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Răducan OPREA

THE VOLUNTARY PAYMENT OF THE BILL OF EXCHANGE

Abstract

The bill of exchange is extinguished normally by paying it at the maturity day, mainly by the main debtor – the accepter of the bill of exchange or the issuer of the payment order.

If the bill of exchange is not honoured at the maturity day, the possessor has several options for action.

The payment of the bill of exchange in most cases is obtained at its presentation by the possessor to the accepted drawer.

Voluntary payment may be studied in two phases, namely: the submission of the payment and the payment itself. Basically payment is obtained in most cases at presentation. It is possible that the payment not be paid by the principal debtor at the submission of the bill, but later by a debtor of recourse. Thus the study of these two distinct phases of voluntary payment, is fully justified. The submission of the payment concerns also the forced payment, which is a further argument for the separation of the two problems listed above.

A. Submission of the payment.

The submission of payment involves two issues, namely: the time of the submission of payment and the place where the submission should be made.[1]

1. The time of the submission for payment. In terms of bills of exchange, unlike the common law, bill must be presented for payment at maturity. A civil or commercial claim may be presented for payment at maturity, but nothing deters to require payment as

[1] Stanciu D. Carpenaru- Romanian Commercial Law, 7th Edition, revised and enlarged, "Juridic Universe", Bucharest, 2008, pag.591.

long as this claim was not barred. Failure to pay a claim of common law does not entail any unfavorable concequence to the creditor.

The bill of exchange due on demand, is payable to any presentation so as to show, but at the latest within one year counting from the date of issue, if this term was not extended or abbreviated by the drawer, or abbreviated by the guarantors, in a clause inserted in the bill.

The drawer can stipulate that a bill on demand not to be presented for payment only after a certain time. Eg.: The drawer will write " you will pay on demand or after 1 January 2005" assuming that the issue took place on November 1. 2004. In this case the term of one year will run from 1 January 2005.

The bill of exchange with maturity date at a certain time from the view will be payable at maturity, to be determined, depending on the date of acceptance, or if the acceptance was refused, and it was not dated, from the date of protest objection, or the protest of not dating.

Bills of exchange with maturity at a specific time on demand, will bear the clause "you will pay, three months (or 15 days etc.) from the view. Not only the bills of exchange can be provided with maturity at a specific time from the view but also the promissory note. There is no acceptance for these notes, they will be presented to the visa issuer, the date which will compute the maturity date.

Submission to acceptance or visa will also be made within one year from the issuance, this term can be extended or abbreviated as the bill on demand.

The bill of exchange with the maturity date at a time from the date of issue, will be specified in days, weeks or months (principiar in years, which in practice does not meet).

The law sets some rules for the counting of maturity date: maturity in one or more months is considered appropriate at the time of the month in which payment shall be made, if that month is the adequate time, otherwise the last day of the month (art. 39. 1) . Eg. A bill of exchange payable to a month of the issue, issued on January 30 will be due on the last day of February.

Maturity at the beginning, the middle or end of the month, then the first day, the fifteenth or last day of the month. With half of the month means 15 days. Expressions 8 days and 15 days is 8 days and 15 days effective, not one or two weeks.

The bill of exchange due on the fixed day will be payable on the day shown in the bill.[1]

For bills of exchange due to a fixed day at a time from the date of issue or at a time from the view, the presentation for payment may take place either at the maturity date or within two working days that follow it (Art. 41) . If the maturity date is on a legal holiday, payment may be required only on the working day following (Article 95). The statutory holiday means the holiday in which courts do not work. In some countries public holidays are known as "bank holidays", because there are no banking operations and can not trade.

Bills of exchange with maturities in view can not be presented for payment only until the last day of the period of one year from the issue, not in the two working days following. If the last day would be on a Sunday or holiday, the payment will be made not later than the day preceding.

Bills issued and payable in places with different calendars. Article 40 provides for the calculation of maturity date for bills having the

[1] Idem, pag. 592

place of payment in a country in which the timing is different from that of the place of issue. And here it must be a distinguish between bills of exchange due to a day fixed and maturing at a time from the date of issue.

Maturing bills of exchange to one day will be fixed by the calendar of the place of payment and the maturity at a time from the date of issue by the calendar of the place of issuance.

The terms for the submission of the bills of exchange are considered after the calendar of the places of issuance, or to a certain time from the view, or the payment or the acceptance or visa.

The above provisions of art. 40 are optional, in the sense that it applies only if the bill does not stipulate a different method of calculating the due date.

Prepay. As a rule, the creditor can require payment only at maturity, so the debtor can provide payment only at maturity. "The owner of bills - art. 44 says - is set to receive payment before maturity. The drawer who pays before maturity makes on his risk and danger.

What could these risks and dangers be? Eg.:The owner is an ill-intentioned owner, receiving bill by theft. If a debtor pays before (in advance) and at maturity it is proved that the real creditor is other that the one who received the payment, you will have to pay to the owner's legitimate bill. Another example: the debtor pays in advance the true owner, but this one is declared bankrupt before maturity.

One of the consequences of bankruptcy is the fact that the bankrupt gives up all his goods and puts them in the administration of a special administrator. The administrator may require, at maturity, the debtor to pay the amount of the bill, to the mass of bankrupt.

Refusal to accept payment at maturity. Owner can not refuse payment at maturity, or total or partial. In case of refuse, debtor may deposit the amount of deposits at the House Bank, and a receipt will deposit in court, on the creditor's risk and danger.

Place of submission for payment.[1] The bill of exchange must be presented for payment at the place and address stated in the bill. The place of payment is the geographical locality where payment must be made, not the exact address where payment is made. But the law of bills of exchange does not require, as a prerequisite, an address indicating where the bill is payable. Therefore, art. 42 establishes a preference order of addresses to which payment will be required. Thus art. 42 says: "In the absence of an address, the bill of exchange must be presented for payment:

1. at the drawer's home, or the person designated to pay the bill for this ;
2. at the acceptance by intervention's home, or the person designated to pay the bill for it,
3. at the address of the one indicated in case of need. It means the home address where a person actually lives.

Importance of presenting payment. Common law claims can even be transmitted through the transfer, generally they are not intended to circulate, and if they are submitted, the debtor must receive a notification so as the assignment to be enforceable against. Following notification, the debtor will know who is the new creditor. The bill moving through endorsement, about whose existence the drawer- or in the case of promissory notes, the issuer - must not know, like any other signatories, it may get in the hands of a person, about whose existence most borrowers are not aware. Submission of the payment is to make known to the debtor, the creditor's bill, which is to justify his entitlement to the amount of the bill through a series of uninterrupted endorsements. Another goal

[1] Idem, pag. 593

pursued by the legislature by compulsory declaring of the submission to payment, is that the regression debtors not remain too long in uncertainty. In fact the regression debtors will be threatened to require payment only if the main debtor fails to pay. To know what the main debtor will do, the creditor will have to submit bill for payment. Because the uncertainty would remain in the case of regression debtors, legislature bills requires the holder to submit payment without delay - the due date or within two working days following - and this under certain penalties.

Failure to pay shall entail the loss of rights of recourse. In this regard therefore, the presentation of the payment provided for in provisions of the art. 41 al. 1, is considered as a conservative measure of the rights of recourse. But it is mentioned again that only the rights of recourse are lost through failure to pay, not the right to direct action against bills of exchange's acceptor or the issuer of the promissory note.

In order to bring action against the main debtor, the submission to pay is not required, the bills of exchange claim may be instituted against it any time within the period of prescription, ie within three years from the due date.

Bill of exchange will be considered submitted for payment by the debtor on the day on which the debtor will receive the copy of the bills of exchange with the summons, or in case they proceed through art. 61 by investing the bill in enforceable formula on the day the debtor is given notice of payment provided for in art. 135 Civil Procedure Code.

Payment of bills.

Who should pay? We have seen that the presentation must be made first to the drawer, whether he accepted or not. If the drawer accepted, he is the main debtor of the following bills and makes the

payment. The drawer who pays, it's on his right to ask, to receive the bill with the words of redemption, written by the owner (article 43 al.1). Against a refusal to surrender bill, the drawer may refuse payment. The title bill is necessary „ad disponendum", that any rights arising from the bill may not be exercised without the possession title. Such creditor's bill may not require payment if he doe not have the title possession, to-surrender it, on request, to the drawer who pays.

The drawer will not neglect, of prudence, to request delivery of title, because otherwise he is exposed to the risk of paying again.

Obviously, the drawer will have an action for damages, or for enrichment without cause against which the owner did pay once but if it is insolvent, the drawer will bear the risk of double payment. The abusive owner will have to bear, in addition the penal consequences.

In case of a partial payment, the debtor may not claim to surrender bill, because the creditor needs the title, as long as the claim was not paid in full, to take legal action against the rest of the unearned claim. But the debtor will require to make statement on the bill and to give receipt for the amount of the paid sum (art. 43. Al. 3).

In addition to acceptor, the drawer, the endorser and the guarantee are held in solidarity to the holders, to which the holder has the right to pursued, individually or collectively, without taking into account the order in which they were bound.

I have seen, talking about the guaranty of the bill of exchange, that the obligation of the bill is solidary, which means that all the signitories of the bill have the right to pay to the holder or to any other subsequent signitories, which were found upon a legitimate bill. So at maturity date any of the regression debtors may pay,

having the right to require the surrender of bills, protest and a return paid (art. 55).

The payment concequences for the debtors are that: "That which is paid at maturity,it is free, except if it was not fraud or mistake" (art. 11 al.2). Debtor may commit fraud, while knowing that bill was stolen, agrees to pay it to the one who stole it, over the legitimate creditor, or even when he does not know this, after all appearances, the one who presents the bill for payment, he does not appear to be the legitimate holder.

The one who pays frees himself and all subsequent signers. If the one who pays is a regression debtors, he will win the right to require the payment from the main debtor and the debtors of the previous regression.

Who should be receive the payment? Payment must be done to the justified holder of a regular succession of the endorsement. The one who pays "is obliged to check the regular sequence of the endorsement, but not the authenticity of guarantors' signatures " (art. 44)[1]. So a regular succession of the endorsement must be verified only formally. It does not matter if one or more endorsement are false. Debtor also has to deal than the regular succession of endorsement to the creditor, not by what follows. Eg.: A bill is signed by A as drawer and B, C, D, E, F as guarantors. Assuming D guarantor has paid the creditor to maturity, he is entitled to demand payment from its previous signatories - ie (A, B, C - and acceptor. The one who was required payment will have to check only the succession of the endorsement until D, no matter whether the endorsements rear of D, has a regular sequence or not.

[1] When it is required to pay a bill with endorsement reached at maturity, the debtor is required to pay. Without being able to invoke any exception as to the authenticity and regularity of the endorsements of the bill, or the ability of guarantors; The only objection that can be done on the falsity of the bills and disprove fraud in obtaining them. Cas. Dec III. 1469 of 31 May 1939. Rev.Dr.Com. 1940, p. 114.

If the sequence of irregular endorsement shows a gap, the holder of the bill of exchange has no bills's rights only against the guarantors following the gap. Eg. Whether incorporating the above hypothesis, the guarantor of B is missing from the endorsement series, the holder will have rights only against C, D, B and F. Against B and A and the acceptor, he will have only civil and commercial rights, because he is in direct causal relationships, but not rights of bills of exchange.

Currency in which payment must be made. Article 45 lays down rules which must be taken to the stipulated payment in foreign currency. Today, however, foreign currency debts stipulated, be payable in the country or abroad, fall under the estimates legislation. In the condition of uncontrolled foreign exchange, the provisions of the art. 45 are applied: "When a bill is payable in a currency that has no exchange rate at the place of payment, the amount may be paid in the country currency, according to the value of its due date".

"If the debtor is in default, the holder may require that the amount to be paid in the country currency or with the value from the due date or the value after the date of payment.

"The amount of foreign currency is determined by the characteristcs of the place where the payment is made. However the drawer can stipulate that the payment will be calculated as indicated in a bill pending. "The rules shown here do not apply when drawer stipulated that payment will be made in a specified currency(actual payment clause in a foreign currency ").

"If the amount is shown in a currency with the same name but a different value, in the country of issuance and payment, therefore, presumably showing that refers to the place of payment.

Payment by intervention[1].

Payment and acceptance of intervention may be made by a designated person, shown in the bill by the drawer, guarantors, or a guarantee. The designated person must be presented the bill for payment, if the drawer does not pay. It will be asked to enter protest for non-payment against the drawer, then this bill will be paid by the designated person when needed. If this does not pay , it will train a new protest of non-payment and called versus protest. Not taking the action of protest against the designated person, leads to the loss of rights of recourse against the one who made the designation, and against its post guarantors. So for example if three guarantors sign the bill, the second shows in the bill the designated person for which the owner fails to protest the non-payment (for protest), the guarantor of the second and following its guarantor will be freed.

Payment can be offered in, spontaneously by a person who is not included in the bill of exchange, or even by a signatory of the bill, the regression debtor. The acceptor of the bill and the issuer of the promissory note can not pay by intervention, because they are main debtors and have to pay under their own commitment. The person who pays by intervention without being mentioned in the bill, he is called intervener for honour, and one for which this payment was made, is called honoured person. In terms of acceptance, I saw that the owner of bill is not required to receive an acceptance of a person not mentioned in the bill or accept a person who is already signed on as a regression debtor if the debtor was not indicated on the bill to pay, showing the reason for these devices. When it comes to payment, however, the holder is obliged to receive payment of the intervener, because in the last analysis the holder tends to collect the bill of exchange, so he has no reason to refuse payment, or who would come. Denial of payment has the effect of

[1] Idem, pag. 594

loss of rights of recourse against the one to whoch the payment was offered and against the guarantors (Article 80).

Conditions for payment by intervention.

1. Payment by intervention can take place whenever the holder of the bill is to bring action for recourse to maturity or before maturity (art. 78 al. 1). So we can offer payment by intervention when it was not accepted, or not paid.

2. Payment by intervention must be full (art. 78 al. 2) the action is explainable for only the payment in full remited the claim stops the action of regression. A partial payment would leave open the path of recourse for the amount of unpaid sum.

3. Payment by intervention must be made till the day following the day on which the protest had to be made (art.78 al. 3).

Formally, in order to be valid, the payment by intervention has the following characteristics:

1. To result from the protest. Thus in the protest of non-payment, or objection, which follows payment by intervention, this payment must be mentioned, and if the protest has been trained,the statement will be made at the end of protest (Art. 78 al. 4).

2. To make a statement about the payment by intervention in the bill, showing the person to whom to intervene. In the absence of such indication the payment is considered to have been paid by the drawer (art. 81).

The payment by intervention.[1]

1. the payment by intervention remits the debt of a bill of its holder.

2. Anyone who has paid by intervention has the right to claim the bill and protest (Art. 81 al. 2).

3. Intervener gains the autonomous rights of the bill, not only the rights deriving from the holder to which the payment was

[1] Idem, pag 595.

made. These rights can exploit against the honoured person and against its anterior holders. The guarantors who follows the honoured person are free.

As a corollary of the above rule, the law provides that if more interveners offer payment, it will be accepted the payment that frees more guarantors. Thus if the bill has several guarantors, and the payment is made for the guarantor of the frist level and guarantor of the third level, it will be accepted the payment of the one who pays for the first gurantor, such as all the other guarantors will be free (art. 82). The penalty for breaking this device is made as follows: "That the wittingly, occurs contrary to these rules, lose the right of recourse against those who would have been free (art. 82). So the law provides no penalty for the owner, it may accept payment of any intervener, even when such payment frees less guarantors. Legislature has considered the holder of the bill does not care from whom he is receiving the payment and who are being freed. Penalty is provided for the intervener. So for example if someone offers to pay for the guarantor of the three level, knowing that another, has offered to pay for the guarantor of the first level, by his payment - although to be guarantor of the three level - will free all those who had been freed by the payment made by the guarantor for the first level. Therefore the guarantor of the third level and of the second level will be free.

Utility payment by intervention.. Theoretically payment by intervention has some benefits, but it has little practical use, for understandable reasons. Indication of a person to accept or pay instead of the drawer, although security is a theoretical and an additional advantage for smooth movement of the bill actually produced the opposite effect often because it raises suspicion about the solvency of drawer, which it is not likely to facilitate the movement bills. Intervention to honor on the other hand, is not practiced, because another institution, fenced in less stringent rules, allowing to obtain the same results, it is the guarantor posterior to

the protest. In fact the one who wants to pay a bill left in distress, preserving the right to collect the claim by bills of exchange legislature, can pay the owner, who has to give the bill by posterior endorsement. Thus there is a surrender of the bills, the surrender has the right to pursue collection of bill against all the signers of the bill, except the holder, from which he received her. This implies that the holder is willing to surrender the unpaid bill by posterior endorsement. Theoretically it is possible to meet creditors to prefer a random bill of exchange than immediate payment. Practically, however, this hypothesis does not exist.

Payment by intervention interests only if the holder of bill of exchange, for purely personal reasons, such as a desire to tease a particular debtor that surprised him in difficulty, he would not like to accept payment from other persons other than those signed in the bill.

In this case, by intervention the holder may be obliged to accept payment under the penalty of loss of rights, of recourse against those whose liberation would be achieved through the payment offered.

A regression debtor may also have the interest to pay. Eg. – The guarantor of the first level of a protested bill knows that the holder can track a posterior guarantor, whether it is at his hand, whether he considers it more solvent, but if the guarantor then turns against the previous guarantor, so even against the first gurantors to whom he is requiring the sum and the costs of the process, in order to avoid these costs, the firts guarantor can pay by intervention, and so he frees himself and the subsequent guarantors.

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George ANTONIU*

SEVERAL REFLECTIONS OVER UNIVERSAL JUSTICE

Abstract

The idea of universal justice suggests a justice that includes both the trial and complementary activity of tracking and enforcement of judgments exercised by a single state whose organs would make abstraction of where the crime was committed, of the nature of the crime but as well of the way in which the fact was incriminated and punished under national laws. Understood in this very broad way, universal justice is synonymous with justice globally performed, expression of global solidarity of community members and their interest to protect the essential values of the world community. Today this idea is not a distant prospect but a becoming reality even in our eyes.

1. In recent years the principle of universal justice is the subject of extensive discussions. This theme was also the subject of a preparatory meeting organized by the International Association of Criminal Law and will be subject of a section of the AIDP Congress in Istanbul, September 2009.

As shown in the overall work of the preparatory colloquium section IV of the 18 th Congress of International Criminal Law in Xian (China, 12-15 October 2007) universal justice is the most important way to combat the impunity of international crimes, became one of the illnesses from which our age suffers; failure to follow the most serious crimes that affect the whole community between nations, is often considered a greater evil than the crime itself[1]. Universal justice is regarded as an effective means to prevent international crimes and to punish the perpetrators thereof, shown in the resolution adopted by the Preparatory Colloquium participants above mentioned.

2. In its most extensive form, universal principle of justice suggests a justice that includes both the trial and complementary activity of tracking and enforcement of judgments exercised by a single state whose organs would

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[1] Isidro Blanco Cordero, *Raport general la tema „Competenţa universală"*, Criminal Law International Magazine no.1/2 quarters, 2008, p.13.

make abstraction from the place where the crime was committed, from the nature and way in which crime was incriminated and punished in national legislation.

Understood in this very broad way, universal justice would be synonymous with justice globally performed, expression of global solidarity of community members and their interest to protect the essential values of the world community.

Such a justice would exclude not to punish any crime: moreover the most serious violations of criminal law, as a result of differences in national laws. Evaluating unseemly acts by such a justice would be by reference to a system of uniform rules in the world, whose violation would trigger the application of the penalties provided by these rules. It also would operate uniform rules of procedure as well as the enforcement of sanctions in the world.

Acting under these conditions, the authority of sole state would only be entitled to pursue, to subject to court, prosecute and enforce the punishment of any person who would violate the universal rules of criminal law, regardless of the place where the crime was committed, of the individual offender, of the place where he has been found out, of the domicile of the crime victim, etc. ., being determining only the chronological order of referral, this being of office or from any natural or legal persons.

As such a perspective is very far, any discussion at this time over the basis of universal justice with this very broad content would seem a mere matter of speculation.

3. If, however, this theme is currently discussed not as a distant prospect but as a becoming reality even under our eyes and under the existing conditions of national states, this would be explained by the fact that to the concept of universal justice would assign the meanings further analysed but a more limited content. Assumption that currently foresee would be that when national states exist but they are grouped to safeguard their common interests. Since the fight against international organized crime have such an interest, it would also be justified for states to unify their criminal laws, even only in relation to a particular category of crimes, as well as procedural laws relating to prosecution, trial and execution of the decision for crimes belonging to the unified group; in these limits a universal justice can happen, because the authorities of each Member State could pursue crimes of the unified group, may provide prosecution and

enforcement of the sentence, excluding the requirement of double incrimination or the presence of the offender within a State or another .

4. This view, though closely does not coincide with that which has the **principle of universality** as a principle of application in the area of criminal law, currently known in national laws. In this case, national law applies, it is true, also to the offenses committed outside the national borders, but with certain limitations. Thus, the Romanian penal law limits this extension of the principle of territoriality to the facts committed by a foreigner or person without citizenship who is not domiciled in the country (thus the principle of universality does not operate in relation to Romanian citizens), claims to have double incrimination and that the offender to be voluntarily in the country or extradited for crimes directed against the Romanian state or against a Romanian citizen. Romanian law will also not apply if there is any legal impediment that would prevent the compliance with the principle of ne bis in idem. Therefore, the principle of universality would not apply, if there is an issue that prevents the movement of criminal action or criminal or the continuation of the criminal process or the execution of punishment. If punishment was not performed or was only partially executed, this will be considered at the application of new sanctions that will have to take into account what has been executed.

The principle of universality implies, therefore, the existence of different national laws (thus the requirement of double incrimination) while universal justice, at the level of a group of States, takes into consideration unified criminal laws and criminal procedure, double incrimination become unthinkable.

Even if in the conditions of the universality principle, the principle's action could be limited by a state only to a specific group of crimes (as do, for example, the Spanish penal law), it would still not create the premises of universal justice, if it would not get to similar formulations of the respective criminal content.

5. Contrary, the concept of universal justice even reduced to a small group of states implies, as seen, the existence of a unitary concept regarding the criminalization of incommodious facts, all or at least the most serious and will be described in the same way. Certainly, it is difficult to achieve this objective as compared to national traditions, the different level of development of each country, etc. being possible to accomplish only on the extent of performing of certain economic, political, social, legal homogenization of the entire community at a planetary level or at the level

of a group of states, a premise absolutely necessary for the identical formulation of all crimes or of the worst of them.

Currently, as revealed by some authors, such a goal is not easily achieved even only at the level of a group of countries (for example, at European level states).

6. It was correctly said that European integration process is performed with difficulties: evidence would be the ostracism of England by De Gaulle, the 2 negative Norwegian referenda, the rejection in the first instance by Denmark of the Maastricht Treaty, attitude subsequently amended, the difficulties for the approval of the Constitutional Treaty, negative responses to referenda in France, the Netherlands, Ireland, accesses of contrary attitudes against European Union among the new entrants states into the European Union[1].

Experts believe Europe would be currently established from several concentric circles: a group of 6 founding countries of the European Union in which it is not contested the privileged ties between France and Germany which have a decisive role; the Europe of the 15 that prepared the European Union in 2004, the Europe 12 which adopted the single currency euro, to them were later added in 2007, Slovakia, Cyprus and Malta in 2008. Another circle is formed by the countries which gathered the European Union in 2007 (Romania and Bulgaria). In these 4 circles there are also added the countries that exercise pressure in order to enter the European Union, some of them are candidates with great opportunities (Serbia, Croatia, Bosnia-Herzegovina, Albania, Macedonia) and others with more distant opportunities (Armenia, Georgia , Moldova and Ukraine)[2].

The above situations are evidence of major difficulties which prevents economic, political, social, legal homogenization, even at the level of a group of countries (the European ones). The greater will be difficulties in creating a homogeneous global community in which to apply a uniform system of criminal law and procedural.

7. To achieve this objective, the creation of a uniform criminal law, it would be necessary that the national components of the group to agree to waive a part of their sovereignty in order to enter their national criminal

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[1] Pietro Grilli di Cortona, *Crise de l'UE ou Crise dans l'Union* ,Bulletin Europèene no.705/2009, p.1

[2] Quoted texts., p.2

laws, common incrimination susceptible offences to be submitted to a unitary justice as well as the adoption of some common procedural rules regarding these incriminations. These common incriminations may, eventually, refer to, within a period to the most serious violations of the Community legal order. In these circumstances any state will be able to refer or be referred to procedural action susceptible to lead to prosecution, trial, punishment, execution of punishment of the guilty if the deed committed corresponds to the legal model of an incrimination of a community type.

Such common incriminations may relate in the first period, to the facts of genocide, terrorism, piracy, illegal diversion of aircraft, counterfeiting currency, prostitution, corruption of minors or unable, illegal trafficking of drugs and narcotics, illicit trafficking or clandestine migration of people, the mutilation of the genitals of women and any other crime that the international community would consider that it must be monitored and sanctioned by any community state.

8. Obviously, that to the extent in which such a justice would be limited only to serious offenses mentioned, this would constitute a first limitation of the sphere of action of the principle of universal justice. There is also a second limitation resulted from the principle of non bis in idem and the judged working authority and namely that the defendant was not acquitted, disgraced or lightly punished for these acts and should not have executed punishment. If he has executed punishment even in part, it will take account of the penalty executed in the sanction decided by a court who exercises justice community. This instance will follow in the same time that the national court should not adjudicate symbolic sanctions in order to circumvent the justice community.

9. Discussion on universal justice acquired new accents as a result of the relative frame decision on the application of mutual recognition principles of judicial decisions (framework decision no.2006/783/JAI of Council from 6th of October 2006 relative to the application of mutual recognition principles of judgments - Official Journal No. L.328 of 24th November 2006) principle considered as a structural principle of the whole community law[1].

[1] Adan Nieto Martin, *Fundamentos constitucionales del sistema europeo de derecho penal*, Criminal law magazine no.1/2008, p.37-38; 40-46

In its current form, this principle has been outlined for the first time within the European Council in Cardiff in 1988, was then resumed in the Action Plan Council and the European Commission in the same year. The principle was also developed in the conclusions of the Tampere European Council in 1999 and was thereafter dedicated in the Treaty of Amsterdam and in the Constitutional Treaty by becoming a "quoin" of criminal cooperation between Member States of the European community.

The principle of mutual recognition of judgments as well as of other types of legal court documents issued by a judicial authority, producing similar effects in all countries of the European Union, has completely revolutionized judicial authority[1]. Adopting this principle enables direct communication between judicial authorities which no longer need to send requests for judicial cooperation to political or administrative authorities; on the other hand it has completely or partially abolished the condition of double incrimination only regarding a limited group of crimes from a list approved of all member states of the community. In this case, the authority which requires cooperation has only to frame the facts into one of the categories of incrimination laid down in the positive list, without such employment to be reviewed by the requested authority. This solution was consecrated also by ECJ decision of 3rd May 2007, the list of incrimination being considered the functional equivalent of double incrimination.

The principle of mutual recognition of judicial acts do not work if the respective act would violate the fundamental rights (egg. the possibility prosecution would enshrine a person on grounds of race, religion, ethnic origin, political opinions, etc.. whenever they would violate the principle of non bis in idem or the penalty limits resulting from a state of infancy)[2].

10. The first and most important result of the principle to which we refer to, is the European arrest warrant which allows the arrest and surrender of persons without being necessary to resort to its extradition. Meanwhile the European arrest warrant foresees the nonextradition principle of its own citizens, principle already limited by the Schengen Convention and the Convention on Extradition of EU. One such principle was objectionable also for the fact that it was at odds with the mutual trust which mutual recognition of judicial documents is based on. On the other

[1] Luis Arroyo Zapatero, Adan Nieto Martin, *Codigo de Derecho Penal Europeo e internacional*, Edita Ministerio de Justicia, Madrid, 2008, p.35-36
[2] Luis Arroyo Zapatero, Adan Nieto Martin, quoted texts, p.35

hand, the exclusion of nonextradition principle of nationalities does not preclude that the person arrested to be subject to the execution of the sentence where there are big chances of social reintegration, such as the one in question by virtue of the above mentioned principle may return in its State to execute the punishment or the measure of safety.

11. Another effect was the direct application of judgments of a state on another state, implicitly renouncing to the principle of double incrimination, an expression of mutual trust between EU member countries of the belief that in all these countries is also ensured the compliance with the fundamental principles of criminal law[1].

12. Another important consequence of the principle was that of strengthening the authority principle of judged thing, if a national judge has given a final decision, is no longer possible a new trial in the same case throughout the European judicial space.

13. On the procedural level, the recognition of this principle has meant the accepting the probative evidence of documents in which the decision results, as well as the preservation of evidences in order to avoid the loss of already existing probative material.

14. An important consequence of the principle of mutual recognition of court decision is also the functional recognition of the principle *forum regit actum* which replaces the *locus of regis actum*. This means that the acts of tracking, which would perform on a foreign territory, are held by the enforcement of the requesting country, even if in exceptional circumstances they would be present reduced securities than if it would apply the law of the required country (egg the search could also be performed without the approval of a judge). In this way, the requesting country makes a real export of laws since the required state will have to comply with the procedural rules of the requesting State. The only allowed exception is in the case in which the applying law of the requesting state would lead to the adoption of measures contrary to fundamental rights (of public order).

Although law export solution seems contradictory, being interpreted as a sign of not complying with the law of the applied state, the experience shows that usually the forum principle ensures greater

[1] Mireille Delmas Marty, avant propos for the paper Geneviève Guidicelli Delage, Stefano Manocorda, *L'integration pénale indirecte*, Société de législation comparée, Paris, 2005, p.15

securities for the compliance with fundamental rights, is more effective, ensure a better administration of justice, usually the applicant state exporting more stringent dispositions in obtaining and evaluating the probative material, obliging the applying state to situate to this new maximum of securities.

Until the full recognition of the principle of *locus regit actum* in the current European judicial space continue to coexist the principle *forum regit actum* and the principle *locus of regit actum* as well as the principle of mutual recognition. So, for example the relative frame decision to the preventive seizure and to ensuring the evidences establishes the principle the forum. Contrary, the Convention of judicial assistance in 2000 enshrines the principle of *locus regit actum*.

Upon some authors, the forum principle would provide greater guarantees in terms of obtaining and evaluating of evidences, while in cases of serious crime when it is justified the formation of joint research teams, it is necessary to use the *locus regit actum* principle correlated with the principal of mutual recognition of judgments.

15. Mutual recognition principle has been enshrined by the European Constitution as a basic principle of judicial cooperation of bodies on criminal matters, this principle including also the principle of bringing closer the dispositions of criminal law between Member States in order to facilitate mutual recognition of judgments. According to the European Constitution by a European framework law, it would be possible to establish uniform rules of procedure to ensure the recognition throughout the European Union of all the other categories of judgments, thereby preventing conflicts of competence between Member States. Also through a European framework law, there shall be taken measures to facilitate the unification of the activity of prosecution and enforcement of criminal judgments. A European framework law would also provide minimum common rules in order to facilitate cooperation of police bodies and of justice bodies on criminal matters in connection with the mutual admission of evidences between Member states of EU or with respect to the rights of persons involved in criminal suit or with the victim's rights, etc..

In addition to these minimal rules to unify the procedural provisions between EU states, the Constitution also provides for the possibility that through a European framework law to provide minimum rules of unifying the definition of crimes as well as of the penalty matter, at first, of particularly serious crimes such as terrorism, trafficking, sexual

exploitation of women and children, illicit drug trafficking, arms trafficking, money laundering, corruption, counterfeiting of currency, informatics crime and organized crime (art.III-271 paragraph 1 al.2). Depending on the development of crime, the European Council may adopt through a European decision other areas of crime, likely to be countered by a uniform definition of the crimes.

All these measures and future plans for the unification at a European level of the substantial and formal criminal dispositions, represent in the same time determined steps towards the creation of a universal justice in terms of the scope of powers in the enforcing of criminal repression even if under territorial aspect, this universality is partial because it is not exercised by a single universal state, but by a community of European states that agree to unify their criminal legislation in order to ensure a uniform repression at European level, at the beginning of the penalties that present a maximum severity for the European Community and later of all criminal law violations unified within the unified European judicial space.

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THE DEVELOPMENT AND THE MODERNISATION OF THE TRANSPORT INFRASTRUCTURE IN ROMANIA ACCORDING TO THE E.U.'S DIRECTIVES

Abstract

The paper deals with the transports' evolution under the sustainable development. For the beginning, we analyse the impact of the transports on the European and the Romanian economies. The analysis covers all types of transports and is focused on the Romania's situation.

A distinct part of the paper talks about the future of the transports' development during 2007-2013.

The final part of the paper analyses the impact of the transports on the environment and connects it to the next evolution. The forecasts talk about a growth of the road traffic about 30% in 2010, comparing to 1995. On the other hand, in the same year, the external costs of the air and road traffic will grow to 42%.

1. General framework

An efficient transport infrastructure which is connected to the European transport network supports the economic competitiveness growth, facilities the integration into the European economy and allows the development of the new activities on the single market.

Nowadays, the situation of the Romanian transports is characterised by a little number of speedways and speedways connections with the neighbour countries and other Member States, by low speed railways, a high degradation of the naval infrastructure and of the rolling stock.

As a result, there are necessary the modernisation and the development of the national transport network in order to obtain a sustainable development of the transports in Romania.

Under the Development and the Modernizition of the Transport Infrastructure Strategy, the objective is to generate an equilibrated development of every transport modes by ensuring the modern and sustainable transport infrastructures together with better services and a unity into diversity system, as well.

The development of the transport infrastructure represents a condition for the implementation of the other Romania's development

priorities during 2007-2013. It supports the growth of the persons and goods' mobility, the integration of the regional growth poles to the trans-European transport network, the elimination of the undeveloped areas' isolation and the development of the regional and local transport infrastructure.

Romania establishes the guidelines for its important communications ways into the Plan of the National Teritorial Development, 1st Section – Comunication ways –as a support of the long term complex and sustainable development, including the regional development. This plan defines the national communication ways network, identifies the priority projects and the harmonisation measures for its development and proposes solutions in order to establish territorial equilibrated economic reports and to connect the major transport national network to the 3 pan-European and priority corridors (IV, VII and IX) wich pass over the Romania's territory.

The Law no. 203/2003 republished establishes the development priorities of the transport infrastructure modernisation till 2015.

The future economic growth, the evolution of the society and the territorial development will influent the transports and this will ask for a constant improvement of the infrastructure and the quality of the transport services.

The growth of the transports demand is supported by the demographic evolution, the tourism development, the evolution of the industry and the agriculture and the occupation dispersion of the urban peripheries.

This growth is accompanied by a demand for services' quality which has to be satisfied under the Romania's access to the post-adhering European funds, which are able to support the investments for the transport infrastructure.

The demand for goods transport is connected to the economic evolution. The growth of the goods transport demand is greater than the growth of the GDP in the developed countries. In Romania, the forecasts determined a rate of the goods transport demand 2% greater than the GDP rate of growth.

This trend is the same with those from other new Member States, like Hungary, Poland, Slovenia and Czech Republic.

The different trends in the goods transport and in GDP rates are caused by the low valoric density of the goods, which means big weight

and low monetary value. In the Western Member States the valoric density of the goods is higher. As a result, every supplementary GDP unit will generate a lower volum of the goods transport.

The development of the transport infrastructure in Romania will support the integration into the single market and the valorisation of its geographic position as transit zone between the pan-European transport corridors IV and IX. This geographic position represents an important element for the strategically options about the development and the modernisation of the transport infrastructure in Romania.

The opportunity created by the Danube-Black Sea Chanel and by the Danube can realise a key position in order to attract the international goods fluxes in the relations between Europe and other continents.

A viable transport alternative for Romania is the transit on the internal navigable ways using the Danube. The Romanian Danube sector (1075 km) and the Danube-Black Sea Chanel ensure the conection between the Danube and Constanta harbour, because the Danube-Black Sea Chanel cuts back the distance between the Black Sea and the Danube harbours from the Central Europe with 400 km. Moreover, this Chanel ensures the direct conection between Constanta and Rotterdam.

The Danube will support the conection and the integration of Romania into the E.U. It will ensure a sustainable development and will improve the Romania's position in order to attract greater goods fluxes connected to the relationships between Europe and other continents.

The air transports have a significant potential to improve its position into the medium and long distance traffic. Romania has to benefit by its geographic location in order to attract investments for the infrastructure and air services. The development of the air transports infrastructure will grow the accessibility of the less developed regions to other internal and external regions, will improve the labour flexibility on the labour markets and the competitiveness of those regions which benefit by the development projects.

An advantage can be the relative harmonious distribution of the air transports' infrastructure on the national territory. The problem is that connected to the inter-modal transport development. This inter-modal transport allows the rare materials and goods' transport with low costs and supports the sustainable development, as well.

As a result, it is necessary to establish equilibrium between the rail and the road transports and to growth the role of the air and the maritime transports.

