal or contraventional liability.

Bibliography

1. Berliba Viorel, *Inc corectitudinea normelor juridico-penale și legalitatea în statul de drept*. În: Materialele Conferinței internaționale științifico-practice cu genericul „Edificarea statului de drept”. Chișinău: Transparency International Moldova, 26-27 septembrie 2003, p. 202.
2. Codul contravențional al Republicii Moldova. Nr. 218 din 24.10.2008. În: Monitorul Oficial al Republicii Moldova, 2007, nr. 78-84.
3. Codul penal al Republicii Moldova. Nr. 985 din 18.04.2002. În: Monitorul Oficial al Republicii Moldova, 2009, nr. 72-74.
4. Codul penal al Republicii Moldova. Comentariu. Sub red. A. Barbăneagră, Chișinău, Centrul de Drept al Avocaților, Editura ARC, 2003.
5. Legea insolabilității. Nr. 149 din 29.06.2012. În: Monitorul Oficial al Republicii Moldova, 2012, nr. 193-197.
6. Predescu Ovidiu, *Dreptul penal al afacerilor*. București: Editura Continent XXI, 2000. 266
7. Stati Vitalie, *Infrațiuni economice. Note de curs. Ediția a III-a, revizuită și actualizată până la data de 1 mai 2019*. Chișinău: CEP USM, 2019. 600 p.

NORMATIVE REFLECTIONS REGARDING THE LEGAL REGULATION OF MARRIAGE IN THE REPUBLIC OF MOLDOVA

PhD. Evghenia GUGULAN*

Abstract

As a social entity, the family based on marriage has had different meanings with time. As a rule, the concept of "family" is approached in sociological terms, but in this research, we intend to investigate the institution of the family in legal terms.

Being a "legal garment", the marriage through which the family manifests itself, forms a specific institution and is defined by a set of particular characters. The concept of "marriage" represents a fundamental human right, also enshrined in the European Convention Provisions on Human Rights. Article 12 provides the right to start a family through marriage, but the European Court of Human Rights differentiates the right to marry and the right to start a family.

In this context, the authors intend to make a comparative study of the legal framework applicable to marriage in the Republic of Moldova and make some suggestions and proposals in this regard.

Keywords: family, marriage, matrimonial arrangements, husbands, children, divorce

I. Preliminary aspects on the definition of marriage.

Under family law, the institution of marriage has great importance. The status of marriage acquired through the conclusion of a marriage, with all its rights and obligations completing the range of attributes identifying the natural person, accompanies and often completes the involvement of the subject of the law in civil legal relations.

Since ancient times, marriage has been considered one of the most important social institutions. Roman jurists defined the term marriage as „***the union of man and woman, a communion for life, the sharing of divine and human rights***” (Hanga, Vl., 1977, p.191) or in another doctrinal meaning is specified that: „***marriage is the union of man and woman consisting in an inseparable community of life***” (Hanga, Vl., Jacotă M., 1964, p. 131).

The status of marriage, acquired by the conclusion of a marriage, confers on the spouses a well-defined legal status - unlike the situation

* Lecture, PhD, Department „Private Law”, Academy „Ștefan cel Mare” of Ministry of Internal Affairs”, Moldova, e-mail: eugenia.gugulan.@mai.gov.md

of the unmarried couple, recognized quasi-legally - which completes the range of attributes identifying the natural person.

Marriage is a secular institution in the sense that its conclusion and registration are the responsibility of the public authority; as an expression of freedom of conscience and freedom to exercise religious worship, guaranteed by constitutional provisions, the religious celebration of marriage is permitted, but only after civil marriage and without legal effect.

The „*marriage*” officiated only religiously does not even mean a legal semblance of a marriage. Consequently, it is incapable of providing the benefit of a putative marriage (Emese Florian, 2021, p.22).

According to the provisions of the **Family Code of the Republic of Moldova**, the conclusion of marriage requires the mutual, unequivocal, personal and unconditional consent of the man and the woman who is getting married, as well as their reaching the age of marriage (Family Code, 2000, Art.11 para.1).

The *Constitution of the Republic of Moldova* (Art. 48 para.2) expressly proclaims that „...*the family is founded on marriage between a man and a woman by free consent...*” and the *European Convention on Human Rights* states that „*Men and women have the right to marry and to found a family according to the national law governing the exercise of this right, from the age determined by law*”. The text provides for the right to start a family through marriage, but the European Court of Human Rights differentiates the right to marry and the one to start a family. In the same way, the Convention does not refer to the right to dissolve a marriage and a family by divorce. The case law has given conflicting solutions concerning the marriage of two persons of the same sex, one of whom has changed sex through a specific operation (European Convention on Human Rights, 1950, Art. 12).

In a comparative aspect, the Romanian Family Code proclaims that marriage is concluded between a man and a woman with equal rights in the exercise of patrimonial and non-patrimonial rights (Family Code of Romania, 2008, art.1).

Article 277(1) of the Civil Code firmly and unequivocally prohibits same-sex marriages (The marriage of persons of the same sex is allowed in France (Loi no 2013-404 du 17 mai 2013), the Netherlands (art.130 of the Dutch Civil Code), Belgium (art.143 Belgian Civil Code), Spain (art.44 Spanish Civil Code) etc.); resistance to such marriages is also unequivocally expressed in other provisions: art. 259 (1) and (2) of the Romanian Civil Code – „Marriage is the union freely entered into between a man and a woman...” , respectively „A man and a woman have the right to marry to found a family...” ; also, according to Art.266 (5) of the Romanian

Civil Code, engagement, as a mutual marital promise, can only be concluded between a man and a woman. The penalty for failure to comply with this substantive condition is the absolute nullity of the marriage.

II. Regarded as a legal family-constituting act, marriage distinguishes by its particular characteristics.

The legislator recognizes a union between a man and a woman intending to start a family with several specific features. Marriage, seen as a legal act constituting the family, is distinguished by the following characteristics:

- *The secular (civil) nature of marriage*

The conclusion and registration of the marriage are the exclusive competence of the State authority. Article 9 of the Family Code of the Republic of Moldova (The Family Code of the Republic of Moldova, 2000) is categorical and clear: *„Only marriage concluded at the state civil status bodies generates the rights and obligations of spouses provided for in this Code. Likewise, marriage can be proved only by a marriage certificate issued, based on the act drawn up in the register of civil status acts”*. The civil nature of marriage is also reinforced by the Romanian Constitution, which stipulates that only after the conclusion of the marriage before the state authority; a religious marriage can be celebrated (Constitution of Romania, 2003, Art.48, para. 2).

- *Solemnity of marriage*

The validity of the legal marriage act is (also) subject to compliance with some formal requirements. It is not enough the mere agreement of the future spouses. The solemnity of marriage refers to the *„summary”* of the following elements: the marriage is concluded before the civil registrar; the marriage celebration requires the personal and simultaneous presence of the future spouses; the civil registrar confirms the conclusion of the marriage; consent to the marriage must be expressed in person and public before a civil registrar (Emese Florian, 2021, p.57).

In a comparative aspect, Article no. 17 of the Romanian Family Code establishes that the civil registrar, taking the consent of the future spouses, will immediately draw up the register of civil status documents and the marriage certificate, which are signed by the spouses, the two witnesses and the civil registrar (The Family Code of Romania, 1953, Art. 1 para. (3), art. 11,16,18,21).

- *Bilateral nature*

Marriage is born by the concurrence of two concordant wills. As a fundamental condition for legal acts in general, the freely expressed consent of the future spouses is the very essence of marriage.

- The cause of the legal act of marriage

The purpose pursued by the parties is the establishment of a distinct family from the families of origin of the spouses. A marriage entered into by one or both spouses for reasons other than the establishment of a family solely as a means of privilege obtaining deriving from the status of a married person may dissolve.

- The state of matrimony arises under the legal marriage act and, therefore, implicitly of the freely expressed consent of the future spouses

The rights and duties that marriage generically designates are imperatively established by law and governed by the principle of full equality between spouses.

- The perpetual character of the marriage

Marriage is for life, and it intends to start a family. The legal act of marriage may not be affected by any time limit, whether extinction or suspension or by any condition, whether resolutory or suspensive. However, the dissolution of the marriage and the loss of the status of spouses is permitted, but only under the conditions of the law.

- Monogamous nature of marriage

The analysis and definition of the family as a social phenomenon can only be successfully achieved, by treating it in direct correlation with the concept of marriage which gives rise to personal and property relations between spouses that cannot be generated by cohabitation. Romanian law also prohibits the conclusion of a new marriage by a person who is already married. In other words, the existence of a marriage impedes a new marriage conclusion.

The principle of monogamy, which is emblematic of Christian-inspired European civilizations does not admit two or more marriages of the same person at the same time (Emese Florian, 2021, p.41).

However, to a different extent from one country to another, the family represents a diversity of forms of cohabitation. The literature offers a multitude of typologies of families. Below is a summary of the most representative ones for our country:

- The traditional family is a family made up of a single couple and their offspring, who live together and have their household.
- The 3- or 4-generation (extended) family is a form of a family with three generations, consisting of a husband, wife and their children, to which may be added: the parents of the husband and or wife, their grandparents, the brothers and sisters of the husband and or wife, their children, uncles and aunts of the couple.

- A blended or blended family is a family in which the parents have been married before and divorced or lost their partner.
- Family consisting of a man and a woman living together (cohabiting): persons living in the same household but not legally married and having or not having children.

In addition to the benefits of modernity, people should face new challenges, conflicts and disadvantages:

- Changing the social status of women through their involvement in professional activities changes the relationship between the two partners.
- The physical and emotional separation between partners is increasingly felt. And there has been a shift from families with many children to small families (one-child families).
- There is a tendency to give up children; both partners are very focused on their careers and ignore the reproductive side of the family.
- Today's young people are much more oriented towards marital satisfaction, towards emotional fulfillment in the family, rather than pursuing family longevity at all costs.
- Changing the mindset from one of stigma to one of acceptance and tolerance of new patterns of family life, such as single-parent families, cohabiting couples, same-sex couples and marriages, teenagers becoming parents et cetera, but also of phenomena such as divorce, separation, living together before marriage.
- The tendency to be promiscuous, including (or especially) sexually promiscuous, and to be stolen away by 'fashionable' family models such as cohabitation.
- Decreasing church pressure on sexual relationships and the institution of the family.

III. The practical issues regarding the implementation of marriage legislation in the Republic of Moldova.

At the same time, in the judicial practice of the Republic of Moldova, there are certain difficulties in assessing parentage concerning family members. Thus, in the Republic of Moldova, *Law No 45 on preventing and combating domestic violence (2008)* is in force, which includes a legislative innovation: the protection order. The law requires the application of its rules (urgent protection) to persons in a marriage, divorce or cohabitation relationship, their relatives, the spouses of their relatives and other persons supported by them.

The persons who can complain about domestic violence are the victims, family members, local authorities and other persons with

information about the danger. The court issues a protection order within 24 hours of receiving the application, offering protection to the victim and imposing certain restrictions on the perpetrator.

Thus, the aggressor is forced to: temporarily leave the common dwelling; stay away from the victim's home; stay away from the victim's place of residence, work and living place; pay the expenses and damages caused by his violent acts, including medical expenses and those for the replacement or repair of destroyed or damaged property; is obliged to attend a special treatment or counselling program if the court so decides as necessary to reduce the violence or to make it disappear; is prohibited from keeping and carrying a weapon et cetera.

The protection measures provided shall apply for a while up to three months and may be withdrawn once the danger which made the measures necessary has disappeared or may be extended in the event of a repeated application or failure to comply with the conditions laid down in the protection order. The Criminal Code of the Republic of Moldova defines domestic violence and stipulates the appropriate penalties.

The assessment of the status of a family member, whereby is meant the family member:

- a) in the condition of cohabitation: persons in a marriage, in divorce, persons for whom a judicial protection measure has been instituted, their relatives, their relatives' spouses, persons in a relationship similar to that between spouses (cohabitation) or between parents and children;
- b) in a separate living arrangement: persons who are married, divorced, their relatives, their relatives, adopted children, persons for whom a legal guardianship measure has been instituted, persons who are or have been in a relationship similar to that between spouses (cohabitation).

With the mention of cohabitation, there is a need for a clear regulation that would include the characteristics of this institution. In addition to the theoretical uncertainties, this term raises some questions which may have a practical impact, namely: from what moment are partners considered to be cohabiting; to be recognized as cohabiting partners, the partners must live together; how will any periods during which the partners live separately be assessed; how will the cohabiting relationship be proved in court, etc.

The lack of clear, predictable and accessible criteria by application of which it can be established with certainty what cohabiting relationships allow for discretionary interpretation and application.

On the other hand, it must be understood that there are several „variants” of marriage, other than that concluded before the civil

registrar and the de facto cohabitation, cohabitation. At the same time, in relations between cohabitants, the source of co-ownership cannot be, in essence, either legal inheritance or the law (since a special regime derogating from ordinary law is reserved for spouses only), or usucapions, but only the agreement of the parties, whether express or tacit, but only if it is unequivocal.

IV. Conclusions and implications

We consider that the institution of marriage today is indeed a union between a man and a woman, based on a legal act freely entered into between the two, who decide to live together in full equality to start a family.

There is no legal definition of marriage in the current Civil Code, as there is none in the Family Code, but because of the regulations it contains, there is no need for such a definition, which is more a theoretical issue and a sum of all the provisions governing marriage.

However, it is clear from the doctrinal definitions mentioned above that, by entering into marriage, a man and a woman establish, in principle for life, a community of life, based on free consent, a community based on feelings of affection, friendship, trust and good understanding, which implies that the future spouses must think deeply about the marriage they intend to enter into so that it is in keeping with its purpose.

Because of the above, the natural conclusion is that the specific element of marriage is the community of life. The bond of marriage intends to endure between the spouses throughout their lives. It cannot, in principle, be dissolved either by simple consent of the spouses or by unilateral expression of will, even if the new divorce rules provide for this possibility either by consent of the spouses, judicially, administrative or notarial procedure, since the consent must be expressed in solemn terms.

Bibliography

1. European Convention on Human Rights. Available : https://www.echr.coe.int/documents/convention_ron.pdf
2. Constitution of the Republic of Moldova no. 1 din 29.07.1994. Published: 29.03.2016 in The Official Journal no. 78. Available: https://www.legis.md/cautare/getResults?doc_id=136130&lang=ro#
3. Constitution of Romania, Available: https://www.cdep.ro/pls/dic/site2015.page?den=act2_1&par1=2#t2c2sosba48

4. Family Code of the Republic of Moldova no. 1316 din 26.10.2000. Published: 26.04.2001 in The Official Journal no. 47-48. Available: https://www.legis.md/cautare/getResults?doc_id=134444&lang=ro#
5. Family Code of Romania. Available: <https://legislatie.just.ro/Public/DetaliiDocument/123080>
6. CETEAN-VOICULESCU, Laura, *Family law and acts related to the civil registry*. Editura Lumen, Iași, 2019.
7. EMESE, Florian, *Family law. Marriage. Marriage regulations. Filiation*, Ediția 7, Bucharest: 7th edition, Universul Juridic, 2021.
8. HANGA, Vladimir, Jacotă Mihai, *Roman Private Law*. Bucharest: Didactică și pedagogică, 1964.
9. HANGA, Vladimir, *Roman Private Law*, Bucharest: Editura Didactică și enciclopedică, 1977.
10. Law No 45 of 01.03.2007 on preventing and combating domestic violence. Published: 18.03.2008 in The Official Journal no. 55-56. Available: https://www.legis.md/cautare/getResults?doc_id=122823&lang=ro#

SOME REFLECTIONS ON THE SEPARATION OF THE CHILD FROM THEIR PARENTS

PhD. Cristiana-Mihaela CRĂCIUNESCU*

Abstract

The family has been, still is, and must remain the social environment in which the child grows and develops their personality. The Civil code, as well as the entire legislation on children's rights stipulate, beyond any possibility of denial, that the ones responsible for raising and educating the children are the holders of parental authority, that is, the parents. For this, the parents must be able to freely exercise their rights and fulfill their parental obligations regarding their children. The intervention of the state in order to separate the child from their parents is only justified in exceptional situations where the child is endangered and this course of action would be in their best interest. However, regardless of the type of intervention by which the parental rights and obligations are taken over from the parents and the child is separated from them, the separation can only be temporary, and can only last until the circumstances that had caused the separation disappear. The restoration of parental rights and the reintegration of the child into the family are being pursued both in the case of the loss of parental rights and in the application of special child protection measures. The new regulations regarding the conditions under which the child must be raised and cared for in the family and the ways by which the state can intervene in order to ensure it cannot in any way change the principles of exercising parental authority and the priority of parents in making decisions regarding the child.

Keywords: *best interest of the child, separation of the child, parental authority, parental rights, special protection measures, termination of parental rights*

1. General considerations

1.1 The responsibility of parents and the right of children to be raised and educated by them

The context of the ratification of Law no. 156/2023 regarding the organization of the activity to prevent the separation of the child from their family, as well as the reactions produced in the public space by this, suggested to me the idea of some brief reflections on the concept of separating children from their parents in the current Romanian legislation.

The child is the joy, the core and the hope of survival of every family. That is why the parents are the ones who surround the child with

* Trainer of the National Institute of Magistracy.

all their care and love and guide them in their first steps in life, a fact that is also reflected in the legislative plan through the legal norms regarding the child's upbringing and education.

We mention that the notion of "parents" designates both natural (natural, by blood) parents, as well as adoptive parents, or the one established in the application of the institution of medically assisted human reproduction with a third-party donor.¹

According to the provisions of Art. 5 of Law no. 272/2004, the parents have, first of all, the responsibility of raising and ensuring the development of the child, as well as the obligation to exercise their rights and fulfill their obligations towards the child, taking into account, first of all, the best interest of the child. And the first aspect of the interpretation of the notion of "best interest of the child" seems to us to be related precisely to the right and obligation of both parents to ensure a suitable family environment for the upbringing and education of the child. Moreover, the child's right to grow up in their parents' care is enshrined in paragraph (1) of Art. 35 of the same law.

The parents are also the ones that, according to the purviews of Art. 483 of the Civil Code, are the holders of parental rights and duties, which make up the content of the notion of parental authority. This takes into consideration both the parental rights and obligations regarding the child, as well as the ones regarding the child's assets. Therefore, the protection of the child by their parents is being performed through the parental authority, which should be carried out exclusively in the best interest of the child. In this sense, it was stated² that since the parental authority is the one that "constitutes the very core of the protection of the child's rights, all the principles established by Law No. 272/2004 pass through the center of the parental authority", and of all these, obviously, the principle of respecting the best interest of the child always prevails.

1.2 The family environment, an important component of the child's life

An entire section of Law No. 272/2004 on the protection and furtherance of the child's rights (Section 2) refers to the "Family environment and alternative care", establishing the child's right in growing up in their parents' who, taking into account the child's best interest, have the obligation to ensure all the care and support necessary

¹ See also: Lupașcu Dan, Crăciunescu Cristiana-Mihaela, *Dreptul familiei*, 4th edition, amended and updated, "Universul Juridic" Publishing House, Bucharest, 2021, p. 551.

² Avram, Marieta, *Drept civil. Familia*, Third edition, revised and completed, "Hamangiu" Publishing House, Bucharest, 2022, p. 421.

for the child's upbringing and education. In this sense, the parents have the duty to supervise the child, to cooperate with them by respecting their privacy and dignity, to inform the child about all the acts and facts that could affect them, taking into consideration the child's opinion as well, to take all necessary measures in order to perform the child's rights, as well as to cooperate with natural and legal persons exercising duties in the field of child's care, education and professional training. (Art. 37 of the same law).

The same principles also govern the regulations contained in the Civil Code, according to which the family is also based on the right and duty of parents to ensure the upbringing and education of their children, as they are the ones who have, first and foremost, the duty of raising and educating their minor children (Art. 261 of the Civil Code).

These regulations clearly underline the central role that the family environment undoubtedly plays in the growth and development of any child's personality.

1.3 The conditions under which state intervention in the upbringing and education of children can take place

Article 38 of Law no. 272/2004 categorically stipulates the impossibility of separating the child from their parents or from one of them against their will "except in cases expressly and limitedly provided by law, subject to judicial review and only if this is imposed by the best interests of the child". The same principle is contained by the Civil Code, according to which "the child cannot be separated from their parents without the parents' consent, except in the cases provided by law".

It should be emphasized that all the cases expressly provided by the law in which it is possible to separate the child from their parents refer to borderline situations, in which the child's upbringing and education are being endangered by the actions or non-involvement of the parents, when the best interest of the child requires finding a temporary solution to replace parental care until the causes that caused it cease to exist. The guarantee of the temporary character of these measures consists in the possibility of judicial review, as the guardianship and family court have the possibility and the obligation to intervene whenever necessary and to return the child to their family environment as soon as the causes of the separation have been removed.

Moreover, the Civil Code guarantees the right of the child to maintain personal relations with the parent(s) with whom, for various reasons, they do not live. The exercise of this right can only be limited under the conditions of the law.

We therefore observe the concern of the Romanian legislator that the child remains with their family and under parental protection, in

order for the child to benefit from a family environment conducive to the growth and development of their personality, in accordance with their best interest and with the social and personal values of the family from which they come.

In the spirit of this fact, in situations where the best interest of the child requires temporary separation from their parents or the limitation of their parental rights, this is preceded by the taking of all the necessary measures by the public social assistance service to detect risk situations, as well as for the prevention of parents' abusive behavior and family violence (Art. 39 par. (1) of Law no. 272/2004). In this sense, in the event of detecting risk situations, the public social assistance service has the obligation to draw up a plan on the basis of which to grant the services and benefits provided for by law, with special emphasis on the appropriate information of the parents, their counseling, therapy or mediation if appropriate.

2. The exercise of parental authority, an attribute of the parents of each child

2.1 The notion of "parental authority"

According to Art. 483 of the Civil Code, parental authority is defined as being the set of rights and duties that concern both the person and the property of the child and belong equally to both parents. Consequently, the notion of parental authority includes two sides, namely the personal side, regarding the protection of the child's person, and the patrimonial one, regarding the administration of the child's assets, their representation at the conclusion of legal acts until they reach the age of 14 and their assistance until acquiring full exercise capacity.³

Parents exercise parental authority over their children until they acquire the full capacity to exercise it, regardless of whether this occurs by coming of age, by marriage or by judicial emancipation (pursuant to Art. 40 of the Civil Code).

Normally, parental authority belongs equally to both parents and is exercised by them together, in the interest of the child and with the respect owed to the child. The involvement of the child in making decisions concerning themselves is recommended by law, taking into account their age and degree of maturity.

The notion of parental authority was introduced in the Civil Code instead of that of entrustment for the upbringing and education of the

³ For more details: Lupașcu Dan, Crăciunescu Cristiana-Mihaela, *Dreptul familiei*, 4th edition, amended and updated, "Universul Juridic" Publishing House, Bucharest, pp. 554 and the next.

child in order to involve both parents in the upbringing and education of the child equally, whenever possible, even in the case of separation or divorce. Therefore, in the old regulation, represented by the Family Code, parental rights and duties were exercised by parents equally only during marriage or when the parents lived together, and in the event of their separation, only one of them would become responsible for the child's upbringing and education, as this parent would be the one to exercise all parental rights, and the other would only have "the right to personal ties with the child as well as to watch over their upbringing, education, and professional training" (Art. 43 par. 3 of the Family Code).

However, the Civil Code has abandoned this approach and, by including the parental rights and obligations into the notion of parental authority, has granted them equal exercise regardless of the parents' situation. Only the minor parent has only parental rights and obligations regarding the person of the child, if they have reached the age of 14, the parental rights and obligations regarding the child's assets reverting to the other parent, the guardian or, as the case may be, to another person, in accordance with the law. Through this regulation, parents are given the opportunity to be actively involved in raising and educating the child equally.

2.2 Exercise of parental authority within the family and in case of parental separation

During the parents' marriage, the child is raised within the family environment by both parents together, equally. The decisions are being made by mutual agreement, in every aspect regarding the child's upbringing and education. In this context, with respect to bona fide third parties, any of the parents, who performs by themselves a current act for exercising the parental rights and obligations is presumed to have the other parent's consent, as provided by Art. 503 para. (2) of the Civil Code.

There are also situations in which, within the family, the decision-making power regarding the exercise of parental authority is unequal. Thus, when one of the parents does not possess exercise capacity, the parental authority is exercised exclusively by the other parent. If one of the parents has limited exercise capacity, i.e. the minor parent who has reached the age of 14, they only have parental rights and obligations regarding the child's person, and the parental rights and obligations regarding the child's assets would remain the responsibility of the other parent or guardian.

An atypical situation is that in which one of the parents benefits from legal advice. According to the provisions of Art. 503 para. (1)¹ from the Civil Code, in such cases, the guardianship court can decide that the parental rights and obligations regarding the child's assets are to be

exercised only by the other parent; the guardianship court can also decide the creation of a guardianship for that child, as the case may be. It is obvious, however, that parental rights and obligations regarding the person of the child will belong to the protected parent in such situations' as well, as long as said parent has the necessary discernment.

However, in the case of separation or divorce of the parents, the situation changes, as, objectively, their equal and permanent involvement in the child's life is no longer possible. In such cases, there is a split in the exercise of parental authority, under the conditions that the child would permanently live with one of them, and with the other, the child would maintain personal relationships as strong as possible.

In principle, even after separation, parental authority still belongs to both parents. This means that both will continue to be involved in the child's upbringing, being obliged to make important decisions for the child together, namely those that influence the child's upbringing and education and are applied in the long term, but also those for which the law requires the consent of both parents. In Belgian jurisprudence⁴ it has been appreciated that the joint exercise of parental authority implies that the father and mother are required to decide together in situations regarding the child, which go beyond daily life. That is, the parents are obligated to make joint decisions when it comes to picking a school, choosing a religion etc.; this is also the case for decisions that apply during the periods of time in which the child lives with the other parent (e.g. extracurricular activities). Any disagreement with respect to making such decision is resolved by the guardianship court. It has been appreciated that, if the deviations from the rule of co-decision in everything regarding the child, by their frequency or by the unfavorable consequences to the child, reach the consistency of the fundamental reasons, the interested parent can request the guardianship court to grant them sole exercise of parental authority, if this is in the interest of the child.⁵

In cases where there are solid reasons to the effect that the parent does not have the capacity to make such decisions or that, by their behavior, the parent endangers the child's upbringing and education, the guardianship court can temporarily limit the exercise of parental authority by said parent, on the ground of Art. 398 of the Civil Code, in conjunction of Art. 36 (7) of Law no. 272/2004. In such cases, the exercise of parental authority will be granted only to the other parent or

⁴ Massager, Natalie, *Droit familial de l'enfance. Filiation. Autorité parentale. Hébergement*, "Bruylant" Publishing House, Brussels, 2009, pp. 278-279.

⁵ Florian Emese, *Dreptul familiei. Căsătorie. Regimuri matrimoniale. Filiația*, 7th edition, C.H.Beck Publishing House, Bucharest, 2021, pp. 564-565.

to other persons, in accordance with the law. In situations like this, the parent who is not exercising the parental authority retains the obligation to support the child and still has the right to maintain personal relationships with the child and will be able to monitor the way in which the other parent fulfills their parental obligations.

As far as day-to-day decisions regarding the child's upbringing and education are concerned, these belong to the parent with whom the child lives.

Naturally, during the periods when the child is with the parent with whom the residence has not been established in the implementation of the personal relations program, this parent is the one who has the obligation to make the daily decisions necessary for the child's upbringing and education.

According to art. 36 (6) of Law no. 272/2004, a parent cannot waive the exercise of parental authority over their child, but they can agree with the other parent on how to exercise parental authority, under the terms of Art. 506 of the Civil Code.

Obviously, parental authority will be exercised unilaterally, by law, in the situations listed as examples in Art. 507 para. (1) of the Civil Code, as the parent holding parental authority has sole responsibility for raising and educating the child. As for the parent with respect to whom the special guardianship protection measure was taken, their right to watch over the child's upbringing and education, as well as their right to consent to the child's adoption, are maintained only when said parent has the necessary discernment.

2.3 The exercise of parental authority by other persons in the situation of parental separation

In case of separation and/or divorce of the parents, the guardianship court determines which of the parents will exercise parental authority and with which of them the children will live. As the Romanian legislation provides, usually, the exercise of parental authority continues to belong jointly to both parents, even if they no longer live together, and the child's home is established with one of them. However, the exercise of parental authority is no longer able to take place in the same way, given that only one of the parents lives with the child and has, implicitly, the obligation to supervise, raise and educate the child to a much greater extent.

Therefore, in such situations, the parent with whom the child does not ordinarily live will exercise parental authority by participating in important decisions concerning the child, and the parent with whom the child does live will have responsibility for making day-to-day, ordinary

decisions regarding the child's upbringing and education. Obviously, the obligation to support the child will remain with both parents.

However, there may also be situations in which, when the parents divorce, the child cannot remain in the care of either of them, for objective reasons. One of those reasons could be that neither parent can provide a safe environment to their children; there could also be other solid reasons that could lead to the impossibility, be it temporary, of exercising parental authority. For such situations, the legislator regulated the possibility of the guardianship court that, through the divorce settlement, to exceptionally institute the placement of the child with a relative, or with a family or a person, with their consent, or in a protective institution, based on Art. 399 of the Civil Code. In most cases, the child's placement is established with the grandparents or other close relatives, who take care of the child up until the time when the parents can resume their parental role.

Establishing this form of placement entails the transfer of the exercise of the parental authority regarding the person of the child to the person or to the institution where the child has been placed, during the period during which this measure is applied. The rights and obligations concerning the minor's assets would still belong to both parents or to only one of them, as determined by the guardianship court through the placement decision.

We can also encounter situations in which, after the divorce, the parents may not have the time or the financial resources to fulfill their daily parental duties. This could be the case for parents that are in college and have very young children; these parents may live in student dormitories and thus have no way of fulfilling their parental duties under such conditions. Another measure that the guardianship court can order in such situations when the parents cannot take care of the child is the establishment of the child's residence, also exceptionally, with grandparents or other relatives or individuals, with their consent, or in a protection institution (Art. 400 para. (3) of the Civil Code). In such cases, the parents retain the exercise of parental authority over the child, and the person with whom the child's residence has been established only has the obligation to supervise the child and fulfill all the usual acts regarding the child's health, education and development. Therefore, in such cases, the parents or the parent exercising parental authority will make the important decisions regarding the child's upbringing and education, and the person with whom the child's residence has been established will implement them. In such cases, a permanent and effective communication is obviously necessary between the parents and the person with whom the child's residence has been established.

2.4 Sanctioning the termination of parental rights

However, there are also situations in which, through their irresponsible behavior, the parent endangers the life, health or development of the child. We encounter such situations in the case of bad treatment applied to the child, alcohol and narcotic consumption, abusive behavior, serious negligence in the fulfillment of parental obligations or serious harm to the child's best interests. For such situations, the Civil Code regulates the only civil sanction under family law, namely the termination of parental rights.

Sanctioning the termination of parental rights is applied by the guardianship court at the request of public administration authorities with powers in the field of child protection, in accordance with the law.

The termination of parental rights can be total (with respect to all parental rights and/or with respect to all the children that said parents have) or partial (with respect to only some parental rights or some of the children).

Applying this sanction inevitably leads to the temporary separation of the children from the parents on whom the sanction had been applied. When only one of the parents loses their parental rights, the other parent shall exercise the parental authority alone. When both parents have their parental rights terminated, guardianship will be instituted for the respective child for the period of application of the sanction. Parents deprived of parental rights will still retain the obligation to support their own children.

If this sanction is applied, the children are separated from their parents. In the situation where a request has been made to restore the exercise of parental rights, the court can allow the parent to have personal ties with the child until the request is resolved, if it is in the child's best interest.

Therefore, even this very harsh family law sanction is temporary and aims only to protect the child against abusive behaviors that put them at risk, but once the risk situation is removed, the child will return to their own family. The child's best interest in being raised by their parents prevails, therefore, even in such cases.

3. Situations in which the exercise of parental authority belongs to other natural or legal persons, in the application of special protection measures

3.1 The exercise of parental authority when parents are absent or when the child cannot be left in their parents' care in order to protect the child's interest

For the situation of children who are temporarily or permanently deprived of the protection of their parents and for whose benefit

guardianship was not established, Law no. 272/2004 provides for a series of special protection measures, which are established based on the individualized protection plan drawn up by the General Directorate of Social Assistance and Child Protection (GDSACP) and with the children's consent, if they have reached the age of 14. The guardianship court can override the child's refusal to express consent only for solid reasons.

The situations in which the children can benefit from the special protection measures regulated by this law are as follows: the child's parents are deceased, unknown, deprived of their parental rights or to whom the punishment of the prohibition of parental rights was imposed, placed under prohibition, declared judicially dead or missing, when guardianship could not be established; the child who, in order to protect their interests, cannot be left in the care of their parents for reasons beyond their control; the child who's being abused or neglected; the child who's found or abandoned in health facilities, as well as the child who has committed an act provided by the criminal law and who is not criminally liable.

The special protection measures provided by law in this regard are the following: placement, emergency placement, and specialized supervision.

All of these special protection measures are temporary, because when establishing the objectives of the individualized protection plan, priority is given to the child's reintegration into the family, and if this is not possible, the internal adoption procedure is opened.

In all these cases, the separation of children from their parents takes place under the conditions of following strict procedures, regulated by law, through which one can identify the perilous situation in which the child is found, and find the most suitable solutions for the child's best interest.

The temporary and reversible character of these measures is also essential in this case. In this sense, the reintegration of the child into the family is a priority objective of the individualized protection plan, as the family environment remains the most suitable solution for the normal and beneficial upbringing and development of the child, for whom parental affection is extremely necessary. Thus, to prevent the separation of the child from their parents as well as to ensure the special protection of the child deprived, temporarily or permanently, of the protection of their own parents, Art. 125 of Law no. 272/2004 has established a series of measures for the county councils and the local council of the sector in the municipality of Bucharest, including the obligation to organize day services, family-type and residential-type

services, according to the needs identified at the level of each territorial-administrative unit.

Based on the service plan, the child in difficulty together with their family can benefit from day services, which, according to the law, ensure the maintenance, restoration and development of the child's and their parents' capacities to overcome situations that could cause the child to be separated from their family.

Even in the case of children that are temporarily deprived of the protection of their own parents, the placement is made with priority to families or individuals, or, whenever possible, to members of the extended family with whom the child enjoyed family life or to specialized foster carers, to provide them with a family environment as suitable as possible to their needs until they return to their parents. Also, for the purpose of maintaining family cohesion, when establishing the placement measure, keeping siblings together and facilitating the parents' exercise of the right to visit the child and maintain personal ties with them is also taken into consideration.

Throughout the entire placement, parental rights and obligations are being exercised, according to the law, by the director of the general directorate of child protection, their daily care being the responsibility of the one who takes care of the child.

In parallel, the general direction of social assistance and child protection monitors the situation of each child for whom a special protection measure has been taken, and if the circumstances considered for the establishment of that measure have changed, it has the obligation to immediately notify the commission for the protection of the child or, as the case may be, the court for the modification or termination of the measure's application, thus ensuring the return of the child to their parents.

3.2 The exercise of parental authority in the case of children whose parents have gone to work abroad

The Law no. 272/2004 also regulates protection measures for children whose parents have gone to work abroad. The Art. 104 of this law regulates the procedure that needs to be followed in order to protect children in such situations.

There is a judicial procedure carried out with the involvement of public social assistance services from the child's home, in which, following the notification of the parent's intention to go to work abroad, the guardianship court confirms the person appointed to take care of the upbringing and education of the children in this situation and orders the temporary delegation of parental authority regarding the person of the

child during the absence of the parents (but not more than one year) to the appointed person. This person will be the one who will take care of the child without parental protection, exercising the rights and fulfilling the duties that the court has delegated to them through the confirmation decision. Naturally, parental authority will continue to be exercised by parents, who delegate only a part of their parental rights and duties to the person in whose care they leave their child during the period of going to work abroad.

It was established⁶ that when one of the parents requests delegation, "the parent's action should be the expression of the agreement of both parents". Such a decision cannot be considered "usual", "ordinary", and therefore it cannot be within the reach of only one of the parents that exercise parental authority.

After confirming the person in whose care the children are left, the public social assistance service at the child's home has the obligation to monitor their upbringing and education, according to the provisions in Annex I of Government Decision no. 691/2015, and to intervene whenever situations of risk for the child arise.

The appointment and confirmation of the person in whose care the child is left can only be done for a period of one year, even if the parents do not return to the country during this period of time. In such situations, it is necessary to resume the appointment and confirmation procedure of the person in whose care the child remains.

3.3 The right to maintain personal relations between the child and their parents

In all cases where the child does not live in the family environment with both parents, they have the right recognized by law to maintain personal relationships and direct contacts with the parent with whom they do not live, with their relatives, as well as with the people with whom they enjoyed family life and to which they developed bonds of attachment. It is a right of the child, but also of the parent, as the latter also feels the need to be involved in the growth and education of their child, to observe the child's physical and mental development and to intervene, if necessary, to correct some mistakes made in the development of their personality.

According to the provisions of Art. 18 of Law no. 272/2004, the personal relations between the child and the parent can take place in several forms, respectively: meetings of the child with the parent,

⁶ Florian, Emese, *Delegarea voluntară a exercitării autorității părintești*, în *Autoritatea părintească. Între măreție și decădere* (Avram, Marieta, coordinator), "Solomon" Publishing House, Bucharest, 2018, p. 35.

visiting the child at their home, hosting the child, for a determined period, by the parent with whom the child does not live, correspondence or other forms of communication with the child, transmitting information to the child about the parent and to the parent about the child with a certain frequency.

In principle, the personal relations between the child and the parent with whom they do not normally live are carried out according to the parents' understanding, but in case of disagreements the guardianship court can intervene, which establishes, upon request, a personal relations program adapted to the age and the specific situation in each case.

In the case of a great availability of the parent and the existence of the child's desire in this sense, the personal relationships can be very extensive, even reaching the equalization of the time spent with each of the parents. It is essential for the child to feel that they are surrounded by the love of both parents and to have as close personal relationships as possible with each of them. Thus, family cohesion is maintained and the child does not feel frustrated by the family environment beneficial for the development of their personality.

4. The problem of separating the child from the parents - a source of contradictions

4.1 What novelties does Law no. 156/2023 bring regarding the organization of the activity to prevent the separation of the child from the family

With the ratification of Law no. 156/2023 regarding the organization of the activity to prevent the separation of the child from the family, numerous controversies broke out in the public space, on the subject of the prospect of unaccepted and unacceptable separations of children from their parents. To a large extent these controversies started from the very imprecise and unclear regulation of the law regarding the conditions under which children can be declared to be at risk of separation and registered as such.

From the title of the law, on the contrary, it would appear a very good intention of the legislator, that is to prevent the separation of the child from the family, but the way in which the text of the law was drafted leaves room for abusive interpretations, which cannot be beneficial for anyone, especially for children. Thus, for example, the situation of risk of separation is defined as "any situation, action or inaction that affects the physical, mental, spiritual, moral or social development of the child, in the family or in the community, for a determined period of time and which is ascertained by the public social

assistance service" (Art. 3 letter f) of the law). This general definition is followed by a series of enumerations of risk and vulnerability situations that are encountered, in reality, in the vast majority of families.

In this context, the assessment as a risk situation of separation of the child from the family in the case of the existence of a risk of monetary poverty or the poor health of one or more family members, including disabilities, seems to us at the very least an exaggeration, considering the plethora of these types of situations in our country, especially in rural or developing areas. The fact that there is a sick person in the family (regardless of the disease they suffer from and the degree of kinship) is extremely common, but this does not, as a rule, constitute an impediment to the normal development of the child within the respective family!

Moreover, the law defines vulnerability as "the situation in which the family loses temporarily, partially or totally, the ability to raise and care for children", and then it shows that the family can be considered in a state of vulnerability if, for example: they illegally occupy certain living spaces, including illegally built spaces or improvised housing or spaces that are not intended for living, or if they do not have sufficient living space in relation to the number of people. How could the public social assistance service assess whether or not the respective family has the right to occupy certain living spaces, whether the homes are built legally or by what standards is the need for each person's housing space assessed?

Among the same indicators provided by law for assessing the family's vulnerability is the situation in which there is a minor mother or a pregnant minor in said family's care; if the family has all the necessary conditions and it is well cared for, why should it be considered at risk of family separation? And the list goes on!

Obviously, such legislative inadvertencies can generate suspicion, even if the law does not regulate a separation of the child from the parents, but only indicates situations that call for some support measures for families in vulnerable situations.

We appreciate that the very fact of calling children in difficulty of any kind "at risk of family separation" may give rise to suspicions. As long as the child has responsible and loving parents who take care of their upbringing and education, why should they be considered at risk of separation if their family, just because one of its members is suffering from an illness (that does not affect the child in any way) or because their family is going through some financial difficulties? Why did the legislator not consider, for such situations, the intervention of the state to help such families in order to overcome material difficulties and provide the child with good conditions for growth and education?

We appreciate that, in such situations, the best interest of the child is of utmost importance, and their separation from the family, even presented and registered as a potential risk, does not find its place in this context!

As it is regulated in all the rest of the Romanian legislation, as we have already shown, the separation of the child from the parents can only be an extreme and temporary measure, taken only in the best interest of the child. However, inducing the idea of the risk of separation so easily seems totally inappropriate to us! Too much expansion of the area of signs of risk of separation only cancels out the ones that are real and serious! And we wonder *qui prodest*?

Furthermore, Law no. 156/2023 is not correlated in any way with the rest of the child protection legislation for a coherent application in practice. Thus, neither the situations of potential risk for the growth and education of the child contained in the Civil Code and Law no. 272/2004, nor the measures to prevent and combat them do not correlate with those provided by this regulation. Separating the child from their parents, even in the form of a potential risk, is not found to be a possible measure of protection or removal of difficulties of any kind arising in the family. Moreover, Law no. 156/2023 does not provide any solution for the difficult situations that arise in the lives of families with children, but only labels them as situations of risk of separation or vulnerability, without correlating them with the regulations that would provide practical solutions to overcome them. We consider, in this context, that its provisions are not applicable, as long as they do not bring a solution to the situation of children in difficulty.

4.2 Child observatory, a legislative necessity?

Another institution that can create reasonable suspicion through the regulatory mode is the National Child Observatory, which is defined as a module within a database developed and administered by the National Authority for the Protection of Children's Rights and Adoption (NAPCRA), in which all children at risk of family separation will be registered by the local public authorities.

First of all, as we stated above, considering the child as being at risk of separation from their parents seems to us very unclear and inappropriate.

Secondly, the law does not provide under what conditions a child can be enrolled in this database and for how long they remain in this record. How is their personal data being protected? Shouldn't the parents, as holders of parental authority, consent to these records? When it comes to children who have turned 14 and have limited exercise capacity, would it not be normal that they are consulted and asked to consent to such a recording?

A very important aspect that the law does not provide is the period during which the child remains registered in this record and under what conditions they can be removed from it, considering the fact that the vulnerabilities of the family they are a part of could be temporary. A permanent recording of the child as being at risk of separation from their family cannot, in any case, be in the best interest of the child!

We do not deny the fact that a record of children in difficulty (we're talking about real situations of difficulty, not like those mentioned in this law!) would be necessary and useful for the general directions of child protection in order to take measures to protect these children and to support their families, but the registration should be done under conditions that guarantee the protection of personal data and it should last only until the change of the difficult situation. However, the current regulation does not offer such guarantees and does not respect the best interest of the child.

5. Conclusions and propositions of *lex ferenda*

To conclude, the Law no. 156/2023 regarding the organization of the activity to prevent the separation of the child from their family has caused numerous controversies due to the vagueness and arbitrariness of the provisions it contains.

Although the title of the law suggests a beneficial objective for children, namely the prevention of their separation from the family, in reality the provisions it contains do not regulate any kind of solutions that serve this purpose. On the contrary, by including in the category of risk situations of separating the child from their family, a multitude of unclear criteria, insignificant for the upbringing and education of the child and extremely frequently encountered in society, the legislator only brings confusion and a demonetization of the real risks that can exist for the child.

In this context, we appreciate that the aforementioned law could not enjoy an effective and beneficial applicability, without the intervention of the legislator in the sense of selecting and specifying real risk situations, which should not be considered as generators of family separation, but imperatives of state intervention in removing risk factors of any nature by supporting families in difficulty in any form.

At the same time, it is important that any new regulation in the field of child protection be corroborated with those already existing and be part of a coherent and efficient legal framework.

Only in this way could a regulation dedicated to the protection of the child be useful and beneficial, in the spirit of the child's best interest.

ESTABLISHMENT OF PARENTAGE BY ALTERNATIVE MEANS¹

PhD. Laura CETEAN-VOICULESCU*

Abstract

The establishment of filiation is carried out according to the general rule, in the case of maternity, by the fact of the child's birth, recognition or action in court, and in the case of paternity, for the resulting child from marriage, through the effect of the relative presumption of paternity and for that outside of marriage through recognition or legal action. But in the present paper we do not intend to analyse these main ways of establishing parentage, but others, which we have called "alternatives". It is about the establishment of parentage as a result of adoption, about the establishment of parentage as a result of artificial fertilization with a third donor, respectively about the establishment of parentage in the case of gestational surrogacy.

Keyword: *filiation to the mother, paternity, recognition of filiation, action to establish maternity/paternity, denial of paternity, presumption of paternity, medically assisted human reproduction with third-party donor, gestational surrogacy.*

General rule for establishing parentage in Romanian law

The rule of establishing filiation in the Romanian legislation is, regarding maternity, the one that is based on the fact of birth of the child, through maternity recognition, when the birth of the child was not registered in the civil status register or, although it was registered in the civil status register, the child was listed as born of unknown parents or by legal action to establish filiation to the mother, where proof of parentage to the mother cannot be furnished by the medical birth certificate or where the reality of those contained in that certificate is disputed.

Therefore, motherhood is based on the fact of birth, assuming that the woman who gave birth to a child is her biological mother. This presumption appears to be an absolute presumption when it comes to the concordance between state possession and filiation resulting from the birth document, when any action in contesting parentage to mother

¹ International Conference: Law and Its Challenges in The Socio-Economic and Administrative Field, 28-30 June 2023, Section: Family Relations and Civil Status Documents.

* Assoc. Prof., Faculty of Law and Social Sciences, "1 Decembrie 1918" University of Alba Iulia.

brought by third parties or in a claim of filiation to mother brought by the person whose parentage is concerned are prohibited by the provisions of Art. 411 Civil Code. But the absolute character is diminished by the exception provided by paragraph 3 of the same article, according to which even in cases of concordance, proof of other parentage may be provided, by any means of evidence, if a court decision has established that there has been substitution of a child. However, this presumption is a relative one in cases of discrepancy, according to art. 422 Civil Code, since when it is not possible to prove filiation to the mother in the birth certificate or to contest those contained in that certificate, filiation to the mother can be established by an action to establish maternity.

As regards the establishment of filiation to the father, the rule of ordinary law is different in the case of the child of marriage, for whom filiation to the father is established based on the rebuttable presumption of paternity, and to the child out of wedlock whose filiation is established by recognition or legal action.

The presumption of the legal type of conception was also transformed by the legislature from an absolute one to a relative one, with the entry into force of the Civil Code, since it is now possible to prove by scientific means that a child was conceived outside the period of time between the 300th and 180th day before the child's birth.

Special (alternative) parentage cases

In addition to these main ways of establishing filiation to the mother, respectively to the father, there are also some particular ways, some recognized by Romanian legislation, others (yet) not regulated or even prohibited.

Regarding the recognized, adoption or medically assisted human reproduction with a third-party donor, they are regulated both in the Civil Code and by special normative acts.

For those not regulated but not expressly prohibited by Romanian legislation, we consider that either the principle according to which in civil matters what is not prohibited is allowed, corroborated with the provisions of Article 60 of the Civil Code, according to which the individual has the right to dispose of himself if he does not violate the rights and freedoms of others, applies, public policy or morality, (if the specific legal relationship is of domestic law), or the conflict-of-law rule, specific to private international law (if the specific legal relationship has at least a foreign element).

In these situations, if the filiation of the child is already established, we must start from the prohibition provided by the Civil Code, according to which as long as a legally established filiation relationship has not been challenged in court, another filiation cannot be established in any

way. Therefore, for the child who has already established filiation to the mother or father, the only way in which filiation to a third person can be called into question is to challenge filiation through justice. Any other method initiated before administrative, notarial or judicial authorities lacks legal efficiency. With regard to filiation to the mother, the rule that no one may dispute the filiation to the mother of a person who has a state possession consistent with his act of birth is also important. We consider, along with other authors in the specialized literature, that these legal norms regarding filiation have the character of public order, arising both from their nature as civil status actions and from the principle of respecting the best interests of the child, as well as from the principle of finding out the biological truth.

The qualification of these legal norms as being of public order justifies the removal from the application of any other foreign legal norm, determined as competent to regulate the legal relationship of filiation from the conflictual norm, when the legal relationship overlaps with any foreign element (citizenship of the mother, father, child, place of birth of the child, legislation applicable to marriage or divorce of parents, etc.). According to the rule of private international law, conflict-of-law rules on parentage are:

- For the child of marriage, filiation shall be established according to the law which, on the date of birth, governed the general effects of his parents' marriage, and if before his birth the marriage of the parents ceased or was dissolved, according to the law governing its effects on the date of termination or dissolution.
- For a child out of wedlock, filiation shall be established according to the child's national law at the time of birth.

Therefore, filiation to the mother can, in these cases, be removed only on the basis of legal action (not on the basis of declarations, contracts or other legal acts), and entries in civil status registers will be made, this time, on the basis of the court decision and not on that of the birth certificate.

Judicial practice has also surpassed legislation in this area, stating that "Recourse to another procedure, such as gestation for another, assumed by the parties to the proceedings, although not expressly regulated by law, cannot be considered an illegal procedure, as long as, in civil matters, what is not prohibited is allowed". The court also noted that "the principle of *mater semper certa est, pater incertus*, also enshrined in the current Civil Code (art. 408) should be amended in the light of advances in medicine in the field of medically assisted reproduction techniques. In its judgment, it is also pointed out that: "the

legal impossibility for minor applicants to have their motherhood from their biological mother recognised – that is to say, their true genetic identity – would, in the first place, undermine their right to privacy, guaranteed by Article 8 of the European Convention on Human Rights".

The third category of ways in which parentage is established is made up of those that are expressly prohibited by Romanian legislation, where the rule that in the private field, what is not prohibited is allowed can no longer be applied.

Establishment of parentage by adoption

As a result of adoption, once the court decision granting it has become final, relations of² filiation and kinship, called civil, are established between the adoptee and his descendants, on the one hand, and the adopters and their relatives, on the other. At the same time, filiation and kinship relations with the biological family cease.

Also as a result of adoption, the adopted child will acquire the adopter's surname or the common name / the one agreed by the adopters. Also, with the consent of the adoptee and the adopter(s), the adoptee's first name may also be changed.

As a result of these two effects comes the third – the adopted child will acquire a new birth document. When the court decision becomes final, it will be sent to the community public service for the registration of persons, which will draw up the new birth document of the adopted child with the inherent changes, based on which a new birth certificate will also be issued.

Establishment of parentage in case of medically assisted human reproduction with third party donor

The alternative ways that infertile people can benefit from are partly regulated by Romanian law. The current Civil Code, inspired by the French and Canadian models, introduced for the first time the procedure of establishing filiation by the method of medically assisted human reproduction with a third donor.

The situations covered by the legal text, although unclear and general, not yet regulated by special law, are those in which genetic material (sperm or eggs) from a third party is used.

But according to the Civil Code, parents will be the man and the woman or the single woman, and the procedure has as finality the birth of a child by a woman – the mother, who will be the carrier of the female

² On another occasion we analysed the legislator's omission regarding the descendants of the adopted, see Laura Cetean-Voiculescu, *Family Law and Civil Status Documents*. Lecture notes and seminar manual, Lumen Publishing House, Iasi, 2019.

genetic material, coming from another woman – third party donor (who will be the "biological mother" but not the "legal mother"), but who will give birth to the child, keeping the concept of the established legal norms of the Civil Code and Law nr. 119/1996, that the woman who gives birth to the child is its mother. In another variant, the genetic material from the third-party donor is male or both male and female, but the parent will be the surrogate mother, who will give birth to the child and not the third donor, female or male.

Therefore, the legal norms contained in the Civil Code (Articles 441-447) do not cover the procedure for establishing parentage on the basis of contracts concerning gestational surrogacy.

It is also possible that the method of medically assisted reproduction with third party donor will target male genetic material and then the father will be the partner (not necessarily the husband) of the mother, who has given consent to medically assisted reproduction with third party donor.

Therefore, in establishing parentage on the basis of this method, the establishment of filiation to the mother will also be done by the fact of the child's birth, the "legal mother" being the carrier of the third-party genetic material, the carrier of pregnancy and the one who will give birth to the child, who will not be able to contest this filiation and the establishment of filiation to the father will be made, depending on whether or not he is married to the mother, by recognition or by the effect of the presumption of paternity, also without the possibility of bringing paternity proceedings after consent.

Medically assisted human reproduction with a third-party donor was considered by some authors as a "violation of nature" or as an "invasion into the privacy of the couple", but it has acquired from its regulation in the Civil Code a widespread, out of the need to support sterile couples eager to have children. More and more couples in the European Union and beyond are facing infertility problems. According to the World Health Organization, it is a disease of the reproductive system, defined by the inability to conceive a child. In Romania, for example, one in six couples faces infertility problems, and the birth rate is on a downward trend.³

Internationally, legislation is quite diverse. The fact that a child can hypothetically have three mothers: one genetic, another gestational and the other raising, respectively 3 fathers (one genetic, one social and one raising) has created, for reasons of human reproduction and the perpetuation of the species, the need, internationally, to redefine filiation, which no longer always resides in the fact of the child's birth or

³ https://www.europarl.europa.eu/doceo/document/E-7-2014-003709_RO.html

in the marriage of his parents according to the adages *Mater in iure certa est* or *pater is est quem intae nuptiae demonstrated*.

There has been an attempt to regulate internally the procedure of medically assisted human reproduction with third party donor, for example PL – x nr. 63/2012 which referred to artificial insemination with reproductive material from a third party and in vitro fertilization, but in 2016 the legislative procedure ceased with the final rejection of the draft law by the Chamber of Deputies.

Reproduction by gestational surrogacy

Gestational substitution maternity involves establishing motherhood through an agreement whereby one of the parties is a woman, called surrogacy or surrogacy, who undertakes to carry a pregnancy to term and give birth to a child for another woman, who will become the mother of the child thus born.

What do we currently know about this procedure in Romania?

First of all, the procedure is recognized by some legislations⁴, not regulated but not prohibited in others or even prohibited⁵. In the Romanian legislative landscape, it is neither regulated nor prohibited, which is why we find it in the practice of the courts.

Why would regulation be necessary in this area?

The rules are necessary in order to mark the limits within which it can be carried out, the substantive and formal conditions of the contract. For example, going only on the thin ice of the principle that in civilian clothes what is not forbidden is allowed, we cannot establish on what legal basis the child is registered in the birth register as having a mother other than the woman who gave birth to him, whether or not the woman who will be the mother of the child must be infertile in order to resort to the gestational substitution maternity procedure, whether or not she must be in a couple, whether the couple must be married or not, how is paternity established between the mother's partner (married or not) and the child, what can be the terms or form of the contract on the basis of

⁴ Gestational surrogacy and oocyte/sperm donation have been legal in Georgia since 1992; under Georgian law, a donor or surrogate mother has no parental rights over the child born; since 2004, surrogacy in combination with oocyte/sperm donation are legal in Ukraine; according to Ukrainian law, biological parents are entered in civil status documents as parents of the child born to the surrogate mother; a donor or surrogate mother has no parental rights over the child thus born.

⁵ Since November 4, 2015, surrogacy is illegal in India; in France, since 1994 any signed surrogacy convention has been illegal; the French court ruled in a case that if a couple entered into an agreement or contract with another person, who should give birth to the child of the spouse or biological child of the infertile couple, they would not be allowed to adopt this child.

which gestational substitution is made, how would the surrogate mother renounce parental rights over the child, whether the child can/must be related to the surrogate mother, whether or not the implanted gametes must be donated by the couple party to the contract, etc.

It is possible that the gestational substitution maternity procedure can be assimilated to procedures of medically assisted human reproduction with a third donor and thus be regulated by art. 441-447 Civil Code?

Personally, we believe that the answer to this question is no, because:

- Alin. 1 Art. Article 441 provides that medically assisted reproduction with a third party donor does not give rise to any parentage link between the child and the donor. The donor would be the woman in the couple who wants a child, respectively her partner, or even both, so in these cases the filiation ties would be blocked by law.

- The situations covered by the legal text, although unclear and general, not yet regulated by special law, are those in which genetic material from a third party is used. But according to the Civil Code, parents will be the man and the woman or the single woman, and the procedure has as finality the birth of a child by a woman – the mother, who will be the carrier of the female genetic material, coming from another woman – third party donor (who will be the "biological mother" but not the "legal mother"), but who will give birth to the child, keeping the concept of the established legal norms of the Civil Code, according to which the woman who gives birth to the child is its mother. In another possible variant, the genetic material from the third-party donor is male or both male and female, but the parent will be the surrogate mother who will give birth to the child and not the third donor, male or female.

The legal vacuum in maternity, gestational substitution, has not prevented courts from issuing numerous solutions that have won the case against parents, but it has created an uneven judicial practice.

For cases where the child is carried during gestation by a woman, but with genetic material from another woman, who will become the mother of the child, the courts have issued favourable decisions, ⁶on the grounds of the person's right to dispose of himself (Article 60 of the Civil Code), the fulfilment of the conditions of state possession, medical documents certifying the biological connection between the applicants and the child, these being the donors, the genetic material from which the child was born, of the provisions of art. 422 Civil Code, which provide that when the reality of what is contained in the birth certificate is disputed, filiation to the mother may be established by an action to establish maternity in which any means of proof may be administered,

⁶ See civil sentence no. 53 dated 15. 01.2015 of the M Court, source www.rolii.ro

on legal basis: the Oviedo Convention of 4 April 1997⁷ on the right to the genetic identity of the child, Art. 8 of the European Convention on Human Rights on the right to respect for private and family life, ECHR practice⁸. They also pointed out that in some special situations the upbringing and development of the child alongside the biological parents is imperative, and the state has a positive obligation to facilitate the child's access to the family, taking all necessary measures to implement the principle concerning the best interests of the child. Therefore, in the absence of express regulation of gestation for another and of the parentage regime in this situation, the national court proceeded to resolve the question of filiation of children born of gestation for another⁹, applying Article 8 of the Convention and the principle of the best interests of the child, the solution being in harmony with ECHR case-law.

Obviously, there have also been courts¹⁰ that have invalidated the possibility of establishing maternity as a result of gestational substitution on the following grounds: The Civil Code regulates

⁷ Law 17/2001 ratified the European Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, the Convention on Human Rights and Biomedicine, signed in Oviedo on 4 April 1997.

⁸ ECHR W - C. Luxembourg, 28 June 2007, *Gaskin v. United Kingdom* Ragat, Mizzi v. Malta, AMM v. Romania.

⁹ By civil judgment no. 11320/2020, the Bucharest Sector 2 Court upheld the action brought by the father in contradiction with the mother and surrogate mother, finding that the first is the mother of the child and the second (entered in the birth certificate) is not. In this case, the DNA forensic expertise sample was administered, from which it emerged that following the comparative analysis of the DNA compounds of all those involved, defendant No. 1 is the biological mother of the minor. The legal grounds considered in reaching this solution are, in addition to the provisions of Articles 408-409, 420, 441-447 NCC and other national and international regulations applicable to the case: "the court considers that, as long as the consequences of gestation for another concern the fundamental right to privacy of those involved, they do not find a fair and equitable solution in domestic law, in the light of the priority provisions of the European Convention and other international acts in the matters signed and ratified by the Romanian State, the Romanian courts may refuse the minor's right to recognition of his true genetic identity only at the risk of ignoring his manifestly superior interest, to whose observance all normative acts in the field of the protection of children's rights oblige (especially art. 49 para. 1 of the Constitution, art. 3 point 1 of Law no. 18/1990 for the ratification of the Convention on the Rights of the Child, Art. 1 para 2, art. 2 para. 1, para. 1 ind. 1 and para. 3 of Law nr. 272/2004, art. 263 C. civil). For more details see Magdalena Căpitanu, "Medically assisted human reproduction with third party donor or surrogacy", vocatcapitanumagdalena.com/reproducerea-umana-asistata-medical-cu-tert-donator-sau-prin-mama-surogat/

¹⁰ Civil Decision no. 708/29.05.2015, pronounced by the Gorj Court – Civil Section I in file no. X, source www.rolii.ro

medically assisted human reproduction with a third party donor, without modifying the legal provisions on filiation maternal or paternal provisions provided for in the old legislation but, on the contrary, expressly in Art. 443 of the Civil Code provides that no one may contest the parentage of the child on grounds related to medically assisted reproduction, nor can the child thus born contest the filiation. The challenge to filiation to the mother is based solely on the absolute presumption, in matters of filiation to the mother, that the fact of birth is crucial for establishing filiation to the mother. The establishment of filiation to a woman other than the one who gave birth to the child can be done exclusively by adoption, this rule also applying when the ovum was donated by the recipient mother. This presumption even overturns the rules on blood kinship between the donor mother and her biological child born to another woman. The Civil Code does not prohibit other methods of medically assisted human reproduction, but the fact that it did not regulate the other techniques of medically assisted reproduction does not mean that there is no regulation in the field of medically assisted human reproduction and, therefore, the question of applying the rule "what is not prohibited is allowed" is excluded. The techniques of 'renting the uterus' do not fall within the traditional principle of unavailability of the human body, and 'gestation agreements' for another are null and void, even in the absence of an express legal text, the refractory courts holding that such agreements aim to deal with values pertaining to public order and morals (marital status, public health).

How would a satisfactory regulation present itself?

The gestational substitution maternity procedure should be based on an authentic contract, free of charge (Romania has ratified the 1997 Convention for the Protection of Human Rights and Biomedicine, which expressly prohibits financial gain from the human body and its component parts).

Personally, we believe that the use of this modality of medically assisted reproduction should be allowed by law only with two cumulative conditions:

- The woman who will become a mother as a result of this procedure is infertile or cannot carry the pregnancy to term for medical reasons;
- At least one parent will donate their own genetic material to be transferred to the surrogate mother.

In their absence, we consider that there are no good reasons for prioritizing this reproductive time by regulation over the adoption procedure. Obviously, the social policy of the state is also important, the

answer to the question: what do we want? Increasing the birth rate or protecting children already born, who are in difficulty.

The parties to the contract would be the surrogate mother, respectively the parents, who could be, by applying the similarity, the man and the woman (married or not, because even in the case of medically assisted human reproduction with a third donor is allowed) or the single woman (married or not, because even in the case of establishing civil parentage, adoption can be made by a single woman or a married woman, but without her husband becoming an adopter).

No one should be able to challenge the parentage of the child on grounds relating to maternity, gestational surrogacy, nor should the child thus born be able to contest his parentage. The mother's husband should only be able to deny paternity of the child if he or she was not a party to the contract or consented to reproduction by gestational surrogacy in another way.

In order to ensure the best interests of the child, we also consider that:

- The rule should be established that parents of a child born through gestational substitution maternity, whether biological parents or not, have the same rights and obligations towards the child as towards a child born by natural conception.
- Matters relating to the liability of parents and surrogates who, having consented to surrogacy through surrogacy, do not recognise (the father) or comply with contractual clauses or legal obligations as parents should also be regulated.

Nor should we forget the principle of confidentiality which must govern family relationships where information is disclosed only for good reasons.

Of course, a special law should also stipulate how the child's birth will be registered in the civil register, since until the date of entry into force of such a law, civil registry officers will take into account exclusively those entered in the birth certificate or those established by a court decision, excluding the possibility of retrieving data on parents from any contracts, even concluded in authentic form. At the moment, the only way to solve the situation is through the court because it is necessary to modify the child's birth certificate.

In order to preserve logic and rules of legislative technique, these general rules should be inserted into the Civil Code, with reference to a special law regulating in detail the legal regime of reproduction of gestational maternity substitution, the modalities of ensuring confidentiality and the transmission of information pertaining thereto, substantive and formal conditions of the contract, prohibitions and legal liability.

Ways prohibited by Romanian legislation

There are also ways in which parentage can be established or ensured the perpetuation of the human species in general or under certain conditions, but which are expressly prohibited by Romanian legislation.

Thus, first of all, there is the prohibition of eugenic practices that harm the human species or tend to organize the selection of persons, prohibited under Article 62 of the Civil Code. The human being is intangible, which implies its non-alteration, so eugenic practices, cloning, interbreeding species, creating hybrid beings are prohibited¹¹. Eugenics designates the system of ideas according to which human populations can be improved by biological measures of genetic inspiration, by replacing pathological genes by recombining good genes, violation of the prohibition on bringing into the world a disabled child, although parents were aware of this risk, choice of parents, sterilization, prohibition of procreation. In the specialized literature¹² there is also talk about the classification of eugenics into: positive (when it involves selective reproduction, aimed at increasing the number of people with an exceptional genetic baggage) and negative (when it eliminates the effects of transmitting unfavourable genetic traits to offspring).

Secondly, there is the prohibition of interventions on genetic characteristics, being prohibited:

- all medical interventions on genetic traits aimed at modifying the progeny of the person, except those concerning the prevention and treatment of genetic diseases.
- interventions aimed at creating a human being genetically identical to another human being, living or dead.
- creation of human embryos for research purposes
- choosing the sex of the future child by using medically assisted human reproduction techniques.

Thirdly, the inviolability of the human body is regulated. Experiences, tests, samples, treatments or other interventions on persons, regardless of purpose, are forbidden, except under the express and limiting conditions provided by law.

Fourthly, there is the examination of genetic characteristics. Only medical or research purposes, or identifications based on genetic fingerprints in legal proceedings can justify examination of the person's genetic characteristics.

¹¹ For more details see Civil Code – Commented and Annotated. About civil law. About people. Art. 1 - 257, Lavinia Tec, Rosetti Publishing House, Bucharest, 2018.

¹² Collective author, coord. Afrasinei Mădălina, *The New Civil Code commented*, Hamangiu Publishing House, Bucharest, 2013.

Fifthly, it is about the prohibition of patrimonial acts, being forbidden to confer any patrimonial value on the human body, its elements or products, except for the situations expressly provided by law.

Sixthly, medical interventions on a person consist of experiments, tests, procurement, treatments or other interventions for therapeutic or scientific research purposes, which are prohibited.

Finally, with regard to removal and transplantation from living persons, the removal and transplantation of organs, tissues and cells of human origin from living donors shall be carried out exclusively in the cases and under the conditions provided for by law, on the basis of the free, prior and express consent of the persons and only after being informed of the risks, with the possibility for the donor to change his mind by the time of removal. The legislator attaches great importance to this consent, which must be given with discernment, since it prohibits the removal of organs, tissues and cells of human origin from minors or persons deprived of discernment because of a mental disability or a serious mental disorder.

Conclusions

The need for a regulation of ways of establishing alternative parentage, in accordance with new discoveries in the field of medicine, is indisputable for reasons invoked in this paper.

The presumption that the mother who gave birth to a child is also his biological mother should be a relative one, not an absolute one, on the grounds that we can imagine proof to the contrary being made and validated by a court.

International and European regulations are also favourable to other alternative ways of establishing parentage, in the category of medically assisted human reproduction.

State possession would be diminished if the child were not regarded by everyone else as that of the woman who gave birth to him.

As stated in the literature¹³, the parental aspirations of any person are human. However, to follow them with the help of medical techniques is, morally and legally, imperative to be rigorously conditioned.

¹³ D. Lupascu, C.-M. Crăciunescu, "*The New Regulations on Parentage*", Romanian Pandectele Magazine, nr. 6/2011, p. 69; Emeșe Florian, Considerations regarding the regulation of medically assisted human reproduction with third party donor in Romanian law, *Studia Universitatis Babeș-Bolyai Journal*, nr. 4/2013, <http://arhiva-studia.law.ubbcluj.ro/articol/578>

Bibliography

1. Laura Cetean-Voiculescu, *Family law and civil status documents*. Lecture notes and seminar manual, Lumen Publishing House, Iasi, 2019.
2. https://www.europarl.europa.eu/doceo/document/E-7-2014-003709_RO.html
3. Civil sentence no. 53 dated 15.01.2015 of the M___ Court, source www.rolii.ro
4. Law 17/2001 which ratified the European Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, the Convention on Human Rights and Biomedicine, signed in Oviedo on 4 April 1997.
5. European Convention for the Protection of Human Rights and Dignity of the Human Being with regard to Application of Biology and Medicine, Convention on Human Rights and Biomedicine, signed in Oviedo on 4 April 1997.
6. ECHR W - C. Luxembourg, 28 June 2007, Gaskin v. United Kingdom Regat, Mizzi v. Malta, AMM v. Romania.
7. Civil sentence no. 11320/2020, Bucharest Sector 2 Court.
8. Constitution of Romania.
9. Civil Code.
10. Law nr. 18/1990 for the ratification of the Convention on the Rights of the Child.
11. Law nr. 272/2004 on the protection and promotion of the rights of the child.
12. Magdalena Căpitanu, *Medically assisted human reproduction with third party donor or surrogacy*, vocatcapitanumagdalena.com/reproducerea-umana-asistata-medical-cu-tert-donator-sau-prin-mama-surogat/
13. Civil Decision no. 708/29.05.2015, pronounced by the Gorj Court – Civil Section I in file no. X, source www.rolii.ro
14. Civil Code – Commented and annotated. About civil law. About people. Art. 1 - 257, Lavinia Tec, Rosetti Publishing House, Bucharest, 2018.
15. Collective author, coord. Afrasinei Mădălina, *The New Civil Code commented*, Hamangiu Publishing House, Bucharest, 2013.
16. European Convention on Human Rights.
17. D. Lupascu, C.-M. Crăciunescu, *The New Regulations on Parentage*, Romanian Pandectele Magazine, nr. 6/2011, p. 69.
18. Emeşe Florian, Considerations regarding the regulation of medically assisted human reproduction with third party donor in Romanian law, *Studia Universitatis Babeş-Bolyai Journal*, nr. 4/2013, <http://arhiva-studia.law.ubbcluj.ro/articol/578>.

