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Nora Andreea DAGHIE

UNE RÉÉVALUATION DU PRINCIPE «PACTA SUNT SERVANDA» SOUS L'EMPIRE DE L'INSTABILITÉ DU MILIEU ÉCONOMIQUE ET SOCIAL[1]

« les bœufs se lient de cornes, les hommes se lient par le biais des mots »

L'accord de volonté représente l'élément essentiel dans la théorie générale du contrat mais son effet obligatoire ne réside pas dans la puissance souveraine des volontés individuelles, mais il est offert par la loi dans la considération des idées de morale, d'équité et d'unité sociale. Les raisons de la reconnaissance de la force obligatoire des contrats / soit celle originaire, de facture romaine et juste naturaliste-divine, soit celles proposées par les courants modernes – démontre que ce principe ne doit pas être compris et appliqué dans le sens absolu, intangible, n'étant pas un but en soi.

Par conséquent, la nécessité pour que la force obligatoire soit en harmonie avec les éléments fondamentaux de la vie sociale et en conformité avec les exigences de la vie économique, n'apparaît pas seulement par un jeu du déterminisme économique-social ou indépendant de conditions imposées pour sa réalisation comme principe des effets du contrat. De plus, il ne s'agit pas seulement d'une nécessité, mais aussi de la possibilité de la mise en accorde de l'obligation du contrat avec les données de la réalité ou, plus précisément, avec le changement des circonstances contractuelles, possibilité « assurée » par la recherche fondamentale de l'obligation.

Il s'impose alors, une solution d'équilibre et une remise du rapport entre « pacta sunt servanda » et « rebus sic stantibus » : « s'il ne faut pas exagérée l'admissibilité du principe rebus sic stantibus, ni pacta sunt servanda ne doit pas être considéré comme principe avec valeur de refus ».

Préliminaires

L'étude de la vie juridique des sociétés humaines, réalisée à la fois tant de la perspective synchronique que diachronique, met en lumière le rôle essentiel des obligations - *les rapports obligatoires entre les individus*

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constituent la structure de la vie juridique. Presque toutes les institutions juridiques du droit privé trouvent leur raison dans le droit des obligations.

Le XXe siècle se caractérise par un large développement de deux instruments du droit des obligations: le contrat et la responsabilité contractuelle. Elle se manifeste par l'augmentation quantitative et qualitative de la notion de « contrat », l'expression juridique de la naissance d'une «culture du contrat ».

J. Commaille souligne le fait que le domaine contractuel a obtenu une expansion sans précédent en raison de son invasion avec des significations qui vont au-delà de la définition juridique jusqu'au point auquel on pourrait même parler et considérer que « la métaphore du contrat occupe l'espace public ». Sur cette métaphore, un autre auteur s'est aussi exprimé qui note que sous l'effet de changement des fondements sociaux du Code civil, il se développe une véritable idéologie volontariste des relations humaines, participant à la recomposition des rapports sociaux ; un miroir d'une société appelée « contractualisée »et qui sent la nécessité de recourir à la « métaphore du contrat » pour couvrir la lutte entre les influences et les intérêts qui se déroule à son intérieur.

L'expansion du phénomène contractuel trouve un corollaire directement dans l'augmentation du pouvoir de l'idée de « contractualisation » de la société.

La complexité et les grandes dimensions des opérations économiques et de consommation de masse qui sont spécifiques à la société contemporaine ont implicitement requis, une collaboration dans la même mesure entre plusieurs Etats, réalisée grâce aux accords industriels, commerciaux et scientifiques. Celle-ci, comme les éléments essentiels de ces activités (les sources de matières premières, la technologie, les moyens financiers) dépendent de différents pays, et leur réunion implique cette collaboration.

La réalisation de certains objectifs de telle ampleur signifie, évidemment, des rapports contractuels qui dépassent beaucoup l'extension des contrats traditionnels, eux étant, souvent, de longue durée (dizaines d'années) ou même ne prévoyant pas les délais finaux d'exécution, leur cessation ayant lieu à la date de la réalisation des objectifs en cause.

Dans de tels cas, naturellement il est possible d'apparaître des situations imprévisibles changeant parfois radicalement, les circonstances que les parties ont envisagé ou auraient pu les envisager à la date de conclusion du contrat, pouvant rompre l'équilibre obligatoire contractuel qui a initialement existé, étant affectée l'économie des contrats en cause, en divers degrés de gravité. De telles situations concernent non seulement les parties contractantes, mais aussi d'autres parties: les financeurs, les garants,

les assureurs, etc. mais même les économies des pays impliqués dans les projets respectifs, étant engagés des investissements importants, d'immenses forces de travail.

Compte tenu de l'ampleur de ces conséquences, il a été besoin de trouver des solutions alternatives pour résoudre ces situations, autres que de rompre les contrats de coopération (coopération économique et financière), ce qui s'est réalisé, dans le domaine juridique, par l'introduction dans les contrats des clauses d'adaptation des contrats à nouvelles circonstances afin de rétablir l'équilibre obligatoire contractuel, s'agissant de la règle *rébus sic stantibus* qui, généralement, n'est pas acceptée par les systèmes de droit nationaux motivant qu'il serait affecté un principe fondamental du droit traditionnel (classique) de contrats (une rigidité juridique qui a été beaucoup atténuée de nos jours).

La force obligatoire et le contenu obligatoire du contrat

A partir des dispositions de l'article 969 paragraphe 1 Code civil – « Les conventions légalement faites ont le pouvoir de loi entre les parties contractantes » - on définit le principe de la force obligatoire, exprimé par « pacta sunt servanda », comme étant la règle de droit selon laquelle l'acte juridique civil conclu s'impose aux parties (dans le cas des conventions) ou à la partie (dans le cas des actes juridiques unilatéraux) juste comme la loi. Dans d'autres mots, l'acte juridique civil est obligatoire pour les parties et non pas facultatif.

Formulé d'une manière synthétique et suggestive, en vertu des dispositions légales citées, pour les actes bilatéraux – les contrats – le principe s'exprime aussi dans la formule largement répandue dans la doctrine : « Le contrat est la loi des parties ».

Une expression de la force obligatoire de l'acte juridique la représente aussi la possibilité que celui-ci soit modifié seulement par l'accord des parties.

Il a été souligné, d'une façon juste, que l'acte juridique civil légalement conclu a de la force obligatoire non seulement pour ses parties mais aussi pour l'organe de juridiction chargé de résoudre un litige découlant d'un tel acte, alors le tribunal est tenu de veiller à l'application de l'acte juridique légalement achevé, en tenant compte dans l'interprétation de ses clauses, de la volonté des parties. Ce principe est fondamental, car sans lui la vie juridique serait impossible ; ce n'est pas seulement un principe de droit, mais aussi l'un de morale. Il consacre le respect de la parole donnée (un adage juridique dit : les bœufs se lient par les cornes, les gens se lient par les mots).

Le fondement moral, retenu en particulier dans le droit canonique, se retrouve même aujourd'hui dans la doctrine roumaine et celle française

mais sous une forme laïcisée ; conformément à la thèse des canonistes, promue par St. Thomas d'Aquino, la promesse de contracter était faite à la divinité et il se conditionnait la nécessité des obligations de garde inchangée de l'environnement : « (…) *le contractant n'est pas infidèle en ne remplissant pas sa promesse parce que les conditions ont changé* ».

Il est intéressant à noter, dans le cadre de l'argumentation de facture morale, l'évolution à partir de la morale originale religieuse à celle laïque, l'explication fournie par les canonistes ne se retrouvant plus dans les thèses actuelles des auteurs roumains et français, même si les derniers recourent à des raisons morales. Cette tendance a été expliquée par un auteur par les œuvres des philosophes modernes - Descartes, en particulier - et il s'encadre, en fait, dans la tendance générale de la suppression de transcedental de l'âge moderne. L'intermédiaire de ce passage est le principe de l'autonomie de volonté qui va assurer le placement de l'individu, considéré comme but du droit, à la base de l'obligation du contrat.

Ainsi, dans la doctrine classique du droit civil roumain, le principe de la force obligatoire a été basé sur la théorie de l'autonomie de volonté, selon laquelle toute restriction de la liberté de l'homme est et elle ne peut être que le résultat de sa volonté ; il en résulte donc que l'acte juridique a de la force obligatoire pour les parties mais aussi pour le tribunal. A présent, le fondement du principe de la force obligatoire de l'acte juridique civil est représenté d'une part, par la nécessité d'assurer la stabilité et la sécurité des relations juridiques découlant d'actes juridiques civils, et d'autre part, par l'impératif moral de respecter la parole donnée.

De la perspective économique et sociale, le professeur Gh Beleiu a proposé – à cause de l'inflation fulminante qui a caractérisé la période postérieure à 1989 – une solution d'équilibre et un nouveau ordre du rapport entre *pacta servanda* et *rebus sic stantibus* : « s'il ne faut pas exagérer la recevabilité du principe *rebus sic stantibus* ni *pacta servanda* il ne doit pas être considéré comme un principe de valeur de refus d'accueil ». Il arrive donc une atténuation de la force obligatoire du contrat en vertu de l'instabilité du milieu économique et social.

La force obligatoire du contrat apparaît cependant, comme un cadre général, à l'intérieur duquel il s'inscrit les rapports obligatoires, les relations entre le débiteur et le créditeur, les parties pouvant avoir ces qualités réciproquement.

En conclusion, affirmer qu'un contrat a de la force obligatoire, il est identique avec la conclusion que l'accord des parties crée une nouvelle norme juridique, contractuelle, qui peut avoir comme objet la naissance des rapports obligatoires entre les parties, le transfert d'un droit, la création

d'un droit ou d'une situation juridique nouvelle. Le caractère obligatoire du contrat signifie le fait que la norme née du contrat s'imposera aux parties comme une norme juridique légale.

Sous l'influence de certaines études doctrinales de valeur théorique sûre parues dans la doctrine française, il est démontré que la force obligatoire du contrat tire son essence, non pas tant de son contenu obligatoire du contrat, mais surtout de l'accord de volonté des parties, qui, par le pouvoir de leur volonté, manifestée dans le cadre créé par le droit positif, ont donné lieu à la loi contractuelle, qui s'impose avec la même force que la loi d'Etat.

« Le pouvoir de loi » des contrats légalement conclus concerne les parties en cause mais le tribunal, jugeant le litige intervenu entre les parties est obligé de tenir compte des clauses du contrat et de veiller à leur application, comme s'agissait de l'application des dispositions des lois ou d'autres actes normatifs.

Théorie de l'imprévision – notion

La clause *rebus sic non stantibus* (les choses qui ne sont plus les mêmes) n'a pas connu, dans le droit civil roumain, un développement spectaculaire, quoique, dans le plan du droit comparé, l'institution ait été analysée en détail, la stabilité ou la « stabilisation » économique détermine, bien entendu l'inapplication ou la réduction des effets de la théorie de l'imprévision. L'impacte actuel dans le circuit civil roumain de l'instabilité économique apporte de nouveau en actualité la théorie de l'imprévision.

Cherchant à définir la notion « d'imprévision », la plupart des auteurs ont consenti sur le fait que l'imprévision est étroitement liée au phénomène économique et financier.

La cause du déséquilibre la représente un événement extérieur à la personne et à la volonté du débiteur, qui n'entraîne pas une impossibilité d'exécution de l'obligation mais la fait plus onéreuse, n'étant pas sûr qu'il est nécessaire que l'événement soit imprévisible ou il suffit que lui ne soit pas prévu.

L'imprévision se distingue tant de la force majeure, c'est-à-dire la force majeure ne peut pas déterminer la nouvelle adaptation du contrat que de l'inapplication imputable des obligations contractuelles envers le débiteur, la cause de l'imprévision n'étant pas imputable au débiteur, ayant un caractère objectif.

Pour devenir applicable, la théorie de l'imprévision suppose l'existence d'un déséquilibre d'une certaine gravité, qui peut être appréciée soit *in concreto*, par le juge, soit *in abstracto* , par le législateur, et qui, par

rapport à un certain niveau, peuvent établir si le déséquilibre des prestations peut être considéré imprévision.

Le remède contractuel vers lequel tend la théorie de l'imprévision pourrait consister dans la révision des clauses contractuelles, leur adaptation à des nouvelles circonstances, pour se maintenir l'équilibre contractuel, la suspension du contrat, la résiliation suivie de dommages, intérêts.

Court historique de l'apparition et de l'évolution de la théorie de l'imprévision

Sur la façon dont il trouve l'application dans la pratique le principe *pacta sunt servanda* et les corrections qu'il a reçues par le biais de l'adage *rebus sic stantibus* il s'impose les observations suivantes.

Jusqu'à l'année1989, il a été estimé qu'il y avait de la stabilité monétaire, qui a conduit, implicitement, à la stabilité des contrats qui comprenaient des obligations financières.

Selon l'adage *pacta sunt servanda*, même dans les situations où de la date d'achèvement jusqu'à la date de l'exécution des contrats il est survenu des circonstances économiques imprévues, qui ont rompu l'équilibre des prestations économiques prévues à la conclusion des contrats, ils doivent être exécutés comme convenu, ce qui ce qui s'est motivé par la nécessité de respecter le mot donné (*promissorum impledorum obligatio*).

Afin de s'adapter à la réalité imposée par le phénomène de l'inflation il s'est formulé l'adage *rebus sic stantibus*, et pour justifier cette exception il a été formulé la théorie de l'imprévision, comme une exception de la règle *pacta sunt servanda*, selon laquelle, chaque fois que l'exécution d'un contrat synallagmatique devient trop onéreuse pour l'une des parties contractantes, la révision du contrat s'impose *ratio legis* afin de rétablir la valeur d'équilibre des prestations. Alors, si ces conditions ont changé, il est nécessaire que le contrat soit adapté aux nouvelles circonstances économiques, et comme l'évolution des conditions économiques a été imprévisible, il a été dit que la révision des contrats économiques correspond à la volonté présumée des parties contractantes.

A partir des dispositions de l'art. 1085 Code civil selon lesquelles « le débiteur est responsable seulement pour les dommages intérêts qui ont été prévus ou qui ont pu être prévus à l'achèvement du contrat, lorsque l'inaccomplissement de l'obligation ne provient pas de sa part », la doctrine roumaine établit une distinction entre les clauses contractuelles prévisibles qui sont admissibles (*pacta sunt servanda*) et les clauses contractuelles imprévisibles, appelées aussi clauses *rebus sic stantibus*, qui sont considérées

comme irrecevables. Dans la doctrine on a apporté des arguments pour l'acceptation de principe de la théorie de l'imprévision dans notre système de droit, qui aurait l'appui de la recherche d'un équilibre entre juste (une exigence de la justice commutative) et utile (exigence de la force obligatoire).

Comme on a déjà indiqué, le Code civil roumain n'a pas un texte spécial qui réglemente l'applicabilité de la règle *rebus sic stantibus*. Par conséquent, pour justifier l'application de cette règle, on a fait appel à des motifs différents, comme l'art. 977 C.civ. (relatif aux règles d'interprétation des contrats), l'art. 970 C.civ. (l'exécution de bonne foi des accords), ou l'enrichissement sans juste cause, l'abus de droit, etc. Aucun de ces motifs n'a pas été entièrement satisfaisant. Dans une analyse récente de la théorie de l'imprévision, le professeur O. Ungureanu montre que son bien-fondé juridique pourrait être l'article 970 C.civ. selon lequel « les conventions obligent non seulement à ce qui est expressément compris en elles mais à toutes les conséquences que l'équité ou l'habitude donne à l'obligation selon sa nature ». Se rapportant au même article, un autre auteur conclut de bonne foi étant un corollaire de l'obligation du contrat, avec l'observation que la bonne foi n'est pas cherchée dans notre matière à la conclusion du contrat mais avec l'occasion de son exécution. L'interdépendance de deux principes a comme conséquence l'écartement de la rigidité absolue de la force obligatoire, dans le contrat restant la loi des parties seulement dans la mesure où, au cous de son exécution, aucune des parties, sur le fond de l'intervention d'une situation imprévisible, n'a pas respecté ses obligations en vertu de l'exécution avec de bonne foi des prestations. Il résulte donc que la théorie de l'imprévision, fondée ainsi sur le principe de la bonne foi dans l'exécution du contrat, est en consonance avec sa qualité de ne pas constituer une véritable exception de la règle de base de l'obligation mais seulement une apparente exception.

En conclusion le rôle de la bonne foi dans la détermination de l'obligation des contrats en cas d'imprévision a comme conséquence la réinstauration d'une certaine justice contractuelle dans les situations de crise, s'inscrivant dans la note générale de moralisation du droit contractuel. La conséquence la constitue un élargissement du rôle du juge dans le contrat, ce qui réclame de la prudence et de la modération dans l'exercice d'un tel pouvoir. La sécurité juridique ne sera pas en danger, parce que l'intervention directe ou indirecte judiciaire est limitée par l'accomplissement des conditions spécifiques à l'imprévision contractuelle et qui concernent plusieurs aspects : la cause et l'effet du changement des circonstances, l'attitude des parties contractantes.

L'importance du phénomène de l'imprévision est démontrée aussi par la façon d'être perçu dans la branche du droit du commerce international, par l'institutionnalisation de la clause de *hardship* dont la présence n'est pas équivalente à l'exclusion *de plano* de l'application de la théorie conformément à son régime commun. On signale aussi des préoccupations pour la définition de l'imprévision par certains concepts nouveaux ou par leur éloignement : « le changement des circonstances contractuelles », « le bouleversement de l'économie contractuelle », « l'inexécution licite du contrat ».

Quoique, dans la dernière période, le législateur roumain ait consacré législativement, dans certaines matières la théorie de l'imprévision (article 43 paragraphe 3 de la Loi no. 8/1996 concernant les droits d'auteur, l'article 32 de la Loi no. 219/1998 concernant le régime de la concession, O.G. no. 5/2001 concernant la procédure de somation de paiement, où il est consacré le droit du juge d'actualiser pour cette procédure, par rapport au taux d'inflation, tant les créances que les intérêts, etc.), on sent le besoin de l'intervention du législateur avec valeur de principe, celle-ci n'étant soutenue ni d'un texte exprès de loi ni d'une jurisprudence constamment favorable, si que les parties d'un contrat se voient obligées de recourir aux diverses clauses, qui, finalement, ont la source dans l'article 969 C.civ.

En vertu de ces clauses, les parties peuvent stipuler la manière de « gérer » la nouvelle situation créée, ou simplement vont donner la possibilité au débiteur de l'obligation devenue extrêmement onéreuse, de solliciter soit la renégociation des clauses contractuelles soit la cessation des effets du contrat « dévié » du but initial.

Formes de révision

Dans la pratique de la révision des contrats on connaît trois formes de révision, à savoir :

1. la révision conventionnelle des contrats, réalisée par des clauses contractuelles de révision, qui peuvent être :

- des clauses *rebus sic stantibus* expresses par lesquelles les parties contractantes prévoient que chacune d'elles pourra invoquer la révision du contrat en cas de changement des circonstances économiques ;

- des clauses de variation automatique qui ont comme paradigme la clause d'indexation par laquelle, dans les obligations pécuniaires, la somme due va varier en fonction de la variation de l'indice choisi.

La révision conventionnelle des contrats a à la base le principe de la liberté de volonté en matière contractuelle, liberté de volonté qui doit être exprimée, aussi, dans les limites des normes légales à caractère impératif.

2. la révision légale des contrats, à laquelle on a recourt dans certains cas en vue de proroger les contrats de location des logements pour la réévaluation des dettes alimentaires et des rentes viagères dépréciées, etc.

La révision légale des contrats est fondée sur le critère de l'intérêt général, administratif qui doit être une priorité par rapport aux intérêts individuels, privés.

3. la révision judiciaire des contrats, admise dans la pratique judiciaire, en particulier en ce qui concerne les obligations pécuniaires successives. Les solutions ont été motivées par le fait que dans les contrats successifs de longue durée la clause *rebus sic stantibus* est sous-entendue, parce que donner le consentement a été subordonné à la supposition que les circonstances économiques qui ont existé à la date de la conclusion de ces contrats resteront tout au long de leur exécution.

Les Parties contractantes établissent les termes du contrat en tenant compte de la situation économique actuelle à un moment donné. Mais, dans le cas où, après la conclusion du contrat, il apparaît certaines situations imprévues (la guerre, la révolution, l'inflation fulminante, la crise financière mondiale, etc.) entre les prestations des parties il peut apparaître de graves déséquilibres significatifs, susceptibles d'enrichir l'une des parties contractantes et de ruiner l'autre partie.