The development of the road transport and its alignment to the European standards is asked by the necessity to connect the national network to the European one and to correlate the Romanian development projects to those form the neighbour countries.

The Romanian development policy has to integrate the national rail infrastructure to the European technical and operational parameters in order to become a compatible and an inter-operable component of trans-European rail network.

During 2007-2013, the main objective of the European rail transport is the growth of its percentage from 6% to 10% for the passengers and from 8% to 15% for the goods, in order to ensure a more equilibrated distribution of the transports and to protect the environment.

During the same period, the major objective of the Romanian rail transports is to maintain an equilibrate percentage from the transport market: 25% for the goods and 35% from the passengers.

The air transports are focused on the implementation of a secure, efficient and functional transport industry, which has to be compatible and adaptable to the European policies, principles and institutions. All civil aeronautic activities respect the greatest part of the specific European standards, regulations and directives.

A special attention will be given to the market demand. The forecasts talk about a growth of 200% of the number of passengers which will be transported from and in Romania till 2013. Moreover, the goods volume wich will be transported will grow as a result of the Romania's adhering to the E.U. and N.A.T.O.

On the other hand, there are necessary to ensure services according to the European standards, to medernise and to enlarge the aeroportuar infrastructure connected to the TEN-T. As a result, will be supported the four national interest airports which are coordinated by the Ministry of the Transports.

The naval transport is focused on the modernisation and the sustainable development of the maritime and fluvial transports, in order to grow the market share of this transport mode, the volume of the transitated goods by the Romanian harbours and the efficient use of the existing harbour infrastructure.

Moreover, there are necessary to refresh the trade potential of the Romanian maritime and fluvial harbours, to redefine and to consolidate the geo-strategic position in the Danube and the Black Sea's areas by building a sure, solid and integrated naval infrastructure which will be able to connect to the TEN-T, to promote a coherent basis in order to promote the free access, the secure and efficient movement of the persons, goods and services, as well.

In order to realise a sustainable development, Romania created a dedicated strategy for the transports. This strategy is based on a SWOT analysis which marked out that the Romanian transport system is less developed comparative to other Member States.

As a result, the general objective is the ensurance of an extended, modern and sustainable transport infrastructure, in order to grow the Romanian economy and to improve the life standard. The contribution of the transport activities in GDP will grow to from 3.6 billion Euros nowadays to 7.0 billion Euros till 2015.

The achievement of this objective will support the growth of the accessibility for Romania, the inter-modality of the transport system, the equilibrated development of all transports modes and the quality and the efficiency of the services. Moreover, this objective will support the decrease of transport impact on environment, the ensurance of the sustainable development of the transports and the integration of the Romanian economy to the European one.

The specific objectives of the Romanian transport strategy are the following:

- ✓ the modernisation of 5701 km from the national road network. 1347 km from the TEN-T network will be reabilited, the road structure will be dimensioned in order to take over a duty on axle of 11.5 t and 1933 E class bridges will be redimensioned, during 2007-2015. Moreover, there will be built 1052 km of highways and 301 km will be modernised;
- ✓ the ensurance of the rail inter-operativity for 1100 km from TEN-T rail lines and to 100 km from all modernised inter-operativity rail lines other than the TEN-T network. Till 2013, at least 25% from the goods transport and 35% from the public passengers transport will be made on the railway;
- ✓ the growth of the goods traffic through national and maritime harbours and the two naval canals, in order to improve the naval infrastructure. As a result, the goods traffic will grow with 3.79 million

tones by the naval ways and canals and with 39.47 million tones by the maritime harbours in 2015 comparing to 2004;

✓ the modernisation of the air echipments and facilities in the four national airports, in order to achieve a yearly passengers traffic of 11.3 million passengers till 2015.

The general and specific objectives of the national development priority- The development and the modenisation of the transport infrastructure- are achieved by actions which are grouped into three sub-priorities:

✓ the modernisation and the development of the trans-European transport infrastructure and the conection networks: this objective will generate the territorial cohesion in Romania and in other Member States by the development and the modernisation of the road infrastructure, the decrease of the travel times to the main destinations, the growth of the rail, naval and air facilities, in order to satisfy the intensive traffic of goods and passengers;

✓ the modernisation and the build of the trans-European road infrastructure: this measures is focused on the finalisation of the highways, including the variant routes for the cities located on the TEN-T and the modernisation of the roads and the bridges on the same TEN-T. The main benefit of the road transport is the growth of the speed and the capacities on the Pan-European road corridors. The implementation of the projects connected to the realisation/development/modernisation of the transport infrastructure on the 4th Pan-European transport corridor represents an absolute priority for Romania. The National Company for Highways and National Roads from Romania will be the main beneficiar of the national and European financial allocations for the road infrastructure development. The main projects will be focused on the North of the 4th Pan-European transport corridor between Nadlac-Arad-Timisoara-Lugoj-Deva-Sibiu-Pitesti-Bucuresti-Constanta;

✓ the modernisation and the build of the trans-European rail infrastructure: this objective will grow the atractivity of the rail transport by growing the speed to 160 km/h for the passengers trains and to 120 km/h for the goods trains, as well. The rail transport will cover 30-35% from the market and it will have a high security degree, modern methods of the rail infrastructure maintainance and a better inter-operability with the European rail transport system. These mean the reability of the rail

tronsons Curtici-Simeria, Simeria-Coslariu, Coslariu-Sighisoara, Sighisoara-Brasov, Brasov-Predeal and Craiova-Calafat;

- ✓ the modernisation and the extension of the trans-European naval infrastructure: is based on the maximum use of the Danube's potential. That means a lot of protection coasts works, consolidation works, topo-hydrographic measures and a semnalisation and watching system for the Danube's traffic. The navigation parameters will be improve between Calarasi and Braila and the building operations will continue across the Romanian-Bulgarian Danube, the Danube-Black Sea canal and Poarta Alba-Midia-Navodari canal, as wel;
- ✓ the modernisation and the extension of the trans-European air infrastructure: is connected to the works for the airports from Bucuresti-Otopeni, Bucuresti-Baneasa, Timisoara and Constanta, in order to eliminate the traffic congestions;
- ✓ the modernisation and the build of the TEN-T conection networks: the conection of the local/county/national transport networks to the trans-European transport network will support the accessibility improvement, the fast acces to the TEN-T and the growth of the goods and passengers volume. A main importance will be gave to the conections between the points of the passengers fluxes' creation, in order to ensure a fast and confortable link between those points and the accessibility growth of the adjacent areas of the TEN-T;
- ✓ the sustainable development of the transports: tries to integrate the principles of the sustainable development into transports sector, as a result of the documents adopted to the European Cpuncil from Cardiff (1998) and the European Strategy for Sustainable Development (Goteborg, 2001).

2. Transports and the sustainable development

The sustainable development implies the decrease of the transport-environment impact and the stabilisation at a low level of the pollution emissions and agents resulted from the transport activities.

These are the result of the adhering negotiations (Chapter 9 – Transport policy) and of the international treaties and accords which Romania and/or the E.U. adhered (UNO Framework Convention- 1992, Kyoto Protocol- 1997, and Geneva Convention about trans-border air pollution).

During 2008-2012, Romania has to decrease its greenhouse effect emissions with 8% comparing to 1989. Moreover, the global greenhouse effect emissions have to decrease at least 5% comparing to 1990 till 2012.

The achievement of this objective will be supported by the extension of the combinated ans inter-modal transports together with their endowments and the use of a specialized rolling material with high performances connected to the energy consumption and the enviroenment protection.

Moreover, will be implemented the centralized gestion of the goods traffic (intermodal platforms), will be use performant means of conveyance and will be created forestry protection curtains.

Other activities will support the logistic integrated services for the road transport, the growth of the electric traction for the trains, the implementation of the modular units for the goods trains, the use extension of the electric and Diesel frames for the rail passengers transport.

During 2007-2013, the improvement of the conventional rail infrastructure and the rolling material will support the rail transport and will offer an unpolluted option, more secure, of transport.

The air transport will discourage the use of the high noices aeroplanes, but it will support the implementation of the modern monitoring systems for noice beside the airports and other systems which will be able to decrease the impact of the air transport on the environment.

A special care will be gave to the Green Paper of the action against the noice, which promotes new modern monitoring noice for road and rail transports by eliminating the noices' sources and by protecting the public health against these noices, as well.

The Marco Polo Program promoted the movement of the goods traffic from the road one to the other transport modes. Moreover, the European Commission asked for this program carrying on during 2007-2103.

As a result, Romania will use government programs in order to encourage the renovation of the road vehicles, the rail rolling material, the maritime, air and naval fleets and to support the sustainable development. This measure contains normative and financial components and it will support the decrease of the soil, air and water pollution and the growth of the transport energetic efficiency.

3. Transports vs environment

The transport policy represents one of the most affected European policies by the ecologic restrictions. The E.U. promotes a sustainable environment policy connected to the transports in ordr to decrease their impact on the environment, to protect the ozone and to prevent the trans-border pulution.

Moreover, the candidate countries can support this policy if they diminuate the pollution, develop new rail and naval transports and extend the public ecologic transport.

The importance of the European environment policy is stipulated in the 2nd Article of the Treaty, which talks about a harmonios, equilibrated and powerful economic development across the E.U. and a high level of environement protection and improvement.

The Article no. 174 stipulates that the European environment policy is based on the precaution principles and on those principles which involve the pollution source to eliminate the pollution, as well.

The 6th Article from the Amsterdam Treaty stipulates that the environment protection has to be integrated into the definition and the implementation of the common policies.

Another challenge for the European transports is that to prepare the pan-European integration using a common transport and environment policy for the Member States and for the candidate countries, as well.

The World Bank considers that some countries from the Central and Eastern Europe have serious difficulties connected to: the high average age of the vehicles, the old models, the unadequate control of the pollution, the pollutant fuels and the unadequate service. All these elements support the environment degradation.

In order to eliminate these situations, the E.U. proposes three kinds of measures:

- ✓ the decrease of the road transports comparing to the rail ones (especially the urban transport using the tram) and the naval ones;
- ✓ the elaboration of the specific regulations in order to limit the use of the pollutant transports;
- ✓ a most flexible prices system, which can be able to stimulate the consumption of the unleded fuel, for example.

Nowadays, Romania implements some environment programs, but their real costs are too high for the Romanian economy. There are just a few

national economies which are able to support the external environment costs.

The transports represent an industry which produces a lot of negative externalities, as: pollution, noice, accidents and the congestion of the traffic routes. The correct solution for these problems is to include the external uncalculated cost into the transport cost. These uncalculated costs are those connected to the pollution damages or to other factors which affect the environment.

As a result, the transport cost has to include the costs of the transport technology's improvement, the costs of the vehicles' replacement with other less pollutant, less clamant and more secure.

Moreover, the transports can be affected by their own activity or by other industries. The climatic changes are the effect of the energetic economic and the transport activities, which lead to the growth of the extreme meteo phenomena with supplementary effects and losses for the air and naval transports.

The internalisation of the external environment costs is made by the inclusion of the environment costs into the transport costs or by using specific taxes. But the share of the different transport modes into the negative externalities is not equal. The road transport generates 92% from the total external costs, the air transport 6%, the rail transport 1.5 % and the naval transport 0.5%.

The forecasts talk about a growth of the road traffic about 30% in 2010, comparing to 1995. On the other hand, in the same year, the external costs of the air and road traffic will grow to 42%.

The E.U. defined the 6th Framework for the Environment Protection and the White Paper for Transports which orient the European environment and transport policies till 2010. The basic idea is to replace the transport taxes with more efficient instruments in order to integrate the infrastructure and external costs.

The Goteborg Council underlined that the sustainable policy has to reconsider the whole internalisation of the social costs, including the transport costs.

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Georgeta MODIGA

KNOWLEDGE AND INNOVATION – THE ROAD TO COMPETITIVITY

Abstract

The central idea around which this essay is built is that knowledge, as an appreciating asset, intellectual capital and investment in education is becoming a dominant reality in the new economics and knowledge-based society.

The first chapter underlines the importance of knowledge and intellectual capital as the main driven forces in the new millenium.

The nation's output depends not only on the number of hours people work ,but also on how productive those hours are. One of the important determinants of workers' productivity is education Both private and public returns to education are highlighted in the third chapter.

The implications of globalisation on the business world are of such a nature that it is necessary for us to redefine the economic concepts and models,aspect which I've tried to focus on in the fourth chapter.

In the fifth chapter the attention is headed towards the new economies, which in the global civilisation are based on innovations and, furthermore, on technological development which leads towards a high level of competitivity and human development.

More and more countries are interested in becoming knowledge-based societies, thus being more prepared to face the challenges of the new millenium.

1. The knowledge-based society and the appearance of the intellectual capital as a resource

1.1 Knowledge – the main propelling force in the new millenium

The last decades have seen an expansion of the concept of "new economy" as a new type of approach concerning the economic science. A part of the economists think the modern economies are dynamic adapting systems rather than closed equilibrium systems, as it has been thought for a long time. Some of these are Kenneth Arrow, winner of the Nobel Prize and one of the first promoters of the neo-classic modern model, and Brian Arthur of the Santa Fe Institute. Sometimes the *new economy* is known also as the *economic school from Santa Fe* because many of the economists preoccupied with complexity thinking are affiliated to the center of interdisciplinary

research in this institute. The complexity specific to the modern economy environment determined some authors to plead for a new approach of the basic economy to a dynamic adapting system. That's why sometimes the economists studying the new economy are also called complexity economists. These economists argue that economies are like the human biological systems, following the same fundamental laws. These laws will manifest differently in economy as compared to biology, but if we can improve the level of understanding them, we will gain from the possibility of getting closer, to a greater extent, to the functioning mechanism of markets and firms. The difference between approaching the equilibrium in the classic economy as compared to the new economy is presented in a suggestive way by **Ilya Prigogine**: "*The classic economic model puts accent on stability and equilibrium. Today we notice the existence of instabilities, fluctuations and evolutionist tendencies that manifest themselves practically at all levels. We are in front of a universe much more complex and more structured than we could ever imagine. The end of this century is associated with the birth of a new vision on nature and science which brings the human being a little closer to nature, a science that makes from human intelligence and creativity an expression of a fundamental tendency in the universe. Thus new perspectives open up for the interdisciplinary research.*"

In the new economy and in the society of knowing the intangible goods such as knowledge and the management of information and knowledge become the new nucleus of competences. In professor Quash's opinion, from the London School of Economics, we are in a world that places accent on the economic value of the intangible goods. We are dealing with "cognitive domains" where ideas are worth billions, while the products may cost less and less. In Peter Drucker's opinion, in the future there will be other success factors: "the traditional production factors – the land, the labour and the capital – haven't disappeared. But they have became secondary. Knowledge becomes the only resource truly relevant today." The new economy requires a rethinking of the production factors' theory. Knowledge becomes the essential component of the contemporary social and economic development system. The spreading of inovations and convergence of the top technologies will play a key part in increasing the spreading of knowledge in the context of the process of globalisation."

The modern concepts of "e-economics" and electronic trade demand the appealing to a nucleus of competences where knowledge will be the main propelling force. The new economy means showing a greater

interest to the so-called knowledge society, to the employee who is the the mean of knowledge, to the intellectual capital resource, as well as to learning organizations.

Knowledge has always been extremely important, we aren't homo sapiens for nothing. Throughout history, victory has been in to the hands of those who used knowledge, being aware of its matchless potential: among these winners are the primitive warriors who learned to build iron weapons, the businessmen from the United States who, for a hundred years, are the beneficiaries of the best public school system in the world, with an extremely well educated work force and, of course, the list can be continued. But knowledge is much more important than before, because we are at the center of an economic revolution that gives birth to the Era of Information.

Knowledge, unlike labour, land and capital is an asset which gains value while being used. The more used, the more effective and efficient the knowledge becomes. In Karl Erick Sveiby's opinion, in the new economy, knowledge has four characteristics: it is tacit/implicit; it is action-oriented; it is based on rules; it modifies constantly being updated.

An organisation based on knowledge can give a new entrepreneurial vibe within itself and can motivate the top managers to be preoccupied with transforming the organisation so that it becomes capable of capturing, applying and developing value as a consequence of implementing some high perforance technology solutions. Knowledge and advanced technologies can transform in a significant way, a nation's economy.

Knowledge and information are the thermonuclear, competitive weapons of nowadays.Knowledge is more powerful and more valuable than natural resources and big factories. Let's take, for example Microsoft and Toyota which have not become what they are today because of being wealthier than IBM and General Motors. On the contrary. But they had a much more precious thing than physical and financial assets, they had intellectual capital resources.

1.2 The appearance of the intellectual capital resource

The society of the third millenium disposes of employees who are valuable because of their knowledge. In many of these companies, value isn't found with the tangible assets, but with those intangible resources.

The intellectual capital is the term applied to the combined intangible assets that allow the company to work efficiently. The intellectual capital is the practice and the intuition of a team of chemists who discover a new drug worth millions of dollars, is the ability of workers to innovate in thousands of horse-power to improve the efficiency of a factory. It is the electronic network that transports information at the speed of light through a company, so that the answer is faster and prompter than that of the rivals. It is the collaboration between a company and its clients, the strong bond between them which brings back the client again and again. It is the power of the collective mind. It is very difficult to identify and even more difficult to use it efficiently. But once we find and exploit it, we will surely win.

The components of the intellectual capital are:

- **The market assets** – are those deriving from a good relationship of the organisation with the market and the clients. The market assets reflect the potential of an organisation due to some intangible assets concerning the market. Examples can include: the clients and their degree of loyalty, the distribution channels, different contracts and agreements etc.
- **The assets based on intellectual property** – include the „know-how", the commercial secrets, the copyright, the patents, or other rights. The intellectual property represents the legal protection mechanism of several assets of the organisations.
- **The assets based on human resources** – refer to the ability and creativity shown in solving problems, as well as to the leader, entrepreneur and manager qualities of the employees of an organisation. The individual is not abilitated to carry on a certain activity, on the contrary, he has to prove he is a dynamic person, who can carry on a variety of activities in time. As they become more competitive in the activity carried on, people learn more and more and become increasingly valuable.
- **The assets specific to infrastructure** – have in view those technologies, methods and processes allowing an organisation to work efficiently on a long term. The examples include: the organisation culture, the methods of management, the financial structure, the data bases and the information about the market or about the clients, the communication systems like the e-mail and the modern teleconference systems.

A hundred years ago, labour was relatively cheap. In the third millenium labour stops being cheap. The assets based on human resource with which an organisation has to operate will be rare and expensive. The

amplifying of the importance of the intellectual capital reflects the increase of the dependancy of some organisations on the intangible assets. Every day new types of companies that have intangible assets appear. Their products are intangible and can be electronically distributed in the "virtual market space" via internet.

The intensive organisation, from a point of view of media, means and of knowledge, whose products are digital, are the organisations of the third millenium. The world has changed again and new means of monitoring and managing these organisations that reflect these changes must be found. The people of the third millenium rely more and more on knowledge. They want to understand and enable objectives to be achieved and to know their role in the organisation.

In the third millenium the organisation from Romania must place the accent on encouraging the personnel involvement by showing consideration to the contribution of an individual inside an organisation. There are several ways to try to increase the potential and the obvious value of the people in an organisation. The modern forms of investing in education are especially recommended: high performance degree training, activities about knowledge as well as forming some components concerning the carrying on of some activities. As the labour force becomes increasingly global", the valuable employers and employees invest in themselves the more. This can contribute to the protection and the increase of the components' nucleus. The so-called analysts of knowledge are ever more requested to work with the individuals of an organisation to identify the key assets for knowledge. To permit the increase in the people's power, it is necessary to measure the asset values based on the human resource. Knowledge is power and profit.

Each country, company and individual depend more and more on knowledge: license patents, abilities, technologies, information on clients. Even Pope John Paul the 2nd acknowledged the increasing importance of knowledge in the "Centessimus Annus", by writing: " if some time ago the decisive production factor was the land, and later the capital, nowadays the decisive factor is the human being himself, the human being and his knowledge."

The spreading of the intellectual capital can be reached in the third millenium if innovation and creativity are ubiquitous in an organisation. The feeling of success is expressed and the need of a permanent mutation and change is felt.

The true "heroes" of an organisation are those in their carees and thus helping their organisation to be a winner in the competition to develop in the long run. This means also the creation of a culture of the organisation which promotes and supports the innovation process. There is a direct relationship between the extent to which an organisation proves to be innovating and its ability to expand its intellectual capital resource. The extent to which a company is innovating is also a measure of its surviving force.

2. Knowledge and Innovation – the Road to Competitivity

Starting with 1998, OECD (the Organisation for Economic Cooperation and Development) and the World Bank cooperated in their activities to create economies based on knowledge, and were helped in their efforts by countries going through transition also.

In Carl Dahlman's opinion, manager of the Programme "Knowledge for Development inside the Institute of the World Bank": "To benefit by the knowledge revolution, concrete strategies that can satisfy the four pillars of the knowledge economy are necessary:

- an institutional and economic background that promotes the efficient use of knowledge;
- an educated population endowed to create and use knowledge;
- a dynamic information infrastructure;
- an efficient innovating system inside the companies and the research centers that can satisfy the new needs of the population."

3. Investment in Education

3.1 The private benefits of investment in education

The empolyees gain additional value. Their value for the organisation, when they are understood and appreciated, is incomparable." David Decenzo

Managers all around the world make decisions on investing their own capital. They weigh things carefully before making a decision and analyse every alternative and opportunity to acquire asset values. Let's take for example the buying of a car. They think which one is best and which one would bring the most benefits. In the end, they will invest tens or maybe hundreds of thousands of dollars for that car.

For the managers to appreciate the employees according to their contribution, it is necessary that they should have an appropriate education. A person's level of education affects the level of his earnings, as there is a direct proportionality relationship between them. The more profound the studies of a person are, the better this person is acquire to absorb the new information and to familiarise with the new technologies, thus their earnings are considerably greater.

The education a person receives has strong implications on his work place. In his book "Studies on the Human Capital", Jacob Mincer specifies:"the educated employees have at least two advantages in comparison with the less educated, among which are: bigger wages and a bigger job stability at their work place."

Another aspect worth mentioning and closely related to education is represented by the quality of our lives. The persons with a higher level of education tend to have a better health state than those with a lower level, the former making an investment in themselves, which they protect by taking preventive measures.

3.2 The public benefits of the investment in education

Economists have been interested in the economic growth the moment Adam Smith elaborated his study on the nations' riches.

The education's contribution to the economic growth is made through two mechanisms. The first and the best known is the creation of new knowledge, also known as the "Schumpeteriana growth". The much more educated persons will later become scientists and investors working to contribute to the growth of the human intelligence stock by developing new processes and technologies. So, we arrive at the second mechanism through which education affects the economic growth by transmitting knowledge and information. The schools ensure the level of education necessary to understand the new information, and in this range of ideas Romania is among the first countries, in my opinion. The rising of the educational level facilitated greatly the process of innovation, that took place in the computer industry, for example if there hadn't been for the schools to teach the pupils and the students how to use these new applications, the innovation's effect would have been much diminished.

Education transforms people, they become better citizens, mothers, fathers and children. In his study "Capitalism and Freedom", written in

1962, the winner of the Nobel Prize Milton Friedman describes some of the effects associated with education: " a stable democratic society can't exist without a minimal degree of studying and knowledge by its citizens and without the acceptance of a common set of values. Education can contribute to both."

4. The Knowledge Economy and the Competitive Advantage

The implications of globalisation on the business world demand a redefining of the concepts and of the economic models.

Today the accent is placed on flexible, agile enough organisations that need specialists who work together in teams. Such teams are suggestively called multi-functional teams. We thus move from the world of narrow specialisations towards the world of teams and especially the world of inter-functional teams underlying not only the product quality, but also that of those making decisions in the business world. The inter and multi-functional teams consist of members having different qualifications and competences. And this fact is full of meanings in the new economy and in the knowledge society. Here is a new challenge Romania has to accept a condition she must provide in her process of transition towards a knowledge society. The work teams also require other organising structures rather than the pyramidal structures specific to the traditional organisation based on hierarchies and the division of labour. A horizontal structure facilitates the labour organisation around production processes which share the clients' needs and not around the functions and duties that need to be fulfilled. Career directions favour those who can practice several professions and who show real qualities for working in a group and for continuous improvement. the new business world remodelling and reconfiguration has had a considerable impact on some of the key economic concepts and models, which implies:

- introducing multi and inter-functional teams;
- adopting horizontal structures and removing hierarchies;
- re-engineering processes.

The accent has been moved from organising labour as a traditional production factor based on the division of labour, towards organising people in teams and towards identifying and developing the career and competence management. Experience has proved that dynamic performing

teams can be more efficient in an environment dominated by change than the big organisations individually or the singular persons could.

The new economy must take into consideration such an approach and incorporate these new concepts into the economic science discipline. Many of the performing modern organisations change and are no longer interested exclusively in maximising profits, but they look to maintain themselves in the business area, in competition with other performing organisations. Some organisations transformed and eliminated the formal structures, especially the pyramidal structures. The personnel of such organisations is no longer interested in having a job that formally takes place at the same office; such persons simultaneously attend several work places; the accent is no longer placed on the traditional specifications of a certain duty in a work place or on a severe programme, strictly observing certain hours.

The competitive organisations think individuals become much more interested in the activities that challenge them to manifest their creativity and inventiveness, bringing them satisfaction; such individuals show less interest in a certain formal socio-professional status or in detaining certain titles with social resonance.

The economic and technological convergence are generated by globalisation changes and will continue to change the manner in which wealth is created both at a national level and at a transnational level. To facilitate the effective spreading of knowledge and innovation, an important information-based structure is developing more and more. Amplifying the convergence will have a significant impact on the economic bases of all countries involued in or affected by the process of globalisation. Globalisation considerably modifies the manner in which business is conducted and make the spreading of the "know-how" and of innovation.

From this point of view organisations must become more and more competitive. This makes it necessary to reformulate the principle of the comparative advantage by appealing to a concept much more suggestive in the context of the new economy and of the knowledge society, that of the competitive advantage.

The main factors allowing Romania to become innovative have in view:

- **Consistent investments** as size order in education in general and in the superior level education in particular
- **A quality technological and information-related basis**

- **High levels of Government spendings on research and development**
- **Efficient laws to protect the intellectual property to sustain the research-development activity.**

5. The Knowledge Economy and the Technological Process Effects on the Human Development

In the global civilisation, the new economies based on innovation have, as a main component, the technological development which leads to a high level of competitiveness and to human development. The technological progress is essential for the human progress. The digital, genetic, molecular innovations open up new perspectives and "break the frontiers" related to the way people can use technologies to extend their knowledge, by stimulating growth and development. The new technologies spread both among different countries, and inside them. The technological innovations affect the human development. The human development and the technological progress are supporting, intensifying and propelling one after another:

- The technological innovations can improve the human potential and abilities
- The technological innovations are a means of ensuring the human development
- The human development is an important means of sustaining the technological development.

The analysis of the Human Development Index in the countries in transition provides results of open offers. So, even if it is placed last, compared to the value of the human development index among the seven countries in transition grouped as states with a medium value of the HDI, Romania recorded, during 1990 and 1998, the lowest negative value in the modification of the human development index.

In Gerardo Berthrin's opinion, author of the **National Human Development Report, Romania 2000**, "... the synergy and the articulation of these three dimensions will ensure favourable premises so that the Government's actions lead to Romania's acceptance as a EU member and to the ensurance of a human development on the long term."

The analysis of the tendencies recorded in the evolution of the human development index in Romania during 1995 and 1999 proves that there are some evolution tendencies of the three components of the HDI in less synchronized directions:

- The medium life expectancy at birth reduced starting with 1995 up to 1997, then it began to grow reaching a 69,7 years level in 1999
- The last five analysed years under analysis have proved among adults, an illiteracy-eliminating rate staying relatively constant, a slight growth of 97,2% rate, being registered only after 1998
- On the whole, the situation of the development index on the educational system in Romania improved.

The knowledge society, in general and the knowledge economy in particular lead, according to some authors, even to the modification of rules specific to the traditional economic development: "...Societies or regions can evolve from economies with a strong agrarian character towards knowledge economies without necessarily going through an industrialisation phase."

A society based on cultural diversity has to invest strongly in education, in health protection and in other programmes of a social character. The key-principle that has to reign in modern societies over the investment policies, public or private should be that of allowing and favouring a special investment in the human and social capital resource. This principle can be applied and linked to the systems that ensure prosperity and life quality as well as to other aspects of the socio-economic development. The traditionally understood prosperity, based on the transferable programs payment system, on bureaucratic services and on the so-called social engineering, must give way to the new approach about the active prosperity, the continuous education and the development of systems which ensure life quality by appealing to a set of priority investment programmes, like those concerning the investment in education.

Education and implicitly the investment in education must become key components for the ensurance of an authentic human development on the long term.

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Constantin PALADE[1]

THE CAUSES OF LACK OF DISCERNMENT. OPINIONS

1. Preliminary observations

Some categories of persons, such as minors, psychiatric patients, old persons, are protected by the institutions of civil law by way of: legal representation, judicial prohibition, guardianship, trusteeship.

The psychiatric patient with lack of discernment is protected by art. 142-151 of the Family Code and by art. 30-35 of the Decree no. 31/1954 on natural and legal persons, by the institution of judicial interdiction.

The essential condition for the application of the principle of judicial interdiction, in the case of a natural person, is lack of discernment. The cause of the lack of discernment is provided by art. 142 of the Family Code: the natural person suffering of a mental insanity or of a mental debility.

The Civil Code contains no definition regarding discernment.

In the legal doctrine, discernment is defined as "the power to appreciate the legal effects that are produced on the basis of will".[2]

The protection of the natural person that lacks discernment by the way of judicial interdiction enacted by the court of law means, on the one hand, the removal of the person from the civil circuit, the law considering that the person lacks capacity to exercise his rights, and by the way of guardianship on the other hand.

In the legal doctrine, the majority opinion is that among the conditions for applying judicial interdiction on the lack of discernment due

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[2] Beleiu, Gh., 1998, "Drept civil roman. Introducere în dreptul civilI. subiectele dreptului civil", (Sansa, Bucureşti), 330-331; Dogaru, I., 1993, "Elementele dreptului civil, vol. 1, introducere în dreptul civil, subiectele dreptului civil", (Şansa, Bucureşti), 327-329; Urs, I., Angheni, S., 1998, "Drept civil. Partea generală. Persoanele, vol. 1", (Oscar Print, Bucureşti), 241-243; Mureşan, M., 2002, "Drept civil. Persoanele", (Cordial Lex, Cluj-Napoca), 38

to psychical diseases named insanity or mental debility is very important. This enumeration is of a limited nature.[1]

Emphasizing this opinion, judicial practice stated that: "Neither the Family Code, nor any other law provides any other conditions for applying judicial interdicition."[2]

Regarding the causes of the lack of discernment, in the legal doctrine a unanimous opinion was expressed in the sense that: "the text (art. 142 Family Code) is of a strict interpretation and it cannot be extended by way of analogy to other similar situations; being so, only those suffering of insanity and debility can be the subjects of judicial interdiction, and not the persons who's discernment is lacking due to other reasons".[3] The Lawmaker had in mind in what regards the person that lacks discernment a factual situation that is stable and prolonged in time. In one opinion that is characterized as being "a permanent state, not one with a fugacious character".[4]

2. The concept of insanity and mental debility

The concepts of insanity and mental debility are not in accordance with the actual medical knowledge. Thus, insanity can be attributed to all psychically ill persons in a general manner, as an incapacity to have a normal social life, without direct reference to discernment.

The term means estrangement. It was used, for the first time, in the medical language by P. Pinel in 1797, who used it to replace the medical term of craziness.[5] Mental insanity means the deterioration of one's understanding capacity.

For the continuators of Pinel, named "insanist", the person with mental insanity totally lacks moral liberty due to the serious perturbations of his capacity of understanding. In France, where the concept of mental

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[1] Beleiu, 1998, 330-331; Dogaru, 1993, 327-329; Urs, I, Angheni, S., 1998, 241-243

[2] Tribunalul Suprem, Secţia civilă, Decizia civilă nr. 691/1978, Culegere de decizii pe 1978, 189

[3] Mureşan, M., Ciacli, P., 2001, "Drept civil. Partea generală", (Cordial Lex, Cluj-Napoca), 47

[4] Lupan, E., 1988, "Drept civil. Persoanele, (Universitatea Cluj-Napoca, Cluj-Napoca), 183-184

[5] Pelicier, Y., 1991, "Histoire de la psychiatric", (Presses Universitaire de France, Paris), 134

insanity appeared for the first time, a forensic device was created to organize medical assistance specialized shelters for mentally insane persons. The system of shelters led to the creation of an authoritarian climate, the shelter becoming o hierarchical society, allowing the observance of psychical diseases.[1]

The word shelter became by time pejorative, the same as the expression mental insanity, due to the segregation of patients and of hospitals where these persons were treated. Thus, in France, on 4 February 1958 by a ministerial circular, the expression mental insanity was removed, being replaced by the expression mental malady. In Romania, where the modern legal language was borrowed from the French, the expression of mental insanity was maintained in the Family Code, possibly, due to the influence of politics in the regulation of the legal institution.

Insanity is a word with more than one meanings, that in addition to its psychiatric sense also bears philosophical and sociological significances.

For the philosopher J.J. Rousseau, in the Social Contract, the free citizen should dispose a part of his natural freedom in favor of society, the only one capable to defend the conventional freedom of everyone.

Thus, the expression of insanity (estrangement) by its multiple meanings and messages, of which some are obsolete, becomes by its continuons use obsolete.

The other expression in the Family Code, namely, mental debility, does not correspond in the present medical knowledge, to such a grave mental illness as to have as an effect the lack of discernment. At present, mental debility is similar to a slight mental retardation that is a mental state that does not preclude discernment. In these situations, when the lack of discernment does exist, it is only of a temporary character.

2. Law no. 487/2002 on mental health and the protection of persons with psychical turbulences regarding discernment and the causes of lack of discernment

The predictions of Law no. 487/2002 art. 5 on mental health and the protection of persons with psychical turbulences defines the following two notions that present interest for the our paper:

[1] Larouse Dictionaire de psiychiatric et de psychopathologic clinique, 1993, 384

a) a *person with grave psychical turbulences* as being the person that "is not capable to understand the meaning and consequences of his behavior, in such a manner that needs immediate psychiatric assistance";

b) *discernment* as being "the possibility of the person to appreciate the content and consequences of his actions".

The cited legal definitions allow the following observations.

1. Discernment is a concept whose content exceeds the domain of law. The acts of the individual can be found in the whole social reality. In the domain of law, the acts of the individual bear the form of legal acts and facts. This ways, the legal definition of discernment is overlapped by the doctrinal definition cited above.

2. Here, we encounter a new notion: the person bearing serious psychical disturbances that lacks discernment. The actual state of psychiatric sciences, obviously different from that of 1954, the year of the entry into force of the Family Code, obliged the lawmaker to reconsider the notions of mental insanity and of mental debility and by the notion of grave psychical turbulences to extend the lack of discernment to persons bearing serious psychical turbulences. Thus, the lack of discernment is caused by a grave psychical disease and not by mental insanity of mental debility.

3. The person that lacks discernment needs immediate medical care. This legal prediction underlines a new aspect: the person lacking discernment is a permanent care for a psychiatrist, the only one capable to provide immediate medical care under special treatment.

3. Conclusions

The causes of lack of discernment, as a permanent state, are serious psychical turbulences, others than mental insanity or mental debility, considered by the legal doctrine and practice, until the entry into force of Law no. 487/2002 as being the only grounds for the lack of discernment. The notion of insanity is synonymous with that of mental illness and can cause confusions. Not eny mentally ill person anyhow lacks discernment. Consequently, it can be considered as lacking discernment also the persons that suffer from other grave mental sicknesses that require immediate psychiatric care.

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BLACKMAIL OFFENCE PROVIDED BY ART. 13¹ OF LAW NO. 78/2000 FOR PREVENTION, DISCOVERY AND SANCTION OF BANKRUPTCY FACTS

Abstact

It is considered as a bankruptcy offence – certainly an assimilated one – the blackmail fact, having the contents of art. 194 Penal code, when it is committed by one of the persons provided in art. 1 of Law no. 78/2000 for the prevention, discovery and sanction of bankruptcy facts, namely:

a) who exercises a public position, irrespective by the way it was invested, within the public authorities or public institutions;

b) who accomplishes, permanently or temporary, according to law, a position or charge, as it participates to the taking up of decisions or may influence them, within the public services, autonomous controls, trading companies, national companies, national companies, cooperation units or of other economical agents;

c) who exercises control attributions, according to law;

d) who grants assistance specialized for the units provided at letters a) and b), as it participates to the taking up of decisions or may influence them;

e) who, irrespective by its quality, perform, control or grant specialized assistance, as it participates to the taking up of decisions or may influence them, with respect to: operations that train the capital circulation, bank operations, currency exchange or credit operations, placement operations, at burses, securities, in mutual placement or regarding the banking accounts and those assimilated to them, internal and international trading transactions;

f) who holds a managing position in a party or in a politic formation, in a trade union, in a patron organization or in an association without a working purpose or a foundation;

g) other natural persons than those provided at letters a)-f), under the circumstances provided by law.