THE INFLUENCE OF THE MATRIMONIAL REGIME OF THE DECEASED ON THE EXTENT OF THE SUCCESSIONAL ESTATE AND THE UTILITY OF CIVIL STATUS DOCUMENTS IN THE NOTARIAL SUCCESSION PROCEDURE

PhD. Iliaora GENOIU*

Abstract

The amicable debate of an inheritance is one of the most important procedures that falls under the competence of the notary, it requires several operations, some of them being particularly extensive and presenting an indisputable importance. This, since the succession procedure is completed with the issuance of the heir's certificate, a notarial act assimilated to an authentic one, which provides double proof: of the quality of the heir and of the ownership right of the acceptors over the goods in the succession table, in the share that belongs to each one. In this procedure, the matrimonial regime of the deceased must be liquidated, by an authentic notarial deed, to the extent that he/she was married, and the opening of his succession takes place after the entry into force of the current Civil Code. The extent of the estate of the deceased mainly depends on the type of matrimonial regime chosen. Civil status documents are also of particular importance in the non-contentious inheritance debate, with the help of which the public notary can determine the persons who have a general and specific vocation for the succession in question.

Keywords: *inheritance debate; the legal community regime; the separation of assets regime; the conventional community regime; the matrimonial regime liquidation; civil status documents.*

1. Introductory considerations

The non-contentious (amicable) debate of the inheritance, within the competence of the public notary, is very often used in practice. This procedure is stated in art. 12 lit. c) and regulated by art. 103-120 of Law no. 36/1995, republished, with subsequent amendments and additions¹, as well as art. 233-259 of the Regulation on the application of the Law on public notaries and notarial activity no. 36/1995².

* Associate Professor, Valahia University of Târgoviște, Public Notary – Ploiești Chamber of Notaries.

¹ Republished in Official Gazette, no. 237 of March 19, 2018.

² Approved by Order of the Minister of Justice no. 2333/C/2013.

The complexity of the notarial succession procedure is undeniable, as it involves the completion of several stages, including the composition and determination of the estate³. However, the extent of the estate depends without a doubt on the matrimonial regime of the deceased, a regime that must be liquidated by an authentic notarial deed, to the extent that the deceased / *de cuius* was married, and the opening of his succession takes place after October 1, 2011⁴. Civil status documents are also of particular importance in the procedure whose issue we are interested in here, only with their help the public notary can determine the persons entitled to the inheritance.

As a result, in this study, we shall discuss, exclusively from the perspective of the notarial succession procedure, some aspects of interest regarding matrimonial regimes, regulated by the current Civil Code and civil status documents.

2. The influence of the matrimonial regime of the deceased on the extent of his/her estate

2.1. General considerations regarding matrimonial regimes

In what follows, we do not intend to fully address the issue of matrimonial regimes. This, first of all, because, from the time of their regulation (October 1, 2011, when the current Civil Code entered into force) and until now, all the aspects they entail have been brought forward and clarified, and, secondly, for the fact that our approach is intended to be carried out only from the perspective of the notarial succession procedure, therefore from the point of view of the public notary, a legal practitioner.

De lege lata, three matrimonial property regimes are regulated: the statutory community of property regime, the separation of property

³ For the issue of the notarial succession procedure, see, for example: Ioan Leș, *Elemente de drept notarial*, 3rd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 98-116; Iliaara Genoiu, *Drept civil. Succesiuni, Caiet de seminar*, 5th edition, C.H. Beck Publishing House, Bucharest, 2023, p. 403-421.

⁴ Only in the case of inheritances opened after the entry into force of the current Civil Code is it necessary to liquidate the matrimonial regime, by an authentic notarial deed. In the case of the other inheritances, the contribution shares of the spouses to the acquisition of common assets and the assumption of common obligations (that we can only talk about the community of assets in their case) are established by the agreement of the heirs, recorded in the final conclusion. In the notarial succession procedure, the final conclusion precedes the issuance of the heir certificate, it is drawn up in two copies and is considered to have the probative force of an authentic document, although it cannot be qualified as an authentic act itself, lacking the authentication conclusion. See, for details, Ioan Leș, op. cit., pp. 109-111; Iliaara Genoiu, op. cit., pp. 414-416.

regime and the conventional community of property regime⁵. Undoubtedly, the current Civil Code is truly emancipated from its predecessor (the Family Code adopted in 1953⁶ and expressly repealed by the entry into force of Law No 287/2009 on the Civil Code⁷), as the old Family Code did not allow spouses to choose a matrimonial property regime, but regulated exclusively the legal community of property. As a result, as a rule, assets acquired by the spouses during the marriage were, from the date of their acquisition, considered joint property outright⁸, but they had the opportunity to prove that they contributed to their acquisition in different shares. In the absence of such proof, there was a presumption of equality of the spouses' contribution to the acquisition of community property. The same legal regime presents the legal community in the new civil regulation.⁹

⁵ For details, see Marieta Avram, *Drept civil. Familia*, 3rd edition, revised and added, Hamangiu Publishing House, Bucharest, 2022, p. 567 ff.; Cristina Mihaela Nicolescu, *Capitolul VI. Drepturile și obligațiile patrimoniale ale soților*, in Flavius Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei (coord.), *Noul Cod civil. Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2012, p. 320-332.

⁶ Approved by Law no. 4 of January 4, 1953, later being amended and supplemented several times.

⁷ Rectified, Official Gazette, no. 246 of April 29, 2013.

⁸ Regarding this form of joint ownership, see, for example: Iosif R. Urs, Mircea Duțu (initiators and general editors of the project), *Enciclopedia juridică română*, D-E, Academiei Publishing House and Universul Juridic Publishing House, Bucharest, 2021, p. 194; Corneliu Bîrsan, *Drept civil. Drepturile reale principale*, 2nd edition, revised and updated, Hamangiu Publishing House, Bucharest, 2015, p. 242-243; Lucia Uță, *Proprietatea comună și proprietatea periodică*, in Marilena Uliescu (coord.), *Noul Cod civil. Studii și comentarii*, vol. II, Universul Juridic Publishing House, Bucharest, 2013, p. 201-202; Marilena Uliescu, Aurelian Gherghe, *Drept civil. Drepturile reale principale*, Universul Juridic Publishing House, Bucharest, 2014, p. 146-147; Iliora Genoiu, *Drept civil. Note de curs și probleme de seminar*, vol. II, Ler Publishing House, 2022, pp. 57-59.

⁹ According to art. 339 of the Civil Code, „*The assets acquired during the legal community regime by any of the spouses are, from the date of their acquisition, common assets of the spouses in divorce*”. It is also interesting, we appreciate, to reproduce here the provisions of art. 340 of the Civil Code, which are intended to indicate the assets considered to be their own, even if they are acquired during marriage by married spouses under the legal community regime. Thus, according to this legal text, „*They are not joint assets, but each spouse's own assets*:

- a) assets acquired by legal inheritance, bequest or donation, unless the disposer has expressly provided that they will be shared;
- b) goods for personal use;
- c) the assets intended for the exercise of the profession of one of the spouses, if they are not elements of a trade fund that is part of the community of assets;
- d) patrimonial intellectual property rights over his creations and over the distinctive signs he has registered;
- e) goods acquired as a prize or reward, scientific or literary manuscripts, sketches and artistic projects, invention projects and other such goods;

However, currently, spouses, both those who contracted marriage after October 1, 2011, as well as those already married on this date, have the opportunity to choose, by concluding a matrimonial agreement¹⁰, a matrimonial regime other than that of the legal community. They can opt for the property separation regime or for the conventional community.

According to art. 360 of the Civil Code, in the case of the property separation regime, „each of the spouses is the exclusive owner of the assets acquired before the conclusion of the marriage, as well as those acquired in their own name after this date”.

As a result of the choice of the conventional community regime, a regime that is intended to be an intermediate category between the other two matrimonial regimes regulated by law and already discussed here, the spouses have the possibility to conclude a matrimonial agreement, which may refer to one or more of the aspects regulated by art. 367 of the Civil Code, as follows:

„a) the inclusion in the community, in whole or in part, of the assets acquired or own debts born before or after the conclusion of the marriage, with the exception of the assets provided for in art. 340 lit. b) and c);

b) the restriction of the community to the specific goods or debts determined in the matrimonial agreement, regardless of whether they are acquired or, as the case may be, born before or during the marriage, with the exception of the obligations provided for in art. 351 lit. c);

c) the obligation of the agreement of both spouses for the conclusion of certain administrative acts; in this case, if one of the spouses is unable to express his/her will or opposes abusively, the other spouse can conclude the act alone, but only with the prior approval of the guardianship court;

d) inclusion of the charge clause; the execution of the fee clause is done in kind or, if this is not possible, by equivalent, from the value of the community's net assets;

e) modalities regarding the liquidation of the conventional community”.

f) insurance allowance and compensation for any material or moral damage caused to one of the spouses;

g) the assets, sums of money or any values that replace an own asset, as well as the asset acquired in exchange for them;

h) the fruits of own assets”.

¹⁰ For the notion of matrimonial agreement, see also Iosif R. Urs, Mircea Duțu (editors and general coordinators), *Enciclopedia juridică română*, A-C, Academiei Publishing House and Universul Juridic Publishing House, Bucharest, 2018, p. 986-987.

2.2. Some reflections in relation to the liquidation of the matrimonial regime

As a result of the dissolution or termination of the marriage, the matrimonial regime, regardless of its type, must be liquidated. Most often, the public notary is referred to the debate on the inheritance of a natural person who was married. As we have already shown, if the opening of his/her inheritance¹¹ took place after October 1, 2011, the public notary must liquidate the matrimonial regime in question, through an authentic act. At least two legal texts must be discussed in this context. It is about art. 320 Civil Code, according to which „In case of *termination* (s.n.) or change, the matrimonial regime is *liquidated* (s.n.) according to the law, by good will or, in case of misunderstanding, by judicial means. The final court decision or, as the case may be, the document drawn up in authentic notarial form constitutes a liquidation act”. We specify that this legal text is placed in Title II „Marriage”, Chapter VI „Equity rights and obligations of spouses”, Section 1 „Common provisions”, point §1. „About the matrimonial regime in general”. As a result, it is undoubtedly necessary to liquidate any matrimonial regime upon the termination of the marriage by death or upon its change (modification of the matrimonial regime being expressly regulated by art. 369-372 Civil Code).

The problem that arises in practice, however, is that of the type, more specifically of the name of the act by which the liquidation of the matrimonial regime is carried out. This, since art. 355 para. (1) Civil Code disposes in the sense that „Upon termination of the community, it is liquidated by court decision or authentic notarial deed”, and para.

¹¹ For the issue of opening the inheritance, see, for example: Dan Chirică, *Tratat de drept civil. Succesiunile și liberalitățile*, C.H. Beck Publishing House, Bucharest, 2014, p. 13-17; Francisc Deak, Romeo Popescu, *Tratat de drept succesoral*, vol. I. Moștenirea legală, Universul Juridic Publishing House, Bucharest, 2013, pp. 57-74; Ilie Genoiu, *Dreptul la moștenire*, 3rd edition dedicated to the memory of the teacher and researcher Bogdan Pătrașcu, C.H. Beck Publishing House, Bucharest, 2023, p. 17-25; Ioan Popa, *Drept civil. Moșteniri și liberalități*, 2nd edition, Solomon Publishing House, 2023, p. 50-59. It is necessary, we appreciate, to insist on the distinction between two concepts, often used in the matter of the notarial succession procedure: opening the inheritance and debating the inheritance. This, as we note the fact that certain legal practitioners, and not a few in number, confuse the two concepts, requesting the public notary to open the inheritance, at a certain time interval from the date of the *de cuius*'s death, when, in fact, they only want debating the inheritance or opening the notarial succession procedure. The opening of the heritage involves the analysis of two coordinates, one related to time and the other to space. The inheritance of a natural person (that only in this case we can talk about „inheritance”) opens automatically, *ope legis*, on the date of his/her death, independently of any action. On the contrary, the debate of the inheritance can be requested by the interested persons, at any time after the opening of the inheritance. As a rule, the last residence of the deceased is considered the place of opening the inheritance.

(3) of the same text of law provides the following: „When the community ends due to the death of one of the spouses, the liquidation is done between the surviving spouse and the deceased spouse's heirs (s.n.). In this case, the obligations of the deceased spouse are divided among the heirs in proportion to the shares they receive from the inheritance”.

As a result, in the consideration of these legal provisions, the following question must be answered: what is the name of the act by which the matrimonial regime is liquidated, in the hypothesis that there is no surviving spouse (both spouses being deceased) and there is one or more of their heirs or do you only have one of them?

From the economy of the legal texts reproduced above, it seems that only the authentic notarial act concluded by the surviving spouse and the heirs of the deceased, which liquidates the matrimonial regime, as a result of the termination of the marriage by the death of one of the spouses, can be called „act of liquidation of the matrimonial regime”¹² between spouses. For the hypothesis in which both spouses are deceased, whether it is cohabitation¹³ or successive deaths, and there are two or more of their heirs, we believe that an appropriate name would be that of „agreement for the liquidation of the matrimonial regime”. We also appreciate that a „declaration of liquidation of the matrimonial regime” could be authenticated, in the hypothesis, quite often encountered in practice, in which both spouses are deceased, without presenting any relevance to the fact that we meet or not the co-mortuary, existing only one heir of them or only one of them. In other words, we gave value here, among other things, to the classification of civil legal acts, according to the criterion of the number of parties between which they are concluded¹⁴. Therefore, in the situation where there are several

¹² Obviously, the act by which the ex-spouses liquidate the matrimonial regime bears the same name, but its issue does not interest us here.

¹³ Co-mortality is that situation in which two or more people die at the same time, under the same circumstances or under different circumstances, so that it cannot be established that one survived the other. According to art. 957 para. (2) of the Civil Code, they do not have the capacity to inherit one another. In the case of successive deaths, however, two or more people die at a certain interval of time, and the order of their deaths can be established. They have the ability to inherit one another, so that the post-deceased person inherits, if he also meets the other conditions required by law to succeed, the predeceased one. See also Ilioara Genoiu, *Dreptul la moștenire, op. cit.*, p. 32-33.

¹⁴ Regarding the classification of civil legal acts, see: Gheorghe Beleiu, *Drept civil român*, Universul Juridic Publishing House, Bucharest, 2001, p. 126-137; Eugen Chelaru, *Teoria generală a dreptului civil*, C.H. Beck Publishing House, Bucharest, 2014, p. 99-107; Marian Nicolae, *Drept civil. Teoria generală*, vol. II. Teoria drepturilor subiective civile, Solomon Publishing House, 2018, p. 310-342; Gabriel Boroi, Carla Alexandra Anghelescu, *Curs de drept civil. Partea generală*, 3rd edition, revised and added, Hamangiu Publishing House, Bucharest, 2021, p. 124-140; Ilioara

parties, we are talking about the deed or agreement for the liquidation of the matrimonial regime, and in the case where only one will is manifested, we question the declaration of liquidation of the matrimonial regime. Keeping the same order of ideas, we can introduce another classification of civil legal acts, namely that into named legal acts and unnamed legal acts, considering the name and regulation given by law.

It seems that the legislator only names the act of liquidation, concluded between the surviving spouse and the heirs of the deceased spouse, without taking into account the other two hypotheses, which are equally common in practice, and which we stated above, although they enshrine, in the content of art. 320 of the Civil Code, the obligation to liquidate the matrimonial regime. The legislator omits to give a name to the manifestation of unilateral, bilateral or plurilateral will by which the matrimonial regime is liquidated, in the absence of both spouses, whose marriage ended by death.

Another aspect of practical interest in relation to the liquidation of the matrimonial regime, is, as we appreciate, the one related to the capacity required to conclude the act of liquidation¹⁵. As far as we are concerned, the answer to this question is influenced, directly and exclusively, by the qualification of the act of liquidation, considering the criterion of its importance, as act of conservation¹⁶, act of administration¹⁷ or act of disposal¹⁸. Article 357 of the Civil Code provides the following: „(1) During the liquidation of the community, each of the spouses *takes* (s.n.) his/her own assets, after which the common assets will be divided. (2) For this purpose, the share due to each spouse is first determined,

Genoiu, Cristian Mareş, Livia Mocanu, Adrian Țuțuianu, *Instituții de drept civil. Curs selectiv pentru licență*, Universul Juridic Publishing House, Bucharest, 2023, p. 10-24.

¹⁵ Also, regarding the new rules applicable in the matter of civil capacity, as they were established relatively recently by Law no. 140/2022 regarding some protection measures for people with intellectual and psychosocial disabilities and the modification and completion of some normative acts (published in Official Gazette no. 500, May 20, 2022), a highly discussed and, at the same time, criticized normative act, see Ilioara Genoiu, Cristian Mareş, Livia Mocanu, Adrian Țuțuianu, *op. cit.*, pp. 31-34; Carmen Tamara Ungureanu, Ionuț-Alexandru Toader, *Drept civil. Partea generală. Persoanele*, 5th edition, revised and added, Hamangiu Publishing House, Bucharest, 2022, p. 101 et seq.

¹⁶ In the doctrine, the act of conservation is defined as representing that act by which a right is preserved, preventing its loss, such as registering a mortgage, putting seals, summons, etc. See, for example, Gheorghe Beleiu, *op. cit.*, p. 133.

¹⁷ By means of the administration act, the normal valuation of an asset or a heritage is carried out. The lease or rental contract is considered such an act. See, in this regard, Gheorghe Beleiu, *op. cit.*, p. 133.

¹⁸ The act of disposition is that act which has the effect of removing an asset or a right from the patrimony or encumbering it with a real burden. Examples of disposition documents are the sales contract, the exchange contract, the mortgage contract, the maintenance contract. See Gheorghe Beleiu, *op. cit.*, p. 133.

based on his contribution both to the acquisition of common assets and to the fulfilment of common obligations. Until proven otherwise, it is assumed that the spouses had an equal contribution”. So, how can the act of liquidation of the matrimonial regime be qualified, from the perspective of its importance? We do not think a categorical answer can be given. That is why, in doctrine and, above all, in notarial and judicial practice, two opinions are outlined:

a) according to one of them, the act of liquidation is considered an act of disposition, so that, in the event of the participation in its conclusion of a person lacking legal capacity or with limited legal capacity, it must be authorized by the guardianship court, the person lacking legal capacity, having to be represented at its conclusion, and the one with limited legal capacity, having to be assisted only by the legal guardian;

b) according to a second opinion, the act of liquidation is an act of administration, so that it can be concluded, in the case of the person without legal capacity, by his legal representative, and in the case of the one with limited legal capacity, by the latter, assisted by the legal guardian, without any authorization from the guardianship court.

As far as we are concerned, not being animated only by the natural prudence of the practitioner, but also having certain theoretical arguments, we tend to appreciate that the act of liquidation, especially in the hypothesis in which, in its content, the presumption of equality of the contribution of the spouses is not capitalized when acquiring joint assets and assuming joint obligations, it should only be concluded on the basis of an authorization from the guardianship court.

This, as the act in question may be harmful, and the administrative acts that may prejudice the protected person (person lacking legal capacity or with limited legal capacity) must be authorized by the guardianship court. Moreover, the courts specialized in family and minor issues in Dâmbovița accept applications for the authorization of acts of liquidation of the matrimonial regime. It seems, however, that not all courts proceed in this way, as there is a non-uniform practice regarding this aspect.

2.3. To what extent does the matrimonial regime chosen by the deceased influence his/her estate?

From the perspective that interests us here, we can identify a correlation only between the surviving spouse's right to inheritance¹⁹,

¹⁹ Regarding the issue of the surviving spouse's succession rights, see, for example: Dan Chirică, *op. cit.*, pp. 63-73; Francis Deak, Romeo Popescu, *op. cit.*, pp. 237-275; Liviu Stănciulescu, *Moștenirea. Doctrină și jurisprudență*, Hamangiu Publishing House, Bucharest, 2017, p. 139-159; Bogdan Pătrașcu, Ilie Genoiu, *Drepturile succesoriale*

on the one hand, and the legal community and the conventional community, on the other.

In the case of the legal community, as we have already shown, the assets acquired by either spouse during the marriage are considered common assets, with the holders exercising a right of joint ownership over them. As a result, the estate of the deceased married under such a regime will be formed from his own assets, as they are determined by art. 340 of the Civil Code, as well as from his share of the common assets, established according to the contribution to their acquisition. In the case of the conventional community, however, the estate of the deceased spouse can be larger than in the case of the legal community, being circumscribed, according to the spouses' agreement, to some of their own assets acquired by them, before or after the conclusion of the marriage, or it can be more limited, being stolen to her, also according to the agreement of the parties, certain assets acquired by the spouses during the marriage.

We believe it is of interest to indicate, here, also, what is the procedure for calculating the succession rights of the surviving spouse, this presupposing, mainly, the following operations:

- a) determining the part due to the surviving spouse from the common assets, namely the liquidation of the community of assets;
- b) determining the part due to the surviving spouse from the furniture and household objects, which were affected by the joint use of the spouses;
- c) the acquisition by the surviving spouse of the right of residence over the house, if the conditions required by art. 973 of the Civil Code;
- d) determination of the estate, which consists of the following elements:
 - the deceased spouse's share of the property community;
 - the deceased's own property.
- e) imputation of the share of the surviving spouse on the estate.

3. Usefulness of civil status documents in the notarial succession procedure

Civil status documents are authentic documents proving the birth, marriage or death of a person²⁰. So, the civil status documents are those

ale soțului supraviețuitor, in Marilena Uliescu (coord.), *Noul Cod civil. Studii și comentarii*, vol. II, Universul Juridic Publishing House, Bucharest, 2013, p. 643-666.

²⁰ The legal framework is ensured, mainly, by the provisions of art. 98-103 Civil Code and of Law no. 119/1996 regarding civil status documents, republished in the Official Gazette, no. 339 of May 18, 2012, with subsequent amendments and additions.

documents from the civil status registers, in which the civil status authorities, under the law, record the elements of the civil status. Civil status documents are birth, marriage and death certificates, completed in civil status registers, certificates issued to those entitled based on civil status documents and duplicate certificates, issued in the cases and under the conditions provided by law²¹.

From the perspective of the notarial succession procedure, the civil status documents of the deceased (death certificate, birth certificate and marriage certificate) and the civil status documents of his heirs (birth certificate, marriage certificate, in all cases, and the death certificate, as regards the post-deceased heirs and predeceased successors) are particularly useful. Only with their help can those who have the right to collect the deceased's inheritance be determined and the shares of the estate that belong to them can be established.

Undeniably useful is the extract from the birth register regarding the deceased, which must be requested even in the event that his/her birth certificate is submitted to the succession file. This extract is an extremely useful piece, to the extent that it contains the changes made in the civil status of the person in question, i.e. marginal notes, ensuring the correct attribution of the inheritance. Unfortunately, however, practice shows us that, in many cases, these changes are not made on the birth certificate. Not infrequently, the marginal notes made on the birth certificate help notaries to identify descendants of the deceased, resulting from another marriage, which has since been dissolved or ended.

With the help of the same documents of civil status, the persons who have a concrete vocation to the inheritance can be established, from which parentage results. Undoubtedly, in the notarial succession procedure, the importance of civil status documents is crucial, without them it is not possible to establish the persons who, under the condition of accepting the inheritance, can succeed the *de cuius*, either directly or through representation. The importance of civil status documents also remains unchanged in the case of the retransmission of the right of succession option or the retransmission of the inheritance²².

However, we encounter practical difficulties, often insurmountable, if these documents of civil status are not completed correctly and rigorously. Not infrequently, the information contained in them is

²¹ For the issue of civil status documents, see, for example: Eugen Chelaru, *Drept civil. Persoanele*, 5th edition, C.H. Beck Publishing House, Bucharest, 2020, p. 156-162; Carmen Tamara Ungureanu, Ionuț-Alexandru Toader, *op. cit.*, pp. 492-499; Ilioara Genoiu, *Drept civil. Teoria generală. Persoanele*, 4th edition, C.H. Beck Publishing House, Bucharest, 2022, p. 361-363.

²² For details and distinctions, see Ilioara Genoiu, *Dreptul la moștenire, op. cit.*, pp. 286-293.

erroneous, the names or surnames of the persons, or the date of the realization of the fact of marital status, being entered incorrectly. In these situations, the rectification of the civil status document is required, an institution regulated by the special law, but unusable in the case of birth and marriage certificates of deceased persons, since the request for rectification must be made by the holder of the document in question. Or, he is deceased. Only rectification of the death certificate is possible, of course, at the request of the heirs or successors of the deceased person. Faced with this reality, it is used in practice, when it is justified, to the declaration of notoriety given by people who knew the deceased. They attest to the fact that the deceased was known in society and in certain documents, under two or more names. However, the declaration of notoriety is used with caution and circumspection and only in the situation where the differences in name or surname are small.

Conclusions

The liquidation of the matrimonial regime is, without a doubt, a useful procedure, although it was diverted, to a certain extent, from its original purpose, enshrined by the legislation of the Province of Quebec, which was the main source of inspiration for the Romanian legislator. The practical difficulties regarding the liquidation of the matrimonial regime, if among the heirs of the deceased spouse there are also persons without legal capacity or with limited legal capacity, are undeniable, but we hope that they will be overcome in the shortest possible time, guardianship courts and those similar to them having to adopt a uniform practice. Then, it is imperative that the officials of the local public administration operate, without exception and judiciously, the entries that are required in the civil status registers of natural persons, so that the extracts from these registers achieve their purpose in all cases, that of to be a useful tool in the notarial succession procedure.

Bibliography

1. Avram, Marieta, *Drept civil. Familia*, 3rd Edition, revised and added, Hamangiu Publishing House, Bucharest, 2022.
2. Beleiu, Gheorghe, *Drept civil român*, Universul Juridic Publishing House, Bucharest, 2001.
3. Bîrsan, Corneliu, *Drept civil. Drepturile reale principale*, 2nd Edition, revised and added, Hamangiu Publishing House, Bucharest, 2015.
4. Boroi, Gabriel; Anghelescu, Carla Alexandra, *Curs de drept civil. Partea generală*, 3rd Edition, revised and added, Hamangiu Publishing House, Bucharest, 2021.

5. Chelaru, Eugen, *Drept civil. Persoanele*, 5th Edition, C.H. Beck Publishing House, Bucharest, 2020.
6. Chelaru, Eugen, *Teoria generală a dreptului civil*, C.H. Beck Publishing House, Bucharest, 2014.
7. Chirică, Dan, *Tratat de drept civil. Succesiunile și liberalitățile*, C.H. Beck Publishing House, Bucharest, 2014.
8. Deak, Francisc; Popescu, Romeo, *Tratat de drept succesoral*, vol. I. Moștenirea legală, Universul Juridic Publishing House, Bucharest, 2013.
9. Genoiu, Ilioara, *Drept civil. Succesiuni, Caiet de seminar*, 5th Edition, C.H. Beck Publishing House, Bucharest, 2023.
10. Genoiu, Ilioara, *Drept civil. Teoria generală. Persoanele*, 4th Edition, C.H. Beck Publishing House, Bucharest, 2022.
11. Genoiu, Ilioara, *Dreptul la moștenire*, 3rd Edition dedicated to the memory of the teacher and researcher Bogdan Pătrașcu, C.H. Beck Publishing House, Bucharest, 2023.
12. Genoiu, Ilioara; Mareș, Cristian; Mocanu, Livia; Țuțuiianu, Adrian, *Instituții de drept civil. Curs selectiv pentru licență*, Universul Juridic Publishing House, Bucharest, 2023.
13. Leș, Ioan, *Elemente de drept notarial*, 3rd Edition, C.H. Beck Publishing House, Bucharest, 2014.
14. Nicolae, Marian, *Drept civil. Teoria generală*, vol. II. Teoria drepturilor subiective civile, Solomon Publishing House, Bucharest, 2018.
15. Nicolescu, Cristina Mihaela, *Capitolul VI. Drepturile și obligațiile patrimoniale ale soților*, in Baiaș, Flavius, Chelaru, Eugen; Constantinovici, Rodica; Macovei, Ioan, (coord.), *Noul Cod civil. Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2012.
16. Pătrașcu, Bogdan; Genoiu, Ilioara, *Drepturile succesoriale ale soțului supraviețuitor*, in Uliescu Marilena (coord.), *Noul Cod civil. Studii și comentarii*, vol. II, Universul Juridic Publishing House, Bucharest, 2013.
17. Popa, Ioan, *Drept civil. Moșteniri și liberalități*, 2nd Edition, Solomon Publishing House, Bucharest, 2023.
18. Stănciulescu, Liviu, *Moștenirea. Doctrină și jurisprudență*, Hamangiu Publishing House, Bucharest, 2017.
19. Uliescu, Marilena, Gherghe, Aurelian, *Drept civil. Drepturile reale principale*, Universul Juridic Publishing House, Bucharest, 2014.
20. Ungureanu, Carmen Tamara; Toader, Ionuț-Alexandru, *Drept civil. Partea generală. Persoanele*, 5th Edition, revised and added, Hamangiu Publishing House, Bucharest, 2022.
21. Urs, Iosif R.; Duțu, Mircea (general editors and coordinators), *Enciclopedia juridică română*, A-C, Academiei and Universul Juridic Publishing Houses, Bucharest, 2018.
22. Urs, Iosif R.; Duțu, Mircea (project initiators and general editors), *Enciclopedia juridică română*, D-E, Academiei and Universul Juridic Publishing Houses, Bucharest, 2021.
23. Uță, Lucia, *Proprietatea comună și proprietatea periodică*, in ULIESCU, Marilena (coord.), *Noul Cod civil. Studii și comentarii*, vol. II, Universul Juridic Publishing House, Bucharest, 2013.

THE RESULT IS DESTRUCTION

Tiberiu-Nicolae TEGLAŞ¹

Abstract

This article reflects on the offence of destruction of national cultural heritage by analysing the offence of destruction under Article 253 of the Romanian Criminal Code and through two cases of destruction of cultural heritage.

Keywords: cultural heritage, destruction, Alba Iulia, Sarmizegetusa

Introduction

The year 2023 is a year rich in archaeological and cultural heritage events and therefore in related press articles. Unfortunately most of them are negative. Two events we refer to resulted in the destruction, degradation of cultural heritage objects.

Main text

We refer first of all to the unfortunate event that took place earlier this year in Alba Iulia, where an about 1700 years old Roman sarcophagus, containing inscriptions and the image of Medusa was destroyed by a worker digging with an excavator. The authorities were alerted by a local who suspected it might be an archaeological object, as the worker had no idea of the significance of the object he had unearthed. A newspaper article reported the following about the incident: "When they went to the site to check, the archaeologists put their hands on their heads. The 1,700-year-old sarcophagus had been destroyed by the excavator, and historical fragments were scattered all over the area, including in the pit where a coffin of a deceased person was to be lowered, Alba24 writes."²

Another unfortunate event happened at Sarmizegetusa Regia on 3 September 2023: 3 people, citizens of Tajikistan, carved on the

¹ Drd., student teaching assistant "1 Decembrie 1918" University Alba Iulia, Faculty of Law and Social Sciences, tiberiu.teglas@uab.ro

² <https://www.digi24.ro/stiri/sarcofag-roman-vechi-de-1700-de-ani-distru-scu-excavatorul-in-cimitirul-din-alba-iulia-este-excavatorist-da-de-pietre-le-scoate-2268609> - 04.10.2023.

monuments on the 11th terrace. This is similar with the event that took place this summer in Rome where a tourist vandalised the Colosseum by the same method. The Tajik workers were caught in the act by the gendarmerie patrols on duty on the tourist routes in the area.

It is clear that in both cases in Romania we are talking about destruction, even if there are major differences between these two cases, so we need to look in more detail at the crime of destruction of cultural heritage. These two cases have been chosen because we want to point out the differences and some other aspects worthy of discussion.

We wonder why are heritage sites being destroyed? First of all, we need to distinguish between situations where the destruction is intentional and those where the destruction is culpable.

With regard to intentional acts, in another article I have sought the answer to the question of the motive for destruction. The answer was a complex one, because the motive is extremely varied in such situations.³

In the case of Sarmizegetusa the motive, according to the perpetrators of the offences, was simply their desire to mark the place they visited. Dobrinoiu states that "motive and purpose are irrelevant as far as the objective side is concerned".⁴

They also defended themselves by saying that they were unaware that their actions were against the law.

In the case of Alba Iulia, the destruction did not take place in touristic context, but unintentional in the course of works. The legitimate question remains: Where is the mistake, and more importantly, what should be done to prevent such incidents?

Regarding the destruction of the sarcophagus in Alba Iulia, the root of this act is of a legislative nature and not only: first of all, it is an amendment to Law 102/2014 on cemeteries, human crematoria and funeral services. The amendment of art. 7 and art. 10 of the mentioned normative act allowed the extension of the cemetery in operation without obtaining a building permit. Art. 7 paragraph (3) states that: 'By derogation from the provisions of Art. 3 paragraph (1) letter i) of the Law no. 50/1991 on the authorization of construction works, republished, with subsequent amendments and additions, it is not necessary to obtain a building permit for the execution of construction

³ For details see Tiberiu Nicolae Teglaş: Cum îmbinăm progresul și dezvoltarea cu protecția valorilor patrimoniului cultural? (How do we combine progress and development with the protection of cultural heritage values?), în Mircea Duțu, Ovidiu Predescu, Sorin Alămoreanu, *Studii de drept al patrimoniului cultural și natural (Cultural and natural heritage law studies Patrimonium)*, In honorem Augustin Lazăr, Universul Juridic, București, 2023, p. 569-580.

⁴ Vasile Dobrinoiu, colectiv, *Noul Cod penal comentat din 01-oct-2012*, Universul Juridic, Comentariu la articolul 253.

works for the extension of cemeteries in function in areas provided for the function of cemetery in the urban planning documentation, the execution of signs, borders or enclosures of burial places, for the realization of obelisks or other works of plastic art in the cemetery". Art. 10. Paragraph (2) specifies that: "For the extension of cemeteries in operation, the rules established for the establishment of cemeteries do not apply." If building permission had to be issued, there was no getting around the archaeological survey.

These provisions make sense in the context that the cemetery is not located in an archaeological site, especially an archaeological site of the size of the Apulum site. According to Art. 3. Paragraph (1) of Law 50/1991 "Civil, industrial, agricultural constructions, those for the support of technological installations and machinery, for infrastructure of any kind or of any other nature may be carried out only in compliance with the building permit, as well as the regulations on the design and execution of constructions, for:" provides for the requirement of a building permit and regulations on design and execution also in the case of sites: letter b. "construction, reconstruction, extension, repair, consolidation, protection, restoration, conservation works, as well as any other works, regardless of their value, to be carried out on all categories of historical monuments provided for by law - monuments, ensembles, sites - including their annexes, identified in the same property - land and/or buildings, on buildings located in monument protection zones and in protected built-up areas, established according to the law, or on buildings of special architectural or historical value, established by approved urban planning documents;"

The provisions of Law 102/2014 somewhat negate the requirement for archaeological clearance in areas where expansion is taking place. However, it should not be overlooked that this cemetery is located in an archaeological site, so according to the law, preventive archaeological excavations would still have been required. The major problem is the legislative vacuum or the fact that the law is unclear, leaving room for interpretation.

If we try to see the full side of the glass, we should mention that this accident led to the undertaking of archaeological excavations financed by the Alba Iulia City Hall, which resulted in the discovery of the tomb of a wealthy Roman woman. Eight gold jewels and a unique small bronze vase were found, which are likely to be classified in the Treasure category. In addition to these objects, some less valuable items were found, such as a blush box, a Roman scythe and ceramic vessels.

In the following we will also analyse the offence of destruction provided for by Article 253 of the Criminal Code, with the mention that

in principle we will discuss the aspects concerning the destruction of cultural heritage objects. Paragraph (1) provides: Destroying, degrading or rendering unusable an asset belonging to another or preventing the taking of measures to preserve or save such an asset, as well as removing the measures taken, are punishable by imprisonment from 3 months to 2 years or a fine.

In the context of cultural heritage, the following paragraph is of interest (3) "If the act referred to in paragraph (1) concerns property forming part of the cultural heritage, the penalty shall be imprisonment for a term of one to five years." This paragraph is an aggravated version of the offences referred to in paragraph (1) (This is also visible from the applicable sanctions: while in the case of destruction in its basic form we also find the sanction of a fine, in the case of offences against cultural heritage we only have the sanction of deprivation of liberty with increased limits.

In the case of offences falling under this paragraph, the material object is "an asset that enjoys special protection under criminal law because it is part of the national cultural heritage (e.g. paintings, famous sculptures, manuscripts, archaeological sites, etc.)"⁵. The legal object consists of social relations relating to the protection of the existence and condition of property forming part of the national cultural heritage.

The active subject can be any person, including the owner of the property subject to destruction. The passive subject is the owner of the property, but in relation to the value and representativeness of the property we could say that the state or citizens are also the passive subject.

As regards the *modus operandi*, in addition to the act of destruction *stricto sensu*, the act is also typical when an asset forming part of the cultural heritage is damaged, or when it is rendered unusable, or even more so when conservation or salvage measures are prevented from being taken, or when such measures are removed.

According to Udrioiu, destruction means "the cessation of the physical existence of the good", degradation "means the deterioration of a good resulting in the alteration of its substance or aesthetics (if the aesthetic aspect is of the essence of the good) to such an extent that the good can no longer be used or valued as in the past without being repaired", rendering the good useless "implies that the good can no longer be used according to its intended purpose even without being destroyed or degraded", preventing the taking of measures for the preservation or salvage of an asset 'creates a possible state of danger

⁵ Mihail Udrioiu, *Drept penal. Partea specială*, Ediția 4. Editura C.H. Beck, București, 2017, p. 323.

with regard to the asset, even if at the time of the criminal activity the asset is not destroyed or damaged by the perpetrator's action', and in the case of the removal of measures taken for the preservation or salvage of an asset, 'the existence of a situation of danger by creating an environment in which it may be destroyed or damaged'.⁶

In the case of destruction of own property, which is not part of the cultural heritage, the act is not typical, except in the situation provided for in paragraph (4): "The destruction, degradation or rendering useless of property, committed by fire, explosion or any other such means and if it is likely to endanger other persons or property, shall be punishable by imprisonment for a term of 2 to 7 years", but if the property of the perpetrator is part of the cultural heritage, the act falls under the offence of destruction.⁷

If criminal liability is incurred for the act committed in the variant provided for in paragraph 4 when the property is not of cultural importance, the more so when it is part of the cultural heritage, the legislator does not distinguish between the regime of property. In this situation, the liability is increased by the increased social danger resulting from the way in which it is committed.

The legislator's concern for offences with increased social danger is highlighted by paragraph (7), which provides that the offence of destruction is also punishable in the case of goods forming part of the cultural heritage: "Attempting the acts referred to in paragraph (3) and paragraph (4) shall be punishable."

The immediate follow-up counts in the destruction (*lato sensu*) of national cultural heritage assets.

"There must be a causal link (from cause to effect) between any of the unlawful actions and the immediate consequence."⁸

Destruction (*lato sensu*) can be voluntary or involuntary. Article 253 only criminalises destruction committed with intent. If intentional destruction were not criminalised in Art. 255 of the Penal Code, the act of unintentional destruction would not constitute an offence. It should be noted that Art. (1) The destruction, degradation or rendering useless, by negligence, of property, even if it belongs to the perpetrator, if the act is committed by fire, explosion or any other such means and if it is likely to endanger other persons or property, shall be punishable by imprisonment for a term of three months to one year or by a fine. (2) If the act resulted in a disaster, the penalty shall be imprisonment for a term of 5 to 12 years." If the act is committed with negligence, the

⁶ *Ibidem.* p. 321-322.

⁷ *Ibidem.* p. 321.

⁸ Vasile Dobrinouiu, *Op. cit.*

offence provided for in Article 255 (Destruction with negligence) may be considered, but only if the act is typical.⁹

The two cases differ in the form of guilt. The perpetrators of the Sarmizegetusa crime committed these acts deliberately, but may not have been aware of the more serious result (result due to the property regime). We would point out that we are not talking about an overriding intention because the result of the act was not amplified compared to what was intended by the perpetrators, but it is simply possible that the perpetrators did not take into account the fact that the act was more serious than they had its representation..

The offence under Article 253 is typical only if the act was committed with direct or indirect intent, and in the case of Sarmizegetusa the perpetrators foresaw the result of their actions, in the sense that they were aware that the carving was causing destruction, even if they had not been aware that the property was part of the cultural heritage. However, we consider this unlikely, as we believe that they did not accidentally arrive at the site and therefore knew what they were visiting. In another case it was held that "in order to incur criminal liability of the defendant, according to the texts of the law allegedly violated, they must be directed against a historical monument, and the defendant must have acted with knowledge of this aspect, and only in such a situation can the existence of the subjective element, i.e. guilt in the form of intent, be retained".¹⁰

If indeed the perpetrators of the Sarmizegetusa crime were not aware of the fact that it is a historical monument from the content of the intention, the intellectual factor, which consists in foreseeing the result, going along the lines of the case to which we referred earlier, not holding guilt in the form of intent, the perpetrators will be acquitted.

The destruction in Alba Iulia was an unfortunate accident. In this case the issue is more complex. As far as the worker is concerned, he most probably did not realise that he was on a site, nor that he had stumbled upon something valuable, so there can be no question of direct intent, and it is unlikely that we can also speak of indirect intent

⁹ M. Udriou, *Drept penal. Partea specială*, Ediția 4. Ed. C.H. Beck, București, 2017, p. 323.

¹⁰ Distrugerea parțială și degradarea unui monument istoric, datând din anul 1622. Executarea fără autorizația prevăzută de lege a unor lucrări la imobilul-monument istoric, precum și efectuarea de săpături neautorizate în zona unui sit arheologic. Încadrare juridică. Achitare – necunoașterea de către inculpat a calității de monument istoric al imobilului - <http://revistaprolege.ro/distrugerea-partiala-si-degradarea-unui-monument-istoric-datand-din-anul-1622-executarea-fara-autorizatia-prevazuta-de-lege-unor-lucrari-la-imobilul-monument-istoric-precum-si-efectuarea-de-sapat/> - 14.10.2023.

because, given his training, it is unlikely that he foresaw and accepted the possibility of the consequences of his actions.

With regard to the cemetery administrator, we believe that the mention that he had contacted the Museum 3 years ago for archaeological supervision, even if he did not receive a reply¹¹, confirms that he was aware that the cemetery was on a site. Thus we opine in the direction of indirect intent, but in the context of law 102/2014 this has some justification, thus we opine that the act was not committed with indirect intent, but the form of guilt is rather fault with foresight. Fault in the manner of commission of the act does not entail criminal liability.

The offence is completed when the criminal activity has been completed and the destruction, degradation or rendering useless of a certain good has occurred, but it can also be committed in continuous form, so that the moment of exhaustion occurs at the same time as the last act of destruction.¹²

Criminal proceedings are initiated ex officio.

The similarity lies in several aspects, two of which are irreversible destruction and the lack of awareness or knowledge of the consequences of certain actions. The sarcophagus has been rebuilt, but it is clear that it cannot return to its original, unaltered form. The loss is amplified by its decontextualisation and the definitive loss of contextual information.

We stress again that the ultimate goal is not to bring anyone to justice but to protect cultural heritage and as far as possible to prevent such acts.

Another legitimate question that arises in connection with the Sarmizegetusa case concerns mass tourism: how should it be conducted? It goes without saying that access to such areas should not be banned, but solutions must be sought to mitigate the dangers of this kind.

Conclusion

Sorin Alămoreanu concludes in an article: „The necessary correlations between related fields have been overlooked, and over time the effects are likely to increase.”¹³ The case from Alba Iulia underlines this reality.

¹¹ <https://adevarul.ro/stiri-locale/alba-iulia/sarcofag-roman-vechi-de-pestre-1700-de-ani-2246518.html> - 14.10.2023.

¹² Vasile Dobrinou, *Op. cit.*

¹³ Sorin Alămoreanu: Observații privind criteriile de validitate ale expertizelor criminalistice asupra unor obiecte de patrimoniu cultural și istoric. in Mircea Duțu, Ovidiu Predescu, Sorin Alămoreanu, *Studii de drept al patrimoniului cultural și natural (Cultural and natural heritage law studies Patrimonium)*, In honorem Augustin Lazăr, Universul Juridic, București, 2023, p. 434-439.

We are aware that it is impossible to prevent destruction completely. However, holding people responsible does not alleviate the damage caused: the damage remains, the destruction remains, and the restoration is almost always impossible.

Bibliography

1. Alămoreanu, Sorin, Observații privind criteriile de validitate ale expertizelor criminalistice asupra unor obiecte de patrimoniu cultural și istoric. în Mircea Duțu, Ovidiu Predescu, Sorin Alămoreanu, *Studii de drept al patrimoniului cultural și natural (Cultural and natural heritage law studies Patrimonium)*, In honorem Augustin Lazăr, Universul Juridic, București, 2023, p.434-439.
2. Dobrinoiu, Vasile, colectiv, Noul Cod penal comentat din 01-oct-2012, Universul Juridic, Comentariu la articolul 253.
3. Teglaș, Tiberiu Nicolae, Cum îmbinăm progresul și dezvoltarea cu protecția valorilor patrimoniului cultural? (How do we combine progress and development with the protection of cultural heritage values?), în Mircea Duțu, Ovidiu Predescu, Sorin Alămoreanu, *Studii de drept al patrimoniului cultural și natural (Cultural and natural heritage law studies Patrimonium)*, In honorem Augustin Lazăr, Universul Juridic, București, 2023, p.569-580.
4. Udroi, Mihail, *Drept penal. Partea specială*, Ediția 4. Ed. C.H. Beck, București, 2017, p.323.
5. Distrugerea parțială și degradarea unui monument istoric, datând din anul 1622. Executarea fără autorizația prevăzută de lege a unor lucrări la imobilul-monument istoric, precum și efectuarea de săpături neautorizate în zona unui sit arheologic. Încadrare juridică. Achitare – necunoașterea de către inculpat a calității de monument istoric al imobilului - <http://revistaprolege.ro/distrugerea-partiala-si-degradarea-unui-monument-istoric-datand-din-anul-1622-executarea-fara-autorizatia-prevazuta-de-lege-unor-lucrari-la-imobilul-monument-istoric-precum-si-efectuarea-de-sapat/> - 14.10.2023.
6. <https://www.digi24.ro/stiri/sarcofag-roman-vechi-de-1700-de-ani-distrus-cu-excavatorul-in-cimitirul-din-alba-iulia-este-excavatorist-da-de-pietre-le-scoate-2268609> - 04.10.2023.
7. <https://adevarul.ro/stiri-locale/alba-iulia/sarcofag-roman-vechi-de-pest-1700-de-ani-2246518.html> - 14.10.2023.

DIVORCE CERTIFICATE IN INTERNATIONAL MATRIMONIAL MATTERS – CIVIL STATUS DOCUMENT?

Drd. Oana-Elena BUZINCU*

Abstract

Civil status documents are silent witnesses of a person's journey throughout life, so all significant moments in the life of the individual are doubled by the issuance of birth, marriage and death certificates.

The object of this study is not the national divorce certificate issued by the notary public or registry office at the time of dissolution of marriage by agreement, but the document issued by competent authorities after the release of the domestic one in order to produce effects in the Member States of the European Union.

International divorces pronounced after August 1, 2022 receive a new configuration, which led us to carry out a parallel analysis of the regulations before and after the adoption of Regulation (EU) 2019/1111 that brings innovative elements in the corroborated sphere of family law with private international law.

The query from which we started the approach of this study relates to the legal nature of the divorce certificate in matrimonial matters, civil status document in the issuing state and/or in the state of destination or not?

Keywords: *divorce certificate, civil status document, notary public, civil status officer, Regulation (EC) No. Regulation (EU) No 2201/2003, Regulation (EU) 2019/1111*

1. General aspects concerning the definition of the divorce certificate in international matrimonial matters and its characters

The object of this study is to establish the legal nature of the certificate issued in matrimonial matters according to Article 36 of Council Regulation 1111/2019 on jurisdiction, recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction and Annex II of the same normative act, respectively the same type of certificate, but this time in the regulation of art. 39 of Council Regulation (EC)

* Attend. Asoc., Faculty of law and social sciences, "1 Decembrie 1918" University of Alba Iulia.

¹ Published in the Official Journal of the European Union L 178/1 series of 2 July 2019.

No 2201/2003 (Brussels II) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No.../... Regulation (EC) No 1347/2000² and Annex I thereto.

From a perspective of defining the divorce certificate in international matrimonial matters, we find that it represents a standardized document, with a unitary form, found in all Member States of the European Union, respecting the framework predetermined by Annex I, respectively Annex II of the already mentioned regulations, which is issued by the court if the divorce has been pronounced before it or if a national divorce certificate has been issued by the civil registry officer or the notary public, like the court but after the divorce procedure has been completed by notary.

In fact, this certificate is used precisely for the recognition of divorce in another EU Member State, if we are in the presence of foreign elements³, such as, for example, taking up residence in another Member State or if you want to obtain a foreign passport with your name after the divorce.

From a perspective of the characters of the divorce certificate with involvement at European level, we can only amplify the aspects already outlined by the supra-state legislature, namely the possibility of issuing such a document only at the request of even one party, without the need for an agreement of the former spouses, thus going beyond the characteristic imposed in the domestic legislation of the agreement and the insistence of the parties in the dissolution of marriage where the procedure is based on such consent.

The divorce certificate in international matrimonial matters is usually issued in the language of the issuing State, but legislation does not exclude the possibility that it may also be drawn up in another official language of the European institutions at the request of the party. In such a case, the certificate issued on the basis of the decision will be issued in the Romanian language, without there being an obligation for the court issuing the certificate to provide a translation or transliteration of the translatable content from the free text fields, according to Art. 36 para. (2) of Council Regulation 1111/2019. It seems to me that such an interpretation may also apply to the certificate issued after the divorce certificate issued by the notary public or the registry officer. In all three

² Published in the Official Journal of the European Union L 338/1 of 23 December 2003.

³ For details on aspects related to public authorities and the issuance of their documents in the law of European states see Maria Ureche, *Autoritățile publice în dreptul statelor europene* (trad.: *Public authorities in the law of European states*), Alba Iulia, Altip Publishing House, 2011, p. 41 et seq.

cases where such a European certificate has been issued by the competent entity, the translation will be done by an authorized translator, with a legalization of the translation (translator's signature) in order to be able to achieve its purpose of issuance, namely to be used according to the regulations in force.

At the same time, such a certificate applicable outside the Romanian state, has a subsidiarity character in relation to the date of its issuance to the court decision or the national divorce certificate, even more than that, being dependent on the priority issuance of the national document certifying the dissolution of marriage. The two documents coexist, being issued for the same purpose, but for different entities, both at the request of the parties, but without the latter being mandatory for proof of dissolution of marriage.

2. Similarities and differences in the issuance of divorce certificate under Regulation 2201/2003 and Regulation 1111/2019 respectively

Until August 1, 2022, the provisions of art. 39 of Brussels II, were those regulating the aspects related to the issuance of a certificate in matrimonial matters applicable in EU Member States, from this date the provisions of art. 36 of Regulation 1111/2019 are those governing the relations regarding the issuance of divorce certificates in international matters, in cases of court proceedings initiated, authentic instruments formally drawn up or registered and agreements registered on or after 1 August 2022.'; I also note from the interpretation of the applicability texts that Regulation 2201/2003 continues to have effect today, since it continues to apply to judgments given in judicial proceedings initiated, authentic instruments formally drawn up or registered and agreements which have become enforceable in the Member State in which they were concluded before 1 August 2022 and which fall within the scope of that regulation.

In fact, the two regulations take into account the same legal assumptions, but produced in other periods before and after August 1, 2022, respectively.

The legislator of the repealed act notes that Regulation 2201/2003 is an instrument that has worked well and has brought important benefits to citizens, but that the existing rules would need to be improved for the sake of clarity, but nevertheless a handover adapted to current social requirements is carried out in favour of Regulation 1111/2019, which establishes uniform rules on jurisdiction in divorce matters, legal separation and marriage annulment, as well as disputes relating to parental responsibility with an international element. The latter Regulation facilitates the circulation within the Union of

judgments, authentic instruments and certain agreements, by laying down provisions for their recognition and enforcement in another Member State. Regulation 1111/2019 should therefore contribute to increased legal certainty and flexibility and ensure better access to justice and greater efficiency of procedures.

From a first perspective of the two indicated certificates, we do not notice major changes, here and there, the structure of the initial certificate is improving according to Annex II to Regulation 1111/2019, being in fact resumed the elements initially found in Regulation 2201/2003 with minimal formal additions. The procedure for issuing remains the same, more precisely, as already mentioned, in the case of divorce by court, the certificate is issued by the same court, and in the case of administrative dissolution of marriage, it is issued by the court according to Art. I3 art.2 of GEO nr. Regulation (EC) No 119/2006 on certain measures necessary for the application of Community regulations from the date of Romania's accession to the European Union⁴, which also applies in the context of the current regulation. The latter article also applies to notarial matters, but this time the legislature becomes precise and establishes a power to issue it also to the notary public issuing the national divorce document⁵.

3. Nature of divorce certificate in international matrimonial matters

The inquiry from which I started the investigation relates to the legal nature of the divorce certificate in matrimonial matters, civil status document in the issuing State and/or in the State of destination or not?

First of all, after the incursion into European regulation, it would be necessary to establish the legal nature of the internal divorce certificate issued by the civil status officer or notary public and then to ascertain the continuity or not of the reasoning in the matter applicable in the EU Member States.

Divorce certificate issued by the registry officer, as already stated in the literature⁶, has the nature of a mixed act, more precisely an

⁴ Published in M. Of. No 1.036 of 28 December 2006.

⁵ See, to that effect, Art. I3, art.2, the sentence regarding the notarial activity of GEO nr. Regulation (EC) No 119/2006 on certain measures necessary for the application of Community regulations from the date of Romania's accession to the European Union; Alin-Adrian Moise, *Procedura divorțului* (trad.: Divorce proceedings) in: Ionuț-Florin Popa, Alin-Adrian Moise, *Legea notarilor publici. Comentariu pe articole* (trad.: *Notaries Public Law. Commentary on articles*), Bucharest, Solomon Publishing House, 2016, p. 679.

⁶ Ioan Popa, *Certificatul de divorț. Natura juridică* (trad.: Divorce certificate. Legal Nature) in: Cornelia Munteanu (ed.), *In honorem Alexandru Bacaci, Ovidiu Ungureanu*, Bucharest, Universul Juridic, 2012, p. 122.

administrative act, issued by a public authority, but also an act modifying the civil status, unlike the divorce certificate issued by the notary public which presents the character of an authentic document, not of an administrative act, but still modifying the marital status. In fact, why is this divorce certificate not a genuine civil status document as long as it restores the configuration of another status, from married to unmarried/divorced? The idea of a civil status modifying act and not a civil status document is reinforced by the provisions of art. 1 of Law no. 119/1996 on civil status documents, republished⁷, according to which "Civil status records are authentic documents proving the birth, marriage or death of a person.", which is also supported by the provisions of section 99 C. civ⁸. Therefore, the legislature limits the scope of civil status documents, without including divorce or divorce certificate.

In fact, what would be essentially the aspects to be taken into account when issuing a divorce certificate in international matrimonial matters? Nor Regulation 2201/2003 nor Regulation 1111/2019 does not establish a clearly applicable rule, i.e. it specifies the competence of the issuing authority only at the level of substantive competence. Thus, the court or notary public as stated above has jurisdiction, but the law does not specify whether the court that issued the divorce decree or the notary who issued the divorce certificate have exclusive competence to issue this international certificate as well. The question that arises in such a context would be, can we talk strictly about the same notary public or the court issuing the initial act on the dissolution of marriage or another notary public or court? And if the answer were the latter, what would be the criterion for choosing his jurisdiction, is he still bound by the competence he has established under national law for issuing the divorce decree or divorce certificate?

At the same time, it is worth mentioning some aspects related to the fulfillment of the procedure, namely the documents to be submitted in order to issue the certificate applicable outside Romania, the number of copies drawn up, as well as the way of rectifying it in case of material errors or obvious omissions, all of which are treated from a notarial perspective.

Even if the legislature does not specify which documents would be attached to the application for an international divorce certificate, we may take into account the identity documents of the applicant, if he is one of the spouses, if we have a trustee, the power of attorney and the identity document of the trustee, together with the copy of the national

⁷ Published in M. Of. No 339 of 18 May 2012.

⁸ Act No 287/2009 on the Civil Code, published in M. Of. No. 505 of 15 July 2011.

divorce certificate from which a copy is made and the elements of which are necessary in order to draw up the requested certificate.

Also, from the point of view of the number of copies, we specify that they will be drawn up in the number requested by the party plus a copy for the archive of the notary office, and the document issued we consider that it should receive a unique number from the notarial register, being an independent document, which only certifies the effects of a decision already confirmed by the national divorce certificate issued.

Ambiguity arises where the international divorce certificate is rectified, either as a result of a material error or manifest omission being established *ex officio* or upon request. If in the notarial legislation the rectification of the act of dissolution of marriage, more precisely of the divorce certificate issued by the notary public, follows the fate of civil status documents, according to art. 278 para. 2 of the Regulation for the application of the Law on Notaries Public and Notary Activity nr. 36/1995 republished as amended⁹, corroborated with the provisions of H.G. nr. 64/2011 approving the Methodology on the unitary application of civil status provisions¹⁰, in the matter of the international divorce certificate, the legislator mentions only the provisions of art. 37 of Regulation 1111/2019¹¹, according to which national legislation on

⁹ Order No. 2333/C/2013 of the Minister of Justice on the approval of the Regulation for the application of the Law on Notaries Public and Notary Activity no. 36/1995 published in M. Of. No. 479 of 1 August 2013 and corrected in M. Of. No. 591 of September 19, 2013, with the amendments and completions brought by: Order no. 1886/C/2016 of the Minister of Justice for amending para. (1) of Art. 331 of the Regulation for the application of the Law on Notaries Public and Notary Activity nr. 36/1995, approved by Order of the Minister of Justice nr. 2.333/C/2013 (M.Of. no. 392 of 23 May 2016); Order No. 4181/C/2016 of the Minister of Justice for amending and supplementing certain orders of the Minister of Justice in order to correlate with the provisions of Government Emergency Ordinance no. 41/2016 on establishing simplification measures at the level of central public administration and amending and supplementing certain normative acts (Official Journal no. 978 of 6 December 2016); Order No. 1618/C/2017 of the Minister of Justice amending and supplementing the Regulation for the application of the Law on Notaries Public and Notary Activity no. 36/1995, approved by Order of the Minister of Justice nr. 2.333/C/2013 (M.Of. no. 468 of 22 June 2017); Order No. 6887/C/2020 amending and supplementing the Regulation for the application of the Law on Notaries Public and Notary Activity no. 36/1995, approved by Order of the Minister of Justice nr. 2.333/C/2013 (M.Of. no. 1135 of 25 November 2020).

¹⁰ Published in M. Of. No. 151 of 2 March 2011.

¹¹ Art. 37 para.1. The court of a Member State of origin, notified to the Commission pursuant to Article 103, shall, upon request, rectify the certificate and may also do so of its own motion if, as a result of a clerical error or omission, there is a discrepancy between the decision to be enforced and the certificate.

2. The law of the home Member State shall apply to the procedure for correcting the certificate.'

rectification will apply, leading to another question mark, which would be the national legislation on rectification of the international divorce certificate issued by the notary public, notarial or civil status legislation on rectification? Will the international divorce certificate follow the fate of the national one issued by the notary public?

Therefore, continuing with the series of questions, can we say that, where the European legislature has not expressly provided for mentions relating to the certificate of international divorce in procedural matters of its issuance, annulment, and rectification, do we apply the provisions of national law by analogy adapted to the requirements relating to the issue of the first specified certificate? We would think so, since there have been no aspects of national law at the time of the investigation that would highlight rules relating to the generally applicable procedure in the matter of divorce certificates applicable outside the State of origin.

4. Some endnotes

From here we can conclude on the legal nature, including the divorce certificate applicable in European law, as a duplication of the national certificate that produces effects outside the country's borders, being conditioned by the initial issuance of the divorce certificate / court decision, but without this certificate that will produce its effects outside the borders of the country to bring a change in the existing legal situation, ie that of changing the marital status of the married in divorced or unmarried, following only the perspective imposed by the internal civil status amending act.

The certificate in matrimonial matters issued on the basis of European regulations extends the area of recognition, respectively opposability of the dissolution of marriage, not being a civil status document, but an easy document to follow, due to the familiarity of the existing form in the civil circuit, simplifying at the same time the procedure for recognizing divorce in EU Member States.

Bibliography

1. MOISE Alin-Adrian, Procedura divorțului (trad.: Divorce proceedings) in: Ionuț-Florin Popa, Alin-Adrian Moise, *Legea notarilor publici. Comentariu pe articole* (trad.: *Notaries Public Law. Commentary on articles*), Bucharest, Solomon Publishing House, 2016.
2. POPA Ioan, Certificatul de divorț. Natura juridică (trad.: Divorce certificate. Legal Nature) in: Cornelia Munteanu (ed.), *In honorem Alexandru Bacaci, Ovidiu Ungureanu*, Bucharest, Universul Juridic, 2012.
3. URECHE Maria, *Autoritățile publice în dreptul statelor europene* (trad.: *Public authorities in the law of European states*, Alba Iulia, Altip Publishing House, 2011.

4. Law no. 119/1996 on civil status documents, republished.
5. Council Regulation (EC) No 2201/2003 (Brussels II) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No.../... 1347/2000.
6. GEO no. 119/2006 regarding certain measures necessary for the application of certain Community regulations from the date of Romania's accession to the European Union.
7. H.G. nr. 64/2011 approving the Methodology on the unitary application of civil status provisions.
8. Order No. 2333/C/2013 of the Minister of Justice on the approval of the Regulation for the application of the Law on Notaries Public and Notary Activity no. 36/1995 with subsequent amendments and completions.
9. Council Regulation 1111/2019 on jurisdiction, recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.

THE CIVIL LAW CONCEPT OF THINGS IN THE DIGITAL ERA – A HUNGARIAN PERSPECTIVE

Dr. habil. Ágnes JUHÁSZ*

Abstract

The main aim of the study is to examine the concept of things as a basic concept of civil law. The author intends to answer the question of how digital assets, including various crypto assets like tokens, can be integrated into the system of classical civil law, whether they may be subject to property rights or the civil law rules applicable to the property.

To answer this question, the author first explores the concept of things based on the old Hungarian private law literature and the provisions of the earlier and current Hungarian civil codes, presenting contemporary private legal opinions. Then, she deals with the legislative extension of the rules governing things and reviews which assets have been subject to a possible revision of the conceptual framework of the thing. The author also pays particular attention to the examination of digital assets, defining and classifying tokens based on the MiCAR regulation recently adopted by the European legislator. In the final part of the study, the author deals with the category of non-fungible tokens, highlighting the problems that are currently identifiable and clearly need to be solved in the future.

Keywords: digital asset, ownership, rights in rem, non-fungible token, crypto asset, MiCAR

1. Introduction

Digital goods play an increasingly important role in our everyday lives, while in most countries the relevant legal framework has yet to be developed or is at least in the early stages. It is an oft-mentioned truth that legislation cannot keep pace with the modern age, and the digital revolution, and answering to the issues generated by newer and newer phenomena, and shaping the necessary legal framework is slow and cumbersome.

The question of the private law treatment of digital assets arises more and more frequently with the spread of these assets, and the response is becoming an increasingly urgent demand on the part of practice and financial market participants. A prerequisite for addressing the issue of digital assets is the clarification of the conceptual bases.

* Associate Professor, University of Miskolc, Faculty of Law, Institute of Private Law, Department of Civil Law, 3515 Miskolc, Miskolc-Egyetemváros, e-mail: agnes.juhasz@uni-miskolc.hu; <https://orcid.org/0000-0002-6029-6988>

The mere possibility and the possible ways of integrating digital assets into the right in rem has recently been a recurring issue among civil lawyers. The most important question is whether digital assets can be treated similarly to traditional assets having physical extent, i.e., these assets can be the object of ownership right or not. To answer this question two directions of examination are necessary: on the one hand, the expression ‘digital asset’ shall be explained, then, the regulatory framework on ownership rights shall be reviewed.

According to the definition set out in Article 5:14 (1) of the current Hungarian civil code, Act V of 2013 on the Civil Code (hereinafter HCC), the most basic concept of right in rem is a tangible object that can be taken into possession and may be the subject of property rights. The question, however, is how to deal with the new phenomena emerging as a result of digitalisation (e.g. crypto-assets, other digital assets, etc.) that cannot meet the criterion of possession required by civil law. Moreover, it is also questionable whether the traditional conceptual framework should be revised or expanded in any direction, or whether the current set of rules can be adapted appropriately to the new solutions.

1. The legal framework of things under the Hungarian civil law

1.1. Starting point: ‘thing’ as a basic concept

Law in rem is a classical area of civil law forming part of private law, which, within the framework of absolute rights, ensures legal dominion for persons over the assets available, thereby fundamentally defining the face of the property structure of society. (Lenkovics, 2001, p. 14) The rights regulated within the framework of legal relations in rem are dominant, i.e., in the case of such legal relations having absolute structure the fundamental question is who has power over the given property. The absolute structure of the legal relationship suggests that the subject of the legal relationship, the rightsholder (e.g., owner, beneficial owner, etc.) is at the core of the legal relationship in rem, and all the characteristic features are defined in relation to it – in the words of *László Leszkoven*, examined from the point of view of the rightsholder. (Leszkoven, 2019a, p. 20).

Within the field of law in rem, ‘thing’ is one of the most fundamental concepts: it constitutes the indirect object of the legal relationship in rem, that is, what the immediate object, the human behaviour (in this case, power over the thing and its exercise) is directed to. For this reason, it is essential that the legislator delineates the boundaries of the concept of thing within the framework of civil law, and defines what it considers to be things and, in view of this, what can serve

as an indirect object of the legal relationship in rem. It should be noted, however, that the concept of a thing in the ordinary and legal sense is not the same: as a legal term, the thing serves to designate and define the object of rights in rem, so it has a narrower meaning than the concept used in everyday life. (Kolosváry, 1942, p. 6)

The concept of thing has been present in Hungarian private law legislation from the very beginning. The Private Law Bill of 1928 regarded the term as a physical object.¹ The model of this provision was Article 90 of the German Civil Code (*Bürgerliches Gesetzbuch*, hereinafter referred to as BGB)² of that time which stated that things within the meaning of the law are only tangible objects. However, in contrast to the German model which gave the term ‘thing’ a rather narrow meaning, the boundaries of the concept of things were drawn much wider by the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, hereinafter referred to as ABGB)³ of that time, according to which anything that is different from man and that benefits man is regarded as a thing in the legal sense. The representatives of the Hungarian private jurisprudence of these years also formulated their positions differently regarding the conceptual definition of the thing, based on the provisions of the Private Law Bill.

According to *Bálint Kolosváry*, a thing can only be something that has a bodily existence. (Kolosváry, 1942, p. 8) In his view, ‘incorporeal things’ (*res incorporales* in Roman law) cannot be regarded as things since they cannot be defined in space, and they do not have a physical character. Although *Lajos Tóth* drew the boundaries of the concept of things in a similar way, his definition is somewhat more detailed. In his interpretation, everything that exists outside of the person has a bodily existence, forms a separate unit, and can be an object of law. (Tóth, 1930, p. 221) *Antal Almási* described things as bodily objects, legally separated parts of nature. (Almási, 1928, p. 40)

The previous Hungarian Civil Code, Act IV of 1959 (hereinafter HCC [1959]) did not define the concept of property. However, Article 94(1) stated that *anything that can be taken into possession may be subject to ownership*. At this time, the Hungarian legislator did not intend to take a position on the content of the concept of a thing; during the preparation of the HCC [1959] *Elemér Pólay* and *Gyula Eörsi*

¹ Private Law Bill, Article 433.

² BGB, Art. 90: ‘*Sachen im Sinne des Gesetzes sind nur körperliche Gegenstände.*’

³ ABGB, Art. ‘*Alles, was von der Person unterschieden ist, und zum Gebrauche der Menschen dient, wird im rechtlichen Sinne eine Sache genannt.*’

explicitly recommended not defining the concept of a thing.⁴ Nevertheless, the Hungarian legislator clearly considered it necessary to stipulate that only those things can be the object of ownership that can be taken into possession. That is, according to the HCC [1959], a thing is defined as the object of ownership.

Regarding Article 94(1) of the HCC [1959], the position represented by *Miklós Világhy* is worth mentioning. As he stated, Article 94(1) of the HCC [1959] suggests that the object of property right may only be the thing in the civil law sense. Nonetheless, this is in fact interpreted in reverse: the nature of a given object shall be assessed by whether it can be the object of ownership. Accordingly, the thing as a category of civil law is, in fact, nothing more than *an abstract expression of the object of ownership*. (Világhy, 1965, p. 285)

It also shall be explained, how the term ‘can be taken into possession’ shall be understood. This term has a dual meaning: on the one hand, it means the physical expression of the given object (bodily object) and its ability to be brought under human domination and its actual possession, which at the same time is supplemented by the legal possibility and permissibility of possession. (Lenkovics, 2001, p. 36; Leszkoven, 2019b, p. 55) Contrary to this, *Attila Menyhárd* considers that possession can be recognised only regarding the physical property of the thing and cannot be understood in a legal sense. (Menyhárd, 2014)

The HCC in force changes the provisions of the HCC [1959] and lays down the following in relation to the concept of the thing: a *physical object that can be taken possession of*, which may be the subject of ownership.⁵ Thus, the text of the HCC clarifies the thesis emphasized by Világhy: the *rem* status (‘thingness’) of a given object is determined by whether it can serve as an object of property rights or not. As Leszkoven concludes, *the legislator puts the relationship of ownership at the centre of the right in rem and intends to approach the concept of right in rem through property rights and property relations*. (Leszkoven, 2017, p. 37) From this point of view, the comment of *Árpád Orosz* is also interesting. According to him, instead of using the term ‘possession’, it would have been more appropriate if the legislator had inserted the phrase ‘ownership’ into the text of the HCC. (Orosz, 2022)

According to the HCC, the object of ownership can only be things. Other civil law phenomena like rights, claims, or contractual positions cannot be the object of ownership, but the legislator provides for the

⁴ Az 1959-es Polgári Törvénykönyv előkészítő anyagai. Az Igazságügyminisztérium iratanyaga az 1959-es Polgári Törvénykönyv előkészítésével és hatályba léptetésével kapcsolatban, I. kötet, Magyar Közlöny Lap- és Könyvkiadó, Budapest, 2017, p. 259.