L'application de la théorie de l'imprévision dans d'autres systèmes de droit

Bien que la stabilité économique d'autres pays européens soit incontestablement plus grande que dans la Roumanie, la plupart d'entre eux ont adopté la théorie de l'imprévision.

Dans le droit allemand contemporain on admet la modification judiciaire du contrat de droit privé, sur le fondement de la théorie GESCHAFTSGRUNDLAGE, élaborée en 1923 par Oertmann, théorie basée sur la représentation que les parties ont sur la présence ou l'apparition de certaines circonstances qui déterminent la volonté contractuelle. La disparition du fondement contractuel conduit à la dissolution du contrat ou à la révision du contrat.

Le changement des circonstances ne doit pas être imputable au débiteur et l'imprévisibilité de l'événement n'est pas toujours nécessaire. L'application de la théorie est soumise aux conditions: d'être le seul moyen

d'éviter de supporter par une part de très lourdes conséquences, incompatibles avec le droit et la justice, et qui, selon l'équité, ne peuvent pas être laissés à sa charge ; la modification ne soit pas incluse dans le domaine du risque du contrat. Si ces conditions sont remplies, le juge va adapter le contrat, et seulement si le contrat a perdu tout sens, va donner sa dissolution.

Dans le droit suisse, la théorie de l'imprévision est acceptée plus restrictivement, la jurisprudence en matière estimant que l'intervention du juge à la demande d'une partie, fondée sur l'art. 2 C.civ. suisse (« Chacun est tenu d'exercer ses droits et d'accomplir ses obligations selon les règles de la bonne foi. L'abus de droit n'est pas protégé par la loi. ») est soumise au déséquilibre des prestations causé par un changement extraordinaire des circonstances, si que le partage des risques devient insupportable pour une des parties, et la persistance dans la transformation de l'autre partie dans la valorisation de ses droits devient abusive. La bonne foi sert, donc, en tant que fondement pour la révision du contrat pour imprévision, admettant en même temps la révision ou la résiliation du contrat pour le déséquilibre objectif des prestations.

Dans le droit italien, la théorie de l'imprévision a été consacrée législativement par l'article 1467, 1468 C.civ. italien. Alors, en vertu de l'article 1467, « les contrats avec exécution continue ou périodique et ceux avec exécution différente, si la prestation d'une des parties est devenue excessivement onéreuse suite aux événements extraordinaires et imprévisibles, la partie peut solliciter la résolution du contrat, avec les effets établis par l'article 1458, paragraphe 2 la résolution ne peut pas être demandée, si l'onérosité intervenue entre dans le risque normal du contrat du paragraphe 3. La partie contre laquelle on a demandé la résolution peut l'éviter, en s'offrant à accepter la modification équitable des conditions du contrat »

En même temps, l'art. 1468 stipule que « les hypothèses retenues dans l'article précédent, s'il s'agit d'un contrat où l'une des parties s'est assumée des obligations, celle-ci peut demander une réduction de son service, ou la modification du moyen de réalisation, permettant la poursuite de cette performance, conformément à l'équité».

L'onérosité excessive consiste dans les événements extraordinaires et imprévisibles, qui provoquent une grave altération de l'équilibre entre les valeurs des prestations lorsque le contrat a été dressé.

En essence, soit la résolution du contrat, soit sa réduction à l'équité, il représente un remède pour éviter l'altération des rapports de valeur entre les deux prestations.

Dans le droit grec, conformément à l'art. 388 C.civ. « Si les circonstances sur lesquelles, compte tenu de la bonne foi et des usances acceptées dans les affaires, les parties se sont basées à la conclusion du contrat synallagmatique, ont changé par la suite, pour des raisons extraordinaires et ne pouvant pas être prévues, et, à cause de ce changement, la performance du débiteur par rapport à la contreprestation, est devenue démesurément lourde, le tribunal peut, à la demande du débiteur de rendre le contrat en fonction de son évaluation, aux proportions convenables, ou même de décider l'entière résolution du contrat paragraphe 2. La résolution du contrat étant donné, les obligations se considèrent éteintes et les parties contractantes sont mutuellement tenues de rembourser les prestations à la suite des dispositions relatives à l'enrichissement sans cause juste ».

Des dispositions similaires sont contenues dans le droit civil portugais, américain, anglais, turc, etc.

Conclusions

L'imprévision constitue un exemple pour la façon où des concepts traditionnels du droit civil sont invités pour analyser et démontrer leur correspondance avec une certaine réalité économique. Pour l'importance pratique de la théorie il plaide tant ses clauses génératrices que les effets qu'elle a sur les relations contractuelles.

La problématique ne doit pas être réduite à la question de l'inflation parce que l'imprévision s'impose comme un moyen de droit efficient dans la résolution d'une situation juridique d'origine contractuelle, déterminée par le changement fulminant et imprévisible des circonstances (n'importe leur nature) du moment de l'exécution du contrat, par rapport à l'âge de sa conclusion. Concrètement, nous sommes dans la présence soit d'une onérosité excessive de l'obligation qui, quoiqu'il soit impossible d'honorer, peut mettre le débiteur dans une posture économique très difficile, même falimentaire, soit d'une diminution drastique de la prestation qui va être reçue par le créditeur, avec la conséquence du déséquilibre de la contre-valeur des prestations et de la perte de l'intérêt dans le maintien de *tale quale.*

Le rôle de l'imprévision contractuelle est celui de réinstaurer l'intérêt pour l'exécution du contrat dans les nouvelle circonstances, par son adaptation et si le but dans la vertu duquel on a contracté ne peut plus être atteint, on arrive à l'annulation du contrat, par une distribution équitable des risques entre les partenaires contractuels. A un tel desideratum on peut arriver par deux voies : législative et judiciaire. Dans

le doit civil roumain, l'imprévision est réglementée seulement en quelques domaines spéciaux, manquant un texte légal général dans cette matière, avec le résultat de la continuation des disputes relatives à son admission de principe.

Les incertitudes apparues autour de cette institution vont disparaître, dans les conditions de l'entrée en vigueur du nouveau Code civil dans la forme adoptée dans la séance du Gouvernement du 11 mars 2009. Le livre V du Projet, intitulé « Sur les obligations », propose une restructuration de la matière et une reformulation des principes et des concepts traditionnels dans la lumière des tendances modernes en matière, réglementant expressément l'imprévision dans l'article 1284 : « (1) Les parties sont tenues à exécuter les obligations même si leur exécution est devenue plus onéreuse. (2) En dépit de ça, les parties sont obligées de négocier en vue de l'adaptation du contrat ou de sa cessation si l'exécution devient excessivement onéreuse pour l'une des parties à cause d'un changement des circonstances : a) qui est survenue après la conclusion du contrat ; b) qui ne pouvait être prévue d'une manière raisonnable dans le moment de la conclusion du contrat ; c) si dans un délai raisonnable, les parties n'arrivent pas à un accord, l'instance peut décider : a) l'adaptation du contrat pour distribuer d'une manière équitable entre les parties les pertes et les bénéfices qui résultent du changement des circonstances ; b) la cessation du contrat au moment et dans les conditions qu'il établit.

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CORRELATING JURIDICAL NORMS WITHIN THE NATIONAL LAW WITH THE NORMS OF COMMUNITY LAW

Abstract

After a thorough doctrine research on the the correlation of the legal norms of the Roman-Germanic law system, after the analysis of the laws of Romania, of the Republic of Moldova as well as of other states, especially of those that are part of the Roman-Germanic law system, we have reached the conclusion that the assurance of an efficient correlation of the legal norms contributes to the assurance of the unitary character of law. It makes law clearer, it makes it operate as a whole without discrepancies and contradictions and it makes it assure the accomplishment of its purpose.

The influence of the Community law upon the internal legislation of those states that are not members of the European Union is, beyond any doubt, less visible, nevertheless the role of the former is constantly increasing due to the expansion process and to the institutional development of the European Union, due to the regulations concerning the good-neighbor policy, the development of asymmetrical trade and of economic relations with non- EU states, as well as due to the launching of certain community programs (which promote cultural, educational, environmental, technical, scientific bonds) etc.

Even so, the states surrounding the European Union feel the influence of the Community law regulations upon their national law system, very often this influence leading to adjustments to the European standards.

The correlation between the norms of national law and the norms of Community law must not be perceived as a "one way street"; sometimes the national legislation may represent a source for the Community law through express or implicit reference.

Express references are explicitly stipulated within the Community acts. For example, Article 48 of the EC refers to founding firms and companies conformably to the legislation of the Member State; Article 256 EC refers to the enforcement of a decision made by the Council of Europe or by the European Commission which impose pecuniary obligations,

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enforcement which must be guided by the civil adjective law in force within the state where it is carried out.

Implicit references are made especially by the Community Courts of Justice in the cases they are assigned to. They applied legal notions drawn from the national law. In this respect, it was asserted that the law system of each member state of the EU, is to designate competent courts of law in absence of Community law regulations and to determine the procedural conditions which will govern the actions in the law-suits destined to assure the protection of the citizens' rights (rights which are the direct effect of Community law regulations). Of course, these procedures and conditions can not be less favorable than those referring to similar actions of an internal nature (respecting the principle of equivalence), and they must not make the exercising of the rights conferred by the Community law virtual impossible or excessively difficult (the principle of effectiveness).

We will briefly analyze the two stated principles by presenting concrete situations.

The principle of equivalence may be interpreted as compelling a member state to extend its most favorable prescription norms to all the actions concerning the returning of taxes and duties collected by violating the Community law. The norms of the Community law do not prevent the legislation of a state from establishing, in addition to a prescription term applicable according to the Common law and according to the actions between persons for recovering the sums of money paid but not owed, some specific, detailed rules (but less favorable) to guide the complaints and the legal procedures related to contesting imposed taxes and other financial obligations. The situation would be different only if these detailed rules would apply just to actions grounded on the Community law for the refunding of such taxes or duties.

The principle of effectiveness is applicable even in the situation when, in the absence of Community regulations, the task of establishing detailed procedural rules to govern the actions either for restoring taxes collected by violating the stipulations contained within the norms of Community law, or for repairing the loss caused by the infringement of Community law (including subsidiary problems such as interest payment), is ascribed to the national juridical system of the Member State. Thus, the actions regarding these matters, filled by people in the courts of law of a Member State, are subject to national procedure regulations which may demand from the claimant to act with the reasonable diligence as to avoid the loss or limit the prolongation.

As for the priority within the relation between the norms of the European Community law and the norms of the national law of Member

States, it must be mentioned that the constitutive Treaties are devoted to monism and impose its observance by the Member States. That's because the community system can function only in the frame of the theory of monism, the only principle compatible with the idea of one integration system. There is that transfer of competence from the national state to the European Union. Within this European Union – Member States relationship, Community law, whether primary or derived, is immediately applicable to the internal legal order, being a part of it.

Community law reassures its privileged position through the jurisprudence of the European Community Court of Justice as well (whose objective is to assure the uniformity of interpretation and application regarding the Community law and whose competence is to solve litigations which involve the Member States, the Community institutions, the private individuals, and the legal persons within the European Union territory).

Throughout the entire judicial practice and in all its precedents, the theory of monism belonging to the doctrine of international law can be detected as a red thread, requiring compliance with the norms of Community law in Member States of the European Union. Community norm will be applicable immediately, without need for the admission or transformation procedure within the internal order of the Member States. Through the decision C-28/67 of April, 3, 1968 given in the Molkerei-Zentrale Westfalen Lippe Gmbh / Hauptzollant Paderborn case, CJEC deliberately consacrated the monist view, determining that "the dispositions pass into the internal juridical order without help from any national measure".

The CJEC emphasized that, in contrast with ordinary international treaties, the EC Treaty has created its own juridical system which, at the time when the Treaty entred into force, became a constitutive part of the legal systems of the Member States and which their courts are obliged to apply . The Court decided upon the following interpretation:

"By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and its own capacity of representation on an international level and, particularly, having real powers originated from a limitation of sovereignty or a transfer of powers from the states to the Community, Member States have reduced their sovereign rights, although in limited areas, and thus created a system of laws which obliges both their nationals and themselves.

The integration of the dispositions which originate from the Community into the system of each Member State, and, more generally, the terms and the spirit of the Treaty, make it impossible for the states that a natural conclusion should give priority to a unilateral and subsequent

measure, counter to a juridical system accepted by them based on reciprocity. Such a measure can not be dissimilar to that legal system. The enforceability of Community law can not vary from one state to another, in deference to subsequent internal laws, without jeopardizing the achievement of the objectives of the Treaty set out in Article 5 paragraph 2 and without giving rise to the discrimination prohibited by Article 7."

Many of the techniques, methods and principles applied in Community law and in the Community legal order connect to the branches, institutions and norms of the national law - especially administrative norms, constitutional norms etc. The autonomy of the Community juridical order does not exclude cooperation with the national legal systems, a cooperation that is not only useful but also necessary, and which is expressed mainly through a participation of state authorities in the implementation of Community law.

If we were to organize things, we could say that direct applicability of the rules of Community law in the legal order of the Member States brings about a series of consequences, such as:

- Community law is naturally integrated into the internal legal order of the states, without the need of a particular introductory formula;
- The norms of Community law take their place in the internal juridical order as Community law;
- The national judges and the national courts are obliged to apply the Community law;
- The Member States have limited their sovereignty in certain areas in favor of the supremacy of the Community legal order established by the regulations of Community law;
- Being implemented by the national legal courts, Community law is separated from the national law, the national legislators do not have the power to repeal or to adopt any amendments, and Community law through its *sui generis* nature is different, but close to the international and internal law of the various Member States.

Community law regulations go further, ensuring a uniform interpretation of Community law in each Member State, because otherwise it would be reduced to a purely theoretical construction of a non-mandatory nature, undermining the very economic and legal foundations of the Treaty. No internal rule can be appealed to before national courts against the laws created by the treaties in question as an autonomous and original source, without losing its community nature, which goes to show once more that in the binomial Community law- national law the former component is essential, and a possible conflict between Community rules

and national rules will be resolved by applying the rule of Community law principle.

On the behalf of the priority principle, Community law regulations will make any opposite rules of national law, whether already in force or future, inoperative, all these being subdued to the general condition that the norms should be applicable to the juridical relations from the Community area. Nothing could disturb the implementation of the norms of national law in all other relationships and situations which are not circumscribed to the Community area and in which the sovereign attributes of the states would continue to exist. The finding of a regulation belonging to the national law which is relatively inapplicable because of its incompatibility with Community law does not result in cancellation or prevention of its application in situations not covered by Community law. In this respect, CJEC considers that what it was previously decided does not qualify as nonexistent an internal norm that is incompatible with Community law and that in Community law there is no procedure which will allow national courts to eliminate the internal regulations contrary to a directive that has not been transposed, if these regulations can not be invoked before a national court.

Another particularity of European Community law is that it not only integrates automatically into the legal order of the Member States, but also has the general ability to directly complete the legal asset of individuals with new rights or obligations, both in relation with other people, and in their relationship with the state they are part of. Direct applicability means "the right of every person to ask a judge to apply the treaties, regulations, directives or Community decisions. The judge is required to use these texts, whatever the legislation of the country to which he belongs." In theory, views are reiterated on the difference between the direct applicability and the direct effect, the latter being a consequence of the application of Community law.

As stated before, recognizing the direct effect means ensuring the legal status of a European citizen. According to PH. Manin, the direct effect of Community rules is represented by the theory founded by CJEC, theory which sets out the conditions under which a private individual or a legal person may invoke a stipulation of Community law in order to defend a right conferred by it, and if necessary, the conditions under which the national judge leaves aside a contrary stipulation of the national law.

Applying the theory of the direct effect depends on the source in question, therefore we can further identify the following situations:

- the direct unconditional and complete effect, of universal applicability;

- the direct conditioned and complete effect, of universal applicability;
- the direct conditioned and limited effect;

The criterions to be met by a Community stipulation in order for its direct effect to be recognized are: clarity, precision and an unaffected by conditions nature. If these criterions are met, the authorities have no power of discretionary appreciation as to what the implementation of the stipulation is concerned, therefore it is liable to be applied by the judge. In terms of wording, the norms of the Common law must be perfect, must create rights and impose obligations on individuals without requiring the addition of any internal stipulations or the interference of Community acts.

The recognizing of the direct effect is not an assertion of quality given to either of the Community laws, but a penalty for its delayed implementation, particularly by the Member States. The direct effect of Community law contributes to enhancing its effectiveness. The CJEC case-law distinguishes between direct vertical applicability and direct horizontal applicability.

Direct vertical applicability designates the possibility of invoking (in case of litigation) the dispositions of Community sources in relation with a state or with one of its authorities, including bodies or entities which are subject to state authority or control, or who have specific powers compared with those applicable in the relations between individuals. In the view of the Court, "when the individuals appearing before the court are able to rely on a directive against the State, they can do so regardless of the status of the latter: employer or public authority." People can always invoke the regulations of Community law (e.g. Directive) before the national court against the state's authority, if this authority failed to implement them in due time, or has implemented them incorrectly, as long as the stipulations in question are unconditioned, accurate enough and their taking into account does not depend on any national measure. In this situation, the Community norm itself becomes a legitimate element of the internal legal order.

Direct horizontal applicability allows a private person to invoke a Community stipulation against another private individual (natural or legal). The horizontal direct effect arises from the national judge's obligation to interpret the national law so as to be reconcilable with the Community document.

Going back to **the direct unconditional and complete effect, of universal applicability,** the documents that have this effect are: regulations, decisions and constituent Treaties (in terms of general principles).

The regulations are Community documents specific to direct applicability and they create rights and obligations which are characteristic of internal law matters in all Member States. They apply in a uniform and simultaneous manner within all Member States, the adopting of any additional legislation or any transformational process being unnecessary. It is possible to resort to legal dispositions related to the regulation in question only to the extent where the enforcement of the regulation in the forms and procedures compatible with Community law is needed.

According to Article 249 paragraph 2 of the E.C. and to Article161 of Euratom, a regulation should be of general application, that is of an indefinite nature in terms of the situations it applies to, of the effects it produces and also in terms of whom it is addressed to – natural persons, legal persons or Member States of the European Union. Regulations can be classified into two categories: basic regulations and enforceable regulations. The distinction was introduced by the usage of the institutions and was confirmed by the CJEC. Enforceable regulations may be subordinated, in terms of the validity and of the interpretation applied, to the basic Regulation to which it must be consistent.

The Community decisions are individual acts that can produce direct effects. A distinction should be made between the decision which applies to private persons and that which is directed to Member States. The former produces a direct effect and private individuals can invoke it before national courts. Frequently, the decisions establish rules and obligations within the field of competition, free movement, within the field of equality in terms of nationality and gender, as well as in other fields. As for the Member States and the decisions directed to them, the doctrine regarding the directive may be applied, but nevertheless the horizontal effect should be excluded.

The norms laid down in Community Treaties referring to the general principles, are norms which the states can not interfere with. They can be invoked by natural and legal persons in any litigation, as their degree of generality requires that they should be unconditionally respected in all cases.

The direct conditioned and limited effect is characteristic of Community acts which can be invoked in any litigation, but for this purpose the fulfilling of some conditions is necessary. These documents are of a conventional nature and they are represented by the founding treaties of the Communities, as well as by other international treaties.

There are three stages being studied in theory, stages which recognize the direct effect of the constitutive Treaties.

The first stage is defined by the not to do requirements. In this respect, the CJEC stated that Article 12 of the EEC Treaty, which prohibits Member States to establish new duties or to increase the existing ones, imposed a clear and unconditional not to do requirement which does not necessitate the legislative intervention of the Member States, so that "this prohibition is perfectly suited by nature to produce direct effects in the legal relations between the Member States and their individuals."

Afterwards, the attribute in question has also been extended to the positive stipulations, particularly those which had to be carried out by a certain date, if that did not occur. So the second step is the irrevocable nature of an obligation of doing. Through its rulings, the CJEC upheld the irrevocable obligation of doing, deciding that it does not allow the states any possibility of estimating.

The third phase of extending the direct effect of the treaties has been marked by the CJEC decision in Case Reyners. The court decided that the provisions of the Treaty have a direct effect even when they set forth a principle to be implemented by rules of derivative law, which have not yet been adopted by the Community institutions. But the provisions that set forth general obligations for the member states do not produce direct effects on natural and legal persons, which can not appeal to them before the courts.

Let us analyze the direct effect of international treaties the Community is part of. These international agreements may be invoked by private individuals (natural or legal persons) if they establish rights for them. The CJEC has stated that a provision of an agreement concluded by the Community with a third country must be regarded as directly applicable when it imposes a clear and precise obligation which does not depend, in relation to its execution or effects, on the intervention of a subsequent document.