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1. Notion and definition. According to art. 13^1 of Law no. 78/2000 for the prevention, discovery and sanction of bankruptcy facts, the infraction consists in the blackmail fact, provided in art. 194 Penal code, where it is implied a person of those provided in art. 1 of Law no. 78/2000, namely:

a) who exercises a public position, irrespective by the way it was invested, within the public authorities or public institutions;

b) who accomplishes, permanently or temporary, according to law, a position or charge, as it participates to the taking up of decisions or may influence them, within the public services, autonomous controls, trading companies, national companies, national companies, cooperation units or of other economical agents;

c) who exercises control attributions, according to law;

d) who grants assistance specialized for the units provided at letters a) and b), as it participates to the taking up of decisions or may influence them;

e) who, irrespective by its quality, perform, control or grant specialized assistance, as it participates to the taking up of decisions or may influence them, with respect to: operations that train the capital circulation, bank operations, currency exchange or credit operations, placement operations, at burses, securities, in mutual placement or regarding the banking accounts and those assimilated to them, internal and international trading transactions;

f) who holds a managing position in a party or in a politic formation, in a trade union, in a patron organization or in an association without a working purpose or a foundation;

g) other natural persons than those provided at letters a)-f), under the circumstances provided by law.

According to art. 194 alignment (1) Penal code, the blackmail offence consists in the constraint of a person, by violence or threatening, to give, to make or not to make or suffer anything, if the fact is committed to unjustly acquire a benefit, for himself or for the other, and according to alignment (2) of the same article, the constraint can be also exercised by the threatening of devolving a real or imaginary fact, compromising for the threatened person, for her husband or a close relative.

For the comprehension of the close relative meaning, we refer to the clauses of art. 149 Penal code, which, in the alignment (1) shows that "the close relatives are and ascendants or descendants, brothers and sisters,

children of them, as well as the persons became by adoption, according to law, such relatives".

In the alignment (2) of art. 149 Penal code, it is added that: "The provisions of penal law regarding close relatives, within the limits provided by the previous alignment, it is applied in case of adoption with full effects, to the adopted person, and, as well to his descendants and reported to the normal relatives; and in case of adoption with restrained effects, to the adopted person and his descendants, and reported to the relatives of the adopter".

The Romanian legislator considered that when the blackmail was committed by one of the persons mentioned in art. 1 of Law no. 78/2000 is more severe and implies a means of bankruptcy, a reason for which it included in the category of offences assimilated to the bankruptcy offences.

The offence provided in art. 13^1 of Law no. 78/2000 is and remains a blackmail, a fact in which it is implied one of the persons mentioned in art. 1 of the same normative act.

2. Special legal object. The blackmail offence has as main legal object the social relations regarding the moral freedom of persons, and as secondary legal object, either the social relations regarding the patrimony, if it is pursued a material benefit, or the social relations, regarding another interest of the victim, if the benefit pursued is not of material nature.

3. Material object. In principal, blackmail offence does not have a material object, as it is defended in principle by a personal right – psychic (moral) freedom of a persoan[1]. However, if the person's constraint is made through physical violence, the offence has also a material object –but secondary –, consisting in the victim's body. Also, in the case in which the patrimony of the person injured is affected, by ceasing a good, through its destruction etc., the respective good represents the material object of the offence[2].

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2. In this sense, to be seen, Gh. Diaconescu, *Infracţiunile în Codul penal român,* vol. I, Oscar Print Publishing House, 1997, p.262.

4. Active subject is qualified. Therefore, the offence can be executed by a person within the one provided at art. 1 of Law no. 78/2000. Letter g) a art. 1 of Law no. 78/2000 considers other physical persons than the one provided at letters a) - f), but in the conditions provided by law. So, it can not be interpreted that the active subject would not be circumstantial, but just that it may also be a physical person, but only when the law expressly provides this (for example, an officer). In change, it is being understood that the offence can not be executed by a legal person.

Penal participation is possible under all forms. It is not necessary that your participants have one of the qualities shown on art. 1 of Law no. 78/2000, although this is not excluded. As long as in art. 13^1 from Law no. 78/2000 it is being used the expression, in which it is implied" a person from the one provided in art. 1 of the same normative act, the incrimination norm considers not only the active not interfered subject (author), but also the instigator or accomplice. Insomuch, if one of the persons shown in art. 1 from Law no. 78/2000 instigates or helps another person, who is not in neither of the situations mentioned in this article, in her charge it will be retained the instigation or complicity for the offence provided on art. 13^1 from Law no. 78/2000, and in the author's charge, there will be retained only the offence provided on art. 194 from the Penal Code. There will be also retained the same framing, but, when the instigator or the accomplice is not in neither of the situations provided at art. 1 from Law no. 78/2000, and the author is. Although, it might be sustained that, whether the situation he might be, the participants will be sanctioned in the same way, according to the legal settlement, the solution can not be other; these situations will be considered, however, at the punishment's individualisation.

5. Passive subject is not circumstantial of penal law; therefore anyone may become a passive subject of the offence. Although, the legislator used, within the content of the incriminating norm, the expression, in which it is implied" a person from the one provided on art. 1 from Law no. 78/2000, we believe that it only considered the active subject of the offence and not the passive one.

It must be shown that the plurality of victims trains a plurality of offences, even when it is performed only one blackmail action[1].

6. Objective side. *Material element*. Blackmail offence presumes, first of all, according to art. 194 line (1) Penal Code, a constraint action, meaning an action through which a person is imposed to do or not to do something against its own will. This constraint must produce fear to the victim. The constraint must be exercised through violence, according to art.180 Penal Code or threat, according to art.193 Penal Code. Both violence acts provided in art.180 Penal Code, and threat actions are absorbed in the blackmail offence[2]. If, through the use of violence, it is producing an injury or a serious injury, there is an offence contest between the offence blackmail and the one provided on art.181Penal Code or on art.182 Penal Code.

Secondly, constraint, performed through violence or threat, must have as an object, the determination of the person to give, do, not to do or suffer from something. To give something means to perform a commitment act (to give a good, an amount of money etc.). to do something means to action in a certain way (to perform an act, to make a denounce etc.), and not to do something means to refrain from an action (to make a denounce, not to give a declaration etc.). By suffering of something means to bear a moral or material prejudice (to bear a humiliation action, to accept the destroying of a good etc.)[3]. It is not necessary to satisfy the claims of a perpetrator. If the constraint one satisfies the perpetrator's claims, difficulties may occur in what regards the delimitation of blackmail from robbery. The delimitation criteria of the two infractions is made by their own different essence, blackmail being an offence against moral freedom, and rubbery, and offence against own patrimony. Thus, if the constraint one immediately satisfies the

1. V. Cioclei, *Drept penal. Partea specială. Infracţiuni contra persoanei*, Universul Juridic Pulishing House, Bucharest, 2007, p.174. Usually, in the case of offences against person, if the same action or inaction is forwarded against some other persons, a plurality of offences are retained, except the cases in which law creates a duly offence able unit (for example, murder executed against two or many persons etc.)
2. In this sense, Timişoara Appellate Court, penal decision no. 21/2001, LEX EXPERT (blackmail offence is complex, containing as a constitutive element also threat offence. It will be performed anytime threat constitutes a middle offence, performed in the purpose of rightfully obtaining a benefit).
3. O. Loghin, A. Filipaş, *Drept penal român. Partea specială*, ,,Şansa"S.R.L. Publishing and Press House, Bucharest, 1992, p.66.

perpetrator's request, and this request refers to the commitment of a good, the act is interpreted as a rubbery and not blackmail, because, mainly, it is infringed the person's property and not its moral freedom. In order to infringe the moral freedom, it is necessary that the constraint has produced a fear state which lasts for a certain period of time, on the other hand, that the satisfaction of perpetrator's request to be distanced in time from the constraint act[1]. Blackmail offence exists in the hypothesis in which the

1. Ibidem, p.66-67. In the same sense, the Supreme Court of Justice, penal section, decision no.4266/1999, Penal Law Magazine no. 4/2001, p.157 (although between blackmail offence and rubbery offence there are similarities, both having as a special judicial object, the relationships regarding person's freedom and regarding it patrimony, they being differentiated, in the case of blackmail are infringed, mainly, social relationships regarding the freedom of the person, when in case of rubbery there are infringed, mainly, social relationships regarding its patrimony. In the case of blackmail, the offender uses violence or thread in order to further obtain an amount of money or other values, time in which rubbery offence is usually characterized, by the simultaneity of violence or threads with the victim's act of giving, as in species, its good. Out of the respective administrated proves, resulted that the accused accosted victims asking them money and that, if they refused, he immobilized them and hit them, after which the injured parts either gave money for fear, either were disposed of by force the money. As a consequence, by thread, hitting activities and putting the injured parties in the impossibilities of defending themselves, acting towards them with the intention of disposing them of money, the accused committed the rubbery offence for which, rightfully, has been convicted) ; Bucharest Appellate Court, IInd penal section, decision no.903/1997, Penal law magazine nr.4/1998, p.159 (the accused fact which, through violence and threads, has forced a bartender to serve alcoholic drinks, whose cost refused to pay, is a rubbery offence –even if it may be consider an atypical form of offence–, and not a blackmail) ; Bucharest Appellate Court, II-nd penal section, decision no.440/2000, in T. Toader, A. Stoica, N. Cristuş, *Codul penal şi legile speciale : doctrină, jurisprudenţă, decizii ale Curţii Constituţionale, hotărâri C.E.D.O.*, Hamangiu Publishing House, Bucharest, 2007, p.303 ; Craiova Appellate Court, penal decision no.577/2001, in T. Toader and its collaborators, *Codul penal şi legile speciale : doctrină, jurisprudenţă, decizii ale Curţii Constituţionale, hotărâri C.E.D.O.*, quoted text, p.303 (the accused act which, under the thread of knife, obtained from the injured party 3 packs of cigarettes, constitutes a rubbery offence, and not the blackmail one) ; the Supreme Court of Justice, penal section, decision no.1979/1998, LEX EXPERT (it is being noted that in the case of blackmail, according to the law text requirements to which it has made referring to, the injured party acts personally, subject to the constraint executed against him as an

victim, being constrained through threats with mutilations in order to give an amount of money, denounces the act of judicial bodies, and they organize a flagrant, during which the perpetrator is surprised in the moment in which he enters in the possession of the claimed amount of money[2].

According to art.194 align.(2) Penal Code, constraint can also be exercises through revealing a real or imaginary act, compromising for the throated person, for its husband or a closer relative. Constraint is made, in this case, only by threat, and the object of threat is to reveal an act. It does not matter whether this act is real or imaginary. However it must be compromising for the throated person, for its husband or for a closer relative. The offence is more serious because the intimidating force of the constraint is bigger, knowing the fact that is very hard, even impossible, to remove the consequences of a public compromising, whether its source is real or imaginary[3].

It does not matter if husbands are practically separated, if they are in the middle of a divorce or not. It also does not mater the real relationships between the closer relatives. Offence is retained even if the relationship between husbands or between close relatives is not good.

The quality of husband or close relative must exist in the moment of committing the blackmail offence. If the husband quality has ended as a consequence of divorce, the offence will not retain. Also, in the case in which marriage has been cancelled or if husbands were united through a marriage declared void due to bigamy. As for the close relatives, it does not matter the kinship level in ascendant or descendant order. It does not matter the case of an bilberry in straight line, nor the case in which persons – to which the perpetrator's threat refers to – finds together with the blackmail offence victim in natural obligations.

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accused, time in which, in case of rubbery, the accused action of entirely withdraw, which dispossess of goods without its consent. Thus, the accused act of taking the money and watch of the victim, by constraining it with threads, represents a rubbery offence, for which it has been convicted, and the blackmail offence in which it has been asked for the change of the judicial framing).

2. Bucharest Appellate Court, IInd penal section, decision no.644/2004, quoted by V. Cioclei, text quoted, p.174-175.

3. O. Loghin, A. Filipaş, quoted text, p.67.

Immediate following consists in creating a fear estate. Immediate following is produced independently of the satisfying of the accused requests[1].

Causality joint results from the materiality of the act (*ex re*).

7. Subjective side. Blackmail is deliberately performed. Subjective side of the infraction includes also the scope of rightfully accomplishing a personal benefit or for another person. Benefit can be of any nature and can also be pursued by the accused from anyone. Law provides that obtaining the benefit to be unrightfully pursued. As a consequence, even if the benefit is rightfully, the act represents a blackmail, as it has been unrightfully pursued its performing[2]. In the doctrine it has been expressed also the opinion that the benefit must be unrightfully. It will be considered an unrightfully benefit, any benefit not owed by the victim either in what regards the quantum (it has been obtained more than the victim owed or from a person who did not owe anything), or in what regards the term (it has been obtained before the falling due), or related to form (it has been obtained without the fulfilment of all necessary forms). If it is established that the victim effectively owed benefit grabbed by the author through constraining, the condition requested by law is not verified – the existence of an unrightfully benefit for the author– and as such, the blackmail offence will not exist, but we might be in the presence of the thread or hitting offence[3]. The first opinion is the correct one and the accused formulation

1. V. Dongoroz and its collabotaros, quoted text, p.309.
2. O. Loghin, A. Filipaş, quoted text, p.71. In the same sense, Bucharest Appellate Court, penal section I, decision no.1353/2002.
3. T. Vasiliu, D.Pavel, G.Antoniu, D.Lucinescu, V.Papadopol, V. Rămureanu, *Codul penal comentat şi adnotat. Partea specială*, volume I, Scientific and Encyclopaedic Publishing House, Bucharest, 1975, p.194. In the same sense, Cluj Appellate Court, penal decision no.18/2002, in T. Toader and its collaboratos, *Codul penal şi legile speciale : doctrină, jurisprudenţă, decizii ale Curţii Constituţionale, hotărâri C.E.D.O.*, quoted text, p.302 (the constraining action performed by the accused resulted in a fear estate of civil parts, meaning a limitation of their physical freedom of acting according to their own will, and between the accused action and the result obtained, there was a causality connection. The subjective side of the blackmail offence is performed, the accused acted with the belief that through its deed, there will be an indirect constraint against civil parts in order to determine them to offer the amounts of money asked for and pursued the performing of this result, in

provides no doubt for this. To sustain the contrary opinion means to indirectly admit each one's freedom of making justice, of valuing a right through the use of violence, constraint[4]. Benefit can be pursued by the accused for itself or for another person.

8. Offence forms. The attempt is punished (art. 15 from Law no. 78/2000). The offence is wasted in the moment in which the constraint action is performed, producing a fear estate of the constraint person.

9. Sanction. The offence is punished with prison from 7 to 12 years.

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order to obtain an unrightfully material benefit for itself, this not being owed to victims).
4. V. Cioclei, quoted text, p.175.

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SANCTIONED REGIME OF MINOR OFFENDERS. EDUCATIONAL MEASURES

Abstract

Compared with children who are responsible can be criminal, according to the criminal law, some of the educational expressly provided for in the Criminal Code or a penalty within the limits set by law. In selecting the penalty will take into account the degree of social danger of the crime committed, the physical, the intellectual and moral development of his behavior, the conditions under which they grew up and lived and any other features likely to characterize person child.

In the article there are presented some aspects of the application by the competent educational measures against juvenile offenders guilty of committing offenses.

In criminal law the word "minor" is used in the sense that it is awarded and the civil law as such "minor" in terms of criminal law, and of the civilian is a person below the age of 18 years, This results not only implicitly art.99 of the Criminal Code, which provides another older age for criminal but also the other texts, such as art.106 al.1 that the measures set out in art education. 104 and 105 can not last only until the age of 18 years, and this provision related to the. 3 of the same article, that, at the time when the child "become major" the court may extend the duration of internship no more than 2 years.

Regarding the age of 18 years, when the minor becomes major, and find art.110 / 1 which relates to the suspension of punishment under the supervision or control, and art. 60 al. 2 Criminal Code, which refers to the liberation of the subject condemned during the minority when I get to the age of 16 years.

Even if the woman who gets married before the age of 18 years acquire full capability to exercise his rights, being treated as in the civil majority, in terms of criminal law it is still considered a minor until the age , the age at which it is considered that complete growing bio-psycho-physical a person.[1]

With regard to the age of majority expressed the view that this involvement should be considered after the expiry day corresponding to that in which the person concerned was born [2].

In this case the defendant was born on 17 November 1955 and committed the crime on 17 November 1973, around 23.00 hours, the court considering that he was still a minor, since it expired that day, becoming the only major the first hour of the day 18 November 1975.

This solution has been criticized since then (see note which accompanies), considering it in our view correctly, that the defendant became major after expiry of the last days of the past 18 years from the date of birth, on 16 November 1973 at 24.00, opinion accordance with the provisions of article 8. 2 of Decree 1954 of nr.31 A on individuals and legal persons and art.154 of the Criminal Code relating to the calculation of time [3].

The same solution should be found when considering the time of fulfillment age 14 years, from which the criminal liability of minors and the 16 years, which is assumption that minor criminal liability.

The limits of criminal liability of minors, from the stages through which the child normally after birth until maturation to bio-psycho-physical, are covered by art.99 Criminal Code, under which "the child below the age of 14 years does not respond Criminal child who is aged 14 years and 16 years only if criminal liability is proven to have committed the deed with discernment ; child who has reached the age of criminal responsibility 16 years.

The first stage of the minority-that the child has not reached the age of 14 years is characterized by absolute lack of criminal responsibility of it, he is presumed in all cases that it has the ability to understand the significance of social facts, or his manifest to the conscious will, with a presumption of absolute ("juris et de jure"), so not allowed to be probation contrary.

A second phase, between 14 -16 years, is characterized by relative lack of criminal responsibility of minors, and now works in principle, the presumption that it has no ability to understand the nature of antisocial criminal, and to manifest the conscious wish only that this time the presumption is a relative (" juris tentum "), can be shattered almost immediately upon evidence of the prosecution the burden resting, which usually use the sample management with medical expertise legal psychiatric although can be given any evidence to prove the existence or Discernment-existence.

The third phase, between 16-18 years are characterized by existing tempt criminal liability. The minor is presumed in all cases that can

understand the social facts of his and to tend will be aware, with a presumption therefore not be completely removed by proof that the child would be deprived of discretion (this does not mean, however, that the child will not be able to prove-as-anything major that has committed the act without fault or that there are other causes that removes the criminal of the crime).

If the minor has committed during the criminal can not answer (so until 14 years or 14 -16 years if not proved the existence of Discernment), part of the successive acts of a criminal offense or continue or continued a crime usually, which repeats the period in which he became liable under the law, he could be held criminally liable not committed in May to work in the latter period.

If, while no criminal responsibility, the child has committed an act provided for criminal law to pursue progressive during the period in which he became liable, he will not be held liable penal.

Also, if a party acts of copyright of a crime were committed to continue during the minority (obviously discerning) and the remaining acts after coming to the offender age, it is the criminal liability as a major in. for continued-fraction as a whole same resolution and the retrieval in case of crimes or continue obicei.[4]

Referring us to the regime sanctioned implementation minor offenders, show that, according to art. 100 Criminal Code, against which criminal child can take a step or learning can be applied to a penalty at the penalty will take into account the degree of social danger of the crime committed, the physical, the intellectual and moral development of his behavior, the conditions in which they lived and any other items likely to characterize the child.

Educational measures are of priority, as according to art. 100. 2 Criminal Code, the penalties apply only if it considers that the learning is not sufficient for referral child.

According to art. 101 Criminal Code, which educational measures may be taken against the minor are:

a) reprimand;
b) freedom of supervised
c) internment in a reeducation center
d) internment in a medical-educational institute.

The order of the education is not going-manner, but the scale is a measure increasingly harsh in content nut corresponding degree of social danger of crime and specifically the degree of corruption of minor, if such a reprimand simple reprimand a child, and internment in a center of re-education also includes a minor restriction of freedom. For choosing the most appropriate action case under consideration, should take account of criticisms provided in the. 1 of art. 100, mention above.

Not consider it necessary to reproduce the contents of each of the four measures education, referring to the provisions covered in art. 102-105 Criminal Code, but mention that the specific penalties as children means that they can not only be taken against perpetrators which have remained minor and the date of delivery to measure education, too, once taken, they can not take - in principle -only until age child and the only exception (n a case of internship) the measure may be extended after age.

May point out, also that when a child do it more crimes before being tried for any of them, competent to judge - if it considers that for each one taken in isolation is necessary to measure learning - be applied to what, given the incompatibility of simultaneous application of two or more special measures, the most severe on the scale as-educated, of course that, if it considers that for each offense up to par should be equally educational It is applied once, as a nonsense simultaneous application of several measures with same [5].

Can complicate the situation, but when the minor has committed more crimes competitors who are tried separately or by different courts and they have taken steps towards this educational identity same or different nature.

In the first case, when for example, it was far internship in a reeducation through several outstanding judgments-defined as the courts were being asked to re-education center, or defendant minor requests of their merger, and the courts, although it had no legal basis, have accepted the requests and willing merger measures into one, negating the forms of execution and to dispose issuance of a single form.

Do not think this is correct, in the absence of legal provisions which allow this (art.34 Criminal Code and respective art. 449 proc code. Pen. relates only to punishment) and on the other hand, neither believe that would be required whereas, however, not least our problem enforcement and separate in time of each educational measures ordered by different judgments.

More over, in art. Code 490 proc. pen. provides that the enforcement of the measure internship child is by sending a copies of the decision by the police to take in-ternary its teaching center reeducation copy decision, the latter communicating court making internship.

If it is subsequently sent to other judgments and internment, the police or reeducation center will notify the court that the child is already on another decision. On the other hand, in these cases not be issued mandates exe -so to feel the need and the cancellation of one single issue.

In case of further education measures by different decision different final remaining, it is obvious that, given the incompatibility of them (for example, is incompatible with the freedom supervised the internship reeducation in the center) they can not be executed simultaneously and no turns, normally to succeed to be enforced only so far the most difficult.

The law does not provide but how we should proceed in this case, so basically it follows the rules specific merger of penalize , although it can not be measures fusion between a obvious incompatibility.

In connection with the education in literature and legal practice were raised many issues of interest to gem to refer to the most frequently encountered.

Thus, in connection with the extent of educational admonition , located on the first rung on the educational ladder was raised whether it can be applied in the situation when the defendant became major on taking them.

Starting from the definition of the measure, contained in art. 102 Criminal Code, which consists of "rebuke of minor " and characterization of the general educational measures as sanctions specific children were rightly reprimand that will be taken if the offender became major [6] time, advantageous take into account that according to art. 487 Cod Penal Procedure.

Performance admonition is immediately on hearing the decision was taken in the presence of the minor, or by setting a deadline for when bringing dispose child, quotation and the parents.

However, by decision of 13 guidance 1 February 1971 a former Supreme Tribunal [7], decided that "measure educative of admonition to be applied minor offender who exceeded the age of 18 years on judgment" .

Although capable of serious criticism in this decision of guidance , retains the guidance and required for instance.

As for the freedom of supervised learning, since, according to art. 103 Criminal Code, it lies in leaving the child free for a period of 1 year, under special supervision, and term runs from the date of its execution (which is made by the court when making them, when the minor is present or at a later time when you have to bring it) can conclude, logically, that it may be taken only from the minor below the age of 17 years on date of delivery so that the decisions which it took me far beyond the child after the age of 17 years should be considered illegitimate [8].

According to art. 103 al. 6 Criminal Code, if during the term of one year the child is exempt from supervision that is exercised on his or bad behavior, or commits an act required by the penal law , the court revoked supervised freedom and the minor measures of internship in a reeducation center, and according to art. 489 Code procedure penal court is the one who pronounced the measure .

When the act provided for criminal law, committed by a minor during supervised freedom, the offense, the court can take far internship or apply a penalty in this case competence Square court being called upon to judge the offense (art. 492 Code penal. proc.).

In legal literature and practice were made different away views and have adopted different solutions to the situation during the period of 1 year the child has committed a contravention [9].

We share the view expressed in that, after revocation of supervised freedom, the court will not apply accused me nor a punishment for the offense that resulted in making educational measure, which then merge to the punishment imposed for the new offense, but you will need to apply one penalty for no-fail offense committed, the individual to be re-seen in the fact that the defendant ignored the confidence that enjoy before, when he took the measure of freedom supervised.

In connection with internment in a reeducation center, re - memory bad that it takes time but can not take in the main-principle -only until the age of 18 years in this connection is considered unlawful decision by the decision internment during the 2 years that expire before the expiration of 18 years (will be given, for example, nr.59/1996 a decision of the Supreme Court, penal section) [10].

To corroborate the art. 106 Criminal Code, that the extent of educational internship will be given unlimited time and that can only last until the age of 18 years, with the art. 107 Criminal Code, under which, if passed at least 1 year from the date of the child and gave evidence of

thorough referral may have his liberation before becoming major may conclude that such a measure educational freedom monitored and internment in a reeducation center can not be ordered unless the minor has not reached the age of 17 years, providing that the legislature itself, in order to take into question possible liberation before becoming major, the minor must be at least 1 state year reeducation center.

However, by deciding nr.1/1971 guidance of former Supreme Court, cited above, it was decided that the measure of internal-reeducation in the center can be taken against the minor who has reached 17 years, solution for considerations above, it seems controversial [11] .

However, this does not mean that internship measure could be taken against a child who is approaching 18 years of age, being non-legal solution given by the court Brăila that had this measure against a minor who at the time of delivery sentence have only 5 days until the age of 18 years, becoming major remaining until the final decision [12].

According art.106 Al. 2 Criminal Code at the time when the minor becomes major, the court (which was first tried in court on minor under art.491 Code proc. Criminal) internship may extend for a period not exceeding 2 years, if it is necessary for the purpose internship .

In this respect, was criticized a solution to long-Court Câmpulung Moldovenesc that dispose internal extension measure minor on the maximum duration of 2 years, that does not justify in relation to the date of completion of the course for qualification in being a hairdresser [13].

Basically, those measures must be always ready for a determined period of time, so as to appreciate that it is necessary for completing and completing re-education , without being able to overcome the over 2 years increased.

Finally, internment in a medical-educational institute can be taken, according to art. 105 Criminal Code against the child who, because of his mental state or physical needs medical treatment and for special education.

And it takes time but can not last only until the age of 18 years, with the difference that it should get your once disappeared due to the required adoption thereof. With the lifting of the measure (the one who first tried in court on minor) may, if necessary, to take over minor extent internship in a reeducation center.

In connection with this mention that it may be the only instance where an expert medical specialist and confirm the necessity of subjecting

the child medical treatment and a special education being understood that the measure may be taken only criminal liability if the minor.

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6. see example. Th. Vasiliu, etc. "**Penal Code annotated and commented, the general**", Scientific Ed Bucharest 1972, pag.537.

7. Review of the Romanian Law no. 4 / 1971, pag.85.

8. See in this regard the decision cited guidance, the decision no. 1369/1999 of the Supreme Court of Justice, Criminal Section, in the "**Right**" nr.7/2001, pag.165 etc..

9. See, example., Lupaşcu Radu, "**Revocation of supervised freedom measure** taken against the minor in nr.3/1999 right, pag.146-149 and Dumitru Ghe. " The revocation of supervised freedom where the term 1 year minor commits a contravention . Controversy practice outlined in the "**Right**" nr.11/1999, pag.145-148.

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CONTRACT OF EXCLUSIVE CONCESSION

Abstract

The contract of exclusive distribution is the one by which the holder of a mark or the conceder sets himself under the obligation that he should not practice goods selling within a certain territory but to the co-contractor or someone else the concessionaire sets under the obligation of delivering the goods that are the object of concessionary contract, on the grounds of the policy of the conceder.

The exclusive character is the most important feature of the contract, exclusivity being sometimes of a double nature: on the one hand, the distributor sets himself under the obligation of not trading goods provided by another supplier, in his turn, agrees not to sell the products to another competitor distributor.

1. Definition and judicial characters

Also called, in the French theory and legislation[1] "contract of selling concession", the contract of exclusive distribution is the one by which the holder of a mark or the conceder has been set under the obligation of not trading his goods, as far as a certain territory or area of distribution is concerned with another co-contractor rather than the one assigned under agreement or with somebody, the concessionaire has set under certain deliverance requirements as the object of the concessionary contract, respecting the conceder's commercial policy.

The contract of exclusive distribution is characterized by the fact that the parties introduce a clause of exclusivity. By the clause of exclusivity, the distributor should obey the imposition of lawful restrictions and not sign contracts with other suppliers; likewise, the supplier is obliged not to involve other distributor contract parties.

The exclusivity can refer to the supplying or the selling and can be either unilateral or reciprocal. These clauses lead in all cases to a limitation of the co-contractor. On the one hand, they strengthen the commercial relations between parties and, on the other hand, the parties cannot get into contractual relations with third parties. For this reason, the clauses of

[1] R. Bout, C. Prieto, G. Cas, Lamy, Droit economique, 1998

exclusivity need to be viewed also from the point of the regulations of the competition.

Taking into consideration the nature of the clause of exclusivity, the distinction should be made among:

- The strengthened exclusivity/ the absolute territorial exclusivity, which gives the holder a monopoly of selling over a given geographical framework.
- The simple/ weakened exclusivity, featured by the fact that there is no exclusivity of selling for certain geographical areas, but only the exclusivity of prospecting for the given area.
- Exclusivity of trademark, by which the distributors is awarded the exclusive right to trade products under the respective trademark in a certain area.

The community right[21] admits the agreements of exclusive distribution, giving them group exceptions from the application of norms establishing anticompetitive practices, when only two companies are involved, of which one is obliged not to deliver certain products but to the other one for the whole or only a part of the common market, to deliver certain products for reselling.

The restriction of the number of companies refers only to the agreement under discussion and does not prevent another such agreement to be concluded simultaneously with other resellers and distribution networks to be built.

The concession is used for consumer goods, such as beer, refreshments, oil products, cars, machines, equipment for agriculture etc. It allows the producer to trade efficiently their products and to supervise their distribution throughout the network, assuring the development of sales, the principle of reasonableness of the trade and warranting the quality of the product. The concessionaires themselves benefit from the trademark and the advantages granted by the conceder.

The features of the contract

In the contract of concession, a producer or a supplier grants a trader the right to trade products in their name and at their risk, thus it is similar to the contract of selling-buying, as the supplier is obliged to deliver

[1] CEE Regulation no. 1983/83 art. 1

the respective goods to the distributor, in a regular manner. The contract distinguishes from the selling operation as its object, assuring, on the part of the concessionaire, the exclusivity of the product distribution to the suppliers, in a given geographical area and a certain time period, moreover, being dissimilar from the contract of successive selling operation as well.

Similarly, the contract of exclusive distribution is not to be mistaken for the mandate, as the distributor act for themselves and at their risk.

The contract of exclusive distribution has the following judicial features:

- It is a complex reciprocal contract, implying an exchange and service assembly between the parties.
- It is a contract of supplying services.
- It is a frame-contract, allowing the subsequent concluding of individual contracts of application, giving the general conditions for the latter.
- It is a contract defined by exclusivity, which can be either simple, that is only for providing, or mutual, that is for providing and supplying.
- It is a consensual contract, which is concluded validly the moment an agreement of will is expressed, but in practice the written form is used.

The exclusive character is the most important feature of the contract. The exclusivity is sometimes double: on the one hand, the distributor is obliged not to get provisioned by another supply authority, and the supplier is obliged at the same time not to sell the products to competitor distributor. The distributor benefits thus from a monopoly of selling in the area provided in the contract, leading to the markets being closed, which is contrary to the competition right.

In other contracts, the clause of exclusivity is limited to the provisioning segment. This is the case of the contracts regarding oil products and some beverages. These contracts raise certain problems related to the establishing of prices, but also, from the point of view of the competition right, against the rejection of selling and the territorial protection.

The exclusivity of supplying in a contract of exclusive distribution allows the supplier to reject the concluding of other contracts with traders

outside the distribution network. The French judicial system[1] agrees that the refusal is justified from the point of view of the competition right, as long as the contract contributes to the amelioration of the consumers' condition.

2. Specific obligation of parties

The contract of exclusive distribution/ of concession creates many obligations for the parties, deriving from the selling, the will agreement bases, as well as from the cooperation agreed upon by the parties and from the clause of exclusivity.

Obligations of the supplier/ conceder

- The conceder must supply the products in the manner agreed upon. In case they do not carry out this obligation accordingly, the concessionaire/ distributor can claim indemnifications, but they can also request support for the forced execution. If the products offered are not competitive, the responsibility of the supplier is not questioned, as each of the parties takes the commercial risks upon their shoulders.
- The conceder must respect the exclusivity areas established. He cannot sell, directly or indirectly, to another person or grant the distribution right in that area and he conveys, to the distributors, all the orders he gets for the respective area, so that the latter can negotiate directly with the persons who are interested. This is the case of the obligation of non-competition, which the conceder has to the distributor. In other words, this is the only obligation that can be imposed on the supplier from the point of view of the competition right, according to the CEE Regulation 1983/83.
- The conceder bears the responsibility of to assisting the distributor. This assistance represents the essence of the contract and may consist of technical, commercial or financial assistance criteria.
- The distributor is granted the free and secure use of the product's trademark by the conceder who is responsible for the process being carried out. This is not the case of a trademark license, as the

[1] R. Bout, C. Prieto, G. Cas, Lamy, Droit economique, 1998

distributor cannot apply the mark on the products; it is a simple transmission of usage.

Obligations of distributor/concessionaire

- The distributor is under more and tougher contract obligations than the conceder does. These give him a certain safety, but at the same time they put him in a position of economic dependence. Not carrying out the obligations he took upon himself leads to either action of cancelling or to action in contractual responsibility.
- The distributor must acquire the products of the supplier, applying the cause of quota share. This clause, which stimulates the competition, implies as a rule the obligation to acquire a pre-established quantity of products, but can also be analysed for the benefit of the distributor, as an obligation of means, being a goal the latter has in view. Often, the contract establishes the obligation of the distributor to have stocks and to maintain them, in order to respond to the needs of the clients. He has to acquire the products at the price agreed upon and to resell them as the supplier indicates.
- The distributor must take all the necessary measures in order to keep the unity of the network and to defend the image of the conceded trademark. He is obliged to respect the law for the commercial policy of the supplier, the sale methods of the latter and to arrange the selling spaces so that the clients should be able to identify the participants in the network, and the personnel must be qualified and trained to give appropriate post-sale services. He cannot disclose the economic, technical or financial information which can favour the competition. For this, the contracts contain penalty clauses or severe commissioning pacts.
- The distributor must respect the sale practices carried in a given area. He is under the obligation of not acting outside this territory, practicing an active policy outside the exclusivity area, which implies a number of problems from the point of view of the competition right.
- The distributor has, therefore, the obligation of non-competition and of loyalty to the supplier. The French juridical system[1] admitted that, in such cases, the supplier can invoke the exception of non-execution of the contract, refusing to deliver the quantities of products agreed upon by the parties and initiating the procedure of direct sale. The

[1] R. Bout, C. Prieto, G. Cas, Lamy, Droit economique, 1998

distributor must respect the clauses of the contract by which he is forbidden to sell directly or indirectly the product or to favour their sale. If he trespasses the exclusive territory of other distributors in the network willingly, he will be the one liable to penalty in the area.

This solution does not comply with the norms of the competition right, because the distributor is not free to compete with others. This is the meaning of the notion of absolute territorial protection.

The CEE Regulation 1983/83 establishes the restriction framework for the competition that can be imposed upon the exclusive distributor:

- the interdiction of manufacturing or distributing the products in competition with those provided in the contract;
- the obligation, according to the contract, of not buying the products in order to resell them from another one than the one involved in the agreement;
- the interdiction of advertizing the contract products, of setting up any branch or keeping any warehouse for their distribution outside the conceded area.

The agreements of exclusive distribution are not anti-competitive if they contain clauses by which the distributor is set under the obligation of buying a minimum quantity of products or sets of products, to sell the products provided in the contract under the marks or presentation indicated by the supplier, to take measures of promoting the sale (advertising, maintaining a sale network or a stock, assuring the service and warranty for the clients, use of specialized personnel).

The presence of other restrictive obligations of the distributor lead to the loss of the benefit of group exception for the respective agreement, as a whole, the exception not being possible other but on an individual basis, if the advantages given are superior to the disadvantages resulting from the limitation of the free competition.

Taking into consideration the provisions of the CEE Regulation 19/65, the agreements of exclusive distribution are considered anti-competitive practices when:

- the products in the contract are not the subject of the effective competition of identical or similar products, in the conceded area;
- the access of other suppliers in different steps of distribution is substantially restricted;

- the intermediaries and users cannot procure the products from the distributors outside the conceded area, under the conditions these distributors practice regularly on the market;
- the exclusive supplier either exclude, without good reason, the delivery within the conceded area of categories of buyers rather than not being able to honestly trade the products or applies different prices or sale conditions, or even sells for excessive prices the products included under the contract.