⁵ HCC, Article 5:14 (1).

transfer of them via separate legal institutions within the system of the law of obligations.⁶

1.2. The legislative extension of the application of the civil law provisions on a thing

The possible revision of the boundaries of the concept of a thing delineated normatively by the legislator is a recurring issue of private jurisprudence. The concept of a thing described by the HCC is rather narrow and inflexible, which makes its application difficult, especially in view of the economic and social changes.

As Lenkovics explains, *'the range of human needs and the things to satisfy them, and even more, so the intangible goods of financial value, are expanding or at least constantly changing with the passage of time.'* (Lenkovics, 2001, p. 35) Accordingly, it is not possible to construct an eternal concept of things that would be always capable of describing the object of the legal relationship in rem adequately.

This characteristic formulated by Lenkovics made it clear from a very early age to practitioners of private law that the extension of the civil law concept of things is indispensable. In his above-mentioned article, Kolosváry has already dealt with the question of whether natural forces and energies can be classified as things. In answer to the question, he stated that *'the classification of natural forces as things is both forced and superfluous.'* To protect the useful effects of natural forces, he considered the rules of property protection appropriate. (Kolosváry, 1942, p. 9)

The need for an extensive application of the rules on the thing was also acknowledged by Világhy. He considered that these rules could be applied to things other than physical things, albeit only in a highly figurative sense. He noted, however, that such an extension does not serve to strengthen the protection of other things. (Világhy, 1965, p. 285)

The HCC explicitly relaxed the strict framework of the concept of a thing and recognised other objects of law as having things-like nature, extending the application of the rules on things. According to Article 5:14(2) of the HCC, rules on things shall apply accordingly to *money* and *securities* as well as to *natural forces* usable as things, e.g. solar energy, wind energy, etc.⁷ Article 5:14(3) of the HCC provides that rules on

⁶ See the provisions of the HCC on assignment (Art. 6:193-6:201), transfer of rights (Art. 6:202), and transfer of contracts (Art. 6:208-6:211).

⁷ At this point, it is worth drawing attention to the distinction between natural resources that can be used in a manner of things and so-called energy sources (e.g., oil and its derivatives, natural gas, coal), since possession may have particular significance in relation to the latter.

things shall also apply to *animals*, taking the provisions of Acts⁸ establishing derogations reflecting their special nature into account.^{9 10} It is important to note that HCC only provides for the application of the rules on things to the mentioned legal objects but does not extend the borders of the concept of a thing, i.e. *they still do not qualify as things within the meaning of the HCC*. (Menyhárd, 2014, p. 933)

However, this application of the rules on things raises further questions when treating money and securities as things. In connection with the HCC [1959], *György Bíró* has already drawn attention to the problems arising from the lack of differentiation of the legislative text. (Bíró, 2003) HCC [1959] concerned only securities and made no distinction between bearer securities and dematerialised securities. Whereas in the case of securities, the material characteristics are still strongly present (they are ‘movable’ by virtue of their tangible nature), dematerialised securities are completely devoid of that characteristic since they exist merely in the form of an electronic signal.

About the thing-like nature of securities, *István Gárdos* expressed a very interesting thought. As he explained, securities, unlike real things, do not exist independently of persons, but precisely as an element of the legal relationship between persons. Their essence is not their bodily nature, physical form, and characteristics, but their content, the debt or value they represent. In his view, *‘the very form of a dematerialised security confirms that, in the case of securities, the physical form is not inherent in the essence of the asset; a security is capable of shedding its bodily form without any change in its essential legal nature if a more effective method of fixing it is available.’* (Gárdos, 2017, p. 271)

In assessing the thing-like nature of money, the distinction between cash (i.e., banknotes and coins) and bank scriptural money raises further questions. Although judicial practice does not consider bank scriptural money to be a thing¹¹, Gárdos took a position on this issue in a similar way to the one explained above: bank scriptural money can also qualify as a thing, since its value does not derive from its physical characteristics but is determined by the social convention behind its role as a general measure of value. (Gárdos, 2016b) According

⁸ Cf. Act XXVIII of 1998 on the protection and humane treatment of animals.

⁹ HCC, Article 5:14 (3).

¹⁰ For example, Article 5:30 (1) of the HCC states that the owner has the right to transfer his ownership to another person or to discontinue his ownership. In contrast, Article 8 of Act XXVIII of 1998 on the protection and humane treatment of animals states that the ownership and keeping of animals kept in the human environment and dangerous animals must not be abandoned.

¹¹ Cf. BH+ 247.6.2015.

to the current state of private jurisprudence, bank scriptural money¹² is treated as a bank deposit on demand, as a claim on the bank, which, although capable of functioning as a means of payment, does not result in its quality as a thing or property.

3. Shall the conceptual framework of a thing be extended?

At the beginning of the 1980s, *Endre Lontai*, in his study dealing with intellectual property ownership issues, emphasized the need to rethink the prevailing concept of property rights, both in view of the inner content of property rights and its attachment to physical things. (Lontai, 1982, p. 414) With regard to intellectual property, *Tamás Sárközy* took the view explicitly that they are subject to property rights. (Sárközy, 1973, p. 117)

During the preparation of the HCC in force, it was Sárközy who formulated several controversial issues related to the civil law concept of things, which may raise the need for the further broadening of the concept of a thing and for the relaxing thing-centred nature of the rules of law in rem. (Sárközy, 2001) He raised the question of to what extent various intellectual works, such as authors' works, computer programs, inventions, industrial designs, trademarks, etc., as well as property rights, especially company shares, can be subject to property rights and consequently, can be transferable. During the codification process of the HCC in force, the transferability of total assets of a natural or a legal person as a unit was also disputed.

In assessing the above questions, Sárközy considered it justified to expand the range of property objects having an 'incorporeal' nature and proposed extending the rules on things to intellectual property and other rights having pecuniary value. (Sárközy, 2001) A similar position was taken by *Vilmos Bacher*, who considered that the legislator should have regulated intellectual property within the chapter of the HCC relating to property rights. (Bacher, 2000, p. 25) Bíró, on the other hand, proposed to expand the range of possible objects of transfer rather than broaden the boundaries of the general concept of a thing. (Bíró, 2003, p. 18)

Although the question of treating *intellectual property* as things arises again and again in Hungarian private jurisprudence, it can be stated that they *do not qualify as things considering contemporary literary positions and judicial practice*. Similarly, it can be stated in relation to the business share of a limited liability company that, although it is marketable and transferable as a set of intangible,

¹² Cf.: HCC, Article 6:395 (2). For details, see: Gárdos, István – Gárdos, Péter: Fidúcia és dologi biztosítékok – Az óvadék és a rendhagyó zálogjog, In: Polgári Jog, No. 6/2018.

pecuniary rights, it cannot be included in the category of things under the HCC.¹³

Although the revision of the current boundaries of the concept of things has not yet been directly raised in contemporary private jurisprudence, the intensification of the digitalisation process, the emergence of artificial intelligence, the civil law ‘taxonomic positioning’ of new phenomena emerging due to the appearance of artificial intelligence, and the applicability of existing rules raise several new questions, to which the legislator must provide answers in the future. The latter raises the issue, for example, of the legal status of digital data¹⁴ and the private law treatment of crypto-assets, in particular cryptocurrencies and NFT-based assets. In the absence of regulation, these phenomena can be assessed solely based on the different positions appearing in jurisprudence.

4. Applicability of the provisions of rights in rem to digital assets

4.1. The meaning of the term ‘digital assets’

Before examining how the provisions of rights in rem can be applied to digital assets, the term ‘digital asset’ should be explained. This expression entered the public consciousness in parallel with the strengthening of the digitalisation process. However, it is important to mention that the use of the term ‘digital asset’ is not exclusive. There is a terminological diversity, according to which other expressions like ‘digital things’, ‘virtual assets’, or ‘crypto assets’ are also used for describing the phenomenon. Although the author of the study consistently uses the term ‘digital asset’, the acceptance of other expressions is also justified, particularly regarding the latest development of EU legislation.

From the point of view of private law jurisprudence, digital assets can be circumscribed as a new class of assets which is a well-known notion of private law. Asset is a *complex concept* encompassing several elements. It can be defined as *the set of a person’s rights and obligations in relation to things and vis-à-vis other persons*.¹⁵ The term covers all assets including things, rights, and contractual positions which are marketable and have value.¹⁶ Based on this, a digital asset can be defined, in the most general sense, as a kind of asset that exists in digital form.

¹³ BDT 2000. 275.

¹⁴ For more details, see Szilágyi, Ferenc: Kié a digitális adat? Az allokatív adatjog létjogosultsága a magánjogi (dologi jogi) megközelítés margóján. Parts I and II, In: Polgári Jog, No. 9-10/2022 and No. 2022/11-12.

¹⁵ Lenkovics op. cit. p. 50.

¹⁶ Menyhárd Attila: Dologi jog, Osiris Kiadó, Budapest, 2007, p. 171.

Although this concept is deduced from the jurisprudential definition of the asset, it is too wide and does not react to the different digital phenomena of which assessment causes a problem in the practice. Therefore, it is worth reviewing those definition attempts that appeared at the international level¹⁷.

As a preliminary point, it should be stated that a uniform and generally recognised legal concept for digital assets does not exist. The wording and the content of the term always depend on the creator of the definition and are always adjusted to the scope and the legal aims to be reached by the regulation. Therefore, most scientific works treat the terms ‘digital assets’ and ‘crypto assets’ interchangeably, though the latter expression is something narrower since *the term ‘digital assets’ covers both crypto assets and non-cryptographically authenticated digital assets*. It shall be mentioned that most international organisations and entities, with a few exceptions, have resisted defining digital assets. Nevertheless, recently several rules were adopted that contain the definition of ‘digital asset’ or ‘crypto asset’.

In 2022, the *European Law Institute* (hereinafter referred as to ELI) published its principles on the use of digital assets as security (hereinafter referred as to Principles).¹⁸ Within the Principles, the concept of digital assets is based on the core attributes of assets. According to the Principles ‘digital asset’ means *any record or representation of value which fulfils the criteria determined by the Principles*. Firstly, *the asset should exclusively be stored, displayed, and administered electronically, on or through a virtual platform or database*, including where it is a record or representation of a real-world, tradeable asset, and whether the digital asset itself is held or not directly or through an account with an intermediary. As can be seen, this criterion reflects the intangible nature of digital assets. Secondly, *the asset should be capable of being subject to a right of control, enjoyment, or use*, regardless of whether such rights are legally characterised as being of a proprietary, obligational, or other nature. Thirdly, *the asset should be capable of being transferred* from one party to another, including by way of voluntary disposition (transferability).

The main feature of the proposed definition of digital assets is the *technology-neutrality* since, for the purposes of the concept, the design and operational features of the relevant platform or database are

¹⁷ M. Ureche, *Autoritățile publice în dreptul statelor europene*, Alba Iulia, publishing house Altip, 2011, p. 108.

¹⁸ https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_on_the_Use_of_Digital_Assets_as_Security.pdf. (Date of download: 12 September 2023).

irrelevant, just like the method of protection (e.g., use of cryptography) and the claim represented by the given digital asset. Therefore, digital assets may be stored either on a blockchain, and be supported by a smart contract, or, alternatively, on a non-blockchain database, including a publicly accessible cloud service or a restricted access ‘data repository’.

In May 2023, a definition of ‘digital assets’ was adopted within the frames of the International Institute for the Unification of Private Law (hereinafter referred as to UNIDROIT). Principle 2 (2) of the *UNIDROIT Principles on Digital Assets and Private Law* (hereinafter referred as to Principles DAPL)¹⁹ defines a ‘digital asset’ as an electronic record (i.e. information stored in an electronic medium and capable of being retrieved) that is capable of being subject to control. According to the commentary added to Principle 2(2), a cryptocurrency on a public blockchain (e.g., bitcoin) or a central bank digital currency (CBDC) shall be deemed as a digital asset, while a social media page with a password for access is not a digital asset.²⁰

The third legal act that should be mentioned considering the definition of digital assets, is the *Regulation (EU) 2023/1114* (hereinafter referred as to *MiCAR*)²¹, which was adopted by the European legislator in May 2023. By the adoption of this regulation, the European legislator intended to create a harmonised framework for markets in crypto assets. As can be seen, the MiCAR uses the term ‘crypto asset’ instead of ‘digital asset’ and, among other important provisions, it gives the definition and the types of these assets.

As defined in MiCAR, a crypto asset means a *digital representation of a value or of a right* that can be transferred and stored electronically using distributed ledger technology (DLT) or similar technology.²² The regulation distinguishes three types of crypto assets. ‘*Asset-referenced token*’ (hereinafter referred as to ART) means a type of crypto-asset that is not an electronic money token and that purports to maintain a stable value by referencing another value or right or a combination thereof, including one or more official currencies.^{23 24} Due to the stability of their value, ARTs serve as a means of payment.

¹⁹ Available at: <https://www.unidroit.org/wp-content/uploads/2023/09/Principles-on-Digital-Assets-and-Private-Law.pdf>. (Date of download: 12 September 2023).

²⁰ See the explanation in detail: Principles DAPL, pp. 16-17.

²¹ Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, OJ L 150, 9.6.2023, p. 40-205.

²² MiCA, Article 3(1), point 5.

²³ MiCA, Article 3(1), point 6.

The main purpose of an ‘*electronic money token*’ (or ‘*e-money token*’, hereinafter referred as to EMT) is to be used as a means of exchange, but it is also intended to maintain a stable value by referencing the value of one official currency.²⁵ EMTs are, therefore, primarily means of payment, but their value is pegged to a single fiat currency for reasons of stability. In addition to the differences, an EMT has several similarities in its functioning with the use of *electronic money*, insofar as the former also acts as an electronic substitute for coins and banknotes and is used for payment.²⁶ ²⁷ Holders of electronic money may always require the electronic money institution to redeem their electronic money at par value for fiat currency which is legal tender. This possibility will also be available for EMTs after the entry into force of MiCAR, contrary to current practice.

As the third type of crypto-assets, MiCAR refers to *utility tokens*, which, contrary to the above two types of crypto assets, qualify as neither means of payment, nor medium of exchange, i.e., they do not serve financial purposes. These tokens intend to provide access to a good or a service supplied by its issuer.²⁸ Therefore, this type of crypto asset is essentially linked to the functioning of the digital platform and digital services.

Considering the scope of the application of MiCAR it should be mentioned that according to Recital 10, the provisions of the MiCAR do not apply to crypto assets that are unique and not fungible with other crypto assets, e.g., digital artworks and collectibles. Moreover, crypto assets representing services or physical assets that are unique and

²⁴ In the application of the MiCA, official currency means an official currency of a country that is issued by a central bank or other monetary authority. Cf. MiCA, Article 3(1), point 8.

²⁵ MiCA, Article 3(1), point 7.

²⁶ Electronic money is the monetary value represented by a claim on the issuer, stored electronically, including magnetic storage, issued upon receipt of funds for the execution of payment transactions as defined in point (5) of Article 4 of Directive 2007/64/EC and accepted by a natural or legal person other than the electronic money issuer. L. Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit, and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, OJ L 267, 10.10.2009, pp. 7-17, Article 2, point (2). The current Hungarian Act on Credit Institutions (Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises, hereinafter referred to as ACE) regulates electronic money as a type of payment instrument and defines its concept in accordance with the Directive. Cf. ACE Article 6(1), para. 16.

²⁷ For a detailed comparison of electronic currencies and cryptocurrencies, see Bacsó, Róbert: Virtuális valuta mint a modern kori pénzpiaci szabályozás kihívása, In: Polgári Szemle, No. 1-3/2016, pp. 244-251.

²⁸ MiCA, Article 3(1), point 9.

non-fungible, such as product guarantees or real estate, also do not fall under the scope of MiCAR. At first sight, it seems that NFTs are not covered by the regulation. Nevertheless, Recital 11 of the MiCAR provides that its provisions shall be applied to crypto assets that appear to be unique and non-fungible, but whose *de facto* features or whose features that are linked to their *de facto* uses, would make them either fungible or not unique. It means that although these crypto assets are issued as non-fungible tokens, the volume of issuance, i.e., they are issued in a large series or collection, shall be considered an indicator of their fungibility.

4.2. Potential application of the provisions of rights in rem

4.2.1. The criterion of ‘thingness’

To answer the question whether of the provisions of rights in rem can be applied to digital assets it has to be examined if the different types of digital assets like cryptocurrencies and other tokens including NFTs fulfil the criterion of thingness.

Article 5:14(1) of HCC states that only those physical objects may be the objects of ownership that can be taken possession. According to this provision, giving the answer is an easy job: since digital assets have no physical extent, they cannot fulfil the criterion of thingness, i.e., they do not fall under the concept of things and therefore are not the object of ownership.

Different types of digital assets could only fall under the concept of things if the Hungarian legislator would revise and amend the referred provision of the HCC. However, since Hungarian legislators refused to amend the concept of things in the past (e.g., in the case of intellectual property and company shares), it is easy to predict that everything will remain the same in the future.

4.2.2. Is it possible to apply the rights in rem rules on money to cryptocurrencies?

Though digital assets do not fulfil the criterion of thingness due to their incorporeal nature, it does not necessarily mean that the application of the provisions of rights in rem is excluded. As it was presented before, in some cases the legislator recognised the application of the rules on things to assets having things-like nature (e.g., money). Regarding this, it is worth examining if a category of digital assets called cryptocurrencies may qualify as money, and therefore may fall under the scope of the legislative extension of the application of the civil law provisions on a thing.²⁹

²⁹ Cf. HCC, Article 5:14(2).

Cryptocurrencies emerging because of digital transformation and technological development, which significantly influenced the evolution of money, can be understood as a specific form of money as a means of payment, even legal, created by digital technology. However, the question arises whether the nature of cryptocurrencies as a means of payment is sufficient to consider them as money, or whether there are further characteristics along which a given instrument, a means of payment, can be classified as money.

Starting from the concept of crypto assets defined by the MiCAR, ARTs and EMTs match the category of cryptocurrency, i.e., the private law assessment of these two types of crypto assets is needed. Accordingly, it is necessary to answer first the question of whether, in addition to their usual designation as cryptocurrency, these instruments can be classified as money.³⁰

In private law jurisprudence, there is no uniform concept of money, and even the content of the term is not the same since it is interpreted differently by the rules of law in rem and contract law. (Gárdos, 2016a) The distinction between cash and bank scriptural money has already been raised in the study, just as it has been recorded that Hungarian jurisprudence and judicial practice treat the latter not as a thing, but as a claim. From the point of view of the law in rem, therefore, *the term money should be understood only as cash (banknotes and coins)*, given that, by virtue of their physical expression and tangibility, they participate in the circulation of property in the manner of things. However, *for the purposes of the application of contract rules, the term money covers both cash and bank scriptural money.*

From an economic point of view, the functions of money shall be examined. As Zoltán Nagy primarily emphasizes, money is primarily a means of exchange, while its value-carrying character in the exchange of goods is also important. In addition to this latter function, he also mentions the appearance of money as a unit of account, i.e., that money serves to express the value of things and goods. (Nagy, 2019, p. 7) Nevertheless, it shall be stated that the possible compliance of cryptocurrencies with these three criteria does not mean that they can be legally included in the money category. The latter would require its recognition as legal tender, issuance by an authorised financial institution (e.g., Hungarian National Bank), and placing on the market, but in the case of cryptocurrencies this element is completely absent.

³⁰ For an examination of cryptocurrencies from a financial law point of view, including the question of their integration into the financial system, see Nagy, Zoltán: A kriptopénzek helye és szerepe a pénzügyi rendszerben, In: Miskolci Jogi Szemle, No. 2/2019, pp. 5-14.

Based on the above, it can be concluded that *cryptocurrencies cannot be considered money in legal terms, but only in an economic sense*,³¹ and therefore the application of civil law rules on things cannot be extended to them.

In view of this statement, the following question rightly arises: if cryptocurrencies cannot be considered money in rem, what other category of private law can they fall under? Can they possibly be perceived as claims, like bank scriptural money? The answer can also be deduced from the lack of recognition of cryptocurrencies as money: if cryptocurrency is not considered money, then the contract law rules of the HCC governing monetary claims cannot be applied.

At the same time, the perception of cryptocurrencies at the EU level is different. The evolving EU regulation of cryptocurrencies, including the MiCAR, which has been referred to several times before, clearly moves in the direction that crypto assets (including cryptocurrencies), similarly to electronic money, are defined as claims and accordingly their transfer or reclaim can take place in accordance with contract law rules. ARTs and EMTs may therefore be defined in domestic law as a means of payment substituting money, in accordance with EU legislation. In a recent study, *Ádám Boóc* explicitly defined cryptocurrencies as freely convertible virtual tools having no issuer, and which serve as money substitutes.³²

4.2.3. Non-fungible tokens and tokenisation of bodily objects

Tokens are a legal embodiment of a share of an asset, a set of permissions, or a set of claims that are held by the holder of the token. They are blockchain-based records that represent the title and other property rights.³³ A token as a unit of account connects to the address of the user who exercises exclusive control over the address by his private

³¹ Cf.: Dornfeld, László: A kriptovaluták és az e-bizalom kapcsolata, In: Magyar Rendészet, No. 4/2021, pp. 211-227, p. 211; Béldi-Turányi, Noémi Tímea: Bitcoin polgári jogi megítélése, és szabályozásának törekvései, In: Bujtár Zsolt et al. (eds.): Kriptoeszközök világa a jog és gazdaság szemszögéből. Konferenciakötet – Válogatott tanulmányok, Pécsi Tudományegyetem, Állam- és Jogtudományi Kar, Pécs, 2021, pp. 159-172, p. 167; Rácz, Lilla: A személy és a dolog fogalmának (lehetséges) változásai a mesterséges intelligencia és a kriptovaluták világában, In: Állam- és Jogtudomány, No. 4/2020, pp. 82-107, p. 104.

³² Cf.: Boóc Ádám: A dologi jog legfontosabb technológiai jogi kérdései, új technológiák joga és a dologi jog, In: Homicskó Árpád Olivér (ed.): A digitalizáció hatása az egyes jogterületeken, Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar, Budapest, 2020, pp. 25-40, p. 35.

³³ Konashevych, Oleksii: General Concept of Real Estate Tokenization on Blockchain, In: European Property Law Journal, 1-2 (Iss. 9) (2020), pp. 1-45, p. 6.

key. Tokens can appear either in physical form or they can be a digital representation of a physical asset (e.g., a real estate³⁴ or an artistic work) or a set of claims, (e.g., the electronic representation of a debt contract).

Based on the main characteristics of tokens, we can distinguish between fungible and non-fungible tokens (hereinafter referred to as NFTs). While fungible tokens can be substituted by other fungible tokens, NFTs have a special place in the diverse world of tokens. Their specialty is precisely their irreplaceability. They are unique and not fungible with other crypto-assets, therefore their value is attributable to each crypto-asset's unique characteristics and the utility it gives to the holder of the token.³⁵ One of the most common uses of NFTs is works of art, where tokens are linked to digital artwork³⁶ and provide proof of authenticity by operating based on blockchain technology.

While artifacts produced in the traditional way are clearly considered things in civil law terms and can accordingly be subject to ownership, the assessment of digital artifacts, particularly NFT-based digital artworks, is far from clear. Since the latter categories are not bodily things, they have no physical dimension, they cannot be defined spatially, and *they cannot be included under the concept of things* according to Article 5:14(1) of the HCC, in accordance with the above-mentioned theoretical approach.

However, another problem seems to be taking shape which will raise further questions. Namely, the process of tokenisation makes it possible for the owners of different things having physical extent (i.e., they are bodily objects and therefore they can be taken into possession) to bring their real things to the virtual space by converting them into digital assets. After tokenisation of a physical asset, the created token will represent the given asset, proving the ownership of the given thing.

Although tokenisation of assets can be useful in future practice in many ways, e.g., tokens can be used to make the transfer of assets traceable, rules in rem, e.g., rules on the transfer of ownership in their current form are not suitable to apply for a situation similar to the above. Nevertheless, tokenisation and the change of 'digital ownership' is common and occurs en masse in the virtual space. Therefore, there is a need to find a legal solution that can properly be used for these transactions. To find this solution, we should know the main aim which makes the owner tokenise a given asset.

³⁴ About the tokenisation of real assets see.

³⁵ MiCAR, Recital 10.

³⁶ For the conceptual definition of digital artwork and the detailed treatment of the related issues, see Sztermen, Orsolya Lili: A digitális műalkotások megjelenési kérdései. I. Terminológiai problémák, In: Miskolci Jogtudó, No. 3/2022, pp. 70-83.

By tokenisation owner can separate the possession of a thing and the rights to dispose of it. This process is like the dematerialisation of securities: both processes involve the digitalisation of a given asset or security. The goal of the two processes is also the same: creating a digital representation of the asset or security to store and transfer it electronically, simplifying the process of transferring ownership. However, there is a main difference between the processes: while dematerialisation of securities means the conversion of an existing physical asset into a digital form, tokenisation means the creation of a new digital asset.

In my opinion, a legal approach that intends to constrict the tokens into categories of rights in rem, cannot succeed since legislators insist on their civil law traditions and will not modify their basic legal rules like the concept of things. Conversely, a shift from the ownership theories toward the solution to accept the rules on the dematerialisation of securities as a model for the future regulation of tokenisation, can bring results. However, it shall be noted that although parallelism exists between the two processes, tokenisation, due to the above-mentioned difference, should not be treated one in one as dematerialisation, since this approach can not provide an appropriate solution for the assessment of the digital assets. Nevertheless, tokenisation presumably represents such a huge leap in development as the spread of dematerialised securities which gradually moved the place of traditional securities did.

5. Closing remarks

The way, how the legal structure of a society explains the concept of a thing always depends on the economic and technical development, and the distinguishing skills and abilities of the given society, as *László Asztalos* stated. (Asztalos, p. 178. Cited by Lenkovics, 2001, p. 35) There is no doubt that economic and social changes have an impact on the development of legal regulations, so it is also clear how the need to revise and expand the boundaries of the classical concept of things ('physical objects that can be possessed') arises from time to time in private law jurisprudence.

The Hungarian legislator accepted the extension of the application of the rules on things already at the time of the adoption of HCC [1959], but the normatively defined framework of the category of things has not changed to this day. According to Article 5:14(1) of the HCC in force, the object of ownership can continue to be only physical objects that exist in their physical reality.

Considering the well-founded position of representatives of private law jurisprudence, the Hungarian legislator still resists the recognition

of disembodied (intangible) objects as things. Nevertheless, it allows the *appropriate* application of the rules relating to things in several cases, such as money, securities, natural forces that can be used in the manner of things, and animals. On the other hand, instead of broadening the boundaries of the concept of things, the legislator prefers to expand the range of objects that can be the subject of transfer (e.g., claims, rights, contractual position).

The phenomena that arose because of digital transformation are undeniably present in our everyday lives: they work and are in motion. At the same time, however, the law is still a mere spectator of events – it does not seem to be able to respond adequately to the questions raised by the appearance of these phenomena yet, although the answer is constantly being demanded by legal scholars. Although recently several different concepts of digital assets appeared at the international level, their legal nature and private law treatment are still controversial. Nevertheless, the number of countries that have already adopted national rules on digital assets constantly increases³⁷, and the adoption of the MiCAR also contributes to the uniform assessment of the operation of digital assets.

³⁷ In Belarus, Decree No. 8 dated December 21, 2017, On Digital Economy Development expressly allowed to use of asset-backed tokens for representing objects of civil law. A blockchain act (Gesetz über Token und VT-Dienstleister) was adopted in Lichtenstein in 2020. In the same year, Serbia adopted its Law on Digital Assets.

MEDIATION IN ADMINISTRATIVE LITIGATION IN FRANCE: WHAT RESULTS AFTER FIVE YEARS OF IMPLEMENTATION AND WHAT POSSIBLE LESSONS FOR THE REPUBLIC OF MOLDOVA?

Dr. Natașa DANELCIUC-COLODROVSKI*
Dr. Maria ORLOV**

1. The continuous development of alternative means of dispute resolution in French administrative procedure

Alternative means of dispute resolution are part of French positive law and the reforms aiming their incorporation and development in legal procedures accelerated the last ten years. The reasons for these changes are multiple and perfectly legitimate: overcrowding of the courts, high costs of judicial procedures, desire to appease social relations. Historically, the alternative means of dispute resolution have been particularly developed in common law countries. American scholars defend the idea that a community can manage a conflict without opening a trial¹. It is a medieval-inspired model² that follows the logic of Jürgen Habermas' "communicational action". In his opinion, the consensus can only be obtained on the basis of a mutual understanding between people³. The implementation of these mechanisms, that are now

* Associate Professor at Aix-Marseille University (France), Vice-director of the Institute SoMum, Director of the Association of French speaking researchers specialized on Eastern Countries.

** Associate Professor at "A. Russo" Bălți State University (Rep. of Moldova), President of the Institute of Administrative Sciences of Republic of Moldova.

¹ S. Kerneis, « Le droit à l'épreuve de l'anthropologie historique: le cas des modes alternatifs de résolution des conflits », *Clio@themis*, n° 5, 2012, p. 4.

² L. Viaut, *Fecimus concordiam. Les mécanismes de gestion des conflits dans l'espace aquitain au haut Moyen Âge (VIII-XIIe siècles)*, PhD thesis, 2018, Université of Limoges, p. 22.

³ The conflict is a tension which generates the communicational reflection. This comprehension requires considering the emotional dimension of the conflict, since it is based, according to Jürgen Habermas, on the subjective authenticity of the communicative actors. This rational argumentation, distinguishing itself from the agreement obtained by simple calculation of interest or concordance of the projects of the actors, requires a reasoned assent of the latter. Cf. É. Challe, « Jürgen Habermas et le fondement communicationnel du droit », *Le Philosophoire*, 1999/3, p. 175

particularly often used in criminal procedure in France, with about 30% of the total number of offenses that must be judged, is often criticized by French scholars as an importation of American practice that does not correspond to the national legal culture and the way the criminal sanction is understood⁴. However, historical studies show that such mechanisms have existed in France for a very long time⁵, including in administrative procedure.

In fact, alternative means of dispute resolution have been developing for more than two centuries in many public services, in order to improve relations between public administration and the citizens⁶. The French Civil Code of 1804 allowed the municipal authorities and public establishments to find a compromise in disputes with the citizens. Later, in a judgment of the *Conseil d'État* – the French supreme administrative court – dating from 1893, was recognized the State's right to compromise. By the Decree of the 24th of December 1907, was created the Advisory Committee for Amicable Settlement of Disputes for public works companies and supply contracts. It was composed of five members appointed by decision of the Minister of Public Works for a renewable period of two years⁷, and had to give opinions on the cases referred to it by the Minister and “to find, in each dispute submitted for its examination, the solution for an amicable resolution”⁸.

After the Second World War, it was decided to broaden the jurisdiction of the Committee for the purpose of strengthening the success of the procedure. A Decree adopted on the 11th of May 1953 provided for the creation of such a committee within each Ministry and extended their jurisdiction to all categories of State contracts. For improving the procedure, by the Decree n° 81-272 of the 18th of March 1981, they were again replaced by a single Committee, composed of six members⁹. This new institution was in charge of resolving all disputes

⁴ J.-L. Lascoux, *Pratique de la médiation professionnelle. Une méthode alternative à la résolution des conflits*, 2013, Paris, ESF, 248 p.

⁵ For ancient roots, especially medieval, see L. Viaut, *op. cit.*

⁶ B. Boumakani, « La médiation dans la vie administrative », *RDP*, 2003, p. 863 ; M. Uyttendaele and R. Witmeur, « Le médiateur et le contrôle politique », in F. Delpérée (ed.), *Le médiateur*, Bruxelles, Bruylant, 1995, p. 221 ; B. Seiller, « Le règlement des différends avec l'administration », *AJDA*, 2015, p. 2485 ; M. Vialettes and C. Barrois de Sarigny, « La fabrique d'un code », *RFDA*, 2016, p. 4 ; A. Mignon Colombet, « La convention judiciaire d'intérêt public: vers une justice de coopération ? », *AJ pénal*, 2017, p. 68.

⁷ Three general inspectors of bridges and roads, a member of the *Conseil d'État* and a public works contractor.

⁸ *JO*, December, 28, 1907, p. 8730.

⁹ A member of the *Conseil d'État*, a members of the *Cour des Comptes* (President and Vice-president), two civil servants serving or having served in the ministerial department

relating to all public contracts awarded by State departments and those awarded by departments with national jurisdiction as well as public State establishments, other than those of an industrial and commercial nature.

In 1991, this Committee was divided into various regional or interregional advisory committees for simplifying the organization and making the procedure more effective¹⁰. In 2010, such committees were created on departmental level, also composed of six members¹¹. These committees could hear disputes relating to contracts awarded by local authorities or their public establishments, or even decentralized State services. As soon as they were seized, they had to seek elements of fact or law to try to find an amicable solution to the conflicts relating to the execution of the contracts awarded. They no longer exist today because the Code of Public Procurement had to be modified in 2016¹² to insure the transposition of the European directive 2014/23/EU of the 26th of February 2014 on the award of concession contracts. In practice, these committees were little known and rarely seized¹³. Their referral was not mandatory prior to apply to the administrative judge. Litigants were preferring to seize the Mediator of the French Republic (the Ombudsman), which was created in 1973.

In addition to this procedure before the Committees, by a reform of 1957 was introduced in administrative procedure the so called “institutional conciliation”¹⁴, which was already well developed in private law. The purpose of this new procedure was to manage a very specialized dispute: that of the distribution of gas and electricity. Two years later, the procedure was extended to disputes that could arise between the State and private educational institutions. However, conciliation did not enter the office of the administrative judge until 1986¹⁵. This procedure is now set out in Article L. 211-4 of the Code of Administrative Justice: “In the Administrative Tribunals and the Administrative Courts of Appeal, the Presidents of jurisdiction may, if the parties agree, organize a conciliation mission and appoint for this purpose the person or persons who will be in charge of it”.

concerned by the case submitted to the committee, two competent personalities exercising or having exercised functions in the same sector of activity as the holder of the contract. They are joined by a representative of the Directorate General of Public Finances, who has an advisory vote, and the public accountant assigning payments relating to the disputed contract or his representative, who has an advisory vote.

¹⁰ Decree No. 91-204, February 25, 1991.

¹¹ Decree No. 2010-1525, December 8, 2010.

¹² Law No. 2015-899, July 23, 2015.

¹³ M. Vrignaud, *Les modes non juridictionnels de règlement des litiges administratifs*, PhD thesis, 2016, University of Nantes, Part 2, p. 13-20.

¹⁴ Order of the Secretary of State for Energy, July 25, 1957.

¹⁵ Law No. 86-14, January 6, 1986.

In the public report drawn up in 1993 by the *Conseil d'État*, was underlined the importance of the development of negotiation in administrative procedure, as well as those of settlement and arbitration as alternative means of resolution of disputes¹⁶. Mediation was not then considered as a concept in this report, even if it was developing in civil procedure. By the Law No. 2016-1547 of the 18th of November 2016 on the modernization of justice in the 21st century, mediation obtained a real institutional recognition. The Law provided for the introduction of mediation in administrative procedure as well as in civil procedure.

The article L. 213-1 of the Code of Administrative Justice defines now mediation as “any structured process by which two or more parties attempt to achieve to an agreement for the amicable resolution of their disputes, with the help of a third party, the mediator, chosen by them or appointed, with their agreement, by the court”. In the light of this definition, it can be noted that mediation is characterized by the intervention of a third party whose role is to facilitate negotiation between the parties in order to find an amicable settlement of the dispute.

As Philippe Gazagnes points out¹⁷, this is a new procedure which must be explained, and which requires the implementation of preliminary work in respect of six conditions:

- the mediation must be accepted by the parties;
- the mediation must be led in an “assisted manner”;
- it is necessary to identify with whom to conduct the mediation and with whom to conclude the agreement;
- the financial controller or the public accountant, as well as the payer, must be informed;
- the mediation must be as short as possible;
- successful mediation results in a settlement.

After the legislative reform, for considering certain particularities of the administrative litigation, many questions were raised regarding the legal regime that is applicable to mediation. The subject was also discussed in detail during the First National Conference on Administrative Mediation held in Paris on the 18th of December 2019¹⁸. During this meeting, about thirty people – public decision-makers, administrative judges, lawyers, mediators – discussed the questions that arose in practice and the solutions that were found in different situations. This was an opportunity to draw up an initial assessment of

¹⁶ *Resolving conflicts differently: conciliation, arbitration in administrative matters. Report adopted by the General Assembly of the Conseil d'État*, February 4, 1993.

¹⁷ p. Gazagnes, « La médiation administrative », *AJDA*, 2018, p. 2334.

¹⁸ For more information, see: <https://www.conseil-etat.fr/actualites/actualites/premieres-assises-nationales-de-la-mediation-administrative>

the actions carried out and to show that mediation now has its place in the settlement of administrative disputes.

Mediation must not be confused with the other mechanisms that allow to initiate a dialogue with the public administration before starting judicial proceedings. Excepting negotiation, settlement, and arbitration, in France is very developed the practice of prior administrative requests. They are mandatory in some specific fields, like tax litigations, some social litigations, access to administrative documents, compensatory remedy, etc. This mechanism does not require a third-party intervention and must be made in writing by the person who wants to contest a negative administrative decision before going to Administrative Tribunal. In case the administrative authority dismisses the request, the mediation can (or must in some cases) be used for trying to find a solution with the help of a third-party before referring the claim to the Administrative Tribunal.

2. The scope and terms of implementation of administrative mediation

The first question that arises is of course whether mediation procedure can be used for any question concerning relations between public administration and citizens? In fact, the Code of Administrative Justice does not formally limit the matters in which the procedure of mediation is possible, a wording that generates uncertainty. There are, however, cases when the procedure of mediation cannot be implemented. Firstly, Article L. 213-3 of the Code of Administrative Justice lays down an absolute prohibition if “the agreement reached by the parties infringes rights of which they do not have the free disposal”. For example, it will be impossible to initiate a mediation procedure if this one results in the waiver of a freedom or a fundamental right.

Secondly, the use of mediation should also be extremely restricted when the dispute concerns sovereign matters, the fundamental interests of public persons. This will be the case, for example, of the management of the public domain, because it is inalienable and imprescriptible. Therefore, no infringement or assignment can occur in the context of mediation. Finally, the exercise of administrative police powers does not seem conducive to mediation. In the field of immigration policy, for example, it is hardly conceivable that the issue of a residence visa should be subject to mediation. In general, it can be noted that all questions concerning the preservation of public interest are not conducive to mediation.

There are, of course, subjects that are conducive to mediation. Traditionally, subjective rights are defined as the prerogatives recognized to the individual by the rule. They are enforceable against third parties

and are traditionally divided into economic rights and extra-economic rights, such as the right to respect for private life. The most conducive field to mediation remains the compensation field. In these cases, mediation generally follows the exercise of a prior claim for compensation, which is also an alternative method of settling of disputes.

Regarding the procedures for implementing administrative mediation, Article R. 213-2 of the Code of Administrative Justice provides for that mediation may be entrusted to a natural or legal person. In the latter case, it will be up to the legal representative to appoint the mediators for the execution of each mission. According to Article R. 213-3 of the Code of Administrative Justice, the natural person carrying out the mediation mission must have the required qualifications, according to the nature of the dispute. The mediator must provide for proof of training or experience appropriate to the practice of training. Administrative judges can also act as mediators themselves, as suggested by article L. 213-8 of the Code of Administrative Justice.

It is important to mention that mediation can be carried out either at the initiative of the parties or on the proposal of the judges. When it is carried out at the initiative of the parties, mediation is necessarily situated outside any judicial procedure. It therefore takes on a preventive character. The parties may also ask the President of the Administrative Tribunal or the Administrative Court of Appeal with territorial jurisdiction to organize a mediation mission and appoint the person(s) responsible for it. In this case, the procedure is called “voluntary” mediation.

In case the Administrative Tribunal is directly seized, the judges have the right to propose the use of mediation mechanism before ruling. However, the agreement of the parties is still required. In this case, the conduct of the mediation is placed under the control of the judges. Moreover, mediation does not remove the case from the judges, who can take any investigative measures they think necessary at any time.

Regarding the costs of the mediation procedure, Article L. 213-5 of the Code of Administrative Justice expressly provides for that mediation is free when it is a mandatory prerequisite for litigation¹⁹. When mediation is initiated by the judges, article L. 213-8 of the Code of Administrative Justice says that: “[...] the judge determines if there is reason to provide for the remuneration and shall fix the amount thereof”. The costs of mediation will depend on the complexity of the dispute, the reputation of the mediator, etc. Most mediations are invoiced between 1000 euros and 2000 euros, an amount which is divided between the parties. However, this sum remains much lower

¹⁹ Decree No. 2018-101, February 16, 2018.

than that of a trial. The parties who benefit from legal aid²⁰ for the remuneration of their lawyer will not have to bear the cost of the mediation which will also be paid directly by legal aid.

Regarding the course of the mediation procedure and its outcome. Once appointed, the mediator will have to lead a negotiation process by promoting the rapprochement of the parties around a consensus. Whatever the duration of the mediation, the result remains binary: either the mediation is a success, or it proves unsuccessful. If successful, the mediation should be formalized in written form, in the classic form of a transactional protocol. The legislator has provided for that the agreement can be validated by the judge who is hearing the conclusions to this effect. This approval will essentially make it possible to defeat any difficulty of execution emanating, for example, from the public accountant. If the mediation fails, the case will be judged by the Administrative Tribunal.

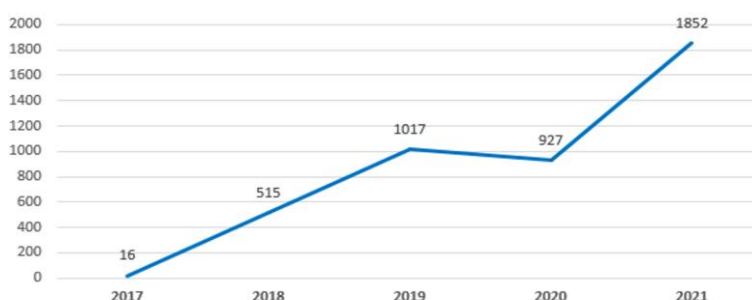
3. The five years implementation results of mediation and the prospects for changing practices

The development of digital administration, the level of complexity of legal norms or the increase of administrative procedures can be sources of disputes between public administration and citizens. If referral to an administrative judge is still possible, some of these disputes may be due to misunderstanding and be settled other than by a court decision. Mediation procedure makes it possible to establish a mainly oral dialogue, in a less formal setting than a courtroom, with the common objective of seeking a compromise acceptable to both parties, the citizen and public administration.

This idea seems rather well received in France. Since 2017, year of the beginning of the implementation of mediation in administrative procedure, the number of cases of mediation has been steadily increasing, by reaching, in 2021, a record number of 1,852 mediations. During the five years of implementation, the total number of cases of mediation cases was of 4,327. In 54% of them mediations resulted in an agreement.

²⁰ Legal aid allows, under certain conditions, people with low incomes to benefit from State support for legal costs, in particular lawyers' fees.

Statistics communicated by the Conseil d'État²¹



From the beginning of the implementation of the procedure of mediation, it was noticed that the cases mainly focused on three matters: civil servants and public agents (all types of disputes concerning their employment contracts; evaluations; career promotion; disciplinary sanctions); decisions pronounced by *Pôle emploi* (a public institution having an administrative nature that is responsible for employment in France); area of urban planning. On the bases of this information, political authorities decided to introduce the mandatory preliminary mediation, tested between 2018 and 2021 on a part of the territory of the country and in a certain number of disputes: civil servants and public agents; disputes concerning social aids granting; disputes concerning social housing.

Of course, this measure explains the increasing of the number of cases of mediation. The parties have not the possibility to make a choice, they are obliged to accept the procedure in order to have the right to seize the administrative judge in case of failure. At the same time, it can be noted that the success rate has risen at 76%. Consequently, out of 4,364 prior mediations recorded, in 3,316 cases, a solution suitable for both parties was found. These very encouraging results have led the political authorities to broaden the area of implementation of mandatory prior mediation. This measure was introduced by the Decree No. 2022-433 from the 25th of March 2022, with entry into force from the 1st of April 2022.

Article 2 of the Decree establishes the mandatory prior mediation procedure, provided for by article L. 213-11 of the Code of administrative justice, for disputes opposing civil servants and public agents to public institutions in the following cases:

1) After unfavorable individual administrative decisions relating to one of the elements of remuneration mentioned in article L. 712-1 of the

²¹ See: <https://www.conseil-etat.fr/actualites/retour-sur-5-annees-de-mediation-administrative>

General Civil Service Code. These are in particular the index salary, the residence allowance, the family residence supplement and all other types of bonuses that are established by law;

2) After refusal of secondment or placement on availability and, for contractual agents, refusal of unpaid leave provided for in articles 20, 22, 23 and 33-2 of the Decree of the 17th of January 1986 and in articles 15, 17, 18 and 35- 2 of the Decree of the 15th of February 1988;

3) After unfavorable individual administrative decisions relating to reinstatement following a secondment, placement on availability or parental leave or relating to the re-employment of a contract agent;

4) After unfavorable individual decisions relating to the classification of the agent following an advancement in rank or a change of body, or employment framework obtained by internal promotion;

5) After unfavorable individual decisions relating to lifelong vocational training;

6) After unfavorable individual decisions relating to the appropriate measures taken by public employers with regard to disabled workers pursuant to articles L. 131-8 and L. 131-10 of the General Civil Service Code;

7) After unfavorable individual decisions concerning the adjustment of the working conditions of civil servants who are no longer able to perform their duties under the conditions provided for by Decree No. 84-1051 of the 30th of November 1984, relating to the reclassification of civil servants recognized as unfit to perform their duties, and Decree No. 85-1054 of the 30th of September 1985 relating to the reclassification of territorial civil servants recognized as unfit to perform their duties.

Article 3 of the Decree of the 25th of March 2022 provides for that the public officials concerned by the compulsory prior mediation procedure are:

1) State civil servants assigned to academic and departmental services, nursery and elementary schools and local public educational institutions within the jurisdiction of the academies which appear on a list drawn up by the Minister of Justice and Minister for National Education;

2) Agents of the territorial public service employed in the local communes and their public establishments having previously concluded an agreement to provide for mediation with the Management Center of the Territorial Public Service to which they belong.

According to article 4 of the Decree of the 25th of March 2022, the institutions for which prior mediation is now mandatory must have a mediator who will ensure the procedure. In this case, the procedure of mediation is free.

In the field of *Pôle emploi*, under the terms of the new article R. 5312-47 of the Labor Code, the mandatory prior mediation procedure provided for by article L. 213-11 of the Code of Administrative Justice applies in the disputes concerning individual decisions taken by *Pôle emploi* and falling within the jurisdiction of the administrative judge:

1) The decisions taken on the basis of the Board of Directors' deliberations of *Pôle emploi* mentioned in 2° of article R. 5312-6 of the Labor Code. These are measures to facilitate the recruitment operations of companies, to promote the integration, reclassification, professional promotion and geographical and professional mobility of people, whether or not they have a job, in application of the tripartite agreement mentioned in article L. 5312-3 of the Labor Code;

2) Decisions relating to the termination of registration on the list of jobseekers or to the change of category mentioned in article R. 5411-18;

3) Decisions to strike off the list of job seekers, provided for in articles L. 5412-1 and L. 5412-2 of the Labor Code;

4) Decisions cancelling the replacement income provided for in article L. 5426-2 of the Labor Code;

5) Decisions relating to the administrative penalty mentioned in article L. 5426-5 of the Labor Code;

6) Decisions relating to the reimbursement of allowances, aid and any other unduly paid benefits mentioned in article L. 5426-8-1 of the Labor Code;

7) Decisions taken on behalf of the State relating to:

a) Allowances intended for young people embarking on a contract support path towards employment and autonomy provided for in articles L. 5131-5 and L. 5131-6 of the Labor Code;

b) The specific solidarity allowance provided for in articles L. 5423-1 to L. 5423-3 of the Labor Code;

c) The solidarity allowances mentioned in article L. 5424-21 of the Labor Code paid to intermittent performers;

d) Aid for the creation or takeover of a business provided for in II of article 136 of Law No. 96-1181 of the 30th of December 1996 on finances for 1997.

Under the terms of article R. 5312-48 of the Labor Code, on the regional level, *Pôle emploi* must have a mediator who is in charge of the implementation of the mandatory prior mediation. Citizens can seize the Administrative Tribunal only if the procedure of mediation fails. According to the new article R. 213-10 of the Code of Administrative Justice, *Pôle emploi* must mention in the letter of notification of its decision that there is no possibility to seize the administrative judges before engaging a prior procedure of mediation and give the contact

details of the competent mediator. In case this information is absent, it is considered that the requirements concerning regular notification of an administrative decision provided for in article L. 112-3 of the Code of Relations Between the Public and the Administration are not respected. In such situation, the time limit for litigation does not run against the disputed decision.

According to the article R. 213-11 of the Code of Administrative Justice, a referral to the competent mediator interrupts the time limit for litigation and suspends the limitation periods under the conditions provided for in article L. 213-13 of the same Code. Article R. 213-12 of the Code of Administrative Justice says that when an Administrative Tribunal is seized of a request that has not been preceded by a mediation which was mandatory, this request is rejected. The case is immediately sent to the competent mediator. The dispute may return to the administrative judge only if the mediation procedure fails.

As we can see, French political authorities make sure that the rules of good practices in the procedure of mediation are respected:

- Information of the parties;
- Independence and impartiality of mediators;
- Guarantee of a fair procedure allowing respect for the rights of the parties and the principle of equality;
- Transparency;
- Execution of solutions obtained through mediation;
- Respect of a reasonable time for the implementation of the mediation;
- Provide for judicial control in order to respect the rights of both parties.

The first five years of implementation of the procedure of mediation can be considered as a success. In different feedbacks, administrative judges declared that in their practice they could see positive results but insisted on the necessity to continue the pedagogical action for convincing citizens that mediation can sometimes lead to much better results than litigation before the Administrative Tribunal, which will be longer and more expensive.

Actually, the French administrative courts themselves carry out awareness-raising and educational work to promote the mediation procedure. For example, there are one or more “mediation referents” within each Administrative Tribunal or Administrative Court of Appeal. Sometimes, it is the head of court, a judge or a registry officer. It can be a single person, but it is often a pair made up of a judge and a registry officer. The mediation reference may also be carried out by extended teams made up of several judges and agents. In November 2022, the

Conseil d'État made public a “Reference guide for the selection of mediators for the use of administrative courts”. This guide allows administrative judges to choose the mediator they propose to the parties to the dispute according to his/her specialization. These measures give encouraging results in practice. At the Administrative Tribunal of Nice, for example, during 2022, 1% of the cases of litigation were subject of an effective orientation in mediation. This percentage appears to be insignificant, but it represents at about 2,000 mediations ordered by the administrative judges per year²². In comparison with the criminal procedure, where mediation is implemented in about 30% of the total number of offenses that must be judged, the margin for progress remains important, but these results show a gradual and continuous evolution in the administrative procedure practice.

The organization of the French institution of mediation will become more structured in future years thanks to the National Council of Mediation, which started its activity in May 2023²³. The role of the Council is to ensure the standardization of training and regulation of the mediation practices. It will write a Code of ethics applicable to the practice of mediation, propose national training guidelines for mediators, establish the conditions for the registration of mediators and have the right to propose to political authorities any measures for improving the mediation procedure. The first composition of the board of the Council shows a high openness. Its more than thirty members are representing administrative institutions, courts, legal professions, NGOs, professional unions²⁴. The multiple and diversified skills of the members will be useful in establishing a regulatory framework to guarantee compliance with the essential principles on which mediation procedure must be based: independence, impartiality, transparency and equity.

Almost two centuries ago, Honoré de Balzac wrote in his novel “*Les illusions perdues*” that “a bad settlement is better than a good trial”²⁵. His words are still actual, and this study shows that the political objective is to continue in the direction of the enforcement of the dialogue between citizens and public administration, which is necessary for the trust that must exist between them.

²² « Justice administrative – Au cœur de la médiation, rencontre avec Amaury Lenoir », *Les Petites Affiches*, August, 4, 2023: <https://www.petitesaffiches.fr/actualites,069/droit,044/justice-administrative-au-coeur-de,28312.html>

²³ Law No. 2021-1729, December 22, 2021, established by article 45 the creation of the National Council for Mediation but it started its activity in May 2023.

²⁴ The list of the actual members is available on: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000047596951>

²⁵ H. de Balzac, *Les illusions perdues*, t. IV, 1977, La Pléiade, p. 1054.

4. What lessons for the Republic of Moldova?

From a chronological point of view, the institution of mediation, in all types of proceedings, was introduced in the Republic of Moldova before this was the case in France. The Moldovan legislator first adopted Law No. 134 of the 14th of June 2007 on mediation, which was replaced by Law No. 137 of the 3rd of July 2015 on the same subject. In the case of the Republic of Moldova, the organization of the institution of mediation appears to be even more structured because Law No. 137 provided for, in article 9, the immediate creation of the Mediation Council, which is composed of nine members²⁶. They are appointed for a term of four years, with the possibility of renewal once.

The Council has many powers, which are provided for in article 10 of the Law. These are regulatory powers – with the possibility of coming up with proposals for improving the normative framework in force as well as the drafting of the Mediator's Code of Ethics –, powers of control and sanction, even budgetary powers because the Council formulates proposals for expenditure to be included by the Ministry of Justice in the annual budget²⁷. Such an institution did not exist in France till

²⁶ Five members are selected by competition by the Ministry of Justice, one is a representative of civil society, one is appointed by the National Council for the Guarantee of Legal Assistance to the State, one is a lawyer appointed by the Council of the Lawyers' Union and another one is appointed by the General meeting of notaries.

²⁷ Article 10 of the law specifically provides for that the Mediation Council has the following powers:

“a) the promotion of mediation as an alternative way of conflict resolution; b) the formulation of proposals and participation in the development of policies and the improvement of the normative framework in the field of mediation; c) the implementation of policies in the field of mediation, including state-guaranteed mediation; d) the elaboration of draft normative acts necessary to ensure the functioning of the Council and for the exercise of the activity of mediator; e) approval of the Mediator's Code of Ethics; f) establishment and approval of rules for initial and continuous training of mediators and accreditation of mediator training providers in accordance with regulations approved by the Ministry of Justice; g) verifying the way in which mediation trainings are organized, as well as their compliance with the standards for initial and ongoing training of mediators; h) the organization of the certification examination for mediators; i) the mediators' activity certification, as well as the suspension, termination and resumption of mediation activity; j) the examination of complaints concerning the activity of mediators, the observation of disciplinary breaches and the pronouncing of disciplinary sanctions on mediators; k) keeping the list of mediator training providers, as well as other information materials, and ensuring access to interested persons, public authorities, courts and criminal prosecution bodies against them ; l) submission of proposals to the Ministry of Justice regarding expenses for mediation to be included in the state budget; m) submission to the Ministry of Justice of half-yearly reports on the use of financial resources for state-guaranteed mediation; n) the development and implementation of pilot programs and other programs in the field of mediation; (o) the exercise of other powers under this Law ».

May 2023. The Ethics Charter for mediators in administrative disputes, for example, was drawn up in France by the *Conseil d'État* and it was its own initiative. There was no text obligation to adopt such a text and the *Conseil d'État* had not competence for doing it. If we make a comparison between Moldovan Mediation Council and the actual French National Council of Mediation, we can see that the first one has more competences – going till the right to pronounce disciplinary sanctions and participation to the preparation of annual budget – than the second one, which has rather a role of consultation and support.

Regarding the initiation of the mediation procedure in Moldova, provided for in article 21 of Law No. 137, it is very similar to that provided for in France: the initiative may come from the parties to the dispute or from judges. The choice of mediator is made by the parties. The only material constraint is provided for in article 21 § 8: “the mediation contract may not contain clauses that would be contrary to law or public order and must correspond to the minimum requirements established by the Council”.

Moldovan legislation is stricter in terms of deadlines. Contrary to French legislation, which provides for that the mediation procedure will be implemented within a reasonable time, article 22 § 3 of the Moldovan Law says that the duration of the procedure may not exceed three months. The expiry of this period entails, in accordance with article 23 § 1 letter d), the end of the procedure, even if the parties did not really intend to waive it. Given the fact that this is a voluntary and not a compulsory mediation procedure, the parties may, under article 22 § 5, give it up at any time.

Law No. 137 contains a single article on mediation in the field of administrative litigation. Article 30 in particular provides for that: “(1) In disputes arising from administrative litigation reports, the provisions of this law shall apply insofar as they do not contravene the legislation regulating the negotiation of transactions in which the participation of legal persons and the conditions of their conclusions is governed by public law; (2) Public authorities and mediation organizations which offer mediation services in the field of administrative litigation disputes may establish additional criteria for the qualification of mediators who must intervene in this type of disputes and may approve the list of mediators”.

By reading this article, we see that the legislator has remained in very vague formulations regarding the way in which the administrative mediation procedure must be organized, the areas in which it can precisely be organized, with reference to other legislative norms, without citing them. Admittedly, we know that in the Republic of Moldova

disputes arising from the employment relations of civil servants are part of civil litigation and the mediation procedure is therefore admitted in this matter in accordance with the provisions of article 29. But there too, the legislator says that the mediation procedure “may be implemented” in this type of dispute, without providing for any obligation.

We therefore note that Moldovan legislation does not provide for a compulsory mediation procedure, as it is the case in France. This difference surely explains the very low rate of cases of use of such a procedure. Indeed, according to the statistical data communicated by the Mediation Council, the number of requests for mediation is constantly increasing. Their number was of 277 cases in 2017, 478 cases in 2018 and 709 cases in 2019, all disputes combined²⁸. This rate is still very low because they represent respectively 0.11%, 0.20% and 0.29% of the number of disputes that exist before courts²⁹. Of all the initiated mediation procedures only 5 (from 277 cases) were administrative disputes in 2017, 2 (from 478 cases) in 2018 and 2 (from 709 cases) in 2019³⁰. They represent a totally insignificant number. Such a situation shows that the culture of mediation in administrative disputes is almost absent, among citizens and judges alike.

Finally, we would like to mention that, in Romanian administrative litigation system, which the Republic of Moldova also had in the period 2000-2019, the amicable resolution of disputes between public administration and the citizens is done through a prior procedure (application) in which only the parties to the dispute can participate, without the assistance of a specialized mediator. In practical terms, however, both in Romania³¹ and in the Republic of Moldova, the institution of general litigation mediation is not widely practiced, and even less in administrative litigation. In addition, the procedure of prior administrative requests does not work either. In case the public administration’s action or inaction infringes the rights of citizens, they will directly seize the judge because, generally, their prior requests rest without any answer. As a result, the public administration’s attitude increases citizens’ dissatisfaction and distrust of it.

²⁸ The Council of Mediation of Republic of Moldova, *Strategia de Dezvoltare și Planul de Acțiuni pentru Consiliul de mediere din Republica Moldova în perioada 2020-2024*, p. 7, https://mediere.gov.md/sites/default/files/document/attachments/cdmd_-_strategie_si_plan_de_actiune_2020-2024.pdf

²⁹ *Idem*, p. 8.

³⁰ F. Chifa, V. Maihailov-Moraru, *Medierea garantată de stat. Analiză empirică a situației și perspective pentru Republica Moldova*, Chișinău, 2020, p. 20.

³¹ M. Ureche, *Autoritățile publice în dreptul statelor europene*, Alba Iulia, publishing house Altip, 2011, p. 198.

This situation also relates the nature of the relationship that exists between public administration and the citizens in the Republic of Moldova, which continues to be conceived in terms of hierarchy and not of dialogue and consensus building. The necessary development could begin with the introduction, as it is the case in France, of compulsory administrative mediation for certain areas, the list of which could be gradually expanded. Mediation should not be seen as competition for the office of the judge. On the contrary, it offers citizens and public administration a new way to settle their disputes themselves. For its successful implementation, it is necessary that this mechanism evolves concomitantly with the institution and that it develops in harmony with the State and not against it.

PARTICULARS OF THE COMMUNICATION PROCESS IN THE CASE OF MASS-MEDIA ETHICS

Lect. univ. dr. Grațian MOLDOVAN

Abstract

Just like business ethics and mass media ethics represent a subspecies of communication ethics. The world of business and mass media culture represent two significant compartments of the practical manifestation of communication ethics. Achieving the communication process requires at least two people, three or multiple of a human group or community. Media ethics as a subspecies of communication ethics must take into account the particularities of the communication process in order to avoid reductionist interpretations regarding the formulation of messages and communications that directly influence the establishment and maintenance of the spirit of public life. After print, the press, radio, television, the Internet have contributed decisively to globalization. We emphasize a non-negligible fact, mass media culture constitutes an environment of interactions, of which two interactions mark morality: intersubjectivity and intercommunication. The weighted and affirmative style is likely to generate trust, respect for oneself and others, necessary and essential ingredients for effective communication. Thus, communication practiced in a critical-constructive manner allows us to establish similarities and differences on what we know, what we want, on the ways in which things must be done and on what we expect from others. We find this style of communication in journalistic language. Media culture if it is not supervised in a careful, critical manner, in a word if it does not show control and self-control, it causes us to lose sight of any true ethical meaning, any project aimed at the realization of authentic values.

Keywords: *mass media ethics, communication process, language, morality, communication styles*

Verbal language as the foundation of a language helps to interpret signals and symbols in the case of non-verbal communication. But let's remember that in the process of communication, linguistic signs go through several stages: it is a symptom for the one who produces it (an indication); signal for the one in the receiving relationship; symbol for the horizon of expectation and understanding between the speaker and the interlocutor. A role is the behavioral norm of an individual, what he tends to do in determining circumstances. The same person can fulfill several roles. Certain people are likely to play the role of leader; while others of participation and subordination. Due to the roles we are involved in the network of positive or negative feelings. From sympathy, good manners, you can move to force, disgust and indifference.

They mark the increase or decrease of psychic and moral potential, intrinsic development and self-expression.

The group deals with obligations, rights and reporting to goals not necessarily through the verbal content of the interaction, moreover, this is also a dimension of group communication. This moral-affective and volitional cohesion gives strength and resistance to a group in the face of situational adversities in reality immediate.

Breaking down blockages caused by interpersonal communication ensures the enhancement of the group's creative energy. Maintaining a tolerant and permissive atmosphere, reducing inhibitions and reducing misunderstandings and preventing possible conflicts, leads to the manifestation of relevant dialogues. Disagreements are not suppressed, but the reasons for these disagreements are examined, looking for possible conciliations.

Language has both a psycho-affective and a logical aspect, constitutive aspects that are fully revealed to us in the process of communication, emphasizing the disclosure of feelings, notions and ideas. It covers the entire panoply of the communication process from perception to skill and assumption. The affective charge of language cannot avoid the actual presence of logical operations, and these also aim at the finality of language (the *de facto* and *de jure* achievement of communication), so called the social function of language.

E. Coşeriu rightly points out that the connection between the signifier (word) and the signified (what it designates, in other words the referential) is not a necessary causal relationship, but a human creation. Although animals have the ability to manifest some mental states, they do not speak, that is, the ability to signify, the defining feature of human language, does not appear.

Ferdinand de Saussure considers language as a phenomenon with two facets, one individual and the other social: speech (words) constitutes the individual, and language (langue) belongs to society. Between the two planes there is a relationship based on the principle of communicating vessels: nothing exists in speech without having been in language before, that is, they are indissociable elements in the concrete act and separable only on a theoretical level. Speaking is an individual activity but also a social habit, instituted in society and determined by it, like morality. The history of languages and languages is not independent from the social-cultural history of peoples and of course not least from the course of civilization.

Language and language are related to social life, to civilization, to the development of thought and particular forms of spiritual life. The habits and customs in force in a community favor the spread of certain

expressions and eliminate others from use. The non-coincidence between expression and understanding, between creation and the targeted model emphasizes the perpetual effort of creative efforts, of the stretched bow against the trajectory of the arrow, whose ballistic curve cannot avoid defeat.

The linguistic act in its essential dimensions (locutionary, illocutionary, perlocutionary and interlocutionary, etc.) involves both the psycho-affective and logical aspect, without reaching mutual exclusion.

Achieving the communication process requires at least two people, three or multiple of a human group or community. The communication process has different and sometimes even divergent folds, structuring and folding. The language proper to media ethics circumscribes both these continuities and discontinuities.

Interpersonal communication as an elementary unit is the basis of the configuration of other types of communication (group communication, public communication, joint verbal communication, scientific, artistic communication, etc.). Language involves both non-verbal and verbal communication. In addition to signals, various symbols (numbers, colors, musical notes, etc.), non-verbal communication also includes gestures and mimicry.

Before the creation of language, there are the conditions for its generation: the world in which we are caught and by which we are caught and by which we are conditioned; the other living things that go before us and that left their mark on the inherited collective unconscious; the world of unarticulated signals and signs, layers that only make up the instance of a "pseudo-language". The establishment of language in the form of a system of articulated signs, i.e. the fact of speaking implies the co-presence of what we call *energeia* and *ergon*, according to Wilhelm von Humboldt, and *la parole* and *langue*, according to Ferdinand de Saussure.

The production of the communication process requires the prior admission of "ego hic et nunc" me and the chronotopic (spatio-temporal) coordinates, that is, a context of communication situations with their psychological features and socio-historical conditions and means. There is no enunciation without enunciation, there is no communication without communication, there is no reproduction without production, just as there is no communication process and language as a system without the interposition between the communication process and language of speakers as interpreters. This is the relevant detail of the communication process that media ethics and the communication process must not neglect.

It is only thanks to the interpreters of language as an articulated system of signs that it acquires conventional and symbolic value. The interpreter mediates between the production of speech and its results,

between the common language and the singular utterance, the useful or useless pendulum between media culture and mainstream culture, whether we are dealing with the semiosis triangle of Ch. Sanders Pierce or the so-called semiotic square.

Linguistics should not be confused with the practical exercise of languages as a result of their knowledge. Linguistic acts circumscribe both language and/or language facts. Linguistics deals with the study of that language in which "signs" are words made up of sounds, that is, those that define articulated language. In articulated language we distinguish two essential realities: the linguistic act and the language. The concrete reality of language is the linguistic act, that is, the way one or more signs of articulated language are used for communication: a word, a sentence or a phrase. All this to make communication possible, which is the purpose of language. We define language as the set of common linguistic acts (isoglosses) of the community of speaking individuals from a certain territory and from a certain era or several eras.

General linguistics studies language in its essence as well as in its general aspects, sometimes wrongly identifying itself with the philosophy of language. It does not study language in itself and for itself, but in relation to other human activities - primarily in relation to thinking - trying to establish the role and place of language among the phenomena that express and characterize the human being.

The main problem of the philosophy of language is to answer the question "What is language?", while linguistics tries to perceive the way language manifests itself and its historical forms, which are languages. The philosophy of language is based on a certain philosophical conception and only in relation to this conception it refers to concrete linguistic phenomenon.

Bibliography

1. Myers, Christopher, *Journalism Ethics: A Philosophical Approach*, New York, 2010.
2. E. Coșeriu, *Introducere în lingvistică*, Ediția I-a, 1993, Editura Echinox Cluj-Napoca.
3. Russell, Nick. *Morals and the Media: Ethics in Canadian Journalism*, Vancouver: University of British Columbia Press, 1994, p. 78.
4. Smith, Ron F, *Ethics in Journalism*, Malden, MA: Blackwell, 2008.
5. Friend, Cecilia and Jane B. Singer, *Online Journalism Ethics: Traditions and Transitions*. New York: Armonk, M.E. Sharpe, 2007.
6. Ferdinand de Saussure, *Curs de lingvistică generală*, Editura Polirom Iași, trad. Izverna Tarabac Irina.

LEGAL REGIME AND LEGAL ASPECTS REGARDING THE LEASE AGREEMENT

PhD. Maria ALBU*

Abstract

The legal contracts concluded between the parties are numerous, regardless of their type. Among the contracts we also find the lease contract, a contract that occupies a special place among contracts, although it might seem that it is not as important as other types of contracts. Its significance is a special one and thus we consider it relevant to capture various legal aspects and its legal regime. The challenges that appear permanently are also felt at the level of this contract, regardless of whether we are talking about challenges regarding the parties in the contract, the object of the contract or the local administrative authority where it can be registered.

Keywords: *lease, legislation, controversies, legal regime*

1 Introduction

Romania, known in the past as the *granary of Europe*, unfortunately changed its title with the establishment of democracy. Guaranteed private property and freedom of decision regarding one's own property, have made a good part of the agricultural land change its destination (especially around the cities) and we have witnessed the development of large residential districts. This is how the city or commune expanded and residential areas were created. However, a very good part of the agricultural lands remained as they were and were either cultivated with cereals or other crops or were subject to leasing.

The development of agricultural land leasing in our country in recent years has been possible mainly due to some advantages. Thus, leasing facilitates the formation of large-scale agricultural holdings, with minimal investment costs in agricultural land trading actions. At the same time, leasing represents an alternative for the exploitation of the lands of those owners who, for objective reasons such as advanced age, urban residence, the precariousness of production factors, etc., cannot work the lands they have. In many situations, not only can they not work, but they also do not want to do so. He prefers to work, sign a lease,

* Senior lecturer, Faculty of Law and Social Sciences, "1 Decembrie 1918" University of Alba Iulia, Romania.

collect the rent and thus have a sum of money that comes to him without making any physical effort and without taking any risks. On the other hand, leasing does not affect the regime of land ownership, neither during the contract nor after its termination.

Since 2007, leasing has proven its effectiveness, as the agrarian policy has supported farmers' incomes in a European manner. If initially by Law no. 16/1994 regarding leasing, it was established that the lessee had to be a Romanian citizen, later this was modified, foreign citizens being also allowed to enter into such a contract. The result was that many foreign nationals entered into such contracts.