For a private individual (be it natural or legal person) the direct effect of the provisions contained within international agreements brings about several consequences: the persons may demand the national judge to ensure compliance with a right conferred by it; the state or the state authority which is responsible for the breach must be ready to stand a sanction, the individual being able to trigger an action based on breach of duty by the state.

We will carry on with analyzing the conditioned limited direct effect/ the direct, conditioned and limited effect of another category of Community acts: decisions and directives addressed to Member States.

The directives are binding on each Member State, to whom they address only in terms of the result to be reached, leaving the task of

choosing the forms and implementation means to the national authorities. The directives are meant to promote the coordination of national laws, tending to obstruct, in certain areas, the states' authority in terms of juridical regulations by assigning them certain obligations of doing, certain restrictions or prohibitions (as it is the case with the directives of the Council of Europe regarding the workers' freedom of movement). The directives require changing the national laws or adopting legal provisions in areas covered by them.

The issue of direct applicability of the Directive can only be discussed insofar as they have not been put into practice within the prescribed period, or were put into practice but in a wrong, improper way. They will have direct effect precisely because that transformation which should have been done was not accomplished. The private individual may invoke the direct effect of the Directive in two situations - when the national judge's removal of that norm of national law which does not comply with the Directive invoked is required. In this situation, it will be required that the internal provision should not be taken into consideration when solving the case;

- when the person is deprived of a right due to the absence or due to the fact that national measures necessary to implement the Directive were not taken. In such a case, the person will ask the judge to recognize the rights conferred by the Directive.

A. Fuerea draws the following conclusions from the CJEC case-law on the direct effect of the Directive:

- the Directive should contain unconditional and sufficiently precise provisions;

- the Directives do not create obligations for individuals, therefore they can not invoke them in litigations between them and the state can not invoke them against individuals;

- the direct effect of the Directive may be invoked against bodies or entities which are subject to state authority or control, or who have specific powers in relation to that resulting from the rules applicable in relations between people.

The decisions of the Community institutions produce direct vertical and horizontal effect. If the decision is addressed to one or more Member States, the CJEC considers that the content of the decision should be examined to see if it is capable of producing direct effects in the relationship between the recipient of the document (the state authority) and a third person. However, the CJEC has not yet ruled on the issue of whether such decisions, if they satisfy these requirements, could have a horizontal effect. So, in terms of the direct effect, the decisions are similar to

the Directives. As to what the decisions are concerned, the same arguments remain valid in justifying the applicability of this principle, except for the fact that there is no need to necessarily adopt internal rules for their application, either because they are not addressed to the state, or because they are not addressed to the individuals (a fact pointed out by the nature and the characteristics of the obligations imposed).

The direct applicability of the Community provisions brings about some effects on the internal legal order and, of course, on the individuals of the states in question:

- the individuals have the option of requesting the national courts to ensure respect for the rights conferred by the Community rules;
- there emerges the effect of sanctioning the Member States which have not taken the necessary measures to enforce the application of Community law.

The direct effect allows individuals to place themselves on the same position as if it would had actually fulfilled the Community obligations (as in the case of a person who invokes a Community provision to his own benefit, although the state has not actually carried it out or has brought it into being in an improper, deficient manner);

- the concept of direct applicability allows Community law to develop the above mentioned effects in the absence of any contrary provisions of national law.

It is only through strengthening the priority that the direct applicability produces its effects even in the presence of any contrary national norm, a fact which provides Community law with a maximum force of penetration in the legal order of the Member States.

The special effectiveness of the legal system within the Community, comparable to that of the internal law within a state, is based on **the rule of Community law principle,** sanctioned by the case-law. Within the relationship between the Community law and the national legal systems of the Member States, this principle provides an answer to the question whether a national law subsequent to the entry into force of a Community rule may not comply with this rule.

The answer to this problem is very important because, if a Member State should be free to not comply with the community norm, the Community juridical order is likely to break up into a series of partial and discontinuous orders, autonomous and divergent in their content.

In theory it has been often proven, that the very existence of Community norms, norms that give rise to the unitary Community legal order, would be jeopardized if, in the event of conflict, the national legal

standards, the national legal order and the national interest might oppose successfully to their complete fulfillment. But any prejudice to the rule of Community law would result in jeopardizing the very existence of the European Union. From this essential requirement follows the necessity of a clearly drawn hierarchy between Community law and national law.

The rule of Community law thus appears as a fundamental requirement in an order of integration, because if it were to recognize a certain efficiency to a manifestation of will belonging to the national authority, manifestation which would be contrary to the common rules, it would mean to compromise the construction of Community order, a order which the states aim at, and it would also cause damage to the integration process by increasing mutual distrust.

Although the rule of Community law principle was not explicitly sanctioned in the constitutive treaties, it was expressed by the CJEC, whose case-law established the basis and the value of this principle.

The Court of Justice was allotted to the task of deciding to eliminate the possible negative consequences that would have inevitably occurred in the process of affirming the rule of Community law principle. It forms the foundation of the legal construction which regulates the European Union's activities together with the direct effect of the Community norms.

The substantiation of this principle was made by the CJEC, through the global interpretation of Community legal norms. This principle is also to be found in the Van Gend en Loos resolution, but it is directly stated in the Costa resolution. The rule of Community law principle was enunciated for the first time in a conflict between the Italian law concerning the nationalization of the electricity system and the Treaty. Even if the Italian Constitutional Court ruled in favor of the more recent norm (the Italian law adopted on the 6th of September 1962) stating that "a treaty has only the effect resulting from the ratification law", the CJEC razed to the ground the stated arguments.

The CJEC started from arguments related to the specific nature of the Community, its unlimited duration, its endowment with specific tasks, with personality and capacity of international representation, and especially, with real powers as a result of a restriction of competence or of a transfer of prerogatives from the Member States to the community. All these in order to infer the fact that the Member States have limited their sovereign rights, even if in only a few areas, and have thus established a system of law which is applicable to nationals and to the states themselves.

In its decision, the CJEC made two important specifications regarding the relationship between Community law and national law:

a) The Member States have definitively transferred a part of their sovereign rights to the Community created by their own volition. Therefore this process can not be reversed, the states not being able to revert to the already transferred rights by means of subsequent unilateral measures which are not compatible with Community law;

b) In the EEC Treaty there is a principle which was afterwards taken over by the Treaties of Maastricht and Amsterdam, according to which no Member State may question the unitary and universally applicable status of Community law throughout the territory of the European Union.

The natural conclusion that follows is that the Community law norms, created in accordance with the tasks and competences which the institutions of the European Union have received through the constituent treaties, have precedence in case of conflict with the internal law of the states.

The consequences of applying the rule of Community law principle can be systematized in the following way:

a) The rules of Community law which a have direct effect should be applied from the day when they come into force, even if it has been ascertained that there exists an incompatible national norm.

It is mandatory for all competent national authorities, including those within the field of administration, not to apply the inconsistent national law.

The Member States are obliged to repair the damage caused to individuals by violation of the Community law, the national judge being able to establish to what extent those prejudices are attributable to them. As to what the conditions of exercising the action in responsibility are concerned, they are those provided by the internal juridical order which determines the competent jurisdiction and the procedural rules. When repairing the prejudice is required in order to implement a directive, the CJEC linked the request to the fulfillment of several conditions such as: the result established by the Directive has to entail the conferring of rights to individuals; the content of these rights has to be established within the provisions of the Directive; there has to be a causal link between the inobservance of the obligation that belongs to the state and the prejudice suffered by the injured person;

b) There is a connection between the rule of Community law principle and the principle of Community law integration, because the application of the former depends on the direct effect of Community law;

c) The national judge is obliged to suspend the application of a national measure, even if a law, when there is serious doubt about its compatibility with the norms of Community law, until the problem of the

incompatibility is resolved. The Court decided that a national tribunal may suspend a national provision adopted in order to implement a Community norm whose validity is challenged, only if the following conditions are met: there has to be a serious doubt on the validity of the Community act, on which the CJEC will be informed through a prejudicial question; there has to be an emergency and the appellant has to be endangered by a serious and irreparable prejudice; the national judge has to take into account the interests of the Community and to consider, when needed, the decisions made by the Court;

d) The interpreting of the norms in the national law system must be done through the provisions contained within the norms of Community law;

e) In the event that the national act which is contrary to Community law has had financial consequences for a natural or legal person who has paid amounts of money under this title, the national authorities are obliged to return these amounts;

f) The Member States of the Communities have the obligation to verify the application of Community rules and to sanction the lack of enforcement with efficacious, dissuasive penalties, proportional to those applied in case of comparable, significant breach of national law.

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Adriana LUPU

LEGAL MEDICINE – INTEGRATED SCIENCE IN INVESTIGATING MINORS WITH JUDICIAL IMPLICATIONS. PARTICULARITIES OF THE LEGAL EXAMINATION IN CASE OF UNDER AGE CHILDREN (victims and aggressors)

Abstract

Forensic medicine represents a medical speciality that offers all its knowledge and effort to legal purposes every time medical and biological expertise is required to solve a legal issue. These medical views are included in the forensic report, a complex document that stands for evidence in the court of law.

The paper herein presents the legal background, aims and methodology of the forensic psychiatric report as well as tactical particularities in case minors are evaluated. The paper also approaches from a forensic point of view the educational and legal protection measures for minors and social prophylaxis for preventing juvenile delinquency.

1. Forensic medicine – science between psychiatry and law

Forensic medicine represents a synthetic medical specialty which places its knowledge in the service of justice any time it is necessary to clarify a legal cause using medical determination. (Belis V.,"*Forensic medicine in legal practice* ", Ed. Orizonturi Lider, Bucuresti, 2002, pag. 26). These speciality references are written in the forensic medical report, a complex document which is considered evidence in court, which retraces in both ways the potentially socialy dangerous event, from cause to effect and reverse and aims at achieving the interdisciplinary examination concerning the mental health and, respectively, the psychical capacity of the perpetrator at the moment of committing a deed which has penal or civil implications. The forensic medicine activity consists in investigations, determinations, laboratory examinations and other forensic medical works on people who are alive or on dead bodies, biological products and corpus delicti in order to establish the truth in causes concerning crimes against life, physical integrity or people's health or in other situations mentioned by law, and also in performing psychiatrical legal medical examination and establishing filiation.

Being related to all the other medical specialities which concern certain particular aspects of pathology with legal implications, such as the main fundamental fields of law, legal medicine accomplishes a double function:

- processing medical data in order to obtain scientific proof and legal social assistance, which has an complex individual character of a medical act;

- reflecting an individual pathology in a social plan (and viceversa), with a view to anthropology (Dermengiu D., Iftene V., " *Medicina legala* ", Ed. Ch. Beck, Bucuresti, 2009, pag. 37).

Legal medical psychiatry represents a field of investigation, research and assistance of people with judicial implications, a field which has a particular methodology of investigation (within an interdisciplinary committee) and a specific methodology for reconstructing the psychical state of mind and the psychical normal capacity of the perpetrator at the moment he committed an act with penal or civil implications. Either way this science is named, medical legal psychiatry or psihiatria forensic, it represents the field of interest which derives from psychiatry and deals with evaluating the state of mind of a person with judicial implications, of his personality traits which gives social vulnerability or makes him a danger to society. It also deals with the therapeutical measures of prevention, fighting against it and social reintegration. This science operates mainly with the following notions: psychical skills, discernment, responsibility, social injuriousness, etc., notions which consist in psychiatric and legal medical characteristics represented by the conclusions expressed by the legal medical report. (Dragomirescu V.T., " *Legal medical investogations in judicial psychiatry;* Ed. Viata Medicala Romaneasca, Bucuresti, 2002, pag. 45 – 46). This paper establishes the cause-effect relation between the victim, aggressor and the aggression agent (which is the instrument used in committing the crime), correlated to the traces at the crime scene or found on the victim's body. Thus, isung psychiatric and law elements, the legal medical investigation has the role of a mediator between these two science, its achieving implying a laborious multidisciplinary activity. Moreover, the multidisciplinary research, together with the professionalism and the objectivity of the experts which perform such an activity, represent the main ideas which guarantee the correctness of the investigation and gives it validity and consistence as evidence in court. Being a probate document, the psychiatric legal medical report has as a main purpose to offer justice objective legal medical criteria on the basis which a person can be penally responsible on condition he has the psychiatrical capability to answer for his acts. (Astarastoae V., Scripcaru Ghe. s.a., " *Legal Medical Psychiatry* ", Ed. Polirom, Iasi, 2002, pag. 72.).

2. Legal medicine – integrated science used for investigating people with judicial implications.

Within the complex activity implied by the legal medical investigation, no matter its specific, the expert specialized in legal medicine uses integratively and synthetically knowledge from more scientifical fields, all of them leading to finding out the truth in a cause. Thus, scientific data and information in the following fields are used:

- general psychopathology ordered according to specific criteria, correlated with psychological examination and with data gathered from the social investigation;

- knowledge offered by general psychology and clinical sociology, adapted to the judicial context:

- information from certain medical fields, such as: neurology, endocrinology (offers data used more frequently in civil causes, for children, teenagers and women), ophthalmology (standard examination required in penal and civil causes), electrophysiology (for example, the EEG represents a standard investigation in any psychiatrical legal medical examination, skull X-rays, angiography, pneumoencefalography, tomography , etc.) and forensic investigation;

- various knowledge and information in fields such as: Biology (for ex. the theory of adaptation, Genetics), Chemistry referring to Toxicology, General Hygene referring to Environmental and Work-related Hygene, Tanatology, including Pathological Anatomy and Histochemistry (autopsy data give important elements for the study of heteroagressivity, suicid, victimology), Ecology, etc.

- uses the specific technique of examining the person;

- uses knowledge and information from the legal field (penal and civil code, family law, etc.)

- uses knowledge and information in Criminology and Criminalistics, such as: the biocriminalistic identifying of orgaic traces (traseology) or lesions (lesional biocriminalistic) resulted from crimes (Dragomirescu V.T., Op. Cit., pag. 116).

Mention that the immediate link between Legal Mdicine, Criminology and Criminalistics, by using different investigation methods and also a specific reconstruction methodology (in which the legal medical cause-effect translated to the legal-social level consists the main linking element), the legal medical report represents an individualised analysis of the somatho-psychical of the perpetrator and offers prognostic deductions in these two scientific fields of law.

3. The psychiatrical legal medical examination

Legal frame, aim and objectives

The psychiatrical legal medical examination is part of the legal medical specialty investigations which concerns the living human being, being specifically implied and required by law in certain causes (penal, civil). The practical system of this type of investigation is implied by Law 459 / 2001 which regulates the activity and functioning of legal medical institutions and Law 487 / 2002 concerning *"The mental health and protection of people with psychical disorders"* (Uta Lucia, " *Legislation concerning the legal medical activity*", Ed. Universul juridic, Bucuresti, 2006, pag. 17).

The investigation is performed by an interdisciplinary medical board which consists of a pathologist and two psychiatrists (when underage children are involved, one of the two psychiatrists may be specialized in child's neuropsychiatry or in psichopedagogy), in the following cases:

- every time a legal institution with competency within the Ministry of Justice, Administration and Internal Affairs requires it by a written notification in which it exposes the objectives the medical board needs to pursue;
- when the person himself requires it, but only for establishing the psychic ability of conceiving disposition documents;
- only for one single act or circumstance, for another one another psychiatrical legal medical examination needs to be done.

Legally, the law brings under regulation the following categories of examinations:

- optional, ruled by the legal authority which considers that in order to clarify the criminal cause, the knowledge of an expert is needed when this is required the parts involved and
- indispensable, required in the following situations specifically provided by law.

The aim of the legal medical examination is firstly to establish the discernment of the perpetrator at the moment of the crime, and secondly to provide information on the basis of which, justice will establish the responsibility.

The discernment is a psychiatric term which represents the capacity or freedom of a person to distinguish between good and evil, legal and illegal, permitted or not, and his possibility to realize the facts he performed and their consequences. In the speciality literature, the discernment is defined as the ability of a person to conceive the aims,

stages and the results of an activity according to what is natural to the human specific behaviour: motivation, anticipation, etc. (Bulgaru – Iliescu D. in " *The Microsocial Anomy. Forms and Consequences* ", Ed. Timpul, Iasi, 2002, pag. 91). Within the frame of the legal medical investigation, establishing the existence or non-existence of discernment during committing a crime plays an important role because its existence or non-existence attracts assuming the responsibility of committing the socially dangerous fact or not.

Responsibility is a legal term which defines the ability of a person to control and appreciate both facts and their consequences, respectively to commit and assume all the consequences of a deliberately committed activity, which is consented and done against the social rules of behaviour, and accepting and assuming the consequences of his own facts. (Buda O., " *Irresponsibility. Psychiatrical legal medical aspects applied to the criminal, civil and family law* ", Ed. Orizonturi Lider, Bucuresti, 2006, pag. 82).

The objective of the Psychiatrical legal medical examination are

- to establish if the examined person has psychiatrical disorders or organic, neurological, sensorial deficiencies, with effects on his psychic life ;
- to establish the mental level of the examined person ;
- to exclude simulation and dissimulation;
- to emphasize the personality traits of the subject and the cause-effect relation between these traits and the committed crime ;
- to appreciate the living and developing conditions of the perpetrator and the influence of the environment on him in terms of motivation of the committed antisocial act;
- to evaluate the psychical ability and the discernment capacity at the moment of the examination, thus if the person can be investigated and trialed ;
- to evaluate the psychical ability and the discernment capacity at the moment of committing the crime ;
- to evaluate the prognostic upon the way the psychic disorders will evolve, thus establish the degree social danger for the moment and in the future;
- to recommend the adequate legal measures to be taken, so that the social reintegration of the individual should be donesa recomande masurile legale adecvate ce vor fi luate, astfel incat sa se poata realiza reintegrarea sociala a individului.

4. The Methodology of performing the examination. Particularities of examining the underage delinquents or victims

When performing a psychiatrical legal medical examination, a set of general *methodological rules* are to be followed:

- clinical examination of the person to be examined will be performed in an out-patient manner and only if necessary with the in-patient manner and performing clinical and para clinical investigations

- from the file of the case, the following information which concern the examination will be taken: - personal medical antecedents and the collaterals of the examined person, and social investigation, criminal record, the motive and the circumstances of the crime

- the psychiatric examination will be performed immediately after the perpetrator;

- the conclusions will be as exhaustive as possible in what the diagnosis and the medical-pedagogical perspectives in what underaged perpetrators are concerned

When underaged perpetrators are involved, the legal medical psychiatrical investigation follows a special methodology. The first role of the investigation of the children is to take into consideration every possible measures to avoid learning of the psychotic behaviour. This is why the investigation will not take the form of an inquest and the examination should be a dialogue. When the child which is under investigation is a teenager, a special concern for the difficulties appeared in the normal and natural development of the child will have to be taken into account. Discussion within the board is mandatory (Nuta A., " Legal medical expertise when speaking about underaged children", Ed. Artpress, Timisoara, 2008, pag. 48 – 49). Methodology of expertise performing is the same as for grown up persons and, additional to the same, psychiatric legal medicine expertise, in cases involving underage delinquents and victims, must elucidate some specific aspects too, as hereunder:

A. In cases with underage delinquents, the commission of experts must include an infant psychiatric specialist or, as the case may be, mandatory warding of the examined person in the specialized medical institution for drawing up the specialized conclusions. According to the law, underage person inquiry requesting and his/her psychological examination are mandatory too, including the specific tests. The child must be fully examined, both somatically and neurologically.

In criminal cases, psychiatric legal medicine expertise shall examine certain aspects, like whether the accused belonged to any criminally oriented group, his/her availability to suggestions, his/her family and

school relationships, the attitude towards the commission and its socially threatening consequences; also, temper and character features shall be outlined. Within the expertise note, there shall be mentioned eventual medical and/or educational recommendations, such pointing out mainly to what is good for the child (this being the priority in any case) and also to society defence and prevention in order to avoid perpetration of new offending actions.

There shall be considered the possible specific features in the child's behaviour on the date of expertise performing, such features regarding: reduced emotional expression, introversion, guiltiness feelings, exaggerated affection relationships, difficulties in establishing interpersonal relationships, improper emotional reactions, confusion on future planning, uncertainty, low self-esteem, poor imagination and language, While performing the expertise, specialists may predict on the examined person's future, concerning: future neurotic disturbances, increased risk when entering improper or even criminal groups, underage person disposition for drug and alcohol abuse, sexual abuse, etc.