3. Cessation of the contract

The duration of the contracts of exclusive distribution is freely established by the parties, taking into consideration the provisions of the competition right, which limits to 5 years the duration of the clauses of exclusivity. According to these provisions, the contracts of exclusive distribution concluded for unlimited duration or for more than 5 years are reduced to such a time period. The contract concluded for limited duration shorter than 5 years ceases on the date agreed upon by the parties.

For the contracts of unlimited duration, any of the parties can cancel unilaterally the contract, without this action being considered abusive, if there are justified reasons and respecting a notification term, either established by the parties, or another justified reason.

A problem related to the ceasing of the contract concerns the product stocks. The question is whether the supplier is obliged to receive the products acquired by the distributors which have not been sold during the contract time period, the moment he gets out of the network. As a rule, the distributor is the owner; the French courts decided, on the other hand, that the ex-distributor who sells the products under the mark of the supplier acts as an un-loyal competitor; the courts cannot oblige the conceder to take over the stocks, as the distributor runs for the commercial risk. As a rule, the parties establish in the contract clauses these situations, either authorizing the distributor to sell these stocks after the cessation of the contract or the supplier taking them over.

Considering the clause of price, there appears the issue of respecting the principles of free competition. This issue appeared in the Volkswagen case:

The Volkswagen car company forbade its German concessionaires to reduce the price of the new Passat model, recommending a unique sale

price. The board considered that this practice infringes upon the principles of free competition provided by the agreement and applied a fine of € 30.96 million to the Volkswagen company.

Volkswagen overturned the decision of the Board in the superior Court, for the reason that the common principles regarding the free competition were not infringed upon, as the limiting of the sale price of the new Passat model was unilateral, the producer and the concessionaire not having an agreement for that sort of thing..

According to TCE art. 1, par. 1, concerning the agreements between companies: "Any agreements between companies, any decision of the groups of companies, as well as any practices between companies, which affect the trade between the member states having as an object or as an effect preventing, limiting or distortion of the competition within the domestic market, especially the direct or indirect statement of price for selling or buying or other conditions of commercial transactions are incompatible with the common market and are therefore forbidden".

TPI cancelled the decision of the Board to apply a fine to the Volkswagen company, saying that it can't be proved that the car producer and its concessionaires from Germany concluded an agreement of will, in order to impose a certain sale price, the agreement being no more than a unilateral act of the Volkswagen company. Thus, the Board couldn't prove the effective acceptance on the part of the concessionaires of the price recommended by the producer.

To state the limitation of the free competence sanctioned by article 81 TCE, it is necessary to prove that there is an agreement between the two companies, that is an agreement of will between the two parties, and not a simple unilateral decision of a company.

The argument of the Board stating that the agreement of will between the producer and the concessionaire, in order to impose a certain sale price results from the contract of concession itself between these parties will be rejected because, by concluding this contract, the concessionaire would accept implicitly the condition that can be imposed afterwards by the conceder, even if these do not conform to the common disposition.

The court considers that the act of signing a contract of concession cannot be taken as a tacit acceptance, in advance, of some further initiatives of the conceder, able to oppose the common principles concerning the free competition within the domestic market.

To apply the protection of article 81, par. 1, TCE, the Board must prove that the concessionaire agrees with the anti-competition initiative of the conceder, in other words, there is an "agreement" between the two parties.

The Romanian legislation contains a similar provision[1]: "It is forbidden to reach any express or tacit agreements between economic agents or association of economic agents, any decisions of association or practices between them, having as an object or effect the limiting, preventing or modification of competition on the Romanian market or on a part of it, especially practices that lead to the direct or indirect statement of prices for selling or buying, for tariffs, discounts, increases, as well as any other unjust commercial conditions; (…)"

[1] Law 21/1996 art. 5 modified by OUG 121/2003

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SETTING UP A GUARANTEE SUFFICIENT TO ENSURE THE PAYMENT OF DEBTS (CUSTOMS) FOR GOODS PLACED UNDER A COMMON TRANSIT PROCEDURE / COMMUNITY

Abstract

The customs duties and other taxes applicable to goods shall be temporarily suspended if the goods are placed under the common transit / community. To ensure the payment of customs duties and other charges resulting from debt incurred (customs) during a transit operation, the principal bound must provide a guarantee.

Keywords: Common Transit / Community, guarantee, principal bound, guarantor.

1. Introduction

A guarantee can be set up in the form of a deposit or a guarantor. The guarantee can be isolated and then is covering a single transit operation, or it could be global - in which case covers several operations[2].

The isolated guarantee furnished by a guarantor may take the form of isolated guarantee vouchers issued by the principal bound. The use of the global security is a simplification measure in relation to the normal rules regarding transit and is therefore subject to authorization.

According to the Article 7 of the Convention, appendix 1in conjunction with Article 95, Article 342 CCC (3) and Article 446 of the Customs Regulation (CCC) as an exceptional measure, is not necessary to set up a guarantee in the following cases:

- the exemption from setting up a guarantee provided by regulations:
  - for certain modes of transport,
  - for public authorities under the Community transit
- exemption from setting up a guarantee granted by authorization
- exemption granted by a by national decision:

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[2] See Article 6 (1) Appendix 1 of the EC-EFTA Convention on a common transit procedure of 20 May 1987, Jol 226, 18.08.1987 as amended (the Convention) and Article 193 the Community Customs Code (CCC).

- if the Contracting Parties agree among themselves on a bilateral or multilateral agreement, to abandon the set up of the guarantee regarding the common transit operations involving only their territories;
- if a contracting party decides to waive the guarantee for the transit operation taking place between the office of departure and the first office of transit;
- if the customs authorities of the State shall not claim a guarantee for a Community transit operation whose total amount due to be guaranteed is below 500 Euros.

2. The need of a guarantee

Setting up a guarantee sufficient to ensure the payment of debts (customs) which are likely to be born - in regarding of goods - is a mandatory condition for the transport of goods under cover common transit / community.

If the amount of the guarantee proves to be insufficient, the office of departure cannot deliver the goods in transit as long as a guarantee is not brought to cover the full amount of debt (customs) which are likely to be born. The office of departure in this condition will not grant the status of free of customs for the goods if the documents presented shows that the guarantee was not set up by the principal bound of the transit operation concerned.

3. The calculation of the guarantee

As a general rule, this calculation is based on the higher fees related to those goods from the country of departure. It is necessary to take account of all customs duties and other taxes, egg.: duty, VAT, generally applicable to the import of these types of goods concerned. Regarding the customs duties, the highest fees are the conventional one. The privileges derived from the presentation of some elements at the time of release for free circulation (movement), such as benefits of preferential tax, or of a contingent, are not considered.

The calculation of the flow is based on the import duties which would have been imposed to the imported goods of the same type from the country of departure, in case of free circulation.

The Goods in free circulation in a contracting party (EU member state) should be treated as goods imported from third countries (non EU member states). The same rule will be applied if community goods are placed under the common transit. They are regarded as non-EU at the time of the calculation in order to guarantee the payment of any of customs debts that would arise in a contracting party other than the Community.

The goods in question are classified under Customs Tariff. If they are not included in Annex I Appendix I of the Convention / Annex 44C RVC and their classification is not possible or appropriate, the amount of guarantee can be estimated. This estimation will take into account the fact that the guarantee shall cover the full amount of debt (customs) likely to be born. In exceptional cases where an estimate is not possible, total guarantee is allegedly set to 7000 Euros.

The main idea of Article 56, paragraph 1 of Appendix I of the Second Convention applies both to global guarantee and to guarantee isolation.

If the goods constitutes a increased risk of fraud, listed in Annex I Appendix I of the Convention (Annex 44c RVC), the calculation is made based on classification of goods.

If when establishing the amount of an isolated guarantee for goods for which a minimum charge is indicated in Annex I Appendix I of the Convention (Annex 44c RVC) and the minimum quantities are exceeded, the result of calculation must will be compared with the minimum amount. If the result exceeds, the total amount of guarantee is based on calculation. If not, the amount of guarantee is based on the minimum amount of the Annex.

Example[1]:

A transport of 3 tons of butter (position HS 0405.10) is placed under transit country X. The customs duties and other taxes applicable to goods in this country normally require a guarantee of 7500 Euros. However, as in column 5 of Annex indicated that the guarantee applicable to the product covered amounts to less than 2600 per ton, the guarantee will be set at 7,800 Euros.

[1] See the Handbook of transit - the document TAXUD/801/2004, with the amendment of 2005.

4. The guarantor

The guarantor can be a third person, or entity, distinct from the principal. The guarantor is established in the contracting party and is where the guarantee is approved by the competent authorities.

Regarding the Community, the guarantor is not necessary to be established in the Member State where the guarantee is lodged or approved by the customs authorities.

When a bond has been approved in another Member State, the proof of the approval must be consistent with the existing provisions of the state guarantee officer.

A guarantor must choose residences in all countries where the guarantee was valid or when the law of a country does not provide this option, it must be to appoint a trustee. Choosing the residence offers to the guarantor a place to operate his activity and to the competent authorities may carry out all formalities and procedures to guarantee, in writing, in the legal form provided.

The trustee is a person or entity designated by the guarantor.

This procedure permits verifying the receipt of written notification and the documents addressed to a guarantor in any country where a customs debt is likely to be incurred in relation to goods placed under transit.

5. The isolated guarantee

A guarantee in form of a deposit in cash may be lodged at the office of departure as provided by the provisions of the country of departure. It is returned when the system is downloaded.

As a general rule, usually the leaving office is responsible for redemption. This office announces the principal bound at the time of the deposit and it will interest about the preferred method of reimbursement. If the principal bound opts for a transfer, the office of departure notes the bank account references and advises him that the transfer costs will be in his charge.

When the guarantee office is not the office of departure, shall retain a copy of the bail. The office of departure must inform the office of guarantee of resubmitting the original to the principal bound.

The guarantee act for the guarantees securities isolated by TC 32, does not contains the maximum amount of obligations.

The office of guarantee shall ensure that the guarantor has sufficient financial resources to pay full customs duty that may arise.

6. The obligations of the principal bound[1]

The principal bound must ensure that the amounts involved do not exceed the reference set. He takes all necessary measures to comply with this requirement and to monitor the reference amount is not exceeded.

The competent authorities specify the control procedures in the authorization. They can examine the proposals made by the principal bound. Control method should enable the principal bound to determine whether the amount committed for transit operation shall not exceed the reference amount.

From this point of view the competent authorities could ask in particular to the principal bound to keep a copy of each transit declaration that submitted it and also the amount plus other charges as calculated and estimated.

In particular, he can calculate the reference amount by deducting from this, the amount committed for each transit operation when placing goods under transit. Then pay again the reference amount when he is informed about the end of the transit operation.

The principal bound can stipulate that the transit operation has ended after the goods must be presented to the office of destination.

When the principal bound finds that the reference amount can be overcome he must take appropriate action in relation to authority and if necessary, to make predictions in order to prevent possible following transit operations.

If the principal bound does not inform the office of guarantee about the exceed reference amount, his authorization can be revoked.

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[1] For details see art. 56 (1) (4) Appendix I of the Convention, Art. 379 (1) (4) CVR, Art. 53 (2) Appendix I of the Convention, Art. 376 (2) CVR.

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MORAL AND LEGAL RESPONSIBILITY

I call free a thing that exists and works only in the necessity of its nature, and a constrained one the one which is made to exist and work by another in a certain determined manner.

Spinoza – *Letter no. 58 to G. H. Schuller*

In the course of time, the deterministic doctrine has known several variants, more or less rigid forms. Absolute determinism, according to which the human being does not have the freedom to choose and at any moment acts by some immutable laws which he cannot oppose, was promoted by famous thinkers, among whom Arthur Schopenhauer, Sigmund Freud, etc.

Any human, being what he is and placed in the given circumstances at a given moment, circumstances which are themselves the result of necessary causes, could not possibly do anything but what he is doing at that moment. Also, the entire duration of that man's life, in all its minor or major aspects, is as precisely determined as clockwork.

Relative determinism is illustrated in the works of thinkers like David Hume şi John Stuart Mill. According to this type of determinism, there is no contradiction between accepting, together with the idea of determinism, the thesis that the human being sometimes acts freely. Free act does not signify devoid of causes, but it means that the human being, in that particular case, acted without being constrained by an external force. There are occurrences — that have been referred to previously — when the human being acts under the pressure of circumstances (self-defence, state of necessity, physical or moral constraint) or without being aware of his acts and their consequences (irresponsibility, intoxication, minority). But there are also occurrences when man acts freely, according to his will. The difference between free acts and imposed acts resides not in the absence or presence of causes, but in the categories of causes at the basis of various activities and decisions.

Similarly, the adepts of these theories deem that there are no contradictions between determinism and moral responsibility. An individual is accountable for his acts morally (and not only), if he acted freely when performing those acts. Freedom is nothing but the choice made by the human being when pursuing his goals. The promoters of determinism find this theory extremely flimsy. This is how, they say, we can be both deterministic (accepting the notion of unchangeable laws) but also free, in the sense of holding accountable and punishing those behaving improperly. John Stuart Mill stated that man could strive to get better, more virtuous, consciously living by his own free will and by his own free will, which is of course commendable. Freedom exists and character shaping is possible. Absolute determinism does not accept such a thesis. Sometimes the human being has the impression of being free, but this freedm is only an illusion. The man who considers himself free is like a butterfly flying and thinking that it is carrying the entire universe, when in fact it is the universe that is carrying it.

Man pursues all through his life the fulfilment of certain desires and the attainment of certain goals. But with regard to choosing these desires, he is not free. He will choose a path or another to fulfil his desire, but he cannot choose the desire itself. His passions take over. He is not really free to act, but he seems so, under certain circumstances. These are, in a nutshell, some of the arguments brought by Schopenhauer in favour of absolute determinism. Man knows for certain what he wants to do, but he cannot master his desires.

Determinism, whether it is absolute or relative, states that sometimes man, by his desires and the choices he makes, may influence destiny, but even so, in the opinion of certain adepts of absolute determinism, he is not responsible for his acts from a moral point of view. In fact, this is the main difference between absolute and relative determinism.

C. A. Campbell, in his paper "*Is Free Will a Pseudo-Problem?*"[1], deals with te issue of moral responsibility, from the point of view of the individual with an under normal intellectual level, on the one hand, and from the point of view of the individual with a higher intellectual level, on

[1] C. A. Campbell - *Is Free Will a Pseudo-Problem?,* Mind, 1951, op. cit. Sidney Hook - *Determinism and Freedom in the Age of Modern Science,* New York University, 1970, p. 122 and the next.

the other hand. The individual who questions life less and has a simpler manner of thinking will consider that a man acts freely and is morally responsible for his acts in case there are no external constraining factors which may force him to make a certain decision or do a certain thing. The intellectual opines that, for moral responsibility to be possible, there should be no external constraining force and the individual should have the possibility to choose and shape his character, that is, in other words, there should be no inner forces either which may force him to act in a certain manner rather than in another.

In conclusion, from the point of view of the superficial individual, moral responsibility does exist, but from the point of view of the profound individual, it does not. However, this distinction is not exactly objective. The profound man, interested in religion, science or culture, may act or think superficially when he is under the influence of strong emotions: fear, hatred, revenge, etc. Similarly, the individual who is less interested in the scientific or cultural aspects of existence, when calm and thinking rationally, realizes the importance of the inner forces dominating us, our desires, etc. The decisions each of us makes are influenced by the environment we have lived and formed in, and the experiences of the past. It is not too much to say that certain life circumstances may trigger in each of us the same responses or acts. This view is frequently used in the Anglo-Saxon legal system, in which the guilt of an individual is decided by jurors. Lawyers often plead in favour of defendants by means of the following type of arguments: any individual, if he had lived the life of the defendant (deprived of family love and attention, deprived of education, living in a hostile and aggressive environment where nobody could infuse moral values into him, etc) , if the jury had lived through what he had lived, they would have made the same unfortunate decisions. And it was not rare occurrence that such arguments could persuade a jury made up of persons who may not have had a high moral or educational level. Doubt is instilled into the man's soul and it is true that none of us can be certain about what decisions may have been made if life or fate had been so hostile. The one who is without sin should be the first to cast the stone.

The influence of the subconscious mind (i.e of factors determinantly affecting our acts and decisions, and of which, normaly, we are not aware of) on the reactions of people has been considered by philosophers over time (especially important are, in this regard, Friedrich Nietzsche or Arthur Schopenhauer). The concept as such was established by Sigmund Freud

and has acquired tremendous importance with the pathology studies of present day psychiatrists. The studies on the human mind (and this is not about people suffering from serious mental illnesses who are not aware of the seriousness of their acts or their consequences) have shown that what used to be considered the free will of the human being is in fact a consequence of the influence of certain very powerful factors that, in most cases, we are not aware of. For instance, in choosing the life partner, an individual can hesitate a lot, weigh various aspects of situations and make the decision after extensive deliberation, thinking that they have made an informed, mature and conscious choice. In fact, their choice was determined by childhood trauma, the parental role model they had or lacked, the fears and phantasies dominating their first years. That is how what seemd to be a free and conscious choice is only the result of the influence of factors that the individual in question is not even aware of, in most of the cases.

John Hospers, in his essay *"What Means This Freedom?"*, wonders about the foundations of the individual's moral responsibility, the freedom of choice, under the circumstances in which we are influenced by these unconscious factors, and our acts are anything but free.

Many times moral responsibility is associated with premeditation and it is considered that what is premeditated may result in imposing a penalty in case breaches of law occur, of course. But it is not every time that moral facts are premeditated. For example, if somebody witnesses a very serious car accident, he does not pass by heedlessly, but calls the emergency service, tries to help the injured, maybe even saves lives by his prompt response, but such an attitude is not premeditated or prepared in advance, it is just a spontaneous, natural reaction.

Also, in criminal law, premeditated acts are more severely punished by the lawmaker. The crime committed as a result of a spontaneous conflict, which does not show prior criminal intent, is deemed less serious than the cold-blooded planning of a crime. But even this premeditation may hide unconscious motives at the basis of the criminal act, which do not draw the attention of the transgressor, at least in the opinion of the adepts of absolute determinism.

It may also be considered that we are morally responsible for our acts that can be rationally explained. But not even this criterion is relevant: people's power of argumentation varies from case to case, and finding

rational reasons for our acts does not mean at all that we are not influenced by unconscious factors.

It is a fact that we act freely when we are not constrained by certain factors, in a sense or another. Sometimes the constraint is obvious, i.e. an external factor drives us to make certain decisions. For instance, when we are attacked or physically assaulted, the situation itself, the other's attitude forces us into being aggressive in turn to defend ourselves. It is the same in the case of a neurotic individual who has the mania of washing his hands constantly, but his impulse lies inside his own mind[1], in a trauma he is not aware of on a conscious level. He may even find a rational explanation for his behaviour: he washes his hands to remove germs and not get sick, but this is not the real cause.

An alternative to discovering which of our actions result in moral responsibility is as follows: let us assume that we are responsible for all our acts which are not determined by unconscious causes, childhood trauma. Man cannot be made responsible for his adulthood acts if these acts, no matter how reprehensible, are the result of traumatising treatments inflicted by other adults (parents, tutors, teachers, etc.) in his early years. He is not deviant at present as a result of consciously choosing this attitude, but because he was hurt in the past, and he is responding to such a situation or his behaviour and reactions are strongly influenced by it. But even in this attempt at uncovering the acts and facts for which the human being is morally responsible does not lead to conclusive results, as most acts and failures to act are also, or for the most part, based on unconscious causes.

This theory is as plausible as can be. It was proved that a human being acts in a wrongful manner, harms the others, because he was hurt at some point in the past. But there is no question of exoneration on these grounds. First, it may be stated that it is precisely the harm inflicted that should render the individual aware of the consequences of certain facts and determine him not to behave himself in such a reprehensible manner. On the one hand, accepting such a theory may have as a consequence the possibility to commit several abuses under various pretences. Related to

[1] "An unconscious representation is therefore one that we can't observe, but whose existence we are still ready to acknowledge based on other signs or evidence." Sigmund Freud – *The Psychology of the Unconscious,* Trei Publishing House, Bucharest, 2000, p. 25.

patients subjected to psychoanalytics therapy, it was proved that certain experiences they had pretended to have had were in fact figments of imagination, which had never taken place in reality.[1]

Understanding the causes of criminal behaviour does not mean exoneration from law penalties. But it still has effects, from the point of view of moral responsibility, in the sense that the perpetrator no longer seems so morally responsible for his acts. It is a proven fact that helplessness and the anger caused by the lack of love and attention in early years irreparably affects the human being and may have very serious consequences, as most serial killers have such a past. To understand is to forgive, at least partially. In the end, the whole society is to blame, morally speaking, for the destiny of some of its members. They are criminally liable for their acts, in some states the death penalty is still in force for certain crimes even today, but there still remain unresolved questions about their moral responsibility. Are they really responsible? Have they really had the chance to choose another lifepath? These are questions that will always remain unanswered.

Any society should necessarily possess a legal system, criminal legislation and appropriate penalties.[2] Even if one agrees with the determinist thesis that people are not morally responsible for their facts and acts, from a utilitarian point of view however, it is to be remarked that the legal system is necessary in any society: in order to prevent possible abuse, to protect the innocent, to feel safe in the world we live in. It is necessary to impose penalties, to remove the individuals who, for reasons that are or not imputable to them, represent a danger to society, for their fellow humans. Otherwise, one would miss the entire purpose for which people live in communities and abide by laws, thus limiting their freedom to move and act.

The reply of moralists to the argument that there could be no question of people's moral responsibility is that there are however

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[1] "It is difficult to question the fact that the phantasy world plays the same role in psychosis, that it also represents here the warehouse where the material or the model for shaping a new reality originates. But the new external, phantastic world of psychosis attempts to replace external reality..." Sigmund Freud – *The Psychology of the Unconscious,* Trei Publishing House, Bucharest, 2000, p. 280.

[2] Richard Brandt – *Determinism and the Justifiability of Moral Blame,* op. cit. Sidney Hook - *Determinism and Freedom in the Age of Modern Science,* New York University, 1970, p. 149 a.s.o;

individuals who grew up without care and attention, or in orphanages and still did not turn out to be criminals. Therefore it is possible to overcome this trauma, according to moralists. Thus, there are no excuses for the others.

But unfortunately things are not exactly so. Certain individuals are merely luckier than others and manage to overcome early childhood trauma. It is not a question of force, but of luck, just like it is to be born and raised in a normal, caring family who loved, educated, supported and taught how to overcome certain emotional issues. Such an explanation may seem superficial, that luck is the key to people's acts, not free will; it is merely luck that makes us be born and raised in a certain environment, overcome certain educational gaps, become criminals or not, and another better explanation is hard to find.

The moralist sheltered in his own world, who has never suffered anything too harsh, never had to make tough choices, and never lost anything important, is quick to judge: whoever did something wrong should pay. I have not done anything wrong, so I am not to blame. But science showed that evil is never gratuitous; all human acts are determined by factors that had impacted on and shaped human character and conduct long before evil occurred. The influence of evil in a man's life is most of the times stronger than the influence of good. Doing something wrong is much harder to resist than doing something right, and such a statement is by no means a sentence, but a proven fact.

According to the words of William Faulkner[1], we should not even once look at evil and corruption, but sometimes we cannot help it, we are not always warned not to do so; we should always resist such temptations, as we should start much earlier and be ready to say no long before seeing, or understanding what such a thing as *evil* means.

For lesser breaches of the rules of social conduct we are more inclined to be understanding. We easily forgive rude behaviour if we are told that such a conduct was brought about by physical pain or health problems, lack of sleep or the like. It is not hard to understand why somebody with a terrible toothache behaves grumpily, maybe even shouts at people, even if such an attitude is not justified. All these reactions and behaviours appear normal once we know their cause. They are to be excused and understood, as they may happen to any of us. Luckily, the

[1] *Requiem for a Nun,* Universul Publishing House, Bucharest, 2001.

events that may irreparably traumatise a child in his early years are not as frequent. Maybe that is why we are more intolerant and reluctant to show understanding; most of us did not have to cope with anything similar, being loved and raised in a united family, receiving instruction, help, protection and constant encouragement. Such things seem normal, as we have had them since the very beginning. They have never been denied to us, and that is why we have not realised that everything had to do with luck rather than anything else.

Another danger that has to be evinced regarding this theory of the lack of moral responsibility refers to certain unavoidable consequences it produces[1]. If it is admitted that all human acts are predetermined by genetic predispositions, and mostly by the conditions in the early years, the following conclusions may be drawn: (1) people should never feel disgust or disapproval towards the behaviour of the others and should not bear judgement under any circumstances; (2) nobody should ever be punished for his past acts; (3) perpetrators of grievous crimes should not have any regrets or remorse, as they are not morally responsible for them; (4) nobody should ever feel proud for the very difficult things they achieved, as they were part of their destiny; (5) nobody should ever be admired for such things, on the grounds mentioned before; (6) no reward should exist for good deeds, for deeds hard to accomplish or for personal sacrifices, etc.

The issue is however open to debate. The theory of the lack of moral responsibility includes arguments whose validity is beyond doubt. But it also has consequences which are hard to accept. Ultimately, there are individuals who commit heinous acts, grievous offences, because of the environment they were born and raised in. They have never been protected or loved. But removing all responsibility is not possible and anyway, nobody expects it. We should probably be more careful about the people around, children's raising and education, and such a conduct at the social level should result in a drop in criminality and a higher number of accomplished individuals, normal from a mental point of view, much less inclined to harm the others around (to respond by doing harm when harmed).

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[1] Richard Brandt – *Determinism and the Justifiability of Moral Blame,* op. cit. Sidney Hook - *Determinism and Freedom in the Age of Modern Science,* New York University, 1970, p. 149 a.s.o.

The philosopher's mission is to wonder, and the question if there is such an issue as moral responsibility or free will is extremely important, raising in turn several other questions. It seems that our ultimate interest resides in finding out the root of evil and the means to avoid it. Or even more importantly, can evil be avoided?

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CONDITIONS REQUIRED FOR APPOINTING AN ADMINISTRATOR

Abstract

Appointing administrators is traditionally done by a double manifestation of will between associates and further between associates and administrator. This union between stating the will between associates reunited with accepting the administrator gets the form of the mandate.

When considering the role of the administrator function, the law enforces the fulfilment of some conditions for being able to accede to it.

The conditions requested for getting the administration function are divided into personal conditions and partner conditions. When grouping them, there is taken into account the criterion how these aim the administrator's individual person or are enforced by the trading company, by taking into account the intrinsic connection between the administrator and company.

The appointment of the administrator is traditionally done by a double manifestation of will[1] between the associates and further between associates and administrator. This union between stating the will between associates reunited with accepting the administrator gets the form of the mandate.

The mandate conferred to the administrator does not need, prior to the amendment of Law no. 31/1990, an express acceptation, being sufficient, according to art. 376 Commercial Code, the tacit acceptance: "*The merchant who does not want to get a task must bring into notice to the principal about the non-reception, as soon as possible.*" The tacit acceptance could consist in unfulfilling operations for the company's commerce, handing on of

[1] Ghe. Piperea, *Societăţi comerciale, piaţă de capital. Acquis comunitar*, All Beck Publishing House, Bucharest, 2005, page 126 (quoted hereinafter *Companies*). The appointment of the administrator is based upon the decision of the associates' general assembly, taken into account either at forming the trading company or further during the life of the trading company. The author suggests the qualification of appointing the administrator as being a double of the convention: appointment into the function (manifestation of will between the associates) and the mandate (the convention between the associates and administrator).

signatures to the trade registry, operations which would highlight the accomplishment of the tasks specific to the administrator function[1]. However, in the light of the current regulation, art. 153[12] par. (3) of Law no. 31/1990 "*for the appointment of an administrator (…) to be valid from a legal point of view, the person appointed must expressly accept it*". As consequence, Law no. 31/1990 derogates from the joint right, art. 1533 par. (2) Civil Code and art. 376 Commercial Code according to a doctrinaire opinion[2], this exact express acceptance of the administrator's mandate represents the existence of a contract between the administrator and company, a mandate contract of special features. This provision is also applied only to the limited trading companies and, as consequence, the rule of tacitly accepting the mandate is applied to the trading companies of people.

When considering the role of the administrator function, the law enforces the fulfilment of some conditions[3] for being able to accede to it.

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[1] In doctrine, before the legislative change in 2006, respectively by Law no. 441 dated 27th November 2006, published in "The Official Journal of Romania", no. 955 of 28th November 2006, the occurrence of a confusion was found out regarding the tacit acceptance of the mandate of administrator referring to the plurality of this mandate of legal labour report, which would create difficulties in precisely knowing at some point the administrator's position and attributions in society in the relations to the society or third parties. As solution to this problem, the conclusion of an administration contract was suggested (similar to the management contract), by the administrator with the trading company – Ghe. Piperea, *Societăţile*, quote page 126. The idea is also found at St. Cărpenaru, S. David, C. Predoiu, Ghe. Piperea, *Societăţi comerciale. Reglementare. Doctrină. Jurisprudenţă* All Beck Publishing House, Bucharest, 2002, page 312-314.

[2] Ghe. Piperea, *Drept comercial*, vol. I, C.H. Beck Publishing House, Bucharest, 2008, page 203 (quoted hereinafter *The Course*). The administrator's appointment would be an offer of contracting, which, followed by the acceptance of the offer, values the contract.

[3] The conditions requested for getting the administration function are divided into personal conditions and partner conditions - N. Dominte, *Organizarea şi funcţionarea societăţilor comerciale*, C.H. Beck Publishing House, Bucharest, 2008, page 251. When grouping them, there is taken into account the criterion of how these aim the administrator's individual person or are enforced by the commercial company, by taking into account the intrinsic connection between the administrator and society. To my opinion, all conditions aim the administrator and surely they are enforced by law, not by the society. These criteria only aim the connection between the person of the future administrator and trading company,

1.1. Administrator's capacity

According to art. 73[1] of Law no. 31/1990 "*Those persons whom, according to art. 6 par. (2) cannot be founders or administrator, managers, members of the surveillance council and directorate, censors or financial auditors, and if they have been chosen, they are in incapacity of rights*". Art. 6 par. (2) stipulates that "*those people whom, according to the law, are incapable (…)*". This interdiction is explained by taking into account its quality as representative of the trading company, proxy of the associates, the administrator must have full capacity of exercise[1] for being able to draw up legal documents for accomplishing the social aim. This is also in fact one of the conditions of the mandate, meaning that the person of the proxy is to have the capacity requested by law for concluding the document which it intermediates.

It must also be taken into account the fact that the administrator is the person exercising the attributes of the social property right[2], accomplishing both provision acts as well as for preservation and administration[3]. This solution is applied to all forms of the trading company. In the situation where an administrator would be appointed by breaching this condition, the sanction intervening is to incapacitate him/her of the rights conferred by means of the administrator function. According to this solution, even the documents drawn up by an administrator lacking the capacity of exercise shall be nullified.

A person lacking capacity of exercise or who has limited exercise capacity, cannot get and exercise the administrator function of a trading

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the so-called "personal" criteria do not take into account the individual person of the administrator in a private environment, but in connection to its relation with the trading company.

[1] St. Cărpenaru, Managing the trading companies in regularising Law no. 31/1990, in the Magazine of commercial law no. 2/1993, page 24-25.

[2] Ghe. Piperea, *Societăţile*, quote page 127; St. Cărpenaru, S. David, C. Predoiu, Ghe. Piperea, quote page 437.

[3] It must be taken into account that by accomplishing trading deeds, the administrator does not acquire the quality of merchant, as it does not meet the third condition, namely to only accomplish them personally. As consequence, he/she fulfils the duty tasks for his/her employer, not at all does he/she try to bind for own sake – St. Cărpenaru, *Drept comercial român*, 7th edition, Universul Juridic Publishing House, Bucharest, 2008, page 74-75.

company. Thusly, minors under 14 and legally prohibited people[1] lack the capacity of exercise, are incapable and cannot draw up legal documents on their own name.

The situations stipulated in art. 6 par. (2) of Law no. 31/1990 aims the interdiction of appointing the administrator, manager, member of the surveillance council and directorate, censor or financial auditor. If these people had such functions and the incapacity has happened after their appointment into the function, the sanction intervening will be the incapacity and interdiction of occupying such functions in the future.

The law of the trading companies intervenes and increases the exigencies regarding the consideration of the persons who have the capacity of exercise for performing a commercial activity, by expanding the range of the incapacities and over minors with capacity of exercise, to the effect of Decree no. 31/1954. This is due because those minors who have a limited capacity of exercise cannot conclude deeds of settlements unless they have the approval of the legal representative and by prior authorisation of the tutelary authority, the situation incompatible with the meaning of the documents, facts and trading operations.

The requirement of the entire capacity of exercise is applied to the natural person administrator as well as to the legal entity administrator.

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[1] According to art. 11 of Decree no. 31 of 30th January 1954 regarding legal entities and natural persons. According to art. 9 of the same Decree: *"The minor who has reached the age of fourteen has limited capacity of exercise. The minor with limited capacity draws up the legal documents, by parents' or tutor's previous approval."* Art. 10 of the Decree orders: *"The minor who has turned fourteen and may draw up the labour contract or enter into a collective agricultural farm or into another cooperative organisation, without needing his/her parents' or tutor's approval. In the case where the minor between 14 and 16 years of age draws up a labour contract or enters into a collective agricultural farm or into a cooperative manufacturing organisation, a medical notification will also be needed, besides parents or tutor's prior approval. The minor who is in the situation stipulated in previous paragraphs exercises alone the rights and thusly executes the obligations sprung from the labour contract or from the quality of member of the collective agricultural farm or of another cooperative organisation and has by himself/herself the amounts of money he/she has gained by means of own work. The minor with limited capacity has the right, without needing parents' or tutor's approval, to deposit to the state savings institutions and to use these deposits, according to the stipulations of the keeping house regulations."*

1.2. Administrator's respectability

According to art. 73[1] reported to art. 6 par. (2) of Law no. 31/1990, "*those persons whom, according to the law (…) have been convicted for fraudulent management, abuse of trust, forgery, use of forgery, fraud, dilapidation, false witness, taking and giving bribe, for the crimes stipulated by Law no. 656/2002 for preventing and sanctioning the money laundering, as well as for installing some prevention measures and for fighting the finance of terrorism deeds, by ulterior amendments and addendums, for the crimes stipulated by art. 143 - 145 of Law no. 85/2006 regarding the procedure of insolvency or for those stipulated by this law, with its ulterior amendments and addendums*"[1].

From what is exposed by the legislator, it results the administrator must have an intact morality. This condition herein is applied to all trading companies, regardless of their legal form[2]. The administrator's respectability is a criterion according to which a trading company can be qualified as being credible or doubtful, this condition exceeding the category of criterion of option, administrator's eligibility. To the same extent, the administrator's respectability is to create the safety and trust of the contracting parties of the trading company regarding the treated operations.

It is deemed[3] that the administrator becomes the image of the trading company regarding the relations with the other people, taking into account his/her quality as proxy of the company, thusly influencing the trust barometer of the company.

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[1] Supreme Court of Justice, commercial section, decree no. 511/1994, in the Magazine of commercial law no. 3/1995, page 156 – the interdiction is applied only in the case of final and irrevocable conviction, the incident of presumption of innocence *according to* St. Cărpenaru, quote page 233. Also see Ghe. Piperea, *The Course*, page 207; N. Dominte, quote page 253/-254; E. Munteanu, *Certain aspects on the legal statute of the administrators of trading companies (I)*, in the Magazine of commercial law no. 3/1997, page 38-41; D. Şandru, *Societăţile comerciale în Uniunea Europeană*, University Publishing House, Bucharest, 2006, page 237.

[2] Supreme Court of Justice, commercial and economical section, decree no. 225/1992, in the Magazine of commercial law no. 5/1994, page 73-74.

[3] N. Dominte, quote page 254; C. Micu, *Organizarea administraţiei societăţii comerciale pe acţiuni Unitary system*, in the Romanian Magazine of business law no. 2/2007, page 60.

It is true the administrator is the one coming into direct connection with the third parties, representing, within the limits of his/her mandate[1], the company, but his/her importance must not be exaggerated, by going as far as qualifying his/her position as being a trust barometer of the company. I think the trust the trading company benefits by is formed by several elements and not only by the administrator's reputation. Thusly, the share capital is an element which leads to the formation and preservation of the trading company's trust, the bigger its value, the more will the company benefit by reliability. This is because the company's creditors shall be certain that in the debtor company's patrimony, there must be goods of at least the value of the share capital, having thusly a guarantee regarding the sufficiency of their claims. The company's credibility related to the value of the share capital is also given by the fact that this share capital is fixed for the entire period of the trading company. Other elements that would lead to the formation and preservation of trust in the company could be the number of employees, social assets, the way in which the company pays its debts, on due term or even before it, the eventual incidents of payment in the history of performing the commercial relations registered to the Central of Payment Incidents, warranties offered by the bank financial credit institutions, guarantees offered for the works performed, the goods manufactured or sold merchandises, the age of the company within the range of commercial activities, the appointment of an independent administrator etc. Certainly, none of these elements does not uniquely and remotely determine the formation of the opinion on the trading company, but they all have a contribution regarding the qualification of the trading company as being credible or doubtful. As consequence, the opinions according to which the administrator of the company would be the barometer of the company's trust are not viable. The administrator's respectability also contributes to the blazon of the

[1] High Court of Cassation and Justice, commercial section, decree no. 1279/27.03.2008, www.scj.ro/jurisprudenta.asp: *"The aim targeted by the legislator by the regulation instituted by art. 55 of Law no. 31/1990 amended, was that of protecting the interests of the third parties in the relations with the trading company, against certain limitations decided by the company regarding the powers conferred to the company's representatives. To this effect, according to art. 55, par. (2) of the law, the clauses of the Articles of Incorporation…. , which limits the powers conferred by law to the statutory bodies of the company, are unopposable to the third parties, even if they have been published."*

trading company, but in competition with all other configuration factors of the company's reputation.