The public administration, through its authorities, must work for the citizen and come to his support. Including the local authorities must do this and the lease manifests concretely at the level of territorial administrative units. Lease contracts can be registered with the local councils within whose jurisdiction they were concluded. "Through the government, the Executive, in particular, and the public administration, in general, must adopt the most suitable decisions in order to realize the general interest of the citizens, must ensure the organizational and functional framework in order to develop economic, social, educational, financial, etc. of the company and, above all, must apply the concrete, effective, thorough and timely measures to satisfy the public interest of the company."¹

2. Legal regime

The lease contract is regulated in the Civil Code, Book V "On obligations", Title IX "Different special contracts", Chapter V "Lease contract", Section 3 "Particular rules in the matter of lease", articles 1836-1850.

The lease is a contract by which one of the parties, called the lessor, transfers agricultural goods to the other party, called the lessee, to be exploited for a period of time, in exchange for a price, called the lease, established by the parties. The lease is a variety of the lease contract (and not a distinct, independent civil contract) in the article 1.778 para. 1 C.civ. it is stipulated that the lease of agricultural goods is called a lease, for which it is subject to the special provisions of the law on the matter and, in addition, to the rules of the lease².

¹ Marta Claudia Cliza, Constantin Claudiu Ulariu, *Drept administrativ, Partea Generala (Administrative law, General Part)*, C.H. Beck publishing house, Bucharest, 2023, p. 159.

²Juhász Ágnes, *Interpretation and contractual intention: Some issues concerning the partial invalidity of the contract*, MULTIDISZCIPLINÁRIS TUDOMÁNYOK: A MISKOLCI EGYETEM KÖZLEMÉNYE 12:3, 2022, pp. 24-35.

If we are to refer to the legal characteristics of the lease contract, we mention that this is a synalagmatic (bilateral) contract, the doctrine appreciating that from the date of its completion, it generates mutual and interdependent rights and obligations between the parties, the obligation of each party having its legal cause in the obligation of the other. In accordance with article 1171 Civil Code, first sentence, "the contract is synalagmatic when the obligations arising from it are mutual and interdependent". From the definition that the legislator gives us, it therefore follows that, in order to qualify a contract as synalagmatic, it is necessary that the obligations arising from the parties upon its conclusion, be mutual and interdependent.

The lease contract is exercised successively over time, without bringing changes in terms of ownership. It is a non-transferable property contract. However, it is a onerous contract. If an agricultural asset is transferred, for the purpose of temporary use or exploitation, free of charge, the contract is void as a lease, but we consider that it can be recognized as a use loan (loan), if the asset has been handed over (the loan being a real contract) and if the other validity conditions provided by law for the loan are met. Also, the lease contract is concluded *intuitu personae*, the contract being considered to have been concluded in consideration of the personal qualities of the lessee (not the lessor).

Being a synalagmatic (bilateral) act, the lease contract has a double derivative object: the leased goods and the price paid by the lessee, called rent. According to article 1.836 of the Civil Code, any agricultural goods can be leased, such as:

a) agricultural lands, namely productive agricultural lands - arable, vineyards, orchards, wine nurseries, fruit trees, fruit bushes, hop and mulberry plantations, wooded pastures, lands occupied by constructions and agro-zootechnical installations, fisheries and land improvements, technological roads, platforms and storage spaces that serve the needs of agricultural production and unproductive lands that can be arranged and used for agricultural production;

b) animals, constructions of any kind, machines, equipment and other such goods intended for agricultural exploitation.

The list is exemplary and not limiting. In all cases, to be in the presence of a lease contract, the mentioned goods must be intended for agricultural exploitation (production) by the lessee. If the use of some of the assets provided for by law is transferred for consideration for other purposes (for example, the land with or without construction for tourist or sports purposes, animals for carting when building a house, etc.), the contract will no longer be subject to the regulations regarding the lease, but the rules of the location. Of course, the contract by which the owner

of the agricultural goods performs the agricultural works, the other party acquiring the harvest at the stipulated price (sale of a future harvest) does not constitute a lease either.

With regard to the lease, the Civil Code left to the parties discretion the determination of the lease price, either in the form of a sum of money or in the form of a quantity of agricultural products, not excluding the determination of the lease partly in kind and the rest in money (lease mixed)³.

3. The form, validity conditions of the lease agreement and its parts

Unlike the common law lease, which is a consensual contract, the requirement of the written form being provided only *ad probationem*, the lease is a solemn contract. According to art. 1,838 para. 1 C.civ. "The lease contract must be concluded in writing, under penalty of absolute nullity". It follows that, by derogation from the principle of consensualism, the Civil Code provides for the written form (regardless of whether the document is authentic or only under a private signature) *ad validitatem*. In case of non-compliance with the written form, we distinguish two situations:

a) If the contract has not been executed, no problems arise; none of the parties can issue claims against the other party;

b) If the verbally concluded contract has been executed (for example, the lessor has handed over the leased land and the lessee has started working on it), since the contract is void and the nullity is imputable to both parties, the relations between them cannot be resolved in accordance with the provisions governing the lease, but in the light of the rules and principles applicable to extra-contractual relationships (for example, the person who cultivates the land can, in opposition to the owner of the land, file a claim based on unjust enrichment, art. 1,345 et seq. of C.civ.).

³ In case of non-execution of the obligations in the contract, the termination of the contract can be requested through the courts, according to common law. In case of total or partial loss of the leased goods, as well as in the case of cancellation (dissolution) of the lessor's title, the rules of common law are also applicable. On the other hand, the unilateral denunciation (as a way of terminating the rental contract concluded for an indefinite period) is not applicable to the lease, because it is concluded for a determined period (either established by the parties or implied by the law, art. 1,837 C.civ). The lease contract can also be terminated before reaching the term, but this way of termination (*mutuus disensus*) should not be confused with unilateral denunciation. Art. 1,850 Civil Code stipulates that the lease terminates upon the death, incapacity or bankruptcy of the lessee. This legal norm highlights the *intuitu personae* character of the lease with regard to the person of the lessee.

Without regulating another condition of validity of the lease contract, art. 1.838 para. 2 C.civ. stipulates an obligation of the lessee: under the penalty of a civil fine established by the court for each day of delay, the lessee must submit a copy of the contract to the local council in whose territorial radius the leased agricultural goods are located, in order to be registered in a special register kept by the secretary of the local council, and when the leased goods are located in the territorial area of several local councils, a copy of the contract is submitted to each local council in whose territorial area the leased goods are located⁴.

So, the contract is registered in a special register, kept by the secretary of the local council. In the absence of an express provision, in the doctrine it is appreciated that the submission of the lease contract for registration must be done immediately after its conclusion.

The purpose of this legal provision is to have a very accurate record of the people who exploit agricultural assets as lessees (this aspect is important, for example, in order to grant agricultural subsidies or to collect the tax related to the income obtained). We appreciate that, in order to impose a civil fine on the tenant, the court can be referred by the tenant or the local council, but nothing prevents the tenant from registering the lease contract with the local council himself.

The lessor is very interested in registering the lease contract at least because such a contract (even verified by writing under a private signature) constitutes, under the law, an enforceable title for the payment of the lease at the terms and in the manner established in the contract⁵.

According to art. 1.838 para. 4 C.civ., the provisions regarding the land register remain applicable. This means that ensuring the opposability of the lease contract is not ensured by registration with the local council, but - when it comes to real estate - by noting the tenant's right of use in the land register (art. 902 Civil Code). Thus, it is very important to remember that regarding the validity conditions of the lease contract, it must be concluded, *ad validitatem*, in written form.

⁴ Maria Ureche, *Autoritățile publice în dreptul statelor europene (Public authorities under the law of European states)*, Altip publishing house, Alba Iulia, 2011, pp.199-205.

⁵ The lease contract cannot be concluded for an indefinite period. Even if the duration is not determined, the lease is considered to be made for the entire period necessary to harvest the fruits that the agricultural good will produce in the agricultural year in which the contract is concluded. For example, in the case of a corn crop, the contract will end in the fall after picking the cobs and freeing the land from the corn stalks, even if the contract was concluded in April of the same year. On the other hand, in the case of animals, constructions of any kind, machines, equipment, the contract is considered concluded for one calendar year. When the contractual term expires, the contract terminates by law, as does the common law lease.

Failure to comply with the solemn form required by law is sanctioned by the absolute nullity of the contract (art. 1.838 para. 1 Civil Code).

The contracting parties can be natural or legal persons. As a lessee, the contract can be concluded by the owner, usufructuary or other legal holder of the goods that form the object of the contract and who can transfer the right of use⁶.

Unlike the rules applicable to the lease (where, in principle, the lessee can have the capacity of lessor), the lessee cannot have the capacity of lessor. Likewise, lessees' offices are not allowed. Through these offices, the legislator had in mind the general lease (through which the lessee would lease a set of agricultural exploitations, contracting each exploitation with sub-lessees), intermediary offices between lessors and lessees or certain forms of association between lessees that would allow that, although the contract was concluded with a certain lessee, the exploitation of the agricultural assets should be carried out by another lessee (which from a practical point of view would lead to the same situation as when sublease contracts were concluded). In other words, any legal formulas that would lead to the circumvention of the imperative rules prohibiting total or partial subletting are prohibited. The prohibition to sublease also entails the prohibition to assign the lease, because the assignment of the lease produces stronger (serious) effects than subletting (*cessio est maius, sublocatio est minus*). We must not forget the tax on income from the sale of goods, including lease. Payment of this tax is required by law and the lessee must consider it as a legal obligation.

From the prohibition of subletting, it also follows that the lessee cannot contribute the use of the leased goods in an agricultural company, because the contribution of the use of an asset is equivalent to a sublease (or assignment). It follows that the lessee, under no circumstances, can conclude a lease contract as a lessee, this contract being considered concluded *intuitu personae* as regards the person of the lessee. But the law does not oblige the tenant to personally perform all agricultural works. He can contract the execution of some works with natural or legal persons providing services in agriculture and can conclude employment contracts, for an indefinite or determined period, with permanent or seasonal employees⁷.

⁶ for example, the landowner, the agricultural society established according to Law no. 36/1991 regarding agricultural companies and other forms of association in agriculture that has a right of use over land, agricultural tools, machinery, etc., a right that can be transferred under a lease contract.

⁷ The lessee is obliged, even in the absence of an express stipulation, to insure the agricultural goods for the risk of the loss of the harvest or the death of animals due to natural calamities

The personal character of the lease refers to the management, coordination, organization and control of the activity, as well as the management of the agricultural assets by the lessee, who bears the full responsibility. Although it expressly prohibits subletting and, implicitly, assignment of the contract by the lessee, exceptionally, art. 1.846 C.civ. provides that with the written consent of the lessor, the lessee can assign the lease contract to the spouse who participates in the exploitation of the leased property or to his or her adult descendants (respectively, children, grandchildren)⁸.

As a lessee, (one or more, for example, members of a family) the contract can be concluded by natural or legal persons. A co-owner can also have the quality of tenant. Thus, if the co-owners (co-sharers) do not regulate their relations between them according to the rules applicable to the division (when the permission for the property to be used, for a fee or free of charge by one of them does not have the meaning of a lease), they can conclude between them a lease contract, the beneficiary of the use adding to his capacity as a co-owner and that of a lessee, and the others having towards him the obligations provided by the law for lessors. Any lessee, natural or legal person, has the priority right to purchase the leased agricultural goods. Unlike the previous regulation, which provided that the lessee had the right of preemption only if the subject of the lease was agricultural land located outside the village, the new Civil Code extended the scope to any leased agricultural property that the lessor intends to sell, a provision intended to protect the lessee and encourage him to properly preserve the leased goods. Regarding the right of preemption, we show that, according to art. 4 of Law no. 17/2014, the alienation, by sale, of agricultural land located outside the village is done in compliance with the substantive and formal conditions provided by the Civil Code and the right of preemption of the co-owners, lessees, neighboring owners, as well as the to the Romanian state, through the State Domains Agency, in this order, at the same price and under equal conditions.⁹

⁸ This form of assignment is allowed only if the lessee is a natural person, and the exploitation of the agricultural assets is to be practically carried out by the same family, which is likely to allow the personal nature of the lease contract to be preserved.

⁹ Adina R. Motica, Oana-Elena Buzincu, *Paralelismul înțelegerii și aplicării dispozițiilor Legii nr. 17/2014, între teorie și practică (The parallelism of the understanding and application of the provisions of Law no. 17/2014, between theory and practice)*, Annals of the West University of Timișoara nr. 1/2016, Universul Juridic publishing house, Bucharest, 2016, p. 39

4. Conclusions

According to art. 1.838 para. 5 C.civ. all expenses related to the conclusion, registration and advertising of the lease contract shall be borne by the lessee. The text of the law takes into account, for example, the fee due to the lawyer who drew up the lease contract or the one due to the notary public who authenticated it, the fees paid for registering the contract with the local council or for noting it in the land register.

Art. 1.839 Civil Code stipulates that the lessee can change the category of use of the leased land only with the prior written consent of the owner and in compliance with the legal provisions in force. Regarding this legal provision, some observations are required. The first one refers to the fact that this agreement must be issued only from the owner, not from the usufructuary or from another person who transferred the right of use to the tenant. Changing the category of use (such as the transformation of a forest, orchards or vineyards into arable land) generates substantial changes, which affect the productive potential of the land, and only the owner must express his consent. The second observation is that the owner's consent must be given in advance, given in writing (a private signature being sufficient) and the category of use in which the change is requested must be indicated, an agreement in principle not being sufficient. Last but not least, we note that the owner's agreement must comply with the legal provisions in force.

The lessee must pay the rent, in kind and/or money, according to the contract. According to art. 1.845 C.civ. lease contracts concluded in authentic form, as well as those registered with the local council, constitute, under the law, enforceable titles for the payment of the lease at the terms and in the manner established in the contract.

Both lease contracts concluded in authentic form (regardless of whether or not they were registered at the local council), as well as those concluded by writing under private signature, constitute executory titles, but in this case only if they were registered at the local council. Lease contracts constitute enforceable titles under the conditions shown above only with regard to the obligation to pay the lease, and not for other obligations. For example, the lease agreement ascertained by private signature and registered with the local council does not constitute an enforceable title to be used by the lessor to evict the lessee from the building intended for agricultural exploitation in case the lessee has not paid the rent. Such a contract can be enforced to enforce the obligation to pay the rent, but for eviction it is necessary to file a legal action.

THE DATE OF "STARTING CONSTRUCTION OF THE HOUSE" INDICATED IN ART. 6 OF LAW NO. 15/2003 REGARDING THE SUPPORT GRANTED TO YOUNG PEOPLE FOR THE CONSTRUCTION OF A PERSONALLY OWNED DWELLING IS REPRESENTED BY THE DATE OF SUBMISSION OF THE APPLICATION FOR THE ISSUANCE OF THE URBAN PLANNING CERTIFICATE OR THE DATE OF ISSUANCE OF THE BUILDING PERMIT?¹

Data „începerii construcției locuinței” indicată în art. 6 din legea nr. 15/2003 privind sprijinul acordat tinerilor pentru construirea unei locuințe proprietate personală este reprezentată de data depunerii cererii pentru emiterea certificatului de urbanism sau de data emiterii autorizației de construire?

Dr. Raluca Laura DORNEAN PĂUNESCU*

Abstract

The article aims to highlight the correct and legal interpretation of the provisions of art. 6 of law no. 15/2003 regarding the support granted to young people for the construction of a personal property, more precisely, art. 6 para. 1 of law no. 15/2003 which imposes on the beneficiary of the land the obligation to start the construction of the house within one year from the date of allotment of the land and to carry it out in compliance with the provisions of law no. 50/1991 regarding the authorization of the execution of construction works, republished, with the subsequent amendments and additions, provision adopted within the clauses of the award contract for free use.

Specifically, the author analyzes the correlation with the provisions of art. 2 para. (2¹) of law no. 50/1991 regarding the authorization of the execution of construction works, which stipulates that the authorization procedure for the execution of construction works begins with the submission of the application for the issuance of the urban planning certificate in order to obtain, as a final act, the construction authorization.

¹ Study presented at the International Conference on the theme 'Law and its challenges – in the socio-economic and administrative field' Public and Private Affairs: law, business, and public administration, '1 DECEMBRIE 1918' University of Alba-Iulia, June 28-30, 2023.

* Lect. Univ. Facultatea de Drept, Universitatea Europeană "Drăgan" Lugoj, România, avocat Baroul Timiș, ralucalaura_paunescu@yahoo.com; ralucalauradorneanpaunescu@gmail.com

Last but not least, the study mentions the attitude of the territorial administrative unit, which, in bad faith, delayed the adoption of the local council decision regarding the town planning regulations, which led to the blocking of the issuance of town planning certificates/building permits and implicitly the impossibility of the beneficiaries to start the construction in compliance with the legal provisions.

Keywords: Law no. 15/2003 regarding the support granted to young people for the construction of a privately owned house, the date of the start of the construction of the house, the date of submission of the application for the issuance of the urban planning certificate, the date of issuance of the building permit

(k390 other substantive areas of law: other – administrative law)

1. Prolegomene

Law no. 15/2003 on the support granted to young people for the construction of a personal property ² states in its first article the following:

(1) The present law regulates the regime of awarding, upon request, to young people aged between 18 and 35 years of land, from the lands located in the private domain of administrative-territorial units, for the construction of a privately owned dwelling.

(2) The allocation of the land is made for free use during the existence of the privately owned dwelling, within the limits of the available surfaces, by decision of the local council of the commune, city, municipality or sector of the Bucharest municipality where the land is located.

The same regulatory act stipulates in Article 6 that:

(1) *The beneficiary of the land for the construction of a personal residence is obliged to start the construction of the dwelling within one*

² Republished in the Official Gazette, Part I, no. 182 on March 13, 2014.

Traian Dobre, *Housing for young people on lands acquired through purchases, exchanges, or donations*, Legestart no. 3/2017 <https://lege5.ro/App/Document/gi4dmnbvgq4a/locuinte-pentru-tineri-pe-terenuri-dobandite-prin-achizitii-schimburi-sau-donatii?pid=261707891&expression=#p-261707891>, accessed on November 14, 2023. Irina Sferdian *Exercising the right of accession by the holder of a real right over another person's property - Romanian Journal of Private Law*. (Universul Juridic) nr. 4/2020, <https://lege5.ro/App/Document/gqzdcnzzgmyq/exercitarea-dreptului-de-accesiune-de-catre-titularul-unui-drept-real-asupra-bunului-altuia>, accessed on November 14, 2023.

Eugen Staicu, *Houses for personal ownership on land allocated by the state: How long can construction be delayed?*, Legestart no. 7/2014. <https://lege5.ro/App/Document/gi4dkobugi2q/locuinte-proprietate-personala-pe-teren-atribuit-de-stat-cat-timp-puteti-intarzia-constructia?pid=261551616&expression=#p-261551616>, accessed on November 14, 2023.

year from the date of land allocation and to carry it out in compliance with the provisions of Law no. 50/1991 on the authorization of construction works, republished, with subsequent amendments and additions.

(2) In case of non-compliance with the conditions specified in paragraph (1), the local council may, by decision, revoke the beneficiary's right to use the allocated land.

(3) Zonal urban plans (PUZ) and detailed urban plans (PUD) for rows or attached housing complexes identified according to Article 1, paragraph (2), are initiated and funded by local councils.

The aforementioned legal provision has been incorporated into the clauses of the agreement for the free use allocation concluded between the beneficiary of the land and the administrative-territorial unit represented by the mayor.³

Thus, Chapter IV of such a contract, marginally titled RIGHTS AND OBLIGATIONS, outlines a series of rights of the owner and extensive obligations of the beneficiary, respectively:

4.1. The rights of the owner

a) The owner has the right to inspect the property, as well as the manner in which the beneficiary fulfills the obligations assumed by the contract. Inspection shall be carried out only after prior notification of the beneficiary, within 15 days, by the owner's representatives;

b) To terminate the contract in case the beneficiary fails to comply with obligations stipulated by law;

c) The owner has the right to unilaterally modify the regulatory part of this contract, with prior notification to the beneficiary, for exceptional reasons related to national or local interests.

4.2. The obligations of the beneficiary are:

a) Take care, guard, and preserve the property with the prudence and diligence of a good owner;

³ In the city of Timișoara, a series of contracts were concluded only as a result of initiating administrative litigation actions that also included a claim for damages, which was rejected by the judicial courts with the reasoning: accepting the action represents sufficient satisfaction. For references regarding the concepts of "damages," "loss," and "compensation R.L. Dornean Păunescu, Moral damages in Romanian administrative litigation: A FATA MORGANA? Published in.. „Journal of Public Administration, Finance and Law”: https://www.jopafl.com/uploads/issue24/MORAL_DAMAGES_IN_ROMANIAN_ADMINISTRATIVE_CONTENTIOUS_A_FATA_MORGANA.pdf

In the respective study, we proposed *de lege ferenda*, the harmonization of the entire normative architecture so that the injured person who has suffered material damage or moral prejudice is legally and thoroughly compensated, and the moral damages claimed through an action in the administrative litigation of administrative acts assimilated not to be a veritable mirage.

b) Comply with the current legal provisions in the field of building construction, notify the County Inspectorate for Constructions of the commencement of building the dwelling, and provide a copy of this announcement to the Municipality of Timișoara (Commission for the implementation of Law no. 15/2003, as well as to the Urban Planning Department);

c) Within a maximum of three months from the signing of the contract by both parties, fence the allocated plot with a temporary fence against occupation with construction materials or materials resulting from neighboring works; otherwise, the Municipality of Timișoara does not assume responsibility in this regard;

d) According to Article 6 of Law no. 15/2003, the beneficiary of the allocated land under this law is obligated to commence the construction of the dwelling within one year from the date of land allocation and to carry it out in compliance with the provisions of Law no. 50/1991. In case of non-compliance with this condition, the local council may, by decision, revoke the beneficiary's right to use the land allocated under Law no. 15/2003;

e) Complete the construction within 5 years from the date of the free use allocation of the land; otherwise, the right to free use is revoked for the duration of the existence of the construction;

f) Use the land received for free use according to its destination, as per the conditions of Law no. 15/2003;

g) Bear, from the date of taking over the property, the expenses necessary for use, without the right to seek their reimbursement from the owner;

h) Obtain the prior written consent of the Municipality of Timișoara for the alienation of the construction or the change of destination of the dwelling built on the allocated land. In the case of a change of ownership of the construction or a change in its use to a different destination other than a residence, the right to free use of the land is lost. In these cases, the beneficiary, the owner of the dwelling built on the land subject to this contract, has the opportunity to directly purchase the land according to Article 8 of Law no. 15/2003;

i) Return the borrowed property in the situations provided by Article 5.1 lit. a) - d); j) Seek the written consent of the owner for any modifications made;

k) Upon termination of the contract, make the property available to the owner in the condition it is at that time, and any investments, improvements, constructions made during the contract period cannot be claimed;

l) The beneficiary is obliged to respect the conditions imposed by the nature of the property (environmental protection and other obligations derived from legislation);

m) Violation of the provisions of Article 3, paragraph (l) of Law no. 15/2003 by the beneficiary, by not declaring that they own or have owned a property or land intended for building residences, constitutes the crime of false statements and is punishable according to the provisions of the Penal Code.

2. The Particular Case of Certain Young Beneficiaries of Law No. 15/2003 in Timișoara

On **March 27, 2019**, Resolution no. 127/27.03.2019 was approved, concerning the approval of the hierarchized nominal table by score of land applicants according to Law no. 15/2003 and the allocation of validated plots in accordance with the decision of the Local Council of Timișoara no. 20 from January 29, 2019.⁴

On **November 11, 2021**, the administrative-territorial unit of Timișoara concluded Lease Agreement No. 9 with X as the beneficiary, with the object of granting by the owner the right to free use of the land registered in CF no. xxxxxx Timișoara, cadastre number A1993/xx, with an area of 276 m².

On **January 17, 2022**, the claimant requested Timișoara City the issuance of an Urbanism Certificate. The response from Timișoara City in January 2022 was as follows:

Considering your request CUO2022-000101 dated January 13, 2022, for obtaining the Urbanism Certificate for the purpose: ".....," which you will complete, we hereby inform you of the following:

- Taking into account the provisions of the Urban Planning Regulations (Government Decision 525), Article 32

- Considering the lack of clear regulations for the proposed row developments in PUZ 204/2003 taken over by PUG approved by HCL no. 157/2002 extended by HCL no. 619/2018, regarding mandatory setbacks, cornice heights, architectural conformity, so as to achieve architectural coherence;

- Taking into account the disastrous experience of the development of row buildings on Arghezi, where a result of extremely

⁴ According to the Methodological Norm for the application of Law no. 15/2003 on support granted to young people for building personal property housing, dated July 29, 2003, specifically Article 5, paragraph (2), the implementation of the decision of the local council to allocate land for the free use for building a dwelling is done by the mayor, within 15 days from the date of approval by the local council, based on a minutes.

poor quality was obtained due to the lack of a regulation on architectural conformity.

The Urbanism Certificate requested by you will be issued only after the adoption of a simplified and specific regulation, which will be approved by a Local Council Decision in the coming months (February-March).

Similarly, in **JUNE 2022**, the City provides the following response: The Urbanism Certificate requested by you will be issued only after the adoption of a simplified and specific regulation, which will be approved by a Local Council Decision in the coming months (May-June).

Under these circumstances, through these responses, Timișoara City implicitly declares that the procedure has been **SUSPENDED** until the adoption of the respective local council decision, thereby halting all processes.

After 6 months, through Decision no. 259/14.06.2022, Timișoara City adopted Regulations regarding row houses. Consequently, Urbanism Certificates could only be issued starting from **July 25, 2022**. Until that date, all processes were blocked.

It is worth noting that a meeting was held with all beneficiaries, attended by a representative of the Heritage Department and another representative of the administrative-territorial unit. During the meeting, the latter informed the beneficiaries not to rush with construction, as the Timișoara City Hall would handle all aspects related to building a road, as well as those related to sewage and electricity.

On **April 24, 2023**, the beneficiary of Law no. 15/2003 receives the following notification from the Municipality – Technical Commission for the implementation of Law no. 15/2003, informing them that, based on analyses conducted at the level of Timișoara UAT (Administrative-Territorial Unit), it has been found that:

- *You did not comply with the provisions of Article 6, paragraph 1, of Law no. 15/2003, republished, regarding support provided to young individuals for building a personally owned residence.*

- *You did not comply with the provisions of Article 4.2, paragraph d), of the Free Use Allocation Contract concluded with Timișoara Municipality, where you are the beneficiary.*

Regarding the fact that you did not commence the construction of the residence within one year from the date of land allocation in accordance with the provisions of Law no. 50/1991 on the authorization of construction works, republished, with subsequent amendments and additions, you are requested to analyze your situation. If you conclude that the identified situation does not apply, please present justifying documents to correct the information obtained

by the Timișoara City Hall within 10 days from the date of receiving this notification, but no later than May 20, 2023.

In the event that, following your analysis, you confirm the identified situation, this notification informs you of the application of Article 6, paragraph 2, of Law no. 15/2003, republished, regarding support provided to young individuals for building a personally owned residence, combined with Article 5, paragraph 1, letter c), of the Free Use Allocation Contract concluded with Timișoara Municipality, where you are the beneficiary. Consequently, the withdrawal of the right to free use of the allocated land and the termination of the Free Use Allocation Contract concluded between Timișoara Municipality as the owner and yourself as the beneficiary will be enforced.

In such a situation, considering that the young beneficiary of Law no. 15/2003 was prevented by the Municipality of Timișoara from undertaking any procedures between November 11, 2021, and July 25, 2022, receiving a notification in April 2023, the issue arises of interpreting contractual clauses that stipulate that the beneficiary of the allocated land according to this law is obligated to COMMENCE THE CONSTRUCTION OF THE DWELLING within one year from the date of land allocation and to carry it out in compliance with the provisions of Law no. 50/1991. This raises questions about what is meant by "commencing the construction of the dwelling," "commencing the building of the dwelling," as well as determining the "date of commencing the dwelling," taking into account the impossibility of obtaining the urbanism certificate under Law no. 50/1991.

3. Compliance with the Provisions of Law No. 50/1991 Regarding the Authorization of Construction Works⁵

In accordance with the legal provisions outlined in Article 2 of Law no. 50/1991 regarding the authorization of construction works:

(1) The building permit constitutes the final act of local public administration based on which the execution of construction works is allowed, corresponding to the measures provided by the law regarding the location, design, execution, operation, and post-use of constructions.

(21) The procedure for authorizing the execution of CONSTRUCTION WORKS BEGINS upon the submission of the application for obtaining the urbanism certificate, with the final act being the building permit, and includes the following stages:

⁵ O. Puie, *Theoretical and Practical Treaty on Administrative Litigation*, Volume II, Universul Juridic Publishing House, Bucharest, 2016. A. Trăilescu, *Administrative Law – University Course, Special Part*, 2nd Edition, C.H. Beck Publishing House, Bucharest, 2020.

- a) Issuance of the urbanism certificate;
- b) Issuance of the opinion of the competent environmental protection authority for investments not subject to environmental impact assessment procedures;
- c) Notification by the applicant to the competent public administration authority regarding the maintenance of the request for obtaining the building permit, as the final act, for investments for which the environmental protection authority has established the need for environmental impact assessment and issued guidance according to the legislation on the assessment of the impact of certain public and private projects on the environment;
- d) Issuance of opinions and approvals, as well as the administrative act of the competent environmental protection authority regarding investments assessed from the perspective of environmental impact;
- e) Preparation of the technical documentation necessary for the authorization of construction works, hereinafter referred to as technical documentation - D.T.;
- f) Submission of the documentation for the authorization of construction works to the competent public administration authority;
- g) Issuance of the building permit.

Article 6, paragraph (2) of the same legal act states: The urbanism certificate is issued by the authorities empowered to authorize construction works provided for in Article 4 and Article 43 letter a) and is issued to the applicant within a maximum of 15 working days from the date of registration of the request, explicitly mentioning the purpose of its issuance.

Without a doubt, it can be observed that the commencement of any construction depends primarily on the submission of the application for the issuance of the urbanism certificate by the public authority, leading to the determination of the necessary documents for obtaining the building permit. In the absence of the urbanism certificate as well as the building permit, any dwelling is constructed in violation of the provisions of Law no. 50/1991 and is, therefore, built illegally.

However, according to Article 1, paragraph 1 of the aforementioned legal act, the EXECUTION OF CONSTRUCTION WORKS is permitted only based on a building or demolition permit issued under the conditions of this law, at the request of the holder of a real right over a property - land and/or buildings - identified by cadastral number, unless the law provides otherwise.

Furthermore, our opinion is grounded in other contractual provisions, specifically the provisions inserted in Article 4.2 letter b) of the Contract, according to which the Beneficiary is obliged:

- to comply with the current legal provisions in the field of building construction,
- to inform the County Inspectorate in Construction about the commencement of the building of the dwelling, along with a copy of this announcement to the Municipality of Timișoara (Commission for the implementation of the provisions of Law no. 15/2003, as well as the Directorate of Urbanism).

Thus, we observe the dichotomy between "commencement of building the dwelling," which implies obtaining the final act of the building permit, and "commencement of the construction of the dwelling," which refers to initiating the procedure imposed by the special law, namely Law no. 50/1991 regarding the authorization of construction works.

Conclusions

In order to obtain a jurisprudential interpretation of contractual clauses, actions have been initiated to establish the fact that the construction of the dwelling was commenced upon the submission of the application for obtaining the urbanism certificate, with the final act being the building permit, based on Article (21) of Law no. 50/1991 regarding the authorization of construction works.

Similarly, actions have been initiated to establish the fact that the one-year term within the mixed resolutive condition stipulated in Article 4.2 letter d) of the Allocation Contract was suspended during the period: contract conclusion – July 25, 2022 (the date of issuance of urbanism certificates after the approval of the Urbanism Regulations by the HCL).

Bibliography

1. Traian Dobre, *Housing for young people on lands acquired through purchases, exchanges, or donations*, Legestart no. 3/2017, <https://lege5.ro/App/Document/gi4dmnbvgq4a/locuinte-pentru-tineri-pe-terenuri-dobandite-prin-achizitii-schimburi-sau-donatii?pid=261707891&expression=#p-261707891>, accessed on November 14, 2023
2. Irina Sferdian *Exercising the right of accession by the holder of a real right over another person's property - Romanian Journal of Private Law*. (Universul Juridic) nr. 4/2020, <https://lege5.ro/App/Document/gqzdcnzzgmyq/exercitarea-dreptului-de-accesiune-de-catre-titularul-unui-drept-real-asupra-bunului-altuia>, accessed on November 14, 2023.
3. Eugen Staicu, *Houses for personal ownership on land allocated by the state: How long can construction be delayed?*, Legestart no. 7/2014, <https://lege5.ro/App/Document/gi4dkobugi2q/locuinte-proprietate-personala-pe-teren->

atribuit-de-stat-cat-timp-puteti-intarzia-constructia?Pid=261551616
&expression=#p-261551616, accessed on November 14, 2023.

4. R.L. Dornean Păunescu, Moral damages in Romanian administrative litigation: A FATA MORGANA? Published in.. „Journal of Public Administration, Finance and Law”: https://www.jopafll.com/uploads/issue24/MORAL_DAMAGES_IN_ROMANIAN_ADMINISTRATIVE_CONTENTIOUS_A_FATA_MORGANA.pdf
5. O. Puie, *Theoretical and Practical Treaty on Administrative Litigation*, Volume II, Universul Juridic Publishing House, Bucharest, 2016.
6. A. Trăilescu, *Administrative Law – University Course, Special Part*, 2nd Edition, C.H. Beck Publishing House, Bucharest, 2020.
7. Law no. 15/2003 regarding support for young people in building personal property.
8. Law no. 50/1991 regarding the authorization of construction works.

CONSIDERATIONS ON THE INSTITUTION OF CRIMINAL LIABILITY PRESCRIPTION, WITH DISTINCT MENTIONS ON THE PARTICULAR ONE, IN THE CONTEXT OF CONSTITUTIONAL JURISPRUDENCE AND THAT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

PhD. Candidate Aurelian Gheorghe MOCAN*

Abstract

The need for the provisions relating to the prescription of criminal liability, need to be consistently applied by the courts. The manner in which the legal issue was debated by the contentious constitutional court in 2018, in the extent of considering unconstitutional the legislative solution which boils down to the idea that a procedural document drawn up in a criminal case, without the condition that to be communicated to the defendant, followed by the explanation of the meaning of the initial decision in the manner in which the legislator would have been forced to react in the sense of establishing the law, in compliance with the Constitution. The interpretation of the operative part of a decision of the contentious constitutional court is also up to it, and is carried out through another decision, which clarifies and explains the previous decision. The effects of such decisions must lead to consistent judicial practice. The complexity of the interference between a recent jurisprudence of the C.J.U.E. and domestic law calls for, in the considered context of the legal aspect, analyzes and deliberations that are of utmost importance.

Keywords: *prescription, criminal liability, special prescription, operative part of the judgement C.C.R., decision C.J.E.U*

1. General considerations on the institution, analyzed from the perspective of legislative developments and unifying jurisprudence of the judicial practice

Related to the legal basis in connection with the legal issue, that we want to submit to the analysis, we acknowledge, first of all, the relevant legal provisions: article 154 paragraph (1) of the Criminal Code which regulates the general terms of limitation of criminal liability, as well as article 155 paragraph (1) of the Criminal Code that regulates the special prescription.

* Associated Member of the Teaching Staff, University "1 Decembrie 1918" Alba Iulia, Faculty of Law and Social Sciences; PhD. Student University "Nicolae Titulescu" Bucharest.

The new Criminal Code adopted a regulatory solution stipulating that the condition for interrupting the deadline is the preparation of any procedural act in question. The solution was different from the previous one, which no longer provided the need that the deed with vocation interrupt of the prescription to be communicated to the suspect or defendant ¹. This new regulation generated debates that are not only related to the jurisprudence of the national courts, which led to the involvement of the contentious constitutional court, materialized, of course, by judgements², but also the Supreme Court³ which also advocated by judgement the unification of the case-law in the matter, but it also determined to be ruled a judgement of the CJEU ⁴, by which this European court ruled in a truly provocative manner with respect to the internal legal and constitutional order.

In the current regulation, the interruption of the prescription is regulated by art. 155 para. 1 Criminal Code in the sense that the limitation period for criminal liability is interrupted by the fulfillment of any procedural act in question which, according to the law, must be communicated to the suspect or defendant⁵. In the regulation prior to the changes brought by G.E.O. no. 71/2022, there was no provision for the interruption to run due to an act communicated to the suspect or defendant, the text of the law referred, generically, to any procedural act in question.

The legal controversy started because of this way of drafting the legislative text. The new legislative solution ended up being examined by the Constitutional Court twice, with effects that we are going to analyze.

¹ In the previous Criminal Code which was published in B. Of. Part I, no. 79-79 bis of June 21, 1968, with subsequent amendments and republications, provided for in art. 123 that the course of the limitation period provided for in art. 122 (which regulated the general prescription periods) is interrupted by the performance of any act which, according to the law, must be communicated to the accused or the defendant in the course of the criminal process. In other respects, the previous regulation has been reiterated in the current Criminal Code, which also stipulates that after each interruption a new limitation period begins to run, and the interruption of the limitation period produces effects against all participants in the crime, even if the act of interruption affects only some of them.

² Decisions of the Romanian Constitutional Court no. 297 of April, 26 2018, published in the Official Gazette under no. 518 din 25.06.2018, and no. 358 of May, 26 2022 published in the Official Gazette under 565 of June, 9 2022.

³ Decision no. 67 of October 25, 2022 published in the Official Gazette Part I, no. 1141 of November 28, 2022.

⁴ Decision C-107/23 of July 24, 2023 of the Court of Justice of the European Union.

⁵ The current text is the result of changes made by G.E.O. No. 71/2022, published in the Official Gazette under 531 of May 30, 2022.

2. Position of the Constitutional Court of Romania

The Constitutional Court responded with Decision no. 297 of April 26, 2018 to an exception of unconstitutionality, ruling that the legislative solution that provides for the interruption of the criminal liability limitation period by fulfilling "any procedural act in question", from the provisions of art. 155 para. (1) of the Criminal Code, is unconstitutional.

The arguments in this decision are related to the predictability of the criminal law and the legality of the incrimination of a criminal act, but the aspect we want to highlight is related to the way in which, subsequently, the Constitutional Court of Romania established the nature of a constitutional decision in relation of the way of drafting its operative part.

However, it is necessary, first of all, to analyze this first decision of the Contentious Constitutional Court, in the context of judicial practice, which proved to be subject to the risk of inconsistency in the period immediately following its approval, in the extent of either elimination (non-application) or the preservation of the legal text that regulated in that form, the disruption of the course of the interruption of the criminal liability prescription.

In this context, was used a mechanism specific to the judicial system, which, without having a vocation as a source of law, tends to ensure a unitary judicial practice⁶.

Thus, regarding the prescription of criminal liability, it was acknowledged during the quarterly meeting in May 2019, with reference to the institution, that the decision of the Constitutional Court no. 297/2018, in the meaning of finding that the legislative solution that provides the interruption of the criminal liability limitation period by fulfilling "any procedural act in question", from the provisions of art. 155 para. (1) of the Criminal Code, is unconstitutional, being an almost unanimous opinion at the level of the Courts of Appeals, in the extent in which the decision of the Constitutional Court no. 297/2018 is an interpretative decision and not a simple one, as it would seem from a superficial analysis, exclusively of the operative part, without observing the considerations. However, the courts do not have to interpret the effect of the decision, but to apply that decision in a way according to its considerations, to the case brought before the court. The conclusion turned out to be in disagreement with the option of the Constitutional Court, an aspect explained later by it, to which we will make a necessary

⁶ The mechanism for standardizing judicial practices to which we refer is regulated by Decision no. 148 of March 19, 2015 of the Superior Council of the Magistracy which ruled to regulate the organization of meetings to debate legal issues that have generated a non-unitary practice.

reference below, but, on the other hand, the need for a reaction based on the mentioned mechanism (with the input of certain magistrates with high-ranking judicial attributions or of honored specialists from the perspective of scientific performance and professional training) which was supposed to lead at that time to an attempt to standardize judicial practice, was obvious.

By Decision no. 358 of May 26, 2022, it is stated that both the considerations and the operative part of the Court's decisions, are generally binding and are enforced with the same force on all legal subjects. Consequently, both the Parliament and the Government, namely the public authorities and institutions, must, in applying the criticized law, observe those established by the Constitutional Court in the considerations and disposition of its decisions.

It is also revealed that an essential issue related to the determination of the nature of the decision ruled by the Constitutional Court, in the sense of its classification, either in the category of simply/extreme decisions, or in the category of interpretive/subject to interpretation, is related to the possibilities of legislative sanctions procedures.

It is clearly stated that Decision no. 297 of April 26, 2018 sanctions the "legislative solution" that the criticized legal text contained, so that, applying the traditional/classical criteria, it will not be able to be classified in the category of interpretative decisions/subject to interpretation. The operative part and especially the considerations of the decision to which the new decision refers, through explanations of interpretation showing that the operative part does not include the phrase specific to a decision establishing the constitutional interpretation of the norm, is relevant enough to show that the Court of Constitutional Contentious, understood to define its own practice from the perspective of the operative part, assigning to it, depending on the drafting⁷, a legal nature that excludes the reanalyzed decision, based on the retained criteria, qualified as traditional/classic, from the category of interpretive decisions/subject to interpretation.

It followed, in the context of the powers of the Supreme Court to unify judicial practice⁸ the Decision no. 67 of October 25, 2022 of the

⁷ CCR decision no. 358 of May 26, 2022 of the C.C.R. regarding the exception of unconstitutionality of the provisions of art. 155 paragraph (1) of the Criminal Code, published in the Official Gazette no. 565 of 09.06.2022 clearly shows that the operative part of the reanalyzed Decision, does not include the phrase specific to a decision establishing the constitutional interpretation of the norm.

⁸ The Supreme Court has the competence and the obligation, according to the regulation in art. in 475 Criminal Proc. Code, which regulates the institution, the subject of the intimation in order to rule in the sense that "the subject of the

High Court of Cassation and Justice, regarding the legal matter of the rules regulating the interruptive effect of prescription of procedural documents. By this decision it was observe that:

"1. The rules related to the interruption of the prescription are rules of material (substantial) criminal law subject from the perspective of their application in time to the principle of the activity of the criminal law provided by art. 3 of the Criminal Code, with the exception of more favorable provisions, according to the mitior lex principle provided by art. 15 para. (2) from the Constitution and art. 5 of the Criminal Code.

2. The court that resolves the annulment appeal, based on the effects of the decisions of the Constitutional Court no. 297/26.04.2018 and no. 358/26.05.2022, cannot reanalyze the prescription of criminal liability, if the appeal court debated and analyzed the incidence of this cause of termination of the criminal process during the process prior to this last decision".

This decision clarified two important aspects related to the nature of the rules of prescription of criminal liability, which it refers, in agreement with the seat of the matter, to the provisions of the Criminal Code, but also with other legal and scientific arguments, in the area of material (substantial) law, as well as the case situation in which the Court of Appeal debated and analyzed the incidence of this cause of termination of the criminal trial during the trial prior to this last decision.

Through the considerations of CCR DECISION no. 358 of May 26, 2022 regarding the exception of unconstitutionality of the provisions of art. 155 para. (1) of the Code, it is stated that the Court found that in its acknowledged jurisprudence "both the considerations and the disposition of its judgement are generally binding and are imposed with the same force on all legal subjects. Consequently, both the Parliament and the Government, namely the public authorities and institutions must, in applying the criticized law, comply with those instituted by the Constitutional Court in the considerations and disposition of this judgement" (reference is made to Decision no. 206 of April 29, 2013,

intimation, establishing that if, during the trial, a panel of judged from the High Court of Cassation and Justice, of the Court of Appeals or the County Court, appointed with the resolution of the case in the last instance, noting that there is a point of law, of whose clarification depends on the resolution of the merits of that matter and on which the High Court of Cassation and Justice did not rule through a prior judgement or through an appeal concerning the law, and is not the subject of an appeal in the interest of the law under resolution, will be able to request the High Court of Cassation and Justice to rule a judgement by which a resolution of principle will be given to the legal issue with which it was referred.

published in the Official Gazette of Romania, Part I, no. 350 of June 13, 2013). The Court appreciated that, indeed, an essential element in such situations is the determination of the nature of the decision ruled by the Constitutional Court, in the extent of its inclusion either in the category of simple/extreme decisions, or in the category of interpretive decisions/with reservation of interpretation. Equally, the Court found that it is important to determine to what extent the rule sanctioned by the judgement ruled by the Constitutional Court is able to function without the subsequent intervention of the legislator, in a manner that does not allow arbitrariness or an application differentiated from one case to another. Starting from these premises, the Court held that the Decision no. 297 of April 26, 2018 sanctions the "legislative solution" that the criticized legal text contained, so that, applying the traditional/classical criteria, it will not be able to be included in the category of decisions interpretive/subject to interpretation. Moreover, it is shown that the operative part of the judgement does not even include the phrase specific to a judgement by which the constitutional interpretation of the norm is determined.

With reference to the category of decisions by which the Contentious Constitutional Court sanctioned "a legislative solution", the Court identified, as follows: *decisions referring to the lack of conditions in the legislation that must be met or situations that should have been foreseen, decisions considering the legislative solution resulting from the use of a phrase in a text, decisions sanctioning the omission to criminalize a deed, as well as decisions sanctioning the lack of appeal.*

The Court observed that, with regard to the decisions establishing the unconstitutionality of "a legislative solution", there are situations in which, despite the silence of the legislator, the normative batch, in force provides all the necessary legislative elements, a fact that allows the application of these norms in a predictable and uniform way. Taking as an example the Decision no. 535 of September 24, 2019, the Court observed that after its publication, although the legislator did not intervene to amend the text (whose legislative solution was sanctioned from a constitutional perspective), the normative set in force allows the application of the provisions of art. 589 of the Code of Criminal Procedure by the judicial bodies, because they provide for the holders of the request, the effects of the ruled judgement, the appeal, etc., a regulation that makes possible a predictable application of the judgement of the Constitutional Court.

On the other hand, it was found that there may be situations in which, despite a comprehensive regulation, which, in principle, would allow the predictable application of the sanctioned rule by the Court's

decision, this becomes impossible to achieve under the conditions in which this desired would turn it into a violation of some fundamental rights/freedoms.

The Court observed that there are cases in which the normative set, in force does not provide all the legislative elements necessary for the foreseeable application of the norms sanctioned by the decisions of the Constitutional Court which found the unconstitutionality of some legislative solutions, appreciates that it must be determined to what extent the legislative body in force is able to determine a clear and predictable application of the provisions of art. 155 para. (1) of the Criminal Code, as they were sanctioned by Decision no. 297 of April 26, 2018.

We note that the Court, in paragraph 34 of Decision no. 297 of April 26, 2018, highlighted the benchmarks of constitutional behavior that the legislator, and not the judicial bodies, had the obligation to adopt, he/she, based on art. 147 of the Constitution, being obliged to legislatively intervene and to establish clearly and predictably the cases interruption of the criminal liability limitation period.

The Court observed then that, due to the legislator's silence, the identification of cases of interruption of the criminal liability statute of limitations remained an operation carried out by the judicial body, reaching a new situation lacking clarity and predictability, a situation which also determined the different application to similar situations of the criticized provisions. It was held that the lack of intervention of the legislator determined the need for the judicial body to replace it by outlining the applicable normative framework in the event of the interruption of the prescription of criminal liability and, implicitly, the application of the criminal law by analogy.

The operative part of the Decision was absolute in the extent of establishing that the provisions of art. 155 paragraph (1) of the Criminal Code are unconstitutional.

The solution is in compliance with the provisions regulating the extraordinary appeal art. 426 para. (1) letter b) Criminal Procedure Code which provides that when the defendant was convicted, although there was evidence regarding a cause for the termination of the criminal process.

The analysis of the phrases of the decisions of the Constitutional Court of Romania that classify its decisions, according to its own jurisprudence, mainly in relation to their device, remain essential in the context of the qualification of the nature of the decision.

Beyond the possible speculations prior to the Decision no. 358/26.05.2022, we note that now assessments related to considerations that would contradict the disposition of the decisions,

which clarifies, through the way of formulation, the nature of the decision of the constitutional court are no longer allowed.

We believe that we must remember that this is a historical solution, which establishes for the first time and clearly the way to interpret a decision of the Constitutional Court, from the perspective of its operative part. It is very important to understand that the Constitutional Court no longer leaves free room for speculation related to considerations, but forces us to analyze the operative part, according to criteria that it indicates very clearly. Thus, we are in a position to accept that any provision of a decision of the Constitutional Court of Romania that does not contain references to the possibility that the text under analysis be interpreted or adapted in the context of judicial activity, must be considered unconstitutional in the sense of the necessity, as a law in its entirety or an article of the law concerned to be revised according to the requirements indicated in the provision of the that decision by another law or ordinance, with the consequence of the exit from force in the situation where the legislative body does not harmonize the criticized legislative text with the Constitution within the term provided by law⁹.

3. Doctrinal positions

Going further with the analysis of the subject under debate, we note the need for a permanent reaction of the legislator to adapt the law to the constitutional requirements, as they are expressed and explained, first of all, in the operative part of a Decision of the Constitutional Court of Romania, then, in the arguments of such a decision. We allow ourselves to note that the legislator, under the conditions of the imperative message sent by the Constitutional Court through such a decision, had to refer also to a pertinent and relevant doctrine that classifies and clarifies the nature of the decisions of the Constitutional

⁹ We mention the provisions of Law no. 47 of May 18, 1992, the consolidated form, regarding the organization and operation of the Constitutional Court published in the Official Gazette no. 807 of 03-12-2010 which stipulates that:

- (1) The decision establishing the unconstitutionality of a law or ordinance or a provision of a law or ordinance in force is final and binding.
- (2) In case of admission of the exception, the Court will rule on the constitutionality of other provisions of the contested deed, from which, necessarily and obviously, the provisions mentioned in the intimation cannot be dissociated.
- (3) The provisions of the laws and ordinances in force found to be unconstitutional cease to have legal effects 45 days after the publication of the decision of the Constitutional Court, if, within this interval, the Parliament or the Government, as the case may be, does not reconcile the unconstitutional provisions with the provisions the Constitution. During this term, provisions found to be unconstitutional are suspended by law.

Court of Romania¹⁰ that refer to the matter of the legislation necessary to be subject to review, which should come and compete positively to align the law in relation to constitutional requirements.

A highly prestigious author of the science of law and the academic environment analyzes, in a work to which we allow ourselves to refer, aspects related to a correct control of the constitutionality of laws. In the work to which we refer, the author makes a comparative analysis of the way in which the issue is approached in the case of flexible or rigid constitutions, as well as previous and subsequent analyzes of the constitutionality of laws, depending on the moment of their ratification.

4. Position of the Court of Justice of the European Union

Recently, Decision C-107/23 of July 24, 2023 of the Court of Justice of the European Union was ruled ¹¹, which instantly raised a

¹⁰ I. Deleanu, *Instituții și proceduri constituționale în dreptul român și în dreptul comparat*, Editura C.H. Beck, București, 2006, p. 823. We note that the author of the cited work does not claim, regardless of how he attributes a certain nature or another to a decision of the Constitutional Court, that the device of such a decision can be ignored, and decisive importance will be given to considerations.

¹¹ Through this decision it was established that: 1) Article 325 paragraph (1) TFEU and Article 2 paragraph (1) of the Convention drawn up pursuant to Article K.3 of the Treaty on European Union on the protection of the financial interests of the European Communities, signed in Brussels on July 26, 1995 and attached to the Council Act of July 26, 1995, must be interpreted as meaning that:

The courts of a member state are not obliged to leave unapplied the judgements of the Constitutional Court of that member state which invalidate the national legislative provision regulating the causes of interruption of the limitation period in criminal matters due to the violation of the principle of legality of crimes and punishments, as protected in national law, in terms of its requirements regarding the predictability and precision of the criminal law, even if these decisions result in the termination, as a result of the prescription of criminal liability, of a considerable number of criminal proceedings, including proceedings relating to serious fraud offenses that affect the financial interests of the European Union.

Instead, the mentioned provisions of Union law must be interpreted in the sense that the courts of this Member State are obliged to leave unapplied a national standard of protection relating to the principle of retroactive application of the more favorable criminal law (*lex mitior*) which allows for reconsideration, including within of appeals directed against definitive judgments, of the interruption of the limitation period of criminal liability in such processes through procedural acts intervened before such invalidation.

2) The principle of the supremacy of Union law must be interpreted in the sense that it opposes a national regulation or practice according to which the national common law courts of a member state are bound by the decisions of the Constitutional Court, as well as those of the Supreme Court of this member state and not may, for this reason and with the risk of the disciplinary liability of the judges in question, leave the jurisprudence resulting from the mentioned decisions unapplied *ex officio*, even if they consider, in the light of a decision of the Court, that this jurisprudence is contrary to some provisions of Union law which have a direct effect.

series of controversies regarding national jurisprudence, following the publication of this Decision, and we note this jurisprudence of the European court.

We note that the Decision was ruled on the interpretation of art. 325 of the Treaty on the Functioning of the European Union which refers to "fraud and any other illegal activity affecting the financial interests of the Union", as well as pursuant to Article K. 3 of the Treaty on the European Union, regarding the protection of the financial interests of the European Communities as and pursuant to Article K.3 of the Treaty on European Union, regarding the protection of the financial interests of the European Communities.

5. Conclusions

We summarize by noting that after this decision of the European Court, there remain two variants of unitary application of the law, one in which the rules regarding prescription will be applied differently from the perspective of the more favorable criminal law (in the case of those crimes considered to be serious fraud which affects the financial interests of the European Union, bearing in mind that the principle of the more favorable criminal law does not apply to these crimes) and a second option in which the Decision C-107/23 of July 24, 2023 of the Court of Justice of the European Union will be left unapplied.

In the first case, the constitutional principle of the equality of citizens before the law would be violated, with the justification that the priority application of Union law is necessary, and the second case would imply a reverse interpretation, in the sense that it would be inadmissible to apply the decision of the European Court to the detriment of the Constitution.

Here is necessary a distinction and observation. The interpretations given by the Court of Justice of the European Union refer to the provisions of the legislation of the European Union, and the mentions regarding the obligation to comply with it, namely the direct effect and the priority effect, have in mind only the jurisprudence of this court, which are not hoored in the legislative framework of the EU.

However, we note that, in the case under analysis, the aspect of EU legislation is clarified in the practice of the European court, even if in a laconic way, of course, with regard to its obligation towards each member state, the aspect of its mandatory character which is explained and motivated only through the jurisprudence of the European court, which, it is true, has been perpetual over time.

We conclude that the Decision artificially links economic aspects, regulated by the European Union legislation, to aspects of internal

material criminal law, circumscribed to shared competences. Different criminal liability limitation periods are not admissible, depending on certain crimes. The legal problem generated by this Decision, with binding effect in relation to domestic legislation, is related to the constitutional aspect it generates from the perspective of the equality of citizens before the law, the possible inequality that is related to the different treatment of criminals under aspect of the criminal liability limitation period. The issue remains open in court files.

Bibliography

1. The initial form of the New Criminal Code, normative act adopted by Law no. 286/2009, published in Official Gazette no. 510 of July 24, 2009, in force since February 1, 2014.
2. The previous Criminal Code which was published in B. Of. Part I, no. 79-79 bis of June 21, 1968, with subsequent amendments and republications.
3. Decisions of the Constitutional Court of Romania no. 297 of April 26, 2018, published in the Official Gazette no. 518 of 25.06.2018, and no. 358 of 26 May 2022 published in the Official Gazette no. 565 of June 9, 2022.
4. Decision no. 67 of the Ú.C.C.J. of October 25, 2022 published in the Official Gazette Part I, no. 1141 of November 28, 2022.
5. Decision C-107/23 of July 24, 2023 of the Court of Justice of the European Union.
6. G.E.O. no. 71/2022, published in Official Gazette no. 531 of May 30, 2022.
7. Decision no. 148 of March 19, 2015 of the Superior Council of the Magistracy, which regulates the organization of meetings to debate legal issues that have generated a non-unitary practice.
8. CCR decision no. 358 of May 26, 2022 of the C.C.R. regarding the exception of unconstitutionality of the provisions of art. 155.
9. I. Deleanu, *Instituții și proceduri constituționale în dreptul român și în dreptul comparat*, Publishing House C.H. Beck, Bucharest, 2006.
10. T. Drăganu, *Constitutional Law and Political Institutions*, "Dimitrie Cantemir" Independent University, Bucharest, Faculty of Law Cluj-Napoca, Part II, Cluj-Napoca, 1992.
11. Law no. 47 of May 18, 1992, consolidated form, regarding the organization and operation of the Constitutional Court published in the Official Gazette no. 807 of 03-12-2010.

TACTICAL ASPECTS REGARDING THE APPROACH TO DRUG CONSUMERS DURING THE CRIMINAL INVESTIGATION

PhD. Sorin Silviu FINTA*

Abstract

In Romania, in accordance with legal provisions¹, drug users who have committed offenses related to the legal framework of drugs are assessed at the prosecutor's request. The purpose of the assessment is the rehabilitation and inclusion of these individuals in an assistance and treatment program. The responsibility for assessment lies with specialists from the Centers for Prevention, Evaluation, and Anti-Drug Counseling, who submit assessment reports to the prosecutors of the Directorate for the Investigation of Organized Crime and Terrorism, which has exclusive competence in investigating offenses related to drug trafficking and illicit drug use. Depending on the conclusions of the assessment report, if the consumer complies with the integrated assistance program protocol at the time of the court's decision, the court may decide to waive the imposition of the sentence or defer its application.

Recent practice and case law have demonstrated the existence of major challenges in Romania in combating the illicit trafficking and consumption of drugs, a phenomenon that has not spared any of the advanced societies worldwide. Trends toward the liberalization of the consumption of light drugs or the use of drugs for medicinal purposes are strongly supported at the legislative level by various interest groups. One of the main arguments in favor of liberalization is that prevention should prevail over enforcement policies, and this is currently a subject of intense debate. Regardless of the legislative solutions adopted, families trying to save their children who have become dependent consumers experience real dramas for which authorities must find an answer. The hearings of drug consumers conducted in criminal cases require not only knowledge of criminal law, criminal procedure, forensic psychology, and criminal tactics but also a vocation and, last but not least, compassion.

Keywords: Drug user, Psychoactive effects, Forensic tactics, Suspect interrogation, Witness, Victim

* Associate Professor "1 Decembrie 1918" University from Alba Iulia, Faculty of Law and Social Sciences, sorin.finta@uab.ro

¹ Article 19, paragraph 1, of Law 143/2000 on the prevention and combating of illicit drug trafficking and consumption.

1. The drug user can be a witness, sometimes a suspect, and always a victim

In accordance with the provisions of Article 4 of Law 143/2000, *"Cultivating, producing, manufacturing, experimenting, extracting, preparing, transforming, buying, or possessing high-risk drugs for personal use without right is punishable by imprisonment from 3 months to 2 years or a fine."* The possession of high-risk drugs for personal use is punished more severely, with imprisonment from 6 months to three years. In Romania, in addition to drug trafficking offenses, those related to the possession of drugs for personal use are the most commonly encountered crimes in practice, among those regulated by specific legislation for the control of psychoactive substances. However, it should be emphasized that among the alternative methods of committing these offenses, consumption is not included in Law 143/2000- concerning the prevention and combating of illicit drug trafficking and consumption². Only the possession of drugs for personal use is punishable. Even though logically one cannot consume drugs without possessing them, if law enforcement authorities do not discover drugs on a person, they cannot be incriminated in the absence of other evidence. Consumers are considered more as victims of traffickers. Of course, this does not mean that traffickers are not also consumers. On the contrary, most of them both consume and sell at the same time. In practice, to avoid a more serious charge, such as drug trafficking, which is punished with imprisonment ranging from 3 to 10 years for high-risk drugs and from 5 to 15 years for very high-risk drugs, individuals upon whom drugs are discovered often invoke the claim that the substances are held for personal use. Sometimes the defense is amusing, especially when large quantities, often in kilograms, are found on the person. However, clearly, any criminal charge must be based on evidence.

In recent years, to adapt to market demands, traffickers acquire and subsequently distribute to consumers the so-called NPS or "new psychoactive substances," which are cheaper products, sometimes with more potent psychoactive effects than traditional drugs, but with a distinct legal framework regulated in national legislation by Law 194/2011 - concerning the prevention of operations with products likely to have psychoactive effects.³ NPS is defined as *"any substance or combination of substances of natural or synthetic origin, in any physical state, or any product, plant, fungus, or parts thereof whose*

² Published in the Official Gazette No. 163 on 06.03.2014.

³ Published in the Official Gazette No. 140 on 26.02.2014.

legal status is not regulated by other legal provisions, which has the capacity to produce psychoactive effects and which, regardless of content, name, method of administration, presentation, or advertising, is or can be used in place of a narcotic substance or psychotropic preparation or in place of a plant or substance under national control or for the same purposes." (Article 2, letter a of Law 194/2011).

Both offenses provided for by Law 143/2000 and those in Law 194/2011 fall under the exclusive jurisdiction of specialized prosecutors within the Directorate for Investigating Organized Crime and Terrorism (DIICOT). At the level of the Romanian Police, specifically designated officers within the organized crime fighting brigades, who act as judicial police investigators, have the authority to carry out investigative activities under the coordination of these prosecutors. Additionally, their actions require the prior approval of the Chief Prosecutor of DIICOT.

The psychoactive effects consist of *"stimulating or inhibiting the central nervous system of the individual, resulting in changes in psychological functions and processes and behavior, or the creation of a state of physical or psychological dependence"* (Article 2, letter e of Law 194/2011). Periodically, depending on the nature of the substances discovered in practical cases and taking into account the effects of these substances, as well as the conclusions of experts resulting from laboratory analyses, the legislator updates the tables annexed to Law 143/2000 with high-risk and very high-risk drugs, including some of these new psychoactive substances.

Trafficking networks, however, adapt to the evolution of legislation and modify the chemical composition of NPS in clandestine laboratories so that it no longer corresponds to that of the basic substances introduced under national control and provided in the annexed tables to the law. Some legislative imperfections are also exploited. Thus, Article 16, paragraph 1, of Law No. 194/2011 incriminates the act of a person who, without holding authorization issued under the conditions of this law, performs, without right, operations with products, knowing that they are likely to have psychoactive effects.

This offense is punishable by imprisonment ranging from 2 to 7 years, and the penalty has recently been increased by Law No. 45/2023⁴ amending and supplementing Laws 143/2000 and 194/2011. Operations with NPS involve *"manufacturing, producing, treating, synthesizing, extracting, conditioning, distributing, placing on the market, selling, delivering, procuring, packaging, transporting, storing, handling, or any other legal activity of importing, exporting, or intermediating products"* (Article 2, letter b of Law 194/2011). An analysis of the law

⁴ Published in the Official Gazette No. 178 on March 2, 2023.

reveals that among these operations, there is no mention of the "possession" of such psychoactive substances for personal use, as provided by the legislator in Article 4 of Law 143/2000 in the case of high-risk or very high-risk drugs. In practice, one can become a criminal if found in possession of a marijuana cigarette for personal use, while having a higher chance of avoiding a criminal charge if found with a kilogram of "crystal" (a highly popular psychoactive substance among consumers). Of course, at the time of detection or during a search, the police only have clues about the nature of the substances found. Subsequently, based on the DIICOT prosecutor's order, the substance is verified in a specialized laboratory, which issues a report and conclusions indicating the nature of the substance and the category to which it belongs (which can be a high-risk drug, a very high-risk drug, NPS, anabolic steroids, or sometimes even a common substance not falling under the scope of criminal law). In practice, there have been cases where individuals involved in drug trafficking claimed that they did not sell but only provided drugs for free, imagining that in this way, they did not commit an offense under Law 143/2000. Unfortunately for them, from the perspective of criminal liability, the law makes no distinction between offering and selling drugs. The judge, in determining the sentence, could take into account the lesser gravity of occasional offering compared to the act of selling such substances. Probably due to disturbances related to substance use, there have also been cases in practice where consumers reported to authorities that they were victims of theft, claiming that their drugs or NPS, which they asserted they possessed legitimately, were stolen. Beyond the amusing situations arising from such complaints, it is easily observed that a drug consumer can be both an offender if they possess drugs for personal use and a victim, especially concerning reported theft or the dependency situation maintained by the trafficker, affecting cognitive, mental, and physiological capacities.

The consumption of drugs or psychoactive substances is more explicitly criminalized when associated with driving on public roads of a vehicle for which the law requires the possession of a driver's license (Article 336, paragraph 2 of the Criminal Code). Often, in practice, it is observed that drug consumption leads to a modification of mental processes that induces indifference to law compliance or an accentuation of arrogance in some individuals, followed by a flagrant or even demonstrative violation of legal norms. Several consumers and even traffickers have been discovered during routine traffic checks. If substances susceptible to producing psychoactive effects are found during body or vehicle searches, they are seized, sealed, and submitted along with the prosecutor's findings to the competent authority.

Drug test devices, provided to the Romanian Police, allow for the detection of the presence of prohibited substances in saliva, but the most relevant evidence comes from the results of laboratory analyses conducted on biological samples collected from the driver. Thus, the presence of alcohol can be detected in blood, while the presence of drugs or psychoactive substances is usually detected in urine.

The difference between the criminal act of possession for personal use of drugs and the consumption of such substances is harder to perceive for the uninformed. Until the laboratory results are received, a distinction cannot be made between the criminal act of drug possession for personal use and the possession of new psychoactive substances. For this reason, the procedure followed by the police is similar, with substances suspected of having psychoactive effects being collected, sealed, and forwarded to the specialized prosecutor along with the record of findings, in order to order, by ordinance, the performance of analyses within a drug analysis and profiling laboratory. Within the Romanian Police, under the coordination of the Directorate for Combating Organized Crime, there is a Central Laboratory and four territorial drug analysis and profiling laboratories. Each year, tens of thousands of samples are analyzed in these laboratories. According to the statistics provided by the National Anti-Drug Agency in the last annual report released in 2022 for the previous year⁵, the fact has been highlighted that *"confiscated drugs are experiencing a significant increase, outlining an illicit market characterized by high availability for almost all types of drugs, especially cannabis, MDMA, cocaine, and heroin."* This alarming trend in recent years, the increase in drug availability on the market, reflects the need to reevaluate the way the state manages the issue as a whole, from public policies in the field, resources allocated for prevention and combat, research capabilities, to regaining control over the streets.

European legislation tends to show a tendency to tolerate the possession of small quantities, either through decriminalization, as is the case in the Netherlands (where quantities of less than 5 grams of cannabis can be possessed without facing criminal charges) or in Italy, where the possession of drugs for personal use is only subject to administrative sanctions. In the public sphere in Romania, the idea of liberalizing cannabis consumption is increasingly discussed, with some legislative initiatives even being introduced to specifically focus on the

⁵ Ministry of Internal Affairs, National Anti-Drug Agency, National Report on the Drug Situation 2022, Bucharest, p. 187, report available at the address: https://ana.gov.ro/wp-content/uploads/2023/02/RN_2022.pdf, accessed on 13.11.2023.

liberalization of cannabis for medicinal purposes⁶. However, the debate on such initiatives is delayed, especially in the context of highly publicized scandals such as the "May 2nd Case"⁷, in which a drug consumer drove a vehicle on public roads under the influence of drugs, causing an accident resulting in the death of two people, and then left the scene, against the backdrop of the passivity and incompetence of law enforcement forces. Intensive lobbying actions for the liberalization of so-called soft drugs, including at the level of the European Parliament, are associated with some cases of corruption⁸, with private companies directly interested in the liberalization of the soft drug market, especially those that trade in cannabidiol (an extract from the cannabis plant). It is also noteworthy that the financial interest of other actors, such as those in the agricultural, pharmaceutical, or entertainment industries, should not be neglected.

The prosecutor can order, in the case of committing a drug-related offense, within 5 days of continuing the criminal investigation, with the written consent of the consumer, their evaluation for the purpose of inclusion in the integrated assistance system. Evaluation reports contain confidential information provided by consumers to the expert (usually a psychologist within the Centers for Prevention, Evaluation, and Counseling for Drug Abuse, which are territorial structures of the National Anti-Drug Agency). As a result of the evaluations conducted by specialists, assistance and intervention programs are proposed for each consumer. Of course, some individuals choose not to participate in the program, others do not participate sincerely, or refuse to cooperate throughout, assuming the risk of not benefiting from the legal provisions that favor them.

There are also situations in practice where the prosecutor omits to order this evaluation, with the consequence of the impossibility of including drug consumers in the integrated assistance program and, implicitly, the court's inability to pronounce a decision to postpone the imposition of the penalty or to waive the application of the penalty for the respective consumer. An exception of unconstitutionality of the

⁶ Draft Law PL-x No. 631/2019 regarding the legal regime of the cannabis plant, substances and preparations containing cannabis, used for medical purposes, adopted by the Senate, currently in the procedure of the standing committees of the Chamber of Deputies, available at the following address: https://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=18223, accessed on 12.11.2023, at 8:00 PM.

⁷ Available at the address: <https://www.juridice.ro/702204/catalin-predoiu-a-prezentat-concluziile-corpului-de-control-privind-accidentul-de-la-2-mai.html>, accessed on 12.11.2023, at 7:00 PM.