The psychiatric legal medicine expertise on underage persons has the following goals:

- To evaluate the school abilities of the underage person, the way he/she identifies himself/herself with the class and school colleagues, behaviour in front of teachers, etc.;
- To evaluate the parent-child relationship and specially the educational aspects regarding the underage person personality shaping and development;
- To specify the diagnosis and origin of disturbances and exclude the over-added elements, especially the simulated ones;
- To establish the main features of examined person's personality, related to diagnosis and reflected in his/her deviant behaviour;
- To mention the evolution stages of disturbances found and eventual risks in the future;
- To evaluate the underage person's behaviour potential risks for the society, thus justifying the actions proposed;
- To establish underage person's mental capacity and consider the next:
- Minor persons under 14 do not have legal responsibilities;
- Minor persons of 14 and more are legally responsible provided that without any doubt the offence was performed with full mental capacity;
- Minor persons of 16 and more are legally responsible (Belis V., Quoted works, p.107)

B. *In cases with underage victims,* the expertise shall be made with all cautions taken, protecting the examined person in all regards. Stress conditions shall be as much as possible avoided and eliminated, such approach being a must.

The expert must know the feelings an abused child is facing (fear, isolation, anger, confusion, guilty, exclusion, etc.). The expert must show full seriousness against the child's report and must treat him/her with full confidence, in order to avoid lack of credibility in the eyes of the victim.

In cases of sexual abuse, the expert must consider all factors, both factors belonging to the parental couple and belonging to the child himself/herself too.

Such conditions may overlap pre-exiting diseases or pecuniary deficiencies or shortage and lead to conditions for abusing the child or to an exaggeration of child's violent instincts too.

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Andrada TRUȘCĂ TRANDAFIR[1]

HOW TO ACHIEVE THE FUNDAMENTAL RIGHT TO A HEALTHY ENVIRONMENT AND THE JUDICIAL RESPONSIBILITY THROUGH THE PRINCIPLE OF THE PUBLIC'S INFORMATION AND PARTICIPATION IN THE DECISION-MAKING PROCESS*

Abstract

In the domain of the protection of the environment, the general tendency is that the environment should be protected by laws meant to settle down those activities able to bring prejudices; there shall be passed more laws to prevent prejudices and less to lay responsibilities: very often the ecological prejudices are definitive, the degradation is irreversible and the costs of the reparations –be they partial or total – are very high. The result is that an "a posteriori" step in the domain of "the committed evil" will more often than not be unclear and its effects will not lead to a complete and efficient reparation.

Introduction

From the linguistic point of view, "responsibility" is the way a person understands his/ her obligation as reported to society, to the group of people he/ she is living and working in, and to the seriousness with which he/ she realizes the importance of adopting a responsible behavior (Rădulescu, 2006, pg 159).

The idea of a judicial responsibility makes the object of all the domains of law, suggesting reparation or sanctioning. Practically it is about a social relationship judicially sanctioned; this relationship is based on the principle according to which any person has a social relationship with another person and, consequently, any prejudice that appeared between them shall be repaired or penalized accordingly (Marinescu, 2008, pg. 635).

We do agree with those authors (Uliescu, 1998, 56) who say that the "classic" juridical responsibility is manifested in the civil, administrative and penal responsibilities (which is certainly stipulated in the common law applied to all these branches) becomes insufficient and inadequate in case the laws concerning the norms on the protection of the environment are infringed or in case prejudices against the environment are noticed (in case of an ecologic prejudice).

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* Translation from romanian to english made by asist. univ. Smaranda Lozinschi, "Dimitrie Cantemir" Christian University.

Consequently, a reconsideration of the juridical responsibility shall be taken into account; it shall lay stress on its specific activity, leaving intact the categories of responsibilities.

In the domain of the protection of the environment, the general tendency – as mentioned in the specialized literature (Duțu, 2008, pg. 464) – is that the environment should be protected by laws meant to settle down those activities able to bring prejudices; there shall be passed more laws to prevent prejudices and less to lay responsibilities: very often the ecological prejudices are definitive, the degradation is irreversible and the costs of the reparations –be they partial or total – are very high. The result is that an "*a posteriori*" step in the domain of "the committed evil" will more often than not be unclear and its effects will not lead to a complete and efficient reparation.

The evolution of the normative acts on the principles concerning the law of the environment and their appropriate doctrine is to be criticized – because, on the one hand, they are too general and very ample and are difficult to be translated into practice, and, on the other hand, their content is inconsequently spoken about by various authors when referring to the doctrine, and so, there naturally appear problems in applying them. Nevertheless the principles contained by the law of the environment are very important because the norms on the law of the environment are to be found in very diverse sources; the principles ensure the internal cohesion among all branches of law. The law of the environment as a quite new, dynamic and progressive branch shall find a quick answer to the problems of environment degradation. But, when the technical norms have not yet been passed, principles are to be applied instead. The laws have a really important role in interpreting the technical norms, which, more often than not, raise difficulties to those practicing the law as they are complex from the juridical, economic and decision-taking point of view, specific to the law of the environment and because they come in with sound arguments regarding the autonomy of this branch of the law (Marinescu, 2008, pg. 59).

Under the above mentioned circumstances, we consider it necessary for an "*a priori*" position to be taken in the domain of the juridical responsibility concerning the law of the environment, by means of some leading principles, as, the seriousness, the amplitude and the irreversibility of the ecological prejudices are highly known by everybody.

We think it would be quite difficult to speak about a correct appliance of the juridical responsibility in case these principles are not to be taken into account, irrespective of the fact that they are granted a main attention by the specialized literature and that they are considered to be a

starting point in the steps to be taken in enlarging upon the phenomenon of ”responsibility”.

The principle of the public's participation –a main way to achieving the fundamental right to a healthy environment

The Stockholm Declaration of 1972 has consecrated for the first time – as a prior principle – man's right to an environment “whose quality to enable him to live in dignity and welfare”, considering, at the same time, the obligation of the society to preserve, defend and meliorate the environment for the generations to come.

This right is consecrated in the constitutional and legislative texts of numerous states, either as a subjective right of the man or as an obligation of the state, or of both at a time. As it is not about the right to an abstract environment but about a right every individual has in order to protect the environment he is living in, this right includes in its definition – among others – the right to being informed on the policies and projects with negative consequences over the environment, the right to participate in those processes that adopt decisions referring to the environment and, if necessary, to make use of adequate juridical means for the recovery of the damages appeared when the legal guarantees were not observed (Marinescu, 2008, pg. 76).

The principle of informing the people and of making them participate in the whole process refers to the right to be informed by and inform the state which might be the cross–borders damages resulted from dangerous activities that took place on the territory of one state or another. The importance of the principle is considerable, especially in the case of reducing the effects of an accident with negative consequences and that is why its preventing role shall not be neglected with respect to the necessity of communicating the information and data regarding the activity to be continued and the risks that might appear.

The principle also includes the right of each person who lives in a possibly contaminated area implying the risks creating significant cross-borders prejudices, to be informed on the respective activity, on the way this activity influences the environment and on the way he/she has to participate in the decision-making.

The necessity of communicating all available information was especially more evident immediately after the Chernobil accident in 1986. Later, the documents of the UN Conference for Environment and Development in Rio de Janeiro, in 1992, the Declaration of the Rio de Janeiro and the Agenda 21 as well as the majority of the international – more or less recent - conventions and treaties referring to the protection of

the seas and the oceans, of the atmosphere, of the soil, or the monuments and of the natural reserves, of the terrestrial and aquatic fauna – all provide the necessity of public implication (Marinescu, 2008, pg. 77).

International Wide Regulations

The Convention of the access to information, the public implication in decision-making and the juridical access to problems concerning the environment was adopted at Aarhus in 1998.[1] The Convention guarantees the right to have access to information - without any special interest requested by the solicitant – as a proof of a major contribution to strengthening democracy in as far as the participation of the civil society in the decision-making process is concerned; at the same time the public have open access to information and are invited to actively involve in the process of making decisions concerning the environment.

The text of the Convention also defines the notion of "public" as being; one or several natural or legal persons – as associations, organizations or groups; as for the "Interested public" the definition is: the public being either affected or interested in the decisions concerning the environment; the legal non-government organizations involved in the protection of the environment are considered to really have an interest.

Art 6 of the Convention stipulates the stages and procedures meant to assure the public participation in the decision-making process on regard of the specific activities with a high impact over the environment (Uliescu, 1998, pg. 48).

The three pillars of the Convention are: the legal procedural rights connected with the access to information, the public participation in the decision-making and the access to justice.

The participation of a correctly informed public is benefic as, on the one hand, it allows the individuals to bring their contribution in the decision-making process - making them appear as more responsible acts – and, on the other hand, it is a modality to higher the level of public conscience and understanding with regard to the problems concerning the environment; the population is thus invited to more actively involve in solving these problems. At the same time the population is offered the opportunity to learn about the risks they and their families as well as the whole community are submitted to and is invited to correspondingly adapt their activities creating them the feeling that they can positively influence the state of the environment in own their own country.

[1] Ratified by Romania by Law no 86 of 10.05.2000, published in the Official Gazette no 224 of 22.05.2000.

The information about the environment is generously defined by the Convention, so that any person shall find out how much the individual's rights to a healthy environment are affected – a right already recognized by the national and international legislation.

In conformity with some authors' opinions (Marinescu, 2008, pg. 78-79) an effective participation is possible and efficient only if the necessary information is accessible. The types of information that can be requires refer to: the emission in the atmosphere, the pouring wastes in the surface or underground waters, sonic pollution, all kinds of debris , the consumption of the drinking water, the use of non-drinkable water, used sources of energy, recovery of the thermal energy, the impact study, the system of licenses, the transport of dangerous wastes and debris, the accidents and incidents followed by deposits of noxious substances, contaminated places, emission of radiations and radioactive substances, the use of chemical fertilizers and pesticides, etc.

Each state signatory of the Convention assumes the obligation of making the public authorities present the public all necessary information respecting the provisions of the national legislation, under the following conditions: not to declare the interest, right in the limits of the required information, except for the situations in which it is more justifiable for the public authority to offer the required information under another form or when the information is already at the disposal of the public, but in a different way.

A request concerning information about the environment can be refused/ denied only if the request is clearly unreasonable or if it regards the system of internal communication of the public authority.

Once guaranteed the right to the decision-making process, the Convention also provides that the refusal/ denial of a request will be made in written, if the solicitant made his request in written or if he desires so. The denial is motivated and will offer information on the solicitant's procedure of appeal. This appeal shall be done as soon as possible, but not later than one month, except for the case when the complexity of the information justifies for the delay or a prolongation of the period up to two months since the date the request was lodged. The solicitant shall be informed about all delays and the reasons of prolongations.

As for the information supply, the state signatory of the Convention has the right to allow its public authorities to fix a tariff not much over the reasonable limits. Each signatory party shall encourage its economic agents - whose activities have a significant negative impact on the environment - to regularly inform the public about the impact of their activities and about their products against the environment; there where possible they shall

volunteer in sticking warnings, and by making proposals for environmental audit, balances of the environment or other modalities.

In order to guarantee the public its participation in specific activities, the Convention provides that it shall be informed by public notifications, individually, when it is necessary, about a decision-making activity, in an adequate manner, in the proper time; the information shall insist on the proposed activity and on a request for a decision-making, on the nature of the possible decision or about the decision-making project, on the public authority responsible with the decision that shall be taken, on the initial procedure, on the moment such an information is going to be made known, on the activity that makes the object of the national or cross-borders procedure of evaluating the impact over the environment, etc. The participation of the public shall take place at the beginning of the procedure, when all operations are open and receptive to any effective participation, and when the decision shall be taken as to take into consideration the result of the public participation.

In conformity with the Convention every state shall promote an ecological education and shall make the public conscious of the environmental problems, especially of its modalities of having access to information, of its participation in the decision-making process and access to justice when it is about environmental problems.

Internal Regulations

In Romania, the legal frame for the participation of the public to adopting and applying environmental decisions is to be found in the Constitution of the country adopted in November 21, 1991, in the Emergency Ordinance of the Government no 195/2005 on the protection of the environment, in the Government Decision no 878/2005 regarding the access of the public to information about the environment as well as in the normative acts regarding sectors concerned with the protection of the environment.

The Constitution of Romania guarantees – as a main component in the public's participation – the right to information in art 31 providing that "*the right of the person to have access to any kind of information of public interest cannot be restricted*."; in par 2 it is specified the obligation of the public authorities with concern to their competences: to assure a correct information of the citizens on the public business and on the problems of personal interest. At the same tine they promise to assure the means of mass information in public and private matters and to assure the correct

information of the public opinion (Constantinescu, Iorgovan, Muraru, Tănăsescu, 2004, pg. 64).

The participation of the public with a view to elaborating, modifying and revising the plans and programs in the domain of the political regime of the rights established by the emergency Ordinance of the Government no 78/2000, whose modifications were approved by Law no 426/2001 concerning accumulators and batteries that contain dangerous substances[1], concerning the protection of the waters polluted with nitrates derived from agricultural sources[2], of the management of the wrappings and of the wrapped debris[3]as well as of the management of the air quality[4] - domains expressly mentioned by the Decision of the Government no 564/2006 regarding the frame able to create a possible participation of the public to the elaboration of certain plans and programs connected with the environment.

So, the access to information connected with the environment and the amplitude of this type of information represent important instruments by means of which the public has the right to be informed with regard to the laws and the juridical instruments from the domain of the environment, reports regarding the state of the environment, or other aspects connected with the environment, contributing to a conscious information of the public with respect with the problems of the environment and to the creation of a healthy environment.

In order to apply the provisions of the Convention of Aarhus and of the norms and recommendations of the Union, in Romania it was created – at the level of the public authority network - an integrated environmental informational system which is the converging and the re-placing centre of the information; thus, it was assured the capacity of the subordinate units to maintain the real access of the public to the information concerning the environment and a much easier communication with the international bodies in the domain (Marinescu, 2008, pg. 81-86).

Conclusions

In the Law of the Environment the general and main principles have a very important role in underlining the content and in defining its characteristic features.

They are, in principal, juridical conclusive laws of a maximum general and universal utility in the domain gravitating around the idea of

[1] Art 22 of the Decision of the Government no 1057/2001.
[2] Art 6 par 1 of Annex 1 to the Decision of the Government no 964/2000.
[3] Art 23 of the Decision of the Government no 621/2005.
[4]Annex 1 to the Decision of the Government no 543/2004.

protecting the environment with a view to a lasting development/ evolution.

From this perspective on these principles are considered to be a criterion able to determine the origin of the other judicial norms and regulations within the law of the environment, as well as a hallmark in interpreting their significance in conformity with the aim in view.

In case of certain unanimously accepted rules concerning the law of the environment there are numerous acceptations of some technical, strategic or methodological norms. Such is, for instance, the "he who pollutes pays" principle – examined from an exclusively juridical point of view as a principle of the civil responsibility – the expression of an axiomatic assertion, because it goes without saying that he who produces damages shall pay for them or repair them. But, unfortunately, this principle refers to a simple de-damaging obligation, as it is considered that all the preventing, reducing and pollution-fighting expenses shall be assumed by those virtual responsible with the respective pollution – real or possible.

It is a well known fact (Uliescu, 1998, pg. 29) that the enunciation of each separate principle can differ from one author to another. But what is really important refers to the content of one principle or another. So, considering this aspect, the comparative studies in the domain concerned with the protection of the environment lead to the conclusion that, generally, the principles of the laws of the environment are identical or very similar in various countries, which finally, would be not at all be surprisingly first, because if the dangers and the problems regarding the integrity and the quality of the environment are very similar or even identical all over the world, the solutions stipulated by the laws cannot be much different, either. Second, because the law of the environment was lately confronted with an accentuated tendency toward internationalization.

Within the present stage in the evolution of the juridical regulations in the domain, the most important principles have already found an express consecration, and their content and meaning have been brought notable precisions. In future, alongside with their full implementation, new general rules are to be created and attached to the essential objective concerning the protection of the environment.

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CONSIDERATIONS ON THE EFFECTS OF TAXATION

Abstract

The taxation is a complex, many-disciplinary phenomenon, mainly juridical, made up of all the taxes provisioned by the fiscal legislation and based on a set of measures and actions imposed by an adequate state fiscal policy.

The moment the political decision is made to harden the taxation there is to be compared the objectivity of the short, medium and long term effects with reference to the target in view – the maximization of the resources of the public finance – because an uncontrolled increase of the taxation can discourage savings and investments, can narrow the imposition bases and can annul the possible benefic effects regarding the level of the budgetary incomes brought about by the increase of the imposition rate. So a low rate of the taxation conducts to a modification – in the positive meaning – of the tendency towards consumption and investments.

In conformity with the specialized literature when speaking about the effects of the taxation – especially the negative ones – one can enumerate the following:

- *Fraud and tax avoidance*
- *Risk of inflation through the taxation;*
- *Weakening of the international competitiveness*
- *Risks of diminishing the productive efforts*

The taxation is a complex, many-disciplinary phenomenon, mainly juridical, made up of all the taxes provisioned by the fiscal legislation and based on a set of measures and actions imposed by an adequate state fiscal policy.

According to the doctrine, the idea of "*taxation*" has different interpretations, meanings and definitions.[2]

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[2] See, for example, Dan Drosu Şaguna, Dan Şova, "*The Fiscal Law*", pp. 12, 2-nd edition, C.H. Beck Printing House, Bucharest 2008; Mircea Ştefan Minea, Cosmin Flavius Costaş, "*The Law of Public Finances – The Fiscal Law*", pp 18-19, Wolters Kluwer Romania, Bucharest 2008; Adrian Fanu-Moca, "*The Fiscal Contentious*", pp. 14-15, C.H. Beck Printing House, Bucharest 2006; Dumitru Adreiu Petre Florescu, Paul Coman, Gabriel Bălaşa, "*The Romanian taxation. Regulations. Doctrine, Jurisprudence*", pp 49 -51, All Beck Printing House, Bucharest 2005; Constantin Ioan Gliga, "*Tax Evasion, Regulations, Doctrine, Jurisprudence*", pp 2, C.H. Beck Printing House, Bucharest 2007

One can also notice that the term "taxation" is derived[1] from the "*fiscal*"- that is "related to the fisc"[2], "connected to the fisc, referring to the fisc, on the fisc"[3].

When studying the specialized literature[4] one can see that "the taxation" drives its etymologic origins from Latin.

So "the root" of this term seems to be the Latin word "*fiscus*" that in its first meaning[5] was translated by "basket"[6] – used in the transport of bread, or of other objects; later the term was used to designate the basket the Romans used to collect money[7], an instrument[8] for collecting means with a view to re-distribute them.[9]

According to the doctrine[10] the taxation is regarded to be a particular science apart from the economic and social sciences that can be defined as a coherent ensemble of notions, ideas, theories and doctrines on in the techniques, methods and measuring procedures of evaluation, managing and stimulating the economic and social activities.

One can notice that according to the specialized literature[11] as far as the taxation is concerned, in the fiscal field, there are several notions that,

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[1] Adrian Fanu-Moca, idem, pp 14

[2] Petit Larousse Illustre 1978 *apud* Constantin Topciu, Gerogeta Vintilă, "*The taxation*", pp 4, SECOREX Printing House, Bucharest 1998.

[3] *The Explicatory Dictionary of the Romania Language*, pp 382, II-nd edition, The Encyclopedic Universe Printing House, Bucharest 1998.

[4] See Mircea Ştefan Minea, Cosmin Flavius Costaş, idem, pp 18; Adrian Fanu-Moca, idem, pp 14; Constantin D. Popa, "*The Essence, the Juridical Nature and the Importance of the Fiscal Contentious*", pp 299, in *Journal of Commercial Law* no 7-8/2001, Lumina Lex Printing House, Bucharest 2001; Constantin Ioan Gliga, idem, pp 1; Emil Bălan, "*The Financial Law*", pp 164, 4-th edition, C.H. Beck Printing House 2007; Viorel Roş, "*The Financial Law*", pp 185, C.H. Beck Printing House, Bucharest 2005.

[5] Constantin Ioan Gliga, idem, pp 1.

[6] The doctrine has another explanation for the term "*fiscus*" which at the beginning meant a weed basket, but at the same time the imperial treasury and tax, while "*fiscus judaicus*" was the name given to the tax paid by the Jews to the emperor.Gilbert Tixier – Guy Gest, idem, pp 13 *apud* Vasile Iancu, Aurel Neagu, "*The Public Financial Law*", pp 109, Natura Press Publishing House, Bucharest 2000.