1.3. Administrator's citizenship[1]

Law no. 31/1990 does not stipulate any restriction regarding the administrator's citinzenship. To this effect, art. 81 of Law no. 31/1990 provides that in the case of appointing a natural person as administrator, the Articles of Incorporation must consist in: „*the surname, first name, personal identification number and, if applicable, its equivalent, according to the applicable national legislation, the place and date of birth, domicile and citizenship*". As consequence, this function of administrator, may be obtained by a Romanian or foreign citizen, under the condition that the constitutive documents of the company would not contain derogatory provisions, as foreigners have, under the conditions of the law, all civil rights Romanian citizens also have.

In the case where a legal entity is appointed as administrator, the Article of Incorporation must consist in: "*the name, headquarters, nationality, registration number in the trade registry or unique code of registration, according to the applicable national law.*" As consequence, the law does not prohibit in any way the appointment of an administrator of legal entity of a nation other than Romanian.

1.4. The quality of administrator's associate

According to art. 77 par. (1) of Law no. 31/1990: "*Those associates representing the absolute majority of the share capital may choose one or several administrators among them (…).*" It unequivocally results the faculty

[1] The principle of this condition is deemed to be in the legislation of the Northern countries, thusly Denmark conditions the appointment into the function of administrator as Danish resident or citizen of a member state of the European Union; on the same line, Finland and Sweden enforce the condition of at least half of the members of administration council and chairman to be residents in the states of the European Economical Space – N. Dominte, quote page 255. When fighting this hypothesis, the community jurisprudence, Commission of the European Communities vs. Kingdom of the Netherlands, Case C-299/02, J.O.C.E., C 300 of 4th December 2004, p. 10, by contesting the condition enforced by the Dutch state that the administrators of a maritime company should be citizens of a member state of the European Union or European Economical Space for registering the boats under Dutch pavilion.

conferred by the legislator of choosing whether the administrator is associate or a third party.

This solution is also expressly given by art. 7 letter e which orders that the company's Articles of Incorporation shall collectively contain in limited partnership or limited liability: *"associates who represent and administrate the company or non-associated administrators, their identification data, powers that were conferred to them and if they try to exercise them together or separately*[1]*"*.

Certainly, the provisions presented refer collectively to the company, in limited partnership or limited liability, but these can also be extended to the trading public limited company.

However, in the case of partnership companies, there are applied the provisions of art. 88 and 188 of Law no. 31/1990: *"The Administration of the limited partnership company shall be committed to one or several active associated partners"; "The administration of the company is committed to one or several active partners"*. As consequence, the Law of the trading companies derogatorily orders that in the case of the limited and sleeping partnership, the administrators are only between associates, by thusly complying with the principle of the connection that must exist between the associates and in the consideration of which the people company was founded.

A new notion introduced by Law no. 441/2006 by means of which Law no. 31/1990 was amended, is that of independent administrator[2].

According to art. 138[2] of Law no. 31/1990[3]: *"When appointing the independent administrator, the general assembly of the shareholders shall take into account the following criteria: a) should not be the manager of the company or a company controlled by him/her and not to have fulfilled such a function in the past*

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[1] Also see A. Beleanu, *Răspunderea administratorilor şi directorilor executivi ai unei societăţi comerciale*, in the Magazine of commercial law, no. 10/2000, page 137 and following

[2] The notion of independent administrator has its origin in the legislation of the United States of America and Great Britain, being successively borrowed along with the notion of corporative governing. The aim of these independent administrators is in fact to create a counter power which would balance and equilibrate the chairman's or general manager's infinite power – Ph. Merle, *Droit commercial. Sociétés commerciales*, 11e edition, Dalloz Publishing House, Paris, 2007, page 274-275 and 416.

[3] These criteria are contained in Appendix II of the European Commission Recommendation no. 162/2005.

5 years; b) not to have been an employee of the company or of a company controlled by him/her or to have had such a labour report in the past 5 years; c) not to receive or to have received an additional remuneration from the company or a company controlled by him/her, or other advantages, other than those corresponding to his/her quality of non-executive administrator; d) not to be a significant shareholder of the company; e) not to have or to have had business relations with the company or with a company controlled by him/her, during the last year, either personally or as associate, administrator, manager or employee of a company which has such relations with the company, if, by means of their substantial feature, these are likely to affect objectivity; f) not to be or have been financial auditor during the past 3 years or employed associate of the current financial auditor of the company or of another company controlled by it; g) to be a manager in another company where a manager of the company is non-executive manager; h) not to have been non-executive administrator of the company for more than 3 mandates; i) not to have family relations with a person found in one of the situations stipulated at letter a) and d).

A definition of the notion of independent administrator is not given by law[1], by only indicating the criteria which his/her person may be individualised. It is however deemed[2] that the independent administrator must be from outside the company, without any connection with the natural persons or legal entities from the leadership of the trading company for a certain period of time and with whom no commercial legal operations have been concluded.

The Law does not necessarily enforce the appointment of an independent administrator. In the case of appointing such an administrator, he/she can contribute to increasing the credibility of the trading company.

[1] The European Commission's Recommendation no. 162/2005, contains Art. 13.1 a definition of the independent administrator, being deemed to be the person whom has no business, family relations or of any other kind with the company, the main associate or with the management and leadership structures likely to create a conflict of interests which can affect his/her objectivity.

[2] N. Dominte, quote page 258.

In order to contribute to the independence of the leadership structures, the German doctrine[1] has suggested the complete elimination of employees from the leadership structures of the trading companies.

In Belgian Law, the Buysse Code regarding the proposals for the non-transacted companies in the corporative governance, suggests the appointment of independent administrators for balancing the composition of the members of the leadership bodies[2].

1.5. Plurality of functions

Law no. 31/1990 institutes two limitations regarding the concomitant exercise of the administrator function.

1.5.1. Interdicting plurality. According to art. 137[1] par. (3) of Law no. 31/1990 *"During the performance of the mandate, the administrators cannot conclude a labour contract with the company. In the case where the administrators have not been appointed from the employees of the company, the individual labour contract is suspended during the period of the mandate."* In order to exercise the function of administrators, they shall be subject of the rules of the mandate and shall conclude a management contract with the company, referred to in art. 144[1] par. (6) of Law no. 31/1990[3].

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[1] A. Kouloridas, J. von Lackum, Recents developments of corporate governance in European Union and their impact on the German legal system, in German Law Journal, vol. 5, no. 10/2004 according to N. Dominte, quote page 259.

[2] It is thusly deemed that the independent administrators shall contribute by an objective vision onto the company, impartial advice, increase of discipline and responsibility, assuming an important role in situations of crisis, watching over the succession of managers etc. To this effect, in order to accomplish their role, the company must proceed with training them, but also with fully and justly informing them.

[3] C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, Law of the trading companies, no. 31/1990. Bibliographical references. Legal practice. Decisions of the Constitutional Court. Annotations, Hamangiu Publishing House, Bucharest, 2007, page 300. Art. 144[1] par. (6) of Law no. 31/1990 orders: "The contents and duration of the obligations stipulated at par. (5) are stipulated in the management contract." In the previous regularisation, the administrator's mandate could have been an independent one or could be burdened either by the quality of shareholder or the employed one, in the case of doubling the mandate by a labour report – Ghe. Piperea, Obligaţiile şi răspunderea administratorilor societăţilor comerciale.

The explanation of the solution of law resides in the incompatibility between the quality of associate of the trading company and that of employee of the trading company[1]. On the same line, the interdiction also imposed by the subordinate status is explained[2], which the employee has regarding the associates, while the administrator may draw up legal documents on behalf of the company. The provision of the law has an imperative feature and its breach would lead to incapacitating the person from the administrator function.

Although the law only refers to the public limited companies, it is deemed[3] that these provisions are also equally applicable to the other form of trading companies.

1.5.2. Limiting plurality. Art. 153[16] of Law no. 31/1990 stipulates that *"A natural person may concomitantly exercise 5 mandates at the most by the administrator and/or member of the surveillance council in public limited companies the headquarter of which is on the Romanian territory. This stipulation is applied to the same extent to the natural person administrator or member of the surveillance council, as well as to the natural person permanent representative of a legal person administrator or member of the surveillance council. The limitation of the plurality of mandates does not operate in the case where the one elected in the administration council or in the monitoring council is the owner of at least a fourth*

Noţiuni elementare, All Beck Publishing House, Bucharest, 1998, page 67 and following (quoted hereinafter The Responsibility).

[1] St. Cărpenaru, quote page 234; S. David, F. Baias, Răspunderea civilă a administratorului societăţii comerciale, în Dreptul, no. 8/1992, page 14; I. Schiau, T. Prescure, Legea societăţilor comerciale no. 31/1990. Analize şi comentarii pe articole, Ed. Hamangiu Publishing House, Bucharest, 2007, page 417; C. Duţescu, Drepturile acţionarilor, 2nd edition, C.H. Beck Publishing House, Bucharest, 2007, page 343. In the case where the person appointed into the administrator function opts for maintaining the quality of company's employee in the prejudice of the administration function, then the position becomes vacant and the general assembly must be called together for appointing an administrator, according to art. 111 of Law no. 31/1990. The solution suggested by the legislator is based on the antithetic feature of the legal relations of the two qualities. This has been suggested in doctrine and prior to the amendments made by Law no. 441/2006 - St. Cărpenaru, Drept comercial român, 5th edition, All Beck Publishing House, Bucharest, 2004, page 219.

[2] C. Cucu, M. Gavriş, C. Bădoiu, C. Haraga, quote page 302.

[3] St. Cărpenaru, quote page 234.

of the total of the company's shares or is a member in the administration council or in the surveillance council of a public limited company holding the indicated fourth. The person breaching the stipulations of this article herein is bound to resign from the function of member of the administration council or of the surveillance council, exceeding the maximum number of mandates stipulated in par. (1) in a term of one month since the date of occurrence of the situation of incompatibility. Upon the expiration of this period, he/she shall lose the mandate obtained, by exceeding the legal number of mandates, in chronological order of designations and shall be bound to return the remuneration and other benefits received by the company where he/she has exercised this mandate. The deliberations and decisions which he/she has taken part in when exercising that respective mandate remain valid".

Thusly, currently, a natural person may concomitantly exercise 5 mandates at the most, of administrator, in the surveillance councils of some public limited companies or in other trading companies, respectively 5 mandates at the most of administrator and member of the surveillance council. The limitation of the plurality of mandates regards not only the administrator natural person, but also the permanent representative of the legal entity administrator.

The provisions of the Law are applied regarding the unitary system as well as the dualist leadership system of the trading public limited company. This plurality is prohibited, as it is also peremptorily stipulated[1], only on the Romanian territory, by being able to exceed the number of mandates imposed by the Romanian law in the case of accomplishing such functions to trading companies in other countries. However, the permissibility of this plurality of administrator mandates must be taken into account, of international feature, by all legislations of those countries where those respective companies are registered.

The provision regarding the plurality of mandates in the Romanian legislation is also encountered in the French legislation, where it is stipulated that an administrator of an anonymous company may hold maximum 5 mandates of administrator or as member in the surveillance

[1] N. Dominte, quote page 260-261. The opinion thusly stated deems the old formulation of Law no. 31/1990, in Art. 145 par. (1) was much better, as it concomitantly prohibited the plurality of three mandates, without geographically restricting this plurality. It was understood from here that a person could not accomplish this function in more than three mandates, regardless of the nationality of the trading companies.

council[1]. To the same line, the mandates of general manager, member of the directorate are restricted to one mandate or of sole general director.

The German legislation, when considering the necessary time that must be affected to the associate activity, limits the plurality of more than five mandates in surveillance council and not more than one mandate as manager in trading companies[2].

The limitation of the plurality of mandates aims the administrator natural person, as well as the legal entity administrator, by its permanent natural person representative.

The interdiction does not take into account the legal entities who have the quality of member into the administration or surveillance council and who can simultaneously have an unlimited number of mandates. The only restriction is that their representatives as natural persons do no breach the legal limitations[3].

Besides the mentioned limitations, Law no. 31/1990 also stipulates a special case in Art. 153^{15} "*In the unitary system, the managers of a public limited company and in the dualist system, the members of the directorate, without the authorisation of the administration council, respectively the surveillance one, will not be able to be managers, administrators, members of the directorate or of the surveillance council, censors or, according to the case, internal auditors or associates with unlimited liability, in other competitive companies or having the same object of activity or exercise the same commerce or a competitive one, on one's own or on another person, under the punishment of revoking and responding for damages.*" In order to fulfil this stipulation, art. 153^{8} par. (2) of Law no. 31/1990 stipulates: "*By the Articles of Incorporation or by the decision of the shareholders' general assembly, specific conditions of professionalism and independence can be set forth for the members of the surveillance council. In evaluating the independence of a member of the surveillance council, at least the criteria regularised at art. 138^{2} par. (2)^{30}" must be complied with.*

The additional provision regarding the managers of a public limited company in the unitary system and the members of the directorate in the

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[1] Ph. Merle, quote page 418-419. Prior to this limitation, the French legislation limited the plurality to eight mandates. The legislative reform in France by Laws of 29th October 2002 and 1st August 2003 has reduced the limitation to five mandates on the territory of the country.

[2] A. Kouloridas, J. von Lackum, quote page 1282 according to N. Dominte, quote page 261.

[3] I. Schiau, T. Prescure, quote page 493.

dualist system is justified by the general obligation they have of prudence, diligence, loyalty and confidentiality in relation to the company. These obligations can only be complied with by eliminating any possible conflict of interests between them and the company, by participating in the leadership of other trading companies. The legislator lets the social will to approve or reject this plurality depending on the actual danger and possible threat which it would represent for the good performance of the company's activity. The acceptance may also intervene *a posteriori*, in the situation where the administration council or the surveillance council finds out afterwards about the incidence of these interfering factors in the company's life and, by actually evaluating their dimension, it deems possible such a plurality. The authorisation, although it must be mainly be precursory, it must be express and unambiguous, for avoiding potential misunderstandings. To the extent where the actual situation allows it, the authorisation may also be tacit if it would undoubtedly result the social will in the sense of allowing such a plurality in everything[1].

Regarding the limited liability companies, according to art. 197 par. (2) of Law no. 31/1990 *„Administrator cannot receive, without the authorisation of the associates' assembly, the administrator mandate in other competitive companies or having the same object of activity, or to perform the same trade or another competitive one on one's own or on another legal entity's or natural person's behalf, under the sanction of revoking and responding for damages."*

1.6. Stipulations.

In doctrine[2], it is suggested to be deemed as condition for exercising, according to the administrator function, the quality of natural person or legal entity of the administrator. Regarding this aspect, I deem it cannot be a matter of a condition for exercising the administrator function, but of a possibility which the company has of appointing a natural person or legal entity into this function. In the Romanian legislation, the exercise of the administrator function is not in any way conditioned according to the administrator being a natural person or a legal entity. As opposed to that, the stipulations in the case of the English, Italian or Portuguese legislative systems, where the compulsoriness of appointing a natural person among

[1] Regarding the future amendments of Law no. 31/1990, I believe it should be explicitly prohibited to fulfill

[2] N. Dominte, quote page 256-257.

administrators is stipulated, being a matter of a condition for fulfilling the administrator function[1].

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[1] Compendio di Diritto Commerciale, XII edizione, Simone Publishing House, Napoli, 2009, page 176-177; art. 155 par. (1) – Companies Act 2006: „*Comp1anies required to have at least one director who is a natural person*". This means that at least one of the administrators must be a natural person.

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CERTAINS PROBLEMES SPECIFIQUES CONCERNANT LE DOMAINE DE LA PRESCRIPTION EXTINCTIVE

Rezume

L'analyse de l'incidence de la prescription extinctive dans le domaine des droits patrimoniaux et non patrimoniaux détermine, en grande partie, son domaine. Mais, dans la pratique et dans la doctrine il y a certaines situations juridiques qui soit ont reçu des solutions différentes sous l'aspect de la prescriptibilité, soit elles nécessitent des précisions supplémentaires en vue de la compréhension de ce problème. En conclusion, la présentation du domaine de la prescription extinctive ne peut pas être achevée sans l'approche de certaines situations controversées telles : la défense du droit subjectif civil sur la voie de l'exception ; l'action en constatation ; des actions mixtes ; la dualité d'actions ; l'action dans la réparation d'un dommage moral, l'action « en restitution » suite à l'annulation d'un acte juridique civil ; des actions concernant le registre foncier ; des actions concernant un droit secondaire ; certaines actions en matière successorale.

Situations juridiques concernant le problème de la prescriptibilité

Dans l'activité pratique il est issu des situations pour lesquelles, soit il a été donne des solutions non uniformes, soit elles nécessitent des explications pour la compréhension de la résolution du problème de la prescriptibilité.

Les suivantes situations s'inscrivent dans ce sens :

- la défense du droit subjectif sur la voie de l'exception ;
- l'action en constatation ;
- les actions mixtes ;
- la dualité des actions ;
- l'action dans la réparation d'un dommage moral ;
- l'action « en restitution » suite à l'annulation d'un acte juridique civil ;
- les actions concernant le registre foncier ;
- les actions concernant un droit secondaire ;
- certaines actions en matière successorale ;

Les solutions adoptées dans la résolution du problème de la prescriptibilité

La défense du droit subjectif civil sur la voie de l'exception

De la définition du droit subjectif civil il est évident que de son essence il résulte la possibilité reconnue du titulaire de recourir, au besoin (quand le droit subjectif est violé), à la force coercitive de l'Etat. La valorisation (la réalisation ou la reconnaissance) du droit subjectif civil peut être obtenue non seulement sur la voie offensive de l'action mais aussi sur la voie défensive de l'exception. A l'occasion du jugement d'un procès deux catégories d'exceptions peuvent être soulevées : de procédure (processuelles) et de fond (de droit substantiel). On va utiliser la notion d'exception pour désigner la défense de fond[1].

Dans la doctrine il n'y a pas de point de vue unitaire en ce qui concerne le problème de la prescriptibilité ou de l'imprescriptibilité de l'exception.

Dans une opinion[2], il se considère que la défense du droit subjectif sur la voie de l'exception est imprescriptible – «que temporalia sunt ad agendum, perpetua sunt ad excipiendum » (ce qui est prescriptibile sur la voie d'action il est imprescriptibile sur la voie d'exception). Pour soutenir

[1] Par exemple, quand le requérant formule une prétention contre le défendeur et celui dernier, pour obtenir le rejet de la prétention formulée contre lui, se défend invoquant un droit subjectif civil, on dit que le droit subjectif respectif est valorisé (défendu, protégé) sur la voie d'exception (de droit matériel, substantiel). Donc, la valorisation d'un droit subjectif civil sur voie d'exception suppose que le titulaire de droit, étant appelé au jugement, il se prévale de ce droit-là pour obtenir le rejet de la prétention formulée contre lui mais sans soumettre au jugement une prétention certaine par rapport à l'adversaire. Il s'impose l'explication, que sous aspect processuel, la valorisation du droit subjectif civil sur la voie d'action implique soit l'introduction d'une demande d'appel au jugement soit l'énoncé d'une demande d'incidence par laquelle il s'invoque une prétention personnelle, en échange, la valorisation du droit subjectif civil sur voie d'exception suppose seulement l'énoncé d'une contestation (pour des détails veuillez voir G. Boroi, L. Stănciulescu, *Droit Civil, Cours sélectif pour l'examen de licence*, Ed. All beck, Bucarest, 2002, p. 122-123)

[2] Veuillez voir: I. Rosetti – Bălănescu, O. Sachelarie, N. Nedelcu, *Principes du droit roumain*, Ed. D'Etat, Bucarest, 1947, p. 260; A. Hilsenrad, *Sur le nouveau réglementation de la prescription extinctive*, dans la revue « Légalité populaire » no. 8/1958, p. 26; E. Roman, *Prescription extinctive*, dans le travail « Traité de droit civil », vol I, Ed. de l'Académie, Bucarest, 1967, p. 441

cette solution, on présente, principalement deux arguments : la loi ne se rapporte qu'à la prescription de l'action et non pas de l'exception (art. no. 1 du Décret no.167/1958 interprété « per a contrario »); la nécessité de dresser des défenses sur la voie d'exception ne dépend pas de la position du défendeur mais de l'attaque du requérant qui s'est cristallisé dans la promotion de l'action[1].

Mais on a montré qu'une telle solution qui, pratiquement, est équivalente à la neutralisation des effets de la prescription extinctive et, par conséquent, avec l'éludation des normes juridiques qui gouvernent cette institution, pourrait être adoptée dans le système de droit où les nomes qui règlementent la prescription extinctive n'aurait pas un caractère d'ordre publique mais l'application de la prescription qui serait conditionnée par son invocation par le défendeur[2].

Dans une deuxième opinion[3] on distingue entre, d'une part, les exceptions par lesquelles il se valorise un droit qui pouvait être protégé et par voie d'action, des exceptions qui sont prescriptibles.

Une troisième opinion fait la distinction suivante[4] :

- si le droit subjectif pourrait être valorisé sur la voie de l'espèce et cette action est prescriptible, alors l'exception est aussi prescriptible, dans les mêmes conditions que l'action. La solution se fonde tant sur la nécessité

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[1] I.B. Noviţki argumente pour cette solution que « la loi ne connait que la prescription de l'espèce... Il ne faut pas perdre de vue la différence entre la situation du titulaire du droit à l'action, dont l'initiative, énergie, etc. il dépend l'introduction de l'action le plus court temps possible, pour ne pas risquer de perdre le droit à l'action et la situation de la personne qui peut dresser des défenses contre une éventuelle action ; l'accélération de l'introduction de l'action et donc, la possibilité de dresser des défenses ne dépend pas d'elle.

[2] Gh. Beleiu, *Droit civil roumain. Introduction dans le droit civil. Sujets du droit civil,* Ed. Univers Juridique, Bucarest, 2004, p. 212.

[3] M. Eliescu, Certains problèmes concernant la prescription extinctive, dans le cadre d'une future réglementation légale, dans la revue « *Eudes et recherches juridiques* » no. 1/1956, p. 263-264; J. Mateiaş, *Domaine d'application de la prescription extinctive*, dans le travail « Prescription extinctive" de J. Mateiaş, P.M. Cosmovici, Ed. Scientifique, Bucarest, 1962, p. 6 et les suivantes.

[4] Veuillez voir: A. Pop, Gh. Beleiu, *Cours de droit civil. Partie générale*, Université de Bucarest. Faculté de droit, Bucarest, 1973, p. 452; Gh. Beleiu, op. cit, p. 252; I. Dogaru, *Eléments de droit civil. Introduction dans le droit civil. Sujets du droit civil*, Maison d'édition « Sansa », Bucarest, 1993, p. 262; E. Lupan, *Droit civil. Partie générale*, Ed. Argonaut, Cluj, 1997, p. 276

de ne pas permettre l'éludation des normes d'ordre publique concernant le caractère prescriptibile de l'action que sur un argument d'analogie – « ubi eadem est ratio, ibi eadem solutio esse debet ». Par exemple, la nullité relative est soumise à la prescription extinctive n'importe qu'elle soit invoquée sur la voie de l'action ou sur voie d'exception ; tant l'action dans la réduction des libertés excessives que l'exception dans leur réduction doivent être sollicitées à l'intérieur de la notion de prescription extinctive ;

- si l'action est imprescriptibile, alors la protection du droit subjectif sur la voie de l'exception est imprescriptibile (l'art. 2 du Décret no. 167 /1958 fait une application à cette règle en ce qui concerne l'invocation de la nullité absolue d'un acte juridique).

Admettant que la valorisation du droit subjectif civil sur voie d'exception est soumise à la prescription extinctive, dans les mêmes conditions que la valorisation du droit respectif sur voie d'action, cependant il ne faut pas exclure la possibilité de considérer, en fonction des circonstances concrètes de l'espèce, que la prescription extinctive n'ait pas commencé se dérouler ou, selon le cas, ait été interrompue par reconnaissance tacite ou expresse.

Action en constatation

En vertu des dispositions de l'art. 111 Code de procédure civile, l'action en constatation est l'action par laquelle le requérants sollicite à l'instance de jugement de constater l'existence ou l'inexistence d'un droit subjectif civil. Une telle action ne peut pas être reçue si le requérant peut demander la réalisation du droit[1].

Le droit à l'action en constatation, n'ayant qu'une acception processuelle, n'entre pas sous l'incidence de la prescription extinctive, étant imprescriptible.

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[1] L'imprescriptibilité de l'action en constatation résulte du fait, comme il est souligné constamment dans la jurisprudence (veuillez voir, par exemple, C.S.J., s. civ. Arrêt no. 3107/1994, dans le Bulletin de la Jurisprudence 1994, p. 85), le requérant n'a pas en vue l'obligation du défendeur à l'exécution d'une prestation mais seulement que l'instance constate l'existence ou, selon le cas, l'inexistence d'un droit subjectif. Autrement dit, l'imprescriptibilité de l'action en constatation se justifie non pas sur la circonstance que le droit de saisir l'instance est imprescriptible extinctif mais sur la circonstance que le droit subjectif existe ou n'existe pas et parce que la partie ne dispose pas de voie d'une action en réalisation, il faut lui reconnaître la possibilité d'obtenir la constatation de l'existence ou de l'inexistence du droit subjectif civil quand il a intérêt.

Parmi les actions en constatation, la plus souvent rencontrée dans la pratique judiciaire est l'action dans la constatation de la nullité absolue d'un acte juridique, qui est imprescriptible.

En effet, au titre de l'art. 2 du Décret no. 167/1958, la « Nullité d'un acte juridique peut être invoquée n'importe quand, soit par la voie d'action soit par la voie d'exception ». Le texte envisage seulement l'action en nullité absolue parce qu'elle opère sous le pouvoir de la loi, dès la conclusion de l'acte juridique et que l'organe de juridiction se limite à la constater.

La justification du caractère imprescriptible du droit à l'action dans la constatation de la nullité absolue réside tout d'abord dans le fait que la sanction a été créée pour la protection de certains intérêts généraux des citoyens, ensuite, dans la circonstance que l'action en nullité n'a pas d'objet patrimonial et dernièrement, étant une action en constatation elle a seulement un caractère processuel[1].

En opposition avec l'action de constatation de la nullité, qui est une action dans le sens processuel imprescriptible, l'action en annulation (ou en nullité relative) est une action dans le sens matériel et, par conséquent, elle est prescriptible parce que l'annulation de l'acte juridique est dite par l'instance par arrêt judiciaire et la nullité relative va opérer dans le pouvoir de cet arrêt, manquant l'acte des effets juridiques à cet effet.

Actions mixtes

Certains auteurs désignent par actions mixtes les actions qui ont les caractéristiques des actions réelles ou en constatation[2], montrant que leur

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[1] Il faut mentionner aussi le fait que lorsque l'acte juridique frappé par nullité absolue a été exécuté totalement ou partiellement, une fois avec l'action dans la constatation de la nullité il se formule, aussi, en règle générale, des demandes de restitution des prestations exécutées qui sont soumises à la prescription extinctive, parce qu'elles revêtent le caractère du droit à l'action dans le sens matériel. Donc, quoique l'action dans la constatation de la nullité absolue soit imprescriptible, ses effets concernant la restitution des prestations exécutées ou le paiement des autres dommages sont paralysés par la prescription du droit matériel à l'action, qui a comme objet ces restitutions ou dommages. L'imprescriptibilité de la nullité absolue a une grande efficience pratique lorsque la nullité d'un acte juridique est soulevée sur voie d'exception parce qu'elle peut paralyser n'importe quand l'action par laquelle il se sollicite l'exécution d'une acte juridique frappé par nullité absolue.

[2] A. Pop, Gh. Beleiu, op. cit. p. 453; I. Dogaru, op. cit., p. 263, P.M. Cosmovici, *Traité de droit civil. Partie générale*, Ed. de l'Académie R.S.R., Bucarest, 1989, p. 173; M.

prescriptibilité se détermine pour chaque cas en particulier, en fonction de la qualification donnée en concret à l'action, selon le but poursuivi à son déclenchement (par exemple, la remise d'un immeuble, le paiement d'une créance, etc.). L'exemple typique de cette action c'est la pétition d'hérédité. Autres auteurs définissent les actions mixtes comme étant celles par lesquelles le requérant suit la protection, en même temps, d'un droit réel et d'un droit de créance qui sont l'effet de la même cause (par exemple, sont issus du même contrat) ou entre lesquels il existe une étroite liaison[1]. On y distingue deux catégories d'actions mixtes telles, d'une part, les actions par lesquelles on sollicite l'annulation, la résolution, la résiliation ou, selon le cas, la révocation d'un acte juridique par lequel il a été créé ou il s'est transmis un droit réel, et, d'autre parte, les actions par lesquelles il se sollicite l'exécution d'un acte juridique constitutif ou translatif de droits réels (la remise du bien, son objet).

Il est à retenir aussi que dans le cadre de cette conception, la prescriptibilité ou l'imprescriptibilité de l'action va être déterminée en fonction de la situation concrète (par exemple, l'action en nullité est relative ou absolue).

Dualité d'actions

Par « dualité d'actions » certains auteurs désignent la situation où le titulaire du droit subjectif civil dispose de deux actions pour la protection de son droit tel que, d'une part, une action basée sur un contrat, donc une action personnelle, („ex contractu"), soumise à la prescription extinctive, en vertu du Décret no. 167/1958, et, d'autre part, une action réelle, dans la revendication du bien, prescriptible ou imprescriptible selon le Code civil[2].

Par exemple, il est cité le cas du déponent, du commodant, du propriétaire du bien donné en gage. Alors dans la jurisprudence il a été décidé que : « … le déponent – propriétaire a contre le dépositaire deux actions pour la restitution des biens donnés pour conservation, une personnelle, issue du contrat de dépôt, soumise à la prescription et autre

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Eliescu, *Transmission et partage de l'héritage dans le droit de Roumanie*, Ed. de l'Académie, Bucarest, 1966, p. 189-192

[1] Ciobanu, *Traité de procédure civile*, *vol I, Théorie générale*, Bucarest, 1995, p. 299-300, G. Boroi, D. Rădescu, *Code de procédure civile commenté et annoté*, Bucarest, 1994, p. 181

[2] A. Pop, Gh. Beleiu, op. cit, p. 453, I. Dogaru, op. cit., 263, P.M. Cosmovici, op. cit., p. 173

réelle, en revendication, basée sur son droit de propriété, qui n'est pas soumise à la prescription.

Ne pas reconnaître au déponent – propriétaire que le droit à l'action personnelle, ça signifierait que dans le cas où cette action-là aurait été prescrite et le dépositaire refuserait de restituer les biens de bon gré, le propriétaire resterait sans eux pour toujours ; en échange le détenteur les utiliserait quoique, par l'effet de la prescription extinctive, celui-ci n'ait pu obtenir aucun droit sur eux, solution inadmissible, manquée de toute raison.

L'existence de deux actions distinctes dans le patrimoine du déponent – propriétaire résulte, d'ailleurs de l'art. 1598 C. civil, qui fait une application de ce principe dans la situation dans laquelle où le contrat de dépôt est conclu avec une personne incapable et quand – à cause de l'invalidité de ce contrat – au déponent il reste seulement l'action en revendication pour apporter de nouveau ses biens en possession si, bien entendu, les trouve encore à la main du dépositaire incapable »[1].

Autres auteurs[2] affirment qu'en réalité, il ne s'agit pas de même droit protége par deux actions distinctes mais d'un droit de créance issu du contrat de dépôt, de commodat, de location, etc. (le droit à la restitution du bien) et qui est défendu par une action patrimoniale et personnelle (prescriptible extinctif), et par un droit de propriété sur le même bien, défendu par une action réelle (prescriptible ou, selon le cas, imprescriptible). Sous l'aspect de la prescription extinctive, l'action réelle est plus avantageuse que l'action personnelle en restitution ; aussi, par rapport à l'action personnelle en restitution, l'action réelle peut être exercée aussi contre les tiers qui auraient la chose, objet de l'acte juridique non translatif. En échange, l'action personnelle en restitution n'implique pas la preuve du droit de propriété, étant suffisante la simple preuve de l'acte juridique d'où est issu le droit à la restitution du droit[3].

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[1] Arrêt no. 1369/1969 de la Section civile de l'ancien Tribunal Suprême dans le recueil d'arrêts du Tribunal Suprême en 1969, p. 93-95; pour commodat veuillez voir Tribunal Suprême, s. civ., arrêt no. 2.300/1989, dans la revue « Droit » no. 8/1990, p. 78

[2] G. Boroi, *Droit civil. Partie générale*, 2e ed., Ed. All Beck, Bucarest, 1999, p. 276

[3] La différence entre la « dualité d'actions » et les actions mixtes par lesquelles il se sollicite la remise du bien qui a été l'objet dérivé d'un acte juridique constitutif ou translatif de droits réels consiste dans le fait que, par définition, dans le cas de la dualité d'actions il ne s'agit pas d'un acte juridique constitutif ou translatif de

Action dans la réparation d'un dommage moral

La doctrine et la jurisprudence de Roumanie ont connu une certaine évolution en ce qui concerne la recevabilité de la réparation – patrimoniale – d'un dommage moral[1]. Ainsi, l'action dans la compensation patrimoniale d'un préjudice moral, étant une action dans la justice par laquelle il se valorise un droit de créance, donc une action patrimoniale et personnelle, entre sous l'incidence des dispositions légales qui gouvernent la prescription extinctive dans la catégorie des droits de créance et, par conséquent, est prescriptible extinctivement[2]. Une consécration législative de la prescriptibilité de l'action dans la réparation d'un dommage moral est prévue dans la Loi no. 11/1991 concernant le combat de la concurrence non loyale. En effet, au titre des dispositions de l'art. 9 par. 1 et art. 12 de cette loi, si, conséquence des faits non loyaux il s'est produit un préjudice patrimonial ou moral, la victime a le droit s'adresser à l'instance de

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droits réels donc le droit réel et le droit de créance n'ont pas la même cause génératrice mais la source du droit réel préexiste à la source du droit de créance. Une autre différence importante se situe dans le domaine probatoire, dans le sens que dans le cas de l'action mixte, s'il est intervenu la prescription extinctive de l'action personnelle, la recevabilité de l'action réelle est conditionnée par la preuve du droit de propriété. La différence entre les deux hypothèses se manifeste aussi sur le plan de la prescription extinctive. Ainsi, dans le cas de l'action mixte, étant donné non pas deux actions cumulatives mais une seule action, la prétention consistant dans la remise du bien est argumentée par l'acte juridique même constitutif ou translatif de droits réels et la prescription extinctive va se rapporter seulement au droit réel ; au contraire, dans le cas de la dualité d'actions, si la prétention en restitution est argumentée sur le contrat de dépôt(C.A. Bucureşti, IIIe s. civ., arrêt no..1303/1995, en *Recueil de pratique judiciaire civile*, 1993-1998. p 12), de commodat, de location, etc. la demande sera rejetée comme prescrite si, par rapport au droit de créance, il serait accompli le terme de prescription extinctive à la date de l'exercice de l'action personnelle, suivant que le déponent, le commodant, le locataire, etc. introduisent une nouvelle action en justice, sur un autre fondement, c'est-à-dire une action réelle.

[1] Voir, pour des détails, C. Stătescu, în *Traité de droit Civil. Théorie générale des obligations*, p. 163-166; C. Turianu, *Responsabilité civile pour les dommages moraux*, en « Droit », np. 4/1993, p. 11-27.

[2] Gh. Beleiu, op. cit., p. 263; I. Dogaru., op. cit. p. 263; P. M. Cosmovici, op. cit., p. 173; D. Lupulescu, *Droit civil. Introduction dans le droit civil*, Université « Anghel Rugină » Galaţi, Galaţi, 1999., p. 194-195; C.S.J., s. civ. Arrêt no. 4105/2000 dans la revue « Droit » no. 4/2001, p. 180.

jugement dans un délai d'une année à partir de la date quand il a connu ou il aurait dû connaître le dommage et celui qui l'a causé mais pas plus tard de trois ans de la date du fait, pour la réparation du préjudice.