⁸ <https://www.euronews.ro/articole/scandalul-drogurilor-din-pe-eurodeputata-maria-arena-a-infiintat-un-grup-de-lobby>, accessed on 12.11.2023, at 9:00 PM.

provisions of Article 19 and Article 20 paragraph (1) of Law No. 143/2000 on the prevention and combating of illicit drug trafficking and consumption, which regulate this situation, was invoked in a case pending before the Satu Mare Tribunal - Criminal Section. However, the Constitutional Court rejected it as inadmissible, considering that renouncing the application of the penalty or delaying the application of the penalty in the prevention and combating of illicit drug consumption is not a right of the offender but a discretion of the court. Any dissatisfaction of the accused with the manner in which the judicial authorities apply the criticized legal provisions can be resolved by the preliminary chamber judge or the court.⁹

A common practice in criminal cases related to drug trafficking is the use of undercover investigators or collaborators, often drawn from drug consumers, to conduct authorized purchases. According to the provisions of Article 148 paragraph 10 of the Criminal Procedure Code, in exceptional situations, a collaborator may be assigned an identity other than their real one. These special investigative methods require experience and appropriate knowledge, and the collaborator must provide sufficient guarantees of trustworthiness to be authorized for such activities. In this context, the provisions of Article 15 of Law 143/2000 must be taken into account, according to which *"a person who has committed one of the offenses provided for in Articles 2-9 and, during the criminal investigation, denounces and facilitates the identification and criminal accountability of other persons who have committed drug-related offenses, benefits from a halving of the legal punishment limits."*

2. Tactical Aspects Regarding the Interrogation of a Drug Consumer in the Context of a Criminal Proceeding

It is well-known that substance abuse often begins in adolescence. There is a wide variety of substances that can cause disorders¹⁰, but the most commonly used ones include cannabis (hashish, marijuana), which is a central nervous system stimulant that primarily leads to euphoria; ecstasy and other similar synthetic stimulants, based on MDMA, which have the property of making consumers feel connected to each other; cocaine, a natural stimulant with effects similar to MDMA but much more powerful; and opioids (e.g., heroin, methadone), which inhibit the nervous system and have analgesic and strongly euphoric effects.

⁹ Constitutional Court Decision No. 127 of March 21, 2023, published in the Official Gazette No. 608 on July 3, 2023.

¹⁰ American Psychiatric Association, *"Diagnostic and statistical manual of mental disorders"*, American Psychiatric Pub., Medical Pub. Callisto, Bucharest, 2016, pp.481-584.

Medical facilities in Romania are increasingly called upon to provide assistance to consumers of new psychoactive substances (NSP), who often present mental and behavioral disorders or withdrawal symptoms. Often, drug or NSP consumption is associated with alcohol, and if so-called cocktails are ingested, consumers may end up in the hospital with hallucinations, severe panic attacks, and cardiac disorders. However, not every consumer of prohibited substances exhibits obvious disorders. There are numerous consumers in a pre-addiction phase who do not recognize their disorder and are in a state of denial.

In the case of cocaine consumers, the initial effect of socialization, euphoria, and even physical stimulation is known, but long-term consumption leads to social isolation with paranoid tendencies.

There are, therefore, different types of consumers who may commit crimes under the influence of drugs, with diminished discernment, but this circumstance is not a justifying cause that eliminates criminal responsibility.

Practice has also shown that street-level traffickers are usually consumers, a circumstance that might lead us not to view them solely as victims. Another category of drug consumers who come before judicial authorities, either as witnesses, victims, or most frequently as suspects/defendants, are those serving sentences in prisons, having been convicted of other offenses and consuming prohibited substances inside the penitentiaries. It is known that the prison system also faces the problem of introducing forbidden goods (mobile phones, anabolic steroids, drugs, NSP), through increasingly ingenious methods, sometimes even with the complicity of public officials. Among the most recent methods of concealing drugs discovered during their introduction into prison are impregnating letters or pages of books with psychoactive substances, hiding substances in various containers (spray tubes, perfume bottles), or within food preparations. Additionally, victims of human trafficking, especially those exploited for sexual purposes, without excluding those exploited through labor, end up consuming drugs due to the dependency in which they are maintained or to mitigate the perceived vulnerability. Sometimes traffickers resort to violence and force victims to consume drugs for easier sexual exploitation. Thus, the tendency of victims of human trafficking to retract their initial statements is well-known in practice, driven by low self-esteem and the pressures exerted by traffickers during the criminal process.

The evaluation of the subjective elements of a criminal act committed by a drug consumer can be challenging from a psychological perspective. According to Article 15 of the Romanian Criminal Code¹¹, *an*

¹¹ Published in the Official Gazette No. 510 on July 24, 2009.

offense is an act provided by criminal law, committed with guilt, unjustified, and attributable to the person who committed it.

For example, circumstances such as guilt retention or determining the circumstances in which the author could foresee the result of the act, as well as psychiatric evaluation when considering irresponsibility or discernment, pose challenges for law enforcement authorities. Additionally, correct evaluation of subjective elements (guilt, motive, and purpose) can allow for an appropriate legal classification. There have been cases where drug consumers committed the crime of murder, but the pursued purpose (facilitating or concealing another offense) made the difference between murder and qualified murder. Minority (Article 27 of the Criminal Code) associated with drug use and juvenile delinquency also requires psychological analysis and evaluation of the cognitive capacity or developmental level of the minor in case of committing an offense.

Listening to individuals, assessing statements, and utilizing them are part of those judicial activities that prominently highlight the need to adhere to both procedural provisions and criminalistic tactical rules.¹² Drug consumers are often questioned as witnesses in investigations coordinated by prosecutors from the Directorate for the Investigation of Organized Crime and Terrorism. The main reason is that their statements contribute to strengthening the evidence against traffickers, who are the main target of investigators. Typically, statements are audio-video recorded, and the aspects they are questioned about are prepared in advance. Most occasional consumers are cooperative, sometimes surprisingly honest. There are, of course, exceptions, but when faced with evidence (recordings of conversations, fragments of discussions through social media applications such as WhatsApp, Facebook Messenger, or Wickr, recordings of surveillance operations, etc.), they realize that persisting in a dishonest attitude could lead to a change in legal classification from a witness to a suspect. When it comes to drug consumers who are suspects, the attitude is often at least uncooperative, if not hostile. Some authors distinguish between judicial interrogation (as an accusatory method of questioning), listening (a term with rather passive, contemplative-didactic connotations), and interviewing (information-focused questioning). Judicial interrogation is defined as *"a verbal interpersonal contact, relatively emotionally tense, systematically and scientifically conducted by a representative of public authority with the suspected person, for the purpose of collecting data and information about an antisocial act, to process and verify*

¹² A.C. Moise, E. Stancu, *Criminalistics - Elements of Technique and Tactics in Criminal Investigation*, Universul Juridic Publishing House, Bucharest, 2020, p. 224.

them later to identify authors, clarify the circumstances in which the act was committed, and establish responsibilities based on truth."¹³

The most well-known interrogation method is the "Reid-Inbau Method." Reid was a police officer in Chicago, and in his manual, revised several times, most recently in 2011¹⁴, he recommends conducting interrogations in small, acoustically isolated rooms, sparsely furnished, with hard, handleless chairs, with straight backs, unfamiliar, to emphasize the suspect's anxiety and discomfort. The Reid-Inbau technique involves the imposition of a restrictive measure (detained or arrested) so that the suspect perceives isolation from the familiar environment, stating the accusations in a certain manner, without accepting denials or objections from the suspect, and minimizing the offense in the final stage of obtaining the confession. Of course, the investigator can change, the position adopted can shift from dominant to understanding, justifications can even be sought on behalf of the suspect. The technique even recommends an initial neutral dialogue, and recognition is presented as a relief. Throughout the interrogation, evidence, justifications formulated by the investigator on behalf of the suspect to facilitate confession, can be presented. Visual contact can be maintained, or the chair can be brought closer to the suspect, and hypothetical questions can be addressed depending on the context.

The PEACE¹⁵ method (P- for preparation/planning, E - for engage and explain, A- for account or taking into account the suspect's position, clarifying, challenging, C - for closure or summarizing the stated aspects, and E- for evaluation of results, reflecting on the efficiency of the interrogation) is an impartial and friendly method, unlike the dominant and controversial Reid-Inbau method. From a psychological perspective, it can yield better results in the interrogation of drug consumers, as it involves building a relationship based on communication with the suspect. The suspect is allowed to speak, declare whatever they wish, and the presentation of evidence, if it is not sufficient, is postponed to a later stage of the interrogation. Unlike the Reid-Inbau technique, it is recommended not to contradict the suspect, but after the free narrative, aspects that contradict the evidence in the file should be revisited in a non-accusatory manner. Periodic summarization of information provided by the suspect, choosing moments of silence, challenging for

¹³ T. Butoi, G. Stolojescu, C.E. Ștefan, *Behavioral Analysis in Criminal Proceedings*, Pro Universitaria Publishing House, Bucharest, 2014, p. 194.

¹⁴ J.E. Reid, F.E. Inbau, J.P. Buckley, B.C. Jayne, *Criminal Interrogation and confessions*, Fifth Edition, Jones&Bartlett Learning, Burlington, MA, USA, 2011, pp.122-144.

¹⁵ G. Groza, *Applied Psychology in Criminal Proceedings*, Universul Juridic Publishing House, Bucharest, 2019, pp.129-132.

them, persistence, and presenting evidence towards the end of the interrogation can significantly contribute to avoiding false confessions and obtaining cooperation and confession.

Conclusions

Despite remarkable results achieved by authorities in combating the international drug trafficking phenomenon, through impressive seizures and dismantling well-organized networks, Romania has gradually shifted from being a transit country to becoming a destination for drugs. The number of consumers has increased, the age of onset, according to the statistics of the National Anti-Drug Agency, has decreased, and the availability of drugs on the market is rising. Therefore, the methods of preventing and combating illicit drug consumption and trafficking must be adapted, so that the allocated resources and their specialization can be improved. According to current legislation, if a student is found with a marijuana cigarette, the jurisdiction for investigating the offense of drug possession for personal use exclusively belongs to the specialized prosecutor within the Directorate for Combating Organized Crime. This aspect is likely to increase the workload at the prosecutor's office level, which must, by law, prioritize complex cases in the field of organized crime. Perhaps a short-term accessible solution is to expand the investigative jurisdiction, so that simple cases of possession for personal use can be investigated by a drug enforcement specialist police officer, under the supervision of a prosecutor. In this way, the territorial units of the Directorate for Investigating Organized Crime and Terrorism (DIICOT) would be relieved of a significant number of criminal cases. Additionally, the specialization of a larger number of police officers in combating the trafficking and illicit consumption of drugs and involving specialists in prevention programs dedicated to target groups are potential solutions to increase awareness of the dangers and effects of psychoactive substance consumption. The liberalization of light drug consumption in Romania is still a controversial topic, and if it becomes a solution to reduce the number of dependent consumers, it must be rigorously argued based on scientifically grounded studies, not just adopted because it seems to be the current European trend.

Bibliography

1. Law 143/2000 - on the prevention and combating of illicit trafficking and use of drugs, published in the Official Gazette no. 163 of March 6, 2014.
2. Law 194/2011 - on combating operations with products susceptible to have psychoactive effects, published in the Official Gazette no. 140 of February 26, 2014.
3. Law 45/2023 - amending and supplementing Law 143/2000 and Law 194/2011, published in the Official Gazette no. 178 of March 2, 2023.
4. Constitutional Court Decision no. 127 of March 21, 2023, published in the Official Gazette no. 608 of July 3, 2023.
5. American Psychiatric Association, "Diagnostic and Statistical Manual of Mental Disorders," American Psychiatric Pub., Callisto Medical Publishing, Bucharest, 2016, pp.481-584.
6. A.C. Moise, E. Stancu, *Criminalistics - Elements of Criminal Investigation Technique and Tactics*, Universul Juridic Publishing House, Bucharest, 2020, p.224.
7. T. Butoi, G. Stolojescu, C.E. Stefan, *Behavioral Analysis in the Criminal Process*, Pro Universitaria Publishing House, Bucharest, 2014, p.194.
8. J.E. Reid, F.E. Inbau, J.P. Buckley, B.C. Jayne, *Criminal Interrogation and Confessions*, Fifth Edition, Jones & Bartlett Learning, Burlington, MA, USA, 2011, pp.122-144.
9. G. Groza, *Applied Psychology in Criminal Proceedings*, Universul Juridic Publishing House, Bucharest, 2019, p.129-132.
10. Ministry of Internal Affairs, National Antidrug Agency, National Report on the Drug Situation 2022, Bucharest, p.187, report available at: https://ana.gov.ro/wp-content/uploads/2023/02/RN_2022.pdf
11. PL-x no.631/2019, draft law on the legal regime of the cannabis plant, substances, and preparations containing cannabis, used for medical purposes, available at: https://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=18223
12. <https://www.juridice.ro/702204/catalin-predoiu-a-prezentat-concluziile-corpului-de-control-privind-accidentul-de-la-2-mai.html>
13. <https://www.euronews.ro/articole/scandalul-drogurilor-din-pe-eurodeputata-maria-arena-a-in-fiinta-sorin-t-un-grup-de-lobby>

MATERIAL OBJECT OF THE LAND REGISTER

Dr. Dan-Adrian DOȚIU*

Abstract

The object of the land book means the object of entries made in the land book, i.e. real estate rights and, where appropriate, claim rights, acts, facts or legal relationships related to the buildings included in the land book.

The material object of the land book is real estate, i.e. "one or more adjacent plots of land, regardless of the category of use, with or without constructions, belonging to the same owner, located on the territory of an administrative-territorial unit and which are identified by a unique cadastral number."

The land body, as a material object of the land book, will be modified by adhesions – when several plots merge into a single land body or when a part of a building is added to another building, or the extent of a plot is increased or by detachments – when a parcel is separated from a building or its extent is reduced.

From the foregoing, it follows that the object of the land book must be analyzed from a double point of view: on the one hand we have a material object of the land book - the body of the land book, as defined by the Civil Code and Law no. 7/1996, and, on the other hand, a legal object of the land book - all real estate rights corresponding to the body of the land book, but also acts, legal facts, claims rights or other legal relations bearing on the real estate constituting the body of the land book, provided that the law expressly allows the possibility of their registration in the land book.

Keywords: *Land Book, material object of the Land Book, Legal object of the Land Book, attachments, detachments*

1. Getting started

As follows from art.876 C.Civ. paragraph 1, with the marginal title – purpose and object of the land book, "the land book describes the buildings and shows the rights in rem having as object these assets," and paragraph 2 of the same article provides that "In cases provided by law, other rights, facts or legal relationships may be entered in the land book, if they are related to the buildings included in the land book."

It follows from the legal texts set out above that the object of the land book means the object of entries made in the land book, i.e. real estate rights and, where appropriate, claim rights, acts, facts or legal relationships in relation to the buildings included in the land book."

* Public notary, University lecturer at the University „1 December 1918”, Alba Iulia, Faculty of Law and Social Sciences, www.dotiu.ro

It follows from the foregoing that the subject-matter of the land register must be analysed from a twofold point of view: on the one hand we have a material object of the land book - the body of the land book, as defined by the Civil Code and Law no. 7/1996, and on the other hand a legal object of the land book - and, on the other hand, a legal object of the land book - all real estate rights corresponding to the body of the land book, but also acts, legal facts, claims rights or other legal relations bearing on the real estate constituting the body of the land book, provided that the law expressly allows the possibility of their registration in the land book.

2. Material object

The material object of the land book is the real estate, on which art.876 para.3 C.civ. defines it as "one or more adjacent plots of land, regardless of the category of use, with or without constructions, belonging to the same owner, located on the territory of an administrative-territorial unit and which are identified by a unique cadastral number."

A similar legal definition, but more precise, because it eliminates the notion of parcel, is provided by art.1 paragraph 5 of Law no.7/1996 on cadastre and real estate advertising, republished, with subsequent amendments, according to which the real estate is "the land, with or without constructions, on the territory of an administrative-territorial unit, belonging to one or more owners, which is identified by a unique cadastral number". We mention that, in its initial form, Law no. 7/1996 spoke of the object of the land book as the "body of property", but Law no. 247/2005 replaced this notion with that of "real estate."

We see from the two legal definitions (the one in the Civil Code on the one hand and the one in Law no. 7/1996 on the other hand) that the same notion – real estate – with the same meaning, is defined differently in two normative acts with the same legal force, both being organic laws.

Useless, but especially in contradiction with the provisions of Law no.24/2000, which, in art.16, marginally Avoiding parallelism, states that "in the law-making process it is forbidden to establish the same regulations in several articles or paragraphs of the same normative act or in two or more normative acts. If there are parallelisms, they will be removed either by repealing them or by concentrating the matter in single regulations."

From the analysis of the two texts, it appears that, although there are differences in form, in reality, the definitions do not include differences in substance.

Real estate, in the sense of material object of the land book, means, in an opinion, the land composed of one or more adjacent plots,

regardless of the category of use, with or without constructions, exclusive or common property of the same or the same owners, located on the territory of a single administrative-territorial unit, which is identified by a unique cadastral number and is registered in a land book.

In another, slightly different opinion, the real estate is defined as "one or more adjacent plots, with or without constructions, on the territory of an administrative-territorial unit, regardless of the category of use, belonging to an owner or several owners, in the case of co-ownership, which is identified by a unique cadastral number.

Law no. 133/2012 by art. I point 5 expressly repealed the provisions previously contained in art.1, paragraph 7 of Law no.7/1996. Paragraph 7 stated that "parcel means the area of land with a single category of use". This implicitly led to the amendments made on the basis of art.I point 2 of the same law, amendments aimed at art. 1, paragraph 5 of Law no. 7/1996. This paragraph defined the building as "one or more adjoining plots..."

The notion of parcel has not been defined in the Civil Code, the only regulation being that contained in Article 1, paragraph 7 of Law 7/1996 (currently, as we have seen, repealed).

In the current regulation, the parcel loses its significance, the main entity being the land, the construction being the accessory entity, The opening of any land book is now done starting from the land and not from the plot.

We do not see the usefulness of including in the legal definition of real estate the notion of parcel, just as we do not see any impediment for the real estate – land to be composed of one or more plots. The simple fact that the plot had only one category of use, and the building with several plots could have several categories of use (land under constructions, yards, arable, vineyard, orchard, etc.) justified this option. By amending Article 1 paragraph 5 of Law no. 7/1996 and defining the notion of real estate as "land, with or without constructions", the legislator had the possibility to eliminate the unnecessary notion of parcel from Article 876 paragraph 3 civ., but did not do so.

In my opinion, the building is the land, independently of the construction on it, precisely delimited, whose identification is made, in the territorial administrative unit where it is located, by a unique cadastral number, being registered in a land book.

The construction represents the building made by edification, which is registered in the same land book in which the land on which it was built is registered. The legal framework for the construction of any construction is Law no. 50/1991 on the authorization of construction works, regardless of whether the construction consists of a single

apartment or several and has no relevance to its destination. The registration of the construction in the land book will be made if there is proof of the material existence of the construction, this proof being made by the building permit and the reception report, documents accompanied by the cadastral documentation of the building.

The definition given above shows the need to identify the real estate from a cadastral-legal point of view to ensure its uniqueness by assigning a single cadastral number to each building.

However, the definition of real estate as a material object of the land book is different from the definition of immovable property, as found in art.537 C.Civ., according to which 'Land, springs and watercourses, rooted plantations, buildings and any other permanent groundwork, platforms and other installations for the exploitation of submarine resources situated on the continental shelf and everything which is naturally or artificially incorporated into them on a permanent basis are immovable.'

Comparing the two definitions, we note that in the definition in art. 537 C.Civ. Real estate means land as well as everything that, naturally or artificially, is incorporated into it, while in the definition of real estate as an object of land book, it means "land, with or without buildings". From the perspective of the land book, what is incorporated, naturally or artificially, permanently, in the land and is not construction, is only related to the description of the building or the specification of the category of use, while the constructions are registered separately.

Law no.7/1996 in art.36 para.1 regulates the manner in which the ownership right over constructions is registered in the land book. This right is registered on the basis of an attestation certificate issued by the local authority issuing the building permit, confirming that the construction of the buildings was carried out in accordance with the building permit and that there is a receipt report at the end of the works, as well as other legal provisions in the field and cadastral documentation. Paragraph 2 of the same article regulates the documents necessary for the registration of constructions completed before August 1, 2001, the date of entry into force of Law no. 453/2001 amending and supplementing Law no. 50/1991 on the authorization of construction works and certain measures for the construction of dwellings and paragraph 3 regulates the possibility and documents necessary to register the ownership right over constructions in the land book by stages of execution.

In fact, even in the legal literature of the beginning of the last century, the idea was expressed that the earth is in reality the only immovable thing by nature, the other things becoming immovable only by incorporation and their attachment to the earth by virtue of the rule

quod solo inaedificatur, solo cedit. The earth can never cease to be immobile, because its mobilization could only take place by virtue of a fiction, which does not exist.

3. Modification of the property registered in the land register

The land body, as a material object of the land book, will be modified by adhesions – when several plots merge into a single land body or when a part of a building is added to another building, or the extent of a plot is increased or by detachments – when a parcel is separated from a building or its extent is reduced. From the analysis of the legal text, it is unequivocal that the category of land use has no relevance, the only condition being that of the existence of the property right.

The removal or attachment of buildings can be done if they are located in the same administrative-territorial unit and are not encumbered. Where buildings to be detached or joined are encumbered, the operation of detachment or attachment may be carried out only with the consent of the holders of such encumbrances, unless the building is the result of a dismantling. The owners of adjacent buildings may request the registration of the merger in the land book based on the act of amalgamation, an agreement on establishing the shares held in the property resulting from the merger, concluded in authentic form, and cadastral documentation.

The attachment or detachment of a building encumbered with encumbrances may be done only with the consent of the holders of those encumbrances. The refusal of the holders of duties must not be abusive and may be censured by the court.

If, however, the mortgage lenders consent to the attachment or, as the case may be, to both the detachment and the attachment of the encumbered property to another building, in the absence of an agreement to the contrary, the mortgages shall rank after those encumbering the property to which the attachment was made.

These real estate modification operations are material in nature and do not involve any transfer of ownership. The changes that occur through the joining or detachment operations are made on the basis of cadastral documentation received by the territorial office and the consent of the owner or possessor noted in the land book, expressed by authentic document or, as the case may be, by final court decision.

In case of adhesion or detachment, the resulting buildings receive new cadastral numbers and are transcribed into new land books. The land books from which the attached or detached buildings originate are closed, and cannot be reopened for new registrations.

As mentioned above, the joining or detaching operation involves:

The cadastral documentation for detachment or attachment contains: a) proof of payment of the tariff; b) request for acceptance; c) declaration on own responsibility regarding the identification of the measured building; d) copies of identity documents, in the case of owners who are natural persons / certificate issued by the community public service for population records resulting in identification data or certificate of ascertainment, in the case of legal entities; e) urbanism certificate, in cases provided by law; f) technical report; g) copy of the plan underlying the allocation of the cadastral number of the building for which the detachment is requested, if the building is registered in the cadastre and land book information system without geometry / copies of the plans that were the basis for allocating the cadastral numbers of the buildings for which the attachment is requested, if the buildings are registered in the cadastre and land book information system without geometry; h) site and delimitation plan with the proposal to detach or join; i) site and delimitation plans for each building resulting from detachment / site plan and delimitation of the building resulting from joining; j) court decision, if applicable.

The operation of detachment or attachment of a building is considered completed when the authentic act of detachment or attachment is entered in the land register.

Bibliography

1. D. Alexandresco, *The Theoretical and Practical Explanation of Romanian Civil Law*, Editura Tipografia ziarul "Curierul Judiciar", Bucharest, 1906.
2. Collectively, *The New Civil Code. Commentaries, Doctrine, Jurisprudence*, Volume I; Art.1-952, Editura Hamangiu, Bucharest, 2012.
3. M. Nicolae, *Treatise on Real Estate Advertising*, vol. I, Editura Universul Juridic, Bucharest, 2011 .
4. A.A. Chiş, *Real estate advertising in the conception of the new Civil Code*, Editura Hamangiu, Bucharest, 2012.
5. Romanian Civil Code.
6. Code of Civil Procedure.

JURISPRUDENT MARKERS REGARDING THE PRINCIPLES APPLICABLE TO PUBLIC PROCUREMENT CONTRACT AWARD PROCEDURES

PhD. Marlena BOANCĂ-IVAN*

Abstract

Public procurement represents an important percentage of the GDP of EU member states, an aspect that justified the dynamics of public procurement regulations at the European level since 1970, as a reflection of the importance of strengthening the European single market.

Being part of the 5th generation of the community acquis on public procurement, Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC represents a directive of minimum and not maximum harmonisation, the national legislator having the possibility to provide additional standards to those provided in the directive. In Romanian law, the principles underlying the awarding of public procurement contracts and the organization of solution contests are expressly enshrined by the provisions of art. 2 para. 2 of Law no. 98/2016, these being: non-discrimination, equal treatment, mutual recognition, transparency, proportionality and assumption of responsibility. The first five principles are derived from Union law, and the principle of assuming responsibility is specific to national law.

Enumerated only in the legislation, the fundamental principles applicable to the awarding procedures are defined by the jurisprudence of the CJEU and the national jurisprudence, having a benchmark role for the conduct of the contracting authorities, but also for the practice of the CNSC and the courts.

Keywords: *public procurement, public procurement contract, principles applicable to award procedures, contracting authority*

1. The European and national regulatory framework. The role of public procurement principles. The application domain

1.1. The European and national normative framework. The role of public procurement principles

The principles of public procurement are based on the principles of the Treaty on the functioning of the European Union (art. 28, 49, 56). In this sense, paragraph 1 of the preamble of Directive 2014/24/EU of the European Parliament and of the Council states that: the awarding of public procurement contracts by or on behalf of the authorities of the member states must comply with the principles of the TFEU, specifically the free movement of goods, the freedom of establishment and the

* Judge, INM collaborating trainer.

freedom to provide services, as well as the principles derived from them, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

According to art. 18 of Directive 2014/24/EU of the European Parliament and of the Council, contracting authorities treat economic operators equally and without discrimination and act in a transparent and proportionate manner. The acquisition concept cannot be made with the intention of excluding it from the scope of this directive or artificially restricting competition. Competition is considered to be artificially restricted if the concept of the purchase is made with the intention of unfairly favoring or disadvantaging certain economic operators.

In Romanian law, the principles underlying the awarding of public procurement contracts and the organization of solution contests are expressly enshrined by the provisions of art. 2 para. 2 of Law no. 98/2016, these being:

- a) non-discrimination;
- b) equal treatment;
- c) mutual recognition;
- d) transparency;
- e) proportionality;
- f) assumption of responsibility.

The first five principles provided by art. 2 para. 2 of Law no. 98/2016 are derived from Union law, and the principle of assuming responsibility is specific to national law.

Beyond the principle regulation provided by art. 2 para. 2 of Law no. 98/2016, there are also special provisions requiring compliance with the principles of public procurement.

In this sense, art. 209 para. 1 of Law no. 98/2016 states that if the information or documents presented by the economic operators are incomplete or erroneous or if certain documents are missing, the contracting authority has the right to request clarifications from the tenderers/candidates within a certain period and, as the case may be, additions to the documents presented by them in the offers or requests for participation, respecting the principles of equal treatment and transparency.

At the same time, special provisions requiring compliance with the principle of mutual recognition can be found in art. 200 of Law no. 98/2016. Thus, according to art. 200 para. 1 of Law no. 98/2016, if the contracting authority imposes on economic operators the obligation to present specific certifications, granted by independent bodies that attest to their compliance with certain quality assurance standards, including

accessibility for people with disabilities, or standards or systems of environmental management, this will relate to the quality assurance systems based on the series of relevant European standards certified by accredited bodies. According to art. 200 para. 2 of Law no. 98/2016, the contracting authority has the obligation, in accordance with the principle of mutual recognition, to accept certificates equivalent to those provided for in para. (1), issued by accredited certification bodies established in other member states.

Also, particular references regarding the principles of public procurement include the provisions of art. 33 para. 2 of Law no. 98/2016, etc. a.

The principles of public procurement play the role of benchmark for the conduct of the contracting authorities, but also for the practice of the CNSC and the courts, acquiring legal force, and therefore direct applicability, based on the provisions of art. 2 para. 2 of Law no. 98/2016.

Determining the content, the exact meaning of the legal norms, in the light of the application of the objective law to concrete cases, the judge will resort to the interpretation of the legal provisions incident to the matter of public procurement in accordance with the principles provided by art. 2 para. 2 of Law no. 98/2016.

In this sense, the provisions of art. 1 paragraph 1 of the Methodological Norms for the application of the provisions relating to the awarding of the public procurement contract/framework agreement from Law no. 98/2016 regarding public procurements approved by H.G. no. 395/2016 states that in the process of public procurement, any situation for which there is no explicit regulation is interpreted through the prism of the principles provided for in art. 2 para. (2) from Law no. 98/2016 on public procurement.

1.2. The application domain

According to Union law, the principles of public procurement provided by Directive 2014/24 - equal treatment, non-discrimination, mutual recognition, proportionality and transparency - are applicable to the procedures for awarding contracts whose estimated value, excluding VAT, is equal to or exceeds the threshold value provided by Art. 4 of Directive 2014/24, for which there is an obligation to publish a notice of participation and/or award in the Official Journal of the European Union.

Likewise, the fundamental principles in the TFEU – the principles of equal treatment and non-discrimination, as well as the obligation of transparency – are applicable to purchases which, by reference to their

value or object, do not fall within the scope of Directive 2014/24, insofar as these procurement contracts are of definite cross-border interest.

Consequently, the principles of public procurement provided for by Directive 2014/24 will not be applied to a public procurement contract whose estimated value is below the threshold value, which is of definite cross-border interest, but only the principles of equal treatment and non-discrimination, as well as the obligation of transparency - the fundamental principles provided by the TFEU.

In this sense, according to the constant jurisprudence of the CJEU¹, the fact that the value of a contract does not reach the threshold provided by EU rules, does not mean that this contract is completely out of the scope of European Union law.

In the CJEU Decision of 04/04/2019, pronounced in case C-699/17², point 49, it was highlighted that, with regard to a contract which, given its value, does not fall within the scope of Directive 2014/ 24, the fundamental rules and general principles in the treaty must be taken into account, in particular articles 49 and 56 TFEU and the principles of equal treatment and non-discrimination, as well as the obligation of transparency arising from them, insofar as the contract concerned presents a definite cross-border interest (Judgment of April 5, 2017, Borta, C 298/15, EU:C:2017:266, point 36).

Essential for establishing the incidence of the TFEU principles is the condition that that contract presents a cross-border interest.

Through the Decision of 19.04.2018, Case C 65/17, *Oftalma Hospital Srl v. Commissione Istituti Ospitalieri Valdesi (CIOV)*, Regione Piemonte³, the CJEU highlighted the objective criteria that can be taken into account by the national court when checking whether the contract is of cross-border interest sure:

39. In this regard, it must be emphasized that, at the time of examination, the existence of a definite cross-border interest cannot be deduced hypothetically from certain elements which, considered

¹ Judgment of CJUE, 10.06.2014, Case-358/12, *Consorzio Stabile Libor Lavori Pubblici împotriva Comune di Milano*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=154820&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=6009515>.

² Judgment of CJUE, 4.04.2019, Case-699/17, *Allianz Vorsorgekasse AG v. Bundestheater-Holding GmbH, Burgtheater GmbH, Wiener Staatsoper GmbH, Volksoper Wien GmbH, ART for ART Theaterservice GmbH*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=212661&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=689326>.

³ Judgment of CJUE, 19.04.2018, Case-65/17, *Oftalma Hospital Srl împotriva Commissione Istituti Ospitalieri Valdesi (CIOV)*, Regione Piemonte, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=201262&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=6006334>.

abstractly, could constitute indications in this sense, but must positively emerge from a concrete assessment of the terms of the contract at issue in the main litigation. This means that it cannot be considered that a certain cross-border interest is established on the basis of elements that do not exclude its existence, but it must be considered as such when its cross-border character is proven on the basis of objective and concordant elements (see in this sense Judgment of 6 October 2016, *Tecnoedi Costruzioni*, C 318/15, EU:C:2016:747, point 22).

40. The Court has already ruled that the significant amount of the contract in question combined with the place of execution of the works or the technical characteristics of the contract and the specific characteristics of the products concerned could constitute objective criteria to indicate the existence of a definite cross-border interest. In this context, the existence of complaints made by operators located in other member states than that of the contracting authority can also be taken into account, provided that it is verified that they are real and not fictitious (Judgment of October 6, 2016, *Tecnoedi Costruzioni*, C 318/15, EU:C:2016:747, point 20 and the case law cited). In addition, the fact that, at the time of the award of the contract at issue in the main proceedings, similar health services had or had not already been provided by entities established in other Member States may also constitute an element to be taken into account.

41. It must be remembered, however, that, with regard to, more precisely, the sanitary activity, the Court considered, in an action for failure to fulfill obligations, that the definite cross-border interest was not established on the basis of the simple fact that the procurement contracts in question had a important economic value (see in this regard Judgment of 29 April 2010, *Commission v Germany*, C 160/08, EU:C:2010:230, paragraphs 18, 54 and 123).

Since Directive 2014/24 is a minimum and not a maximum harmonization directive, the Romanian legislator provided through Law no. 98/2016 additional standards compared to the Directive regarding the scope of public procurement principles. Thus, according to Romanian law, they also apply to the procedures for awarding public procurement contracts whose estimated value, without VAT, is below the threshold value provided by art. 7 para. 1 of Law no. 98/2016, but greater or equal to the values provided by art. 7 para. 5 of Law no. 98/2016.

In this sense, art. 7 para. 2 of Law no. 98/2016 states that the contracting authority awards the public procurement contracts/framework agreements and organizes the solution contests regarding public procurements whose estimated value is lower than the corresponding thresholds provided for in para. (1) by applying a

simplified procedure, in compliance with the principles provided for in art. 2 para. (2).

Since the direct purchase does not represent an award procedure within the meaning of art. 68 of Law no. 98/2016, the principles provided by art. are not applicable to it. 2 para. 2 of Law no. 98/2016, but only the fundamental principles in the TFEU - the principles of equal treatment and non-discrimination, as well as the obligation of transparency, to the extent that the direct purchase has clear cross-border interest.

Also, identical provisions art. 2 para. 2 of Law no. 98/2016 include the provisions of art. 2 para. 2 of Law no. 99/2016 and art. 2 para. 2 of Law no. 100/2016. Consequently, the previously mentioned principles also apply when the awarding procedure concerns sectoral procurement contracts or works or service concession contracts.

2. The principle of non-discrimination

The principle of non-discrimination is based on the provisions of art. 18 of the TFEU, which prohibits any discrimination based on citizenship or nationality and the provisions of art. 34 of the TFEU, which prohibit the direct and indirect restriction of the free movement of goods and services.

This principle involves conducting the procedures for awarding public procurement contracts in a real competitive framework, ensuring economic operators, regardless of nationality, the effective chance to participate in the procedure and conclude the public procurement contract.

In the legal sense, competition between economic operators in public procurement procedures involves confrontation, rivalry between economic operators with similar or similar activities, exercised in public procurement procedures, in order to conclude the contract, in order to obtain profit.

Through public procurement, contracting authorities intervene on the market, but this must not affect fair and undistorted competition between economic operators participating in public procurement procedures.

In applying this principle, the contracting authorities have the obligation not to impose discriminatory conditions in the specifications, not to establish qualification requirements that favor certain participants in the public procurement procedure, not to discriminate against potential bidders on the basis of unjustified reasons, such as the nationality of the bidder, and not to impose in the award documentation technical specifications likely to favor national economic operators.

The effects of respecting the principle of non-discrimination in the procedures for awarding public procurement contracts are the

development of the single market of public procurement, the creation of a real competitive framework between the participating economic operators, the elimination of practices that restrict competition, guaranteeing the widest possible participation of potential bidders in the procedure in terms of ensuring the efficient use of public money.

In the matter of public procurement, the European courts applied this principle, noting its violation: either by referring to the discrimination of potential bidders on grounds of nationality, or by referring to the imposition in the award documentation of some technical specifications of the products or services likely to favor the operators national economies.

Regarding the discrimination of potential bidders on grounds of nationality, it is discriminatory, for example, the requirement that the companies interested in the contract be established in the same Member State or region as the contracting entity. The only exception to this rule would be the obligation of the winner to place a business infrastructure at the place of execution of the contract if this is justified by certain specific circumstances of the contract.

In Case C-21/88, *Du Pont de Nemours Italiana SpA v. Unita sanitaria locale n 2 di Carrara* - the Italian state imposed on all public bodies and administrations, as well as bodies and enterprises with state participation located throughout the national territory, the obligation to supply, in a proportion of at least 30% of their needs, from the industrial, agricultural and artisan enterprises established in the Mezzogiorno, where the respective products were processed. The Court established that Article 30 of the EEC Treaty must be interpreted in the sense that it opposes a national regulation that reserves to companies established in certain regions of the national territory a percentage of public procurement contracts.⁴

In the Decision of June 22, 1993, pronounced in case C-243/89, the *Commission vs. In Denmark*, the CJEU ruled that a contractual clause in an award document, which introduces discrimination based on nationality considerations, is contrary to the principles of Community law. The clause mentioned in art. 6 para. 2 of the general conditions, which are part of the specification, stipulated that the contractor is obliged to use, to the greatest extent possible, Danish materials, consumer goods, labor and equipment. Although, before the signing of the public procurement contract, the aforementioned clause was removed from the contract, this does not change the fact that the Danish

⁴ Judgment of CJUE, 20.03.1990, Case-21/88, *Du Pont de Nemours Italiana SpA vs. Unita sanitaria locale n 2 di Carrara*, <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:61988CJ0021>.

contracting authority called for tenders on the basis of discriminatory requirements, the award procedure being carried out on the basis of a clause that was not according to Community law.⁵

In the Judgment of September 20, 1988, C-31/87, the CJEU considered the requirement to hire the long-term unemployed as compatible with European law, as long as it does not discriminate against potential bidders from other Member States.⁶

Regarding the violation of the principle of non-discrimination by reference to the inclusion in the award documentation of some technical specifications of products or services likely to favor national economic operators, the European courts ruled that in order for a procedure not to violate the principle of discrimination, the description of the characteristics of a product or a the service must not refer to a particular method of manufacture or a particular origin, nor specific processes, nor refer to a specific brand, patent, origin or production, unless a mention of this nature is justified by the object of the contract and if it is accompanied by the mention "or equivalent".

In the CJEU Decision of September 22, 1988, C-45/87 Commission v. Ireland, a violation of the principle of non-discrimination was held in the situation where in the award documentation, the definition of the technical specifications, by reference to a certain national standard, is not accompanied by the mention "or equivalent".⁷

We also find an application of this principle in case C-359/93, Commission vs. Kingdom of the Netherlands, the Court highlighting that the definition of technical specifications, by reference to a certain brand is only allowed if a sufficiently accurate and intelligible description of the object of the contract is not possible and only if such a reference is accompanied by the mention "or equivalent".⁸

3. The principle of equal treatment

The principle of equal treatment requires that during the award procedure the contracting authority establishes and applies fair rules,

⁵ Judgment of CJUE, 22.06.1993, C-243/89, Comisia vs. Danemarca, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61989CJ0243&from=RO>

⁶ Judgment of CJUE, 20.09.1988, C-31/87, Beentjes v. Netherlands, <https://curia.europa.eu/juris/showPdf.jsf?jsessionid=D38EDB690CA78F3E0D3AB677A2E6AFB8?text=&docid=95121&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=11107026>

⁷ Judgment of CJUE, 22.09.1988, Case-45/87 Comisia v. Irlanda, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61987CJ0045>

⁸ Judgment of CJUE, 24.01.1995, C-359/93, Comisia vs. Regatul Țărilor de Jos, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61993CJ0359&from=RO>

requirements and criteria for all economic operators, guaranteeing them equal chances of awarding the contract.

This principle must be reflected in an equality of opportunities, respectively in the fair treatment of economic operators from the perspective of establishing the requirements, as well as in an equality of results, respectively in the fair treatment of economic operators from the perspective of applying the requirements.

The principle of equal treatment demands compliance by the contracting authorities with the obligation to avoid bias and conflict of interest in the procedures for awarding public procurement contracts, as well as the obligation to avoid the appearance of bias, as well as the appearance of the existence of a conflict of interest. In this sense, art. 24 of Directive 2014/24/EU of the European Parliament and of the Council expressly requires, for the first time, Member States to adopt measures to ensure that their contracting authorities prevent and remedy conflicts of interest.⁹

Respecting the principle of equal treatment implies guaranteeing the same chances regarding the formulation of offers to all bidders, the simultaneous communication to them of all the information necessary for the procedure, removing the subjectivity of the contracting authority in the adoption of decisions during the award procedure.

The effects of this principle are:

- the guarantee for all participants of the same chances in formulating offers;
- ensuring decision-making impartiality throughout the procedure;
- guaranteeing real competition between economic operators participating in a public procurement procedure.

In the jurisprudence of the CJEU, it was highlighted that the principle of equal treatment obliges that comparable situations should not be treated differently and that different situations should not be treated in the same way, unless such treatment is objectively justified.¹⁰

The principle of equal treatment concerns not only economic operators who have actually participated in an award procedure, but also potential bidders who hope to participate in the procedure.¹¹

⁹ To be seen S. Arrowsmith, *The law of public and utilities procurement. Regulation in the EU and UK*, vol. II, Third edition, Thomson Reuters, London, 2018, p. 371.

¹⁰ Judgment of CJUE, 3.03.2005, Joined Cases C-21/03 and C-34/03, *Fabricom v. Belgium*, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62003CJ0021&from=EN>

¹¹ Judgment of CJUE, 5.10.2000, Case-16/98, *Commission v. France*, <https://curia.europa.eu/juris/showPdf.jsf?jsessionid=9069DFDCD97E3183D519A3EE7B2E6E22?text=&docid=45712&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs&part=1&cid=789147>

The High Court of Cassation and Justice decided that by subsequently modifying the contract award, the essential elements of the contractual clauses (payment methods, payment term, penalties paid by the beneficiary, the guarantee granted, the clauses relating to the adjustment of the contract price) the competition was implicitly violated between economic operators, not being guaranteed equal treatment and non-discrimination of economic operators, and at the same time not being ensured the efficient use of public funds.¹²

In the CJEU Decision of May 11, 2017, *Archus si Gama*, C-131/16, it was highlighted that the contracting authority can invite a tenderer to clarify an offer or correct an obvious material error that it might contain, provided that certain requirements and in particular that such a request be addressed to any tenderer who is in the same situation, that all tenderers are treated equally and fairly and that this clarification or correction cannot be assimilated to the submission of a new tender.¹³

Directive 2014/24/EU of the European Parliament and of the Council in conjunction with the principles of equal treatment and transparency must be interpreted in the sense that the tender notice must indicate the estimated quantity and/or value as well as a maximum quantity and/or value of the products to be provided under a framework agreement and that once this limit is reached, that framework agreement will expire.¹⁴

In the Judgment of 11.07.2019 in case C 697/17 *Telecom Italia SpA*¹⁵, the CJEU analyzed the principle of equal treatment of bidders through the lens of the need to maintain a legal and material identity between the preselected candidate and the one submitting the bid.

Article 28 paragraph (2) first sentence of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that, given the requirement regarding the

¹² The decision of Roumanian Hihg Court of Cassation and Justice no. 1443/6.03.2020, <https://www.scj.ro/1093/Detaliijurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=171635>

¹³ Judgment of CJUE, 11.05.2017, *Archus and Gama*, Case-131/16, <https://curia.europa.eu/juris/document/document.jsf?jsessionid=6EC544C5719396474F7EAA2B3EAD96E5?text=&docid=190585&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=11131285>

¹⁴ Judgment of CJUE, 17.06.2021, Case-23/20, <https://curia.europa.eu/juris/document/document.jsf?jsessionid=96D8F881BD46B2CC27C7C93476D25B53?text=&docid=243105&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=373882>

¹⁵ Judgment of CJUE, 11.07.2019, Case-697/17, *Telecom Italia SpA*, <https://curia.europa.eu/juris/document/document.jsf?jsessionid=BF0FAF1C24A9B7D2A7C78955D309D780?text=&docid=216065&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=5992220>

identity legal and material between the preselected economic operators and those who submit the bids, does not oppose that, within a restricted procedure for awarding a public procurement contract, a preselected candidate who undertakes to absorb another preselected candidate, based on an agreement of merger concluded between the pre-selection stage and the stage of submission of offers and executed after this stage of submission, to be able to submit an offer.

8. In May 2016, Infratel launched, on behalf of the Ministry of Economic Development, a restricted procedure for the purpose of awarding public procurement contracts for the construction, maintenance and management of a passive public ultra-broadband network in the so-called "white areas" from several regions of Italy (Abruzzo, Molise, Emilia Romagna, Lombardy, Tuscany and Veneto).

9. This tender procedure was part of the implementation of the state aid scheme SA.41647 (2016/N) ("Strategia Italiana Banda Ultra Larga"), notified by the Italian authorities on 10 August 2015 and approved by a Commission decision of 30 June 2016 [C(2016) 3931 final].

10. The mentioned procedure referred to the allocation of five lots and included the following three stages:

- submission of participation applications (until July 18, 2016);
- sending invitation letters to preselected operators (until August 9, 2016) and
- submission of offers (until October 17, 2016).

11. For each of these five lots applications were submitted by Telecom Italia, as well as, among others, Metroweb Sviluppo Srl and Enel OpEn Fiber SpA (hereinafter "OpEn Fiber"). Although shortlisted, Metroweb Sviluppo ultimately did not submit a bid.

12. Infratel published, on January 9, 2017, the list of admitted bidders and, on January 24, 2017, the provisional ranking of the winning bidders. OpEn Fiber was ranked first in each of the five batches, while Telecom Italia was ranked second, except for batch no. 4, in which he took third place.

13. Unsatisfied with the outcome of the procedure in question, Telecom Italia submitted a request for access to the documents contained in the file related to this procedure.

14. It follows from these documents that, between the pre-selection stage and October 17, 2016, the deadline for submitting offers, Enel SpA and Metroweb Italia SpA, holding companies, concluded, on October 10, 2016, a binding framework agreement that provided that OpEn Fiber would acquire all the shares of Metroweb SpA, which owned Metroweb Sviluppo, this acquisition thus causing the merger by absorption of

Metroweb SpA and, consequently, Metroweb Sviluppo, by OpEn Fiber. In accordance with this framework agreement, the takeover of Metroweb Sviluppo by OpEn Fiber was decided on 23 January 2017.

15. This concentration project had been notified to the European Commission on November 10, 2016 in accordance with Regulation (EC) no. 139/2004 of the Council of January 20, 2004 regarding the control of economic concentrations between enterprises (OJ 2004, L 24, p. 1, Special edition, 08/vol. 1, p. 201). By decision of 15 December 2016 (Case M.8234 – Enel/CDP Equity/Cassa Depositi e Prestiti/Enel Open Fiber/Metroweb Italia) (OJ 2017, C 15, p. 1), the Commission decided not to oppose the said concentration.

16. Telecom Italia contested the award of the five lots in question by means of five actions brought before the Tribunale amministrativo regionale del Lazio (Regional Administrative Court of Lazio, Italy), which dismissed them all. Telecom Italia subsequently appealed against the decisions thus rendered by this court to the Consiglio di Stato (Council of State, Italy).

17. The Consiglio di Stato (Council of State) asks whether, in a restricted procedure governed by Article 28 of Directive 2014/24 such as that at issue in the main proceedings, the requirement of legal and material identity established by the Court in regards Article 51 of Directive 2004/17 in the Judgment of 24 May 2016, *MT Højgaard and Züblin* (C 396/14, EU:C:2016:347), may apply.

18. This court further points out that, on the date of submission of the bids, 17 October 2016, the merger operation in question in the main litigation had just begun, its completion occurring only later, and that, consequently, on that date, the structure of OpEn Fiber remained unchanged.

19. According to the said court, it would be impossible to demonstrate that, through the merger agreement in question, the parties sought to achieve an anti-competitive agreement, with the aim of restricting competition in the procurement contract award procedure in question in the main litigation(...).

26. By means of the question formulated, the referring court essentially asks to determine whether the first sentence of Article 28(2) of Directive 2014/24 must be interpreted as meaning that, given the requirement regarding the legal and material identity between the preselected economic operators and the tenderers object that, in a restricted procedure for the award of a public procurement contract, a preselected candidate who undertakes to absorb another preselected candidate, on the basis of a merger agreement concluded between the preselection and the submission of bids and executed after this submission stage, to be able to submit a bid.

27. In accordance with Article 28 paragraph (2) first sentence of Directive 2014/24, only economic operators invited in this regard by the contracting authority after evaluating the information provided may submit an offer.

28. This rule is provided for the restricted procedure, which takes place in several stages and in particular for the pre-selection stage and for the submission of tenders.

29. It emerges from the wording of the first sentence of Article 28 paragraph (2) of Directive 2014/24 that the economic operator submitting an offer must, in principle, be the one that has been preselected.

30. This provision does not provide rules regarding the possible changes in the structure or in the economic and technical capacity of the preselected candidate.

31. In the similar context of Directive 2004/17, the Court examined the aspect of the impact of such changes during a negotiated procedure for the award of a public procurement contract in the Judgment of 24 May 2016, *MT Højgaard and Züblin* (C 396/14, EU:C:2016:347), in the light of the general principles of Union law, in particular the principle of equal treatment and the obligation of transparency arising from it, as well as the objectives of that law in the field of public procurement.

32. In this regard, it must be remembered that the principle of equal treatment and the obligation of transparency mean in particular that bidders must be on an equal footing both when they prepare their bids and when they are evaluated by the contracting authority and constitute the basis of the Union rules on the procedures for awarding public procurement contracts (Judgment of 24 May 2016, *MT Højgaard and Züblin*, C 396/14, EU:C:2016:347, point 37 and the cited case law).

33. The principle of equal treatment between bidders, whose objective is to promote the development of fair and effective competition between companies participating in a public procurement procedure, requires that all bidders have the same chances in formulating the terms of their bids and therefore implies that they should be subject to the same conditions for all competitors. A strict application of the principle of equal treatment between tenderers, in a negotiated procedure, would lead to the conclusion that only economic operators who have been preselected as such can submit tenders and become winning tenderers (see in this regard the Decision of 24 May 2016, *MT Højgaard and Züblin*, C 396/14, EU:C:2016:347, paragraphs 38 and 39).

34. This approach is based on Article 28(2) of Directive 2014/24, according to which "[o]nly economic operators invited for this purpose by the contracting authority after evaluating the information provided may submit a tender", which presupposes an identity legal and material

between the preselected economic operators and those who present the offers (see by analogy the Judgment of 24 May 2016, *MT Højgaard and Züblin*, C 396/14, EU:C:2016:347, paragraph 40).

35. However, the Court also ruled that, in a negotiated procedure, in the event of the dissolution of a pre-selected group as such, of which two economic operators were part, one of them can replace that group and continue the procedure mentioned, without the principle of equal treatment being violated, provided that it is established that this economic operator alone meets the requirements initially established by the contracting authority and that its continued participation in the mentioned procedure does not cause a deterioration of the competitive situation of the other bidders (a see in this regard Judgment of 24 May 2016, *MT Højgaard and Züblin*, C 396/14, EU:C:2016:347, paragraph 48 and operative part).

36. It must be shown that, in the case in which the aforementioned judgment was handed down, both the legal identity and the material identity between the preselected operator and the one who submitted an offer were changed, since, on the one hand, not the group of companies preselected as such continued the procedure, but only one of the operators in this group, and, on the other hand, the economic and technical capacity of the original candidate was reduced by the loss of the capacity of one of the economic operators in question. However, this change was not likely to prevent the continuation of the procedure, if the conditions established by the Court were respected.

37. In this regard, it must be emphasized that the main dispute concerns, instead, a situation in which one of the tenderers has increased its capacities by purchasing one of the other preselected tenderers.

38. Therefore, it must be determined whether, in these circumstances, the legal and material identity of the shortlisted tenderers has been changed.

39. In the present case, it is clear that, as regards OpEn Fiber, the requirement of legal identity between the pre-selected candidate and the tenderer has been met.

40. Instead, it emerges from the request for a preliminary decision that, between the pre-selection stage and the deadline for submission of bids, the holding companies of two of the bidders, OpEn Fiber and Metroweb Sviluppo, concluded a binding framework agreement that has the vocation of thereby determining the merger by absorption of Metroweb Sviluppo by OpEn Fiber. To the extent that a firm commitment had been made that OpEn Fiber was to acquire Metroweb Sviluppo's assets, and OpEn Fiber, while awaiting a Commission decision, could therefore reasonably rely on Metroweb Sviluppo's ability

in its business future, it is necessary to establish, even if the concrete and definitive effects of the merger operation in question did not occur until after the submission of the offers, a non-existence of a material identity between OpEn Fiber on the date on which it was preselected and this company on the date deadline for submission of offers.

41. Consequently, it is necessary to examine whether, despite this lack of material identity, the principle of equality can be considered not to have been violated, taking into account the criteria mentioned in the Judgment of 24 May 2016, MT Højgaard and Züblin (C 396/14, EU:C:2016:347, point 48), cited in point 36 of this judgment.

42. In this regard, it must be emphasized, as is evident from the contents of point 37 of this judgment, that these criteria were developed in the context of the case in which the Judgment of May 24, 2016, MT Højgaard and Züblin (C 396/14 , EU:C:2016:347), mentioned, which essentially concerned circumstances in which the capacities of the initially pre-selected bidder decreased, while the present case concerns a situation in which one of the bidders increased the capacities by acquiring one of the other pre-selected bidders. This difference in situation necessarily has an impact on the application, in this case, of the mentioned criteria, since, unlike an increase in the capabilities of a tenderer, a reduction in them can cause difficulties in a contract award procedure of public procurement.

43. Thus, allowing a candidate, whose economic and technical capacity has significantly decreased since his pre-selection, to submit an offer could lead to a circumvention of the pre-selection procedure, given that such a candidate whose capacity was thus reduced would not have been, as the case may be, preselected.

44. In a negotiated procedure for the award of a public procurement contract, it is in the interest of the contracting authority that, when candidates have been preselected, they maintain their economic and technical capacity throughout the procedure, as the loss of this capacity could prejudice the objective of this procedure, which is to choose a tenderer capable of executing the said contract.

45. On the other hand, it is not against the interests of the contracting authority for a candidate to strengthen its economic and technical capacity after pre-selection. It can even be considered normal for a candidate to equip himself with means that allow him to ensure his ability to guarantee the good execution of the contract.

46. This increase in economic and technical capacity may include the use of the means of other economic operators and, as the case may be, the partial or complete absorption of an economic operator, including an economic operator participating in the same negotiated procedure for awarding a public procurement contract.

47. Considering these considerations, it must be noted that the criterion regarding essentially establishing the fact that an economic operator who wishes to continue a procedure for awarding a public procurement contract as a tenderer, in the absence of a legal or material identity between this economic operator in the preselection stage and the same operator at the deadline for the submission of offers, must prove that it still meets the requirements originally established by the contracting authority is met by hypothesis in a situation where its material capacity has only increased.

48. Regarding, in this case, the criterion regarding the fact that the continued participation of the tenderer in a procedure for awarding a public procurement contract must not cause a deterioration of the competitive situation of the other tenderers, it must be shown that the distinct provisions of Union law of those governing public procurement contracts specifically aim to ensure that the existence of free and undistorted competition within the internal market is not jeopardized by merger operations such as the one at issue in the main litigation. Thus, to the extent that the behavior of an economic actor complies with these specific rules, it cannot be considered that his participation in such an operation could, in itself, lead to a deterioration of the competitive situation of the other bidders by the simple fact that the resulting entity following the merger, it will benefit from an increased economic and technical capacity.

49. Therefore, an absorption such as the one in question in the main litigation must be carried out in compliance with Union regulations, in particular Regulation no. 139/2004.

50. However, it appears from the request for a preliminary decision that, in this case, the Commission decided on December 15, 2016, based on the aforementioned regulation, not to oppose the notified operation.

51. It should also be added that, although the principle of equality is not affected by the simple fact of the merger between two preselected bidders as such, it cannot be excluded that sensitive information regarding the contract award procedure could have been exchanged by the parties interested in merger before its realization. Or, this circumstance would be susceptible, on the occasion of the submission of offers, to ensure unjustified advantages to the absorbing bidder in relation to the other bidders, thus necessarily causing a deterioration of the competitive situation of the latter (see by analogy the Decision of May 17 2018, *Specializuotas transportas*, C 531/16, EU:C:2018:324, paragraph 29).

52. Such a situation would be sufficient, in principle, so that the offer of the absorbing tenderer cannot be taken into account by the

contracting authority (see by analogy the Judgment of 17 May 2018, *Specializuotas transportas*, C 531/16, EU: C:2018:324, point 31).

53. However, such exchanges of information, which, on the other hand, as the Commission pointed out in its observations, are likely to violate Article 7 of Regulation no. 139/2004, regarding the suspension of any concentration falling within its scope until it is authorised, just as it could also infringe Article 101 TFEU, cannot be presumed. However, it appears from the information available to the Court that no collusive behavior was established in the case.

54. It follows from all the preceding considerations that the first sentence of Article 28(2) of Directive 2014/24 must be interpreted in the sense that, given the requirement regarding the legal and material identity between the preselected economic operators and those submitting the offers, it does not oppose that, in a restricted procedure for the award of a public procurement contract, a preselected candidate who undertakes to absorb another preselected candidate, pursuant to a merger agreement concluded between the preselection and the tendering stage and executed after this submission stage, to be able to submit an offer.

Also, the CJEU Decision of 28.02.2018 in the related cases C 523/16 and C 536/16 *MA.T.I. SUD SpA v. Centostazioni SpA and China Taiping Insurance Co.Ltd and Duemme SGR SpA v. Associazione Cassa Nazionale di Previdenza e Assistenza in favore dei Ragionieri e Periti Commerciali*¹⁶ reflect an analysis of the principle of equal treatment and the principle of proportionality.

Union law, in particular Article 51 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public contracts for works, goods and services, the principles relating to the award of procurement contracts public, among which are the principles of equal treatment and transparency provided for in Article 10 of Directive 2004/17/EC of the European Parliament and of the Council of March 31, 2004 coordinating the procedures for awarding procurement contracts in the water, energy, transport sectors and postal services and in Article 2 of Directive 2004/18, as well as the principle of proportionality must be interpreted in the sense that they do not oppose, in principle, a national regulation

¹⁶ Judgment of CJUE, 28.02.2018, Joined Cases C-523/16 și C-536/16 *MA.T.I. SUD SpA vs. Centostazioni SpA and China Taiping Insurance Co.Ltd și Duemme SGR SpA împotriva Associazione Cassa Nazionale di Previdenza e Assistenza in favore dei Ragionieri e Periti Commerciali*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=199775&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=331086>

that establishes a mechanism to assist in the preparation of the file under which, in a procedure of award of a public procurement contract, the contracting authority may invite any tenderer whose tender is affected by essential irregularities, within the meaning of the said regulation, to correct the tender irregularities subject to the payment of a pecuniary penalty, to the extent that the amount of this penalty continues to comply the principle of proportionality, an aspect that must be determined by the referring court.

On the other hand, the same provisions and principles must be interpreted in the sense that they are opposed to a national regulation establishing a mechanism to assist in the preparation of the file under which the contracting authority may request a tenderer, with payment by the latter of a pecuniary penalty, to remedy lack of a document which, according to the express provisions of the procurement documents, must lead to its exclusion or eliminate the irregularities affecting its offer in a way in which the corrections or changes made would be similar to the presentation of a new offer.

4. The principle of mutual recognition

The principle of mutual recognition is a corollary of the principle of non-discrimination.

The foundation of the European single market, the principle of mutual recognition requires, in the matter of public procurement, that the contracting authorities accept:

- the products, services, works offered legally on the EU market, it being enough that they comply with the national standards of a single member state;
- diplomas, certificates and other documents issued by the authorities of other member states;
- technical specifications equivalent to those requested at national level.

The essential consequence of respecting the principle of mutual recognition is the development of the single European market in the field of public procurement.

5. The principle of transparency

The principle of transparency involves guaranteeing the right of full access of all interested economic operators to the award documentation, to the decisions of the contracting authority and to all relevant information in the public procurement procedure, in order to avoid the risk of favoritism and arbitrariness on the part of the contracting authority.

The application of the principle of transparency implies:

- the formulation by the contracting authorities in a clear, precise and unequivocal way of all the documents developed during the public procurement procedure;
- all informed tenderers can understand, with minimal diligence, the conditions and detailed rules of the award procedure and interpret them in the same way;
- the contracting authority should be able to check whether the submitted offers meet the criteria applicable to the contract in question.¹⁷

Transparency creates the conditions for equality between bidders and also allows the verification of compliance with the principle of equal treatment.

The objectives of respecting the principle of transparency are:

- ensuring an open system of public procurement in EU member states;
- the consolidation of a set of good practices both for contracting authorities and for potential bidders,
- control of the impartiality of the award procedure.

In the Decision *Pippo Pizzo v. CRGT SRL*, C-27/15¹⁸, the CJEU analyzed the principle of transparency by referring to the obligations that are not provided for in the award documentation but result from the interpretation of the national legislation applicable to the award procedure. The CJEU ruled that the principle of equal treatment and the obligation of transparency must be interpreted in the sense that they oppose the exclusion of an economic operator from the procedure for awarding a public procurement contract as a result of his non-compliance with an obligation that does not result expressly from the documents related to this procedure or from the national law in force, but from an interpretation of this law and these documents, as well as from covering the gaps, by the authorities or by the national administrative courts, presented by the said documents. In these circumstances, the principles of equal treatment and proportionality must be interpreted in the sense that they do not oppose the fact of allowing the economic operator to remedy his situation and fulfill the mentioned obligation within a period established by the contracting authority.

¹⁷ Judgment of CJUE, 4.02.2016, Case-336/14, Ince, <https://op.europa.eu/en/publication-detail/-/publication/47f059fo-ef34-11e5-8529-01aa75ed71a1/language-ro>

¹⁸ Judgment of CJUE, 2.06.2016, Case-27/15, *Pippo Pizzo v. CRGT Srl*, <https://curia.europa.eu/juris/document/document.jsf?jsessionid=FA5A3B77BE5CE5E733A05B5F50CCA435?text=&docid=179463&pageIndex=o&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=196128>

The CJEU judgment of 04/04/2019, pronounced in case C-699/17¹⁹, reflects an analysis of the principles of equal treatment and non-discrimination, as well as the principle of transparency. Thus, the CJEU ruled that articles 49 and 56 TFEU, the principles of equal treatment, non-discrimination and the obligation of transparency must be interpreted in the sense that they are applicable to the conclusion of an affiliation agreement between an employer, body governed by public law, and an occupational insurance company, in order to administer and place the contributions intended to finance the compensatory allowances paid to the employees of this employer, even if the conclusion of such an agreement is not the exclusive result of the said employer's will, but requires the agreement of either the staff or the works committee.

Regarding the transparency obligation, the CJEU highlighted the following:

61. However, the obligation of transparency imposes on the contracting authority an adequate level of publicity, which allows, on the one hand, the opening to competition and, on the other hand, the control of the impartiality of the award procedure (Judgment of December 17, 2015, *UNIS and Beaudout Père et Fils*, C 25/14 and C 26/14, EU:C:2015:821, paragraph 39).

62. It is therefore important that the rules on the award procedure are applied transparently to all bidders. Thus, the obligation of transparency, which is a corollary of the principle of equality, essentially aims to ensure the possibility of any interested operator to decide to submit an offer within the framework of requests for offers based on all relevant information and to guarantee the absence of the risk of favoritism and arbitrary behavior on the part of the contracting authority. It requires that all the conditions and modalities of the award procedure be formulated clearly, precisely and unambiguously, so as to enable all reasonably informed and reasonably diligent tenderers to understand their exact content and to interpret them in the same way and, on the other hand, to circumscribe the discretionary power of the contracting authority and to give it the possibility to effectively check whether the tenderers' offers correspond to the criteria governing the procedure in question (see in this regard the Decision of 4 February 2016, *Ince*, C 336/14, EU:C:2016:72, paragraph 87, and Judgment of 22 June 2017, *Unibet International*, C 49/16, EU:C:2017:491, paragraph 46).

¹⁹ Judgment of CJUE, 4.04.2019, Case-699/17, Allianz Vorsorgekasse AG, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=212661&pageInd ex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=6174162>

6. The principle of proportionality

In the interpretation given by community jurisprudence, the principle of proportionality assumes that:

- the measures taken by the institutions must not exceed the limits of what is appropriate and necessary in order to achieve the objectives pursued; if it is possible to choose between several appropriate measures, the least restrictive one must be used, and the inconveniences caused must not be disproportionate in relation to the goals pursued;²⁰
- when faced with an ambiguous offer, and a request for clarifications regarding the content of said offer could ensure legal security in the same way as the immediate rejection of the offer in question, the contracting authority should request clarifications from the concerned candidate rather than opting purely and simply for rejecting his offer;²¹
- in the presence of an error in the drafting of the offer, its rejection by the contracting authority instead of requesting clarification appears as disproportionate to the detected procedural flaw;²²
- the requirement that the bidder has not had financial losses for more than one year of the last three years before the time of the procedure was considered excessive, as long as the company transfers its annual profits to the parent company and in the award procedure it was based on the support of the parent company in terms of financial capacity;²³
- the automatic exclusion, based on the provisions of the applicable national legislation, of the bidders who had common shareholders was assessed as disproportionate as long as the bidders were not allowed to prove the non-existence of an anti-competitive agreement.²⁴

²⁰ Judgment of CJUE, 5.05.1998, *The Queen împotriva Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise, ex parte National Farmers' Union, ș.a.*, Cauza C-157/96, <https://eur-lex.europa.eu/legal-content/RO/ALL/?uri=CELEX:61996CJ0157>

²¹ Judgment of the Court of First Instance, 27.02.2002, *Tideland Signal Ltd împotriva Comisiei Comunităților Europene*, Case T-211/02, <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A62002TJ0211>

²² *Idem*.

²³ Judgment of CJUE, 18.10.2012, *Édukövízig and Hochtief Construction*, Cauza C-218/11, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=128653&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=5942746>

²⁴ Judgment of CJUE, 19.05.2009, *Assitur Srl v. SDA Express Courier SpA, Poste Italiane SpA*, Cauza C-538/07, <https://eur-lex.europa.eu/legal-content/RO/ALL/?uri=CELEX:62007CJ0538>

In the Decision of 02.05.2019 in case C 309/18 Lavorgna Srl²⁵, the CJEU analyzed the automatic exclusion of the tenderer who did not separately indicate labor costs in the offer through the principle of proportionality. In the aforementioned decision, the CJEU ruled that the principles of legal certainty, equal treatment and transparency, such as those provided by Directive 2014/24/EU of the European Parliament and of the Council of February 26, 2014 on public procurement and repealing Directive 2004/18 /EC, must be interpreted in the sense that they do not oppose a national regulation, such as the one at issue in the main litigation, according to which the separate indication of labor costs, in an economic offer presented in a procurement contract award procedure public, leads to the exclusion of this offer, without the possibility of assistance in preparing the file, including if the obligation to indicate these costs separately was not specified in the documentation of the request for offer, to the extent that this condition and this possibility of exclusion are clearly provided for in the national regulation on public procurement procedures to which explicit reference was made in their content. However, if the provisions of the request for tender do not allow the tenderers to indicate these costs in their economic offers, the principles of transparency and proportionality must be interpreted in the sense that they do not oppose the possibility of allowing the tenderers to remedy the situation and fulfill the obligations laid down by the national regulation in the matter within the term established by the contracting authority.

7. The principle of liability

The principle of assuming responsibility implies the acceptance by all those involved in the public procurement procedures of the consequences of the decisions taken and the actions taken.

In view of compliance with the principle of assuming responsibility, the contracting authorities have the following obligations:

- establishing the composition of the evaluation committee in compliance with the requirements regarding the professionalism of its members,
- ensuring the impartiality and independence of the decisions adopted during the course of the procedure, including by complying with the legal provisions regarding incompatibilities and conflicts of interest reflected in the request for declarations

²⁵ Judgment of CJUE, 2.05.2019, Lavorgna Srl v. Comune di Montelanico, Cauza C-309/18, <https://curia.europa.eu/juris/document/document.jsf?jsessionid=CABDD2BD46457E86A3ED5503F19568D7?text=&docid=213587&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=5976504>

on one's own responsibility, in this sense, from the members of the evaluation committee,

- the rigorous determination of the tasks and responsibilities incumbent on the parties involved in the procedure for awarding public procurement contracts.
- The consequences of complying with the principle of assuming responsibility are:
 - ensuring professionalism in the public service,
 - increasing public trust and the predictability of the conduct of public authorities and institutions,
 - limiting errors, sanctioning fraud and corruption.

Conclusions

Determining the content, the exact meaning of the legal norms, in the light of the application of the objective law to concrete cases, the judge will resort to the interpretation of the legal provisions incident to the matter of public procurement in accordance with the principles provided by art. 2 para. 2 of Law no. 98/2016.

In this sense, the provisions of art. 1 paragraph 1 of the Methodological Norms for the application of the provisions relating to the awarding of the public procurement contract/framework agreement from Law no. 98/2016 regarding public procurements approved by HG no. 395/2016 states that in the process of public procurement, any situation for which there is no explicit regulation is interpreted through the prism of the principles provided for in art. 2 para. (2) from Law no. 98/2016 on public procurement.

In the light of the above, we conclude that the principles of public procurement play a role of reference for the conduct of the contracting authorities, but also for the practice of the CNSC and the courts, acquiring legal force, and therefore direct applicability, based on the provisions of art. 2 para. 2 of Law no. 98/2016.

Bibliography

1. M. Andhov, R. Caranta, A. Wiesbrock, *Cost and EU Public Procurement Law. Life-cycle costing for sustainability*, Routledge, UK, 2020.
2. S. Arrowsmith, *The law of public and utilities procurement. Regulation in the EU and UK*, vol. II, third edition, Thomson Reuters, London, 2018.
3. P. Bogdanowicz, *Contract modifications in EU procurement law*, Edward Elgar Publishing, UK, 2021.
4. R. Caranta, A. Sanchez-Graells, *European Public Procurement. Commentary on Directive 2014/24/EU*, Edward Elgar Publishing, UK, 2021.
5. A. Castelli, G. Piga, *The challenge of public procurement reform*, Routledge, UK, 2021.
6. C. Risvig Hamer, M. Comba, *Centralizing Public Procurement. The approach of EU member states*, Edward Elgar Publishing, UK, 2021.
7. M. Steinicke, P. L. Vesterdorf, *EU Public Procurement Law. Brussels Commentary*, ED. C. H. BECK, Baden-Baden, Germany, 2018.
8. D. Cimpoeu, *Public Procurement. Concessions. Management of public utility services. Public-private partnership. Remedies and Appeals*, 7th Edition, Ed. C.H. Beck, Bucharest, 2022.
9. E.-M. Dobrota, D.-V. Pârvu, *Public Procurement. New ideas, old practices*, Edit. University, Bucharest, 2020.
10. D.-M. Șandru, I. Alexe, *European Union Legislation in the matter of public procurement*, University Ed., Bucharest, 2018.