[7] Mircea Ştefan Minea, Cosmin Flavius Costaş, idem, pp 18.

[8] Viorel Roş, *idem*, pp 185; Emil Bălan, idem, pp 164.

[9] Emil Bălan, *idem.*, pp 164.

[10] See Dumitru Adreiu Petre Florescu, Paul Coman, Gabriel Bălaşa, idem, pp 50-51.

[11] Dan Drosu Şaguna, Pătru Rotaru, "*The Financial and Budgetary Law*", pp 72, All Beck Printing House, Bucharest 2003. See Ioan Condor, Radu Stancu, "*The Romanian Financial and Fiscal Law*", pp 128, The Tomorrow's Romania Foundation

ultimately, refer to one and the same aspect, that is to fix and control imposition, taxes and other incomes in the favor of the state – aspects generally mentioned by the state budget, local budgets and special budgets. So, the doctrine establishes a similitude between the taxation and the *fiscal system*[1].

Still, the taxation has, since a very long time, a negative image. The tax payers consider it a means of compulsion exercised by the abuse state which – by means of special methods – takes away from the populations their hardly earned sums of money.[2]

The taxation is, consequently, *an inopportune task for the tax-payer*, irrespective of how much fiscal civic spirit he might have. It also becomes a burden and a reason for public dissatisfactions when the number of taxes is too high and when it is not in conformity with the declared intentions of the public authorities and voted by the population.[3]

From a politic and economic point of view the taxation is practically necessary in any type of society as it is an instrument by which the state of law influences the economy in order to correct certain market deficiency or in order to re-distribute the incomes and the resources.[4] That is why there is

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Printing House, Bucharest 2002; Ioan Condor, Silvia Cristea Condor, "*The Customs and Fiscal Law*", pp 71-72, Lumina Lex Printing House, Bucharest 2002; Ioan Condor, "*The Fiscal and Financial Law*", pp 146-147, The Economic Tribune Printing House, Bucharest 1996; Adrian Ovidiu Bălan, "*The taxation of the Romanian State*" – doctor's degree, pp 105; University of Bucharest, Law Faculty; Bucharest 2006; Constantin Topciu, Georgeta Vintilă, *idem*, pp 4-5.

[1] The fiscal system is regarded as a amount of impositions, taxes, contributions and of other incomes deriving from legal or natural persons nourishing the public budgets. See Ioan Condor, Radu Stancu, *idem*, pp 128; Ioan Condor, Silvia Cristea Condor, *idem*, pp 71; Ioan Condor, *idem*, pp 147. See also Viorel Roş, *idem*, pp 180. Definition accepted by other authors as: Dan Drosu Şaguna, Dan Şova, "*The Fiscal Law*", II-nd ed., pp 10; Mircea Ştefan Minea, Cosmin Flavius Costaş, *idem,* pp 18.

[2] See also Vincent Nouzille, La traque fiscale, Ed Albin Michel, Paris, 2000; Mircea Ştefan Minea, Elements of International Fiscal Law, Accent Printing House, Cluj-Napoca 2001 pp 153; Mircea Ştefan Minea, Cosmin Flavius Costaş, The European Taxation at the beginning of the III rd Millennium, Rosetti Printing House 2006, pp 18-23 *apud* Mircea Ştefan Minea, Cosmin Flavius Costaş, idem, pp 19.

[3] N Hoanta, Fiscal Evasion in Romania – doctor's degree, Babeş-Bolyai University, Cluj-Napoca 1996, pp 6 *apud* Constantin Ioan Gliga, idem, pp 2. See also Dragoş Pătroi, "*Fiscal Evasion between Permissiveness, Conventionalism and Infractions*", II-nd ed., pp 80, Economics Publishing House, Bucharest 2007.

[4] See Mihai Adrian Hotca, Maxim Dobrinoiu, "*Infringements Provided by Special Laws. Commentaries and Explanations*", pp 231, C.H. Beck Printing House, Bucharest 2008.

under discussion the problem of drafting a fiscal system able to diminish the social loss and to achieve those equity objectives socially accepted at a certain moment.[1]

The taxation can contribute to the increase of the living standard of the population, to the economic and social progress and to the corresponding fulfillment of the duties the public institutions and services have.[2]

The doctrine[3] underlines the important contribution the taxes have in forming the financial resources the state needs to cover the public expenses with. In other words, by means of taxes a large part of the gross national product is at the disposal of the state, and this phenomenon – both from the political and economic, financial and social point of view –is of a major interest.

The moment the political decision is made to harden the fiscal policy there is to be compared the objectivity of the short, medium and long term effects with reference to the target in view – the maximization of the resources of the public finance – because an uncontrolled increase of the fiscal policy can discourage savings and investments, can narrow the imposition bases and can annul the possible benefic effects regarding the level of the budgetary incomes brought about by the increase of the imposition rate.[4] So a low rate of the fiscal policy conducts to a modification – in the positive meaning – of the tendency towards consumption and investments.[5]

In conformity with the specialized literature[6] when speaking about the effects of the taxation – especially the negative ones – one can enumerate the following:

- Fraud and tax avoidance
- Risk of inflation through the taxation

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[1] Dumitru Adreiu Petre Florescu, Paul Coman, Gabriel Bălaşa, *idem*, pp 55.

[2] Mihai Adrian Hotca, Maxim Dobrinoiu, *idem*, pp 231.

[3] Iulian Văcărel, Gheorghe D. Bistriceanu, Florian Bercea, Gabriela Anghelache, Tatiana Moşteanu, Maria Bodnar, Florin Georgescu, "*The Public Finances*", IV-th ed., pp 371, Didactic and Pedagogic Printing House, RA Bucharest 2003.

[4] Dragoş Pătroi, idem, II edition, pp 84.

[5] Narcisa-Roxana Moşteanu, "The Taxation. Taxes and Duties. Case Analysis", pp 81, University Printing House, Bucharest 2008.

[6] Dan Drosu Şaguna, "Financial and Fiscal Law", pp 340-342; Dan Drosu Şaguna, Dan Şova, idem, II edition, pp 26-27; Petre Brezeanu, "The taxation. Concepts, Models, Theories, Mechanisms, Policies and Fiscal Practices", pp 134, Economics Publishing House, Bucharest 1999. See also Dragoş Pătroi, idem, II edition, pp. 79-92 ; Dumitru Adreiu Petre Florescu, Paul Coman, Gabriel Bălaşa, idem, pp 80.

- Weakening of the international competitiveness
- Risks of diminishing the productive efforts

Still, in the specialized literature[1], one can notice that the pressure of the taxation can become – due to its effects – a factor of high risk when reporting it to the national security[2] by producing micro and macro economic perturbations as well as a high social instability; it can also take the form of a political resistance[3] against the compulsory advance deductions – that are generally manifest in firm vindications in the favor of the diminution of certain imposts or social contributions, as well in a firm stand or vote.

1.1. **Fraud and tax avoidance**[4]

In conformity with the doctrine[5], in the case the *fiscal fraud* is considered to be an infringement of the law – as, for instance, the non-declaration of certain incomes or the non- invoiced sales – the *fiscal evasion* is "the logical result of the flaws and of the inadvertencies of an imperfect legislation, of its wrong application, and of the lack of provision and competence of the law-maker whose excessive taxation is supposed to be as blameful as those who incited to evasion"[6]. There are quite frequent the cases in which the territorial character of the fiscal laws are excessively speculated as to place certain income producing activities on the territory of certain foreign countries[7].

As mentioned by the doctrine[8] such kinds of practices have always existed, but the more the deductions in advance are higher the more

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[1] Petre Brezeanu, idem, pp 134; Dumitru Adreiu Petre Florescu, Paul Coman, Gabriel Bălaşa, idem, pp 80.
[2] Dumitru Adreiu Petre Florescu, Paul Coman, Gabriel Bălaşa, idem, pp 80.
[3] See also Petre Breazeanu, idem, pp 134; Dumitru Adreiu Petre Florescu, Paul Coman, Gabriel Bălaşa idem, pp 80.
[4] See Dan Drosu Şaguna "Financial and Fiscal Law", pp 340-341; Dan Drosu Şaguna, Dan Şova, ed. 2, idem, II edition, pp. 26-27; Petre Brezeanu idem pp 134-137.
[5] Dan Drosu Şaguna, "Financial and Fiscal Law", pp 340-341.
[6] Dan Drosu Şaguna, "Financial and Fiscal Law", vol II, Oscar Printing House apud Dan Drosu Şaguna, "Financial and Fiscal Law", idem, pp 340-341.
[7] Dan Drosu Şaguna, "Financial and Fiscal Law", pp 341. See also Petre Brezeanu, idem, pp 134; Dan Drosu Şaguna, Dan Şova, idem, II ed, pp 28.
[8] Petre Brezeanu, idem, pp 134.

stimulated they are; the specialized literature[1] mentions – in principle – two procedures: the underground economy and the international tax avoidance.

Thus, the *underground economy* takes various forms of manifestation that are characterized by the avoidance from the payment of the taxes, as the level of the imposts/ taxes and of the social contributions is very high. An eloquent example is the *black labor* hat enables the one who does it to gain (main and complementary) undeclared incomes, while this practice - within a salary-paid activity – forces the owner to avoid the payment of the social taxes. The more the difference between the real net payment – the one received by the employee (the gross salary minus the social contributions of the employees) – and the global price of the labor power (the gross salary plus the contributions paid by the owner) is higher, the more the interest of the employer to resort to this kind of labor increases. There evidently results income losses registered by the public authorities, in general, and by the social protection authorities, in particular.

At the same time, in agreement with the doctrine[2], the underground underground economy, within the national context shall include two aspects as to be defined:

1) the hidden economy is the one that "skips" statistics and the precise quantification;

2) all activities of the underground economy shall be expressed in the terms of the gross national product.

The international tax evasion means to move the production of certain enterprises toward those countries where the fiscal policy is more favoring (the so-called *fiscal paradises*)

This form of tax evasion is also favored by the increase of certain *tax-free zones* (in countries from Asia, Africa, Latin America), real territorial enclaves, real "states within a state", that enjoy customs extra- territorial advantages, and which exit – totally or partially – from the jurisdiction of the international legislation. The foreign enterprises are interested to implant the industrial units (branches) in such export producing countries as the conditions are visibly advantageous in as far as the salaries and the social fiscal are concerned. Yet, these phenomena risk to weaken the labor power/ force in certain sectors from the originate country companies.

At the same time, the doctrine[3] speaks again about the opinion according to which "the specialists in the fiscal domain have unanimously

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[1] Dan Drosu Şaguna, Dan Şova, idem, II ed, pp 27-28; Petre Brezeanu, idem, pp 134-137; Dan Drosu Şaguna "Financial and Fiscal Law" pp 341.

[2] Petre Brezeanu, idem, pp 135.

[3] Dragoş Pătroi, idem, II ed, pp 81.

reached the conclusion that tax avoidance is more frightening when the tax is higher. That is why to grow its own income any state shall consider and divide the public duties in such a way as for any tax-payer to be able to integrally and in time pay the due taxes. Not to take into consideration such an outlook makes a system be inefficient. Thus, irrespective of the high class of the auditor or of the severity of the applied sanctions it is almost probable for the state to be unable to collect from the tax-payers the taxes in view. Under these conditions any tax-payer will try his best to avoid such unbearable rigors: one of these attempts is the very fiscal fraud"[1].

1.2. **The risk of inflation through the taxation**[2]

In agreement with the doctrine[3] this risk is connected with any increase of the taxes or social contributions, risk that has the tendency to influence the process of price-fixing, of salaries and of stimulating inflation.

Consequently, as the enterprises try to include in their selling prices the increases of the social taxes and duties they have to pay, the employees also try to recuperate – in the form of higher salaries – the loss of the buying power that results from the increase of the imposts or from the betterment of the living standard.

At the same time, as mentioned in the specialized literature[4], the relaxation of the taxation seems to be a good solution able to prevent or to avoid the undesired and non-productive consequences of the tax-resistance, several states have resorted to.

1.3. **Deterioration of the international competitiveness**[5]

For the countries with a developed economy, the competitiveness of the enterprise and its capacity to successfully face the international competition is a determining factor in the economic growth and in the level

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[1] Victor Munteanu (coordinator), "Control and Accountant and Financial Audit", Lumina Lex Printing House, Bucharest 2003, pp 336-337 apud Dragoş Pătroi, idem, II ed, pp 83.

[2] See, in detail, Dan Drosu Şaguna, Dan Şova, II ed, idem, pp 27; Dan Drosu Şaguna, "Financial and Fiscal Law", pp 341; Petre Brezeanu, "The Taxation. Concepts, Models, Theories, Mechanisms, Policies and Fiscal Practices", pp 138.

[3] Dan Drosu Şaguna, Dan Şova, idem, II ed, pp 28; Petre Brezeanu, idem, pp 138.

[4] See, Petre Brezeanu, idem, pp 138.

[5] See, in detail, Dan Drosu Şaguna, Dan Şova, II ed, idem, pp 27; Dan Drosu Şaguna, "Financial and Fiscal Law", pp 341; Petre Brezeanu, idem, pp 138.

of the occupational level of the labor force. This is the reason for which the priority of the competitiveness is a major objective of the public authorities. The other side of the coin might be the fact that an increase in the compulsory deductions in advance, paid by enterprises, risks to bring prejudices to their competitiveness; they might be echoed in the price of the products and in the diminution of the self-financing capacity and in the investment and modernization capacity, as well.

1.4. Risks of diminishing the productive efforts[1]

According to the same opinion[2] it is considered that in this respect the liberal economists are stepping forward, as they insist on the discouraging effects the high levels of the compulsory deductions in advance over labor, economy and investments, as well as over the enterprising spirit can produce.

So, from the point of labor incitement it is considered that there are two opposite reactions that an increase in the income taxation might produce:

a) *the substitution effect* that means the diminishing of the working time of an individual due to the diminution of his net payment;

b) *the income effect* that means the increase of the work quantity with a view to compensate the loss of the net income due to the tax increase.

In this context, in order to express the *tax resistance* the phrase *fiscal abstinence*[3] is used as it consists in avoiding the fulfillment of certain operations with a view to avoid the taxes they generate.

So, it is about a passive resistance by which an active person tries to limit or reduce his salaried activity so that his income should not to hit a certain level as not to be affected by a higher quota of the tax, or, a consumer does not buy goods that have included in their price a higher value of the impost.

The fiscal abstinence can be materialized in the diminution of the economic activity if it dramatically reduces labor, saving and investment incitement.

At the same time, according to the doctrine[4] the degree of the fiscal policy of our country has a *confiscating nuance* in as much as the available

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[1] See, Petre Brezeanu, idem, pp 133-134.
[2] Petre Brezeanu, idem, pp 133.
[3] See Petre Brezeanu, idem, pp 133-134.
[4] See Dragoş Pătroi, "Fiscal Evasion between the Permissive, the Trespassing Aspect and Offensive Character", II ed, pp 80.

sums of money – that remained after taxation – can assure the indispensable means of living and not just a convenient covering for all the human necessities. This situation can inhibit the motivation for work and the "orientation" of the tax-payer towards obtaining illicit, tax-avoiding incomes

It is also written in the specialized literature[1] it is noticed that, in the period immediately after 1990, the Romanian fiscal system was made up on the antithesis between the more and more limited character of the financial public resources and the higher and higher demand of public funds, with a view to better satisfy certain social needs. The state authority considered that the increase of the taxation was the easiest modality to gather public financial resources; still the state failed in taking into account the adverse effect: *an increase of the taxation brings about an increase of the fiscal pressure*, and, when it becomes overwhelming there appears the "tax-run-away" phenomenon, in other words the tax avoidance.

At the same time it is considered that under the present day conditions, once integrated in the Union, and after almost two centuries of research and findings, the Romanian Fiscal Policy shall be governed by *the principle of the positive stimulation of the tax-payer*; the main objective shall represent the growth of the degree of voluntary acceptance of all taxes and duties, directed towards a more sensitive approach between the tax-payer and his fiscal obligations/ duties[2]. According to the same opinion[3] it is considered that, in connection with this aspect, "the more the tax-payers can concretely quantify the material dimension of the way the sums of money they paid in the form of a tax are used, the more the degree of their consent to paying the fiscal obligation they are due will be higher".

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[1] See Dragoş Pătroi, idem, II ed, pp 79.
[2] See Dragoş Pătroi, idem, II ed, pp 79.
[3] Dragoş Pătroi, idem, II ed pp 85.

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THE JURIDICAL INSTRUMENTS OF THE ROMANIA STATE IN THE FIGHT AGAINST AND PREVENTION OF THE DRUGS TRAFFIC AND ILLICIT CONSUMPTION*

Abstract

The very serious problems raised by the present-day fight against various forms of international criminality – especially the traffic and the illicit consumption of drugs - has become a main preoccupation of more and more international organizations at either global or regional level. Because of the dimensions and the amplitude of this phenomenon the drugs traffic is to be met with at a global level, raising huge problems with regard to the growth of trans-national organized criminality. Through the joint efforts of the specialized bodies the phenomenon can be understood but cannot be significantly diminished or eradicated. This problem cannot not be solved within a short period of time, but with the active participation of all specialized institutions and organizations it can be diminished - either privately or in groups.

The traffic with narcotics has become a dramatic contemporary reality. After 1990 Romania had turned from a transit-country in a country enlisted among the drugs consumption countries – from light to high risks drugs – and annually the number of the youngsters taking to drugs increases.

In the contemporary Romania, the opening of the inter-state borders, the thousands of natural persons who enter or leave the country traveling freely in the virtue of their constitutional rights, the large amounts of goods and services and of the means of transport are as many factors favoring the drugs illicit traffickers who, changing their spatial co-ordinations on the spot, attract an even larger number of citizens on the territory of our country (Drugs Legislation, 1998, pp. 25).

The massive presence of the foreign citizens in our civil society and the long term residence of some of them is another source of anxiety as many of them come from economically underdeveloped countries where drugs consumption is – very often – part of their tradition.

The dissolution of the centralized market economy, the economic crisis, the transitory measures adopted by the entire Central and Eastern

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Europe do complicate the geopolitical and the social context even more. Under these conditions the appearance of the organized crime with its major component – the drugs illicit traffic and the money laundering, as well as many other undesired transgressions existing in the life of a democratic system where the individual's liberties cannot be determined exactly without falling into another extreme – are as many serious threatens to the civic safety.

The brief dysfunctions mentioned impose a massive usage of the juridical weapons as normal and coercive instruments for preventing and fighting against the illegal drugs demand and supply.

In the anti-drugs fight there have been attracted all authorities: family, school, clergy, non-government organizations, sports organizations, etc.

The Romanian government launched a national Program of preventing drugs traffic and consumption within the Phare Program: "Fighting against Drugs". In June 12, 2002 the National Anti-drugs Agency was created – a legal institution subordinated to the Ministry of Administration and of the Interior – meant to make the activity of ministries, institutions and civil organizations more efficient in their fight against the drugs.

A similarly important role against this flagellum is played by such bodies as: The Drugs and Toxicological Mania Observatory – within the Ministry of health – directly subordinated to the European Monitoring Center for Drugs and Drugs Addiction, in Lisbon, as well as the co-operation with the international bodies in the domain: the INTERPOL, the EUROPOL, the UN Program for Drugs Control, the Phare Program with "Fighting against Drugs," UNPD – Phare, Precursors Project, Synthetic Drugs Program – perspective objectives, etc, the Cooperation EMCDDA Project – supporting the candidate states to the Union adhesion by a transposition of the acquis communautaire.

The phenomenon represented by the drugs traffic and illicit consumption shall be analyzed from the point of view of the different means that are used in preventing and fighting against it (Cioclei, 2008, pp. 243). In particular, this problems is restricted to the estimation of the efficiency or of the opportunity in which the drugs traffic and illicit consumption is charged.

The juridical rule of a domain is influenced by several factors as: the national and historical tradition of the law system, the degree the social relationship are troubled by the phenomenon that generates the social reaction, the law maker's awareness of the danger and of his will to restrict it, the way it can be adapted to the international legislation by an adherence

to international conventions and the way their provisions can cope with the internal legislation (National Anti-drug Agency, Report on the Drugs Phenomenon in Romania 2004).

The treaties, the protocols and the international conventions Romania is part, practically lay at the base of the sources of the juridical system meant to prevent and fight against the abuse of illicit drugs, codified – in certain countries – in a Drugs Law.

These dispositions can be find in the internal charge (in conformity with the *pacta sunt servanda* principle) of those deeds that encroach the juridical regime made for the substances and the products containing narcotics or psychotropic elements or for the essential chemical substances or their precursors, in conformity with the will of the law maker.