L'action « en restitution » conséquence de l'annulation d'un acte juridique civil

Comme il a été montré, l'action en nullité (prescriptible ou imprescriptible si la nullité est relative ou absolue) ne se confond pas avec l'action en restitution, totale ou, selon le cas, partielle des prestations exécutées en vertu de l'acte juridique qui a été annulé, même s'il est possible l'exercice concomitant de deux actions, dans un procès où la nullité représente l'objet du point de demande principal et la restitution des prestations exécutées constituent l'objet d'un point de demande accessoire. En ce qui concerne l'incidence de la prescription extinctive sur l'action dans la restitution des prestations exécutées en vertu d'un acte juridique qui ultérieurement a été annulé, doit, tout d'abord de prendre en compte sa nature patrimoniale. Deuxièmement, il est nécessaire de prendre en considération la nature du droit patrimonial qui va être valorisé par l'intermédiaire d'une telle action (droit réel ou droit de créance).

Dans le cas de l'annulation d'un acte juridique translatif ou constitutif de droits réels sur des biens individuellement déterminés, l'action par laquelle celui qui a éloigné ou a constitué le droit réel, sollicite la restitution de sa prestation a le caractère d'une action réelle, devenant donc applicables les règles qui gouvernent le domaine de la prescription extinctive dans la catégorie des droits réels. Par exemple, l'action par laquelle l'ancien vendeur sollicite l'obligation de l'ancien acheteur de remettre le bien, objet du contrat d'achat-vente qui ultérieurement a été annulé a la nature d'une action en revendication.

Dans tous les autres cas, l'action en restitution a le caractère d'une action patrimoniale et personnelle, étant donc une action prescriptible extinctivement qui s'encadre « lato sensu » dans les actions basées sur l'enrichissement sans juste raison ou, parfois (la déclaration de la nullité du contrat synallagmatique après que les deux parties aient exécuté les charges de ce contrat-là) dans les actions justifiées sur le paiement non dû.

La solution est semblable aussi dans l'hypothèse où on sollicite la restitution des prestations exécutées en vertu d'un contrat synallagmatique annule suite à la résolution, annule suite à la résiliation (par exemple, l'action par laquelle il se sollicite la restitution d'un bien, objet d'une

location résiliée pour faute de payement du loyer) ou d'un acte juridique révoqué.

Actions concernant le registre foncier

En ce qui concerne la prescriptibilité ou l'imprescriptibilité des actions en matière de registre foncier, il faut préciser, préalablement, que la Loi no. 7/1996 du cadastre et de la publicité immobilière envisage expressément seulement l'action en rectification des inscrits du registre foncier.

L'art. 37 par. 1 de la Loi no. 7/1996 dispose que « l'action en rectification[1] sous la réserve de la prescription du droit matériel à l'action de fond sera imprescriptible ». Donc, cette disposition doit être corrélée avec les dispositions de l'art. 1890 C. civ., suivant s'appliquer le principe « accesorium sequitur principale ».

Le paragraphe suivant du même article prévoit que « par rapport aux tiers personnes qui ont acquiert de bonne foi un droit réel par donation ou legs, l'action en rectification ne pourra pas être démarrée que dans un délai de 10 ans, à comper du jour d'enregistrement de leur demande d'inscription, excepté le cas où le droit matériel à l'action de fond n'a pas été prescrit plus tôt ». Par conséquent, l'action en rectification exercée contre les tiers acquéreurs de bonne foi et à titre gratuit est prescriptible, le délai de prescription extinctive étant, en principe, de 10 ans de la date

[1] En vertu de l'art. 35 de la Loi no. 7/1996, « dans le cas où le contenu du registre foncier ne correspond pas, en ce qui concerne l'inscription, avec la situation juridique réelle, il peut être sollicitée sa rectification. Par rectification on comprend la radiation, l'éloignement ou la mention de l'inscription de toute opération, susceptible de faire l'objet d'une inscription dans le registre foncier ». En vertu de l'art. 36 de la Loi no. 7/1996. « toute personne intéressée peut demander la rectification des inscriptions du registre foncier, si par un arrêt judiciaire définitif et irrévocable il s'est constaté que : 1. l'inscription ou l'acte en vertu duquel il a été effectué l'inscription n'a pas été valable ; 2. le droit inscrit a été erroné qualifié ; 3. les conditions d'existence du droit inscrit ne sont plus accomplies ou les effets de l'acte juridique en vertu duquel il a été fait l'inscription ont cessé ; 4. l'inscription dans le registre foncier n'est plus en concordance avec la situation réelle actuelle de l'immeuble ». On retient encore que l'art. 55 de la Loi no. 7/1996 réglemente la rectification des erreurs matérielles commises à l'occasion des inscriptions ou des radiations dans le/du registre foncier.

d'enregistrement de la demande du tiers par laquelle celui-ci sollicite l'inscription de son droit dans le registre foncier (et dans cette hypothèse il trouve application le principe « accesorium sequitur principale », mais seulement si le délai de prescription extinctive serait plus bref que celui établi par cette disposition légale).

Mais s'il s'agit d'un tiers acquéreur de bonne foi et avec un titre onéreux, l'art. 38 de la Loi no. 7/1996 prévoit que le délai de prescription extinctive de l'action en rectification est de 3 ans à compter la date d'enregistrement de la demande par laquelle le tiers respectif a sollicité l'inscription de son droit.

En synthèse, on va retenir les suivants : l'action en rectification des inscriptions définitives et provisoires[1], exercée contre les acquéreurs directs ou des tiers sous-acquéreurs de mauvaise foi, en principe est imprescriptible extinctivement (art. 37 par. 1); l'action en rectification des inscrits définitifs et provisoires, exercée contre les personnes tiers qui ont inscrit leur droit réel acquis de bonne foi et par un acte juridique avec un titre onéreux est prescriptible extinctivement (art. 38)[2].

A ces explications, il faut ajouter encore que l'action en rectification des erreurs matérielles contenues dans le registre foncier est imprescriptible ou, selon le cas, prescriptible extinctivement, dans les conditions prévues par l.art. 37 et les suivants de la Loi no. 7/1996, qui, en vertu de l'art. 55 par. 2 de la même loi, s'applique par ressemblance.

La loi n'envisage pas la prescriptibilité ou l'imprescriptibilité de l'action en rectification des notes à effet d'opposabilité ou d'information pour les tiers personnes mais dans la doctrine il s'estime qu'une telle action est imprescriptible extinctivement, s'agissant d'actes et de faits juridiques concernant les droits personnels, l'état et la capacité des personnes en liaison avec les immeubles compris dans le registre foncier[3].

Dans l'absence de certaines dispositions légales expresses, on soutient que le problème de la prescriptibilité ou de l'imprescriptibilité

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[1] L'art. 31 „L'inscription provisoire dans le registre foncier se fait dans le cas de l'acquisition des droits affectés par une condition suspensive ou si l'arrêt judiciaire n'est pas définitif et irrévocable »; « L'inscription provisoire opposable aux tiers avec le rang déterminé par la demande de candidature, sous les conditions et dans la mesure de sa justification ».

[2] G. Boroi, Liviu Stănciulescu, op. cit., p. 129-132

[3] M. Nicolae, *Publicité immobilière et les nouveaux registres fonciers,* Ed. Press Mihaela, Bucarest 2000, p. 422

d'autres actions en matière de registre foncier (on a en vue tant l'action en prestation tabulaire[1] et l'action en justification[2] que la demande d'inscription du droit réel immobilier dans le registre foncier mais pas la demande de radiation de l'inscription du droit réel immobilier, parce que, dans la conception du législateur, cette dernièreest comprise dans la catégorie des actions en rectification) va être résolu en fonction de la qualification de ces actions comme non patrimoniales ou, au contraire, comme patrimoniales. Si on admettait qu'il s'agit d'actions non patrimoniales, il signifierait qu'elles sont imprescriptibles extinctivement. ; en échange, s'il estimait qu'il s'agit des actions patrimoniales et personnelles, alors il signifie que les actions en cause seraient prescriptibles dans le terme général de prescription extinctive, applicable aux actions personnelles (3 ans)[3], et s'il estimait qu'il s'agit d'actions patrimoniales et réelles, alors il sera admis que les règles qui gouvernent le domaine de la prescription extinctive dans la catégorie des droits réels[4] deviennent incidentes.

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[1] En vertu de l'art. 29 par. 1 de la Loi no. 7/1996, « celui qui a transmis ou a créé, au profit de l'autre, un droit réel sur un immeuble est tenu de remettre l'inscrit translatif ou constitutif du droit, pour l'inscription dans le registre foncier, si cet inscrit est dans sa possession et c'est le seul exemplaire preuve, excepté le cas où il s'est procédé, d'office, à l'inscription » et le paragraphe 2 du même article prévoit que « dans le cas où celui obligé refuse la remise de l'inscrit, il sera demandé à l'instance judiciaire de décider l'inscription », cette action en justice étant dénommée action en prestation tabulaire. Il s'agit toujours d'une action en prestation tabulaire spéciale dans le cas règlementé par l'art. 30 de la Loi no. 7/1996, au titre duquel, « l'acquéreur antérieur peut demander à l'instance judiciaire d'octroyer à son inscription un rang préférentiel par rapport à l'inscription effectuée à la demande d'un tiers, qui a acquis ultérieurement l'immeuble avec titre gratuit ou qui a été de mauvaise foi à la date de conclusion du document »

[2] L'action en justification est celle par laquelle il se sollicite la transformation d'une inscription provisoire dans une inscription définitive dans le registre foncier.

[3] Pour la solution selon laquelle l'action en prestation tabulaire est soumise au délai de prescription de 3 ans, voir, par exemple, C. Bârsan, M. Gaiţă, M. M. Pivniceanu, *Droit civil. Droits réels*, Institut Européen, Iaşi, 1997, p. 222-223

[4] Certains auteurs (G. Boroi, Liviu Stănciulescu) estiment que la solution doive être donnée à partir non pas du caractère non patrimonial ou patrimonial de ces actions, mais de la prémisse que le droit de faire opposable envers les tiers le droit réel immobilier qui s'est transmis ou s'est constitué a un caractère accessoire par

Pour la résolution du problème de connaître si l'action en prestation tabulaire (spéciale) en vertu de l'art. 30 de la Loi no. 7/1996 est ou non soumise à la prescription extinctive, il faut avoir en vue aussi la circonstance que la recevabilité d'une telle action aura comme effet la rectification du contenu du registre foncier, par la suppression de l'inscription faite par le tiers acquéreur, ce qui signifie qu'il devrait prendre en compte non seulement la prescriptibilité ou l'imprescriptibilité du droit réel immobilier effectif valorisé, mais aussi les dispositions qui règlementent la prescription de l'action en rectification exercée contre en tiers acquéreur de mauvaise foi, est imprescriptible extinctivement, sous la réserve de la prescription du droit à l'action au fond (conclusion issue de la corroboration de l'art. 30 avec l'art. 37 par.1), et l'action exercée contre le tiers acquéreur de bonne foi et avec un titre gratuit est prescriptible (conclusion issue de la corroboration de l'art. 30 avec l'art. 37 par.2)[1].

L'action concernant un droit secondaire

Dans la littérature de spécialité[2], par droits secondaires on désigne les droits subjectifs qui n'entraînent pas directement un droit à l'action, c'est-à-dire des prérogatives consistant dans le pouvoir de donner naissance par manifestation unilatérale de volonté d'un effet juridique qui affecte également les intérêts d'une autre personne, tel : le droit de choix dans le cas d'une obligation alternative ; le droit de dénonciation unilatérale d'un contrat, dans les cas admis par la loi ; le droit des tiers,

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rapport au droit réel immobilier même. Par conséquent, en principe, ces actions sont soumises ou non à la prescription extinctive, comme le droit réel immobilier en cause est ou non prescriptible extinctif (« accesorium sequitur principale »). Plus exactement, cette solution va être appliquée pour l'action en prestation tabulaire justifiée sur l'art. 29 de la Loi no. 7/1996, de l'action en justification et de la demande par laquelle il se sollicite l'inscription du droit réel immobilier dans le registre foncier. Par exemple, l'action en prestation tabulaire (au titre de l'art. 29 de la Loi no. 7/1996 est imprescriptible extinctivement si elle se fonde sur le droit de propriété immobilière ou sur le droit de superficie, mais elle est soumise à la prescription extinctive si elle se fonde sur le droit d'usufruit, d'usage, d'habitation ou de servitude.

[1] Voir aussi M. Nicolae, op. cit., p. 412.

[2] M. Eliescu, *Certains problèmes concernant la prescription extinctive dans le cadre d'une future réglementation légale*, dans la revue « Etudes et recherches juridiques », no. 1/1956, p. 258; E. Roman, *« Prescription extinctive »*, en « Traité de droit civil », Ier vol., Partie Générale, Bucarest, 1967, p. 450; Gh. Beleiu, op. cit., p. 214; P.M. Cosmovici, op. cit., p. 173

dans le cas de la simulation, d'opter entre l'acte apparent et l'acte réel ; le droit de ratifier une gestion des intérêts d'autrui etc.[1]

Étant donné que les droits secondaires ne donnent pas naissance directement et immédiatement à un droit à l'action, ils sont considérés comme imprescriptibles extinctivement[2]. Toutefois, les effets de la prescription extinctive vont se produire indirectement, notamment en ce qui concerne le droit à l'action qui est issu du rapport juridique concernant l'exercice du droit secondaire. Par exemple, dans le cas d'obligation alternative, le droit (généralement, du débiteur) de faire un choix entre les deux prestations qui font l'objet de l'obligation ne se prescrit pas mais la prescription extinctive peut intervenir pour ce qui est le droit du créditeur de demander du débiteur la prestation choisie.

Certaines actions en matière successorale

Le droit d'option successorale est soumis à la prescription extinctive (art. 700 para. 1 Code civil, qui dispose que le droit d'accepter la succession se prescrit par un délai de 6 mois considéré de la date de l'ouverture de la succession »)

L'action par laquelle il se sollicite la sortie de l'indivision successorale (partage successoral) est imprescriptible extinctivement (art. 728 par. 1 Code civil, au titre duquel, « … un cohéritier peut n'importe quand demander le partage de la succession même s'il existait des conditions ou des prohibitions contraires »)[3]. A retenir que l'action de

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[1] Il s'observe, qu'en réalité, les soi-disant droits secondaires ne sont pas de véritables droits subjectifs mais seulement de simples facultés ou bénéfices légales ou conventionnels (G. Boroi, Liviu Stănciulescu, op. cit., p. 127).

[2] T. Ionaşcu, *Traité de droit civil*, Ier vol., Ed. de l'Académie R.S.R., Bucarest, 1967, p. 450; D. Lupulescu, op. cit., p. 195; I. Dogaru, op. cit., p. 264

[3] Tribunal Suprême, s. civ., arrêt no. 673/1982, dans le Recueil d'arrêts 1982, p. 36 ; arrêt no. 860/1983, dans le Recueil d'arrêts 1983, p. 87. Quoique imprescriptible extinctivement, l'action de partage successoral peut être quand même paralysée temporairement dans le cas de l'existence d'une convention de maintien de l'état d'indivision sur une période de maximum 5 ans (art. 728 par. 2 C. civ.), respectivement définitivement (au moins e partie) dans le cas où l'un des coindivisaires a exercé sur certains biens successoraux une possession utile de 30 ans qui conduise à leur acquisition par usucapion (art. 729 C. civ.). En pratique on a mis le problème de la séparation de la prescription du droit d'option successorale – à laquelle on applique le délai de 6 mois, prévu par l'art. 700 C.civ. – par rapport à l'imprescriptibilité de l'action de partage – prévue par l'art. 728 C.civ – statuant que : « Décidant le rejet de l'action comme prescrite, l'instance a retenu que le

partage est imprescriptible extinctivement non seulement en ce qui concerne le partage des biens mobiles et immobiliers qui composent la masse successorale mais aussi des fruits produits par les biens indivis, dans la mesure où ces fruits existent encore dans leur matérialité ; mais si les fruits n'existent plus dans leur matérialité, la demande d'apporter à la masse de partage de leur équivalent de valeur a un caractère patrimonial et personnel, étant prescriptible dans un délai de trois ans de la date de cueillette des fruits respectifs[1].

L'action par laquelle il se sollicite la constatation de la masse successorale, de la qualité d'héritier ou des quottes successorales est imprescriptible instinctivement, s'agissant d'une action en constatation.

L'action dans la réduction des libertés excessives (l'action par laquelle les héritiers réservataires ou, selon le cas, leurs héritiers, ou ceux qui les présentent les droits, c'est-à-dire ceux qui ont acquis des héritiers réservataires des droits successoraux par des actes entre les vivants, et aussi les créditeurs des héritiers réservataires sollicitent la réduction des legs et des donations qui violent la réserve successorale, ainsi que ces libertés s'encadrent dans la quotité disponible ordinaire) n'est pas une action réelle, mais une action patrimoniale et personnelle, parce que le droit de demander la réduction peut être opposé seulement aux légataires et aux donataires, l'héritier réservataire ne pouvant pas suivre les biens, l'objet des libertés excessives (plus exactement, les biens donnés) dans les mains des tiers sous-acquéreurs, hypothèse où la réserve se complète par l'équivalent de la partie qui dépasse la quotité disponible (art. 855 C. civ.) ; par conséquent, l'action en réduction des libertés excessives est soumise à la

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requérant n'avait pas accepté le délai de 6 mois, prévu par l'art. 700 C.civ., la succession de ses parents. Parce que, en vertu des dispositions de l'art. 728 C.civ., un héritier peut demander n'importe quand l'issue d'indivision, une telle action est imprescriptible, tandis que le refus dans le délai légal de l'héritage a comme conséquence la perte de la qualité d'héritier, le successible étant considéré une personne étrangère héritière. Donc, rejetant la demande de partage sur le considérant que le droit à l'action du requérant s'est prescrit, l'instance a prononce une solution avec la violation essentielle de la loi » (Arrêt no. 1566/1986 de la Section civile de l'ancien Tribunal Suprême, dans le Recueil d'arrêts du Tribunal Suprême sur l'année 1987, p. 98-101).

[1] G. Boroi, Liviu Stănciulescu, op. cit., p. 132.

prescription extinctive, le délai de prescription étant de trois ans et il se calcule à compter de la date de l'ouverture de la succession[1].

La même solution aussi dans le cas de l'action concernant le rapport des donations (l'action par laquelle on valorise l'obligation que les descendants et l'époux survivant du défunt ont entre eux, qui viennent effectivement et ensemble à l'héritage, d'apporter de nouveau à l'héritage, en nature ou par équivalent de valeur, les biens qu'ils ont reçus à titre de donation de „de cuius", excepté le cas où le donateur a disposé l'exemption de rapport de la donation), donc une telle action, ayant caractère patrimonial et personnel (le droit des héritiers de réclamer le rapport est un droit personnel, la créance, né de la loi et de la volonté présumée du donateur, l'action qui le sanctionne pouvant être exercée seulement contre

[1] Tribunal Suprême, s.civ, arrêt no. 1649/1972, dans le Répertoire 1969-1975, p. 204; arrêt no. 1973/1973, dans le Recueil d'arrêts 1973, p. 215; arrêt no. 732/1986, dans le Recueil d'arrêts 1986, p. 86, dans le dernier arrêt se montrant que, dans le cas où de raisons indépendantes de sa volonté, le titulaire du droit à l'action n'a pas su de l'existence du testament par lequel on lui a lésé la réserve successorale, le délai de prescription commence à couler de la date de prise de connaissance du testament respectif (G. Boroi apprécie que dans une telle hypothèse la prescription commence à couler de la date de l'ouverture de la succession mais la circonstance de l'espèce constitue une cause qui justifie la remise dans le délai de prescription extinctive). Dans le même arrêt on précise encore que, dans la situation dans laquelle celui qui invoque la réduction se trouve dans la possession de l'objet de la réduction, on ne peut pas lui opposer la prescription parce qu'on ne peut pas lui reprocher une négligence dans la valorisation de ses droits tant qu'il a exercé en fait tous les prérogatives issus d'une telle situation et le bénéficiaire de la libéralité n'a pas demandé la remise de l'objet du legs. Dans le même sens, l'instance suprême avait antérieurement décidé que la réduction pouvait être demandée sur voie de défense, qui n'est pas prescriptible, si celui qui invoque la réduction est dans la possession de l'objet du legs - Tribunal Suprême, s.civ, arrêt no. 700/1972, en Répertoire 1969-1975, p. 206 (pour cette solution voir aussi Fr. Deak., *Traité de droit successoral*, Ed. Univers Juridique, Bucarest, 2002, p. 387). On a avancé également la solution selon laquelle la réduction des libertés excessives est soumise à la prescription extinctive, même si on sollicite sur voie d'action ou sur voie d'exception, parce que la valorisation du droit sur voie d'exception (défense de fond) est prescriptible ou imprescriptible, comme la valorisation du droit respectif sur voie d'action est ou non prescriptible (voir, dans ce sens, Tribunal Suprême, s.civ, arrêt no. 1119/1977, dans le Recueil d'arrêts1977, p. 92; St. Cărpenaru, *Droit d'héritage*, en Droit civil. Contrats spéciaux. Droit d'auteur. Droit d'héritage, Université de Bucarest, 1893, p. 478).

les héritiers donataires et les héritiers qui sollicitent le rapport ne bénéficient pas d'un droit de poursuite) peut être introduite dans le délai général de prescription de 3 ans[1], étant sans relevance la circonstance que le rapport des donations est sollicité séparément (soit avant le partage, soit ultérieurement au partage successoral) ou dans le cadre du procès de sortie d'indivision.

En ce qui concerne la pétition d'hérédité (l'action en justice par laquelle le requérant demande à l'instance la reconnaissance de sa qualité d'héritier universel ou à titre universel et l'obligation du défendeur, qui prétend également être héritier universel ou à titre universel, à la restitution des biens successoraux qu'il détient, les droits revendiqués par les deux parties étant inconciliables), il se considère qu'elle soit soumise à la prescription, le délai de prescription étant est de trois ans à compter de la date à laquelle le défendeur a achevé les actes d'héritier[2].

Compte tenu que la pétition d'hérédité est qualifiée par la plupart des auteurs comme une action réelle[3], il faudrait admettre qu'elle soit gouvernée, en ce qui concerne la prescription extinctive, par les règles prévues par le Code civil et non pas par celles comprises dans le Décret no. 167/1958. En tout cas, comme il a été décidé aussi dans la jurisprudence, si on ne sollicite pas la restitution des biens successoraux mais seulement la constatation de la vocation successorale, en réalité, une simple action en constatation, étant donc imprescriptible extinctivement[4].

En ce qui concerne la prescriptibilité de l'action qui exige l'exécution du legs à titre particulier, la solution doit être donnée en fonction des objectifs du legs à titre particulier. Ainsi, si le legs à titre

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[1] Dans ce sens, par exemple, le Tribunal Suprême, s. civ., arrêt no. 1663/1981, dans le Recueil d'arrêts1981, p. 129; arrêt no. 2238/1985 dans la « Revue roumaine de droit » nr. 9/1986, p. 62., arrêt nr. 685/1989, dans la revue « Droit » no. 3/1990, p. 66.

[2] St. Cărpenaru, op. cit., p. 513. Voir aussi C.A. Ploieşti, arrêt civil no. 1407/1998, dans le Bulletin de la jurisprudence, Ier semestre – 1998, p. 209

[3] Voirpar exemple : M.B. Cantacuzino, *Eléments du droit civil*, Ed. Cartea Românească, Bucarest, 1921p. 240, C. Hamangiu, I Rosetti – Bălănescu, Al. Băicoianu, *Traité de droit civil roumain*, IIIe vol., Ed. All, Bucarest, 1998,p. 493; Şt. Cărpenaru, op. cit. p. 513; Fr. Deak, Traité de droit successoral, p. 536; L. Stănciulescu, *Droit civil, droit d'héritage*, IIe édition, Ed. Rosetti, Bucarest, 2000, p. 260

[4] Tribunal Suprême, s. civ., arrêt no. 1051/1969, dans le Recueil d'arrêts 1969, p. 160

particulier est de revendiquer des droits de créance ou des biens de genre, l'action a un caractère patrimonial et personnel, étant donc soumises aux règles du droit commun relatives à la prescription extinctive, contenues dans le Décret no. 167/1958 ; mais si l'objet du legs consiste dans le droit de propriété ou dans un autre droit réel sur un bien déterminé individuellement, il s'agit alors d'une action réelle, donc en termes de prescriptibilité ou d'imprescriptibilité il est d'appliquer les règles régissant l'action en revendication, ou, le cas échéant, l'action confession.

L'action dans la déclaration de la nullité du legs se prescrit dans un délai de trois ans si on invoque une cause de nullité relative de cet acte juridique, mais il est imprescriptible extinctivement lorsqu'on invoque une cause de nullité absolue.

L'action en révocation (la dissolution) du legs pour l'inexécution de la charge est une action patrimoniale et personnelle, étant soumise à la prescription extinctive dans le délai de 3 ans prévu par le Décret no. 167/9158. Il en est de même pour la révocation (dissolution) du legs, avec l'indication que, dans le cas où la demande de révocation est fondée sur une grave insulte faite à la mémoire du testateur, l'art. 931 C. civ. instaure un délai d'un an à compter de la date du délit[1].

Il n'y a pas de point unitaire concernant la solution du problème de la prescriptibilité ou de l'imprescriptibilité de l'action concernant la liquidation des dépenses d'enterrement. Dans une solution, l'action est imprescriptible, parce que l'action de sortie d'indivision successorale est imprescriptible[2] (cette solution coulerait du besoin social de ne pas forcer indirectement l'héritier qui a fait les dépenses d'enterrement d'appeler au jugement les autres héritiers)[3]. Dans une autre solution, l'action est soumise

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[1] On précise qu'il est majoritaire la solution selon laquelle dans tous les cas d'ingratitude, la demande de révocation doit être intentée dans un délai d'un an, soit en vertu de l'art. 833 par. 1 C.civ., soit en vertu de l'art. 931 C.civ. Quand même, l'art. 930 C.civ, concernant les causes de révocation du legs, fait référence seulement à l'art. 830 et art. 831 point 1 et 2 C. civ. (qui établissent les causes de révocation de la donation) et non pas à l'art. 833 par. 1 C.civ et la norme inscrite dans ce dernier article étant spéciale, ça signifie qu'elle ne peut pas être appliquée par analogie. L'art. 931 C. civ. est aussi une norme spéciale et donc il ne s'applique qu'à l'hypothèse en cause. (G. Boroi, L. Stănciulescu, op. cit., p. 135)

[2] Tribunal Suprême, s. civ., arrêt no. 1699/1972, en Répertoire 1969-1975, p. 226

[3] Par rapport aux héritiers acceptants de l'héritage, la demande de paiement de leur partie des dépenses d'enterrement doit être considérée imprescriptible,

à la prescription extinctive, parce qu'elle a comme objet la valorisation d'un droit de créance, s'agissant donc d'une action à caractère patrimonial et personnel[1].

C'est de même dans le cas de la liquidation de toutes dettes de l'héritage (ces obligations-là patrimoniales du défunt qui, n'importe qu'elles soient leur source, existent dans le patrimoine successoral à la date de l'ouverture de l'héritage) et charges de l'héritage (ces obligations-là patrimoniales qui, sans être dans le patrimoine de celui qui laisse l'héritage, apparaissent dans la personne des héritiers à l'ouverture de l'héritage ou ultérieurement, indépendamment de la volonté du défunt ou des héritiers, et les dépenses pour l'administration et la liquidation de l'héritage, le paiement à titre particulier, etc.), donc l'action exercée par l'héritier qui a payé plus qua sa part contre les autres héritiers est soumise à la prescription extinctive dans la notion générale de la prescription extinctive dans le terme général de prescription applicable aux droits de créance et celle-ci même si la demande se valorise sur une voie séparée ou dans le cadre du procès de sortie d'indivision successorale. Mais, comme l'a décidé dans la jurisprudence[2], le cas échéant, la possession exercée sur les biens successoraux trouvés en indivision par l'héritier qui a payé plus que sa part a la signification d'une reconnaissance des autres héritiers, s'agissant donc d'une interruption de la prescription ou d'un ajournement du début de son cours ; dans un tel cas, la prescription de l'action en restitution commence à courir à partir de la date de la perte de la possession des biens successoraux ou de la date du partage volontaire ou de la date d'une demande de partage de l'un des autres héritiers.

En ce qui concerne la séparation de patrimoines (le privilège ou le bénéfice individuel qui peut être invoqué par tout créditeur de la succession, y compris le créditeur - légataire, en vertu de laquelle il a le droit d'être payé de la valeur des biens successoraux avec la préférence

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comme même le droit de demander le partage ; par rapport aux héritiers non acceptants de l'héritage, l'action est prescriptible dans les conditions de l'art. 3 et art. 7 par. 2 du Décret no. 167/1958.

[1] Tribunal Suprême, s. civ., arrêt no. 503/1987, dans le Recueil d'arrêts 1987, p. 116; I. Ivanov, Pour ce qui est la prescriptibilité de la demande – formulée dans le cadre de la procédure de partage – concernant la liquidation des prétentions entre les cohéritiers rapportées aux dépenses d'enterrement, dans la « Revue roumaine de droit » no. 8/1986, p. 21

[2] Tribunal Suprême, s. civ., arrêt no. 503/1987, citée au dessus.

envers les créditeurs personnels des héritiers), le Code civil distingue, en termes de prescription extinctive comme les biens de succession sont meubles ou immobiliers. Ainsi, dans le cas des biens meubles, le privilège du créditeur séparatiste est prescrit dans les 3 ans à compter de la date d'ouverture de la succession (C. civ. art. 783); dans le cas des biens immobiliers, le privilège est imprescriptible sous la réserve de la prescription du droit à l'action sur le fond, étant opposable aussi aux tiers acquéreurs, dans la mesure où il a été conservé selon les règles de la publicité immobilière (art. 783 et art. 1743 C.civ.).

Pour ce qui est la prescriptibilité ou l'imprescriptibilité de l'action en annulation du certificat d'héritier il faut mentionner qu'une telle action n'est pas en soi, mais une greffe sur les actions qui pénalisent directement les droits des héritiers ou, le cas échéant, des tiers, de sorte qu'elle doit être soumise à des règles relatives à la prescription extinctive, applicables à ces actions, étant donc nécessaire de déterminer si le droit qu'on prétend avoir été violé est ou non soumis à la prescription extinctive. Nous faisons la distinction suivante: a) lorsque celui qui demande l'annulation du certificat d'héritier a participé à la procédure successorale notariale et a consenti de délivrer le certificat, son annulation peut être demandée que pour des vices de consentement ou d'incapacité, dans ce cas, s'agissant d'une nullité relative, l'action est soumise à la prescription extinctive[1], ou pour des motifs de nullité absolue, hypothèse dans laquelle l'action est imprescriptible extinctivement[2], b) celui qui n'a pas participé à la procédure successorale notariale, parce que les mentions contenues dans le certificat d'héritier lui sont opposables jusqu'à la preuve contraire, peut demander à l'instance de constater sa qualité d'héritier, la détermination de la masse de succession et des droits de chaque héritier, hypothèse dans laquelle l'action en annulation du certificat d'héritier déjà émis a le caractère d'une action en constatation et est donc elle est imprescriptible extinctivement[3] (mais bien

[1] Voir par exemple, Tribunal Suprême, s. civ., arrêt no. 514/1972 dans le Recueil d'arrêts 1972, p. 164; arrêt no. 844/1991, en « Revue roumaine de droit », nr. 1/1982, p. 57; C.S.J., s. civ. , arrêt no. 790/1990, dans la revue « Droit », no. 1/1991, p. 69; arrêt no. 232/1992 en Problèmes de droit 1990-1992, p. 136

[2] C.S.J., s. civ., arrêt no. 459/1993, Bulletin de la jurisprudence 1993, p. 28

[3] Voir aussi Tribunal Suprême, s. civ., arrêt no. 514/1972, citée au dessus. Pour une solution contraire (que l'action en annulation du certificat de vacances successorales serait une action personnelle et donc soumise à la prescription

entendu, la prescription extinctive pourrait se produire sur le droit d'option successoral), mais, n'étant pas héritier, il peut contester l'inclusion dans la masse successorale d'un bien sa propriété, hypothèse dans laquelle l'action en annulation du certificat d'héritier est régie par les règles applicables aux action réelles.

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extinctive dans le délai général de 3 ans) voir C.A. Bucureşti, IVe s. civ., arrêt no. 1611/1996, en Recueil de pratique judiciaire civile 1993-1998, p. 85

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THE FREE MOVEMENT OF PEOPLE

Speaking, at a given moment, about the concept of European identity, a certain author specifies the fact that among the objectives of the European Union, there is a series of desiderata that have to be mentioned, according to the treaty of Lisbon, which classifies them into several levels:
a. promoting peace, its values and the welfare of the member states;
b. offering to its citizens a space of freedom, security and justice without any internal boundaries.

It has to be mentioned that when the Treaty of Rome was drawn up, an especially important treaty for Europe, the free movement of people was not envisaged as a right for the citizens of the member states to travel anywhere within the community and having no matter what purpose.

At first, the freedom of movement was related to the concept of worker – to what the German doctrine calls ***Marktburger,*** when it describes the status of the individual within the communitarian law, namely, the individual that exerts economic cross-border activities. The principle of free circulation has evolved, considering the establishment of an internal market, along with other types of freedom. The development was due both to the jurisprudence of the Court, as well as to the law-making activities of the other communitarian institutions.

The doctrine considers unquestionable the fact that **free circulation and inhabitancy** constitutes one of the fundamentals of the European Community. **Its relation to the European citizenship has an important significance, especially from a symbolic approach** point of view. Currently, it is still a branch falling apart from citizenship, because of the role played in the development of the communitarian integration.

The institution of any EU citizen's right to travel and live freely on the territory of the member states, stipulated by the Treaty of Maastricht, has put an end, to a certain extent, to the controversy and tensions related to the free circulation. The establishment of this right reasserts the consolidation of a freedom system achieved a long time ago and which had lost, even before the Treaty, its exclusively economic character over the European Union. The combination of the intergovernmental cooperation –

established especially by the Schengen agreements – with the communitarian integration, as well as with the persistence of some states' refuse to eliminate the inner border control, make the treaty of Amsterdam almost illegible. This treaty made an attempt to settle the substance, the latter having four significant general objectives:
- to bring forth the employment and the citizens' rights to the attention of the European Union;
- to eliminate the last obstacles for the free movement of people and to consolidate security;
- to allow Europe strengthen its position at the global level;
- to render more efficient the institutional architecture of the Union with a view to a future expansion.

A special case which has made a change in the jurisprudence of the Court in Luxembourg in the field of free movement , was the *Grzelcyzk* case, a student, French citizen, who studied for three years at a Belgian university, paying his studies by taking part-time jobs and by way of obtaining credits. In the fourth year of college, he applied for a Belgian benefit of social security, also known as the minimal sustenance allowance - minimex. The application was turned down under the reason that the relevant Belgian legislation pronounced as eligible the applicant that is not a Belgian citizen only if the Regulation 1612/68 is applicable, with a view to the free movement of workers within the community. As a consequence, the regulation would be applicable only to workers, not to students too. If the French citizen had been Belgian, he would have been entitled to such an allowance. The Belgium Court of Law has concluded that the subject was not a worker and at the same time it questioned the compatibility of the Belgian legislation with the articles 12 and 17 of the Treaty of European Communities Establishment (T.E.C.) and it required a preliminary interpretation to the European Court of Justice (E.C.J.). While analyzing this case, the Court has taken into account the regulation 1612/68 and the Directive 96/93/CEE regarding the residence right of the students, emphasizing the fact that the directive does not contain stipulations for allocating social benefits to the resident students in the host member state, but it does not prohibit this either. It was drawn the conclusion that in this particular case, the discussion was about a discrimination based on citizenship, which virtually is forbidden by the art. 12 of T.E.C.

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The employment and the rights of the workers carrying out a certain activity in other EU member states than the origin country

One of the most important aspects regarding the free circulation of people is related to the free circulation granted to workers.

As per art. 48 of T.E.C., it has been stipulated that the free movement of workers should be carried out within the Community by the end of the transition period at the latest. This right of free circulation of workers has been established by the regulation 1612/68 of the Council and the Directive 68/360 concerning the abolishment of restrictions on movement and residence within the community for the workers of the member states and their families**.**

The high level of unemployment in the European Union is one of the main concerns of the member states and it used to be a priority in all the documents of the Union. Although creating new job opportunities remained in the scope of the governments of the member states, which had the necessary levers, the Treaty of Amsterdam has given a common dimension to this issue, establishing common politics and strategies, as per the political will of the member states. The stipulations mentioned in this Treaty have rebalanced the Union, balancing the economic and currency dispositions contained in the Maastricht Treaty.

The free movement of people is rendered, among other things, also into the free circulation of workers in relation to whom Bernard Teyssie used to state that „it is a fundamental right that the national jurisdictions have to defend".

The free movement of people aims at, first of all from the economic point of view, creating a sole workforce market, and from the political point of view, achieving a higher cohesion of the peoples making up the European Union, by eliminating the barriers to migration and promoting a communitarian citizenship.