THE REQUIREMENTS FOR CONFIRMING THE RESTRUCTURING AGREEMENT IN ORDER TO PREVENT DEBTOR'S INSOLVENCY

Luiza Cristina GAVRILESCU*

Abstract

The restructuring agreement procedure is an insolvency prevention tool, based on an agreement concluded between the debtor in difficulty and some of its creditors, who consent to their claims being affected in order to support the debtor's business recovery plan. The drafting and negotiation of the agreement is carried out through the restructuring administrator, who will ensure that fair and equitable treatment is respected. In order to be enforceable against all creditors whose claims are affected, it is necessary for the syndic judge to comply with it. The control carried out by him is carried out in a non-contentious procedure and aims to verify the conditions provided by law regarding the voting of most categories of affected claims.

Keywords: restructuring agreement, state of difficulty, affected receivables, debtor recovery, restructuring administrator

JEL Classification: K22

Introduction

The restructuring agreement procedure belongs to the category of mechanisms to support viable debtors facing economic difficulties, to avoid triggering insolvency. The precursor to the restructuring agreement procedure was the ad hoc mandate procedure, which did not enjoy representative application in practice.

The new procedure of the restructuring agreement confers the advantage of providing legal guarantees designed to provide certainty for creditors and advantages for debtors. In particular, it stands out for structuring clear and transparent conditions of access, which are carried out on objective grounds and not on the basis of presumptions. The structuring of restructuring proposals is conducted with the help of an insolvency practitioner, the restructuring administrator, who will assist the debtor and mediate the negotiation of the plan in order to obtain the votes of creditors whose claims are affected.

The conditions for confirming the restructuring agreement have been harmonized by the principles outlined by the European Directive

* "Alexandru Ioan Cuza" University of Iasi, Romania, luiza.gavrilescu@uaic.ro

(EU) 2019/1023 on restructuring and insolvency¹, to eliminate disparities in the laws of the Member States of the European Union and thus facilitate wider application. The requirements enshrined in the Directive reflect best practices in the field and transposition into national laws will be conducted taking into account the specificities of Member States' regulation in the field of insolvency and pre-insolvency proceedings². In our country, the legal framework was reformed by adopting law nr. Regulation (EC) No 216/2022³ transposing the Directive. In the following, we will present a summary of the requirements imposed by the new regulation necessary for the confirmation of the restructuring agreement by the syndic judge.

1. Submission of the request to initiate the agreement procedure by the entitled debtor

The initiative to initiate the restructuring agreement procedure rests solely with the debtor.

This mechanism is intended as a means of protection by which it is given the chance to avoid insolvency. Creditors may not themselves propose the implementation of the agreement or demand liability of the debtor who has not availed himself of this means of protection. Therefore, unlike insolvency proceedings, the opening of which is in certain situations a duty of the debtor, the restructuring agreement procedure is optional and left to the debtor.

The signal alerting the debtor that it is appropriate to use the restructuring agreement procedure shall be sent to the debtor through early warning and other specific tools that detect that the debtor is in a state of failure⁴. The early nature of the means of alert allows the warning to be triggered with a variable time interval, depending on the debtor's situation, as the law does not provide for a precise deadline against which the "probability of insolvency" will invariably be assessed⁵. In order to determine in fact *the relevant period* for assessing "the debtor's future ability to pay its debts as they fall due", the

¹ The 'New Chance Directive' published in OJ L 172 of 26 June 2019 is available online at: <https://eur-lex.europa.eu/legal-content/RO/TXT/?qid=1571073221410&uri=CELEX:32019L1023>, accessed 2023-10-25

² Augustin Fuerea, Andreea Deli Diaconescu, *Provocările profesionale aduse de Directiva privind restructurarea și insolvența*, in „Revista Română de Drept al Afacerilor” nr. 6/2019, pp.63-73.

³ Published in the Official Gazette, Part I, nr. 709 of 14 July 2022.

⁴ Florin Sandu, *Early warning and insolvency mentors*, in Revista de Insolvență Phoenix, no. 85/ 2023, pp.10-14.

⁵ According to art. 5*1 newly introduced in Law nr. 85/2014.

recommendations formulated in the recitals of the Directive are useful⁶. Thus, the relevant period for determining such a threat can relate to a period of several months, or even longer. Since the particular aspects of each business must be taken into account in determining which term represents a relevant period, the task of quantifying the revealing timeframe in terms of impact on the viability of the business lies with the restructuring manager⁷.

Being intended to prevent the insolvency of viable debtors, the restructuring agreement can only be accessed by debtors who fall into the categories to which the law has granted this facility⁸. Debtors must have the potential to rehabilitate their businesses so that they can continue to operate in the economic circuit. In order to avoid abuse of preventive restructuring frameworks, it is recommended to carry out *the viability test of the debtor*. In order not to cause further damage to the debtor's property, it is advisable to carry out the test without undue delay.

The good faith of the debtor and the manifestation of diligent conduct in conducting his business are intrinsic conditions for granting this facility to obtain legal support. Thus, access to the agreement procedure will be stopped for a period of 12 months from the date of closure of another insolvency prevention procedure that had as effect a final discharge of obligations – according to art. 6 *1 newly introduced in the provisions of Law nr. 85/2014⁹ as a result of the adoption of Law nr. 216/2022, to prevent misuse of this remedy.

Also, according to art. 6 *2 of the Law, the exercise of the right of access will be postponed for a period of 3 years from the date of conviction of the debtor for a certain crime, an interval during which the debtor has the opportunity to rehabilitate.

Right to the restructuring agreement procedure is also granted to entrepreneurs carrying out a liberal profession, the law exempting only notaries public and bailiffs from the benefit of this procedure. At the same time, entities that have a distinct insolvency regime, such as: credit institutions, investment firms and other financial institutions, insurers and reinsurers; CCPs, central securities depositories, may not propose a restructuring agreement.

⁶ Andreea Deli Diaconescu, Augustin Fuerea, *Adoptarea și transpunerea Directivei privind a doua șansă cadrelor de restructurare- repetiția unor compromisuri acceptate*, în „Revista de insolvență Phoenix”, no. 75-76, pp 11-19.

⁷ Geanina Oancea, *Acord de restructurare sau concordat preventiv?*, în Revista de insolvență Phoenix nr. 75-76, pp. 3-34.

⁸ Nicoleta Țândăreanu, *Codul insolvenței comentat*, vol. I, art. 1-182, Universul Juridic Publishing House, Bucharest, 2017, p. 21.

⁹ Hereinafter referred to as *the Law*.

In order to be able to support the procedure of the restructuring agreement, debtors must have sufficient financial resources and have a cordial relationship with the creditors to whom they intend to propose the agreement for approval¹⁰.

2. Preparation of the report certifying the debtor's state of difficulty

The purpose of the preventive procedure of the agreement is to remove the debtor's state of difficulty in order to prevent him from becoming insolvent.

Difficulty is defined in Article 26*1 as the condition arising from any circumstance causing a temporary impairment of activity giving rise to a real and serious threat to the debtor's future ability to pay its debts as they fall due, unless appropriate measures are taken; the distressed debtor is able to perform his obligations as they fall due. As follows from the new definition of failure, the assessment of the debtor's situation is no longer restricted to financial difficulty, which allows for a wider coverage of cases of opening of restructuring agreement proceedings. Therefore, the state of difficulty which may temporarily affect the debtor's business may be determined by any circumstance, provided that it results in a real and serious threat as regards the debtor's ability to honour its outstanding debts within a maximum period of 24 months from the occurrence of that circumstance

Proof that it is in difficulty shall be provided by the debtor in accordance with Article 6 through *the report* drawn up by the restructuring administrator. For this purpose, the debtor will employ an independent expert, with the restructuring administrator to be appointed from among the insolvency practitioners. He or she will take over the task of drawing up a report stating that the debtor is in a state of difficulty threatening to degenerate into insolvency unless adequate preventive measures are taken to halt the deterioration of the debtor's financial situation.

The current regulation has established this objective instrument emanating from a professional in the field – the appointed insolvency practitioner, in order to eliminate the controversies generated by the application of the legal presumption regarding the installation of the state of difficulty¹¹.

¹⁰ Dumitru Vlad, *Ce înseamnă și în ce constă procedura de prevenire a insolvenței. Condiții de accesare și caracteristici generale*, the document is available online at <https://www.normedia.ro/2023/05/18/insolvente-procedura-r3orki45rg/> accessed on 10.10.2023.

¹¹ Luiza Cristina Gavrilescu, *Condițiile în care debitorul în dificultate își poate restructura datoriile prin intermediul unui acord cu creditorii pentru a evita*

Making the report involves an analysis of the indicators recommended in the law, which may be simpler or more complex, depending on the structure of the debtor entity. The attestation of the state of difficulty involves a description of the circumstance causing the temporary impairment of the activity and the expected effects. The causes that led to the difficulty will also be identified, respectively the internal and external factors that determined the debtor's state of difficulty. The administrator will conduct an analysis of the financial situation of the company and the reason why the difficulty cannot be considered naturally reversible. Thus, the report will demonstrate the need for restructuring to avoid insolvency¹².

The analysis of the report drawn up in order to ascertain the debtor's state of difficulty rests with the syndic judge, who will also be able to take into account the result of *the debtor's viability test*.

3. Elaboration of the restructuring agreement:

The drafting of the restructuring agreement is carried out by the debtor also with the assistance of the restructuring administrator chosen by the creditor by contract, against a fee. The content of the agreement must contain the elements provided for in the new regulation – art. 15*2 of Law nr. 85/2014.

The agreement will propose a detailed restructuring plan, including specific measures to improve the company's financial situation¹³. Appropriate restructuring measures may include restructuring the debtor's business as well as the realisation of the debtor's assets. The concrete establishment of the measures to be adopted will be carried out within the negotiations with creditors, including the merger or division of the debtor or the conversion of receivables into shares¹⁴.

At the same time, the plan should include ways to reduce debt, optimize expenses and improve cash flows. The provisions of the agreement will clearly specify how liabilities and assets will be managed.

insolvența, presentation held at the National Conference "Mechanisms of plurality in law", on 28.10.2022, at the Faculty of Law, "Alexandru Ioan Cuza" University of Iasi.

¹² Geanina Oancea, *Acord de restructurare sau concordat preventiv?*, în *Revista de insolvență Phoenix* nr. 75-76, pp. 3-34.

¹³ Luiza Cristina Gavrilăscu, *Redresarea activității întreprinderilor în dificultate prin intermediul procedurii acordului de restructurare*, presentation held at the Conference "Legislative changes in the field of commercial law. Challenges for Theorists and Practitioners", on December 17, 2022, at the Faculty of Law, "Alexandru Ioan Cuza" University of Iasi.

¹⁴ Luiza Cristina Gavrilăscu, *Consequences of confirmation of the restructuring agreement in the company rescue procedure* presentation held at the International Conference "Challenges of business law in the third millennium", organized by The Society of Juridical and Administrative Sciences, on 17.11.2023.

The schedule for payment of receivables shall be drawn up in relation to financial flows and the duration of the agreement.

It should be noted that the agreement must propose fair terms and conditions for all creditors involved. The debtor shall ensure that the amount provided for in the plan for the payment of salary claims is at least equal to that which he would obtain in the event of foreclosure, but not less than he would receive in the scenario of the next best alternative. In this respect, a *simulation of distributions that would benefit affected creditors in case of the scenario of the next optimal alternative, which may even be bankruptcy, will be carried out, based on* an evaluation report, drawn up by an authorized valuer no later than 6 months prior to the date of opening the procedure, of the assets existing in the debtor's patrimony and the comparative presentation of these distributions with those foreseen to be made by restructuring agreement.

The law requires that minority creditors are also treated fairly and that the plan does not overly favour the interests of specific groups¹⁵.

4. Convening creditors to negotiate the restructuring agreement

The restructuring administrator must facilitate open communication with all creditors to negotiate the terms of the plan.

The list of receivables to be notified shall refer to the date of drawing up the agreement, to be updated, if necessary, during negotiations with creditors.

Creditors entitled to participate in pre-insolvency proceedings are only creditors holding claims affected by the restructuring plan, in any of the ways expressly indicated: reductions in amount or accessories, or payment instalments¹⁶. Receivables that are not modified by the plan are qualified as unaffected receivables. Reasons will have to be given for not including certain claims in the list of those affected.

The new financing is any financing, including the provision of guarantees, supplier credit with a payment term of more than 90 days, granted by an existing creditor or a new creditor, in order to implement the restructuring agreement - art. 5 point 28 *2 of the Law.

Creditors whose claims are affected will be notified by the restructuring administrator and the restructuring agreement will also be

¹⁵ Mihaela Sărăcuț, *Contestațiile în acordul de restructurare – parte a procesului de implementare a directivei (UE) 2019/1023* The document is available online at [adresahttps://revistaphoenix.ro/numarul-75-76/contestatiile-in-acordul-de-restructurare-parte-a-procesului-de-implementare-a-directivei-ue-2019-1023/](https://revistaphoenix.ro/numarul-75-76/contestatiile-in-acordul-de-restructurare-parte-a-procesului-de-implementare-a-directivei-ue-2019-1023/) accessed on 23.10.2023.

¹⁶ Cristina Dinu, *Acordul de restructurare – noul instrument de prevenire a insolvenței*, the document is available online at [adresahttps://www.linkedin.com/pulse/acordul-de-restructurare-noul-instrument-prevenire-insolventei](https://www.linkedin.com/pulse/acordul-de-restructurare-noul-instrument-prevenire-insolventei), accessed on 15.10.2023.

communicated to them by any means of communication allowing acknowledgement of receipt¹⁷

5. Obtaining approval from creditors holding most affected claims:

The restructuring administrator will invite creditors whose claims are affected by the agreement to negotiate. To this end, it shall send them indications of the voting procedure and the correspondence address, including e-mail, to which the vote may be communicated. The deadline for transmitting the vote may not be less than 20 days from the date of communication of the agreement - Art. 5 item 15 *3 of the *Law*. Creditors whose claims are not affected shall not be entitled to take part in the vote, assuming they have no interest contrary to the procedure¹⁸.

In compliance with the established dates, meetings will be held to conduct meetings or voting processes to obtain the consent of creditors. Any vote received within 10 days after the expiry of the deadline set by the restructuring administrator will be attached to the confirmatory application and taken into account by the syndic judge when confirming the agreement.

The creditors' vote on the restructuring agreement is in reality a vote of claims, a creditor can be the holder of several claims, registered in different classes, and can vote differently with each claim he holds; in other words, the principle becomes 'one claim, one vote'¹⁹. The main stake is to obtain the agreement of the majority of claims in each category for the proposed restructuring plan.

If negotiations with creditors reveal the need to amend the restructuring agreement, then its amended version and updated list of claims will be communicated to creditors by the restructuring administrator for the exercise of voting rights²⁰.

¹⁷ Claudia Antoanela Susanu, *Administratorul judiciar – aspecte teoretice și practice relevante din perspectiva desemnării, desfășurării activității și a înlocuirii acestui organ care aplică procedura insolvenței*, in „Revista de insolvență Phoenix” nr. 82/2022 (octombrie-decembrie 2022), pp. 5-14.

¹⁸ Alice Ene, *Noi instrumente pentru restructurarea afacerii în dificultate*, the document is available online at <https://www.vf.ro/noi-instrumente-pentru-restructurarea-afacerii-in-dificultate/>, accessed on 09.10.2023.

¹⁹ Andreea Deli Diaconescu, Augustin Fuerea, *Adoptarea și transpunerea Directivei privind a doua șansă cadrele de restructurare- repetiția unor compromisuri acceptate*, în „Revista de insolvență Phoenix”, no. 75-76, pp 11-19.

²⁰ Luiza Cristina Gavrilescu, *Efectele acordului de restructurare asupra activității debitorilor viabili*, presentation at the National Conference "Law in European and pan-European context" on 06.05.2023 at the Faculty of Law, "Alexandru Ioan Cuza" University of Iasi.

6. Hypotheses regarding the confirmation of the restructuring agreement by the syndic judge:

Within maximum 3 days from the conclusion of the voting report, the debtor will submit an application to the specialized court to obtain formal approval of the restructuring plan, accompanied by supporting documents.

The hearing takes place in a non-contentious procedure and only if it is found that it is necessary to supplement the application with other documents or to motivate it by additional explanations, the debtor or the restructuring administrator will be summoned by the syndic judge²¹. Such additional clarifications may relate to the presentation of arguments that the plan is feasible and serves the purpose of preventing insolvency.

The rejection of the application for confirmation of the restructuring agreement may be decided solely on grounds of legality.

The admission of the application for confirmation of the restructuring agreement is decided by an enforceable conclusion pronounced by the syndic judge, to the extent that it finds that the legal conditions regarding the attestation of the debtor's state of difficulty and the approval by creditors of the restructuring agreement in compliance with the requirements imposed by, through the legally appointed administrator, are cumulatively met²².

In his analysis of the conformity of the restructuring agreement, the syndic judge will verify whether the division into categories of receivables was made according to the legal norms. With regard to *new financing*, if its granting is justified by the implementation of the restructuring agreement, it will be checked that it does not unfairly prejudice the interests of creditors²³.

The syndic judge will also have the task of verifying compliance with the quorum requirements. Thus, it will be investigated whether the agreement was approved by an absolute majority of the value of the

²¹ Luiza Cristina Gavrilăscu, *Mandatul administratorului restructurării în procedura de prevenire a insolvenței debitorului*, presentation held at the National Conference "Representation, representatives, representatives – approaches in public and private law", „Reprezentare, reprezentati, reprezentanti- abordări în dreptul public și privat” on 27.10.2023, at the Faculty of Law, "Alexandru Ioan Cuza" University of Iasi.

²² Luiza Cristina Gavrilăscu, *Prerequisites for the recovery of companies in economic difficulty by concluding agreements with the relevant creditors*, presentation held at the International Conference “Challenges of business law in the third millennium organized by The Society of Juridical and Administrative Sciences on 17.11.2023 .

²³ Alexandru Stănoiu, *Implementarea Directivei privind restructurarea – o șansă în plus pentru companii*, the document is available online at [https://www.rtpr.ro/ro/stiri/legal-update/implementarea-directivei-privind-restructurarea-o-sansa-in-plus-pentru-companii/accesat on 20.10.2023](https://www.rtpr.ro/ro/stiri/legal-update/implementarea-directivei-privind-restructurarea-o-sansa-in-plus-pentru-companii/accesat%20on%2020.10.2023).

claims in each category, otherwise if the subsidiary approval requirements established by law were met, respectively if the agreement was approved:

- a majority of the categories of claims, one of which must be a class of claims benefiting from causes of preference or any category of claims other than the generic category "other claims" or, failing that,
- by at least one class of voting claims other than a class of claims that would receive no payment in the event of bankruptcy.
- the agreement was voted by at least 30% of all affected claims;
- In these cases, compliance with the following cumulative conditions shall be taken into account²⁴:
- the categories of claims which did not vote for the agreement are treated more favorably than any other category of lower-ranking claims, as determined by the hierarchy established by law;
- all other conditions required cumulatively for approval are fulfilled.

As regards the treatment accorded to creditors, it is noted that it differs depending on whether or not they voted on the plan following negotiations, after prior information²⁵. Thus, creditors who have voted to propose the agreement to amend their claim will have to be ensured equal and proportionate treatment with other claims of the same category. Instead, the treatment of creditors who did not vote on proposed changes to the plan or did not participate in the vote depends on the degree to which the agreement was approved. More specifically, if the *agreement has been approved by all categories of creditors by an absolute majority, dissenting creditors* will need to be treated fairly and equitably, in order to be able to oppose the changes proposed by the plan to their claims. Conversely, if the agreement *has been approved by only a majority of the classes of claims*, then claims that have not voted will have to be *treated more favorably than any other category of lower-ranking claims*.

The requirement for fair and equitable treatment shall be verified against the value of all claims on the same date, both affected and unaffected, so that:

- a) no creditor shall receive more than the amount of his claim;
- b) the holder of an affected claim who does not vote on the agreement does not receive less than the amount of distributions that would be made in the next-best-alternative scenario if the restructuring

²⁴ Cristian Ianca, *Ce este acordul de restructurare?*, the document is available online at <https://cristianianca.ro/ce-este-acordul-de-restructurare/>, accessed on 11.10.2023.

²⁵ Flavius Moțiu, *Transpunerea Directivei UE 2019/1023 Concordatul preventiv*, în „Revista de insolvență Phoenix nr. 75-76, pp. 19-30.

agreement were not confirmed, which may even be bankruptcy, according to the simulation provided for in the agreement;

c) creditors receive less favourable treatment than other creditors in the same class of claims, according to the list of claims, only if they expressly agree to such treatment.

Consequently, if the restructuring agreement is confirmed by the judge, the company's business will be restructured accordingly, with the confirmed agreement *enforceable against all affected creditors*, including those who voted against or did not vote²⁶.

As regards claims proposed not to form part of the restructuring agreement, if the grounds for their exclusion from the agreement are well founded, they *will not be directly affected* by the measures provided for therein ²⁷.

Both creditors holding affected claims and creditors holding unaffected claims will receive, through the restructuring administrator, a communication of the agreement confirmed by the syndic judge within 48 hours of the judgment.

The confirmation of the agreement by the judge is not necessary for debtors who achieved in the previous year a net turnover or, as the case may be, a gross income of up to the RON equivalent of EUR 500,000, and the restructuring agreement was voted unanimously. In this case, it will be sufficient for an insolvency practitioner to endorse the agreement. The approval procedure does not apply if there is new funding, as well as if the restructuring agreement provides for the dismissal of more than 25% of employees.

Conclusions

The recovery agreement allows viable debtors in financial distress to avoid insolvency by accessing the restructuring agreement procedure. In order to draw up the restructuring plan, the debtor shall be assisted by the restructuring administrator, who shall certify that the debtor's business is temporarily affected by a difficulty giving rise to a serious and serious threat to pay off debts due in the near future. In order to facilitate negotiations with creditors, the restructuring administrator will

²⁶ Andreea Bocioacă Andrei Manea, *Acordul de restructurare noul instrument de prevenire a insolventei in curs de a fi introdus prin ultimele modificări ale Legii no. 85/2014*, the document is available online at: <https://blog.pwc.ro/2022/07/12/acordul-de-restructurare-noul-instrument-de-prevenire-a-insolventei-in-curs-de-a-fi-introdus-prin-ultimele-modificari-ale-legii-85-2014>, accessed on 12.10.2023.

²⁷ Paul Popovici, *Inefficiency or uselessness? The practical avatar of regulating the preventive concordat and the ad hoc mandate*, în revista „Curentul Juridic”, 2013, vol. 53, 141-144.

propose a recovery plan presenting reasonable prospects of preventing the debtor's insolvency and ensuring the *viability of the company*.

Approval of the agreement by creditors whose claims are affected must be made by a majority vote of the claims in each category. The plan will have to ensure compliance with the principle of equality and proportionality of claims of the same category. At the same time, creditors who have not voted for the restructuring agreement must be guaranteed *fair and equitable treatment*. proposes to the syndic judge for confirmation the agreement approved by the majority of them. At the debtor's request to confirm the agreement, the syndic judge will verify the fulfilment of all conditions provided by law, without being able to rule on the grounds of expediency. Claims proposed not to form part of the restructuring agreement *shall not be directly affected* by the measures provided for therein.

Bibliography

1. Bocioacă A., Manea A., *Acordul de Restructurare, noul instrument de prevenire a insolvenței, în curs de a fi introdus prin ultimele modificări ale Legii 85/2014*, the document is available online at <https://blog.pwc.ro/2022/07/12>
2. The 'New Chance Directive' published in OJ L 172 of 26 June 2019, available at: <https://eur-lex.europa.eu/legal-content/RO/TXT/?qid=1571073221410&uri=CELEX:32019L1023>
3. Diaconescu Deli, A., Fuerea, A., *Adoptarea și transpunerea Directivei privind a doua șansă cadrelor de restructurare- repetiția unor compromisuri acceptate*, in „Revista de insolvență Phoenix” nr. 75-76.
4. Dinu, C., *Acordul de restructurare – noul instrument de prevenire a insolvenței*, the document is available online at <https://www.linkedin.com/pulse/acordul-de-restructurare-noul-instrument-prevenire-insolventei>
5. Dumitru, V., *Ce înseamnă și în ce constă procedura de prevenire a insolvenței. Condiții de accesare și caracteristici generale*, the document is available online at <https://www.normedia.ro/2023/05/18/insolvente-procedura-r3orki45rg/>
6. Ene, A., *Noi instrumente pentru restructurarea afacerii în dificultate* , <https://www.vf.ro/noi-instrumente-pentru-restructurarea-afacerii-in-dificultate/>
7. Fuerea, A., Deli Diaconescu, A., *Provocările profesionale aduse de Directiva privind restructurarea și insolvența*, în „Revista Română de Drept al Afacerilor”, nr. 6/ 2019.
8. Gavrilesco, L. C., *Condițiile în care debitorul în dificultate își poate restructura datoriile prin intermediul unui acord cu creditorii pentru a evita insolvența*, presentation held at the National Conference " Mecanismele pluralității în drept" " on 28.10.2022, at the Faculty of Law, "Alexandru Ioan Cuza" University of Iasi.

9. Gavrilesco, L. C., *Redresarea activității întreprinderilor în dificultate prin intermediul procedurii acordului de restructurare*, presentation held at the Conference " Schimbări legislative în materia dreptului comercial. Provocări pentru teoreticieni și practicieni", on 17.12. 2022, at the Faculty of Law, "Alexandru Ioan Cuza" University of Iasi.
10. Gavrilesco, L. C., *Efectele acordului de restructurare asupra activității debitorilor viabili*, presentation held at the National Conference " Dreptul în context european și pan-european" on 06.05.2023 at the Faculty of Law, "Alexandru Ioan Cuza" University of Iasi.
11. Gavrilesco, L. C., *Cerințele confirmării acordului de restructurare în vederea prevenirii insolvenței* presentation held at the International Conference "Law and its challenges in socio-economic and administrative filed", on 29.06. 2023, CIPPA 2023.
12. Gavrilesco, L. C, *Mandatul administratorului restructurării în procedura de prevenire a insolvenței debitorului* presentation held at the National Conference " , on 27.10.2023, at the Faculty of Law, "Alexandru Ioan Cuza" University of Iasi.
13. Gavrilesco, L. C., *Prerequisites for the recovery of companies in economic difficulty by concluding agreements with the relevant creditors*, presentation held at the International Conference "Challenges of business law in the third millennium organized by The Society of Juridical and Administrative Sciences on 17.11.2023.
14. Gavrilesco, L. C., *Consequences of confirmation of the restructuring agreement in the company rescue procedure* presentation held at the International Conference "Challenges of business law in the third millennium", organized by The Society of Juridical and Administrative Sciences, on 17.11.2023.
15. Ianca, C., *Ce este acordul de restructurare?* The document is available online at <https://cristianianca.ro/ce-este-acordul-de-restructurare/>
16. Moțiu, F., *Transpunerea Directivei UE 2019/1023 Concordatul preventiv*, in „Revista de insolvență Phoenix” nr. 75-76.
17. Oancea, G, *Acord de restructurare sau concordat preventiv?* in „Revista de insolvență Phoenix” nr. 75-76.
18. Popovici, P., *Inefficiency or uselessness? The practical avatar of regulating the preventive concordat and the ad hoc mandate*, in „Curentul Juridic”, 2013, vol. 53, 141-144.
19. Sandu, F., *Avertizarea timpurie și mentorii insolvenței*, in „Revista de insolvență Phoenix” nro 85/ 2023, pp.10-14.
20. Sărăcuț, M., *Contestațiile în acordul de restructurare – parte a procesului de implementare a directivei (UE) 2019/1023* The document is available online at adresa <https://revistaphoenix.ro/numarul-75-76/contestatiile-in-acordul-de-restructurare-parte-a-procesului-de-implementare-a-directivei-ue-2019-1023/>
21. Stănoiu, A., *Implementarea Directivei privind restructurarea – o șansă în plus pentru companii*, the document is available online at <https://www.rtp.r.ro/ro/stiri/legal-update/implementarea-directivei-privind-restructurarea-o-sansa-in-plus-pentru-companii/>
22. Susanu, C.A., *Administratorul judiciar – aspecte teoretice și practice relevante din perspectiva desemnării, desfășurării activității și a înlocuirii acestui organ care aplică procedura insolvenței*, in „Revista de insolvență Phoenix” nr. 82/2022 (octombrie-decembrie 2022).

23. Țândăreanu N., *Codul insolvenței comentat*, vol. I, art. 1-182, Universul Juridic Publishing House, Bucharest, 2017.
24. Viorică, I., Apostolescu R., „Legea nr. 216/2022: *Cum se modifică legislația privind procedurile de prevenire a insolvenței și de insolvență?*” the document is available online at [universuljuridic.ro%2flegea-nr-216-2022--se-modifica-legislatia-regarding-procedures-de-prevent-a-insolvency-si-de-insolventa](https://universuljuridic.ro/legea-nr-216-2022--se-modifica-legislatia-regarding-procedures-de-prevent-a-insolvency-si-de-insolventa).

LEGISLATIVE DEVELOPMENTS IN CIVIL SERVANTS' REMUNERATION

Cristina COSTEA

Abstract

*Civil servants' payment, like any other worker, has been a subject of interest for this professional category, and has been constantly evolving in recent years due to legislative changes and interpretative decisions of the High Court of Cassation and Justice. Clearly, the amount of the salary, as a compensation for the work performed, is one of the determining factors in the acceptance of public office. Civil servants' payment generates a generous judicial practice, due to frequent legislative changes, the interventions of the High Court of Cassation and Justice, in the form of appeals in the interest of the law or the resolution of questions of law being able to contribute to the unification of jurisprudence on the matter. It is obvious that identical situations, where the same reasoning is applied, must be applied identical solutions, in accordance with the adage *ubi eadem est ratio, eadem solutio esse debet*, and the steps taken by the High Court of Cassation and Justice are necessary in order to unify judicial practice in this area, in order to respect the right to a fair trial, as ruled by the European Court of Human Rights in *Beian v. Romania*.*

Keywords: *civil servants' remuneration, the jurisdiction of civil servants' claims, payment equalization, equity*

Civil servants' payment, like any other worker, has been a subject of interest for this professional category, and has been constantly evolving in recent years due to legislative changes and interpretative decisions of the High Court of Cassation and Justice.

Clearly, the amount of the salary, as a compensation for the work performed, is one of the determining factors in the acceptance of public office.

The Administrative Code defines a civil servant in a relatively ambiguous manner as a person appointed to a public office in accordance with the law.¹

It is therefore necessary to define public office in order to find out which categories of persons fall within this concept. The answer is provided by the Administrative Code itself, which in Article 5(1)(y) defines the scope of the concept of public office as 'all the duties and

¹ Art. 371 of the Administrative Code: a civil servant is a person appointed by law to a public office.

responsibilities established by law for the purpose of exercising the prerogatives of public power by public authorities and institutions', and Annex 5 to the same act explicitly describes the categories of public office, divided into two main categories. The first category is general public functions, with three sections: public functions corresponding to the category of senior civil servants, managerial public functions and executive public functions, and the second category is specific public functions, also with two sections, namely managerial public functions and executive public functions.²

² Annex No. 5 of the Administrative Code: LIST of public functions

"I. General public functions

A. Public functions corresponding to the category of senior civil servants

1. secretary-general in ministries and other specialised bodies of the central public administration; 2. deputy secretary-general in ministries and other specialised bodies of the central public administration; 3. and 4. Repealed by O.U.G. No 4/2021 5. government inspector; 6. secretary general of the prefect's institution.

B. Public management positions

1. director-general; 2. deputy director-general; 3. director; 4. deputy director; 5. executive director; 6. deputy executive director; 7. head of department; 8. head of office.

C. Executive civil service posts

1. adviser, legal adviser, auditor, expert, inspector, procurement adviser; 2. specialist adviser; 3. adviser.

II. Specific civil service posts

A. Senior civil service posts

1. secretary general of the administrative-territorial unit/sub-unit; 2. chief architect; 3. head of prefectural office; 4. chief commissioner; 5. deputy chief commissioner; 6. chief commissioner of division; 7. chief commissioner of section; 8. chief commissioner of section. Deputy Chief Commissioner; 9. Chief Financial Controller; 10. Deputy Chief Financial Controller; 11. State Inspector General; 12. Deputy State Inspector General; 13. Chief Inspector; 14. Deputy Chief Inspector; 15. - 19. Repealed by O.U.G. No 138/2021 20. regional chief inspector; 21. county chief inspector; 22. economic manager; 23. chairman - public procurement dispute resolution adviser; 24. head of administration; 25. deputy head of administration; 26. head of customs office; 27. deputy head of customs office; 28. chief treasurer; 29. deputy chief treasurer; 30. chief medical officer; 31. head of sector.

B. Executive civil service posts

1. ecologist officer; 2. customs officer; 3. evaluation-examination analyst; 4. cashier referent; 5. commissioner; 6. public procurement appeals advisor; 7. evaluation-examination advisor; 8. delegated controller; 9. customs controller; 10. procurement system advisor; 11. Information technology and telecommunications expert; 12. local police officer; 13. audiovisual inspector; 14. competition inspector; 15. integrity inspector; 16. labour inspector; 17. environmental inspector; 18. social inspector; 19. customs inspector; 20. Repealed by O.U.G. no. 138/2021; 21. construction inspector; 22. civil protection inspector; 23. property tracking and management inspector; 24. public manager; 25. Repealed by O.U.G. No 138/2021 26. SELEC liaison officer; 27. monitoring inspector; 28. sustainable development expert."

In this legislative context, we shall conclude that the civil servant is any person who occupies one of the functions expressly described in Annex 5 of the Administrative Code or another specific public function, which may be established by the public authorities or institutions, under the terms of Article 384 (1) and (2) of the same normative act.³

Civil servants' salaries are currently regulated by Law 153/2017 on the salaries of staff paid from public funds. Although since its inception, the stated objectives of the law have been to ensure a uniform, equal and non-discriminatory salary framework for this professional category⁴, in practice, due to different interpretations at the level of authorising officers, there have been situations where civil servants at the same professional level, i.e. with the same function, seniority, grade, grading and salary class, benefit from different salary rights.

The basic text of this law provides in Art. 39 para. 1: "for newly appointed staff, for staff appointed/supervised in the same public institution/authority in similar positions, including staff promoted in positions or professional grades/steps, the salary shall be at the level of salary for similar positions in the public institution/authority in which

³ A useful analysis of the novelties in the field of public office classifications is provided in the Annotated Administrative Code, 3rd revised and added edition by Prof. Dr. Verginia Vedinaş, 2021, pp. 393 et seq.

⁴ In this regard, Article 6 of Law 153/2017 sets out the following principles:

(a) the principle of legality, in the sense that rights of a salary nature are established by legal rules with the force of law, with the exception of the decisions referred to in Article 11 para. (1), in accordance with the principles set out in Article 120 of the Constitution of Romania, republished, but within the minimum and maximum limits provided for by this law;

b) the principle of non-discrimination, in the sense of eliminating all forms of discrimination and establishing equal treatment with regard to staff in the budgetary sector who perform the same activity and have the same seniority in work and function;

c) the principle of equality, by ensuring equal basic salaries for work of equal value;

d) the principle of the social importance of work, in that the remuneration of budgetary sector staff shall be related to the responsibility, complexity, risks of the work and level of education;

(e) the principle of providing incentives to staff in the budgetary sector, in the context of recognising and rewarding their professional performance, on the basis of criteria laid down in accordance with the law and their own regulations;

f) the principle of vertical and horizontal hierarchisation within the same area, according to the complexity and importance of the work carried out;

g) the principle of transparency of the mechanism for establishing salary rights, in order to ensure predictability of salaries for staff in the budgetary sector;

h) the principle of financial sustainability, in the sense of setting the level of salaries for budgetary staff in such a way as to ensure compliance with the ceilings on staff expenditure of the general consolidated budget, established by law;

(i) the principle of publicity in the sense of transparency of income of a salary nature, as well as other rights in cash and/or in kind for all budget sector functions.

they are appointed/supervised or in their subordinate institutions, if there is no similar position in pay. ", and according to paragraph 4: "In applying the provisions of paragraph 1, the following shall apply. (1), in the case of institutions or public authorities subordinate to the same authorising officer, having the same purpose, performing the same functions and duties, and at the same level of subordination in financial terms, the level of basic salary/employment allowance shall be set at the maximum level in payment within all these subordinate institutions or public authorities. "

The notion of appointed/supervised staff was interpreted by the ÎCCJ in HP 8/2021, which established that "in the category of 'appointed/supervised staff', to which the provisions of Art. 39 para. (4) in relation to Art. 39 para. (1) of the Framework Law no. 153/2017, is also included the staff re-staffed under the provisions of art. 36 of the Framework Law no. 153/2017".

The High Court of Cassation and Justice has given an extensive interpretation of the concept of appointed or employed staff, assimilating this situation to that of reemployed staff, in order not to create inequalities between the two categories of staff, i.e. in order not to end up with newly employed staff benefiting from higher salary rights than reemployed staff.

This context has rightly led to an avalanche of cases before the administrative and tax divisions of the courts on the merits and the courts of appeal, all with the aim of standardising salary rights at the highest level in payment.

Of particular importance for the predictability of pay in this area was the Constitutional Court's decision No 794/2016⁵, which held that the "maximum level of basic salary/employment allowance" must also include the rights established or recognised by final and irrevocable/final judgments.

The establishment of this principle should in practice have resulted in a reduction in the number of actions relating to salary rights, given that in a given establishment at least one employee would have benefited from judicial recognition of higher salary rights than his colleagues.

In reality, however, the Constitutional Court's decision no. 794/2016 has opened the way to actions for recognition of discrimination, for recognition of the same favourable salary rights, brought by civil servants in identical professional situations to those who had salary rights recognised by the courts.

⁵ Constitutional Court Decision no. 496/2016, published in the Official Gazette no. 1029/21.12.2016.

In the area of civil servants' payment, the decisions of the High Court of Cassation and Justice, delivered with a view to unifying case law, were welcome.

One of the most important decisions in this area was Decision No 49/2018 on the examination of the referral made by the Court of Appeal of Craiova - Administrative and Fiscal Disputes Section for the resolution of a question of law, in which the High Court of Cassation and Justice established that "In interpreting the provisions of Article 31 para. (1), in relation to Art. 31 para. (13) of Government Emergency Ordinance No. 57/2015, as amended by Government Emergency Ordinance No. 43/2016, the determination of the maximum level of the basic salary/employment allowance for staff employed in the general directorates for social assistance and child protection is related to the level of the same authorising officer to whom they are financially subordinated, and not to the national level."⁶

The principles used in this decision have been taken up by the courts and are equally applicable to the salaries of civil servants in general, not just those in the Directorates-General for Social Assistance and Child Protection.

Thus, in order to identify the maximum level of basic salary/employment allowance, the factual situations identified at the level of the same authorising officer, and not at national level, must be verified, since only administrative and financial subordination is relevant, not functional subordination to the central authority. Thus, salary equalisation will be carried out, directly or through the court, at the level of the authorising officer, by horizontal component.

With regard to the procedural rules concerning the jurisdiction of civil servants' claims for salary rights, Article 536 of the Administrative Code lays down the rule as follows: "cases concerning the civil servant's employment relationship shall fall under the jurisdiction of the administrative and fiscal disputes division of the court, except in cases where the jurisdiction of other courts is expressly established by law".

As the issue of salary rights requires as a prerequisite the existence of an employment relationship, and this has among its component elements issues relating to the payment of salary⁷, the jurisdiction of the Administrative Jurisdiction Division of the Court, as regards the

⁶ Decision No 49/2018 of the Supreme Court of Justice, published in the Official Gazette No 838/2.10.2018.

⁷ The employment relationship that arises between public authorities or institutions and civil servants, based on the act of appointment, has the following essential elements: function, salary and place of work (A. Trăilescu, Administrative Law, 2010, p. 151).

judgment on the merits, is obvious. Appeals are heard by the corresponding division of the Court of Appeal.⁸

As regards territorial jurisdiction, while the general law on the subject, Law 554/2004, recognised an alternative territorial jurisdiction in favour of the court of the official's domicile or of the employer's headquarters, depending on the plaintiff's choice⁹, since the advent of Law 212/25.07.2018, exclusive territorial jurisdiction has been assigned in favour of the court of the official's domicile.

Among the exceptions considered by Article 536 of the Administrative Code, there is the situation of the military personnel of the Romanian Gendarmerie. Decision RIL 19/2021 established that "the jurisdiction of the courts of first instance to settle cases concerning the obligation of public institutions of the Romanian Gendarmerie to pay salary rights to their military personnel belongs to the specialised sections/compartments for labour disputes of the courts".

The Supreme Court took into account that although the nature of the service relationship of the military personnel of the Romanian Gendarmerie remained the same, both before and after the advent of the Administrative Code, being the professional situation of civil servants with special status, compared to the exceptions enshrined in Art. 382 of the Administrative Code, it is no longer possible to recognise the jurisdiction of the administrative dispute departments to judge claims concerning salaries, as it was during the period of activity of Law 188/1999 (art. 109), but the functional jurisdiction is to be recognised in favour of the specialised labour dispute panels or the civil divisions of the courts.

The other exceptional situations referred to in Article 536 of the Administrative Code are explicitly specified in Art. 382 and concern the following categories of budgetary staff: contractual staff employed in the public authorities and institutions' own apparatus, performing secretarial, administrative, protocol, housekeeping, maintenance-repair and service activities, security, as well as other categories of staff who do not exercise prerogatives of public authority; salaried staff employed in the dignitary's office; magistrates, staff assimilated to them and, where appropriate, categories of auxiliary staff in the courts; teachers and other categories of staff of educational establishments and institutions;

⁸ In this regard, it has been pointed out in specialized doctrine that civil servants are an institution that belongs to public law in general and administrative law in particular - Prof. Verginia Vedinaş, PhD, Administrative Law, 2017, p. 387).

⁹ Alternative jurisdiction was seen as a protective rule enacted in favour of the plaintiff: Gabriela Bogasiu, Administrative Litigation Law, commented and annotated with legislation, case law and doctrine, p. 197.

persons appointed or elected to public office; staff of health establishments; staff of autonomous companies, national companies and public sector companies; military personnel; members of the Diplomatic and Consular Corps of Romania and contractual staff employed in specific functions of the Ministry of Foreign Affairs.

With regard to the court procedure, i.e. the need to go through the preliminary procedure or not, the Court of Cassation and Justice of the European Communities established in RIL 22/2020: In civil service disputes concerning the obligation of the employer to pay unpaid salary rights, as well as when the employer has not issued an administrative act or when the act has not been communicated to the civil servant, the civil servant may apply directly to the administrative court, without it being necessary for him to have requested the employer to grant the same rights prior to the application to the court.

According to the constant opinion of the Court of Cassation, the employer's refusal to comply with an employee's request concerning salary claims does not constitute the main object of the legal action, in order for Article 7 of Law 554/2004 to become applicable, but this refusal is only the cause of action.

With regard to the burden of proof in disputes of this type, the question arises as to whether we should consider that the burden of proof lies with the employer, given that the right to wages is exclusively a matter of labour law, or whether we should apply special legislation, namely Law 554/2004, which in Article 28 makes explicit reference to the provisions of the Code of Civil Procedure.

Even if civil servants are a special category of employees, whose status is governed by special laws, any disputes arising from their pay are in no way specific to the overall situation of any other employee. What distinguishes the service relationship of a civil servant from the employment relationship of any other employee is simply the specific nature of the work, i.e. the exercise of public authority within the limits of the position held. As regards the existence of a relationship of subordination between the employee and the employer, a specific element of labour law, this exists in the case of civil servants, without any element of differentiation.

Consequently, in the interests of procedural uniformity, the burden of proof is reversed in disputes involving civil servants, with the burden of proof being on the employer to prove compliance with the relevant legislation. Moreover, under Law 188/1999, Article 117 referred directly to labour law.

Civil servants' payment has been and remains an area of interest, which generates a generous judicial practice, due to frequent legislative

changes, the interventions of the High Court of Cassation and Justice, in the form of appeals in the interest of the law or the resolution of questions of law being able to contribute to the unification of jurisprudence on the matter.

It is obvious that identical situations, where the same reasoning is applied, must be applied identical solutions, in accordance with the adage *ubi eadem est ratio, eadem solutio esse debet*, and the steps taken by the High Court of Cassation and Justice are necessary in order to unify judicial practice in this area, in order to respect the right to a fair trial, as ruled by the European Court of Human Rights in *Beian v. Romania*.

ULTIMA RATIO IN CRIMINAL LAW – A BRIEF ANALYSIS

Proc. Gabriel TUDOROAIA

Abstract

The study aims to make a brief incursion on the principle of ultima ratio, starting from its sources, passing through its content and ending with its applicability in criminal law. We shall consider both theoretical aspects and examples and developments in case-law, especially following the intervention of the constitutional court. At the same time, we aim to observe some of the advantages of using this principle in the activity of judicial bodies, but also problems that it is likely to create in its turn.

Keywords: *ultima ratio, Constitutional Court, criminal law, principle, criminal law sanction, criminal policy*

1. Content of the ultima ratio principle

Historically, the birth of the principle of using criminal law only as a last resort was judged¹ to be due to Baron de Montesquieu, with his work "The Spirit of Law", where he stated that "Any punishment which does not originate in necessity is tyrannical."² These were stated in a chapter where the philosopher talked about how to change the mores and manners of a nation, being against the use of laws in their case, preferring the example. For a better understanding of his opinion, we present the continuation of the quote indicated above, namely "The law is not a simple act of power; things indifferent by nature are not within her purview."

However, the current legal roots of the principle of *ultima ratio* in criminal matters are more abstract and subject to debate, being identified either in art. 53 para. (2) of the Constitution (on restrictions

¹ Nicolas Queloz, *Les dérives des politiques pénales contemporaines. La fin de l'ultima ratio du droit pénal?*, Revue Suisse de Criminologie, no. 2/2013, p. 3 ; Voicu Pușcașu, *Drept penal. Partea Generală. Ediția a II-a, revăzută și adăugită – note de curs- (trad: Criminal Law. General part. Second edition, revised and added – course notes-)*, Bucharest, Universul Juridic, 2022, p. 51.

² Montesquieu, *Despre spiritul legilor (trad: The Spirit of Law)*, Bucharest, Antet Revolution Publishing House, 2011, p. 261.

on the exercise of certain rights or freedoms)³ or as stemming from the principle of legality of criminalisation and penalties.⁴ At EU level⁵ it was also considered to flow from the principle of proportionality: *the legislator must therefore consider whether measures other than criminal law, for example administrative or civil sanctioning regimes, could not sufficiently ensure the implementation of the policy and whether criminal law could address problems more effectively. This will require detailed analysis in impact assessments preceding any legislative proposal, including, for example and depending on the specificities of the policy area concerned, assessing whether Member States' sanctioning regimes are achieving the expected result as well as the difficulties faced by national authorities implementing EU law on the ground.*

At national level, the *principle of ultima ratio* has been taken into account in the motivation of its decisions by the Constitutional Court of Romania on several occasions during recent years, on which occasions it has also clarified its meaning.

Thus, in its decision no. 405/15.06.2016⁶, the Court analyzed this principle, stating in paragraphs 68 and 69 that (...) *in exercising its power to legislate in criminal matters, the legislature must take into account the principle according to which the criminalization of an act as a criminal offence must intervene as a last resort in protecting a social value, guided by the principle of "ultima ratio". (...) Thus, ultima ratio has the common meaning of the ultimate or final process or method used to achieve the goal pursued. The Court considers that, in criminal matters, this principle should not be interpreted as meaning that the criminal law must be regarded as the last measure applied from a chronological perspective, but must be interpreted as meaning that the criminal law is the only one capable of achieving the aim pursued, other measures of a civil, administrative nature, etc. being inadequate to achieve this desideratum. The Court considers that, in a broad sense, the aim pursued by the legislature through criminal legislation is to defend the rule of law and, in a narrow sense, is to defend social values, identified by the legislature in the special part of*

³ Monica-Marcela Dinu Bakos, *Echitatea în dreptul substanțial* (trad: *Equity in substantive law*), Bucharest, Edit. Universul Juridic, 2018, p. 62.

⁴ Nicolas Queloz, *op. cit.*, p. 4.

⁵ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions Towards an EU criminal policy: ensuring effective implementation of EU policies through criminal law, available online at <https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52011DC0573&from=PL>, COM 2011/0573, accessed on 25.06.2023.

⁶ Published in M. Of. No. 517/08.07.2016.

the Criminal Code, this aim being, in principle, legitimate. At the same time, the measures adopted by the legislator to achieve the aim pursued must be adequate, necessary and respect a fair balance between public and individual interests. The Court notes that, from the perspective of the principle of 'ultima ratio' in criminal matters, it is not sufficient to find that the criminal acts undermine the protected social value, but that such damage must have a certain degree of intensity, seriousness, justifying the criminal penalty. Following its exposition, the Constitutional Court also proceeds to carry out a brief study of comparative law in case-law matters by reference to this principle. We mention that the above-mentioned aspects did not remain at the stage of sole affirmation, the Constitutional Court subsequently resuming them on several occasions.

2. Practical application of the principle

The question then arises: who is obliged to take into account the principle of *ultima ratio*?

A first option, the one in which it would be considered that analysing this principle of law and acting in accordance with it would be strictly the responsibility of the legislative power, although it may seem justified at first glance, in reality it may prove to be an unfortunate one.

The assessment of social relations which are important for society as a whole, and therefore their classification on different scales of value, according to the strength of the reasons justifying their protection, and thus the creation of a complex and proportionate system of penalties, falls within the exclusive tasks of the legislator. Pursuant to Article 61 para. (1) and Art. 73 para. (1) and para. (3) letter h) of the Romanian Constitution⁷ The Parliament, as the sole legislative authority of the country, has the power to establish the country's criminal policy⁸, the intervention of other authorities in the field constituting in fact an interference in its activity⁹. Even the Constitutional Court cannot require

⁷ Art. 61 para. (1) of the Romanian Constitution: *Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country*", Art. 73 para. (1), para. (3) letter (h) of the Romanian Constitution: *Parliament adopts (...) organic laws (...). An organic law shall regulate (...) h) offences, punishments and the regime of their execution.*

⁸ Decision of the Constitutional Court nr. 824/2015 published in M. Of. No. 122 /17.02.2016; Decision No.405/2016 par. 80, published in M. Of. No. 517/08.07.2016; Decision of the Constitutional Court nr. 561/2021 published in M. Of. No. 1076/10.11.2021.

⁹ Decision of the Constitutional Court nr. 22/1999 published in M. Of. No. 178/26.04.1999.

the Parliament to pass laws regulating a particular issue, regardless of its importance, urgency or seriousness¹⁰.

However, history has shown that the instrument constituted by criminal law, especially in the context of contemporary developed societies, can be very effective and has been used assiduously when societies have lost their balance, following extreme ways of solving the problems they encountered or thought they had before them. Therefore, from a historical perspective, it appears risky for society itself to adopt an approach which considers that it is not only exclusive, but also unrestricted in any way for the legislator to assess actions requiring criminal criminalisation, that there is no need to review its decisions, being the only one in a position to assess the proportionality of its measures. And this opinion, based on the retention and observance of the lessons of the past, is also shared at supranational level, the Parliamentary Assembly of the Council of Europe expressly mentioning, in Resolution no. 1950(2013), ¹¹pt. 4.1, that *urges the ruling majorities in the Member States to refrain from abusing the criminal justice system for the persecution of political opponents*. In order to distinguish between political decisions and criminal acts, the resolution ¹² also contains some principles that should be taken into account by each Member State, among which the one set out in pt. 3.1 states that *criminal proceedings should not be used to sanction political mistakes or disagreements*.

Therefore, in order to overcome this shortcoming, another legal actor intervenes and has the possibility to analyze compliance with the requirements related to the principle of *ultima ratio*, namely the Constitutional Court, by virtue of the supremacy of the Constitution in the legal system.

Thus, the constitutional court pointed out that *according to art. 1 para. (5) of the Fundamental Law, compliance with the Constitution is mandatory, from which it follows that Parliament cannot exercise its*

¹⁰ Decision of the Plenum of the Constitutional Court nr. 1/1993, published in M. Of. no. 232/27.09.1993. In the separate opinion it is also specified that *the establishment of a term within which the legislator can pronounce does not have in any way the meaning of obliging him to a certain activity, but of providing him with a legal instrument that allows him to express, without any restriction, his will in the field of criminal policy. In doing so, the Court not only does not violate its rules of jurisdiction, but also plays an active role in ensuring the constitutional balance of powers*.

¹¹ Adopted on 28.06.2013, available online at <https://pace.coe.int/en/files/20016/html>, accessed on 23.06.2023.

¹² The resolution was entitled 'Keeping political and criminal responsibilities separate' and concerns the criminalisation of abuse of office.

*competence to criminalize and decriminalize antisocial acts, except in compliance with the norms and principles enshrined in the Constitution (...)*¹³. Therefore, this competence of the legislative body, although in principle exclusive, is not an absolute one, being bound by constitutional provisions¹⁴ and including compliance with the principle of *ultima ratio*¹⁵, in criminal matters being necessary that the incriminated acts also have a certain level of seriousness justifying a criminal sanction. The criminal policy of the State must strike a balance between, on the one hand, the interests of the protection of public order and security, with the fundamental rights and freedoms of the person, on the other, otherwise the very attribute of the rule of law may be affected¹⁶. Consequently, even if the constitutional court cannot order the Parliament to regulate certain areas, it may nevertheless prevent it from eliminating the criminal legal protection of values with constitutional status when decriminalisation creates a regulatory vacuum, with the consequence of depriving that value of any form of real and adequate legal protection, in such a case being considered *that the freedom of regulation that Parliament has in these cases is exercised by regulating the conditions for criminal liability for antisocial acts that undermine the values provided for and guaranteed by the Constitution*¹⁷.

Furthermore, the Constitutional Court stated that the analysis of the principle of *ultima ratio* in criminal matters also involves a third institutional actor, namely the judicial bodies themselves called upon to hear the cases brought to trial. On this point he has repeatedly stated, expressly stating that *the task of applying the principle of 'ultima ratio' rests, on the one hand, with the legislator and, on the other, with the judicial bodies called upon to apply the law*¹⁸.

¹³ Decision no. 62/2007 published in Official Journal no. 104/12.02.2007; Decision no. 2/2014 published in Official Journal no. 71/29.01.2014; Decision No. 405/2016 published in M. Of. No. 517/08.07.2016.

¹⁴ Decision No. 392/2017 published in M. Of. No. 504/30.06.2017; Decision No. 824/2015 published in M. Of. No. 122/17.02.2016.

¹⁵ Decision No. 392/2017 published in M. Of. No. 504/30.06.2017; Decision No. 858/2017 published in M. Of. No. 340/18.04.2018.

¹⁶ Decision No. 650/2018 published in M. Of. No. 97/07.02.2019.

¹⁷ Decision of the Constitutional Court nr. 62/2007 published in M. Of. No. 104/12.02.2007, which aimed to decriminalize insult and libel. However, the separate opinion also clarified the view that the Constitution did not provide for the legal means by which social values would be protected, and by virtue of its prerogative to establish criminal policy, the legislature is free to assess when the intervention of criminal law is necessary.

¹⁸ Decision No. 405/2016 published in M. Of. No. 517/08.07.2016; Decision No. 858/2017 published in M. Of. No. 340/18.04.2018; Decision No. 189/2019 published in M. Of. No. 334/02.05.2019; Decision No. 283/2023 published in M Of. No. 488/06.06.2023.

There were also criticisms of these decisions of the constitutional court, considering that the analysis of the *principle of ultima ratio* not only by the legislator, but also by the judicial bodies, would undermine the principle of legality of criminalisation, since the determination of the criminal character of a specific act by a judicial body would render the law unclear and unpredictable¹⁹. It was also considered to infringe the principle of separation of powers²⁰ to allow an assessment of the specific act by a magistrate (who would find that it does not present the social danger of a crime) to remove the characterisation of that act as a criminal offence, as carried out by the incrimination rule. However, we cannot agree with these points of view because the law continues to be clear and predictable, emerging from its content what conditions must be met in order to attract criminal liability, but to these conditions, expressly specified, is added an intrinsic and general one, imposed by the principle of *ultima ratio*, i.e. that the actual damage to the social relations involved is sufficiently serious to impose criminal liability. The latter element, although difficult to quantify, cannot be dismissed for that reason alone. It remains up to the magistrate to assess in this regard in relation to each case, and, no matter how much we would like all situations to be regulated, such a state of law is not only impossible, but also undesirable, given that there would be an over-regulation of such magnitude that it would affect the rule of law by itself. And as regards the separation of powers, the magistrate will only find that the conditions laid down by the legislator are not met, as we will explain below.

The question then arises as to how exactly the principle of *ultima ratio* could be applied by judicial bodies. We consider it obvious that the solution required is one of acquittal / closure on the grounds that the act is not provided for by the criminal law, and the reasons for the solution are clear in the case of those facts for which it could be concluded that it would be necessary to attract a liability of a nature other than criminal (for example, the disciplinary one would be considered sufficient), in the event of a qualification competition, however, we have asked ourselves what happens in situations where there is no regulation of a different nature, but the concrete facts are of such little importance that it is not justified to carry out even minimal criminal investigations in order to assess in the sense of a solution to waive the criminal prosecution.

¹⁹ Cristinel Ghigheci, *Abuz în serviciu comis de judecători (trad: Abuse of office committed by judges)*, Universul Juridic Magazine, no. 9/2019, p. 7.

²⁰ George Antony in George Antoniu, Tudorel Toader (ed.) *Explicațiile Noului Cod penal, vol. I, art. 1-52 (trad: Explanations of the New Criminal Code, vol. I, art. 1-52)*, Bucharest, Universul Juridic, 2015, p. 39.

The old Criminal Code had solved such a problem as a result of the institutions of substitution of criminal liability, regulated by Articles 91-98, and the famous Article 18¹. Currently, however, when ordering solutions for acquittal or closure, judicial bodies cannot take into account the social danger as an independent legal institution, which is removed from the essential features of the crime with the adoption of the current Criminal Code. As shown in the specialized literature²¹, the new Criminal Code approached a formal definition of the crime, so that its existence is strictly determined by its description in the incrimination norm, taking into account only its external, formal, not the internal aspect, of content (which the previous Criminal Code envisaged through the concrete social danger provided by art. 18¹). Thus, in the case of the essential feature of the crime that it is provided for in the criminal law, three existing realities are embedded: the existence of the act actually committed in the material world, of the result and of the causal link between them; the existence of a legal model of criminalisation and the identity between the features of the concrete act and those of the legal model of criminalisation (typicality).²² The phrase "act provided for by the criminal law" used by art. 16th of the Code of Criminal Procedure refers to this third element, namely the fulfillment of the feature of typicality. This aspect was revealed not only by the specialized literature²³ but also by the legislator, in the explanatory memorandum to the new Criminal Code²⁴.

Also, in several decisions²⁵, the Constitutional Court addressed the issue of actions that in fact do not sufficiently affect the protected social values. Thus, the constitutional court drew a parallel between the institution of absence of social danger, provided by art. 18¹ of the old Criminal Code, and the institution of renunciation of the application of punishment, introduced by the new legislation, on which occasion it

²¹ Ibid., p. 157.

²² George Antony, op. cit. p. 157, apud. Costică Bulai, *Practică generală (trad: General Practice)*, Timisoara, All Publishing House, pp. 146-147.

²³ Irina Kuglay in Mihail Udrouiu (ed.), *Codul de procedură penală. Comentariu pe articole, art. 1-603 (trad: Code of Criminal Procedure. Commentary on articles, art. 1-603)*, Bucharest, C.H. Beck Publishing House, 2015, p. 111; Constantin Duvac in Constantin Duvac, Norel Neagu, Niculae Gamenț, Vasile Băiculescu, *Drept penal. Partea generală (trad: Criminal Law. General part)*, Bucharest, Universul Juridic Publishing House, 2019, p. 299.

²⁴ Available online at <https://cdep.ro/proiecte/2009/300/00/4/em304.pdf>, accessed 26.06.2023.

²⁵ Decision No. 407/2016 published in M. Of. No. 573/28.07.2016; Decision No. 721/2016 published in M. Of. No. 59/20.01.2017; Decision No. 113/2020 published in M. Of. No. 394/14.05.2020; Decision No. 176/2022 published in M. Of. No. 451/05.05.2022.

found that if, according to the previous legislation, the act that did not present the social danger of a crime did not constitute a crime, according to the current regulation the act would remain a crime.

However, this situation is an effect of changing the definition of 'offence', as indicated above, but we cannot believe that the legislator has fallen into an extreme of formalism and has sought that absolutely any act formally suited to it should also be regarded in fact as a criminal offence, with the consequence of unnecessary waste of resources by investigating them.

Therefore, I consider that social danger retains a certain role in the analysis, but it is considered strictly by reference to the case before the judgment and as an element of fact rather than a legal element, observable in the light of changes produced or that could have been produced in the material world, therefore it appears to be one of the elements influencing the actual gravity of the act committed. I therefore consider that it should not be regarded as an element in its own right, but should be integrated into the process of analysing the immediate consequences of the offence. Thus, in so far as the actual social danger caused by the act committed is not such as to justify its classification as a criminal offence, it may be concluded that the act is not provided for by the criminal law in that it did not produce the consequence provided for by the law, without undermining the protected social values as considered by the legislator²⁶.

It should be noted that when deciding to criminalize an action, the legislator analyzed the danger that that manifestation gives rise to society and the principles on which it is built, but the immediate follow-up, as an element of the objective side of the crime, considered by the legislator for criminalization is an abstract one. By its very nature, it can only assess a threshold of consequences which, if exceeded, leads to the commission of the offence, but it cannot objectively analyse for each specific act the immediate aftermath, that task falling to the judicial bodies.

It thus follows that the actual social danger of the act, that assessed by the magistrate, is subsumed to the existence of a social danger that is assessed in an abstract and general manner, as well as by exceeding the threshold to which I referred, analysed by the legislator at the time of criminalisation.

Going further with the reasoning, from the perspective of the consequences of the crime it would seem that a problem would arise in

²⁶ The need to analyze the social danger was also felt by the Timișoara Court of Appeal at the time of referral to the Constitutional Court, with the exception of unconstitutionality that was the subject of decision no. 330/26.05.2022 published in M. Of. No. 1017/19.10.2022.

the case of crimes of abstract danger. If, in the case of those of result and those of concrete danger, it is incumbent on the prosecution with also proving the occurrence of the result or the birth of the danger, with the consequence of the possibility of implicitly analyzing its seriousness, in the case of crimes of abstract danger it is not necessary to prove the existence of a danger, since it is presumed by the legislator by the very criminalization of the act, presumption considered to be absolute²⁷. However, I consider that this presumption is capable of proving the existence of the danger, that is to say, of the damage to the protected social value, but not of the extent of that damage, so that the judicial bodies are still open to the possibility of finding that the act has not been criminally sanctioned.

I would further like to draw attention to the situation when it would be considered that the act does not affect social relations at the level at which it would be considered a crime, but without the legislation providing for another way of punishing it. According to the provisions of Article 18¹ of the old Criminal Code, the possibility of applying an administrative sanction was open, but if such an act, manifestly antisocial, even if of minimal importance, is currently committed, and no other liability can be incurred, it may lead to the non-sanctioning in fact of behaviors offensive to social values. Although at first glance such an approach may seem unjustified, we recall that such cases are not unique, being generated by the institution of waiver of criminal prosecution. When such a solution is adopted, but without imposing on the author one of the obligations provided for in art. 318 para. (6) C. proc. pen.²⁸ In fact, the same result is achieved, namely that an act, this time considered a crime, does not entail any sanction, but only an implicit warning against the perpetrator, a warning generated by the conduct of criminal proceedings.

3. Instead of conclusions

The application of *the principle of ultima ratio* in substantive criminal law should not be excluded ab initio. At the same time, however, recourse to it should be done with the utmost reluctance and only after extensive and profound analysis of the case before the court in all its aspects, since the application of the principle easily can open a real

²⁷ Florin Streteanu, Daniel Nitu, *Drept penal. Partea generală, vol. I (trad: Criminal Law. General part, vol. I)*, Bucharest, Universul juridic, 2014, p. 297.

²⁸ Art. 318 para. (6) C. proc. pen.: to remove the consequences of the criminal act or to repair the damage caused, or to agree with the civil party a way of repairing it; publicly apologize to the injured person; perform unpaid community service for a period of between 30 and 60 days, unless, owing to his state of health, the person is unable to perform such work; attend a counselling programme.

Pandora's box. There is a fine and even fickle distinction between a fact which would not require any attention from the criminal law and a fact which would nevertheless constitute a criminal offence, albeit of minimal seriousness, and which would rather require a solution of waiver of criminal prosecution. Moreover, although initially considered to be of little importance for consideration by criminal legislation, the repetition of the same fact is liable to reveal its subsequent increased seriousness, through repeated attacks on the protected social value, so that criminal investigations would then be required. Thus, it becomes a real balancing act to analyse this principle, but we cannot imagine that it would be otherwise in the context in which it refers precisely to facts which are of obvious irrelevance, generally accepted and which facts represent nothing more than extraordinary and marginal situations, which are on the lower limit of the scale of the need for criminal law intervention, even solely for its preventive purpose, and which, depending on the specific circumstances of each case, are capable of crossing the border in one direction or the other. This analysis does indeed have an element of subjectivity, but the facts themselves are of such legal "smallness" that, strictly from a practical point of view, they are of no importance and would not cause any harm to society or any risk to the social values defended if certain facts were overlooked, facts for which perhaps other legal actors would consider that a prosecution should be instead waived. To illustrate: if a minor, with no antisocial record, one day steals a fruit from a tree, is it really necessary to resort to criminal proceedings? Does his act, singular both for the minor and viewed in relation to the general state of affairs, and without any element denoting a dangerous habit, really affect social values to such an extent as to justify the intervention of the State through the most serious instruments, in terms of potentiality, at its disposal? I think not. On the contrary, following such a path is capable of causing only greater damage by harming the minor by presenting him before the police for questioning and, where appropriate, before the forensic commission for determining his discernment. At the same time, what is the danger of an act, also singular, of crossing with an unregistered car, diagonally, a communal road, so only a few meters, a road located between two isolated localities and which can be characterized as poorly traveled at best, and the crossing to be made in an area with wide visibility on both sides?

How can such actions be motivated as dangerous and to such an extent as to justify the intervention of the criminal law, if not only by a strictly formal application of the law, considering only its letter, not its spirit? The mere fact that grammatical analysis of the legal text would

classify the act as a crime is not enough. Let us recall the roots of the principle: "Every punishment that does not originate in necessity is tyrannical. Law is not simply an act of power; things indifferent by nature are not within her competence." This analysis of a real need for law enforcement should not be ruled out from the start, but should be analyzed on a case-by-case basis, even if in almost all cases the answer is positive.

Consequently, I consider that the principle of *ultima ratio* is not only capable of helping to improve knowledge of the spirit of the law, having theoretical relevance, but it may also have consequences in everyday practice, but its actual use, although it should not be excluded, should nevertheless be a rather 'exotic' solution, preserved for truly exceptional cases.

Bibliography

1. Antoniu George in Antoniu George, Toader Tudorel (ed.) *Explicațiile Noului Cod penal, vol. I, art. 1-52 (trad: Explanations of the New Criminal Code, vol. I, art. 1-52)*, Bucharest, Universul Juridic Publishing House, 2015.
2. Dinu Bakos Monica-Marcela, *Echitatea în dreptul substanțial (trad: Equity in substantive law)*, Bucharest, Universul Juridic Publishing House, 2018.
3. Duvac Constantin in Constantin Duvac, Norel Neagu, Niculae Gament, Vasile Băiculescu, *Drept penal. Partea generală (trad: Criminal Law. General part)*, Bucharest, Universul Juridic Publishing House, 2019.
4. Ghigheci Cristinel, *Abuz în serviciu comis de judecători (trad: Abuse of office committed by judges)*, Universul juridic Magazine, no. 9/2019.
5. Kuglay Irina in Mihail Udrioiu (ed.), *Codul de procedură penală. Comentariu pe articole, art. 1-603 (trad: Code of Criminal Procedure. Commentary on articles, art. 1-603)*, Bucharest, C.H. Beck Publishing House, 2015, p. 111.
6. Montesquieu, *Despre spiritul legilor (trad: The spirit of law)*, Bucharest, Antet Revolution Publishing House, 2011.
7. Pușcașu Voicu, *Drept penal. Partea Generală. Ediția a II-a, revăzută și adăugită – note de curs- (trad: Criminal Law. General part. Second edition, revised and added – course notes-)*, Bucharest, Universul Juridic Publishing House, 2022.
8. Queloz Nicolas, *Les dérives des politiques pénales contemporaines. La fin de l'ultima ratio du droit pénal?*, Revue Suisse de Criminologie, no. 2/2013.
9. Streteanu Florin, Nițu Daniel, *Drept penal. Partea generală, vol. I (trad: Criminal Law. General part, vol. I)*, Bucharest, Universul juridic Publishing House, 2014.
10. Decision of the Plenum of the Constitutional Court nr. 1/1993.
11. Decision of the Constitutional Court nr. 22/1999.
12. Decision of the Constitutional Court nr. 62/2007.
13. Decision of the Constitutional Court no. 2/2014.
14. Decision of the Constitutional Court nr. 824/2015.
15. Decision of the Constitutional Court nr. 405/2016.
16. Decision of the Constitutional Court nr. 407/2016.