Although there exist prohibitive dispositions with regard to the illicit drugs circulation since the Middle Ages,[1] we shall deal only with those regulations in the domain that refer to the second half of the XIXth century.

In 1928 **Decree no 1578** was issued, a decree by which our country adhered to the Geneva Convention of February 19, 1925 and to the annex protocol.

In the same year **Law no 58** was issued as well; it listed among narcotics the following: opium, its compounds, its main actives, derivatives, hashish and its compounds, pure ether or mixed with any other substances meant to be orally taken, as well as other natural or synthetic substances having similar effects with the above mentioned ones.

In 1933 Romania adhered to the Geneva Convention of 1931 on the limitation of the manufacturing and distribution of narcotics (**Law no 84**).

In **the Penal Code of 1936,** art 382 the offence of narcotics traffic was introduced. Art 383 stipulated the aggravating circumstances to this offence.

By **the Decision of the Council of Ministries no 1626/1960** Romania accepted the Protocols of December 11, 1946 and November 19, 1948 that amended the international conventions regarding drugs.

In 1950 **Decree no 227** was passed, as to regulate the use of drugs.

Two years later **Decree no 496/1952** was passed; it regulated the regime of the toxic substances.

[1] The first signs of a law making intention regarding the toxic substances (poisons) will be met with in the Code of Law written by Vasile Lupu in 1646. From Dimitrie Cantemir quoted by Pompei Ghe. Samarian we learn about apothecaries, that he is "the one that sits in the apothecary and sells herbs and remedies for health".

A few years after, **the Decision of the Council of Ministries no 1178/1954** on the transmission of data connected to the import and the use and distribution of narcotics was passed.

The replacement of the legislation - that was in force until 1969 and regulated the regime of the narcotics and of the psychotropic products – became necessary if considering the flaws of the ex-norms and of the situations appeared in the course of time, making this legislation become rather obsolete. These situations can be briefed as:

a) Romania accepted – by the Decision of the Council of Ministries no 1626/1960 – the Protocols of December 11, 1946 and of November 19/1948. The necessity to elaborate the already mentioned protocols was due to the progress achieved by the modern chemistry and pharmacology that conducted to the discovery of new drugs - especially synthetic drugs - susceptible to provoke addiction to narcotics.

b) Romania adopted - in 1961 – the Unique Convention of Narcotics that replaced all the previous international documents referring to narcotics and that brought about new regulations.

c) In Romania the narcotics manufactures started working since 1957 as there were satisfied all the conditions necessary for the export of narcotics since 1966.

d) In Romania there was re-organized the medical assistance, which from 1950 up to 1969 underwent several transformations (Croitoru, 2006, pp. 61).

Law no 73/1969 on the Regime of the Narcotics Products and Substances was published in the Official Gazette no 154 of December 29, 1969. This law brought about a better regulation concerning the regime of the Narcotics Products and Substances as compared to the old legislation - as it made the existent Romanian realities in the domain -meet the dispositions of the Unique Convention on Narcotics of 1961. On the other side, the whole regulation concerning the licit activities with narcotics was based on the fundamental principle of preventing the illicit traffic with such products or substances, as well as the recovery of the addicts and rendering back to society.

Instructions no 103/1970 for executing the provisions of Law 73/1969 regarding the regime of the narcotics products and substances were published in the Official Gazette no 38 of April 25, 1970. The certificate for an activity with narcotics products and substances was annually issued by the Ministry of Health in the basis of a written request addressed to this institution. The deliveries and registering of such certificates were issued until December 1 of the current year, for the next

year, in the case of already recorded units, and for the newly set up units, 45 days before the respective unit started to work.

The Decision of the Government no 75/1991 on establishing the norms regarding the regime of the Narcotics Products and Substances was published in the Official Gazette of January 28, 1991. At present it is abolished.[1] In art 1 there were enumerated those deeds considered to be an offence to the norms regarding the regime of the Narcotics Products and Substances.

Law no 143/2000 on Preventing and fighting against the Drugs Traffic and Illicit Consumption was published in the Official Gazette no 362/of August 3, 2000. There are charged all those offences regarding the traffic and the other illicit activities with substances under national control.

In this law there are included procedural dispositions regarding the research over the traffic and the illicit drugs consumption, as well as the measures that shall be adopted against the illicit drugs consumption.

In the effort to control this phenomenon and to adapt it to the international legislation, the Romanian law maker passed Law no 143/2000 on the prevention and fight against the traffic and the illicit drugs consumption.[2] Although a large period of time elapsed since its coming into force, this law – unfortunately - still raises questions with regard to both the strictly penal aspects and to political and penal strategic aspects (Cioclei, 2008, pp. 237).

Consequently, the dispositions of Law no 143/2000 generated – in the penal doctrine – certain controversies concerning the modality in which the law maker understood to punish the drugs consumption.

The problem raised was simply to know whether the Romanian criminal law charges the drugs consumption or not. This is a fundamental problem and – no matter how strange it might appear – this new law meant to especially regulate the "prevention and the fight against the traffic and the illicit drugs consumption", gave way to interpretations exactly with regard to this aspect. The controversy that appeared in the doctrine is a proof that things are really interpretable and it can be considered that – at least - the law maker proved to be somehow uncertain with regard to the modality of punishing the illicit drugs consumption. This hesitation shown

[1] It was abolished by Law no. 339/2005 regarding the juridical regime of plants, substances and the compounds from narcotics and psychotropic elements, published in the Official Gazette no. 1095 of December 5, 2005.

[2] The Official Gazette no. 362 of August 3, 2000. It was modified by Law no. 522/2004, Regulament, 2005 and by The Emergency Ordinance o the Government no 121/2006.

by the criminal law maker might still not be the expression of a mere technical and juridical "clumsiness" but, on the contrary, it might express a politically criminal dilemma connected with the opportunity of charging the drugs consumption. Thus, there appears another problem that exceeds the norms without being able to ignore them (Cioclei, 2003. pp. 109).

The Decision of the Government no 1359/2000 for the Approval of the Rules of Applying the dispositions of Law no 143/2000 was published in the Official Gazette of January 29, 2001. At present it is abolished.[1]

Law no 300/2002 on the juridical regime of the precursors used in the illicit manufacturing of the drugs was published in the Official Gazette no 409 of June 13, 2002. At present it is abolished.[2]

Law no 522/2004 on the modification and completion of Law no 143/2000 was published in the Official Gazette no 1155 of December 7, 2004. Important modifications were brought about in the sense that, at first the law maker, in his fight against the traffic and illicit drugs consumption, laid stress on the preventing aspect and only after on the repressive one; second, there were introduced new ideas, the drugs detaining offence was re-formulated, the procedural dispositions applicable in the domain were completed and new measures against the illicit drugs consumption – the medical ones, inclusively – were taken.

The Decision of the Government no 860/2005 for the Approval of how to apply the dispositions of Law no 143/2000 on the prevention of the traffic and illicit drugs consumption was published in the Official Gazette no 749 of August 17, 2005. By this regulation there were defined several terms and phrases the law operates with in speaking about the prevention and fight against the traffic and the illicit drugs consumption. There were also provided prevention measures regarding the fight against the illicit traffic of drugs, the integrated assistance programs, the suppliers of medical, psychological and social services, as well as the financing of the assistance services for the drugs addicts.

The Emergency Ordinance of the Government no 121/2006 on the Juridical Regime of drugs precursors was published in the Official Gazette no 1093 of December 28, 2006. By this ordinance Law no 300/2002 was

[1] It was abolished by the Decision of the Government no 860/2005 for the Approval of the Rules applying the dispositions of Law no 143/2000 on the prevention and fighting against the traffic and the illicit drugs consumption with further modifications and completions, published in the official Gazette no 749 of August 17, 2005.

[2] It was abolished by the Government Emergency Ordinance no. 121/2006 on the juridical regime of the drugs precursors, published in the Official Gazette no 1039 of December 28, 2006.

abolished. It was thus, necessary to adopt a norm regarding the adherence of our country to the European Union from January 1, 2007, as the provisions of the regulations passed by the institutions of the Union would have had a direct appliance within the Romanian juridical system; it was also necessary to adopt certain measures able to create an adequate institutional and juridical framework for the application of the provisions of these documents of the Union.

Law no 339/2005 on the juridical regime of the plants and substances and on the products derived from narcotics and psychotropic substances was published in the Official Gazette no 1095 of December 5, 2005. This law settles the juridical regime regarding the cultivation, the manufacturing, the stocking, the trade, the distribution, the transport, the detaining, the offering, the transmission, the intermediation, the use and the transit over the Romanian territory of spontaneous or cultivated plants, of the substances and compounds provided in the charts I, II, III, in the annex – as an integrant part of the law.

The Decision of the Government no 1915/2006 for the Approval of the methodological norms in the application of the provisions of Law no 339/2005 on the juridical regime of plants, substances and narcotics compounds and psychotropic elements was published in the Official Gazette no 18 of January 11, 2007. According to this law the control and the supervision of the observance of the juridical regime of the plants, substances and narcotics compounds and psychotropic elements by the Ministry of Public Health are exercised through a thorough checking of the documents and through inspections made by the pharmacist auditors from the Ministry of Public Health, according o a plan of inspections and specific procedures issued by the specialized department. There are also enlarged the dispositions of Law no 339/2005 on the medical use of the substances and narcotics compounds and psychotropic elements, the destruction, the research certification and records of their listing and storage.

In the context of Romania's accession to the European Union, the legislative approximation to the acquis communautaire continued with the formulation and amendment of regulatory documents meant to improve the national juridical framework in the field of drug demand and drug supply reduction.

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APPLICABILITY OF THE PROVISIONS MADE BY THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE MATTER OF THE LEGAL POLICY ON MINOR OFFENCES AT THE EUROPEAN AND NATIONAL LEVELS. ANALYSIS OF THE ANGHEL VS. ROMANIA CASE

Abstract

The Convention for the Protection of Human Rigths and Fundamental Freedoms was drown up within the Council of Europe. In addition to lying down a catalogue of civil and political rights and freedoms, the Convention set up a mechanism for the enforcement of the obligations entered into by the Contracting States.The right of individual complaint, which is one of the essential features of the system today was originally an option that the Contracting states could recognize at their discretion.

The European Court of Human Rights has a peculiar system of analizing different types of law's infidgement as crimes, misdemeanours as there are differences of treatment between the national and european criminal law. Not all national common law legal systems draw a clear distinction between misdemeanours and felonies, the former being still included, in certain Western states, in the Penal Codes texts, even if only in the last chapter, being looked upon as a type of law infringement with a lower degree of social risk.

Anghel versus Romania is one of the most important cases for our state that provoqued decisive changes in our legal system regarding misdemeanours and the adminsitratice procedure applied during the civil trials which object is to solve the complaints against contraventional documents.

1. Brief presentation of minor offence regulation in Romania

The field of minor offences in Romania is undoubtedly a field with some of the most profound and complex applications in everyday life of the citizens and, implicitly, in the administrative practice of the authorities holding prerogatives in this matter.

Despite its obvious social significance, the Romanian legislation in the field of minor offences – and by that we mean a framework regulation, other special normative acts, as well as normative acts containing certain provisions in the matter is far from being crystallized, systematized, and from having a well-defined unitary point of view on the fundamental issue of clarifying the legal nature of the minor offences and minor offence liability.

One substance issue that remains unsolved in the matter of minor offence liability aims at the possibility to reintroduce the minor offence in

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the sphere of penal unlawful acts, according to the traditional model of the western states, which would have implied the rethinking of the entire penal legislation and of the criminal trial legislation under this aspect (D. Apostol Tofan, Regimul juridic actual aplicabil contraventiilor. Aspecte de drept material, Curierul judiciar nr. 6/2002, All Beck Publishing House, Bucharest, 2002, page 1).

As far the historic evolution of the minor offence nature in Romania is concerned, it should be noticed that in the beginning it was of a penal nature, as it belonged to the crimes – misdemeanors and minor offences triad, as it was described in the 19th century documents. For a relevant overall view of the legal nature of the minor offence it should be specified that the idea of minor offence was for the first time described in the Organic Regulations, more exactly in the Criminal Register of 1841, and in the old Penal Manuscript of Stirbei the Ruler, which would divide crimes into three large categories **trespasses – guilts and crimes.** A perfect parallel was thus achieved to the French Penal Code (The French Penal Code of 1810, which became a model code of the time, as well as a source of inspiration for many European states of that age; the 1st article of the Code referred to the minor offence as "the crime punished by typical police sanctions,) the text of which would also stipulate the affiliation of the minor offence to the sphere of penal illicit acts, just as it remained to our times, the minor offence being in most western states the crime with the lowest degree of social threat. The Calimah Code also sanctioned one bipartite division of crimes, **though without maintaining the term of minor offence**, thus not only the terminology, but the idea of grading the penal illicit acts too were taken from the French legislation (A. Iorgovan, Tratat de drept administrativ, volume II, 3rd edition as restructured and supplemented, All Beck publishing House, university course collection, Bucharest, 2005, page 375).

The minor offence belonged to the sphere of penal illicit acts until 1954, when the famous "depenalization of the minor offences" was established by the decree 184/1954 The crime – misdemeanor – minor offence trichotomy was also maintained in Cuza's Penal Code of 1865, and in the Penal Code of 1936, also referred to as the Code of Charles the Second.

At that moment, most minor offences were given a special statute; special framework regulations were provided inside the trials treating complaints against the official reports for minor offences; civil procedure norms still apply nowadays instead of penal procedure norms. Whereas the old regulation of minor offences, namely the law 32/1968, while defining minor offences, would occasionally refer to the social threat relation

between the minor offence and the crime, nowadays the Government Ordinance 2/2001 as subsequently modified and complemented by the law 180/2002 doesn't even mention this aspect anymore.

In the course of time, in Europe, in the states where the minor offence was disincriminated, two large systems of minor offence regulation appeared. The first one was the **framework-law system** (to which Romania adhered too), other supporting countries being Bulgaria and the former German Democratic Republic in the old times, and the **system of a Minor Offence Code,** which, beside the common law in the matter, would also include the main minor offences and their applicable punishments, as was the case of Poland or Hungary. The late Professor Antonie Iorgovan coined money on the need for a minor offence code in Romania in the 70's, and we still feel acutely the lack of such an act that would crystallize the legal policy on minor offences, as the Government Ordinance 2/2001 as subsequently modified and complemented did not set clear all the abrupt issues related to the field of minor offences. It is certain that in most western European states the seat of the minor offences is in the penal codes (see the case of France, Spain or Italy) and the procedure applied by court in minor offence trials is a typical penal law one. What we found worth mentioning is the fact that, surprisingly, even if it is not a member state of the European Union and it is far from being regarded as a western country, the Republic of Moldova has a very clear Minor offence code. The imperfections present in the present minor offence legislation, even imperfections related to the norms of procedure applied, led to Romania being penalized by the European Court of Human Rights – for starters through the notorious case Anghel vs. Romania case in which the Strasbourg court found the breach of the provisions made by article 6 of the European Convention on Human Rights as regards failing to observe the presumption of innocence and the right to a fair trial. (The decision 28183/03 of October 4th 2007, Strasbourg – declared final on 03.31.2008). in this case, the petitioner was accused of having insulted and addressed offensive words in public to a person who worked for Pucioasa Law Court, and for that he was punished by a fine of 2 million Romanian Lei (approximately 59 Euro), based on article 2 par. 1 of the law 61/1991.)

2. Anghel vs. Romania. Circumstances of the cause

In a synthetic presentation, the factual circumstances of the cause are the following: "On November 21st, 2002, Mr. Petre Anghel (the petitioner) went to the archives of Pucioasa Law Court in order to obtain a copy of a judgment passed by the Court in one of the cases he had filed

with this same court. According to the petitioner's statement, Mrs. S., an archivist, unjustly refused to deliver the document, motivating that it was not in the archives. It seems that Mrs. S may have impolitely asked him to leave her office. With the help of the judge assigned with supervision and after much insistence from the petitioner, the file was finally found again in the archives and the person interested in it received the requested copy. Mrs. S and Mrs. R, another employee from the archives, called a police officer, Mr. C, who asked the petitioner to make a statement concerning the incident he had had with S; the petitioner accepted.

On November 24th 2002, the petitioner received at his house the official report of minor offence dated November 21st 2002, in which he had been applied a minor offence fine amounting to 2 million ROL (approximately 59 Euro as per the exchange rate in force at the time the deeds were committed) for having uttered insults and, in a public place, he addressed Mrs. S vulgar expression the nature of which would be injurious to her honor and dignity, a minor offence provided by and punished as per article 2 par. 1 of the Law no. 61/1991 for the punishment of breaching the norms of social life, public order, and peace.

On December 17th 2002, the petitioner filed with the Police Inspectorate of Dambovita a complaint against such official report. He invoked the fact that the official report was illegal, on grounds that he had not committed the facts he had been accused of. His legal contest was sent to Pucioasa Law Court, which had the competence to examine it.

From there on, the problems occurred during the trial continued to get more complicated, as the court did not observe the principle of the presumption of innocence and also breached other fundamental law principles related to hearing the petitioner or hearing again his witnesses (the opinion of whom had only been presented in a distorted way).

On the dates of January 30th, February 20th, March 13th 2003 hearings took place at Pucioasa Law Court. During the session of January 30th, the petitioner was hear by a judge and Mrs. D (the clerk from the law court archives) asked him if he admitted the deeds attributed to him. The petitioner denied them and asked the court to accept the depositions from two witnesses who could confirm his sayings. The court admitted his claim and asked him to file the list of witnesses within five days, and the petitioner complied.

On 03.13.2003, the case judge heard the archive clerk R and this latter specified that several persons were present during the incident, mentioning Mrs. B, an attorney, and Mrs. G, the head clerk. She did not remember having seen A and D, the witnesses indicated by the petitioner.

On the same term, he requested the court to hear again A and D, as they were the only witnesses for the defense who could validate or invalidate R's statements and to complement the previous depositions, specifying that the same had only been partially delivered by the Law Court Clerk's Office. The court rejected these claims as ungrounded and declared the case on trial.

As regards the way of solving this case by the ECHR, considering the Court decision, it is worth to make an analysis in order to see whether the provisions governing the Romanian procedure on minor offences can be included in what the ECHR autonomously calls penal matter.

The European Court of Human Rights, holding the obligation of checking the observance of the provisions made by the Convention in legal systems that show great diversity, operates in its jurisprudence on certain autonomous notions that do not have the same sense in the national law of the member states of the Council of Europe. (R. Chiriță, Convenția Europeană a Drepturilor Omului, Comentarii şi explicații, volume I, C. H. Beck Publishing House, Bucharest, 2007, page 30).There are certain senses that receive different qualifications in the multitude of the European legal systems. For instance, in certain legal systems the minor offence is included in the sphere of penal law, while in other systems it is considered either as a form of administrative illicit acts or as a distinct form of illicit acts (M. Ursuța, Procedura contravențională română poate fi considerată ca aparținând noțiunii autonome de materie penală din jurisprudența Convenției Europene a Drepturilor Omului? Curierul judiciar, 2/2008, C. H. Beck, page 78).

In terms of case analysis in Anghel vs. Romania, it should be cleared out whether the minor offence field – as regulated in Romania, belongs to the notion of "penal matter" as seen by the Court in Strasbourg.

From a terminological point of view, the Court showed that the notions of accusation in penal matter (accusation en matière pénale or criminal charge) accused of having committed a crime (charged with a criminal offence) and accused (accuse or charged with a criminal offence) as used in article 6 ECHR consider identical situations under the same notion a person accused of having committed a penal acts. Furthermore, the accusation in penal / criminal matter as specified above has an autonomous meaning, which should be regarded in the sense of the convention, just as article 5 par. 2, which uses in the English version the term "charge" with a more vast area than the notion of actual accusation.(C. Bîrsan, Convenția europeană a drepturilor omului. Comentariu pe artcole, 2005, page 442).

The fact that in the vision of the Court the notion of penal or penal accusation bears an autonomous meaning, though, does not prevent the signatory states of the Convention from not establishing a distinction between the penal law or the disciplinary law, for instance, or to distinctly delimit to the Court the liability in the penal, disciplinary or administrative law under certain circumstances. As stipulated in the case Engels and others vs, Holland, /Engel c. Olanda, 8.06.1976, claims 5100/1971, 5101/1071 71 and others, par. 81. paragraph 81 it clearly reveals that "The states parties are free to establish certain problems (notions) in matter of national penal, administrative or disciplinary law, as long as the distinction between them and the notions implemented by the Court does not come against the facts established by the European Convention on Human Rights (http://www.humanrights.coe.int, consulted on 01.12.2009).