According to the European Social Charter – signed at Torino in 1961 - „every person should have the possibility to make a living by freely exercising a profession", and the fundamental Charter of the fundamental social rights of the workers of December 8-9th, 1989 proclaimed the right of every worker to exercise any kind of profession or trade within the Community, a right which is achievable only by way of free movement. Moreover, the free movement of people must allow the countries facing a certain level of unemployment to export their redundancy to the countries experiencing a shortage of workforce. The displacement of independent

workers is indispensable in order to allow the communitarian exertion of commercial or liberal professions. The displacement of physical persons may contribute to the life of societies and the practical exertion of the freedom to establish branch offices. The access to different positions of the social proxy does not fall into free movement of the employees, but within the dispositions regarding the independent workers.

In addition to that, align. 2 of the Adherence Treaty tackles the Regulation C.E.E. 1612/ 68 regarding the free circulation of workers within the community, with a view to establishing a derogation for a two year interval, calculated from the date of adherence (for Romania 01. 01. 2007-12. 31.2008). During this interval, the member states (at that moment) would apply measures of internal law or measures resulting from bilateral agreements regulating the access of the Romanian nationals to the workforce market of each and every of these states.

In the *Politierechtbank te Mechlen* case – *Belgium c. Hans van Lent, October 2nd 2003,* Mr. Van Lent, Belgium citizen, owns a car, registered in Luxembourg, where he worked. The vehicle is lease purchased by a Luxembourgish company. The Belgium legislation imposes to the Belgian residents the obligation of registering the cars in Belgium on the owner's name, which was impossible for Mr. Van Lent to do, considering that the Leasing Company was registered in Luxembourg. Following a traffic control, the Belgian authorities filed a criminal lawsuit to Mr. Van Lent. The Belgian High Court of Justice has intimated the C.J.C.E. in relation to the compatibility between the Belgian legislation and the principle of free movement of workers, consecrated by the T.E.C. The case entailed the interpretation of the articles 10 (regarding the loyalty obligation) and 39 (regarding the free circulation of workers) of the T.E.C. The Court has appreciated the fact that, in absentia of a harmonization in the field, the member states can establish the terms of vehicles registration (on condition that the dispositions of the treaty regarding the free movement are complied with) and that the Belgian legislation in the field may discourage the employment of Belgian citizens in other member states. The Court has also taken into account the fact that, since August 2001, the Belgian law allows a Belgian resident to register a car he/she uses, only in case that the car owner has no residence right on the territory of Belgium. Nevertheless, the Court considers that neither of these dispositions is able to eliminate the confinements to the free circulation of workers.

The solution of the Court reiterates the principle according to which the member states are compelled to eliminate any legal or administrative barrier that might affect the free circulation of people. In addition to that, the solutions of the Court imply that there is an incompatibility with art. 39 T.E C. not only among the measures establishing restrictions to the employment freedom of the communitarian citizens in other member states, but also among those which may discourage the employment of their citizens in other member states or of other states citizens in the member state under focus.

In a different case, *Christine Morgenbesser c. Consiglio dell'Ordine degli Avvocati di Genova, Italia – a prior appeal* , Mrs. Christine Morgenbesser, French citizen, residing in Italy, is the titular holder of a bachelor's degree in law, awarded in France 1996, but without having obtained the competence certificate for the lawyer profession. After a short internship in some French advocacy cabinets, she had worked since 1998 in a cabinet from Genova, Italy. Consequently, she asked to be registered in the probationers register in Italy, in order to carry out validly the internship period with a view to setting in for the competency exam, which is necessary for the legal practice. Her application was rejected by the Geneva Council of the Attorneys Order, as well as by the National Council of Florence, on the grounds that the Italian law regarding the attorney profession requires a law diploma obtained in an Italian University and the fact that Mrs. Christine M. was not qualified as attorney in France. The High Court of Cassation and Justice has asked C.J.C.E to decide on whether the communitarian law accepts that the Italian authorities reject the registration of title holder of a diploma obtained in another member state, on the simple grounds that the diploma was not issued in Italy.

The Court specified firstly that the case of Mrs Christine M., was not applicable neither to the Directive 98/5, regarding the permanent exercise of the attorney profession, nor to the Directive 89/48 regarding the acknowledgement of high education diplomas. The first directive aims obviously only at fully qualified attorneys, whereas the „practitioner" quality, which is limited in time and representing a part of the training necessary to becoming an attorney, cannot be qualified as „regulated profession", as per the directive 89/48.

Assuming the fact that the internship period entails exercising certain *remunerated activities* (by the clients or the attorneys cabinets, as fees or wages), the principles, established in the treaty as regards the freedom of

becoming a resident or aiming at the free movement of the workers, are applicable to probationers as well. Consequently, the Court reiterates the principles established in the prior jurisprudence: if the national rules do not take into account the knowledge and the already acquired qualification of citizen belonging to another member state, apart from the host state, the exercise of free circulation and residence is restricted.

As far as the term "worker" is concerned, this is not defined either by the primary law or by the secondary law, the Regulation no. 1612/68 of October 15th 1968 defining under art. 1 the *labor relations* in the sense of art. 39 of T.E.C. as a *remunerated activity*. Due to the major importance of the free movement of workers, CJCE has specified that the term "worker" has to have a more comprehensive meaning, the workers, in the communitarian law acceptance being those people that exercise a certain non-liberal profession during a definite period of time and that are remunerated for this

This general definition of the term was given by the Court in the case *Lawrie Blum against Land Baden-Württemberg*, when Mrs. Deborah Lawrie Blum, British national, after obtaining from the University of Freibourg the certificate of pedagogic competence for high school, Oberschulamt of Stuttgart turned down her access to the internship stipulated by „zweite Staatsprüfung" (the second state exam), granting the graduates the possibility of having a career as high school teachers. The file and the remarks presented to the Court state that in the Federal German Republic the training of teachers is, in fact, the scope of the lands. This training include university studies, confirmed by a „erste Staatsprüfung" (the first state exam) and an internship, followed by a „zweite Staatsprüfung" (the second state exam), which is an exam of pedagogical skills, according to paragraph 8 of the resolution. As her access to the internship had been turned down due to the fact that she didn't have German citizenship, Mrs. Lawrie-Blum entered an action to Verwaltungsgericht Freiburg (the administrative High Court of Justice of Freiburg) with a view to invalidating the rejection decision, on the grounds that the communitarian norms were being breached, due to her citizenship, for the access to employment. Verwaltungsgericht Freiburg, just like Verwaltungsgerichtshof Baden-Württemberg (the administrative court of appeal), rejected her request, invoking that article 48 align. (4) of the C.E.E. Treaty excludes from the norms regarding the free circulation of workers, the positions within the public administration; the appeal court added the

fact that the public education is excluded from the treaty field of application, as it is not an economic activity. The court considered that since the free movement of workers constitutes one of the fundamental principles of the Community, *the notion "worker", as stipulated by article 48, cannot be interpreted differently, depending on the national law, as it has a field of application at the communitarian level.* According to our specialized literature, a "worker" is „a person entering dependently in a wage system, which is also the case of football players".

In fact, so that article 48 can be applied, it is required that the activity should have the character of a remunerated work, no matter the field it is performed. The economic character of these activities can no longer be denied on the grounds that they are carried out in the field of public law, because, as the Court showed, the nature of juridical relationship between the employee and the employer – be it public law status or private low contract – has no relevance for the application of article 48.

The *free circulation of workers* is different from the *freedom of residence* by the fact that the latter can be used only by the people exercising a liberal profession. The criteria of assessing the liberal character of a profession are participation to profit and losses, the free choice of the working hours and the possibility of choice for collaborators. The freedom of movement entails the removal of any discrimination based on nationality among the workers of member states as far as remuneration, employment and other working terms are concerned. The abolishment, on the part of the member states, of the obstacles to the free movementof people could be compromised if the abolishment of the state barriers could be neutralized by obstacles resulting from their juridical autonomy exercised by certain organizations or associations that are not ruled by the public law.

The banishment of discrimination concerns any form that it may take, whatever its importance or field, ***including the educational field.*** In the case "*Commission against Italy*, it was stated, for instance, that the equality of treatment principle prohibits not only the direct discrimination, but any other disguised form of it by way of applying other differentiating criteria, such as the case of private universities in a member state having not acknowledged the rights obtained by former foreign languages assistant lecturers who have become mother tongue linguistic experts, even if such an acknowledgement is granted to national workers.

A similar case that brought to discussion a discriminating principle is the *Delay case* reiterating the issue of exchange lecturers who were not acknowledged by the Italian administration. They have to benefit from equality of treatment with the Italians hired on similar positions as regards the ceasing of their working contracts or their rights to social services, after Italy was denounced in 2001 (*case C-212/99*) for discrimination on grounds of nationality of the foreign language lecturers, who had become in the mean time „linguistic collaborators" (by way of not acknowledging their rights). After having analyzed art. 39 T.C.E. regarding the discrimination based on nationality grounds and after having drawn a parallel with the other cause, that is the Commission against Italy, the Court came to the conclusion that, in this case however, a particularity stands out, regarding a syncope in the collaboration of Mrs. Delay with the university that she used to teach at. The Court stipulates that in such cases, the continuity of collaboration should be taken into consideration. It was considered that the temporary stoppage of the work relations was not an element of importance just because „only an analysis focused on the substance, not on the form of juridical regimens, *can allow the probation as to whether their practical application to different types of workers, placed in comparable juridical situations, leads to compatible/non-compatible situations with the communitarian principle of nondiscrimination for nationality reasons".*

Similarly, the generally imposed obligation on all foreign physicians and dentists as regards the practice of their profession in France is, no doubt, restrictive, so much the more that in the case of medical specialization it is required that the specialist should be in permanent contact with the patient after their intervention.

In the decision given in case of *Ian William Cowman against the Public Finances,* the Court has established, by drawing parallels with other two cases - C- 286/82 and C- 26/83 *Luisi and Carbone against the Ministry of Public Finance,* that the liberty of providing services also includes the liberty for the service beneficiaries to travel to other member states with a view to obtaining a certain service, without being deterred by certain restrictions.

According to the provisions of art. 39 align. (4) of the E.C. Treaty, the free movement of workers is not applicable to public administration abidance. To put it differently, it is possible that only the citizens of the host state could have access to this type of jobs. However, this exception was interpreted by the Court of Justice of the European Communities as being extremely restrictive. In the Court's opinion only the employment entailing

the public authority exercise and the defense of general interests of the state may be limited strictly to the citizens of the respective country. These criteria have to be assessed from case to case, according to the nature of tasks and responsibilities that the job engenders. Consequently, if the jobs do not fall into this category, the examinations organized for their occupation should be accessible to every citizen of the European Union.

The Free Circulation Conferred by the Schengen Agreement

The right to the free movement on the territory of the European states is translated into the fact that every European citizen has the right to travel and settle anywhere on the territory of the member states of the European Union. This right should not be mistaken by the Schengen cooperation which is even more comprehensive, eliminating the checking at the border of the states having signed the Schengen agreement. The right to freely circulate means traditionally that no formality is needed in order to travel across the borders of a member state, except for the condition of holding a valid traveling document. This right is extended to the family members who can travel freely on the territory of certain states such as Norway, Liechtenstein, Island (based on A.E.E.A) and on Switzerland territory (based on a bilateral agreement), whereas the communitarian legislative basis as regards the free movement and residence of citizens and their family members is represented by the 38/04/C.E.E Directive.

The freedom of movement and residence within the current Schengen area has taken shape in 1985 when Germany, France and the component members of Benelux signed an intergovernmental agreement with a view to gradual elimination of the document control at the borders of these states, in a border town of Luxembourg, Schengen. The Schengen Agreement was followed in 1990 by the Convention bearing the same name which acquired juridical force in 1995. The role of the Schengen agreement was the elimination of the document control at the borders of these internal states signing the document and it introduced a common policy named the *short stay visa* and other measures as well, such as the judiciary cooperation among police and judiciary authorities. The representatives signing the Schengen agreement specified the fact that these states can reintroduce the control at the borders only for a short stay and especially under specific and clearly determined circumstances. A protocol annexed to the Amsterdam Treaty has included the development achieved subsequently to in intergovernmental cooperation within the judiciary and legal

cooperation among certain states (acqu-is Schengen) which has become thus, a part of the E.U. legislation, being divided between the first and the third community pillar, whereas the visa and border policy are included under the first pillar.

Starting with December 2007, 22 member states of the EU are situated within the Schengen area, eliminating thus their border control. Thers states are: The Czech Republic, Belgium, Denmark, Estonia, Germany, Greece, Spain, France, Hungary, Italy, Lithuania, Luxemburg, Malta, Holland, Austria, Poland, Portugal, Finland, Slovakia, Slovenia and Sweden. Two of the non-member states of the E.U., namely Norway and Island, fully apply the Schengen agreement based on a *specific agreement*, while Bulgaria, Cyprus and Romania apply it only partially at the moment, because becoming a member of the European Union does not necessarily imply that they are assimilated automatically to the Schengen area and that they can eliminate the internal border control. In resolution dated from 2006, the Council has decided that the member states having joined the European Union in 2004 have the possibility of acknowledging the visas and the residence permits issued by the Schengen states or by those countries that are not Schengen members, as they are considered equivalent to the national visas. This equivalence is valid only for transit, for a period no longer than five days. After the extension of the Schengen area, since December 2007, these rules were about to be applied only to Cyprus.

The Court has decided in a certain case that Spain has infringed the communitarian law by refusing to allow access to two Algerian citizens on the grounds that Germany had issued an alert according to the Schengen Convention of 1990 (named CISA) implementing the Schengen agreement since 1985. In 1999, Mr. Farid, who used to live with his wife (a Spanish citizen), has required to the Spanish consulate of London, a visa in order to enter the Schengen area and his application was rejected in 2000. In this case, the question was if the immediate refusal was compatible with the communitarian law, when the alert concerned the husband of a member state citizen. In this case, the Court has clarified the relation between the Schengen CISA and the communitarian law, indicating that the Schengen Protocol confirmed the fact that the CISA provisions are applicable if and when compatible with the communitarian law.

The Schengen Visas Issue

A sum total of 24 states apply the Regulation CE 539/2001 and have a completely common policy as regards the visas, while the citizens of other states are subjected to visa obligation. A visa issued by one of the countries having signed the above mentioned Schengen Agreement, is valid also for other states joining the same agreement. The visa sticker, which looks the same for all the Schengen states, shows the inscription "valid for Schengen States" and the alphanumeric codes that are marked down, indicate the country where the visa had been issued. The procedures and conditions for the Schengen visas released are stipulated in the Common Consular Instructions, published in the Official Journal C 326 of 22nd of December 2005. The third country nationals having the obligation of holding a visa as per the Regulation CE /539/2001- as Regulation CE/ 453/ 2003 and Regulation 1932/2006/CE have been modified, can travel with one visa on the Schengen territory and are not compelled to require a new national visa from the new member states. The third country nationals, holding a valid residence permit issued by a Schengen member state are able to travel based on this permit to every st ate and are not compelled to apply for another visa,

The freedom of residence

The freedom of residence refers to the right of the physical and legal entities to decide on the place of residence, that is the freedom of choice regarding the place where they are about to carry out their activity. The settlement of a physical or legal person in another member state implies the rolling out of an economic activity for a non-definite time because, if the activity is not carried out this way, it falls under the stipulations of the communitarian law regarding the freedom of providing services.

Art. 43 of the E.C. Treaty as well as art. 31 of the Agreement establishing the E.E.A. (European Economic Area) confers to the nationals of the member states the right to settle with a main or secondary title on other states territory. As a direct effect, art. 43 allows the nationals of a member state to exercise or accede to certain activities, mainly, under the same terms as the nationals of the respective country. The freedom of residence refers to the right of legal persons to participate in a stable and continuous way to the economic life of another member state of the community, other than the origin state.

According to the *case Gebhard,* the freedom of residence has been transformed from a simple interdiction of discrimination into general interdiction of limitation. The limits of the freedom of residence cannot have a discriminative character; they have to be grounded by a general interest, they have to be appropriate and necessary so that the intended objective is reached.

According to art. 43 E.C. "the restrictions regarding the freedom of residence of the nationals of a member state on the territory of another member state are prohibited. This prohibition refers also to the restrictions concerning the establishment of agencies or branches by the nationals of a member state on the territory of another member state". As for the containment of the residence freedom, the Court stipulates that, as results from the jurisprudence, a restriction regarding the freedom for residence, which is applicable with no discrimination based on citizenship or nationality, may be justified on imperative grounds of general interest, on condition that it could guarantee reaching the objective aimed at and does not exceed everything necessary for the objective to be reached. The free circulation right includes, however, both the European Union citizens' right to enter a member state other than the native country, and the right to leave it.

The Court of Luxembourg considers that the guaranteed fundamental liberties based on the E.C. Treaty could be depleted of any substance if the origin member state could, with no valid justification, prohibit its own nationals to leave the respective state territory in order to enter other states territories

As for the freedom of residence, in case of a more than three months stay period, the European citizen has to fulfill one of the following conditions:

- exercise an economic activity as an employee or non-employee;
- dispose of enough financial resources and a health insurance;
- being a student and dispose of enough financial resources and a health insurance;
- being a member of the family of an European Union citizen, falling under one of the above-mentioned categories.

For the citizens of the European Union member states, there is no notion such as the residence permit. Nevertheless, the host state can ask the citizen to record a procedure which is done by the presentation of an

identity card or a valid passport and a proof according to which, the terms regarding the financial incomes are complied with

Another case debating on the freedom of residence and circulation of people is the *Morson* case [1]. Mrs. Elestina Esselina Christina Morson has raised the issue of discriminating her country's own citizens in applying the free circulation of workforce. In this case, E. Morson and S. Jhanjan, Surinamese citizens, have requested for their right to settle in Holland to be acknowledged, as their children resided in Holland having that citizenship. They have founded their request based on art. 10 of the Directive 1612 /68 allowing a worker, traveling in order to fill a position, to bring along his/her family members. The Court stated that these provisions meant to ensure the free circulation of workforce cannot be applied to a situation that has nothing to do with another situation that the communitarian law is applicable to. To put it more simply, it is impossible to apply certain rights which are generated by the right to free circulation of workforce for a person that has never made use of his/her right to the free circulation of workforce

The enunciated case is not singular, as similar aspects regarding the right for residence of family members are represented by the case *European Communities Commission against. F.G R* where the defendant state has been accused that, by introducing and maintaining in its national legislation the dispositions regarding the residence permit (dispositions stating the obligation of "living in normal living conditions, and not only during the accommodation period of the migrant worker, but during their entire stay"), the former F.G.R. did not comply with the dispositions of art. 48 T.C.E.

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CONSIDERATIONS SUR LA PROTECTION JURIDIQUE DE LA POSSESSION

Résumé

Etroitement liée à la protection du patrimoine et de la propriété, la possession est protégée par des moyens offerts par le droit civil tout comme par le droit pénal.

La protection de la situation de fait est basée notamment sur la garantie d'une sécurité sociale, dans les conditions où on la rencontre aussi souvent dans la protection indirecte de la propriété, car, dans la majorité des cas les deux droits se superposent.

Du point de vue statistique on enregistre de nombreuses atteintes à la possession qui suscite des discussions à l'échelle nationale et communautaire ; il est ainsi nécessaire d'identifier des moyens efficaces de combat.

En ce qui concerne la possession d'un bien, nous rencontrons trois situations juridiques distinctes : la propriété, al possession, la détention, avec les précisions apportées par la littérature juridique[1] : le propriétaire ne peut jamais se constituer détenteur précaire, la qualité de possesseur nie la qualité de propriétaire, et la présence du détenteur précaire empêche le propriétaire d'exercer la possession mais *corpore alieno*.

Etroitement liée à la protection du patrimoine et de la propriété, la possession, reconnue dans la littérature juridique comme « fondement des droits réels »[2] est protégée par des moyens offerts par le droit civil tout comme par le droit pénal, fait qui résulte de l'incrimination de certaines infractions dans le Code pénal, au Titre III, dans le chapitre « Infractions contre le patrimoine » et dans des lois pénales spéciales.

Dans le droit moderne[3], la possession a été appréciée comme le fondement des droits réels et le signe extérieur de leur existence, « le corps

[1] C. Bîrsan, "Drept civil. Drepturi reale principale", Ed Hamangiu, Bucarest, 2008, p. 242

[2] C. Hamangiu, I.Rosetti Bălănescu, Al. Băicoianu, "Tratat de drept civil român", Ed. All, Bucarest, 1996, p. 576;

[3] C. Hamangiu, I.Rosetti Bălănescu, Al. Băicoianu, "Tratat de drept civil român", Ed. All, Bucarest, 1996, p. 576;

et l'âme de la propriété, la propriété en action et en intention, dans l'acte et la pensée »[1].

A partir de l'étymologie du mot possession, du latin « possesio », qui signifie être installé sur un bien, il résulte que cela présuppose une situation de fait, différente du droit de propriété. La situation semble contradictoire, de protection d'une apparence, les justifications apportées à cette situation s'appuyant surtout sur le garanti d'une sécurité sociale, dans les conditions où on la rencontre aussi souvent dans la protection indirecte de la propriété, car, dans la majorité des cas les deux droits se superposent.

En fonction de l'évolution d'une société et du contexte de son développement à un moment donné, le législateur établit que la transgression d'une règle de droit n'est pas suffisamment protégée par les normes du droit civil, qui ont d'habitude en vue des sanctions réparatrices, et qu'on a besoin d'une protection plus forte, par la sanction des faits comme infractions dans le domaine du droit pénal. On passe donc de l'illicite civil ou extra pénal à l'illicite pénal[2].

Dans cette perspective, hors les moyens de protection de la possession prévus par le droit civil, concernant les deux actions possessoires, celle générale en complainte, « complenda », par laquelle le possesseur demande la cessation de tout trouble apporté à la possession ou la ré-obtention de la possession dont il a été dépourvu sans violence et celle spéciale, en réintégration, « reintegranda », l'existence la consolidation des relations sociales de telle nature s'effectue aussi par leur inclusion dans la sphère de protection du droit pénal, constituant l'objet juridique des infractions.

Il est pourtant évident, même faute d'une énumération expresse dans les dispositions du Code pénal des valeurs sociales auxquelles le législateur a entendu d'accorder de la protection, que parmi les objectifs les plus importants du droit pénal s'inscrit aussi la protection du patrimoine de la personne.

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[1] G. Cornu, „Droit civil. Introduction. Les personnes. Les biens", Ed.11, Montchrestien, Paris 2003, p. 379;

[2] La définition des deux concepts a été faite par le professeur Vintilă Dongoroz au sens où l'illicite civil est né de la transgression de certaines règles de droit qui prévoient seulement une sanction réparatrice, et dans le pénal par la transgression d'une règle de droit qui contient comme sanction une punition - V. Dongoroz, "Drept penal (reeditarea ediţiei din 1939)", Bucarest, 2000, Ed. Societăţii Tempus &Academia Română de Ştiinţe Penale, p. 164;

Du point de vue statistique, les infractions par lesquelles on apporte atteinte au patrimoine, sous différents aspects qui présupposent la protection de la propriété, de la possession et même de la détention sont parmi les plus nombreuses. Par exemple, les données centralisées pour l'année 2008 par le Ministère Public, attestent que sur premier lieu se situent les mises en jugement en ce qui concerne les infractions contre le patrimoine avec un pourcent de 36,5%[1].

D'ailleurs, l'argument criminologique de leur prépondérance, basé sur l'état de paupérisation de la population, le désir de s'enrichir et la crise des valeurs dans la société contemporaine ont justifié leur incrimination le long des années.

Dans une autre perspective, à partir des années 1990, les instances de jugement de Roumanie se sont confrontées avec de nombreuses causes ayant comme objet des actions en revendication pour la restitution des immeubles passés dans la propriété de l'état entre 1945-1989, formulées par les anciens propriétaires. Les solutions contradictoires prononcées et la législation déficitaire ont déterminé la saisine de la Court Européenne des Droits de l'Homme.

Ainsi, la Loi 18/1991, avec les modifications et les complétions ultérieures a déterminé une pratique judiciaire non unitaire, et le dépassement du système juridique national, en ce qui concerne les litiges dans ce domaine par l'invocation des documents internationaux adoptés par notre pays.

Dans ce sens, par la Loi nr. 30/1994[2] la Roumanie a ratifié la Convention pour la protection des droits de l'homme et des libertés fondamentales[3], tout comme les protocoles additionnels ; la problématique concernant le respect du droit de propriété, par les théoriciens, et par les praticiens du droit, ne peut pas ignorer le contenu de l'art. 1 du premier

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[1] www.mpublic.ro, Rapport d'activité pour l'année 2008, p. 20;

[2] La Loi no. 30 du 18 mai 1994 a été publiée dans le Moniteur Officiel no. 135 du 31 mai 1994; ultérieurement, elle a été modifiée par la Loi no.79\1995 concernant la ratification du Protocole no. 11 à la Convention pour la protection des droits de l'homme et des libertés fondamentales concernant la restructuration des mécanismes de contrôle établis par la convention, achevé à Strasbourg le 11 mai 1994.

[3] Adoptée à Rome le 4 novembre 1950, elle est entrée en vigueur le 3 septembre 1953; connue aussi sous le nom de la Convention Européenne des Droits de l'Homme.

Protocol additionnel à la Convention[1]: "Toute personne physique ou morale a le droit au respect de ses biens. Personne ne peut être privé de sa propriété que pour une cause d'utilité publique et dans les conditions prévues par la loi et par les principes généraux du droit international.

Les dispositions précédentes n'apportent pas atteinte au droit des états d'adopter les lois qu'ils considèrent nécessaires pour réglementer l'utilisation des biens conformément à l'intérêt général ou pour assurer le paiement des impôts ou d'autres contributions ou des amendes.

Ainsi comme on a déjà remarqué[2], la première règle de l'article 1 a un caractère général, énonçant le principe de respect de la propriété. Ce principe se réfère au droit de toute personne, physique ou morale, de jouir de sa propriété. On considère le principe du respect de la propriété violé non seulement dans l'hypothèse où une personne est effectivement privée de sa propriété mais aussi, quand on n'accorde pas à une personne la possibilité de jouir normalement de ce bien.

Apparemment les dispositions se réfèrent au droit de propriété, mais dans l'appréciation de la sphère de protection de l'article 1 on a aussi suscité des discussions à partir de la terminologie différente utilisée dans le contenu de la Convention, (respectivement dans la première phrase du premier alinéa, la variante française « respect de ses biens » ou la variante anglaise « peaceful enjoiment of his possessions », dans la deuxième phrase « sa propriete » et « his possessions » et dans le deuxième paragraphe « usage des biens », respectivement « use of property ») justifiée aussi par les différences entre le système romano-allemand et celui anglais. La jurisprudence de l'instance européenne a apprécié que l'objet des réglementations de l'article 1 est complexe, inclut le droit de propriété sur les biens mobiles et immobiles, mais aussi d'autres droits réels, de servitude, emphytéose, usufruit, concession, droit de créance, aspects patrimoniaux des droits de création intellectuelle.[3]

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[1]Adopté à Paris le 20 mars 1952, elle est entrée en vigueur le 18 mai 1954; ratifié par la Roumanie par la Loi no. 30\1994.

[2]P. M. Cosmovici, « Drept civil. Drepturi reale. Obligaţii. Legislaţie", Ed. ALL, 1994, p. 103;

[3]Corneliu Bîrsan, "Convenţia Europeană a Drepturilor Omului", Volumul I, Drepturi şi Libertăţi, Ed. All Beck, Bucarest, 2005,pp. 970-1000;

La situation ainsi créé après 1990 a eu aussi des implications au niveau pénal, par l'augmentation nu nombre d'infractions de trouble de possession, dans sa forme principale ou celle de loi spéciale, quand la réglementation était encore en vigueur, tout comme le non-respect des décisions judiciaires, le problème étant particulièrement important dans les communautés rurales. On est ainsi arrivé à des décisions d'emprisonnement pour des personnes qui ont transgressé de manière répétitive le droit de possession sur les immeubles, notamment des terrains, et à une situation d'impacte sur l'opinion publique, dans le contexte de la condamnation d'une personne âgée pour des infractions de non-respect des décisions judicaires (dans la plupart des cas, les décrets de grâce individuelle de 2008-2009 ont visé des personnes âgées de plus de 75 ans, condamnées à l'emprisonnement pour l'infraction de non- respect des décisions judiciaires à partir de solutions civiles concernant des terrains[1]).

La conjecture actuelle indique de nombreuses transgressions de la possession du point de vue civil et infractionnel, ainsi qu'on pourrait proposer un abord du point de vue sociologique, car on peut discuter, à partir de la causalité, l'identification de quelques moyens efficaces de combat, parce qu'ainsi que le réputé sociologue Dimitrie Gusti disait "le but principal de la punition doit prédominer et non pas le caractère de combat du facteur individuel"[2].

[1] dans ce sens Dec. 296, 299/2008, publiées dans le M.O. 137/21.02.2008, Dec. 328/2009, publié dans le M.O. 113/25.02.2009, Dec. 506, 507/2009, publiés dans le M.O. 211/01.04.2009;

[2] D. Gusti, „Opere", vol V, Bucarest, Ed. Academiei, 1971, p. 195.

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PREVENTING AND COMBATING CYBER CRIMES

Abstract

Recent and anticipated changes in technology arising from the convergence of communications and computing are truly breathtaking, and have already had a significant impact on many aspects of life. Banking, stock exchanges, air traffic control, telephones, electric power, health care, welfare and education are largely dependent on information technology and telecommunications for their operation. We are moving towards the point where it is possible to assert that everything depends on software.

This exponential growth, and the increase in its capacity and accessibility coupled with the decrease in cost, has brought about revolutionary changes in every aspect of human civilization, including crime.The increased capacities of information systems today come at the cost of increased vulnerability. Information technology has begun to produce criminal opportunities of a variety that the brightest criminals of yore couldn't even begin to dream about.

Nowadays, the one place that people thought they were secure could be one of the most dangerous areas in society. Computer use is increasingly spreading, and more and more users are connecting to the Internet. The Internet is a source for almost anybody to access, manipulate and destroy others' information. These "criminal activities directly related to the use of computers, specifically illegal trespass into the computer system or database of another, manipulation or theft of stored on-line data, or sabotage of equipment and data" are defined as computer crimes according to the American heritage dictionary (2000). Even though companies strive hard to prevent these criminal activities, companies are still fighting a losing war against computer invasions ("Experts: Computer Hacking", 1999). Although computer "hacking" has become a growing concern, much is being done to address this problem.

To better understand the situation, users and companies must be aware of the indicators that problems with computer crime do exist. One of these indicators is that many companies are involved in computer crimes. Eighty-five percent of companies reported security breaches in their systems, and 94% detected viruses in their systems in 2001 ("Computer Crime Soaring," 2002). Furthermore, the U. S. Defense Department was also hacked many times. It alone was hit by about 250,000 hacks in 1995 (Allbritton, 1998). These hacks aren't minor, hack damages cost a lot of money. Hacking resulted in a cost of about 377 million dollars ("Computer Crime Soaring," 2002). This problem is also rising and needs to be quelled. Break-ins are rising rapidly and double every year ("Experts: Computer Hacking," 1999).

Companies and users must also be aware of who the hackers are and of their victims. The victims of hacks come in an extensive range. The major targets for most hackers are fortune 500 companies, who are big names and make a lot of money (Allbritton, 1998). "If this [breach of security system] could happen to Microsoft, this can happen to anybody," said Sandra England, president of PGP Security (Markoff, 2000, p. A5). The fact is, though, that every online--computer user is at risk. A hacker can penetrate virtually any computer on the Internet if he has the right tools ("Experts: Computer Hacking," 1999). In addition to knowing the victims, users and companies should know who the hackers really are. The real bad guys are often just mischievous youth trying to steal credit cards or breaking into advanced systems. A hacker going by the pseudonym "Route" says the major hackers are generally "this tiny minority of 13- to 18-year olds who learned to make toll calls for free" (Allbritton, 1998, p. A4). Moreover, some people even hack in online gaming to steal another's virtual items, which can also be sold over the Internet for money (Ward, 2003). Most hackers, though, are actually crackers and don't hack to do real damage but only want to embarrass big-name companies (Ma, n.d.). However, many people are still accessing data with criminal intent. These people can vary from revengeful employees trying to backstab their company to foreign spies wanting to access government files. Some do it simply to steal money, valuable objects or code (Allbritton, 1998). Interestingly enough, half of unauthorized system intrusions involve insiders who actually have legitimate access to the system (Schindler, 2000).

The new breed of crime, which is either perpetrated using computers, or is otherwise related to them, is broadly termed as Cyber Crime.

Methods of Perpetration:

1. **Unauthorized access**
2. **E-mail bombing**
3. **Data diddling**
4. **Salami attack**
5. **Internet time theft**
6. **Logic bomb**
7. **Virus/Worm attack**
8. **Trojan attack**
9. **Denial of service attack**
10. **Distributed denial of service attack**
11. **E-mail spoofing**
12. **Intellectual Property Crime**
13. **Cyber stalking**

Unauthorized access (cracking, not hacking):

Unauthorized access also known as cracking as opposed to hacking, means gaining access to a system without permission of the users or without proper authority. This is generally done either by faking identity, or by cracking access codes.

E-mail bombing:

This means sending a large number of mails to the victim resulting in the victims mail account (in case of individual) or server (in case of corporations) crashing.

Data diddling:

This kind of attack involves altering the raw data before it is processed by a system and re-altering it after processing.

Salami attack:

This is generally used to commit financial crimes. Here the key is to make the alteration so small that in a single case it would go unnoticed. For example, a bank employee deducts five rupees from every customers account. The individual customers are unlikely to notice this small change but the employee will make a significant earning.

Internet time theft:

This connotes the usage by an unauthorized person of Internet time paid for by someone else.

Logic Bomb:

This is an event dependent program. This implies that this program is created to do something only when a certain event occurs (e.g., the Chernobyl virus)

Virus/Worm attack:

A virus is a program, which attaches itself to another file or a system and then circulates to other files and to other computers via a network. They usually affect computers by either altering or deleting data from it. Worms on the other hand do not interfere with data. They simply multiply until they fill all available space on the computer.

Trojan attack:

A Trojan is a program, which appears to be something useful but under the disguise of a useful program causes some damage.

Denial of service attack:

This involves flooding the computer resource with more requests than it can handle. This causes the resource to crash, thereby denying the authorized users of the service.

Distributed denial of service:

This is a denial of service attack in which the perpetrators are more than one in number and geographically displaced. It is very difficult to control such attacks.

E-mail spoofing:

A spoofed email is one, which appears to originate from one source but actually originates from another.

Intellectual property crime:

This is a crime, which involves the unauthorized copying and distributing of copyrighted software. Software piracy is an example.

Cyber stalking:

This involves following a person on the Internet and causing harrassment.

Hackers have many ways of hacking and gaining access to systems. One common way of getting almost anything out of a computer is by utilizing a virus. By accessing the network a hacker can easily put a virus in the source code of big-name programs like Windows and Office, which will damage computers that run or use this software (Markoff, 2000). One of the types of viruses are Trojan horses, which are hidden instructions embedded in software or email that, once opened, may modify, damage or send important data. Another type of virus is the logic bomb, a virus that is placed on a computer to run after a specified amount of time, allowing time to clear up the evidence (Information Systems Unit, n.d.). Other ways that hackers hack are by using program bugs. Examining the original program's instructions can let a vandal find vulnerabilities in programs not known to other people and use them to his benefit (Markoff, 2000). Another problem with these bugs is that even after bugs are found, a company may spend months before releasing a fix for it ("White Paper: Lies," 1999). Furthermore, many hackers utilize vulnerabilities involving computer use. One of these methods is called data diddling. This is when a hacker modifies certain programs to send certain information such as passwords and names back to him when other people use these programs. Many hackers also gain access to systems by guessing passwords. Users often have simple passwords that someone could guess by knowing a few things about the person (Information Systems Unit, n.d.). A hacker may even simply pose as a member of a department to gain access to certain data (Schindler, 2000).

Varieties of Cyber Crime:

1. **Theft of Information Services**
2. **Communications in Furtherance of Criminal Conspiracies**
3. **Telecommunications Piracy Act**
4. **Electronic Money Laundering**
5. **Electronic Vandalism and Terrorism**
6. **Sales and Investment Fraud**

7. Illegal Interception of Telecommunications

Theft of Information Services:

The 'phone phreakers' of three decades ago set a precedent for what has become a major criminal industry. Here the perpetrators gain access to the PBX board of an organization, and make their own calls or sell call time to third parties.

Communications in Furtherance of Criminal Conspiracies:

Just as legitimate organizations use the information networks for record keeping and communication, so too are the activities of criminal organizations enhanced by the advent of information technology.

There is evidence of information systems being used in drug trafficking, gambling, money laundering and weapons trade just to name a few.

Telecommunications Piracy Act:

Digital technology permits perfect reproduction and easy dissemination of print, graphics, sound, and multimedia combinations. This has produced the temptation to reproduce copyrighted material either for personal use or for sale at a lower price.