17. Decision of the Constitutional Court nr. 721/2016.
18. Decision of the Constitutional Court nr. 392/2017.
19. Decision of the Constitutional Court nr. 858/2017.
20. Decision of the Constitutional Court nr. 650/2018.
21. Decision of the Constitutional Court nr. 189/2019.
22. Decision of the Constitutional Court nr. 113/2020.
23. Decision of the Constitutional Court nr. 561/2021.
24. Decision of the Constitutional Court nr. 176/2022.
25. Decision of the Constitutional Court nr. 330/2022.
26. Decision of the Constitutional Court nr. 283/2023.
27. <https://cdep.ro/proiecte/2009/300/00/4/em304.pdf> accessed 26.06.2023.
28. <https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52011DC0573&from=PL> accessed 25.06.2023.
29. <https://pace.coe.int/en/files/20016/html> accessed 23.06.2023.

EVOLUTION, JURISPRUDENCE AND PERSPECTIVES OF DIFFERENT TAXATION SYSTEMS IN ROMANIA AND THE EUROPEAN UNION

Asist. Univ. Drd. Gabriel TAMAS-SZORA

Abstract

Presentation and analysis of the different taxation systems of commercial companies from an evolutionary and practically point of view, compared to other European systems.

What will the future hold for the Romanian tax payer?

Keywords: *Taxation of profit, taxation of income, micro-enterprise income tax, deductibility of expenses, tax evolution.*

1. Introduction

Navigating the complex realm of fiscal policies in the European Union requires a nuanced exploration of taxation systems, and this article aims to unravel the economic intricacies embedded within member states. The focus zooms in on Romania's taxation landscape, tracing its evolution and dissecting the jurisprudential influences that have molded its trajectory. This examination naturally extends to the broader context of the European Union, unveiling the diverse tax frameworks employed by member states and contemplating their implications for economic harmonization.

Within this comprehensive analysis, the spotlight falls on two indispensable components – profit tax and income tax. These are not mere technicalities but rather fundamental contributors to the economic fabric of both individual nations and the EU collective. Romania's narrative unfolds against a backdrop of transformative shifts in profit tax policies and income tax structures, exerting tangible impacts on businesses and individuals alike. The interplay of these tax categories within the European Union introduces intricate interdependencies, where the alignment or divergence of profit and income tax strategies among member states holds profound implications for economic collaboration and competition.

As we navigate this intricate web of fiscal mechanisms, the lens widens beyond the technicalities of taxation to unveil the strategic decisions shaping nations. Whether aimed at fostering economic growth,

achieving social equity, or ensuring financial sustainability, these decisions underscore the dynamic interrelation between fiscal policies, societal aspirations, and the ever-evolving perspectives that shape the financial landscapes of nations and the European Union at large.

1.1 Taxation of profit

1.1.1 Accounting profit and tax profit

From an accounting point of view, according to point 420, para. (1-3) from OMFP no. 182/2014¹, "In accounting, the profit or loss is established cumulatively from the beginning of the financial year, and the result of the year is determined as **difference between the revenues and expenses of the exercise**, the final result of the financial year being established at its close and represents the final balance of the profit and loss account."

Compared to the accounting profit, the fiscal one is calculated by adjusting the accounting profit taking into account non-deductible expenses and non-taxable income. Thus, according to art. 19 paragraph 1) of Law no. 571/2003, "Taxable profit is calculated as the difference between the incomes made from any source and the expenses incurred for the purpose of incomes, from a fiscal year, from which the non-taxable incomes are subtracted and from which non-deductible expenses are added."

1.2. Analysis of the notion of income from accounting law and tax law

In accordance with the provisions of point 19, paragraph 2-3) of OMFP no. 1802/2014 for the approval of the Accounting Regulations regarding individual annual financial statements and consolidated annual financial statements²,

"a) revenues constitute increases in economic benefits recorded during the accounting period, in the form of incomes or increases in assets or reductions in liabilities, which materialize in increases in equity, other than those resulting from shareholders' contributions;

(3) Revenues are recognized in the profit and loss account when an increase in future economic benefits related to an increase in the value of an asset or a decrease in the value of a liability can be reliably assessed. The recognition of income is carried out simultaneously with the recognition of the increase in assets or the reduction of liabilities (for example, the net increase in assets, resulting from the sale of products or services, or the decrease in liabilities as a result of the cancellation of a debt)."

¹ Monitorul Oficial no. 963 of Dec. 30, 2014.

² The same.

In the fiscal sense, according to the Methodological Norms of Law no. 571/2003 ref. Art. 19, para. (1) Fiscal Code (Section 12 - Section 15)³: "The income and expenses that are taken into account when determining the taxable profit are those recorded in the accounting according to the accounting regulations given on the basis of the Accounting Law no. 82/1991, republished, with subsequent amendments and additions, as well as any other elements similar to income and expenses, from which non-taxable income is subtracted and non-deductible expenses are added according to the provisions of art. 21 of the Fiscal Code." As examples of elements similar to income, we have: favorable exchange rate differences, resulting from the evaluation of receivables and payables in foreign currency, recorded in the accounting record in the retained earnings, as a result of restatement or transposition; the reserves from the revaluation of fixed assets, according to the provisions of art. 22 para. (5) and para. (51) of the Fiscal Code; gains related to the sale or cancellation of acquired/repurchased own shares.

We note that from a fiscal point of view there are no regulatory differences in terms of income, not even in the current tax code (art. 19 General Rules, from Law 227/2015⁴). and more important is the fact that, basically, in terms of income, **the tax rule is based entirely on the accounting rule.**

1.2.1. Analysis of the evolution of the basic rule of the deductibility of expenses starting from 1990

After 1990, according to art. 4 of **GD no. 741 of July 3, 1990 regarding the benefit tax at state economic units**⁵, "The taxable profit represents the difference between the income from the total activity and the related expenses, from which the amounts that, according to the law, are borne directly from the financial results are subtracted". As a finding, we note that, as far as expenses are concerned, there is no delimitation between deductible/non-deductible ones, neither in the fiscal nor accounting sense, there are only certain expenses that are borne directly from the financial results, without the latter being listed nor in the text of GD no. 741/1990.

In accordance with LAW no. 12 of January 30, 1991 regarding the profit tax⁶, applied until **31.12.1994**, the notion of profit is introduced for the first time instead of benefit, and "Taxable profit is determined as the difference between the revenues received and

³ The same.

⁴ The same.

⁵ Monitorul Oficial NO. 86 of May 7, 1992.

⁶ Monitorul Oficial no. 25 of January 31, 1991.

the expenses provided for in annex no. 2 to the law". The referral to collected revenues represented a unique case after 1990 in the matter of profit tax, contrary to the accrual accounting established by Law no. 82/1991. regarding the deductible expenses from annex no. 2 of the law, apart from the usual allocable ones, the following expenses should be noted:

1. **The expenses related to the activity carried out, corresponding to the income received**, which according to the legal regulations are highlighted in the costs of economic agents, keeping the same link as with income (related to those collected);

2. **Amounts paid for research contracts** what are the priority programs of national interest, the substantiation of development strategies, the increase in the quality of products and services and the development of new, competitive products, not included in the production costs or circulation expenses, as the case may be, of the economic agents;

3. Amounts used for buying **shares for** which dividends are collected;

4. **Withdrawals from the reserve fund and other special funds**, established according to legal regulations;

5. **Losses from previous years**, to the extent that they could not be recovered until the date of determining the taxable profit;

In accordance with OG no. 70 of August 29, 1994 regarding the profit tax the current calculation system was introduced in the sense that the taxable profit according to art. 2 of OG 70/1994 is calculated as the difference between the income obtained from the delivery of movable goods, the services provided and the works performed, from the sale of immovable goods, including earnings from any source, and **the expenses incurred for their realization**, from a fiscal year, from which non-taxable income is subtracted and non-deductible expenses are added.

In accordance with LAW no. 414 of June 26, 2002 regarding the profit tax⁷, with entry into force on 01.07.2002 until 31.12.2003, the previous tax rule is kept, so that, according to art. 7, para. 1) "Taxable profit is calculated as the difference between the income from any source and **the expenses incurred for their realization**, from a fiscal year, from which non-taxable income is subtracted and non-deductible expenses are added."

According to art. 19 paragraph 1) of Law no. 571/2003, "Taxable profit is calculated as the difference between the income from any source and **expenses incurred in order to generate income**, from a fiscal

⁷ The same.

year, from which the non-taxable income is subtracted and to which the non-deductible expenses are added."

In accordance with the provisions of point 19, paragraph 3) of OMFP no. 1802/2014, lit. b) "expenses constitute decreases in the economic benefits recorded during the accounting period in the form of outflows or decreases in the value of assets or increases in liabilities, which materialize in reductions of equity, other than those resulting from their distribution to shareholders."

In accordance with the provisions of point 19, paragraph 4) of OMFP no. 1802/2014 for the approval of the Accounting Regulations regarding individual annual financial statements and consolidated annual financial statements, "Expenses are recognized in the profit and loss account when a decrease in future economic benefits related to a decrease in the value of an asset can be reliably assessed or an increase in the value of a debt. The recognition of expenses takes place simultaneously with the recognition of the increase in the value of liabilities or the reduction in the value of assets (for example, employee salary rights or depreciation of equipment)".

According to point 12, of the Methodological Norms of the Fiscal Code of 2003⁸, "The income and expenses that are taken into account when determining the taxable profit are those recorded in the accounting according to the accounting regulations given on the basis of the Accounting Law no. 82/1991, republished, with subsequent amendments and additions, as well as any other elements similar to income and expenses, from which non-taxable income is subtracted and non-deductible expenses are added according to the provisions of art. 21 of the Fiscal Code". As examples of items similar to expenses, the following are listed:

- unfavorable exchange rate differences, resulting from the evaluation of receivables and payables in foreign currency, recorded in the accounting records in the retained earnings, as a result of restatement or transposition;

- the expense with the unamortized value of research and development expenses and fixed assets of the nature of inventory items that was recorded in the retained earnings. In this case, the expense is tax deductible for the remaining period to be amortized of these immobilizations, respectively the initial period established according to the law, less the period for which the amortization was calculated. The same will be done in the case of inventory items, barracks and temporary arrangements transferred to the retained earnings on the occasion of the restatement of the annual financial statements.

⁸ The same.

- the unfavorable differences between the sale price of own participation securities and their acquisition/redemption value, recorded on the date of sale of the respective securities.

According to art. 25 paragraph 1 of the Fiscal Code of 2015⁹, for the determination of the fiscal result, expenses are considered expenses **incurred for the purpose of carrying out the economic activity are deductible**, including those regulated by normative acts in force, as well as registration fees, dues and contributions owed to chambers of commerce and industry, employers' organizations and trade unions."

As a summary of the analysis of the evolution of the basic rule of the deductibility of expenses, starting from 1990, we note that at the level of principle, they were substantiated differently, in the sense that they were attached each time to the incomes, there being three ways to connect them to the incomes: realized incomes / collected incomes/conditional on the **purpose of the economic activity** (the latest version).

1.2.2. If and how long a company can operate at a loss (unaffiliated company). Identifying criteria for establishing these limits

In accordance with the Accounting Law no. 82/1991¹⁰, art.19 alin.4), "The carried forward accounting loss is covered by the profit of the financial year and the carried forward, from reserves, capital premiums and social capital, according to the decision of the general meeting of shareholders or associates."

According to Law no. 31/1990, art. 69¹¹, "If a loss of the net asset is found, the subscribed capital will have to be replenished or reduced before any distribution or distribution of profit can be made.", and according to art. 153²⁴, paragraph 1), "If the board of directors, respectively the directorate, finds that, following losses, established by the annual financial statements approved according to the law, the company's net asset, determined as the difference between its total assets and its total liabilities, has decreased at less than half of the value of the subscribed share capital, will immediately convene the extraordinary general meeting to decide whether the company must be dissolved".

A similar provision also exists in art. 35 paragraph 1) of Law no. 1/2005 of February 21, 2005¹², according to which, "The board of directors or the sole administrator, as the case may be, is obliged to

⁹ The same.

¹⁰ The same.

¹¹ The same.

¹² Monitorul Oficial no. 172 of February 28, 2005.

convene the general meeting at the request of at least one tenth of the total number of cooperating members, of the censors or in the situation where it finds that, following losses, the net asset, determined as the difference between the total assets and the liabilities of the cooperative society, represents less than half of the value of the social capital or that the number of cooperative members has decreased below the legal minimum."

We find that there is no expressly established period of time in relation to which the carried forward accounting loss is covered, the competence of the decision being at the level of the AGM, which is, from our point of view, an element that generates losses in the chain, respectively bankruptcies, so we believe that this situation must be regulated by supplementing the existing regulations with the taking of appropriate and effective measures by the AGM. As a principle, such a supplement can be formulated as follows: after. 153²⁴, paragraph 1) of Law no. 31/1990 to insert the following text:

If within 1 year from the date of the AGM convened according to 153²⁴, paragraph 1), do not take measures or they do not remove the situation, the company will go into liquidation.

1.2.3 Loss carry forward and recovery

From a fiscal point of view, the carry-forward of the loss and its recovery during the analyzed period was regulated as follows:

- in accordance with GD no. 741 of July 3, 1990 regarding the benefit tax at state economic units¹³ - applied until 31.12.1991, as the tax was calculated on profitability installments, the first installment being up to 5% (which included loss-making units), practically the loss was not recovered fiscally, as there was an obligation to pay the tax and in case of losses;

- in accordance with LAW no. 12 of 30 January 1991 regarding the profit tax, applied until 31.12.1994¹⁴ annex no. 2, expenses with losses from previous years, to the extent that they could not be recovered until the date of determining the taxable profit, are recognized as deductible expenses without time limit;

- according to OG no. 70 of August 29, 1994 regarding the profit tax¹⁵, we have in art. 8 paragraph 1) the following incidental regulations:

- "The annual loss, established by the profit tax declaration, is recovered from the taxable profits obtained in **the next 5 years**;

¹³ Monitorul Oficial NO. 86 of May 7, 1992.

¹⁴The same.

¹⁵ Monitorul Oficial no. 246 of 31.08.1994.

- The recovery of losses will be carried out in the order of their registration, at each profit tax payment term, according to the legal provisions in force from the year of their registration;
- The fiscal loss recorded by the legal entity is not recovered, in the event that the division or merger takes place;
- Taxpayers who, for a period of 3 consecutive years, have made only losses are automatically included in the control objective of the fiscal body for ascertaining the causes that led to non-realization of profit.";

We note the introduction for the first time of the principle of loss recovery in a certain period (5 years).

- Law no. 414 of June 26, 2002 regarding the profit tax provides the following regarding the coverage, respectively the recovery of losses:

- Art. 2 para. 7): "Amounts registered in reserve accounts, representing fiscal facilities, according to the law, cannot be used to increase the social capital or to cover losses."
- Art. 13 paragraph 1): Resumes the way to recover the loss within 5 years, according to OG no. 70 of August 29, 1994 regarding the profit tax;

- The first Fiscal Code¹⁶ (Law no. 571/2003), at art. 26: Fiscal losses provides for the 5-year period for the recovery of losses;

- Law no. 227/2015¹⁷ (second fiscal code), in art. 31: Fiscal losses provides for a new period of 7 years for the recovery of losses;

Unlike internal losses, described above, external losses are also regulated, according to art. 40: External fiscal losses from the current Fiscal Code¹⁸, as follows: "Any loss made through a permanent establishment located in a state that is not a member state of the European Union, of the European Free Trade Association or located in a state with which Romania has not concluded a convention to avoid double taxation is deductible only from the income obtained by the respective permanent establishment. In this case, the losses made through a permanent establishment are deducted only from these incomes, separately, for each source of income. Uncovered losses are carried forward and recovered in the next 5 consecutive fiscal years." The same provision was established by the old Fiscal Code, in art. 32, per a contrario the loss realized through a permanent establishment located in a state with which Romania has concluded a convention to avoid double taxation is deductible, it is also deductible from the income obtained from Romania.

¹⁶ Monitorul Oficial no. 927 of 2.12.2003.

¹⁷ The same.

¹⁸ The same.

We find that there is a temporal difference, in terms of duration, regarding the recovery of the internal loss (7 years) compared to the external one (5 years).

Compared to Romania, in EU countries the tax loss is treated differently.

In Germany income tax is calculated in the following way:

$\text{Taxable income} \times \text{tax rate} = \text{income tax}.$

The manual calculation of income tax is relatively complicated, which is why there is an official income tax calculator on the website of the Federal Ministry of Finance:<https://www.bmf-steuerrechner.de/>.

Calculation formula for business **tax** in Germany it is as follows:

$\text{The profit made by the business} \times 3,5\% \times \text{business tax rate} =$
 $= \text{business tax}$

If the corporate tax rate is 3.5%, the business tax rate in Germany differs depending on the location of the company. This quota is set by the local authorities.

Therefore in **Germany**, companies pay business tax and income tax, and in addition:

- income tax for legal entities (germ. Körperschaftsteuer);
- investment income tax (Kapitalertragssteuer);

The corporate tax rate in Germany is 15%. apart from this tax, corporations also have to pay the solidarity surcharge and the so-called commercial tax. The effective tax rate for corporations in Germany is around 30%.

So, in Germany, the profit tax component is less significant than in Romania (there is also an income tax), so the recovery of the tax loss has a lower importance.

Corporate tax in France is 33.33%. For the activity carried out in France, the permanent establishment (branch) in France has the obligation to calculate, declare and pay the profit tax to the tax authorities in France. Large companies bear an additional social tax of 3.3% and in their case the average tax rate on profits is 35.4%.

In recent years, the following changes have appeared, regarding the profit tax at **European level**¹⁹:

- 13 EU member states reduced their corporate tax rates starting in 2013. Eight of them reduced their corporate tax rates in 2017-2018. These are Belgium, Croatia, Italy, Luxembourg, Poland and Slovakia;

¹⁹ "Profit tax in the EU for 2023", 22nd of January 2023, <https://finante-banci.ro/impozitul-pe-profit-in-ue-pe-2023/>

- EU member states increased the corporate tax rate, namely Greece, in 2015 (from 26% to 29%), Slovenia, in 2017 (from 17% to 19%), and Latvia, in 2018 (from 15% to 20%);

- The EU member states with the lowest corporate tax rates are: Hungary, with 9%, Bulgaria, with 10%, Ireland, with 12.5%, Cyprus, with 12.5%, Lithuania, with 15%, Poland , with 15% (but only for small businesses) and Romania, with 16%;

The EU member states with the highest corporate tax rates are Malta, with 35%, France, with 33.33%, Germany, with 30-33% (the national share combined with solidarity tax and municipal tax), Belgium, with 29%.

1.2.4 Problems arising from the transition from the profit tax system to the micro-enterprise income tax and vice versa

The fiscal treatment of micro-enterprises was last amended on 01.01.2023 with the provisions of OG 16/2022 amending and supplementing the Fiscal Code and Law 370/2022 approving OG 16/2022 (micro-enterprise income tax is no longer mandatory, being optional with the fulfillment of some conditions, which change substantially compared to the year 2022; the ceiling is reduced from 1 million euros to 500,000 euros; the condition of achieving revenues of less than 20% from consulting and management in total revenues is reintroduced; the condition of 1 employee is introduced , with certain exceptions; the condition is introduced that the associations do not have more than 25% in more than 3 companies paying micro-enterprise income tax; there remains only one tax rate, that of 1%).

The transition from the profit tax system to the microenterprise income tax and vice versa has permanently induced a series of difficulties, of which we will analyze the most recent ones.

Thus, starting with 2023, there could be several situations, such as:

(1) Entry into micro-enterprise income tax.:

1.1) entry by option:

- The option of entering the micro-enterprise income tax from the profit tax (PT) CAN only be done starting with the year following the one in which all the micro-enterprise fiscal conditions are regulated in art. 47 para. (1) of the Fiscal Code and only if they were no longer paying micro-enterprise income tax after January 1, 2023 under the conditions of application of the provisions of the Fiscal Code valid starting from 01.01.2023 (OG 16/2022, with subsequent amendments and additions 01.01.2023), according to art. 48 para. (2) of the Fiscal Code (with the

exception of HORECA companies, which can apply the micro-enterprise income tax system without any condition, but paying profit tax if they also carry out activities other than HORECA).

- Thus, in PRACTICE, starting from 01.01.2023, the following situations may arise in which a company can CHOOSE or NOT opt for the transition from IP payment to micro-enterprise income tax payment:

- a) On 31.12.2022, the company meets the micro-enterprise fiscal conditions provided for in art. 47 para. (1) from the CF (Attention: We specify that the income ceiling up to which the micro-enterprise income tax can remain payer, on 12.31.2022, is 1,000,000 euros),

- (a.1) and on 31.12.2022 is an IP payer, but opts to pay micro-enterprise income tax starting from 01.01.2023. The company can pay micro-enterprise income tax, starting from 01.01.2023, since it opts for the first time to switch from IP to micro-enterprise income tax, after 01.01.2023. We specify that if it later switches from micro-enterprise income tax to IP, optional or mandatory, the company will definitely remain paying IP.

- (a.2) and is an micro-enterprise income tax payer on 31.12.2022 (Attention: We specify that the income ceiling up to which you can remain an micro-enterprise income tax payer, on 31.12.2022, is 1,000,000 euros) and continue and starting from 01.01.2023 to remain micro-enterprise income tax payer. On 31.12.2023 the company fulfills the micro-enterprise fiscal conditions provided for in art. 47 para. (1) from the CF, but opts for the payment of the profit tax starting from 01.01.2024. On 31.12.2024 the company fulfills the micro-enterprise fiscal conditions provided for in art. 47 para. (1) from the CF, but it CANNOT opt for the micro-enterprise income tax payment starting from 01.01.2025, as the company was paying micro-enterprise income tax after 01.01.2023, taking into account the new conditions regulated under the Title of the Microenterprise Income Tax from the Fiscal Code, as amended by the provisions of OG 16/2022.

- (a.3) and is an micro-enterprise income tax payer on 12/31/2022 (Attention: We specify that the income ceiling up to which you can remain an micro-enterprise income tax payer, on 12/31/2022, is 1,000,000 euros), and continue and starting with 01/01/2023 remains an micro-enterprise income tax payer, but during the fiscal year 2023 must switch to IP payment. in this situation, the company:

- **in case of overtaking ceiling legal** (which starting with 01.01.2023, is 500,000 euros) of revenues and/or exceeding the weight of 20% including revenues from consulting and/or management of the total revenues (except tax consulting), will never be able to apply the

taxation system micro-enterprise income tax, as specified in art. 52 para. (1) from the Fiscal Code;

OR

- in the case of the other situations that forced the company to become an IP payer during the year (no longer has employees; carries out activities among those provided for in art. 47 paragraph (3) letters f)-i); any of the associates / shareholders of a micro-enterprise (natural or legal person) owns more than 25% of the value/number of participation titles or voting rights in more than 3 micro-enterprises that pay micro-enterprise income tax) **MAY CHOOSE** to switch from IP to micro-enterprise income tax, starting with the year following the one in which all microenterprise fiscal conditions regulated in art. 47 para. (1) of the Fiscal Code and only if they were no longer paying micro-enterprise income tax after January 1, 2023 under the conditions of application of the provisions of the Fiscal Code valid starting from 01.01.2023 (OG 16/2022, with subsequent amendments and additions 01.01.2023), according to art. 48 para. (2) of the Fiscal Code (with the exception of HORECCA companies, which can apply the micro-enterprise income tax system without any conditions).

b) On 01.01.2024 the company is an IP payer, then on 31.12.2024 it fulfills the micro-enterprise fiscal conditions provided for in art. 47 para. (1) from the CF and opts to switch from IP to paying micro-enterprise income tax starting with 01.01.2025, which is possible because it was no longer micro-enterprise income tax according to the new provisions of the Fiscal Code in force starting with 01.01.2023. Then, on 31.12.2025, it no longer meets the conditions of a micro-enterprise, being obliged to pay IP starting with 01.01.2026. We specify that if on 31.12.2026 or later, the company even if it meets the fiscal conditions of being a micro-enterprise provided for in art. 47 para. (1) from the CF, he can no longer switch from IP to micro-enterprise income tax, since he opted to switch to micro-enterprise income tax after 01.01.2023, namely he opted to pay micro-enterprise income tax starting from 2025.

(2) Exit from I.V.M.:

2.1) exit - by option:

2.1.1) exit by option - at the beginning of the year:

It is possible to CHOOSE to exit the micro-enterprise income tax in the IP, **ONLY** starting with the next fiscal year, there being no possibility of opting, during the fiscal year, to exit the micro-enterprise income tax for the payment of the profit tax, according to art. 48 para. (2 index 1) from the Fiscal Code.

Subsequent changes to the data in the tax registration declaration must be brought to the attention of the central tax body, within 15 days from the date of their production, by completing and submitting the statement of mentions (/ Form 700 / Form 010), according to art. 88 para. (1) from the CPF.

2.1.2) Exit by option - during the year:

There is NO option, during the fiscal year, to opt out of the micro-enterprise income tax for the payment of the profit tax, according to art. 48 para. (2 index 1) from the Fiscal Code.

2.2) Exit - mandatory:

2.2.1) compulsory exit - at the beginning of the year:

if, at the end of the year, all the micro-enterprise fiscal conditions regulated in art. 47 para. (1) of the Fiscal Code (ATTENTION: We specify that the income ceiling up to which the micro-enterprise income tax can remain payer, on 31.12.2022, is 1,000,000 euros), starting with the following year, it is mandatory to leave the micro-enterprise income tax and become IP payer.

If, starting with 01.01.20023, you left the micro-enterprise income tax by becoming an IP payer, you can no longer return to the micro-enterprise income tax, according to art. 48 para. (2) of the Fiscal Code.

2.2.2) compulsory exit - during the year:

in the course of a year, it is obligatory to leave the micro-enterprise income tax and switch, during the year, to the payment of IP in 5 situations:

(S.1) If during a fiscal year the micro-enterprise achieves revenues greater than 500,000 euros (ATTENTION: We specify that starting from 01.01.2023, the income ceiling up to which it can remain paying micro-enterprise income tax is 500,000 euros), in which case it owes tax on profit starting from the quarter in which this limit was exceeded, without the possibility of opting for the following period to apply the micro-enterprise income tax taxation system, according to art. 52 para. (1) of the Fiscal Code.

(S.2) If, during a fiscal year, the share of the revenues achieved by the micro-enterprise from consulting and/or management in the total revenues is over 20% inclusive (with the exception of fiscal consulting), in which case it owes profit tax starting from the quarter in which this limit was exceeded , without the possibility of OPTING for the next period to apply the micro-enterprise income tax taxation system, according to art. 52 para. (1) of the Fiscal Code.

(S.3) If during a fiscal year, the micro-enterprise no longer meets the condition provided for in art. 47 para. (1) lit. g), that is, it does not have at least 1 employee, with the exception of two situations: (S.1) the situation provided for in art. 48 para. (3) (namely when a newly established company hires within 30 days inclusive of the date of registration) or (S.2) the situation provided for in art. 52 para. (3) (namely when the micro-enterprise with a single employee, whose employment relationship ends, the condition provided for in art. 47 paragraph (1) letter g) is considered fulfilled if, within 30 days from the termination of the employment relationship of work, a new employee is hired with an individual employment contract for an indefinite period or for a fixed period for a period of at least 12 months).

(S.4) If during a fiscal year, they begin to carry out activities among those provided by art. 47 para. (3) lit. f)-i) (activities in the banking field; in the fields of insurance and reinsurance, of the capital market, including that which carries out intermediation activities in these fields; in the field of gambling; activities of exploration, development, exploitation of oil deposits and natural gas) owes profit tax starting from the quarter in which the respective activities began, as provided for in art. 52 para. (4) of the Fiscal Code.

(S.5) If, during a fiscal year, any of the associates/shareholders (natural or legal person) of a micro-enterprise holds more than 25% of the value/number of participation titles or voting rights in more than 3 micro-enterprises, the associates/shareholders must establish the micro-enterprise/micro-enterprises that are not covered by the micro-enterprise income tax system and that are to become profit tax payers (PT).

1.3 Relevant Practice

As well as the relevant jurisprudence, we mention below some of the decisions on the resolution of appeals issued by ANAF through the General Directorate for the Resolution of Appeals.

A common denominator of the nature of the decisions to settle appeals is, for the most part (of those analyzed, over 95%), their rejection.

Conform art. 1 alin.1) to Law no. 554/2004 of December 2, 2004 - Law on administrative litigation, "Any person who considers himself injured in his right or in a legitimate interest, by a public authority, by an administrative act or by the non-resolution of a request within the legal term, may address the competent administrative court , for the annulment of the act, the recognition of the claimed right or legitimate interest and the reparation of the damage caused to him. The legitimate interest can be both private and public".

Regarding the settlement of actions by the competent courts, in the matter of profit tax, from a statistical point of view, there is an evolution in favor of taxpayers in the sense that the percentage of partial or total admission is about 40-45%.

Among the tax cases regarding the profit tax from the national courts, we exemplify the following:

- Bucharest Court, Civil Sentence No. 695/2009 – profit tax - Deductibility of expenses with the disposal of fixed assets;
- Alba Iulia Court of Appeal, civil sentence no. 33117.02.2017, Administrative and Fiscal Litigation Section, tax obligations;
- Alba Iulia Court of Appeal, civil sentence no. 90/26.08.2020, Administrative and Fiscal Litigation Section, profit tax and others;
- I.C.C.J., Administrative and Fiscal Litigation Section, Decision 4111 of November 22, 2006, Non-residents;
- I.C.C.J., Administrative and Fiscal Litigation Section, Decision no. 1424/2014, Refusal to grant a subsidy;
- I.C.C.J., Administrative and Fiscal Litigation Section, (A) Decision 685/2013, Taxation of the surplus from the revaluation of tangible assets;
- I.C.C.J., Administrative and Fiscal Litigation Section, (A) Decision 7695/2013, Activities of the nature of bars, night clubs, discotheques, casinos and sports betting - minimum profit tax;
- I.C.C.J., Administrative and Fiscal Litigation Section, (R) Decision 2312/2014, Fiscal charges related to the proforma invoice;
- I.C.C.J., Administrative and Fiscal Litigation Section, (A) Decision 974/2014, Lack of proof of service provision;
- I.C.C.J., Administrative and Fiscal Litigation Section, (R) Decision 950/2015, Conditions for deducting expenses;
- I.C.C.J., Administrative and Fiscal Litigation Section, (R) Decision 3253/2012, Expenses that did not benefit the taxpayer company but its sole partner. Non-deductible character;
- I.C.C.J., Administrative and Fiscal Litigation Section, (A) Decision 23/2017, Crime Competition/Tax Evasion and Money Laundering;
- I.C.C.J., Administrative and Fiscal Litigation Section, DECISION no. 25/2017, Tax evasion offences;
- I.C.C.J., Administrative and Fiscal Litigation Section, (A) Decision 21/2017, The registration of accounting documents through falsified tax invoices constitutes tax evasion;

At the level of European jurisdiction there are far fewer solutions than e.g. in the matter of VAT, as we do not have a harmonized legislation. However, we have identified, by way of example, the following judicial practice solutions:

- case C-458/18 - "Preliminary reference - Common tax regime applicable to parent companies and their subsidiaries in different Member States - Directive 2011/96/EU - Article 2 letter (a) points (i) and (iii) and annex I Part A letter (ab) and Part B last indent – Definitions of “companies incorporated under the laws of the United Kingdom” and “corporation tax in the United Kingdom” – Companies registered in Gibraltar and subject to corporation tax in its territory "
- case-28/17 - NN A/S - National fiscal regulation subjecting the transfer of losses recorded by a permanent establishment;

Conclusion

The fiscal regime at the national level is constantly subject to changes, creating difficulties in adapting the strategies of organization and planning of the activities of economic entities operating on the territory of Romania. The dynamism resulting from the political circumstances in a post-pandemic European market affected by armed conflicts, by high prices in the field of energy, cereals, interest rates and inflation, entail difficulties in changing behavior in accordance with the adopted norm, thus violating the principle predictability of the law.

The concept of "foreseeability" of the law was developed by the European Court of Human Rights in the wider context of analyzing compliance with the principle of legality²⁰. CtEDO ruled in the Sunday Times judgment that "a norm cannot be considered "law" unless it is formulated with sufficient precision to allow the citizen to regulate his behavior: he must be able - if necessary with adequate advice - to foresee, to a reasonable extent in the circumstances data, the consequences that a certain action can have. These consequences should not be predictable with absolute certainty: experience shows that this is unattainable. Again, while certainty is highly desirable, it may impose excessive rigidity, and the law must be able to keep pace with changing circumstances.²¹.

The imperative requirement of foreseeability means that the effects of the law must be foreseeable, to the extent that they allow subjects of law to think about their conduct according to its regulations. We end the article with a question addressed to the reader: Can we really check whether the predictable and timely character of an Emergency Government Ordinance issued for the regulation of the fiscal field can comply with these requirements or the answer will be possible only after

²⁰ L. Lavrysen and p. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak, *Theory and practice of the European Convention on Human Rights*, fifth edition, Intersentia, 2018, pp. 311-314

²¹ ECtHR, Sunday Times v. the United Kingdom, judgment of April 26, 1979, application no. 6538/74, para. 49.

the passage of a reasonable period of time in which the ordinance produced effects? What happens if all the effects are predominantly negative and harmful, how will the state repair the damage created?

Bibliography

1. Monitorul Oficial no. 25 of January 31, 1991.
2. Monitorul Oficial NO. 86 of May 7, 1992.
3. Monitorul Oficial no. 246 of 31.08.1994.
4. Monitorul Oficial no. 927 of 2.12.2003.
5. Monitorul Oficial no. 172 of February 28, 2005.
6. Monitorul Oficial no. 963 of Dec. 30, 2014.
7. L. Lavrysen and P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak, *Theory and practice of the European Convention on Human Rights*, fifth edition, Intersentia, 2018, pp. 311-314.
8. ECtHR, *Sunday Times v. the United Kingdom*, judgment of April 26, 1979, application no. 6538/74, para. 49.
9. "Profit tax in the EU for 2023", 22th of January 2023, <https://finante-banci.ro/impozitul-pe-profit-in-ue-pe-2023/>.

AMENDMENT IN LABOR CONTRACT AND THE UNPREDICTABILITY THEORY

Assoc. prof. Ada HURBEAN*

Abstract

The amendment of the labor contract is a very important aspect which can intervene during the execution, especially taking into consideration the fact that duration of labour contract is unlimited, according with the law. So, The Labor Code is establishing very strictly the cases in which the contract can be amendment by the employer or, in general. In this context, we are trying to determine if the unpredictability theory, regulated by the Civil Code is applicable in this field of interest.

Keywords: labor contract, amendment, unpredictability theory, protection, employee, employer

1. General aspects regarding the amendment of the individual employment contract

Taking into account that we are in the presence of a contract, the amendment of the individual employment contract can occur only by agreement of the parties. As an exception, it can be modified by unilateral agreement of the employer only in the cases and conditions provided by the Labor Code.

As far as a rule is concerned, the legitimate interest underlying the stability of employment relationships requires that the amendment of the individual employment contract to be made under the same conditions under which it was concluded, respectively by agreement of both parties.¹ The amendment of the individual employment contract may concern several defining elements of it, namely the duration of the contract, the place of work, the type of work, working conditions, salary or working time and rest time.

Typically, this change consists of the transfer of an employee from one job to another or to another activity, of course, temporarily, or definitely. This situation is determined by socio-economic needs, better organization of work or even personal interests related to employees.

* Law and Social Sciences Faculty, "1 Decembrie 1918" University of Alba Iulia.

¹ see Decision no. 637/2007 (published in Monitorul Oficial al României, Partea I, no 577 from 22 august 2007).

According to art. 38 C. of Labor, any transaction aimed at giving up or limiting certain rights granted to employees is null and void. Such a measure must not affect the rights of employees, since these rights are protected by mandatory provisions of law. On the other hand, The unilateral amendment of the individual employment contract may be made only under the conditions and cases provided for by the Labour Code, for example in the case of delegation and secondment or in certain situations regulated by special laws.

The synthetic picture of the possibilities of unilateral modification of the individual labor contract by the employer in accordance with the provisions of the Labor Code is as follows: art. 40 para. 1 lit. F) (individual performance targets); Articles 43 to 44 (delegation); Articles 45 to 47 (posting); Article 48 (force majeure, disciplinary sanction, employee protection measure); Art. 52 para. 3 (reduction of working hours in case of temporary reduction of activity).²

The Labor Code also establishes certain rules that must be observed by the employer to legally carry out such a disposition. According to art. 17 labor code paragraph (1) "prior to concluding or amending the individual employment contract, the employer has the obligation to inform the person selected for employment or, as the case may be, the employee, about the essential clauses that he intends to include in the contract or to modify them". The modification of the contract, an operation that occurs due to the existence of a contract concluded between the parties, in execution, is materialized by an addendum to the respective individual employment contract, contract concluded in written form, condition ad validitatem, to be concluded.

Art. 17 para. (5) Labour Code provides that this addendum shall be concluded within 20 working days from the date of occurrence of the change, unless such modification is expressly provided for by law. Moreover, any bilateral or unilateral acts of the employer wishing to modify the contract must be written in writing. To be legal, the addendum must be the expression of the employee's untainted consent, it must not be concluded abusively, by threatening or defrauding the interests of that employee, or by ignoring his agreement.³

It should be noted that in cases where the change occurs, expressly, by operation of law, according to art. 17 para. (5), final sentence, conclusion of the addendum is no longer necessary. In this respect, the

² See, Ștefănescu I. T., *Tratat teoretic și practic de drept al muncii*, ed. a 2-a, Editura Universul Juridic, București, 2012, p. 359.

³ See, A. Țiclea, *Tratat de dreptul muncii*, 6th edition, Editura Universul Juridic, București, 2012, p. 635.

Constitutional Court ⁴noted that this text applies both in the private and public sectors, so that the legislator can intervene in the existing employment relationships, in the private environment, being able to modify certain elements of the contract without the need for an addendum concluded between the parties, respectively between the employee and the employer. We can mention here: the duration of annual leave; normal working hours, expressed in hours/day and hours/week; the amount of the minimum gross national salary guaranteed in payment, thus the parties cannot stipulate lower monetary rights.

Regarding the intervention of the legislator in the public sector, the Constitutional Court ruled⁵ that in this sector "salaries/allowances/balances are established on the basis of the law (see also art. 162 para. (3) of the Labor Code), as an act of the original or delegated legislator; It is the law that gives the public employer a margin regarding the granting of certain specific bonuses, which does not have the power to grant salary rights only on the basis and on the basis of a discretionary manifestation of will. Its manifestation of will is conditioned and limited by law. However, when the law reduces the amount of bonuses or abolishes them, the individual employment contract must not be renegotiated by meeting the agreed will of the two contracting parties to apply the new legal provisions."

There are also situations in which the employer may unilaterally order the modification of the individual employment contract or even the termination of employment relationships, but these situations and the reasons for which such measures may be ordered, related or not to the employee's person, are rigorously and limitatively provided by labor legislation⁶. In this respect, Article 48 of the Labour Code provides that the employer, without the consent of the employee, may temporarily change the place and type of work in case of force majeure, as a disciplinary sanction or as a measure to protect the employee. However, we note that the text of law, art. 48, is an exception to the principle of inadmissibility of unilateral modification of an individual employment contract, because this principle refers to the essential elements that constitute it, namely the type of work, which is determined by the function or profession entrusted to the employee, the place of work, which means the unit and locality where the employee carries out his activity and finally by the salary he is entitled.

⁴ See Decision no. 1265/2011 (published in Monitorul Oficial of Romania, Part I, nr 885 from 14 decembrie 2011).

⁵ See, Decision no. 874/2010 (published in Monitorul Oficial of Romania, Part I, no. 433 from 28 iunie 2010); Decision no. 1658/2010 (published in Monitorul Oficial of România, Part I, nr. 44 from 18 ianuarie 2011).

⁶ See, Tribunalul București, secția a VI-a civilă, dec. nr. 461/1994.

In juridical practice it was noted that if the employer moves the employee to another headquarters of the same branch, in the same locality, neither changing the type of work nor the amount of salary, this measure does not constitute a modification of the individual employment contract. In strengthening this argument, we specify that the employer has the right to establish the organization and functioning of the unit, according to art. 40 para. (1) letter a) of the Labor Code, however, respecting the imperative condition of not changing the type of work performed by the employee or his salary. Moreover, it does not constitute a modification of the individual employment contract, the situation in which the employer changes the duties of the employee's position, according to art. 40 para. (1) (a), provided that this does not prejudice the specific nature of the function concerned.

In the situation in which the employer entrusts the employee with certain additional tasks specific to the position that do not lead to a change in the type of work, and eventually these tasks will not constitute an act of modification of the individual employment contract, unless his salary or other essential elements of the individual employment contract are modified⁷. it should be specified that when it is desired to keep the name of the position that the employee holds, but to add new duties that do not correspond to the job description and that have another specific or correspond to another position, this amendment constitutes an act of modification of the individual employment contract because an essential element of it is modified, namely the type of work.

If the employer unilaterally and illegally changes the employee's position, resulting in a decrease in salary, we are in the presence of a violation of an imperative norm. The type of work as well as the salary are essential elements found in the individual employment contract, elements that must be taken into account when concluding the contract and can only be modified by agreement of both parties and only for a limited time.⁸ At the same time, it was decided in jurisprudence⁹ as illegal unilateral modification of the individual employment contract by which the employee is transferred from a management position to an executive one, the act being hit by absolute nullity. Also, according to art. 41 para. 1 of the Labour Code, the individual employment contract may be amended only by agreement of the parties. Thus, the employer

⁷ See, Curtea de Apel Ploiești, secția litigii de muncă și asigurări sociale, dec. nr. 18/2011 (portal.just.ro).

⁸ see Curtea de Apel București, secția a VII-a civilă și pentru cauze privind conflictele de muncă și asigurări sociale, decizia nr. 1931/2009, în Revista română de dreptul muncii no 1/2010.

⁹ see Curtea de Apel Iași, secția civilă, decizia nr. 82/9.02/2006.

cannot unilaterally change the working time from 8 hours per day to 4 per day, because it would constitute an unlawful amendment to the individual employment contract.

The employer may apply to the employee certain disciplinary sanctions that are practically equal to unilateral modification of the contract. Thus, he can demote an employee from office for up to 60 days, granting him a salary corresponding to that position, or he can reduce his basic salary (and/or management allowance) by 5-10%, for no more than 1-3 months, according to art. 248 para. 1 of the Labour Code.

As a measure of protection for the employee, present in Article 48 Labor Code, his temporary transfer to another work occurs if, on the basis of medical advice, he has to perform lighter work or for retirement from disability of the third degree.

Referring to the first case, Art. 39 para. (1) of Law nr. 346/2002 republished, on insurance against accidents at work and occupational diseases specifies that "insured persons who, due to an occupational disease or an accident at work, can no longer carry out their activity at the workplace prior to the manifestation of the insured risk may temporarily transfer to another job". If they can no longer carry out their activity, the only possible legal solution remains dismissal on grounds of physical and/or mental incapacity, pursuant to art. 61 lit. c.

We can also note here, in the case of employee protection, the situation provided by OUG nr. 96/2003 updated by Law 154/2015 and published in the Official Gazette, Part I no. 445 of 22 June 2015 on maternity protection at workplaces. This law stipulates the obligation of the employer to transfer, according to art. 19 para. By way of derogation from paragraph 2, pregnant women, women who have recently given birth or women who are breastfeeding from night jobs to day jobs and workplaces other than those which are unsanitary or difficult to bear, in accordance with Article 20 (2). It should be noted that if the transfer takes place, according to Article 20 (2), the employee must have his gross monthly basic salary maintained. Also as a protective measure, the same normative act, provision in art. 9 that if an employee is in one of the situations provided for in art. 2 letters c) to e) and carries out at the workplace an activity presenting risks to his health or safety or with repercussions on pregnancy and breastfeeding, within the meaning of art. 5 para. (1), the employer is obliged to modify accordingly the working conditions and/or schedule or, if it is not possible, to assign her to another workplace without risk to her health or safety, according to the recommendation of the occupational medicine doctor or family doctor, while maintaining the salary.

Some clarifications are necessary, regarding the transition to another job, as a form of changing the individual employment contract.

This situation has been defined as a unilateral amendment of the individual labor contract under which the employee performs, within a determined period, a function or profession other than that provided in the labor contract, but which must correspond to his professional qualification. We can discuss two situations in which a temporary transition to another job can be achieved: if the employee's consent is required, there are two situations, namely, the appointment of a replacement by delegation and the replacement of a person who is temporarily absent from work and whose employer is obliged to keep his job; If the measure is necessary, we will be in the presence of force majeure, cases of disciplinary sanctions and legal measures to protect the employee.

2. Unpredictability in contracts

To begin with, we mention that the Theory of unpredictability is regulated by the Civil Code. This law starts from the principle of binding effects of a contract where unpredictability is a strict exception to this principle. The modification of the individual contract may take place according to art. 1271 of the Civil Code (... *'if performance of the contract has become excessively onerous because of an exceptional change in circumstances which would make it manifestly unfair to oblige the debtor to perform the obligation'*). Under these circumstances, the court may modify the individual employment contract by adjusting, fairly, certain elements (losses or benefits) resulting from changing circumstances, in order to create a balance between rights and obligations of the parts, accordingly with their initial will.

There must be a major and obvious imbalance between the services which the parties have to perform, that is, that this imbalance must be so great as to put the debtor of the obligation in an extremely serious, disadvantageous situation, if he were to perform his service. The law speaks, as can be seen, of an obligation that has become excessively onerous, this being the only hypothesis in which a party can invoke the theory of hardship or unpredictability. The second element is hardship itself, i.e. the imbalance between benefits occurring in a totally unforeseen way, neither party knowing what will happen in the (by definition, distant) future with the value of the benefits to which the parties have committed.¹⁰

Hardship rarely manifests itself in an employment relationship. This could occur at times of exceptional changes in working conditions, resulting in an excessively onerous nature of the employee's work

¹⁰ See, Tița-Nicolescu G., Pandectele române nr. 11/2012 review, *Excepțiile de la principiul obligativității efectelor contractului prevăzute în noul Cod civil.*

compared to his original employee. One reason for which is hard, but not impossible to imagine such a scenario in labor contract, is the fact that, according with the law, there is in place the minimum salary. That means, an employee can not receive or get an amount of money as salary under the amount stipulated by law as the minimum wage. If the minimum wage is increasing by the law, the labor contract will be modified automatically.

Also, in this regard, we have to take also into consideration the following principle of salary system in Romanian law – *indexarea si compensarea*. This principle is talking about the necessity that wages are constantly correlated with the inflation rate and with the increase in prices of utilities and basic products. Therefore, if this principle were consistently respected, the danger of an unforeseeable situation, of a financial imbalance for the employee, would be almost non-existent.

Bibliography

1. Ștefănescu I. T., *Tratat teoretic și practic de drept al muncii*, ed. a 2-a, Editura Universul Juridic, București, 2012.
2. Al. Țiclea , *Tratat de dreptul muncii*, 6th edition, Editura Universul Juridic, București.
3. Tița-Nicolescu G., *Excepțiile de la principiul obligativității efectelor contractului prevăzute în noul Cod civil*, Pandectele române nr. 11/2012 review.
4. Decision no. 637/2007 (published in Monitorul Oficial al României, Partea I, no 577 from 22 august 2007).
5. Decision no. 1265/2011 (published in Monitorul Oficial of Romania, Part I, nr 885 from 14 decembrie 2011).
6. Decision no. 874/2010 (published in Monitorul Oficial of Romania, Part I, no. 433 from 28 iunie 2010); Decision no. 1658/2010 (published in Monitorul Oficial of României, Part I, nr. 44 from 18 ianuarie 2011).

THE FAMILY BOOKLET – BETWEEN NECESSITY AND LACK OF USE

OPINIONS ON THE RESPECT OF CONFIDENTIALITY IN THE CASE OF THE SETTLEMENT OF THE CLAIM FOR COMPENSATION IN THE MATTER OF COMPETITION

PhD. Manuela NIȚĂ*

Abstract

Confidential investigations that have come into the possession of the Competition Council are protected in all public documents issued by the authority. Any party who has suffered damage caused by a breach of competition law is entitled to compensation for the damage suffered. This study analyzes the limits of confidentiality in the case of the settlement of such a request, by the competent court, the protective measures and the conditions for the disclosure of the information held by the parties, third parties and the authority. Our research will also consider the impact of privacy in the special case of leniency. The entire analysis concerns, on the one hand, to what extent the competitive environment is legally protected in such cases, and on the other hand, whether the necessary framework is created for capitalizing on the right to compensation.

Keywords: *confidentiality, compensation, leniency, disclosure*

I. Introduction

Exercising the right to promote an action for compensation, allows any person who has suffered damage as a result of an anti-competitive action to be compensated in full, including the actual loss, the profit of which the injured person is deprived and the payment of the related interest¹.

This right requires a special attention by the legislator because there are a lot of cases in which serious damages are produced and they are affecting or destabilizing businesses, even affecting a branch of the economy. Also, the interest is increased because, in general, in the matter of competition, it is quite difficult to prove the violation of the

* Associate Professor, "Valahia" University of Targoviste, Faculty of Law and Administrative Sciences.

¹ Point 13 of the statement of reasons of Directive 2014/104/EU shows that "compensation under this Directive should not lead to overcompensation, whether by means of punitive, multiple or other damages".

legislation and the actions, conduct of competitors evolves rapidly and we find new manifestations on the market, which are challenges for the legislator, authorities, courts in their qualification of these actions as being anti-competitive and generating damages.

Together with the Government's Emergency Ordinance no. 170/2020² regarding actions for compensation in cases of violation of the provisions of the competition legislation, as well as for the amendment and completion of the Competition Law no. 21/1996, the issue of the disclosure of evidence is also regulated both within the specific procedure for the compensation action before the court, as well as those contained in the file of an authority with powers in the field of competition.

The European Commission's Communication on the protection of confidential information by national courts in proceedings to ensure compliance with EU competition law at private level is also relevant for the application of the above provisions³.

The information held by the parties, third parties, authority concerns elements of an economic nature, related to the protection of intellectual and industrial property, information whose content must be protected. On the other hand, the right to compensation must be exercised, but often its justification is closely related to this confidential information. The legislator has an extremely delicate role: to create the legal framework to ensure a normal, healthy competition in which businesses can exploit their rights and, on the other hand, to protect entities from the unauthorized use by third parties of the information existing in the evidence of the file.

II. The limits of confidentiality and the disclosure of evidence before the courts

The court⁴ in an action for compensation can decide to disclose some evidence considered relevant, at the request of the plaintiff or the defendant, when they are held by the opposing party, by a third party or even by an authority with competences in the matter of competition. The disclosure of certain evidence and the elimination of confidentiality is

² Published in M. Of. no. 952/16 October 2020. The adoption of this emergency ordinance was under the pressure of a possible sanction that the Court of Justice of the European Union could impose (on the proposal of the European Commission) for the non-transposition of Directive 2014/104/EU and the legislative failure of GEO no. 39/2017 which was declared unconstitutional along with its approving law.

³ O. J., C 242/1/2020, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0722\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0722(01)).

⁴ According to art. 4 of GEO 170/2020, jurisdiction rests with the Bucharest Court. The decision of the tribunal can be appealed to the Bucharest Court of Appeal, against its decision an appeal can be declared to the High Court of Cassation and Justice.

done under certain conditions strictly regulated by art. 5-8 of GEO no. 170/2020, in accordance with European legislation.

2.1. General rules governing disclosure of evidence

The court vested with the competence to settle a claim for compensation as a result of the violation of competition rules, will analyze and may order the disclosure of some evidence or categories of evidence, very clearly determined and described as clearly as possible⁵. In the case of evidence held by third parties, in order to assess the necessity of disclosing the evidence, it will hear them in this sense, in the council chamber, with the summons of the parties (art. 5 para. 8 of the emergency ordinance).

It is not relevant for the court, the interest of the parties who violated the specific competition legislation, to avoid the action for compensation, invoking data protection.

Undoubtedly, the court will do everything possible to ensure compliance with the law⁶, including compliance with professional secrecy. At the same time, its decision will take into account certain limits, determined by the principle of proportionality, and when one of the parties requests this, it will take into account the interests of the parties and third parties involved, looking in particular at the following aspects:

- if there are sufficient clues and evidence submitted to justify the request for the disclosure of evidence;
- if there is a proportionality between the size of the disclosure and its cost, between the relevant evidence and adjacent information, including the extent to which third parties perform;
- if it concerns confidential information, which particularly affected third parties and if it can be protected.

Regarding this last aspect, in order to protect confidential information, the court can order a series of measures that it considers to be efficient and effective, on a case-by-case basis, the legislator identifying some of them:

a) regarding the number of people who can have access to information, the hearings to be held in the absence of the public and the limitation of the number of people who can come into contact with these evidences: legal representatives, lawyers, experts;

⁵ Regarding the administration of evidence in the civil process, see S. Ionescu, *Civil procedural law. General part*, Pro Universitaria Publishing House, Bucharest, 2021, pp. 175 et seq.

⁶ See in this sense, I. Lazăr, *European Union Law in the field of competition*, Universul Juridic Publishing House, Bucharest, 2016, pp. 216 et seq.

b) regarding the documents drawn up, deleting sensitive fragments and drawing up expert reports so that confidential information is respected.

2.2. Rules regarding the disclosure of evidence in the file of a competition authority

In the situation where the court comes to the conclusion or it is brought to its attention that part of the evidence is in the possession of a competition authority, and a file has been drawn up in this regard, it will take into account the general rules regarding the disclosure of evidence and, in addition, this will take into account a number of specific provisions.

Before addressing the authority, the court must ensure that such evidence cannot be made available by the parties or third parties. It can also take possession of the evidence held by an authority, if it has issued a decision sanctioning an anti-competitive practice or adopted an administrative act, concluding its procedures, the evidence from the file being necessary for the court to rule on the case with which was invested. When the procedure is carried out and the evidence has been obtained, the court will ensure the protection of documents with a special regime concerning business secrets and confidential information.

The analysis of the proportionality of the disclosure, will in this situation have new values (art. 6 paragraph 7), which the court will additionally take into account, compared to the general criteria:

- if it concerns an express request for the disclosure of documents held by the competition authority, regarding the nature, object and content of the documents.
- if the party realizes the implications of the disclosure request, in terms of an action for compensation before the court.
- if by applying the special provisions regarding the evidence from an authority's file, *"the effectiveness of ensuring compliance with competition legislation at the public level is guaranteed"*.

2.3. Categories of evidence

From the content of art. 6 (para. 8-12), and art. 7, we can distinguish the following categories of evidence: *potentially admissible evidence* (art. 6 para. 8 in conjunction with para. 11), *inadmissible evidence* (art. 6 para. 9), *admissible evidence without limitation* (art. 6 para. 12), *evidence obtained exclusively through access to the file* (art. 7)⁷.

⁷ In Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law (2020/C 242/01), the evidence mentioned in art. 6 para. 5 and para. 6 of the Compensation Directive, respectively art. 6 para. 8 and para. 9 of the ordinance are entitled "documents from the black list and the gray list"

The diversity of the rules governing competition, their particularity, lead to the identification of special categories of evidence that are excluded from disclosure, justified by the authority's commitment, under the law, to ensure the confidentiality of information. In the absence of special provisions, the evidence can be disclosed if the authority has completed its procedures, adopting a decision or an administrative act, as the case may be, and we refer to information that has been made available to the Competition Council by a natural or legal person, under specific procedures, as well as information regarding transactions that were proposed but were withdrawn (potentially admissible evidence).

As mentioned above, statements of leniency and proposals to conclude a transaction, which are valid (inadmissible evidence), cannot be disclosed under any circumstances. However, according to art. 6 para. 9 of GEO 170/2020, the plaintiffs in the action for compensation, can request the court to take steps to the authority to allow it access to the evidence, to ensure the content of their compliance with the legal meaning of the declaration of leniency and the proposal to conclude the a transaction. In order to rule on this request, the court may request assistance from the competent authority. Furthermore, for clarification, the authors of the evidence may have the opportunity to be heard.

Any information (evidence) attesting to the compliance of the exceptions, which the court has in this context, cannot be disclosed to the other parties involved or to third parties. Evidence that does not meet the requirements of paragraph 9 may be disclosed following the procedure we are reviewing.

Any other evidence that does not fall into any of the above categories, held by a competition authority, may be disclosed at any time during an action for compensation (art. 6 para. 12). I named this category generic, as unlimited admissible evidence.

Of course, the competition authority can exercise an active role *ex officio*, formulating observations to the court regarding the compliance with the proportionality of the requests for disclosure of evidence submitted to it.

If a natural or legal person, without being a party, had access to the authority's file and came into possession of information regarding statements of leniency or valid proposals to conclude a transaction, they are considered inadmissible to be administered as evidence in - an action for damages. The other categories of evidence (art. 6 para. 8) that came into their possession, after the completion of the procedure within the authority can be used, even until then they have been also considered inadmissible (evidence obtained exclusively through access to the file).

It should be noted that the evidence in this category (based on access to the file), for which there are no restrictions, *"can be used in a compensation action only by the person in question or by a natural or legal person who has succeeded in rights to the person respectively, including a person who acquired the litigious rights of the respective person"* (art. 7 paragraph 3).

2.4. The meaning of the concept "confidential information"

The directive on compensation actions does not define the concept of confidential information, but the European Commission Communication 2020/C242/01 provides guidelines for understanding the concept in this context, referring to the jurisprudence of the EU courts and the practice of the European Commission⁸, showing that, in principle, there are three cumulative conditions that has to be fullfield:

1. A limited number of people had access to the confidential information⁹.

2. If they are disclosed, those who own them or third parties may suffer serious damage.

Regarding the imminence of harm, case-by-case analysis is required, depending on the nature of the information, knowing that the disclosure of information that has commercial, financial or strategic value has a high probability of causing serious harm. Also, there is information that has been very well protected over time, with great efforts, but there is also another category of information that over time acquires a notorious character, losing its confidential character. Recently acquired information, for which research has been invested or is being finalized, as well as that which concerns a business in progress or to be started, are considered confidential.

3. Confidential information that is protected is justified.

Regarding trade secrets, according to art. 2 of Directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets)¹⁰ against their unlawful acquisition, use and disclosure,

⁸ European Commission, Directorate-General for Competition, paragraphs 17-19, Chapter 11 of Antitrust manual of procedures – Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU, Publications Office, 2019, <https://data.europa.eu/doi/10.2763/267952>.

⁹ It is possible that over time, the information will no longer remain confidential, entering the possession of specialist groups, or it can be extracted from information made available to the public. See *Deutsche Telekom v Commission*, Case T-271/03, EU:T:2006:163, paragraphs 64 and 65.

¹⁰ E. N. Vâlcu, *Theoretical Considerations Regarding the Know-How Contract from the Perspective of the European Union Legislation and the Romanian Transposition Legislation*, article published in the volume *The 32th International RAIS Conference*

by trade secret we mean one or more pieces of information which are fulfilling the following cumulative conditions:

”- it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

- it has commercial value because it is secret;

- it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.”

There is no doubt about them that they would not fall under the category of confidential information.

III. Assessments on the confidentiality of evidence in the leniency procedure

The existence of a very large number of anti-competitive agreements, also known as cartels, has determined that at a global level there is a constant concern of the authorities, non-governmental organizations, chambers of commerce and other public and private bodies to combat this extremely harmful phenomenon for the market, affecting competitors and consumers alike.

The decision-making act of the agreement within the cartel can be expressed verbally, in writing, a change in behavior on the market, as a concerted practice, a fact that demonstrates various ways of concluding illicit agreements. The economic effects of the cartel are very strong and often long-term, and because it was difficult by the authorities to make the evidence, w one of the solutions was the adoption of the leniency policy.

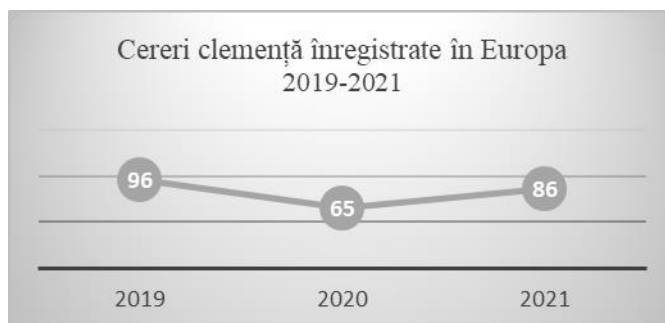
The leniency policy is the legal instrument by which the companies involved in the cartel decide to withdraw from the agreement, cooperating with the national authorities, respectively the European Commission, disclosing, with respect for confidentiality, the cartel and the way it operates, making a significant contribution to the authority's evidence¹¹.

As a facility, the first enterprise that cooperates, bringing evidence, benefits from immunity from the fine, following that in the event that other enterprises, parties to the cartel, wish to denounce their participation, they can benefit from a reduction of the fine, of course under the condition of contributing to the investigation. The facility is getting smaller and smaller depending on the number of clemency applicants.

on Social Sciences and Humanities, volume published by The Scientific Press, Cambridge, MA, pp. 103-109, DOI: 105281/zenodo.8132840.

¹¹ See in this sense, M. Niță, Gh. Gheorghiu, *Competition law, revised and added III edition*, Universul Juridic Publishing House, Bucharest, 2022, pp. 197-202.

As the leniency policy was conceived, since its inception, it had an unexpected success because on one hand, it stimulated the companies participating in the cartel to denounce it, substantially helping the authorities, and, on the other hand, it has a preventive character, discouraging possible parties who in other conditions, he would have joined a settlement. Later, the policy did not have the same success, but it remains an important means of combating illicit deals. It is possible that one of the reasons that led to the waiver of leniency was to expose the cartel companies to future damages actions.



Source: OECD Competition Trends 2023¹²

One of the key elements of the leniency policy is ensuring confidentiality. Without it, clemency would not produce effects and could not function.

The instructions regarding the conditions and criteria for applying the leniency policy, from 07.15.2019¹³, by art. 44 establish that the declarations submitted by an enterprise to the Competition Council cannot be disclosed or used for purposes other than for the application of art. 5 para. (1) of the law and/or of art. 101 para. (1) of the TFEU. Also, according to art 45, only the involved parties and their legal representatives who receive access on their behalf have access to the statements, if they undertake not to make copies, by mechanical or electronic means, of any information from the statements to which access is granted. For other people will not be allowed access to the statements.

Moreover, the leniency program has evolved along with technology, with the *eLeniency* version existing, as an online IT tool through which notifications can be made, without the need for the parties to be physically present in front of the authority (the European Commission).

¹² OECD (2023), OECD Competition Trends 2023, OECD Publishing, Paris, <https://doi.org/10.1787/bcd8f8f8-en>, p. 22, accessed on 20.11.2023.

¹³ Implemented by Order 642/2019 for the implementation of the Instructions regarding the conditions and criteria for the application of the leniency policy, published in M. Of. no. 631/30 July 2019.

The *eLeniency* system¹⁴ ensures confidentiality and protection of the parties, as is also guaranteed in the already established classic system. The data is stored on a server managed from a security point of view by the European Commission. This data can only be downloaded, copied, unzipped under a strictly controlled regime.

Nothing prevents an enterprise that is harmed by a manifestation of another party on the market, through non-compliance with competition law, from bringing an action for compensation, if it finds that it has been harmed as a result of an illegal agreement for which the parties have benefited from leniency. The direct link between the damage and the act exists, but the biggest difficulty is proving it because, as I have shown, confidential information submitted under the leniency program cannot be disclosed.

In this situation, a conflict of interest arises. On the one hand, the authorities are interested in stopping the cartels, assuming the granting of immunity and reductions of the fine, based on the leniency legislation and, on the other hand, the court and the same authorities also aim to ensure the valorization of the rights through a compensation action. The disclosure of evidence, respectively their non-disclosure affects one of the interests.

The legislator through Directive 2014/104/EU, respectively GEO no. 170/2020 ensures that, beyond respecting the confidentiality of the leniency policy, it makes possible and creates the legal framework for the utilization of the evidence held by the authority, through art. 6 para. 10 of the ordinance, the court going to verify when it has an express request "*the compliance of their content with the definitions provided in art. 2 lit. h) and q)*", letters that define the declaration of leniency and the proposal to conclude a transaction.

We appreciate that this text allows the court to give a different interpretation to the statements and the content of the documents submitted to the authority by the parties accused of causing damage, for which the authority considered that they were statements of leniency. The court is not primarily vested to verify the legality of a decision of the competition authority, but through the main application it is vested to rule on the granting of compensation for the violation of the competition rules. We can ask: *What happens when the court considers that the evidence does not conform to the definitions in the ordinance? Will they be able to be disclosed?* Continuing the reasoning, we ask ourselves a new question: *If on the basis of these statements of leniency, the authority ruled and one of the parties benefited from immunity from*

¹⁴ eLeniency (europa.eu), Antitrust: Commission upgrades eLeniency tool (europa.eu) The platform was upgraded in September 2022; sites accessed on 10.11. 2023.

sanction, is the decision of the authority correct by applying the policy of leniency?

The text of art. 6 para. 11 can provide an answer to the first two questions, since the legislator decrees that *"If only part of the required evidence falls under para. (9), the other part of the evidence is disclosed in accordance with the provisions of this article, depending on the category in which it falls."*

According to GEO 170/2020, the court when analyzing the application may request assistance from the competition authority, but is not obliged to have the same point of view. At the same time, the authority does not change its classification because the court (Bucharest Court) judged in an action for compensation that it is not a declaration of clemency.

Returning to the text of art. 6 para. 10 which is quite complex, from our point of view raises several problems. In its final part it is mentioned *"...The authors of the respective evidence may also have the opportunity to be heard..."*. As the text is drafted, we understand that, in the judgment of an action for compensation, exceptionally, when the categorization of some evidence as admissible or inadmissible by the court is questioned, the authors of the evidence can request a hearing. We believe that this text should be reformulated by the legislator, giving the court the right to request a hearing, in order to clarify.

We believe that the mentioned texts must be interpreted in the sense that there is the possibility that several documents may be submitted in leniency declarations, some of which are naturally subject to confidentiality and others that are not of the essence of the operation and do not endanger the leniency policy, for which this protection is not justified. The court, collaborating with the competition authority, considering these expectations to the parties (beneficiaries of leniency), based on the hearing if requested, may order that they be disclosed, without affecting the solution of the competition authority and the interests of the parties.

Conclusions:

Violation of competition rules can have extremely serious consequences both for the economic environment, competition and consumers. Illegal manifestations have different forms and very large sizes, a fact that determined the legislator to find several solutions that can identify and stop such anti-competitive practices. Because the interests of the parties are high and substantial profits are obtained, they tend to protect themselves, making it difficult for the authorities to work.

The leniency policy is a program that aims to help authorities complete investigations, break up cartels and sanction participants. To have the intended effect, the information provided is considered confidential and protected.

On the other hand, any person who has suffered damage as a result of the violation of the competition rules has the right to compensation and can apply to the competent court. In order to be able to judge the case, it needs a series of documents that justify the solution it will pronounce, documents that are not always in the possession of the plaintiff, being held by the defendant, third parties or even the competition authority.

Although Directive 2014/104/EU, known as the Compensation Directive, was adopted since 2014, and the member states had the obligation to transpose it by December 2016, after a difficult journey, Romania managed to adopt the transposition act only in 2020, lacking until this moment, a specific normative foundation, the injured parties.

The existence of confidential information raises problems both for the court and for the parties and the authority, a problem that is analyzed in the present study, depending on the adopted European and national legislation.

Bibliography

1. M. Niță, Gh. Gheorghiu, *Competition law, revised and added III edition*, Universul Juridic Publishing House, Bucharest, 2022.
2. S. Ionescu, *Civil procedural law. General part*, Pro Universitaria Publishing House, Bucharest, 2021.
3. I. Lazăr, *European Union Law in the field of competition*, Universul Juridic Publishing House, Bucharest, 2016.
4. E. N. Vâlcu, *Theoretical Considerations Regarding the Know-How Contract from the Perspective of the European Union Legislation and the Romanian Transposition Legislation*, article published in the volume *The 32th International RAIS Conference on Social Sciences and Humanities*, volume published by The Scientific Press, Cambridge, MA, DOI: 105281/zenodo.8132840.
5. Government's Emergency Ordinance no. 170/2020 regarding actions for compensation in cases of violation of the provisions of the competition legislation, as well as for the amendment and completion of the Competition Law no. 21/1996.
6. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, p. 1) ('Damages Directive').

7. Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law (2020/C 242/01).
8. Order 642/2019 for the implementation of the Instructions regarding the conditions and criteria for the application of the leniency policy.
10. The instructions regarding the conditions and criteria for applying the leniency policy, from 07.15.2019.
11. Antitrust manual of procedures – Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU, Publications Office, 2019.
12. OECD (2023), OECD Competition Trends 2023, OECD Publishing, Paris, <https://doi.org/10.1787/bcd8f8f8-en>

THE PEOPLE'S ADVOCATE, GUARANTEE OF RESPECTING THE PRINCIPLE OF THE BEST INTEREST OF THE CHILD, IN THE FIELD OF CRIMES AGAINST SEXUAL FREEDOM

Emil Mihai PAȘOLEA*

Abstract

This material presents the involvement of the Romanian People's Advocate in clarifying the inadvertences that occurred at the legislative level after the amendment of the provisions of Art. 218, 219, 220 of the Criminal Code, as well as the importance of the legal framing of sexual abuse directed against minors by referring to their young age. At the same time, an analysis of discernment is desired, as a condition for the validity of the consent of minors, victims of crimes against sexual freedom.

Keywords: *the best interest of the child, dignity, sexual act with a minor, rape, consent, discernment, constitutionality control, legislative proposal*

I. The succession of regulations of crimes against sexual freedom

The criminal code from 1968¹ initially criminalized the sexual intercourse with a minor under the marginal name of sexual intercourse with a minor, stipulating in the content of Art. 198 that sexual intercourse with a female person who has not reached the age of 14 or between the ages of 14 and 18 if it was committed by a guardian or by a supervisor, caretaker, attending physician, teacher or educator using his capacity, is punishable by imprisonment from 1 to 5 years.

The act was more serious and was punishable by imprisonment from 3 to 10 years in the situation where the minor was in the care, protection, education, guarding or treatment of the perpetrator, or if the victim suffered serious bodily injury or health damage. If the deed resulted in the death of the victim, the penalty was imprisonment from 7 to 15 years.

* Deputy of the People's Advocate.