In this case, the Court set certain criteria based on which an act can be qualified as penal", because it is possible for certain deeds to be of an extra-penal nature in the national law, while in the vision of the Court the deed could be penal. Referring to the case at hand (Anghel vs. Romania) we will find that here too the Court established the affiliation of minor offences to the sphere of penal illicit deeds, while in Romania they belong to the sphere of administrative illicit deeds, and during trial norms of civil proceedings are applicable.

In order to identify the autonomous notion of penal charge, the Court set the following criteria (Ozturk vs. Germany, claim 85744/79, the decision dated 02.21.1984, par. 50 and Engel and others vs. Holland):

a. qualifying the deed according to the national law
b. nature of the incriminated deed
c. nature and seriousness of the penalty
d. purpose of the punishment

2.2. Qualification of the deed according to the national law

In terms of the case at hand, as regards the applicability of article 6 invoked in the litigation, the Court found that the Romanian national law does not qualify the minor offence as penal, offence that caused a fine to the petitioner; the Romanian legislator aimed at disincriminating some action that, even if they cause prejudice to public order, were committed under circumstances that lead to the conclusion that they are not crimes under the penal law. In the case at hand, the petitioner was criticized for having addressed a clerk with insults that may prejudice this latter's dignity, a

deed that is punished as a minor offence under the provisions made by article 2 par. 1 of the law 61/1991.

At the time the deeds were committed, article 2 of the law 61/1991 made the following provisions: "A minor offence is to commit one of the following deeds, unless they are committed under circumstances according to which, as per the penal law, they can be deemed as crimes: a. committing in public obscene deeds or gestures, uttering insults, offensive or vulgar expressions, threatening with acts of violence against persons or their property, likely to trouble public order and peace or to cause the indignation of citizens or to harm their honor or dignity or that of public institutions. Minor offences of this kind were punished by fine from 700,000 to 40,000,000 ROL **"or by minor offence imprisonment from 15 days to 3 months"**. This minor offence differed from the penal crimes of insult and slander, which were punished at the time of the deeds according to articles 205 and 206 of the penal code by both the procedure applicable to the authors and by the legal consequences (Anghel vs. Romania, claim no. 28.183/03, decision declared final on 03.31.2008, par. 49-50).

Still, this fact is not decisive in the sense of applicability of article 6 par. 1 of the Convention, as the indications given by the national law have only some relative value. (Ozturk vs. Germany, par. 52).

As far as the criteria above are concerned, the Strasbourg Court established that they are applicable alternatively and not cumulatively. For article 6 par. 1 to be applicable to an accusation in penal matter, it is sufficient for the crime to be penal by its nature, as related to the provisions made by the Convention, or that the author be exposed to a penalty that may be qualified as a penal penalty. (Lutz vs. Germany, August 25th 1987, par. 23). Still, this fact does not prevent the taking of a cumulative approach, should the separate analysis of each criterion not allow reaching a clear conclusion as to the existence of a criminal charge (see Garyfallou Abebe vs, Greece, claim 93/1996/712/909, decision dated 09.24.1997. Lutz vs. Germany, August 25th 1987, par 23.)

For the Court, the identification of the referred deed in the national law of the respective state is just a starting point in view of its own analysis, which will lead to its own identification, the indication given by the national legislation having only relative value that is to be examined in the light of a common denominator of the legislations in this matter in the contracting states (C. Bîrsan, quoted work, page 445). Even so, considering the importance of the guarantees provided by article 6, it is essential that they be observed in the internal procedures even though the **states parties to the Convention are free to qualify a certain deed as being a breach of discipline or a minor offence** (Lutz vs, Germany, par. 57).

The Court reaffirmed the possibility of the contracting states to legislate a system in which finding and punishing minor offences is the duty of administrative authorities (Lutz vs, Germany, par. 57).B and the compliance with the provisions made by the Convention is assured by the possibility of the party concerned to contest that decision.(B.Ramaşcanu, Procedura contravențională judiciară în lumina jurisprudenței C.E.D.O., the I.N.M. review, Themis, 2/2005, page 2).

In examining these criteria, the Court considers that for article 6 as invoked by the petitioner Anghel in his petition to the Court to be applicable, it is sufficient that the deed "be penal by nature from the point of view of the Convention" or "expose that person to a penalty which, by its nature or by its degree of seriousness, belongs to the penal sphere". According to the text of the claim, the petitioner invoked the provisions made by this text of the Convention for the reason that "during the trial by Dambovita Law Court where he made appeal against the decision made by Pucioasa Law Court he was in an unfavorable position to the opposite party, meaning the Police of Pucioasa that was given the day by the courts". Indeed, the 16th of July 2004 he had asked the Law Court of Pucioasa to suspend the cashing of the minor offence fine applied by the official report of minor offence dated November 21st 2002, but by the sentence of January 6th 2005 the court dismissed his request on grounds that the Law Court of Dambovita, as per its final decision passed on May 26th 2003 had dismissed his petition, and this decision was enforceable, thus the cashing needed no further formalities.

It is common knowledge that in Romania since 1954 the penal nature of the minor offence has been out of the question, as the minor offence enters the sphere of administrative illicit acts. Nevertheless, up to 2003, among the main penalties for minor offence we could find the minor offence imprisonment, this latter being applicable in the context of mala fide of the offender who was in debt of paying a fine further to the conclusion of an official report. Even article 2 of the law 61/1991, based on which the petitioner Anghel was fined, provided the possibility of applying a punishment by minor offence imprisonment from 15 days to 3 months. Making a simple parallel to the sphere of typically penal punishments where the punishment by prison is also one of the main punishments applicable, in the case of committing a crime provided by the Penal Code, we can draw the conclusion that in this case precisely by the possibility of freedom of the offender, the legislator brought once again the sphere of minor offences to the one of penal acts.

The court considers that only by the Government Emergency Ordinance 108/2003 (Official Journal of December 26th 2003) the

Government eliminated the minor offence imprisonment from the list of punishments susceptible to be applied to offenders (Neață vs. Romania, par. 25).

But, at the moment the petitioner was applied the fine, according to the legislation in force at that time, the punishment by minor offence imprisonment was also applicable to him. Should the criteria mentioned by the Court and extracted from its jurisprudence be taken into consideration, minor offence imprisonment is a harsh punishment that by its nature and seriousness belongs to the penal matter, thus article 6 finds its applicability under the aspect of its penal side (Ezeh and Connors vs. the United Kingdom, claim no. 39665/1998 and 40086/1998, 07.15.2002, par. 120.)

Moreover, taking into account the fact that according to the provisions made by the Romanian law the fine for minor offence has an administrative and not a penal nature, it goes without saying that there is a clear tendency to "disincriminate" minor offences on the Romanian legislative plane and then the problem is raised of applying article 6 in this context. The Court constantly maintained that in principle the Convention does not oppose the disincrimination tendency existing in the member states of the Council of Europe.

Should the contracting states consider a deed as being of an extra-penal nature in order not to give efficiency to articles 6 and 7 of the Convention, that would take place within the limits of sovereignty of such states, still without opposing the objectives and purpose of the Convention. That is exactly why, in principle, such acts come under the jurisdiction of article 6 of the European Convention on Human Rights (Ozturk vs. Germany, par. 50).

2.2.b. Nature and gravity of the penalty

This criterion is very valuable in view of applying article 6 of the Convention on its penal side, even if according to the national law we are not facing a penal deed, but a deed placed in the sphere of another form of illicitness (administrative, disciplinary or another form established by the national legislations). Thus, one of the Court decisions established that "both the nature and gravity of the penalty imposed and the sanctions to which the doer could have exposed himself must be analyzed considering the purpose and object of article 6 the meaning of the specified term, as well as in the light of the laws of the contracting states"(Dorota Szott and others vs. Poland, 10.09.2003).

This criterion is different from the one regarding the nature of the penalty, which we are about to analyze. If the purpose of the penalty applied does not allow for the application of article 6, the Court will have

to analyze the criterion regarding the nature and gravity of the punishment that can make applicable the provisions made by the same article in terms of guaranteeing a fair trial. Furthermore, article 6 of the Convention even bears the title "The right **to a fair trial**", the text specifying the following aspects:

Any person has the right to **fair and public trial** and within reasonable deadlines for their case, by **an independent and impartial court** established under the law, which will decide either upon the violation of their rights and obligations of a civil nature or upon any criminal charge against them".

As far as the gravity and nature of the penalty applied to the petitioner Anghel are concerned, such penalty is an administrative one and according to the Romanian legislation in force it is not considered as a very serious one, such as a penal fine or a punishment by imprisonment, even in the version provided by articles 85-86 of the Penal Code (with suspension).

As far as the amount of the fine given to the petitioner is concerned, according to the decision, on November 24th 2002 he received at home the copy of the official report of minor offence, by which he was applied a minor offence fine amounting to two million ROL, that is to say about 59 Euro according to the exchange rate in force at the time the deeds were committed (Anghel vs. Romania, par. 6).amount which could be considered significant for a retired person. The question that lies here is to what extent a higher or a lower amount of money – the equivalent of a fine – can be considered can be considered as a criminal charge and whether a lower fine applied by the authorities can still be taken into consideration by the Court as interpreted as such.

In the light of the criteria taken from its jurisprudence, the Court considers that in spite of the pecuniary nature of the penalty effectively applied to the petitioner, its low amount and the civil nature of the law punishing that minor offence, the procedure in this case can be assimilated to a penal procedure (Ezeh and Connors vs, the United Kingdom, claims 39655/1998 and 40086/1998, par. 120). Within the framework of the decision made in the case of Ezeh and Connors vs. the United Kingdom, the Court admitted that the nature and gravity of the penalty applicable to the petitioners were established **in relation with to the maximum penalty that could have been applied to them, based on the national legal provisions**(see also Demicoli vs. Malta, claim no. 1305/1987, 08.27.1991, par. 47 or Weber vs. Switzerland, claim no. 11034/1984, 05.22.1990, par. 18 and 34).

Furthermore, it should also be considered that administrative penalties do not concern a group of persons, but they address all citizens

with a view to achieving the preventive and repressive purpose of the penalty, which gives the deed a penal nature. In Romania, in the case of pecuniary penalties, prevention is achieved by diminishing the assets of the offender by the amount of the fine applied. In such cases, the Court ruled that the minor offense fine does not have the nature of compensation for covering a prejudice, and its repressive and preventive function gives it a penal nature (Ziliberberg vs. Moldova, claim no. 61821/2000, 02.01.2005, par. 33).Otherwise, even the doctrinal definition of the minor offense makes us think of its repressive nature, the fine being considered as "the main pecuniary penalty that consists in the forced diminution of the assets of the penalized person" (Dana Apostol Tofan, Regimul juridic aplicabil contravenţiilor al contravenţiilor... page 13). The seat of the matter explicitly specifies the administrative nature of the fine. According to this text, it consists in an amount of money payable by the offender who commits a minor offence with a higher degree of social threat[1] and which becomes a revenue to the state budget or, as the case may be, to the local budgets.

The lack of gravity of the punishment (for instance the low amount of a fine) applied to the petitioner cannot deprive a minor offense of its penal nature. (Ozturk vs. Germany, par. 54.). In the case of the petitioner Anghel, it may be considered that the amount of 59 Euro at the level of the year 2002 was not a low one, taking into account the fact that he probably was retired and consequently the harshness of the penalty was as much higher as 2 million ROL (59 Euro) represented a significant part of the revenue for a person of this social class. The judgment of the Court concerning the gravity of the fine is **related to the actual situation of the petitioner**. For instance, in the above-mentioned case, Ziliberberg vs. Moldova (Ziliberberg vs. Moldova, par. 34) it was established that the fine amounting to 36 MDL (3.17 Euro) was over 60% of the monthly income of the petitioner, and the maximum penalty applicable was 90 MDL (7.94 Euro at the time).

Moreover, as in the Anghel case, should he have failed to pay the imposed fine, he would have been applied a punishment under the form of administrative arrest under the circumstances imposed by article 26 of the Minor offense proceedings code for a period of 20 days. However, even if the fine could not have been changed into arrest in this case, this fact could not have been decisive in the classification of a minor offense as having a penal nature in the meaning of article 6 of the Convention.

What can be concluded is that in relation with the European justice, the minor offense in the Romanian law has a penal nature, the more the minor offenses are serious enough and the punishments applied are big enough (very high fines, sometimes higher than the penal ones, confiscation of highly valuable property, (See Grecu vs. Romania, claim no. 75101/2001, 11.30.2006,) and before the Government Emergency Ordinance 108/2003 passed, the existence of minor offense imprisonment), all these being generally applicable and having a preventive and punitive nature (L. Popescu, Procedura contravențională judiciară. Natură penală în sens penal autonom. Prezumția de nevinovăție. Dreptul la un proces echitabil. Neconvenționalitate, Curierul judiciar 10/2007, C. H. Beck Publishing House, Bucharest, page 14.).

We shouldn't leave out the fact that also in other legal systems in the case of minor offenses a special procedure is applicable (for instance in France, in the case of minor offences it is not necessary to issue a penal ordinance) (M. Ursuța, Procedura contravențională română..., page 82.) and that in certain cases related to minor offences the Court of Strasbourg ruled that, as it was the case of a minor offense, it does not belong to the penal matter. (Gutfreund vs. France, June 12th 2003, claim 45.681/1999, 09.12.2003, par. 3). For instance, in Gutfreund vs. France, the petitioner had been applied a fine of 1000 Francs on October 8th 1997 -in the context in which the maximum fine was 5000 Francs- for attacking his wife, attack that resulted into her impossibility to work. However, as suggested earlier, the Court has to analyze the presented situation in this case depending on the actual details, as for some persons the amount of 59 Euro (Anghel vs. Romania) may be considered a tiny amount, but for other it may be a significant part of their monthly income.

2.2.c. Nature of the deed

Even though the states are allowed not to penalize certain crimes and / or eliminate them, as in this case, in an administrative way rather than in a penal way, the authors of the behaviors considered to be against the law should not have to find themselves in an unfavorable situation for the mere fact that the legal policy applicable differs from the one applicable in penal matters (Grecu vs. Romania, par. 58).

According to this criterion, if the penalizing norm addresses an entire population (all citizens), then it usually is a penal norm (Weber vs. Switzerland, claim 11.034/1984, 05.22.1990, par. 33) whereas "disciplinary penalties are established by law in order to ensure the observance of conduct norms by certain groups of persons".

For instance, the obligation to pay taxes does not come within the natural field of application of article 6 to the extent to which the Court

considers that fiscal issues are part of the essential prerogatives of the public authorities (Ferazzini vs. Italy, claim no. 07.12.2001. Gutfreund vs. France, June 12th 2003, claim 45.681/1999, 09.12.2003, par. 3).

This European court ruled that the fiscal matter belongs to the "tough core" of the prerogatives of public power, the public nature of the relationship between the taxpayer and the collectivity remaining prevalent. It considers the fiscal contentious matters as being outside the sphere of civil obligations, in spite of the patrimonial effects these contentious administrative matters bring naturally to the situation of the taxpayers (V. Berger, Jurisprudența Curții Europene a Drepturilor Omului, 5th edition, the Romanian Institute of Human Rights, page 296, Ferazzini vs. Italy).

Still, if the authorities impose fines or other penalties through a penal punishment within the framework of a fiscal contentious matter, the provisions made by article 6 in the matter of criminal charge are applicable (Vastberga Taxi Aktiebolag and Vulic vs, Sweden, claim no. 36985/1997, 07.23.2002, par. 77).

2.2.d. The presumption of innocence and the issue of turning the evidence task

According to paragraph 54 of the decision made for Anghel vs. Romania, the petitioner complained that the national courts that gave rulings over his contest did not take into account the fundamental guarantees set by article 6 of the Convention, among which the presumption of innocence. He reproaches the courts that they administered the proofs badly, especially by reversing the obligation of presenting evidence.

As far as the minor offence proceedings are concerned, it well-known that it is complemented by the norms of the Civil proceedings code and not by those of the Penal proceedings code, so that the person who formulated the legal contest against the official report of minor offence is forced to prove their innocence. This proceeding issue raised a lot of controversy both in the doctrine and especially in the practice of courts, as these latter had to face many exceptions of unconstitutionality regarding the provisions made by the Government Ordinance 2/2001 and in the minor offence proceedings.

Turning the task of evidence was for instance analyzed in the decision 407 dated 11.04.2003 of the Constitutional Court of Romania, where the Court concluded that "even if the legislator disincriminated the minor offences, according to article 34 of the Government Ordinance no. 2/2001, […], the court having competence to solve the complaint filed

against the official report of finding and penalizing the minor offence holds the obligation of following certain procedural rules which are distinct from the ones of the civil trial law, and based on which as the author of the exception maintains, the task of evidence belongs to the one who states something in court. Thus, par. (1) of the specified law text sets with no distinction that the court competent to solve the complaint checks whether it was filed within the deadlines, hears the one who filed it and the other persons subpoenaed, among which, according to article 33 of the ordinance, also the body that applied the penalty, administers any other proof provided by law, which is necessary in order to check the legality and the grounding of the official report and makes a decision concerning the penalty, the compensation established, and the measure of confiscation. The provisions made by par. (2) of article 34 of the ordinance stipulates that the court decision by which the complaint was solved can be attacked by means of appeal, and the motivation is not compulsory. Thus being, under this aspect too, the Constitutional Court did not consider that the provisions made by the Government Ordinance 2/2001 are in breach of article 6 of the Convention, on the contrary, according to their decision, "**the criticized legal provisions fully comply with the requirements of article 6 of the Convention for the defense of human rights and fundamental liberties, and the procedure for solving the complaint against the official report setting the establishment and penalization of the minor offence does not reveal the turning of evidence task, which would be contrary to the interests of the offender, but rather the exercise of the right to defense**".

In another decision of the Constitutional Courtit was also decided that the articles 33 and 34 of the ordinance, both regarding the judgment procedure, including the administration of proofs by the court vested by **complaint** to exercise the grounds and legality check for the official report of minor offence include no provision that may reveal some inequality of arms between the litigating parties (such parties being in this case the offender in his capacity as contester and the body of which the contesting agent having applied the penalty makes part in the capacity as respondent). Since the initiative of the legal action belongs to the contester who filed the complaint against the official report of minor offence, it is on him that is incumbent the task of evidence according to the general principle of common law in the civil proceedings.(Decision 380 dated 10.14.2003 of the Constitutional Court).

The contested act is considered to be an individual administrative act (it consequently benefits by the presumptions of authenticity, legality, and veracity); therefore, the contester has the duty to prove the

unlawfulness and the groundlessness of the official report in order for it to be cancelled. (C. L. Popescu, quoted work, page 12)

The Strasbourg Court reminds that in penal matter the problem of administering proofs is analyzed depending on paragraphs 2 and 3 of article 6 of the Convention. In combination with paragraph 3, paragraph 1 forces the contracting states to take positive measures. They consist especially in informing the accused, within the shortest delays, on the nature and cause of their charge, in granting the time to prepare their defense or in the possibility to allow them to question or ask for the hearing of the accusation witnesses or to obtain the summoning or hearing of the witnesses for the defense. This last right implies not only the existence of balance between accusation and defense (Bonisch vs. Austria, 05.06.1985, par. 32) in the matter, but also the fact that the hearing of witnesses should generally have a contradictory nature (Barbera vs. Spain, claim no. 10.590/1983, 12.06.1988, par. 78).

It cannot be said that in the case of Anghel vs. Romania the witnesses for the defense were not heard, but it comes out clearly that the court's clerk's office recorded only partially their statements and the insistencies of the petitioner to hear them again were not taken into consideration, passing directly to the judgment of the case. We consider that the most critical fact was that the court emphasized the statements of the accusation witnesses (an attorney from Pucioasa court and another clerk from the archives of the same court), thus violating the "principal of equal arms" precisely through the inequitable and biased attitude in the trial. This principle is considered a very important one by the Court and it translates by the idea that each party in the trial must have equal chances to present their cause (Neumeister vs. Austria, claim 1936/1963 on 06.27.1968) and that nobody should have a substantial advantage in relation with their adversary. Similar cases in which witnesses were only allowed for partial stating of the facts or in which some witnesses weren't even subpoenaed by the national courts competent created the jurisprudence based on which the Court justified the violation of equal chances in the case of Anghel vs. Romania too (Blum vs. Germany, par. 29, 32, and 33).