Electronic Money Laundering:

For some time now, electronic funds transfers have assisted in concealing and moving the proceeds of crime. Emerging technologies make it easier to hide the origin and destination of funds transfer. Thus money laundering comes to the living room.

Electronic Vandalism and Terrorism:

All societies in which computers play a major role in everyday life are vulnerable to attack from people motivated by either curiosity or vindictiveness. These people can cause inconvenience at best and have the potential to inflict massive harm.

Sales and Investment Fraud:

As electronic commerce or e-commerce as it is called becomes more and more popular, the application of digital technology to fraudulent crime will become that much greater.

The use of telephones for fraudulent sales pitches or bogus investment overtures is increasingly common. Cyberspace now abounds with a wide variety of investment opportunities, from traditional securities such as stocks and bonds to more exotic opportunities like coconut farming.

Fraudsters now enjoy access to millions of people around the world, instantaneously and at minimal cost.

Illegal Interception of Information:

Developments in telecommunications as well as data transfer over the net have resulted in greater speed and capacity but also greater vulnerability. It is now easier than ever before for unauthorized people to gain access to sensitive information.

Electromagnetic signals emitted by a computer, themselves can now be intercepted.Cables may act as broadcast antennas.

To add to this no existing laws prevent the monitoring of remote signals from a computer. Under the circumstances information is more and more vulnerable to unauthorized users.

Computer crime can cause many damaging results. For one, computer crime can cause damage involving data. Once inside, a hacker can steal desired items such as credit-card number and passwords ("White Paper: Lies," 1999). He can also manipulate and destroy crucial data such as bank accounts, legal files or personal information (Zikun, n.d.). In addition, hackers can take control of various services, including one time when hackers figured out how to control the phone service nationwide in order to win prizes on phone-related games (Schindler, 2000). Computer crime can also cause business failure. Hacking has caused government sites to temporarily and permanently shutdown, giving users and employees denial-of-service errors when trying to access them ("Experts: Computer

Hacking," 1999). Hacks resulting in losing credit-card numbers or social-security numbers can result in costly lawsuits, threatening bankruptcy for the company (Schindler, 2000). Moreover, after websites are hacked, businesses often lose their credibility, and consumers look elsewhere for the services ("White Paper: Lies," 1999).

Stopping computer crime would raise many problems. For one thing, hacking is very easy to do for almost anyone. With so many free hacking tools available, almost anyone can go around networks and attack machines ("Experts: Computer Hacking," 1999). Furthermore, hackers identify themselves with anonymous names so that tracing a crime back to its source can be difficult (Allbritton, 1998). Even the government has a critical shortage of trained computer scientists for defense. Most go to the private industry, and the current government systems designers haven't been careful with protecting their sites ("Experts: Computer Hacking," 1999). Current anti-virus protection is also another problem with stopping computer crime. Standard anti-virus protection is limited in that it can only find known viruses, leaving new viruses to devastate a user or companies systems (Kabay, 2000). Besides, having bad protection against computer crime, companies have bad detection of computer crimes. A study by the U. S. Department of Defense, where they attacked 38,000 of their own computers and penetrated 65% of them, detected only 4% and only reported 1% of them (Schindler, 2000). Moreover, most hacks are detected only long after the attack took place (Allbritton, 1998). Prosecution of computer crimes is also inadequate. Getting evidence to prove a crime was committed can be hard since data is so easily manipulated before and after a crime takes place (Ward, 2003). In addition, computer crime has an inadequate punishment system. Even if a computer crime is committed, the hacker is given a punishment that doesn't fit the crime, and the victim is required to take most of the action (Zikun, n.d.).

Prevention methods:

1. **Firewalls**
2. **Frequent password changing**
3. **Safe surfing**
4. **Frequent virus checks**
5. **Email filters**

Firewalls:

These are programs, which protect a user from unauthorized access attacks while on a network. They provide access to only known users, or people whom the user permits to.

Frequent password changing:

With the advent of multi-user systems, security has become dependent on passwords. Thus one should always keep passwords and sensitive data secure. Changing them frequently, and keeping them sufficiently complex in the first place can do this.

Safe surfing:

This is a practice, which should be followed by all users on a network. Safe surfing involves keeping one`s e-mail address private, not chatting on open systems, which do not have adequate protection methods, visiting secure sites. Accepting data only from known users, downloading carefully, and then taken from known sites can also minimize the risk.

Frequent virus checks:

One should frequently check one`s computer for viruses and worms. Also any external media such as floppy disks and CD ROMS should always be virus checked before running.

Email filters:

These are programs, which monitor the inflow of mails to the inbox and delete automatically any suspicious or useless mails thus reducing the chances of being bombed or spoofed.

Although users have many problems facing them involving using the Internet, they also have several ways of preventing these problems. For instance, they have many ways to keep their passwords secret. To keep someone from guessing their passwords, they should use special characters, numbers and letters and use at least eight characters. In

addition to keeping their passwords safe, they can use and upgrade certain software to prevent problems with their system. Firewalls allow the user to set policies on his system that will block unwanted data, hidden content or message attachments from his system. The user should also use anti-virus software that can detect logic bombs, Trojan horses and known viruses (Information Systems Unit, n.d.). Users need to upgrade their software whenever it is available to prevent the majority of problems ("White Paper: Lies," 1999). Furthermore, hackers can help prevent problems. Many elite hackers now work to find weak spots in networks and publicly display them so companies will fix them (Allbritton,1998).

In addition to having users prevent such problems, companies have many ways to improve their security systems. Companies need to reevaluate their security systems and respond accordingly. "Companies need to re-evaluate their own security policies and infrastructure," said Sandra England (Markoff, 2000, p. A5). A business should regularly assess its vulnerabilities and respond accordingly with buying firewalls, installing software or upgrading security (Schindler, 2000). Moreover, companies can undertake various actions to improve their security systems. A company should perform regular audits and supervise their employees well. It should also use software to detect for modification of programs (Information Systems Unit, n.d.). Other actions that they should undergo include background and security checks that should be performed on important computer personnel (Schindler, 2000). Companies also need the proper security to handle computer crimes. "Organizations need to properly fund, train, staff and empower those tasked with enterprise-wide information security," said Patrice Rapalus, director of the Computer Security Institute ("Computer Crime Soaring," 2002). Many businesses are also hiring good-guy hackers to prevent bad-guy hackers from breaching their systems (Allbritton, 1998). Reducing networking is another simple solution to improving a company's security system. "Government agencies need to reconsider and probably pull back from their embrace of networking," said James Dempsey, senior staff council for the Center of Democracy and Technology.

Other improvements need to be made by the government to detect criminals better. For one, the government needs to upgrade their systems... Our country and other agency systems are currently using systems that are

at least ten-years old, and they need to upgrade them for better detection (Help Net Security, n.d.). Better employee training and funding should also be done to help catch criminals. Most government agencies have inadequate personnel for catching computer criminals and need to train and fund better and more qualified people (Help Net Security, n.d.). Several agencies have already been set up to help detect criminals and are helping solve this problem. Moreover, many actions are already being taken and need to be taken to punish the hackers. Many new laws are both needed and have been implemented to punish computer criminals. Cyber-criminal laws need to be more severe towards lawbreakers and should establish rules of conduct to clearly define what is illegal (Zikun, n.d.)Most cyber crimes in Romania are currently aimed at the illegal gaining of material benefits,' said Eduard Bisceanu, expert in information security with the Romanian Intelligence Service (SRI), at the opening of a conference dubbed CyberSecurity.

Bisceanu did not disclose the official number of such crimes, but mentioned that the Romanian Police, through its subordinated institutions, can supply such data. Bisceanu specified that not only Romania, but also other EU countries and NATO partners are victims of the cyber crime.

'The danger of cyber terrorism is significant for both Romania and the NATO and EU states. There area several cyber crime cells in Romania and they have the capacity to initiate IT attacks,' Bisceanu explained.

However, he stated that no individuals, groups or organizations able to pose a threat to national security have been found on Romania's territory.

Cyber crime cases in Romania in 2008 targeted mainly the bankcard fraud. According to the General Department for the Combat of Organized Crime (DGCCO), losses of 500 million euro are expected this year.

Conclusion

With the information highway having entered our very home places, we are all at increasing risk of being affected by Cybercrime. Everything about our lives is in some manner affected by computers. Under the circumstances it`s high time we sat up and took notice of the events shaping our destinies on the information highway. Cybercrime is everyone's problem. And it`s time we did something to protect ourselves. Information is the best form of protection.

In short, although computer "hacking" has become a growing concern, much is being done to address this problem. Many problem indicators show that this is a big problem that needs to be solved. The almost limitless number of possible victims for the variety of hackers makes computer crime hard to stop, and hackers have many different ways of hacking, and the results can be catastrophic. The government and companies also have bad protection for preventing the intrusions and many problems with stopping the hackers. However, even though computer crime is a big problem, much can be and has already been done to help fight it. Users and companies have many ways to protect themselves from these invasions, and the government has many ways to help defend the companies and users from the hackers. Also, many actions have already been and need still to be taken to help punish hackers. "While some regard hackers as a threat, others think they are a manageable problem" (Ma, n.d.). If these solutions are undertaken, the world of computer usage will no longer be a dark, dangerous alley for criminals to tamper with and will become a haven for anyone who wants to come.

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THE PRECLUSION OF PARENTS FROM THEIR PARENTAL RIGHTS – THE MOST SEVERE SANCTION APPLICABLE TO PARENTS FOR MISSMANAGING THEIR PARENTAL DUTIES

Exercising inadequately or not exercising the parental rights at all as well as not fulfilling or fulfilling inadequately the parental duties bring sanctions that may be applied to the parents. The preclusion from the exercise of the parental rights[1] is the most severe sanction that may be applied to parents that have not exercised or do not, at present, exercise adeguately the parental protection, having as an effect the loss of their parental rights.

Establishing the situations that may determine the proposition to apply this sanction – the source of the material is constituted by art. 109 of the Family Code that establishes the following: "If **the health and physical development of the child is endangered** by the way in which the parental rights are exercised, **by abusive behavior** or **by severe negligence in fulfilling the parental duties** or if the child's education, learning or professional training is not conducted in the spirit of devotion for Romania, the Court of Law, at the request of the tutelary authority, will pronounce the preclusion of the parent from his parental rights. Citing the parents and the tutelary authority is mandatory."

From the ideas mentioned above, it results that applying the preclusion of the parent from the parental rights is conditioned by the fact that these rights have been exercised by abusive behavior or by severe negligence, both able to endanger the child's health or physical development[2]. Consequently, this behavior must not presuppose only aggression, violence or conviction for abandoning the family, but also

[1] See I. Imbrescu, "Treaty of Family Law", Lumina Lex Publishing House, Bucharest, 2006, pp. 421-426; A.Corhan, "Family Law. Theory and Practice", Revised and completed 2nd edition, Lumina Lex Publishing House, Bucharest, 2008, pp. 449-457;

[2] C.A.Bacău, decision no. 54/18.06.2001, maintained by a civil decision no. 2295/2002 of C.S.J., apud D.Tiţian, Constantin Antonia, Cîrstea Mihaela, „The Annotated Family Code", Hamangiu Publishing House, Bucharest, 2008, 2nd Edition, pg. 381

depriving the underage child of his subsistence means, which may endanger the child's health and physical development[1].

In other words, the preclusion of one person from his/her parental rights is disposed for parents only for deeds of a certain degree of severity, when there are no other possibilities in order to determine them to change their conduct.

Thus, the family code states the limits of the situations in which the declining from parental rights may intervene: abusive behavior or severe negligence in fulfilling the parental duties.

The law no. 272/2004 defines in art. 89 the abuse and negligence of the child as follows:

By **abuse on the child** is understood any voluntary action of a person that is in a

- relationship of responsibility, trust or authority with the child, by which the child's life, physical, mental, spiritual, moral or social development, his corporal integrity, physical or mental health are endangered.
- By **negligence of the child** we understand the voluntary or involuntary omission, from a person that has the responsibility to raise, take care of and educate the child, takink any measure subordinated to this responsibility, fact that may endanger the child's life, his physical, mental, spiritual, moral or social development, his corporal integrity, his physical or mental health.

If the representatives of the general department of social assistance establish that there are good reasons to support the existence of a situation of imminent danger for the child due to abuse and neglect, the general department of social assistance and child protection informs the court of law, requesting the issuing of a **presidential decree to place the child urgently** in the care of a person, a family, a maternal assistant or in a residential type of shelter.[2]In 48 hours after the date, the presidential decree has been executed, decree that has disposed the urgent placement of the child, the general department of social assistance and child protection informs the court of law in order to decide upon: replacing the urgent

[1] C.S.J., s.civ., dec.no. 2396/10.17.1997, în B.J. 1997, pg. 65, apud D.Tiţian, et.al., op.cit., pp. 381

[2] According to art. 94 par.3 from the Law no. 272/2004

placement of the child with the simple placement, **the total or partial preclusion from the exercise of parental rights,** as well as on exercising the parental rights[1].

As it can be observed, the special law brings more indications regarding the definition of abuse and negligence and it also establishes that the representatives of the general department of social assistance and child protection have the right to inform the court of law in order for the preclusion from the parental rights to take place.

Putting together the two normative laws, there can be observed that the values they protect by applying sanctions to the parents are[2]: the child's life, corporal integrity, the physical and mental health, his physical, mental, spiritual, or social development, education or professional training.

The court of law may be as well informed for the preclusion from the parental rights by **both the representatives of the tutelary authority** and **the representatives of the general department of social assistance and child protection,** but also **by the public prosecutor[3].**

By analyzing the stipulations of the Family Code and those of the Law no 272, we can see that there are situations when the preclusion from the parental rights may be still solicited by the tutelary authority. We consider especially the situation in which only one of the parents manifests inadequate exercises as far as his parental rights are concerned while the other parent demonstrates an adequate attitude in managing his/her parental duties . In this case, as it is not necessary to take measures to protect the child, the tutelary authority may solicit the preclusion from the parental rights for the guilty parent, without involving the general department of social assistance and child protection. Nevertheless, the literature[4] says that no matter who is responsible for informing the court of law, there is really the need of a report referring to the child, made by the representatives of the general department of social assistance and child protection. We consider this opinion correct as subsequently, the representatives of the general department of social assistance and child protection must ensure the counseling of the parent for which the

[1] According to art. 94 par.4 from the Law no. 272/2004
[2] A.Corhan, op.cit., pg. 450
[3] According to art. 45 from the Civil Code
[4] I.Imbrescu, op.cit., pg. 423

preclusion from his parental rights has been adopted in the view of regaining these rights.

In practice, the preclusion of the parent from his parental rights is a sanction that is recommended quite rarely and usually by the representatives of the general department of social assistance and child protection and not by the tutelary authority.

In addition, when analyzing the par. 3 and 4 of the art. 94 of the Law no. 272/2004 carefully, we notice that, especially when a child is separated by his parents through a presidential decree, due to the imminent danger that he/she is in, in the care of his/her parents, the court of law must be notified for the preclusion from the parental rights of the parent/parents. There must be mentioned that, before separating the child from his parents, the public service of social assistance or the people that have attributions of social assistant have the obligation of taking all the necessary measures to find out the situations of risk that may determine the separation of the child from his parents as well as to prevent the abusive behavior of the parents towards their children[1].

Any separation of the child from his parents, as well as any limitation of exercising the parental rights must be preceded by systematically offering services and necessary actions, the focus being on counseling, a thorough informing of the parents, based on a service plan[2]. The service plan is made and put into practice by the public service of social assistance or the people with social assistant attributions from the City Hall, as a result of evaluating the situation of the child and his family.

The service plan has as a goal to prevent the child from being separated from his family but it may have as a result taking the case to the general department of social assistance and child protection in order to ask for special protection measures for the child[3].

The general department of social assistance and child protection must inform the court of law when it finds out that all the conditions stipulated by the law have been met for the preclusion from the parental rights of one or both parents [4].

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[1] According to art. 34 par.1 from the Law no. 272/2004
[2] According to art. 34 par.2 from the Law no. 272/2004
[3] According to art. 35 from the Law no. 272/2004
[4]According to art. 36 par. 3 from the Law no. 272/2004

The court of law is the only competent authority to pronounce itself regarding the preclusion from the parental rights and restoring the parental rights[1].

2. **Establishing the competence of the court of law and the procedure that has to be followed in applying the sanction –** both the Family Code and the Law no 272/2004 establish the fact that the court of law is the only one competent to give a sentence on the preclusion from the exercise of the parental rights[2]**.** But none of these normative acts establishes, however, which court of law is competent to judge such a case.

Until the Civil Code has been modified by the O.U.G no. 58/2003, this competence was that of the court of law of first instance. Because now the law does not specify which courts of law is competent from a material point of view, according to art.1 par. 1 of the Civil Code, that stipulates that the courts of law solve, in the first instance, all the law suits and requests, except those attributed by law to other courts of law, the competence to solve the requests having as an object the preclusion from the exercise of the parental rights belongs to the court of law of first instance.

In the specialty literature there was also the opinion[3] according to which when the preclusion from the parental rights is requested as a result of putting into practice a presidential decree of placing a child urgently, the competence belongs to the court of law by prorogation of judgment competence, because this sanction is requested along with alternative measures to protect the child.

However, there are situations when the measure of urgently placing the child is instituted by the disposition of the general manager of the general department of social assistance and child protection and the deeds of the parents subscribe to the conditions requested by law to solicit the preclusion from their parental rights. The urgent placement, in this case, may be replaced by simple placement, wardship or reintegration in the natural family and the law does not expressly impose on the General Department of social assistance and child protection to solicit the

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[1] According to art. 38 from the Law no. 272/2004

[2] Acccording to art. 109 from the Family Code and art. 38 from the Law no. 272/2004

[3] E. Florian, „The Protection of the child's Rights", C.H.Beck Publishing House, Bucharest, 2007, pp. 108

preclusion from the parental rights. Consequently, there was appreciated that in this situation, the preclusion from the parental rights will be solicited in a separate suit, the cause being sent to the local court, not to the higher court. At the court of law too, there will also be analysed the petition for the establishment of the trust. In these cases, we should not discuss anymore the competence extension problem[1].

This division of the competences is not efficient, due to the following reasons:

- The purpose of the Law No. 272/2004, the one to protect the rights of the child, will be achieved in a better way if the same court (eventually a court specialised in the underage children cases) will be called in order to pronounce upon all the situations that require the intervention in favour of the child, court that will have a full comprehension upon the situation of every child;
- The trial court has a larger volume of work than the court of law and insufficient experience in causes so delicate regarding underage children.

It is clear that the law maker intended to give to the court of law in this matter of child protection only the competence regarding the special child protection measures (placement in emergency situations, placement, specialised surveillance), competence that results very clear from the article 124 paragraph 1 of the Law No. 272/2004: «The causes stipulated by the present Law regarding the establishment of the special protection measures are the competence of the court of law from the child's residing area».

Unfortunately, this alternative competence for solving the causes that regard underage children leads to a more difficult resolution and to a slowing of the solution for the cases of the children for which a protection measure has been established or will be established, possibly leading to delays in the solution of the juridical situation of the children and in the identification of the ways to exercise the parents' rights.

From the territorial point of view, the competent court is the one from the address of the defendant, according to article 5 of the Civil Procedure Code.

Another aspect that must be mentioned is the one of the subpoena persons in the causes that have as an object the preclusion of the parental rights Article 109 Paragraph 2 of the Family Code establishes the fact that

[1] A. Corhan, op.cit., pp. 452-453

the citation of the parents and of the tutelary authority is compulsory. The Law No. 272/2004[1] establishes that the general direction for social assistance and child protection from the residence of the child or from the territorial-administrative area where the child has been found makes and presents to the court the report referring to the child that will include data regarding:

a) The personality, the physical and the mental condition of the child;
b) The socio-medical and the educational background of the child;
c) The conditions in which the child was raised and the conditions in which he lived;
d) Propositions regarding the person, the family or the residential service where the child could be placed;
e) Any other data regarding the growth and the education of the child that can help reaching for a solution in this cause.

Also the special Law establishes the fact that any child that is capable of judgement has the right to freely express his opinion upon a problem that regards him. The child has the right to be listened in any judicial or administrative procedure and the listening of the child that has 10 years old is mandatory. Even more, the child that has not reached the age of 10 years can be listened, if the court appreciates that this thing is necessary[2]. Although it is imposed that the underage child must be assisted by a psychologist that must know the background of the child when the child is heard by the court and the hearing must be made in the council room.

The court can manage any evidence that is considered as necessary in order to correctly solve the case. The judging of the request for the preclusion of the parental rights is made using the rules of the common procedural law.

The court can appreciate if the request is grounded and can dispose the preclusion of the parental rights for both parents or only for one of the parents. According to the Law No. 272/2004[3], the preclusion can be total or partial. In the case of the partial preclusion the court will establish the

[1] Art. 130 al. 1
[2] According to art. 24 of Law no. 272/2004
[3] According to art. 36 par.3 of Law no. 272/2004

rights that make up the object of the preclusion.[1] This delimitation of the preclusion of the parental rights in "total preclusion" and "partial preclusion" is not right in my opinion, taking into account the fact that the legislator does not make any statement concerning the practical modality in which there is going to be established when it is imposed the total preclusion and when it is imposed the partial preclusion of the parental rights. Furthermore, taking into account that this sanction is proposed only for serious deviations from the exertion of the parental rights, we will not be able to appreciate when the deviation is more serious and when it is less serious in order to propose the total or partial preclusion of the parent/parents from the parental rights, the consequences of the abuse and the neglect of the child not being able to be quantified.

3.The effects of the preclusion of the parental rights – as a result of the application of the preclusion sanction, the parent loses both categories of rights (the one concerning the child as well as the ones concerning the child's goods), as well as their parental obligations. It will be maintained only the obligation of the child support[2] and the right to consent to his/her child adoption[3].

The parent precluded from his rights can maintain personal relationships with the underage child if through these relationships the growing up, the education, the studies and the professional preparation of the child would not be jeopardised[4]. We considered that the court of law that pronounced the sentence of preclusion of the parental rights must pronounce itself also upon the necessity of maintaining the personal relationships with the child, because if we talk about a serious abuse upon the child (physical, emotional or sexual), that determined the sanction of the parent or of the parents, the maintaining of the personal relationships with the child is not indicated, this thing triggering the difficult recovery of the child after the trauma that he had.

If the preclusion acts upon only one of the parents, the other parent exerts alone the protection of the child[5]. If both parents are precluded from

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[1] E. Florian, op.cit., pp. 104-112;but also D.Lupaşcu, „Family Law", Ed. Universul Juridic, Bucharest, 2008, p. 339

[2] According to art. 110 of the Family Code

[3] According to art. 62 par. 3 of the Law no. 272/2004 and art. 12 al. 2 of the Law no. 273/2004

[4] According to art. 111 of the Family Code

[5] According to art. 98 par.2 of the Family Code

the parental rights, or the only parent is precluded from his rights, the trust must be established, because the child cannot remain without the legal tutor[1].

The preclusion can be pronounced concerning the exertion of the parental rights upon one of the children or upon all the children, according to the behaviour of the sanctioned parent or parents.

The preclusion also attracts some side effects such as: the inability to be a tutor[2] and the inability to adopt.

1. **The restoration of the parental rights exercise –** the parent who is precluded of the parental rights can be restored back in his rights if the events that led to his preclusion have stopped, in a manner in which, by the restoration of these rights the growing up, the education, the learning process and the professional preparation of the child are not jeopardised. Only the court of law is able to decide the restoration of the parental rights exercise[3].

The special law establishes the obligation of the general direction for social assistance and child protection to take all the measures so as the parents precluded from their rights must benefit from specialised assistance in order to increase their capability of taking care of the child, having the aim of restoration of the parental rights exercise. The parents who request the restoration of the parental rights exercise benefit of free juridical assistance from the general direction for social assistance and child protection[4].

Although it is not specifically stated in any legal document that details the stipulations of the Law No. 272/2004, it is imposed that, taking into account the serious events that determined the proposal of preclusion of the parental rights, the restoration of the parental rights should be realised only after the parent who was precluded attended some psychological guidance and therapy courses for the development of their parental abilities.

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[1] According to art. 113 of the Family Code and art. 40 par. 1 of the Law no. 272/2004

[2] According to art. 117 lit.b of the Family Code

[3] According to art. 112 of the Family Code and art. 38 lit. d of the Law no. 272/2004

[4] According to art. 37 of the Law no. 272/2004

2. **Conclusions:** the preclusion of the parental rights exercise is indeed, the most serious sanction that can be applied to a parent who did not fulfil or mismanaged his parental obligations. We must not neglect the fact that this sanction must be applied only after some proceedings have been made so that the guilty parent to be made responsible and aware upon the consequences of his fact upon the education of the child. In Romania, there are not enough services of this type that are offered to the parents and there were not made enough efforts to change the parents' mentalities towards the modalities of education and the growing up of the child. There must be set up some "parents' schools" and day care centres in order to offer support to the children that are to be found in risk situations as well as to the parents. The Law No. 272/2004 establishes the obligation of the general direction of social assistance and child's protection to take all the measures so that the parents who are precluded from their rights to benefit by specialised assistance to increase their ability to take care of the child with the aim of restoration of the parental rights exercise. The parents that request the restoration of the parental rights exercise benefit from free juridical assistance from the general direction of social assistance and child's protection. Although it is not specifically stated in any legal document that details the stipulations of the Law No. 272/2004, it is imposed that, taking into account the serious events that determined the proposal of preclusion of the parental rights, the restoration of the parental rights should be realised only after the parent who was precluded attended some psychological guidance and therapy courses for the development of their parental abilities.

Last but not least, must be modified the Law No. 272/2004 concerning the protection and the promotion of the child's rights, because the quotation "total or partial preclusion" is totally inadequate taking into account the situations that determine the application of the rights preclusion measure and the fact that the judge has anyway the obligation to establish the modality of maintaining the personal connections with the child depending upon the fact pattern that determined the application of the sanction.

We also hope that very soon the underage courts will be established in which specially trained prosecutors will work dealing with underage cases. This way we can talk about the celerity and the efficiency in the activity of child's protection.

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2009 – THE INSURANCE CHALLENGES YEAR

Abstract

The insurance market in Romania has followed a tremendous evolution in the last decade, increasing annually by about 30 percent. Romanian insurance market is dominated by auto insurance, with over 60% of all subscriptions made in the first nine months of 2008. Moreover, the auto sector was and still is looking for the next period, as a true "engine of growth of the Romanian insurance market"

Financial crisis facing the entire world economy has shaken many auto manufacturers of international stature, in view of the considerable reduction in the volume of sales, compared to the same period a year earlier. In Romania, too, the demand for vehicles has undergone a significant decline, if we relate to sales recorded in the previous year, especially against the backdrop of restricting credit.

This reduction in sales recorded in Europe, could have a strong indirect influence on the sale of RCA and CASCO policies in Romania.

Besides the auto insurance, other segments of insurance, such as life insurance (especially policies of unit-linked) could be affected by the crisis. All these issues have required legislative changes for the year 2009.

The insurances market in Romania has known a "beautiful" evolution during the last decade, industry rising yearly with about 30 per cent. At the level of the Romanian specialized industry, the auto insurances dominate the market with over 60 percent of the total sum of subscriptions realized in the first 9 months of the year 2008. More than that, the auto segment was and is considered, in the following period, as a real "engine rising the Romanian insurance market".

The financial crisis economy faces all over the world has affected many international car producers, from the point of view of the considerable decrease of sales compared to the same period last year. In Romania, the car demand has also suffered an important decrease, if we take into account the sales recorded during the previous year, especially because of the credit limitation.

This sales decrease, recorded all over Europe, could have a powerful indirect influence on selling optional car insurance policy (CASCO) and compulsory car insurance policy (RCA) in Romania. Besides

the car insurance, other insurance segments such as life insurance (particularly the unit-linked policies) could be affected by the crisis.

All these aspects have imposed legislative changes during the year 2009.

1. **The amicable Constant of accident has been introduced**:

- CASCO insurances – beginning with January 1st 2009, the holders of CASCO auto policies, involved in a traffic incident having as a result only the damage of their own car or if the damage happened in other circumstances than a traffic accident (fallen trees, cars found hit in the parking places), need not go to the Police to draw up the form of introduction in car repair, they can also go to the insurance companies. The procedure is stipulated in the Order no 12/2008 concerning the application of norms regarding the procedure of drawing up and release of the document of introduction in vehicle repair, issued by CSA.

According to the norm, the companies specialized and authorized in services of establishing and liquidating damages may designate personnel with attributions in establishing, solving the damage dossiers and issuing documents of introduction in vehicle repair, when the insured have a viable optional CASCO insurance, issued by the respective insurer and come to announce the material damages for the insured vehicle in the conditions stipulated by the Government urgent decree no 195/2002 regarding the circulation on public roads.

The repairing firms have the obligation to accept the documents of introduction in repair of vehicles issued by insurers and presented by the CASCO insured persons, these being equivalent to those issued by the traffic Police under the name of "repair authorization".

The norms underline the fact that the issuing of the document of introduction in vehicle repair represents neither the final technical mark of establishing damages nor the insured's obligation to pay, that being already mentioned in the document.

The document of introduction in repair, that will be issued by the insurer in two copies (the original being given to the applicant), will have a unique series and the following form:

- for the authorized insurers in Romania: RA-xxx/JJ/…where RA-xxx represents the unique number of registration of the insurer in the Insurers and Brokers' Register; JJ represents the abbreviation of the county where the document of introduction in vehicle repair is issued and the

damages dossier is administrated; all these are followed by a number of order given by the insurer to administrate the damages dossier.

- for the authorized insurers in a EU member state that are involved in insurance activities in Romania on the basis of free circulation of services or of the right of establishment: RX-yyy/JJ/…where RX-yyy stands for the registering code given by CSA; JJ has a zero value "00"; all these are followed by a number of order given by the insurer.

The information included in this document will be maintained and introduced compulsorily in a data basis of every insurer who practices optional insurances of vehicles or compulsory civil responsibility and is kept for ten years.

The entry into force from July 1st2009 of the Amicable Constant of accident makes waves on the insurance market in Romania. On one hand, there are some insurers that are worried about the increase of frauds in the system and also about the costs generated by the organizing changes they have to operate in their own structures, whereas, on the other hand, there are the Traffic Police representatives and the clients dissatisfied with the long queues they have to attend in case of a minor accident.

The fears regarding the amicable constant of accident are somehow groundless since in most of the European countries, this has already worked successfully for many years.

Giving up the contravention report issued by the Traffic Police has a great practical advantage:

- First, in the actual system, the insurers cannot attack in the law court the provisions of this report, that being possible only at the initiative of one of the party involved in the accident. Once with the amicable constant this will disappear.
- Second, the introduction of the procedure will make the services of finding damages develop in a faster rhythm. Such an external neutral entity does not allow to make mistakes because it risks losing its clients and image.

- RCA insurances – The necessity of harmonizing with the European Union practices, of aligning the Romanian Traffic legislation with the European standards, led to modifying the normative acts in the insurances field. Coming to meet this necessity, the Committee of Insurances Surveillance (CSA), at the recommendations of the European specialized missions, adopted the Order no 21/18.12.2008 to enforce the

norms regarding the use of the form of amicable finding, a normative act meant to facilitate the faster and less bureaucratic solution of traffic incidents ended with slight collisions, without disobeying the present traffic law. The normative act applies for the insurance policies of compulsory auto civil responsibility whose validity starts from the date of its publication.

Thus, in case of minor traffic accidents that happened in Romania, without any person injury, informing the insurance company may be done by means of a standard form issued by the insurer, named "amicable finding of accident" on which the respective drivers note the circumstances of the accident, the identification data of the persons and vehicles involved, as well as those of the insurers.

The form of "amicable finding of accident" will be printed and handed out by every insurance company to its RCA clients once with the compulsory RCA insurance policy. The insured may demand, during the validity of the insurance policy, one or more documents, in case that the initially acquired document was used, given away or lost.

The amicable finding of traffic accidents in which two vehicles were involved and which resulted only in material damages, will be valid from July 1st 2009. Minor accidents will be solved through parties' agreement, both drivers signing the amicable finding.

The form of amicable finding of accident contains information regarding the date and the place of the accident, identification data of the drivers, their vehicles and the RCA companies, as well as information about the circumstances of the accident.

The amicable finding of accident of any of the parties involved represents a damage notice and makes the insurer open a damage dossier and find damages, thus shortening the procedure of recovering damages.

According to the norm, the insurer is forbidden to guide the parties in the accident protocol done by the Traffic Police.

The RCA insurers, noticed about the accident because of the amicable finding form, are obliged to issue the document of introduction in repair to the solicitants.

The insurance companies, authorized to sell RCA policies, have the obligation, in a period of 60 days from the norm date of appearance, of concluding a protocol regarding the way the right to damage is established for the owners/drivers involved in accident.

Thus, minor accidents will be solved through parties' agreement, both drivers signing the amicable finding. This change will definitely shorten the period of solving the auto damages.

The insurers authorized to conclude the RCA insurance have the obligation to take any necessary measures to apply the norm provisions and they are responsible for the correct training of their personnel and of the intermediaries regarding the solving of damages in adequate conditions, obeying the legal provisions.

Thus, starting with the second part of the year, the traffic accidents on Romanian territory, having as a result only material damages and in which two vehicles were involved, will be solved without the documents of amicable finding issued by the police, provided that the form is filled in and signed by both drivers involved in the accident. Once it has the information on the accident, the drivers' names and it is signed by them, the form must be handed in to the insurance company which will issue the necessary documents for the repairing of the vehicles.

The issuing of insurance policies in an electronic format

Since the beginning of the year 2009, the RCA policies may be issued in an electronic format and also starting with January 1st 2010, they will be issued only in an electronic format, according to the article….in the CSA Order no 20/2008. Therefore, they totally give up the manual RCA subscription, often in a hurry and in unsuitable places, the information systems taking the information and transmitting it to the insurance companies and to the centralized data basis (CEDAM) in real time.

For clients, the implementation of this system will lead to the increase of services quality and to the decrease of errors that inevitably appear while filling in the insurance policies.

Meanwhile, the insurers of auto civil responsibility are obliged to transmit, in the CEDAM data basis, using electronic communication, the complete registration of their own data basis regarding the compulsory auto insurance contracts and the final date of their validity or the date of annulment of the insurance documents, as well as information on damages registered in the basis of concluded RCA policies, as a result of some events produced during the contract; an instrument that allows the checking of the degree of inclusion in policy of the vehicles in Romania.

The online data basis CEDAM offers an accessible evidence of RCA policies concluded on Romanian territory. After the registering number or the body series, one can check if a car is insured or not on the website

http://cedam.csa-isc.ro/index.php. The purpose of CEDAM data basis is both to watch the way the law on vehicles insurance is obeyed and to facilitate the access of all persons interested in information connected to a RCA policy for a certain vehicle. The data basis is permanently actualized to reflect the actual status of the compulsory insurance market in Romania.

The introduction of the bonus-malus system in rating the RCA insurances has represented the decisive step in making the drivers responsible and has also contributed to changing the public perception towards the role of a responsibility insurance policy towards third parties.

From the client's point of view, the introduction of the bonus-malus in RCA is translated through the payment of bigger insurance bonus for drivers who have an unfavourable history concerning traffic accidents. Drivers who have a favourable history will benefit by bonus reductions.

The system of collecting the main insurance bonus for the RCA policies will allow the insurers to offer their clients successive reductions up to a level of maximum 25% of the fundamental fares, except the reductions granted to pensioners and persons with locomotor deficiencies, according to the order no 20/2008 issued by CSA.

4. The payment of damages produced as a result of the lack of use of the damaged vehicle

The RCA insurance may also pay the damaged vehicle, according to the CSA Order no 20/2008. In fact, as he did not use the car while it was in repair, the victim may ask for damage from the insurance company. The damages for the lack of usage of the damaged vehicle may be obtained only in the law court.

Nowadays, the insurance companies grant damages for lack of usage of the damaged vehicle only for judicial persons that are involved in merchandise or persons transport. For physical persons, damage cannot be accounted for, therefore only the law court may appreciate its value.

For the authorized physical persons or the judicial ones who practice taximetry or persons and merchandise transport, damages are determined taking into consideration the damaged person's taxes at that time. For example, in case of an accident resulted in the damage of a taxi, the driver may demand money from the insurance company starting with the daily income multiplied with the number of days in which the vehicle was not used.

In case of a physical person, the sum could be smaller, more precisely it should be equal to the value of renting a car for the period in which the vehicle is being repaired.

Practically, at present, the Romanians may receive compensations for not using the damaged vehicle only in the law court. In time, based on the decisions of the court, compensations could be given on the basis of judicial practice, without going to the law court.

The compulsory insurance of dwellings

The policies for insuring the dwelling will become compulsory for all owners of buildings in Romania.

Consequently, the year 2009 is the "Year of Challenges", a year when all the companies in our country will be forced to operate more efficiently to maintain both the increase and the profit at acceptable levels.

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