¹ Law no. 15/1968 regarding The Criminal Code of Romania - published in Official Gazette no. 79-79 bis of January 21, 1968 and republished in Official Gazette no. 55 of April 23, 1973 and no. 65 of April 16, 1997. Law no. 15/1968 regarding The criminal code was repealed by art. 250 of Law no. 187/2012 for the application of Law no. 286/2009 regarding Penal Code, published in Official Gazette no. 757 of November 12, 2012.

By Law no. 197/2000 for the amendment and completion of some provisions of the Criminal Code², the Romanian criminal legislator corrected the text of Art.198, which unjustifiably excluded the male minor from the criminal protection granted to his sexual freedom and inviolability.

Thus, the Criminal Code joined the European criminal codes which do not distinguish from a sexual point of view in the case of the protection granted to minors, be they girls or boys³.

Later, by the Government's Emergency Ordinance no. 143/2002 for the amendment and completion of some provisions of the Criminal Code and some special laws, in order to protect minors against sexual abuse,⁴ the legislator redefined the normative content of the crime, as the sexual act, of any nature, with a person of a different sex or the same sex, who has not reached the age of 15, introducing new aggravated modalities of committing the crime, increasing the punishment limits.

By Law no. 286/2009 regarding the Criminal Code in force on the date of adoption, Art. 220 regulated sexual intercourse with a minor, namely *sexual intercourse, oral or anal intercourse, as well as any acts of vaginal or anal penetration committed with a minor between 13 and 15 years of age*, the legislator redefining sexual intercourse with a minor according to the new definition of rape (art. 218⁵).

It should be noted that in its initial form, the new Criminal Code waived the aggravation of the crime when the sexual act was determined by offering or giving of money or other benefits to the victim by the perpetrator, directly or indirectly, or caused damage to the minor's physical integrity, such as and when the deed resulted in the death or suicide of the victim.

As it was also seen in the specialized literature⁶, the socially dangerous nature of this act results both from the fact that the sexual intercourse, the sexual act or the act of vaginal or anal penetration takes place with a minor at a young age, at which the practice of sexual acts can have bad consequences for their physical and mental development,

² Published in the Official Gazette no. 568 of November 15, 2000.

³ For a detailed analysis, see I. Vasîu, Criminal law. special part, Editura Argonaut, Cluj-Napoca, 2001, pp. 166 and next.

⁴ Published in Official Gazette no. 804 of November 5, 2002.

⁵ Para. (1) of Art. 218 NCP has the following content: " Sexual intercourse, oral or anal intercourse with a person, performed through constraint, putting in the inability to defend oneself or to express the will or taking advantage of this state, is punished with imprisonment from 3 to 10 years and the ban of exercising some rights.

⁶ D.I. Lămăşanu, Comments (on Art. 220), in G. Antoniu (coord .), C. Duvac, D.I. Lămăşanu, I. Pascu, C. Sima, T. Toader, I. Vasîu, Explanations preliminaries of the new Criminal Code. Vol. III (art. 188-256), Ed. Universul Juridic, Bucharest, 2013, p. 216.

as well as due to the impact it brings to social relations regarding the conduct of sexual life, because the perpetrator takes advantage of the lack of experience of the minor, who is easier to convince than an adult, and achieves with him a intercourse, a sexual act or an act of vaginal or anal penetration.

It should also be mentioned that the criminalization of the act of sexual intercourse with a minor is imposed by the ratification by Romania of the Convention of the Council of Europe for the protection of children against sexual exploitation and sexual abuse, signed on October 25, 2007, in Lanzarote⁷.

In accordance with the provisions of Art. 18 para. (1) of the Convention, each party shall take the necessary measures, whether legislative or otherwise, to ensure the criminalization of the following acts committed with intent: sexual activities with a child who, according to the provisions in force of national law, is under the legal age for sexual life, sexual activities with a child if coercion, force or threats are used or a position recognized as trust, authority or influence over the child is abused, including within the family, or a situation of particular vulnerability of the child is abused, especially due to a mental or physical disability or due to a dependency situation.

By Law no. 217/2020 for the amendment and completion of Law no. 286/2009 regarding the Criminal Code, as well as for the amendment of Art. 223 para. (2) from Law no. 135/2010, regarding the Code of Criminal Procedure, published in the Official Gazette of Romania Part I no. 1012 of October 30, 2020, the legislator made changes regarding crimes related to sexual life, also reconsidering its position on the age of the victim as well as the need to sanction the attempt.

In essence, the changes brought by the new Penal Code regarding crimes on sexual life, including in reference to the situation of the minor victim, aimed at redefining the act of committing the crime, namely: sexual intercourse, oral or anal sex, as well as any other acts of vaginal or anal penetration, these being limitedly enumerated in the current regulation and differentiated from a sanctioning point of view between minors who have not reached the age of 14 and minors between 14 and 16 years of age (amended by Law no. 217/2020).

Unlike the crimes of rape (Art. 218 Criminal Code) and sexual assault (Art. 219 Criminal Code), which are committed without the

⁷ Romania has ratified the Lanzarote Convention by Law no. 252/2010 regarding ratification Council Europe Convention for protection children against sexual exploitation and sexual abuse, adopted in Lanzarote on 25 October 2007 and signed by Romania in Lanzarote on October 25, 2007, published in Official Gazette no. 885 of December 29, 2010.

consent of the victim (by coercion, making it impossible to defend themselves or express their will or taking advantage of their state), the sexual act with a minor was regulated as the act committed with the consent of the minor, consent considered by the legislator to be flawed due to the young age of the victim.

Regarding rape, Art. 218 para. (1) of the Criminal Code regulates this crime in its standard version, as *sexual intercourse, oral or anal sexual intercourse with a person, committed **by coercion, making it impossible to defend oneself or to express one's will or taking advantage of one's state***, the penalty being imprisonment from 5 to 10 years and the prohibition of exercising certain rights. According to paragraph (2), with the same penalty are sanctioned *any other acts of vaginal or anal penetration committed under the conditions of para. (1)*.

According to paragraph (3), *in the aggravated form, rape is committed in the following circumstances: a) when the victim is in the care, protection, education, guard or treatment of the perpetrator; b) the act was committed by a family member or by a person who lives with the victim; c) **when the victim is a minor** ; d) the act was committed for the purpose of producing pornographic materials; e) the act resulted in bodily injury or endangered the life of the victim in any other way; f) the deed was committed by two or more people together.*

Art. (3¹) establishes that *the punishment is imprisonment from 7 to 15 years and the prohibition of the exercise of certain rights when the facts provided for in para. (1) and (2) were committed against a minor in the circumstances provided for in para. (3) lit. a), b) and d)-f) or by a person who has previously committed a crime against freedom and sexual integrity against a minor, a crime of child pornography or pandering on a minor.*

According to paragraph (4), *if the deed resulted in the death of the victim, the penalty is imprisonment from 9 to 18 years and the prohibition of the exercise of certain rights.*

The current criminal code regulates separately in **Art. 220 sexual intercourse with a minor**, as sexual intercourse, oral or anal intercourse, as well as any other acts of vaginal or anal penetration committed **with a minor aged between 14 and 16**; in this form, the act is punishable by imprisonment from 1 to 5 years. If the intended act is committed **on a minor who has not reached the age of 14**, the penalty is imprisonment from 2 to 9 years and the prohibition of the exercise of certain rights.

Para. (3) and para. (4) of Art. 220 provide for the aggravating circumstances that occur when the act provided for in para. (1) it is committed by an adult with a minor who, as the case may be, is a family

member of the minor; the minor is in the care, protection, education, guard or treatment of the perpetrator, or he has abused his recognized position of trust or authority over the minor or his obviously vulnerable situation, due to a mental or physical disability, an addiction situation, a condition of physical or mental incapacity or another cause; the act endangered the minor's life; was committed for the purpose of producing pornographic material.

We also note that the act provided for in para. (1), committed against a minor aged between 14 and 16 or on a minor who has not reached the age of 14, is more serious when the perpetrator has reached the age of 18.

According to Art. 220 para. (6), the facts provided for in para. (1) and (2), as well as in para. (4) lit. e) are not sanctioned if the age difference does not exceed 3 years.

By Law no. 217/2023 for the amendment and completion of Law no. 286/2009 regarding the Criminal Code, of Law no. 135/2010 regarding the Criminal Procedure Code, as well as Law no. 504/2002 of the audiovisual, the legislator modifies several provisions of the Criminal Code in force, modifications that will enter into force on January 1, 2024.

Thus, a new article is introduced, **Art. 218¹: the rape committed on a minor**, having the following content:

*(1) Sexual intercourse, oral or anal sexual intercourse, as well as any other acts of vaginal or anal penetration committed **by an adult with a minor who has not reached the age of 16** are punishable by imprisonment from 7 to 12 years and the prohibition of the exercise of certain rights.*

*(2) The act provided for in para. (1) committed **by an adult with a minor through coercion, making it impossible to defend themselves or to express their will or taking advantage of their state** is punished with imprisonment from 8 to 15 years and the prohibition of the exercise of certain rights.*

*(3) Sexual intercourse, oral or anal sexual intercourse, as well as any other acts of vaginal or anal penetration committed **by a minor with another minor through coercion**, making it impossible to defend themselves or to express their will or taking advantage of their state are punished with imprisonment from 3 to 10 years and the prohibition of the exercise of certain rights.*

(4) If the facts provided for in para. (1)-(3) are committed in one of the following circumstances:

a) the act was committed by a family member of the minor or by a person who lives with the minor;

b) the minor is in the care, protection, education, guard or treatment of the perpetrator or he has abused his recognized position of trust or authority over the minor or his obviously vulnerable situation caused by illness, mental or physical disability, dependency situation or a state of physical or mental incapacity;

c) the act resulted in bodily injury or endangered the minor's life in any other way;

d) the act was committed for the purpose of producing pornographic material;

e) the act was committed by two or more people together;

f) the act was committed by a person who previously committed a crime against sexual freedom and integrity, a crime of child pornography or the crime of pandering, human trafficking or trafficking of minors;

g) the act was committed by using a weapon or threatening with a weapon;

h) the victim was administered, without their knowledge or against their will, alcohol or any substance that affects their judgment or control of their actions;

i) as a result of the act, the victim became pregnant;

the special maximum of the punishment is increased by 3 years.

(5) The provisions of para. (4) also apply if the acts were committed in exchange for remuneration, a material benefit or an advantage in kind or the promise of such benefits, as well as in the situation where the minor was forced to live with the perpetrator.

(6) If the deed resulted in the death of the victim, the penalty is imprisonment from 9 to 18 years and the prohibition of the exercise of certain rights.

(7) The facts provided for in para. (1) do not constitute a crime if the age difference between the perpetrator and the victim does not exceed 5 years.

(8) Attempts at the offenses provided for in para. (1)-(4) shall be punished."

After article 219 - **sexual aggression**, two new articles are introduced, Art. 219¹ and Art. 219²:

Art. 219¹ regulates **the sexual aggression committed against a minor**, paragraphs (1) and (2) establish: **(1)** acts of a sexual nature, other than those provided in art. 218¹, committed against a minor who has not reached the age of 16, are punishable by imprisonment from 3 to 10 years and the prohibition of the exercise of certain rights. **(2)** The act provided for in para. (1) committed between minors by coercion, making it impossible to defend themselves or to express their

will or taking advantage of their state is punishable by imprisonment from 2 to 7 years.

We find that also in the case of this crime, para. (5) provides that *the facts provided for in para. (1) do not constitute crimes **if the age difference between the perpetrator and the victim does not exceed 5 years.***

Art. 219² sanctions **determining or facilitating the intercourse or of acts of a sexual nature between minors**, as follows: *the act of a minor who determines an intercourse, an oral or anal sexual act, as well as any other acts of vaginal or anal penetration between minors who haven't reached the age of 16, as well as the determination of the minor to be subjected or carry out such an act is sanctioned with the penalty provided for in Art. 218 ¹ para. (1)-(3), as the case may be, reduced by one third.*

By Law no. 217/2023, the provisions criminalizing **sexual intercourse with a minor were repealed.**

Unfortunately, although an increased protection of minors, possible victims of sexual abuse, was desired through the recent amendments to the Criminal Code, the legislator is moving away from this goal.

II. The proceedings of the People's Advocate regarding the protection of minors against sexual abuse

In order to fulfill its constitutional role as guarantor of citizens' rights and freedoms, the People's Advocate acts independently and transparently against maladministration and violations of fundamental human rights and freedoms.

"The People's Advocate's function is to defend citizens' rights and freedoms, being an institutionalized constitutional guarantee of them, based on which it acts both ex officio and at the request of interested persons" ⁸.

The People's Advocate (Ombudsman) in Romania has always positioned itself as one of the most active actors in identifying systemic dysfunctions and correcting them, through the specific methods provided by Law 35/1997 on the organization and operation of the People's Advocate institution, republished.

A. Steps regarding the legal classification of sexual abuse against minors, from the perspective of consent, in order to respect the principle of the best interests of the child.

⁸ Ioan Muraru and Mihai Constantinescu, *Constitutional Studies*, Vol. I, Editura Actami, 1995, Bucharest, p. 49.

The People's Advocate **proceeded ex officio in 2020**, regarding a possible violation of Art. 49 of the Constitution regarding the protection of children and young people, starting from the presentation in the press of several situations in which the victims of crimes against sexual freedom were minors between the ages of 10 and 15, and the courts changed the classification of the facts from "rape", in "sexual intercourse with a minor", motivated by the lack of "direct evidence", i.e. traces of physical violence. In these cases, the courts considered that the victims consented to the sexual intercourse.

The steps taken by the People's Advocate started from the premise that the existence of consent cannot be assumed in the case of minors, which would allow milder sanctioning treatment (sexual act with a minor) instead of being classified as rape with the consequence of a more severe sanctioning treatment.

Discernment is an **essential element in the legal framing of facts** and essentially represents the capacity to judge and appreciate things at their fair value, the mental capacity of a person to realize the character and consequences of the act they commit and to and consciously manifests their will, in relation to that deed. Therefore, discernment presupposes thinking (cognitive functions, affective functions, which motivate specific human behavior) and will (volitional functions).

Art. 113 of the Criminal Code provides for the limits of criminal liability, as follows: minors who have not reached the age of 14 are not criminally liable; the minor who is between 14 and 16 years old is criminally liable only if it is proven that they have committed the act with discernment; the minor who has reached the age of 16 is criminally responsible according to the law.

Analyzing how the age of minority has evolved in criminal legislation, we find that in the Criminal Code of 1968, the age of sexual consent was 14 (Art. 198).

By Law no. 197/2000, this is increased to 15 years and is maintained in the new Criminal Code entered into force in 2014 (Art. 220).

In Law no. 217/2020, the age of sexual consent is increased to 16.

In the Statement of Reasons accompanying Law no. 217/2023 it is noted that in Romania the age of sexual consent is 14 years. But applying the cause of non-punishment regulated by Art. 218¹ para. (7) leads to presuming the sexual consent of a child who is a little over 13 years old.

In its jurisprudence, by Decision no. 683/2014, the Constitutional Court ruled that *the incrimination/decriminalization of certain acts or the reconfiguration of the constitutive elements of a crime belong to the margin of appreciation of the legislator, a margin that is not absolute,*

being limited by the constitutional principles, values and requirements. By regulating the criminal protection regarding only the facts that produce certain consequences, the legislator must place itself within this margin. The incidence of criminal liability is conditioned by a certain gravity of the deed or a certain level of damage to the value protected by the criminal law.

Thus, the lack of discernment is directly determined by the age of the minor, and assessing the existence of discernment differently for the "perpetrator" and "victim" goes against the principle of the child's best interests.

Consequently, the People's Advocate assessed that a possible consent of a minor at such a young age cannot be considered valid, as they don't have the necessary degree of maturity nor the legal age to decide on having intercourse.

Understanding the fact that the legal regulation of facts that affect the sexual freedom of minors presents inadvertences that generate vulnerabilities in terms of respecting the principle of the best interest of the minor, and the criminal investigation bodies and sometimes the courts find themselves in situations where they cannot guarantee compliance with this essential principle for the rule of law, the Romanian People's Advocate, Ms. Renate Weber, following the ex officio notification, took steps towards the following institutions :

- ***The Prosecutor's Office attached to the High Court of Cassation and Justice*** (PÎCCJ) to communicate a point of view regarding the advisability of introducing into the Penal Code some provisions regarding the lack of discernment of minors who are victims of crimes, similar to those provided for minors who commit criminal acts;

- ***The National Institute of Magistracy*** (INM), with the request that, in the training of magistrates, greater attention be paid to the issue of sexual abuse of minors;

- ***Superior Council of the Magistracy*** (CSM), to communicate the result of the checks carried out.

Following the steps taken, **the Prosecutor's Office attached to the High Court of Cassation and Justice** sent the following:

- a) *regarding the advisability of amending the Criminal Code in the proposed form:*

From the corroborated analysis of Art. 1, Art. 27 and Art. 113 of the Criminal Code⁹ results that the minority is a cause of non-liability whose

⁹ Art. 1: Legality of incrimination

(1) The law criminally provides the facts constituting crimes.

presence depends on the meeting of elements of the crime which attract criminal liability and, consequently, the fulfillment of the conditions for the criminal liability of the minor who committed an act incriminated by the Criminal Code.

Regarding the presumptions established regarding the lack or presence of discernment of the minor who commits a criminal act, the PÎCCJ's opinion is that it cannot be extended to the minor victim of the crime, since, on the one hand, assuming that the victim under 14 years of age does not have discernment would implicitly attract the guilt of the perpetrator for a more serious crime without this being able to be proven, and on the other hand, the law establishes anyway, in the case of certain crimes, a special protection for the minor victims of the crime.

Thus, within the framework of crimes against sexual freedom and integrity, the legislator granted additional protection to the minor victims of the crime, either by providing for aggravating variants of the crime (rape and sexual assault) or by incriminations aimed exclusively at such victims (sexual intercourse with a minor, sexual corruption of minors or recruitment of minors for sexual purposes).

In addition, the PÎCCJ shows that, considering the age and implicitly the capacity to express a valid consent, through the criminalization provided by Art. 220 Criminal Code (Sexual act with a minor) the legislator instituted a special protection of minors, establishing the age limit -15 years at which it can be accepted that a minor can express a valid consent to have a sexual act. In addition, and under the conditions of the existence of such consent, the consequences of criminal liability are not removed, the facts being only sanctioned in milder limits.

Also, the PÎCCJ mentions that the expression of a valid consent is equivalent to the existence of the discernment of the person who expressed it and, implicitly, leads to the conclusion that there is no need for a **special provision requiring the establishment of the discernment of the minor victim who consented to have a sexual act**, because this requirement emerges through interpretation,

(2) No one can be sanctioned for an act that was not foreseen by the law criminal on the date it was committed.

Art. 27: Minority of the perpetrator

The deed provided by the criminal law committed by a minor, who at the time of its commission did not meet the legal conditions to be criminally liable, is not imputable.

Art. 113: Limits of criminal liability

(1) The minor who has not reached the age of 14 is not criminally liable.

(2) The minor who is between 14 and 16 years old is criminally liable only if it is proven that he committed the act with discernment.

(3) The minor who has reached the age of 16 is criminally liable according to the law.

from the analysis of criminal offenses that regulate crimes against sexual freedom and integrity committed against minors.

Establishing the validity of consent is based on the evidence administered in the case, under the terms of the Code of Criminal Procedure.

b) regarding the advisability of introducing into the Code of Criminal Procedure a provision obliging the determination of the discernment of minor victims of crimes, the PÎCCJ informed us of the following:

Establishing the victim's consent to the commission of a crime against them is mandatory for the judicial body, because on the victim's position depends the legal classification in a certain crime, or even the meeting of the constitutive elements of the crime, as consent can be, in the case of other crimes, a justifying cause.

The law does not require the administration of a certain evidence to prove the mental capacity of the minor victim to realize the significance of their actions and the consequences produced by them, therefore the lack of discernment of the one who consents to the commission of the act can be proved by any evidence administered in the respective case.

Thus, in the case of establishing the discernment of the minor victim, the legislator allows a standard of evidence lower than that which must be administered to establish the discernment of the minor between the ages of 14-16 who has committed a criminal act (in which case psychiatric expertise is mandatory).

If one wanted to equate the conditions for establishing the discernment of the minor victim on the one hand, and that of the minor person who committed a criminal act, on the other hand, the way would be to complete Art. 184 of the Criminal Procedure Code¹⁰,

¹⁰ Art. 184 Forensic psychiatric examination

(1) In case of offenses committed by juveniles aged between 14 and 16, in case of killing or injury of a new-born infant or of a fetus by the mother, as well as when the criminal investigation body or the court have doubts on the judgment of a suspect or defendant at the moment of commission of the offense subject to indictment, these shall order a forensic psychiatric expert examination, by establishing at the same time the term of their appearance for examination.

(2) In a forensic medical institution, an expert examination shall be conducted by a committee created under the law.

(3) A forensic psychiatric expert examination is conducted after obtaining the written consent of the person to be subjected to examination, expressed in the presence of a selected or court appointed counsel, before judicial bodies, and, in case of underage persons, in the presence of their legal guardian.

(4) If during the criminal investigation a suspect or defendant refuses to be subject to an expert examination or fails to appear for examination before the forensic psychiatric

examination committee, the criminal investigation body shall notify the prosecutor or the Judge for Rights and Liberties for the issuance of a bench warrant to bring them before the forensic psychiatric examination committee. Art. 265 par. (4) - (9) shall apply accordingly.

(5) If the forensic psychiatric expert examination committee deems that a more complex examination is necessary, which requires the medical admission of the suspect or defendant in a specialized medical institution, and they refuse such admission, the committee shall notify criminal investigation bodies or the court on the need to take an involuntary admission measure.

(6) If, during the criminal investigation, the prosecutor deems that the request of the forensic psychiatric expert examination committee is well-founded, they may request that the Judge for Rights and Liberties of the court having the competence of jurisdiction to examine the case in first instance or of the court corresponding to its level under whose territorial jurisdiction the admission venue or the premises of the prosecutors' office to which the prosecutor who prepared the request belongs are located, order such involuntary admission for a maximum of 30 days for the conducting of a psychiatric expert examination.

(7) The prosecutor's proposal regarding the ordering involuntary admission has to contain, as applicable, mentions concerning: the act in respect of which the criminal investigation is conducted, the offense's legal classification, the charges, facts and circumstances confirming doubts on the suspect's or defendant's judgment, notification of the psychiatric expert examination committee on the refusal of the suspect or defendant to get admitted, a justification of the need of such admission and its proportionality to the pursued goal. Such proposal, together with the case file, shall be submitted to the Judge for Rights and Liberties.

(8) The Judge for Rights and Liberties shall set a date and time for the settlement of the proposal to order involuntary admission, within maximum 3 days of the notification date, having the obligation to summon the suspect or defendant for the set term. The term shall be communicated to the prosecutor, as well as to the suspect's or defendant's counsel, who is granted, upon request, the right to study the case file and the proposal filed by the prosecutor.

(9) The proposal to order involuntary admission shall be ruled only in the presence of the suspect or defendant, except for situations where they are missing, avoid coming to court or when, due to their health condition or to force majeure events or a state of necessity, they are unable to come.

(10) Participation by the prosecutor and the suspect's or defendant's retained or court appointed counsel is mandatory.

(11) In case the order for involuntary admission is returned, the court resolution by the judge has to contain:

- a) the suspect's or defendant's identification data;
- b) a description of the acts for which the suspect or defendant is charged, the offense's legal classification and name;
- c) facts and circumstances generating doubts on the psychological condition of the suspect or defendant;
- d) a justification of the need for such involuntary admission for the conducting of a forensic psychiatric expert examination and its proportionality to the pursued goal;
- e) the time frame of such involuntary admission measure.

(12) After such step is taken, the suspect or defendant is informed forthwith, in a language they understand, of the reasons of such admission, and a report shall be concluded for this purpose.

(13) After ordering such admission, if the suspect or defendant is held in custody, the Judge for Rights and Liberties shall inform the management of the detention facility of the admission measure and shall order the transfer of the arrested person to a psychiatric ward of a hospital penitentiary.

(14) A court resolution by the Judge for Rights and Liberties can be challenged before the Judge for Rights and Liberties of the hierarchically superior court by the suspect, defendant or by the prosecutor within 24 hours of its return. A challenge filed against a court resolution ordering involuntary admission shall not suspend enforcement.

(15) A challenge filed by a suspect or defendant against a court resolution ordering involuntary admission is ruled on within 3 days of its registration date and does not suspend enforcement.

(16) To rule on a challenge filed by the prosecutor, the judge of the hierarchically superior court shall order summoning of the suspect or defendant. Participation of the suspect's or defendant's selected or court appointed counsel is mandatory.

(17) For the settlement of a challenge filed by a suspect or defendant, the judge of the hierarchically superior court shall communicate to them and to the prosecutor the date set for the challenge examination, and shall offer them the possibility to submit written observations by that date, except for situations where they believe that the presence of the suspect or defendant, the participation of the prosecutor and the submission of oral conclusions by these are necessary for a just settlement of the challenge.

(18) In case of admission of a challenge filed by a suspect or defendant, the judge of the hierarchically superior court shall order dismissal of the admission proposal, and the immediate discharge, if the case, of the suspect or defendant, if they are not held in custody or arrested, even in another case.

(19) The case file shall be returned to the prosecutor within 24 hours after the challenge was ruled on. If the court resolution of the Judge for Rights and Liberties is not appealed by a challenge, they shall return the case file to the prosecutor within 24 hours as of the expiry of the challenge filing time frame.

(20) During the trial, if a defendant refuses to submit to an expert examination or fails to appear for examination before the forensic psychiatric committee, the court, ex officio or upon request by the prosecutor, shall issue a bench warrant against them as under Art. 265.

(21) An involuntary admission may be ordered by the court during the trial upon proposal by the forensic psychiatric committee. The stipulations of par. (6) - (19) shall apply accordingly.

(22) Immediately after taking an involuntary admission order or in case of a subsequent change of the admission facility, the Judge for Rights and Liberties or, as applicable, the presiding judge of the panel having ordered the measure shall inform a member of the suspect's or defendant's family or another person appointed by them, as well as the forensic medical institution conducting the expert examination the admission location, and shall conclude a report for this purpose. The specialist institution is under an obligation to inform the judicial bodies on such change of the admission location.

(23) An order for involuntary admission is enforced by the prosecutor, through law enforcement bodies.

(24) In the event that a suspect or defendant is in detention, the Judge for Rights and Liberties or the court having ordered admission to a specialist institution for the conducting of a forensic psychiatric examination shall inform forthwith the management of the detention or arrest facility on the ordered measure.

but **the PICCJ does not consider such a legislative intervention appropriate**, for the following reasons:

- the performance of the psychiatric examination requires the expression of consent, which, in most cases, will be given by the legal representative, and not by the minor victim;
- the psychiatric examination can further traumatize the victim;
- in the case of crimes against sexual freedom and integrity, most of the victims will be under 15 years old, the age already established by the legislator for establishing a valid consent, which would call into question, from a medical point of view, the appropriateness of a complex psychiatric examination;
- the obligation to carry out psychiatric expertise in the case of minor victims would contravene the provisions of Art. 113 from the Code of Criminal Procedure ¹¹ (and of the Directive that this article

(25) An order for medical admission for the conducting of a forensic psychiatric examination may be extended only once, for a term of maximum 30 days. A forensic psychiatric committee shall notify the prosecutor or, as applicable, the court on the need to extend such admission at least 7 days prior to its expiry. Such notification has to contain a description of the performed activities, the reasons why the examination was not completed during admission, and the time frame while the extension is necessary. The stipulations of par. (6) - (24) shall apply accordingly.

(26) If, prior to the expiry of an involuntary admission term, it is found that such measure is no longer necessary, the forensic psychiatric examination committee or the admitted person shall notify immediately the body that ordered the measure, for its revocation. Such notification is ruled on an emergency basis, in chambers, with the participation of the prosecutor, after hearing the selected or court appointed counsel of the admitted person. Such court resolution returned by the Judge for Rights and Liberties or by the court is not subject to any avenue of appeal.

(27) If during the conducting of a forensic psychiatric expert report, it is found that the requirements set by Art. 247 are met, the forensic psychiatric examination committee shall notify the judicial bodies in order for them to take the safety measure of temporary medical admission.

(28) The time frame while a suspect or defendant was admitted to a specialist institution for the conducting of a psychiatric examination shall be deducted from the penalty term, under the terms of Art. 72 of the Criminal Code.

¹¹Art. 113: Protection of the aggrieved person and of the civil part

(1) When the conditions provided by the law regarding the status of a threatened or vulnerable witness or for the protection of private life or dignity are met, the criminal investigation body may order the protection measures provided for in Art. 124-130, for the injured person or the civil party, which apply accordingly.

(2) Child victims, victims who are dependent on the perpetrator of the crime, victims of terrorism, organized crime, human trafficking, violence within close relationships, sexual violence or exploitation, victims of hate crimes and victims affected by a crime due to prejudice or discrimination that could be related in particular to their personal characteristics, victims with disabilities, as well as victims who have suffered considerable damage as a result of the seriousness of the crime are presumed to be vulnerable.

transposes), minor victims being presumed by law to be vulnerable persons, for whom even the re-hearing is only done if this is necessary for the proper conduct of the criminal process.

The PÎCCJ opined that the current regulation offers sufficient possibilities and guarantees for establishing the consent of the minor victim of a crime. The establishment of a certain procedure for the administration of evidence, including the establishment of recommendations regarding the performance of a consent evaluation report by a psychologist, can be achieved through guidance, control and professional training measures, without the need for legislative intervention.

The National Institute of Magistracy communicated the following:

The entire issue presented by the People's Advocate was forwarded for consultation to the INM trainers, with a view to integrating it into the training programs in the specialized fields.

The INM took note with interest of the concern shown by the People's Advocate institution towards the issue of sexual offenses committed against minors and mentions that it pays special attention to this issue, both within the initial professional training activities addressed to judicial auditors, and within the continuous professional training for judges and prosecutors.

From the stage of initial professional training of future judges and prosecutors, the issue of sexual offenses against minors is addressed in several disciplines. The didactic activities included in the study program aim to ensure a complete training of judicial auditors, which requires not only the acquisition of legal knowledge, but also the development of non-legal skills, essential for an overall view of all the circumstances of a case.

The Superior Council of the Magistracy sent *the Report on the practice of the courts and the prosecutor's offices attached to them in the investigation and resolution of cases regarding sexual crimes*

(3) If the aggrieved person or the civil party is in any of the situations provided for in para. (2), the criminal investigation body informs them of the protective measures that can be taken, their content and the possibility to waive them. The renunciation of the aggrieved person or the civil party to take protective measures is recorded in writing and signed by them, in the presence of the legal representative, if applicable.

(4) The rehearing of the aggrieved person is done only if this is strictly necessary for the conduct of the criminal trial.

(5) At the hearing, the aggrieved person may be accompanied, at their request, by their legal representative and by another person designated by the aggrieved person, unless the judicial body decides otherwise by a reasoned decision.

(6) Whenever the judicial body cannot establish the age of the aggrieved person and there are reasons to consider that he/she is a minor, the aggrieved person will be presumed to be a minor.

with minor victims¹² and its Summary, in which both the identified vulnerabilities are mentioned, both in terms of the criminal investigation activity and the court activity, with special reference to the legal classification of the act and the way of hearing minors, in the cases regarding crimes related to sexual life with victims minor, as well as the indication of concrete measures. As such:

Directorate of Inspection for Prosecutors - Vulnerabilities found in criminal investigation activity:

- Non-correlation/non-adaptation of legislation to ECHR jurisprudence:

- the regulation of the absolute sanction also in case the aggrieved person is heard without a lawyer;

- the lack of provisions regarding the obligation to hear the victims in premises designed or adapted for this purpose/ hear the victims in the presence of a psychologist or a specialist in counseling the victims/ perform a psychological assessment of the minor aggrieved person;

- The place where the hearing and audio-video recording of the statement of the minor victim is carried out

- the lack of spaces specially arranged for the hearing and the insufficient provision of technical means for recording statements

- Ways of hearing minors

- insufficient specialization of investigative bodies;

- lack of multidisciplinary and inter-institutional teams;

- the repeated hearing of minor victims;

- hearing the victims in the absence of a lawyer, a parent, a legal representative, a psychologist;

- failure to inform the victims of the legal provision regarding the hearing by persons of the same sex; hearing victims by persons of the opposite sex;

- hearing the victims in the presence of the people who make them vulnerable;

- lack of a methodology for hearing the victims;

- Lack of legal and sexual education

- the difficulty/impossibility of administering some evidence as a result of late reports

- the perpetuation of the "tradition" regarding the marriage of children or the consensual union between them at an early age.

¹² http://www.inspectiajudiciara.ro/Raportul-privind-practica-instantelor-de-justitie-si-a-parchetelor-de-pe-langa-acestea-in-investigarea-si-solutionarea-cauzelor-privind-infractiuni-to-sexual-life-with-minor-victims_2021-07-28.pdf

Inspection Directorate for Judges

Specialization of the court panels that resolve cases with crimes against sexual freedom and integrity committed against minor victims

- as a rule, these cases are resolved by panels specialized in criminal matters, and, at certain courts, there are also panels specialized in solving cases involving minors;

- this distinct specialization, however, is not found at the level of certain courts, usually these with a small number of judges who judge in several or even all matters;

The manner of hearing the minor victim of a crime

Persons present at the hearing of the minor victim:

- the hearing of the minor victim takes place, in most cases, in the presence of a court-appointed attorney and, in very few cases, the aggrieved person has a chosen defender;

- in the trial stage, in most cases, the hearing of the aggrieved person takes place in the presence of the defendant, and only in some cases the hearing was separate (without the presence of the defendant);

- the participation of a psychologist in the hearing of the minor aggrieved person was recorded only in some cases, this measure being at the discretion of the court;

- as a rule, the minor victim's legal representative participates in the hearing;

The place where the hearing takes place:

- at the level of most courts, the necessary infrastructure and material conditions are lacking for the hearing of the minor aggrieved person in a premises designed or adapted for this purpose;

- most of the time, the hearing of minor victims takes place in the courtroom where, as a rule, the session is not public (closed session).

Publicity of the court session:

- the hearing of minors takes place, as a rule, in a non-public meeting, following the submission of this request for debate; in certain cases, the measure of judgment in non-public session was ordered only for the moment of hearing the minor;

Rehearing the aggrieved person:

- the aggrieved person is interviewed during the criminal prosecution phase, and the analyzed court decisions reveal the fact that statements are often taken successively, at different time intervals;

- during the judicial investigation, the aggrieved person is re-heard by the court, with some exceptions: non-appearance/judgment in the simplified procedure of admitting guilt/deteriorated emotional state/ if the hearing would constitute a new trauma for the victim;

- as a rule, the minor aggrieved person is not automatically reheard in court, except for justified situations.

Vulnerabilities in the hearing of minor aggrieved persons:

- lack of special premises and well-defined access paths to the courtroom;
- difficulties in creating an atmosphere conducive to communication with a minor, in a language adapted to their level of understanding;
- presentation of the aggrieved person without the legal representative/difficulties in identifying the legal representative or failure to designate a legal representative ;
- the unfriendly nature of hearing the minor through audio-video means;
- difficulties of communication with aggrieved persons caused by fear, anxiety, shame, damaged emotional state;
- repeated hearing of the aggrieved person and at different intervals of time, likely to produce revictimization;
- the victim is changing their statements as a result of the passage of time or the pressure exerted on them by the defendant or even by their own family;
- hearing the victim in the absence of the psychologist or in the presence of a person who makes them vulnerable;
- lack of a hearing procedure for the victims;

Conclusions: the current regulations should be adapted to the specific situations of children's hearing - regardless of their status in the trial, they should be prepared for the hearing and know how the procedures should be carried out, but also ensure their physical and mental comfort.

The Probation Standard in Sex Offense Cases with Minor Victims

- no specific and generally applicable probation standard is identified in the cases regarding sexual crimes with minor victims.

Criteria for assessing the validity of the consent of minor victims by reference to their age

- assessing the validity of the consent is the exclusive attribute of the judicial body, but it is absolutely necessary to establish whether or not the minor victim understood the meaning of the sexual act and all the consequences it entails;
- in the cases having as object sexual crimes with minor victims, the courts' assessment of the validity of the minor victims' consent was carried out on a case-by-case basis, in each separate file, as a rule not exclusively based on their age, but depending on the concrete data of the case.

Vulnerabilities related to the legal classification of the act:

- late arrival of the facts to the knowledge of the judicial bodies;
- difficulties in administering relevant evidence, determined by the specifics of these crimes;
- the existence of circumstantial situations that raise difficulties in the assessment of the minor victim's consent, identifying a possible moral coercion, by reference to the evidence that could not be administered, likely to produce consequences on the legal classification of the deed.

Opinion of the People's Advocate

Even after the Superior Council of the Magistracy prepared the Report on the practice of the courts and the prosecutor's offices attached to them in the investigation and resolution of cases regarding sexual crimes with minor victims, in the case file of the People's Advocate institution, were encountered situations in which, acts directed against minors under the age of 14 were classified as "sexual intercourse with a minor" and not as "rape".

Thus, taking into account the fact that during that period there was an alarming increase in cases of sexual abuse against children, the People's Advocate assessed that in the resolution of criminal cases it is necessary that the investigation bodies and the courts pay greater attention to these cases, including the legal classification of these crimes.

Consequently, in applying the provisions of Art. 15 para. (1) letter n) from Law no. 35/1997 regarding the organization and operation of the People's Advocate institution, republished¹³, in conjunction with Art. 34 of the Criminal Procedure Code¹⁴, an institutional practice has been established in the sense that, in such cases, the People's Advocate is to request the courts or prosecutors' offices to change the legal classification from the crime of sexual intercourse with a minor, to the crime of rape, for the following reasons:

¹³ The People's Advocate can file requests for summons or criminal complaints and can represent the minor before the court, when he/she was a victim of physical or mental violence from the parents, guardian or legal representative, abuse, violence and sexual exploitation, of labor exploitation, human trafficking, neglect and exploitation, as well as any form of violence against children, provided for and sanctioned by the domestic and international legislation to which Romania is a party.

¹⁴ Art. 34: Other procedural subjects.

Apart from the participants provided for in Art. 33, are procedural subjects: the witness, the expert, the interpreter, the procedural agent, the special fact-finding bodies, as well as any other persons or bodies provided by law having certain rights, obligations or attributions in criminal judicial proceedings.

Starting from the text of the Convention adopted by the General Assembly of the United Nations Organization on November 29, 1989, but also from the national legislation, **the protection and the special care given to the child is determined by their lack of physical and intellectual maturity.**

The incapacity of minors who have not reached the age of 14 is intended to protect these persons from the consequences that could result from their lack of skill in legal action. Children's limited capacity or lack of capacity to protect themselves means that all aspects of age and discernment imply stronger rights to protection, never weaker.

At the same time, as long as the Criminal Code protects minors who have committed criminal acts, establishing that minors who have not reached the age of 14 are not criminally liable, and those between 14 and 16 years of age are only liable if the discernment they had at the time of committing the act is proven, then minor victims of crimes must be protected even more. The legislator itself excludes the existence of the discernment of the minor up to 14 years old, admitting only the possibility, and not the certainty of the existence of the discernment for the minor aged between 14 and 16 years. Thus, the lack of discernment is directly determined by the age of the minor, and assessing the existence of discernment according to the quality of "perpetrator" or "victim" goes against the principle of the child's best interests.

Thus, we cannot consider that a minor who, due to his young age, cannot validly conclude a simple civil legal act and cannot be criminally liable, also due to his young age, could consent to sexual intercourse.

As a consequence, we appreciate that a possible consent of a minor at such a young age cannot be considered valid, as they do not have the necessary degree of maturity nor the legal age to decide on having sexual intercourse, nor the ability to understand the serious of a sexual act to their further physical and moral development.

The provisions of Art. 218 of the Criminal Code state that rape is a non-consensual act, an act committed by coercion, making the victim unable to defend themselves or to express their will or taking advantage of their state.

However, in the situation of young minor victims we are in the presence of coercion through psychological and emotional manipulation, which does not necessarily involve direct threats or physical violence, but puts the victim in an inability to act.

At the same time, within the circumstances of the act, there should be no differences in treatment between the types of sexual intercourse, considering the fact that regardless of the degree of abuse or the type of abuse, the physical and mental integrity of minors is deeply damaged.

In the opinion of the People's Advocate, a minor, a victim of a crime, does not have discernment below the age of 14, so he cannot be aware of the consequences of a sexual act and, as such, cannot consent to a sexual act with an adult.

Relevant jurisprudence (the acts were classified as sexual intercourse with a minor, not rape)

We mention some cases in which, despite the very young age of the victims, the courts judged that they consented or that there were no traces of coercion and thus, the convictions of the perpetrators were for the crime of sexual intercourse with a minor and not for rape:

- Târgu Bujor Court, Galati County: the victim was 11 years old, and the defendant was a relative from the mother's side.

- Ploiesti Court: the victim was 12 years old, and the perpetrator 53 years old;

- Constanța Court: changes the legal classification in the case of a homeopathic doctor sent to court for raping two girls, aged 11 and 13, in a sexual act with a minor.

- Târgu Jiu Court: the victim is a 12-year-old student, abused by a 34-year-old teacher;

- Sector 3 Court: the victim is 11 years old, and the perpetrator is a 29-year-old neighbor;

- the victim is 12 years old and is a schoolmate of the perpetrator's daughters;

- The Juvenile Court in Brașov: an educator was sent to court by DIICOT Brașov for raping six boys from a foster care center between the ages of 7 and 14, but the court decided to change the classification from rape to sexual corruption.

- Șimleu Silvaniei Court: the victim: 13 years old, and the perpetrator 38 years old; the court assessed that "*the minor had knowledge about sexual life, she understood what could happen to her, she was eager and curious to start her sexual life*".

Also, *the MGC case against Romania should be specified* ¹⁵, in which the ECHR decided that there was a violation of the positive obligations of the Romanian state provided for in Art. 3 and Art. 8 of the Convention, in the case of a girl of only 11 years old, who used to go to play with two girls of a neighboring family at their house. The girl was sexually abused by a relative of her friends, aged 52, but also by 4 of their brothers and another friend of theirs (who, however, was under 14 and did not respond criminally). The minor became pregnant and resorted to the termination of pregnancy.

¹⁵ <http://ier.gov.ro/wp-content/uploads/cedo/MGC-impotriva-Romaniei.pdf>

The Police of Deva city forwarded the file to the Prosecutor's Office attached to the Hunedoara Court for the continuation of the criminal prosecution for rape, which, however, by indictment, ordered the 52-year-old man to be prosecuted for committing the crime of sexual intercourse with a minor repeatedly, and the four brothers received administrative fines for that crime.

The Deva Court found, first, that the forensic certificate recorded that there were no traces of violence on the little girl's body, as well as that, according to the statements of the man and the other perpetrators not brought to trial by the prosecutor, the plaintiff was the one who always took the initiative in sexual acts and used to provoke them to have sex with her. Thus, from their statements, the court considered "relevant" the fact that the plaintiff was wearing revealing clothes and that she continued to play at her friends' house.

On appeal, the Hunedoara Court convicted the man for the crime of rape, but later, the Alba Court of Appeal upheld the decision of the Deva Court, considering that the minor had expressed her consent and, moreover, appreciating that the presumption of lack of discernment applies only to minors who have not reached the age of 14 who have committed a crime, or, in the case, the minor is the victim and not the perpetrator.

B. Involvement of the People's Advocate by formulating some legislative proposals

In the exercise of its constitutional and legal duties, the People's Advocate proceeded ex officio regarding the unconstitutionality of the provisions of Art. I point 9 of Law no. 217/2023 for the amendment and completion of Law no. 286/2009 regarding the Criminal Code, of Law no. 135/2010 regarding the Criminal Procedure Code, as well as Law no. 504/2002 of the audiovisual, with reference to Art. 218¹ para. (7), which establishes a cause of non-punishment of the act provided for in Art. 218¹ para. (1).

Considering that from the analysis of the aforementioned normative act, the People's Advocate found that it presents some unconstitutionality flaws, a new approach was initiated, to the Romanian Parliament, being referred to the President of the Legal, Disciplinary and Immunities Committee, regarding the following aspects:

Analyzing the criminal legislation in force and, at the same time, the legislative process regarding the changes made to the content of some crimes against sexual freedom and integrity by Law no. 217/2023, in order to be able to decipher the legislator's intention, it was noticed that, on the one hand, by Law no. 217/2023, the crime of sexual

intercourse with a minor was removed from the legislation and, on the other hand, a new crime was regulated, that of rape committed against a minor, which has two forms: **consensual sexual act / sexual intercourse between an adult and a minor who has not reached the age of 16** and sexual act / sexual intercourse committed by an adult with a minor (in this case there is no longer a threshold for the age of minors) **by coercion, making it impossible for the minor to defend themselves or to express their will or by taking advantage of their state.**

From the Explanatory Memorandum of Law no. 217/2023, it follows that the amendment of the Criminal Code by Law no. 217/2023 is determined by the need to adopt increased protection measures for minors against sexual assaults, in the context where Romania ranks first in Europe in terms of victims of human trafficking, and the number of minors who become victims of sexual abuse on the internet and social networks has increased considerably since 2020.

But, if the Explanatory Memorandum fully justifies the rationale of these essential legislative changes, however, the form adopted by the Chamber of Deputies seems to inexplicably depart from the intention stated above - an increased protection of minors - since in the final form of Art. 218¹, newly introduced, by applying the cause of non-punishment provided for in par. (7), in the case of a minor of 13 years and one month, who consents to sexual intercourse with an adult of 18 years, it shall be presumed to be a valid consent. Thus, surprisingly, the final form adopted by the legislator establishes an age difference of 5 years, necessary for the deed to constitute a crime, which leads to hypotheses that are difficult to reconcile with the reason for the adoption of Law no. 217/2023 in the first place. If the text of the law establishes that an age difference of less than 5 years (and not 3 years, as it is currently and as originally proposed in the amending bill) between the victim and the perpetrator would not lead to the conclusion of the existence of a crime, the legislator presumes in this hypothesis that a child of 13 years and one month has the capacity to express a valid consent for practicing sexual activities with an adult who is 18 years old ¹⁶.

In this context, if discernment is a condition for the validity of consent, the question arises as to how the Romanian legislator came to the conclusion that a child of 13 years and a few days can discern and

¹⁶ In the Explanatory Memorandum accompanying Law no. 217/2023, initially was kept this difference of three years, being justified by the "Romeo and Juliet" clause of French criminal law. During the debates in the committees, the age difference was increased to four years (see the Report of the legal committee of the Chamber of Deputies dated February 14, 2013) and then to five years (see Additional Report 2 of the same committee dated June 26, 2023), but without being reasoned.

express a valid sexual consent in the presence of an 18-year-old adult and, moreover, how do we reconcile this text with Art. 113 of the Criminal Code, which establishes an absolute presumption that a minor under 14 lacks discernment? This case of non-punishment seems to contradict the claims of the Explanatory Memorandum.

Another unclear hypothesis refers to the situation where the sexual act is committed by a perpetrator who is a few days away from turning 18 and a minor who will soon turn 14 and who consents to the sexual act. Until the date of entry into force of Law no. 217/2023, such an act qualifies as the crime of sexual intercourse with a minor, however, after January 1, 2024, when the new amendments will enter into force, the act will no longer be classified as a crime because Art. 218¹ para. (3) only refers to the sexual act committed by a minor with another minor through coercion, making it impossible for the victim to defend themselves or to express their will or taking advantage of their state.

The People's Advocate also emphasizes the fact that the criticized normative act also contains a situation of double regulation: Art. 218 para. (3) lit. c) criminalizes the rape committed on a minor aged 16-18, and Art. 218¹ para. (2) and (3) criminalize the rape of a minor, committed under coercion by an adult/minor. However, for the victim who is a minor aged 16-18, two legal texts are in force that provide for different punishments.

In the light of the values that want to be protected by amending the Criminal Code, as justified in the Explanatory Memorandum of Law no. 217/2023, it is appreciated that **Art. I point 9 of Law no. 217/2023, which introduces into the Criminal Code a cause of non-punishment through the provisions of Art. 218¹ para. (7), violates the constitutional provisions of Art. 1 paragraph (3) and (5)**, according to which Romania is a rule of law state, democratic and social, in which human dignity, rights and freedoms citizens, the free development of the human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and are guaranteed, and compliance with the Constitution, its supremacy and laws is mandatory.

Also, the criticized legal text **violates Art. 22 of the Constitution, regarding the right to life and physical and mental integrity, Art. 26 regarding intimate, family and private life, Art. 34, which enshrines the right to health protection and Art. 49 on the protection of children and young people, according to which children and young people enjoy a special protection regime and assistance in achieving their rights.**

The changes made **do not meet the law's predictability requirements**, the way of formulation being unclear, equivocal and contradicting those ruled by the Constitutional Court in its jurisprudence: according to the jurisprudence of the Strasbourg court, Art. 7 paragraph 1 of the Convention, which enshrines the principle of legality of incrimination and punishment (*nullum crimen, nulla poena sine lege*), the criminal law must not be interpreted and applied extensively to the disadvantage of the accused, for example, by analogy.

It follows, therefore, that the law must clearly define crimes and the applicable punishments, this requirement being met when a litigant has the opportunity to know from the text of the relevant legal norm, or if necessary with the help of its interpretation by the courts and after obtaining adequate legal assistance, what are the acts and omissions that can engage his/her criminal liability and what is the punishment he/she risks according to them.

Finally, the Romanian People's Advocate requested the legislature to initiate a **legislative proposal for the elimination of the non-punishment clause or the reduction to 3 years of the age difference that attracts the incidence of the non-punishment clause, regulated by Art. 218¹ para. (7) of the Criminal Code, as introduced by Art. I point 9 of Law no. 217/2023.**

Despite all the steps taken by the People's Advocate, Law 217 /2023 for the amendment and completion of Law no. 286/2009 regarding the Criminal Code, of Law no. 135/2010 regarding the Criminal Procedure Code, as well as Law no. 504/2002 of the audiovisual media introduced substantive changes for crimes regarding sexual freedom and integrity, as well as procedural-criminal changes aimed in particular at the rights of the victim of such crimes, without taking into account the position of the Ombudsman.

C. Involvement of the People's Advocate through constitutionality control

In accordance with the provisions of Art. 146 point (d) from the Constitution of Romania¹⁷ and of Art. 15 para. (1) point (i) from Law no. 35/1997¹⁸ regarding the organization and functioning of the People's Advocate institution, republished, the People's Advocate formulated an

¹⁷ The Constitutional Court has the following attributions: d) decides on the exceptions of unconstitutionality regarding laws and ordinances, raised before courts of law or commercial arbitration; the exception of unconstitutionality can also be raised directly by the People's Advocate.

¹⁸ The People's Advocate has the following attributions: i) can refer directly to the Constitutional Court with the exception of unconstitutionality of laws and ordinances.

exception of unconstitutionality, having as object the provisions of Art. I point 9 of Law no. 217/2023 for the amendment and completion of Law no. 286/2009 regarding the Criminal Code, of Law no. 135/2010 regarding the Criminal Procedure Code, as well as the Audiovisual Law no. 504/2002, with reference to Art. 218¹ para. (7) of the Criminal Code.

Criticizing the legislative formulation that will take effect starting from 01.01.2024, the People's Advocate opines that the positive obligations of the state are also inherent in the right to the effective respect of private life, in accordance with Art. 8; these obligations may even include the adoption of measures in the sphere of relations between persons. Although the choice of means to ensure compliance with Article 8 of the ECHR, in the field of protection against the acts of individuals, falls, in principle, within the margin of appreciation of the state, the effective prevention **of serious acts such as rape, which involve fundamental values and essential aspects of private life, requires efficient criminal law provisions. Children and other vulnerable persons, in particular, have the right to effective protection** (see C.A.S. and C.S. against Romania, no. 26692/05, point 71, March 20, 2012).

As regards children, who are particularly vulnerable, the measures applied by the state to protect them against acts of violence that fall within the scope of Art. 3 and Art. 8 of the ECHR, should be effective and include not only reasonable measures to prevent ill-treatment of which the authorities were or should have been aware, but also the effective deterrence of such serious violations of the person's integrity (see M.P. and others v. Bulgaria, no. 22457/08, item 108, November 15, 2011). **Such measures should be aimed at ensuring respect for human dignity and protecting the best interests of the child** (see *CAS and CS v. Romania*).

As regards serious acts such as rape and sexual abuse of children, which involve fundamental values and essential aspects of private life, **it is the responsibility of the Member States to ensure the existence of effective criminal law provisions** (see M.C. v. Bulgaria, cited above, § 153). This obligation also derives from international instruments such as Chapter VI - "Substantive criminal law" of the Council of Europe Convention for the Protection of Children against Sexual Exploitation and Sexual Abuse or Articles 19 and 34 of the United Nations Convention on the Rights of the Child.

Based on the above principles, the European Court previously found that **states have a positive obligation**, inherent in Art. 3 and Art. 8 of the Convention, **to adopt criminal law provisions that effectively punish rape and to apply them in practice during**

an effective investigation and prosecution. In addition, in accordance with the current rules and trends in the matter, the positive obligations of the member states, based on Art. 3 and Art. 8 of the Convention, must be seen as requiring the effective punishment and prosecution of any non-consensual sexual act, including in the absence of physical resistance on the part of the victim.

However, by regulating a non-punishment clause for the sexual act between an adult and a minor if the age difference is less than 5 years, **the state did not fulfill its positive obligation to adopt provisions that effectively punish rape and discourage such serious violations of the integrity and dignity of the person.**

Considering its general competence regarding the protection of human rights and freedoms, the People's Advocate appreciates that **the provisions of Art. 1 point 9 of Law no. 217/2023 for the amendment and completion of Law no. 286/2009 regarding the Criminal Code, of Law no. 135/2010 regarding the Criminal Procedure Code, as well as the Audiovisual Law no. 504/2002, with reference to Art. 218¹ para. (7) by which a cause of non-punishment is instituted, violate Art. 1 paragraph (3) and (5), Art. 22, Art. 26, Art. 34 and Art. 49 of the Constitution, reason for which it requested the Constitutional Court to issue a decision to admit the exception of unconstitutionality.**

Conclusions

I think the aspects captured in this material about the changes made in the criminal legislation by Law 217/2023 speak for themselves. Although an increased protection of minors, possible victims of sexual abuse, was sought through these amendments to the Criminal Code, this desired goal is nowhere near being achieved.

The formulated texts decriminalize a wide range of acts which are currently crimes, introduce overlaps, so that for the same act different crimes may be committed with different sanctions and create difficulties in establishing the scope of the acts which constitute certain crimes.

Contrary to the rules established in the matter of the criminal liability of minors in the general part of the Criminal Code, where it is stipulated that the sanctions in their case are educational measures, this law provides for imprisonment in the case of crimes committed by minors.

If we add to these the non-unitary drafting style of the normative act, the natural conclusion leads only to a validation of the position of the People's Advocate by the Constitutional Court by admitting the

exception of unconstitutionality, thus being able to avoid the chaos determined by the entry into force on 01.01.2024 of these legal texts, and of a possible application of the more favorable criminal law, if the Court's rules after its entry into force.

It becomes obvious that it is necessary to analyze crimes against sexual freedom from the perspective of the behavior of the adult author, who understood, in most cases, the consequences of his actions and accepted them or was indifferent to them, and not as much from the perspective of the discernment and the consent of the child victim, which are presumed by the legislator to be flawed anyway.

It should be emphasized that, when I wrote this paper, the Constitutional Court of Romania was already invested by the People's Advocate, with the resolution of the exception of unconstitutionality of some of the amendments proposed by Law 217/2023, and at the same time a proposal to amend and supplement Law 217/2023 was developed and has already been submitted for debate to the Romanian Parliament, which, according to the statement of reasons, aims to eliminate technical legislative errors, so that the normative act achieves its goal, namely to make the law clearer, more predictable, in order for the magistrates to apply it effectively.

Regarding the actions of the People's Advocate, it must be emphasized that the constitutional regulations and current laws enshrine a series of relations between the People's Advocate and the Constitutional Court which have the role of putting within reach of the People's Advocate the necessary tools to be able to act effectively in the field of human rights protection, the essential component of its activity.

These two public authorities with control powers in the democratic evolution of any society, in the process of consolidating the rule of law, can concretely contribute to guaranteeing the rights and liberties citizens, exercising constant control over the excess of power of the public authorities that exercise the classical functions of the state.

In the complicated relationship between persuasion and coercion in law, the conclusion of the Ombudsman institution is the plea for persuasion, to the detriment of coercion.

The final conclusion can therefore be drawn, which is that the Romanian Ombudsman really acts as a guarantor of the respect of citizens' rights and freedoms, and the humble analysis presented above underlines the tenacity and diligence with which this institution, which I am very proud to be a part of, honors its mandate, fighting for the real respect of the principle of the best interest of the minor in the sphere of crimes against sexual freedom, in the current legislative context.

Bibliography

1. The Constitution of Romania.
2. Law no. 286/2009 regarding the Criminal Code.
3. European Convention on Human Rights.
4. Council of Europe Convention for the Protection of Children from Sexual Exploitation and Sexual Abuse.
5. United Nations Convention on the Rights of the Child.
6. Law no. 15/1968 regarding the Criminal Code of Romania.
7. Law no. 197/2000 for the amendment and completion of some provisions of the Criminal Code.
8. Government Emergency Ordinance no. 143/2002 for the amendment and completion of some provisions of the Criminal Code and some special laws, in order to protect minors against sexual abuse.
9. VasIU Ioana, *Criminal law. The special part*, Editura Argonaut, Cluj-Napoca, 2001.
10. Law no. 252/2010 on the ratification of the Council of Europe Convention for the protection of children against sexual exploitation and sexual abuse, adopted in Lanzarote on October 25, 2007.
11. Law no. 217/2023 for the amendment and completion of Law no. 286/2009 regarding the Criminal Code, of Law no. 135/2010 regarding the Criminal Procedure Code, as well as Law no. 504/2002 of the audiovisual.
12. Explanation of reasons for Law no. 217/2023.
13. Law no. 504/2002 of the audiovisual.
14. Ioan Muraru and Mihai Constantinescu, *Constitutional Studies*, Vol. I, Actami Publishing House, 1995, Bucharest.

GENDER QUOTAS – A SOLUTION FOR GUARANTEEING EQUALITY BETWEEN MEN AND WOMAN REGARDING ACCES TO PUBLIC POSITIONS AND DIGNITIES

PhD. Mihaela SIMION*

Abstract

Ensuring gender equality in the field of political power is an important goal of every democratic society, of the European space and of the international community. But this goal is not easy to achieve, and politics is still considered in many countries as an area reserved par excellence for men.

In order to facilitate fair and balanced representation of women in political life, Romania aims, at least at declarative level, to introduce gender quotas in the composition of electoral lists for the election of the Romanian Parliament.

The paper aims to analyze the legislative framework in force regarding gender equality, the pros and cons of gender quotas, as well as the experience of other states in this field.

Keywords: *the right to be elected, gender equality, gender quotas, public functions*

1. Introduction. Brief History of Women's Electoral Rights in Romania

Women's electoral rights were recognized in Romania much harder and much later than in Western European states. For a long time, universal suffrage meant the right of men to be elected and to choose, women having the status of second-order citizens.

From a legal point of view, the recognition of the electoral rights of Romanian women happens only in the Constitution of 1923 and only formally and limitedly. Article 6 of that Basic Law provided that special laws, passed by a two-thirds majority, would determine the conditions under which women could exercise their political rights. However, the initiative did not cover all women, but only those married or widowed after the war.

Concretely, it was only in 1929, through the new electoral law, that women acquired the right to vote, but only in local elections.

The establishment of King Carol II's personal regime and the adoption of a new Constitution (1938) brings with it the formal

* Lecturer, Faculty of Law and Social Sciences Alba Iulia.

recognition of women's right to vote, but this time again conditionally: only women who have reached the age of 30 and are literate can vote.

The communist political regime recognized women's right to elect and be elected. In this sense, the first communist constitution, of 1948, stipulated that "all citizens, without distinction of sex (...) have the right to elect and be elected to all organs of the State." The universal character of voting was maintained in the same coordinates in the Romanian Constitutions of 1952 and 1965, but in the absence of effective political pluralism, the electoral rights of all Romanian citizens were purely formal.

The 1991 Constitution, republished in 2003, is nothing new in regulating women's electoral rights, rallying to European and international democratic standards¹.

Thus, regarding the right to be elected, the constitutional provisions were correlated with those of the Universal Declaration of Human Rights, Article 21, "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. Everyone has the right of equal access to public service in his country", „Every citizen shall have the right and the opportunity, without any of distinctions mentioned in article 2 and without unreasonable restrictions: a) to take part in the conduct of public affairs, directly or through feely chosen representatives b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors c) to have access, on general terms of equality, to public service in his country”.

2. Current Regulations on Women's Representation in Politics and Public Office

First, the Romanian Constitution, in art.16 paragraph 3, enshrines at constitutional level "equal opportunities between women and men for occupying public, civil and military positions", leaving it to the legislator to identify the most appropriate legal formulas so that the principle of equality between women and men in this field does not remain a mere declaration.²

The most important normative transpositions of this constitutional principle can be found in:

¹ Doina Bordeianu, *Evoluția constituțională a drepturilor electorale ale femeilor în România*, Sfera Politicii magazine no.149, <https://revistasferapoliticii.ro/sfera/149/arto7-bordeianu.html>

² Ioan Muraru, Elena Simina Tănăsescu, *Constituția României. Comentariu pe articole*, 2nd edition, Editura C.H.Beck, 2019, p. 141.

- Law no. 202/2002 on equal opportunities between men and women, which in Article 22 states that "In order to achieve equality of opportunities and treatment between women and men, central and local public institutions and authorities..., political parties ensure fair and balanced representation of women and men at all decision-making levels. All governmental and parliamentary committees and committees ensure fair and parity representation of women and men in their composition. Political parties have the obligation to provide in their statutes and internal regulations positive actions in favour of the under-represented sex at decision-making level, as well as to ensure the equitable representation of women and men in the proposal of candidates for local, general and European Parliament elections³".

- Law no. 334/2006 on the financing of political parties and electoral campaigns stipulates that "for political parties promoting women on electoral lists, on eligible seats, the amount allocated from the state budget shall be increased in double proportion to the number of mandates obtained in elections by women candidates" (Article 18 paragraph 2).⁴

- Law no. 115/2015 on the election of local public administration authorities, in art.7 para.1 provides that "The lists of candidates for the election of local councils and county councils must be drawn up so as to ensure the representation of both sexes, except for those containing only one candidate⁵".

At European level, European Commission President Ursula von der Leyen has proposed that by the end of 2024 a gender parity of 50% should be achieved at all levels of management of the Commission and European agencies. For its part, it called for strategies to be developed and implemented to ensure that the number of women in political decision-making positions is increased.

3. Women's Representation in Politics in Romania. Current Situation

The recognition of women's electoral rights has not necessarily led to gender equality in politics. Even despite the adoption of normative acts in this field, such as the one mentioned above, regarding the increase in funding of political parties that promote women on electoral lists, on eligible seats, political parties have not shown much interest in putting this goal into practice.

³ Official Gazette no. 326/2013.

⁴ Official Gazette no. 446 /2015.

⁵ Official Gazette no. 349/2015.

Thus, although in Romania women represent today 51.1% of the population, in the Romanian Parliament only 17% of the elected representatives are women (respectively 82 out of 466 senators and deputies), well below the European average of 32.5%. Also, in the last local elections in 2020, only 22.9% of candidates were women.⁶

The same trend can be observed in the European Parliament elections, in 2019 only 7 women won a deputy mandate out of a total number of 33 mandates, resulting in a percentage of only 21.2%, down from the previous election. Previously, following the 2014 European Parliament elections, 34.4% of Romania's representatives were women.

The underrepresentation of women in political life is visible even at the level of the Executive. The current Government of Romania has six women from 20 portfolios of ministers, while in the former Cabinet there was only one woman as minister.

So far, despite two legislative proposals, Romania has remained reluctant to apply the solution of introducing gender quotas. The latest proposal aims to amend and supplement Law no. 208/2015 on the election of the Senate and Chamber of Deputies in the sense of: "The lists of candidates for the Senate, except for those containing fewer than three candidates, must be drawn up in such a way as to respect the minimum representation quota of 33% for both women and men out of the total number of proposed candidates. The registration of candidates in the lists for the Senate and for the Chamber of Deputies is done by alternating one person of the gender with two other persons of the opposite gender, until the seats on the list are exhausted. The district electoral bureau examines compliance with the provisions and rejects the registration of all candidacies included in the lists of candidates who do not comply with the minimum representation quota".

I cannot fail to note that the wording of the legislative proposal has a deficiency. On literal application, it would prevent the submission of a perfectly parity list, which would alternately contain one man and one woman each. I think a clearer wording could have been "the list may not successively contain more than two persons of the same gender".

4. Gender Quota System – Definition. Pros and Cons

A gender quota is a tool used by countries and parties to increase women's representation in the legislature. According to European Institute for Gender Equality, gender quotas represent a positive measurement instrument aimed at accelerating the achievement of gender-balanced participation and representation by establishing a defined proportion (percentage) or number of places or seats to be filled

⁶ <https://www.cdep.ro/proiecte/2022/300/00/8/em373.pdf>

by, or allocated to, women and/or men, generally under certain rules or criteria⁷.

Quotas can be applied to correct a previous gender imbalance in different areas and at different levels, including in political assemblies, decision-making positions in public, political life and economic life (corporate boards), as well as to ensure the inclusion of women and their participation in international bodies, or as a tool to promote equal access to training opportunities or jobs.

In general, three categories of quotas are used:

- reserved seats quotas guarantee the number of female legislators holding seats in legislature by setting aside a certain percentage of seats for women. Within reserved seats policies, seats can either be allocated by direction elections or appointments.

- quotas mandated by the constitution or by electoral or gender equality law (legal gender quotas, which may entail sanctions for non-compliance);

- voluntary political party quotas, provided in the statute of political parties and applied on a voluntary basis.

Several arguments have been put forward against the introduction of the gender quota system, the most important being the following:

- quotas violate the principle of equal opportunities for all, favouring women over men;

- quotas require candidates to be chosen on the basis of gender, not qualifications, meaning that the most qualified can be excluded in order to guarantee gender balance;

Many women do not want to be elected simply because they are women.

- gender quotas can give rise to significant tensions in the organisation of political parties;

- quotas violate the principles of liberal democracy.

On the contrary, the following considerations may be used to support gender quotas:

- as citizens, women representing half of a country's population have the right to equal participation and representation in political life;

- gender quotas in favour of women do not amount to discrimination, but are only meant to compensate for the obstacles that prevent them from accessing elective public offices;

- women's experience is indispensable in political life.

Women are just as qualified as men, but women's qualifications are devalued and minimized in a male-dominated political system.

⁷ https://eige.europa.eu/publications-resources/thesaurus/terms/1304?language_content_entity=en

- quotas allow more women access to an assembly or council, thus making their ideas more easily known and limiting the timorisation felt by isolated women in a male-dominated environment;
- visible improvement of women's political representation in states where legislative measures have been adopted to ensure gender equality in this area.

5. Gender Quotas in the Legislation of Some European Countries

France was the first European country to introduce gender quotas. The law of 6 June 2000 had as its main purpose to promote equal access for women and men to electoral mandates and elective offices. This law, called "parity", obliges political parties to present an equal number of men and women in municipal, regional, parliamentary and European elections. If political parties do not comply in legislative elections, they will receive a fine, but they can still submit lists that do not comply with the parity reform. In other elections, failure to comply with the parity law entails the sanction of non-registration of the list.

Since the adoption of the "parity law", the desideratum of equal representation of women and men has progressed greatly in France⁸. Today, women represent 36% of French senators, 37% of deputies, 45% of municipal councillors and 49% of French MEPs.

Similarly, the Spanish gender equality law (organic law 3/2007 of 22 March 2007) mandates parties to incorporate in all electoral lists no fewer than 40% and no more than 60% of candidates of each sex. This proportion has to be respected within each list every five positions. This mandate is in effect a 40% women's quota. This law establishes effective sanctions since electoral authorities withdraw electoral lists that do not fulfil the requirement of the quota.

Also, the measure is designed to prevent abuse by political parties as the 40/60 proportion must be respected not only in electoral lists as a whole but also every five positions within each list. This requirement prevents parties from indulging in bad practices such as relegating the 40% of female candidates to the bottom of the list, thereby placing many of them in unwinnable positions. This is particularly important in proportional election systems, as it is the case in Spain, with closed and blocked party lists⁹.

After 2009, political parties in Spain adopted the *zipper system*, also known as vertical parity, according to which female and male candidates alternate between positions on the electoral list.

⁸ <https://www.inegalites.fr/place-femmes-polique>

⁹ <https://eige.europa.eu/gender-mainstreaming/good-practices/electoral-quotas-work>

Thus, combining the *zipper* system with the effectiveness of gender electoral quotas, Spain represents a successful model in terms of equal representation of women in Parliament: 47% of all elected MPs (350) were women (165) in the 2019 elections.

Conclusions

Without being positive discrimination, the introduction of gender quotas appears as the only viable solution to remove inequalities related to equal gender representation in public offices. The example of many states shows us that men give up some public offices in favor of women only when the law obliges them. Thus, legislating gender quotas in Romania is a necessity and an emergency at the same time, being likely to lead to changing mentalities and stereotypes related to women's participation in political life.

Bibliography

1. Ioan Muraru, Elena Simina Tănăsescu, *Constituția României. Comentariu pe articole*, 2nd edition, C.H.Beck Publishing House.
2. Doina Bordeianu, *Evoluția constituțională a drepturilor electorale ale femeilor în România*, Sfera Politicii magazine no.149, <https://revistasferapoliticii.ro/sfera/149/art07-bordeianu.html>
3. <https://www.cdep.ro/proiecte/2022/300/00/8/em373.pdf>
4. https://eige.europa.eu/publications-resources/thesaurus/terms/1304?language_content_entity=en
5. <https://www.inegalites.fr/place-femmes-polique>
6. <https://eige.europa.eu/gender-mainstreaming/good-practices/electoral-quotas-work>