A parallel can thus be made with De Haes and Gijsels vs. Belgium, 1996 and Mantovannelli vs. France, 1997, where the Court considered that the violation of arms' equality was achieved through the right of the party to present some proof or Bonisch vs. Austria where the petitioner was denied the hearing of a key witness.

Moreover, in the Romanian legislation, by the name of "offender" given to the doer from the beginning the principle of the presumption of

innocence invoked by the provisions made by article 6 is violated. From the very moment of their being penalized for a minor offence the person is qualified from the start as an offender, their presumption of innocence is consequently totally out of the question. The word "offender" is the equivalent of "criminal" in the penal matter, where the person alleged to have committed a penal act is called in the first instance defendant, then accused, but they benefit in the penal proceedings stage and before the court of the presumption of innocence (in dubio pro reo) until the moment a final decision is passed against them.

Article 6 par. 2 of the Convention provides that "any person charged with a crime is presumed innocent until their guilt is legally established". The Court decided that the presumption of innocence inter alia that "in fulfilling their prerogatives, the members of the panel of judges should not have the preconceived idea that the accused committed the crime they are charged with; the task of proof belongs to the accusation and any doubt should be beneficial to the accused (Barbera, Messegue and Jabardo vs. Spain,. Claim 10590/1983, 12.06.1998, par. 68). In the opinion of the Court, the presumption of innocence is not observed if without previously establishing legally the guilt of an accused and especially without this latter having the opportunity to exercise their rights of defense, a judicial decision that concerns them shows that they are guilty (Minelli vs. Switzerland, claim no. 8660/1979, 03.25.1983). Sliding from the idea of penal liability to the notion of guilt illustrates the very relative nature of such a distinction. Any legal system can decide upon the presumptions de facto or de jure; obviously, the Convention does not oppose in principle any obstacle to them, but in penal matter it forces the contracting states not to exceed the reasonable limits taking into account the gravity of the stake and preserving the rights of the defense (Salabiaku vs. France, 10.07.19989, par. 28).

This issue was amply debated by the Constitutional Court within the framework of the decision 183/2003, decision grounded on raising an exception on unconstitutionality concerning the provisions made by articles 16, 17, 18, 25, 27, and 18 of the Government Ordinance 2/2001, all of them concerning the use of the term of offender for minor offences, and article 34 regarding the collocation "necessary for checking the legality and grounds of the official report". In the opinion of the author of this exception, the usage of the notion **offender** in the indicated legal texts for the person of which it is stated that they may have committed a minor offence has the significance of qualifying them as person guilty of having committed an illicit deed and not as a person investigated or charged with such a deed, which is against the provisions made by article 23 par. 8 of the

Constitution, according to which "until the court decision of conviction is declared final, the person is considered guilty". The Constitutional Court considered that the mere designation of a person as an offender is not the same as establishing their guilt. The usage by the legislator of the notion of offender in the administrative law or of criminal in the penal law does not mean the defeat of the presumption of innocence as set by the article 23 par. 8 of the revised Constitution. This constitutional provision is applicable both in the penal field and in the field of minor offences, as no person having committed a crime (criminal) or a minor offence (offender) can be excluded from the benefit of this trial guarantee before a court decision is declared final. (Curierul judiciar 7/2003, All Beck Publishing House, Bucharest, page 60).

The author of the exception of unconstitutionality also states, based on the same exception, in case the offender is considered necessary and informs the court has the trial capacity as contester, and the body that applied the penalty has the capacity as respondent, so that the task of turning the presumption legality and grounding of the official report of minor offence, even if the task of proof is incumbent on the offender and not on the body that applies the penalty.

The issue of these legislative "gaps" was also resumed in other moments by the Constitutional Court, in the decision 349 of 09.18.2003, the author of the exception of unconstitutionality supporting his critic by approaching in different ways the same reasons of unconstitutionality. Thus, he did not invoke anymore only the fact that the notion of offender used by law supposes implicitly the guilt of the one who only allegedly committed the minor offence, but also the fact that the agent ascertaining the minor offence establishes the guilt of the person without being the impartial and independent tribunal required by article 6 of the European Convention on Human Rights, but a mere administrative body.

From the point of view of the Romanian law, and even of the terminology it uses, the legislator qualifies as offender the person who guiltily commits a deed provided by law or other administrative acts. Consequently, the guilt is one of the intrinsic elements, defining ones for the deed qualified as minor offence, which has to be proved for a person alleged to have committed such deed to be qualified as an offender. Before the Government Ordinance 2/2001 came into force, the law 32/1968 defined the minor offence as having a degree of social threat lower than the crime, an issue that the text of the new regulation did not bring up anymore.

The same situation can be met in penal matter, where guilt belongs to the essence of the crime, and it must be proved in court for a person to be

qualified as a criminal. The logic behind depenalizing the minor offence, also according to the jurisprudence of the European Court of Human Rights makes it necessary that further to this process the situation of the alleged offenders should not become more difficult than the one of the alleged criminals. In this context, what matters is not as much the terminology used (offender or criminal), but legal regime attached to the respective terms (E. S. Tănăsescu, Contravenții. Prezumția de nevinovăție. Sarcina probei. Aplicarea principiilor dreptului penal în materie contravențională. Comentariu asupra deciziei 349/18.09.2003 a Curții Constituționale, Curierul judiciar, 12/2003, All Beck Publishing House, Bucharest, page 32).

The biggest issue here is not the terminological one, but the fact that the law does not secure the minimal safety and guarantee supposed to protect the human being from the abuse of public authority. Analyzing the cause, the constitutional judge himself concluded that "from the point of view of the ascertaining agent, the person is guilty, and the official report of contravention has the nature of an administrative act of finding until it is declared final". Therefore, this person (the offender) is ab initio considered to be guilty, eliminating from the discussion the presumption of innocence, of which benefits even a person alleged to have committed a more serious deed, a crime. Their only chances to prove their innocence are to contest the official report of minor offence, to make a complaint against it and then appealing against the decision made by the court on the substance, only such a decision passed by a court can eliminate the spectrum of their guilt. It can thus be seen that in Romania, in the case of minor offences, the administrative stage does not observe the presumption of innocence (what happens for instance in the penal proceedings), on the contrary, the starting point is the premise established by the ascertaining agent that the doer is guilty, and only during an eventual trial the court is to establish whether the suppositions of the ascertaining agent were or were not correct, which proves the discrepancy between these legal provisions and the provisions made by article 6 of the Convention. E. S Tănăsescu, quoted work, page 33).

2.2.e. The notion of "impartial tribunal" in the light of the text of the European Convention on Human Rights

We consider that in the Anghel case the provisions made by article 6 with reference to an **impartial tribunal** were also violated. According to the European jurisprudence, impartiality is proved as the absence of all prejudice or all preconceived idea regarding the solution to a trial. This principle reflects an important element of the preeminence of the law, namely that the verdict of the tribunal is final and compulsory, unless

invalidated by a higher jurisdiction on grounds of illegality or inequity (C. Bîrsan, quoted work, page 493).

In spite of the special nature of the procedure at hand that was initiated further to a legal contest made by the petitioner Anghel with regard to an official report and not to a complaint made by the injured party on grounds of article 204 of the Penal Code ion force at the time the deeds were committed(Anghel vs. Romania, par. 63). The Strasbourg Court that the possibility of the petitioner to confront the accusation witnesses in the presence of the judge who should finally make a decision for the case, remained an essential guarantee. Indeed, the observations of the court regarding the behavior and the credibility of a witness could have had consequence on the results of the proceedings (. P. K. vs. Finland decision no. 37442/1997, declared final on 07.09.2002 and Milan vs. Italy, claim no. 32219/2002, on 12.04.2003).

As regards the second testimony that the court believed (the archive clerk, R), according to the documents at file, the court dismissed both the request of the petitioner to confront this witness and the witnesses for the defense and the one filed for a hew hearing of these latter in the light of the facts presented in the statement of R. but here we are talking about decisive proofing means, since the testimony of R threw serious shades of doubt over the veracity of the defense testimonies, which, moreover, were the only proofs on which the petitioner would support his contest.

More than that, the Court found another error in this case, namely the fact that the sentence given by Pucioasa Law Court was confirmed by the Dambovita Law Court Decision, which did not indicate in addition the reasons for which it considered, according to the pattern set by the first panel of judges, that the testimonies for the defense were not credible.

Analyzing the idea of independence and impartiality of the courts, the Strasbourg judges considered that any court must be independent at the same time both to the executive and to the parties concerned (Campbell and Fell vs. the United Kingdom, claim no. 7819/1977 and 7878/1977, 06.28.1984, par. 78). Other cases in which the important testimonies in the trial were granted unequal importance drew the attention of the Court, a similar case from the point of view to the Anghel vs. Romania being Bonisch vs. Austria, where there was a violation of article 6(1) for the fact that the witness called by the defense did not benefit by the same prerogatives as the accusation witness (Bonisch vs. Austria, claim no. 8658/1979, 05.06.1985, par. 2.) In this case Mr. Bonisch brought to the attention of the Court the violation of article 6(1) and 6(3) letter on grounds that the national courts treated differently (partially) the two experts

concerned, hearing the expert for the defense only once and then only in the capacity as a mere witness.

The impartiality of a court was defined with the analysis of the case Piersack vs. Belgium, (Piersack vs. Belgium, claim no. 8692/1979, 10.01.1982, par. 30) when the Court considered that "If **impartiality** is usually defined by the absence of prejudice or bias, especially in the light of article 6 par. 1 of the Convention, it can be appreciated in various ways. Distinction can be made between the subjective part trying to determine what such a judge thinks in his mind under such circumstances, and the objective part that contributes to investigating the fact whether he offers guarantees enough to exclude any legitimate doubt in this respect" (The right to a fair trial, Guide regarding the application of article 6 of the European Convention on Human Rights, page 30, taken from www.humanrights.coe.int, consulted on 01.02.2009).

In conclusion, the Court's opinion was that failing to penalize the minor offence raises no problems in itself, on the contrary, **failing to observe the fundamental guarantees** – among which **the presumption of innocence** – which protects individuals from possible abuse by authorities imposes in this respect a problem based on article 6 of the Convention. Reiterating the importance on the occasion of a procedure that may qualify as "penal", of such a guarantee called to reestablish the balance between the presumed authors of the illegal deeds and the authorities appointed to pursue and penalize them, it concludes that **the case of the petitioner was inequitably judged**, according to article 6 of the Convention. This is precisely why the Court unanimously **declared the claim admissible in terms of the complaint grounded by the petitioner** on the inequitable nature of the finding action of an official report for minor offence, decided that article 6 of the Convention was violated and obliged the Romanian state to pay the petitioner within 3 months of the date the decision is declared final (in this case 03.31.2008) 1200 Euro for the moral prejudice plus any amount that may be due as tax, as converted into Romanian Lei at the exchange rate of the day of payment.

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14. Lutz vs. Germany

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21. Ferazzini vs. Italy

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THE RIGHT TO DEFENSE - THE SOLICITOR'S ATTRIBUTIONS IN THE CRIMINAL TRIAL

Abstract

This paper aims at analyzing the solicitor's attributions in the criminal trial – especially referring to debates. It is divided into four sections, as follows: 1) The organization and exercise of the lawyer's profession established by Law no. 51/1995, with a special emphasis on the criminal trial, 2) The lawyer's participation in the criminal trial, 3) The lawyer's rights and liabilities in the criminal trial and 4) The lawyer's role in the criminal trial debates.

In this paper we chose to analyze the lawyer's activity according to the Romanian laws: Law no. 51/1995 regarding the exercise of the lawyer's profession, The Constitution, Law no. 92/ 1992 regarding the organization of the justice system, The Code of penal proceedings, etc. and international documents such as The European Convention for the human rights.

The main importance of this subject lays on the fact that the lawyer's attributions in the criminal trial constitutes a real guaranty for the right to defense during the trial – the juridical assistance is the most important aspect of the right to defense. Juridical assistance can be exercised for any of the parties in the trial, but the most important and complex is the defense of the defendant. This is considered a very complex matter and the exercise of this right for the defendant is considered to be properly done if a lawyer participates in the criminal trial. Romanian law – as well as international laws – provides for situations when the legal assistance of the defendant is imperative and the criminal trial cannot take place in the absence of a lawyer.

This paper is meant to underline the importance of the right to defense, which is considered to be one of the most important rights internationally , deserving special attention from our part as lawyers.

The Lawyer's Role in Judicial Debates

Legal provisions regulating the defense institution have undergone successive alterations after 1990. Out of these, of the utmost importance are Law no.90/ 20th February 1990 modifying Decree no. 281/1954 on organizing and exercising the lawyer's profession, Law no.129/ 24th April 1990 on modifying and completing Decree no.251/1978 on pensions and other rights of social assistance pertaining to lawyers. At present, the organization and exercise of the lawyer's profession is regulated by Law no.51 / 7th June 1995 which abolished the other norms in the field.

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These regulatory statutes, whose purpose is, among others, to define the lawyer's statute within the system of criminal trials, start from the regulations on the right to defense and the defense counsel's rights included in the Penal Code, the Romanian Constitution, the Law of judicial organization no.92/1992, as well as the European Convention on human rights.

The defense counsel's activity within the criminal proceedings system is of crucial importance, as it represents one of the guaranties of the right to defense. The Universal Declaration of Human Rights includes, among the fundamental human rights, the right to defense. Judicial assistance is seen as a fundamental guarantee of this right.

The defense is the individual who takes part in the criminal trial in order to grant judicial assistance to one of the parties. Even if judicial assistance may be granted to either party, the legal provisions on this matter mainly refer to the judicial assistance of the defendant or the accused.[1]

Defense is seen as a complex process activity requiring that the efforts of the individual fighting for the defense of his rights should be accompanied by the participation of a defense counsel.[2]

According to the provisions of art. 1 alin.2 in Law no.51/1995, on organizing and exercising the lawyer's profession, the defense counsel may be only a lawyer, member of the Advocates' Bar, who is practising in one of the judicial forms stipulated by law: individual practice, associated practices or professional civil societies.

By law, for an individual to be granted the statute of lawyer, he has to cumulatively meet the following requirements:

- He should be a member of a Romanian Bar. In order to be a member of the bar, he should first follow the procedure of joining the bar, as well as the procedure of being received into the profession. An individual who is a Romanian citizen and may exercise his civil and political rights may be a member of the bar.
- He should not be incompatible by law. The cases of incompatibility are as follows: remunerated activity for another profession, activities damaging to the dignity and independence of the lawyer's profession or public decency, direct performance of trade activities.

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[1] Grigore Theodoru – *Drept procesual penal. Partea generală*, Cugetarea Publishing House, Iaşi, 1995, p.156.

[2] Ion Neagu – *Drept procesual penal,* Global Lex Publishing House, Bucharest, 2002, p.196;

Within the criminal trial, the defense does not have the position of a party, as he has no rights and obligations resulting from exercising a criminal or civil case in a criminal trial, but rights and obligations originating from the contract of judicial assistance concluded with the client and by law. He is to be placed on the position of the party he defends, but without identifying with him.[1]

According to the provisions in art.1-8 of Law on organization and exercising the lawyer's profession and art.1-15 of the Lawyer's Profession Statute, exercising the lawyer's profession is ruled by the following principles:

-the principle of legality. It requires that the lawyer's profession should be exercised according to the Constitution, the law, the professional statute and international conventions that our country has joined. The lawyer has the right and obligation to defend only the legitimate rights and interests of his client, being required to provide the client only with legal advice, corresponding to legal provisions and professional creed.

-the principle of independence. The lawyer's independence concerns both the relations to the physical and juridical persons he assists or represents, and the relations to the courts, authorities, institutions, other physical and juridical persons and even the organs of advocacy (the Union of the Advocates of Romania and the Advocates' Bars). According to this principle, the lawyer may not be subject to pressure from the part of the public authorities or other physical and juridical persons.

-the principle of liberty. According to this principle, the lawyer is free to choose, or to change his option for, one of the forms of exercising this profession provided by law, to get involved in the causes of his choice, to choose the means whereby to exercise the right to defense that he deems necessary to meet the client's interests. The lawyer's freedom may be limited by law (i.e. the cases of compulsory legal assistance that the lawyer cannot refuse, in case he was summoned ex officio, or the necessity to observe the solemnity of trial proceedings, to depose notes or written conclusions at the request of the court) or the client's interests (according to the State, the lawyer may not act outside the limits of the contract with his client, except for the cases provided by law).

-the principle of cooperation with the criminal legal organs. In virtue of this principle, the lawyer should cooperate with the legal organs in order to find the truth and justly solve criminal cases. According to the law, the lawyer carries a social mission, in the service of truth and justice.

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[1] Gheorghiţă Mateuţ – *Procedură penală. Partea generală,* vol.I, "Chemarea" Foundation Publishing House, Iaşi, 1997, p.113;

-the principle of the educational role. On exercising his profession, the lawyer has the obligation to re-educate his client by his legal advice in the spirit of abiding by the law, as well as the other individuals by the pleas he delivers in court. The lawyer has the obligation to plead in a dignified manner in front of the court and the case parties, to show conscientiousness and professional probity, being forbidden to use language that might prove offensive to the court. Also, the lawyer has to advise his client in a correct and diligent manner, in accordance with the law and his professional conscience.

-the principle of professional deontology. I the law on organizing and exercising the lawyer's profession it is stipulated that the lawyer's profession is subject to the rules of professional ethics. The relations between lawyers and their clients should be based on honesty, probity, correctness, sincerity and confidentiality. Similarly, the lawyer has to advise his client in a proper manner and in all due diligence in order to defend their legitimate liberties, rights and interests.[1]

For a lawyer to acquire the quality of defense counsel, it is necessary to be chosen by the party or to be appointed by the state in the cases stipulated by law and by art.142-148 of the Statute of the Advocate's Profession.

As shown above, the defense has a special position among the participants in the criminal trial, as he is not one of the parties in the trial and therefore does not have personal interests to defend or represent.

The circumstance that the lawyer is not a party in the trial results from the provisions of the Penal Code, which by expressly and limitatively enumerating the parties, does not refer to defense. From the point of view of contradictoriality, the defense is placed on the position of the party whose interests he supports and defends, thus being able, as a rule, to exercise all the rights of that party.[2]

By his contribution to finding the truth and owing to the function he accomplishes, he is one of the main participants in resolving the criminal case.[3]

In exercising his profession, the lawyer has to cooperate with the legal organs, in order to find the truth and properly solve the case. Thus, the lawyer in the criminal proceedings, not only serves the private interest

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[1] Gheorghiţă Mateuţ – *Procedură penală. Partea generală,* vol.I, "Chemarea" Foundation Publishing House, Iaşi, 1997, p.110-113;
[2] Nicolae Volonciu – *Drept procesual penal*, EDP, Bucharest, 1972, p.94;
[3] Ion Neagu – *Drept procesual penal*, Global Lex Publishing House, Bucharest, 2002, p.201;

of his client, but also a general interest, i.e. administering justice in criminal cases.

In exercising the defense function in the trial, the defense counsel has a close relationship with his client, originating in the contract of legal assistance. The contract concluded between the party and his lawyer includes the payment of a fee which is mutually agreed upon. There are also cases when certain individuals benefit from free legal assistance.

The contract between the lawyer and his client may be cancelled by mutual agreement. The parties may unilaterally denounce the legal assistance contract, according to the provisions expressly stipulated in the contract. In the event the lawyer steps down from providing defense services on solid grounds, according to the contract clauses, he has the obligation to ensure his replacement by another lawyer, so that the interests of his client should not be injured.

The activity of the defense counsel serves the law only partially and subjectively, as he only focuses on clarifying the circumstances in favour of the party whose interests he supports and defends. For example, the defendant's lawyer should only refer to the issues favourable to the former, within the limits of the law and by using legal means.

In conclusion, together with the defense that each party can form at the trial, there is the possibility to exercise the defense by means of a lawyer who is able to provide the interested party with legal assistance. By legal assistance one should understand the support provided by defense counsel at the trial under the form of clarifications, advice and interventions as law experts. In the case of legal assistance, the defense counsel draws conclusions in the presence of the party whose interests he defends. Legal assistance may only be provided by lawyers.[1]

The parties' legal assistance is usually optional, in the sense that the interested parties may choose between defending themselves and resorting to the services of a lawyer. There are certain exceptions to this rule, viz. in some cases legal assistance is compulsory.

The provision of the Penal Code details the legal assistance of the defendant.

According to art. 171 alin.1 the defendant has the right to be assisted by has lawyer all along the prosecution and the judgement, and the judicial organs have to bring this to his knowledge.

The defendant's legal assistance is compulsory in the cases provided in art.171 alin.2, that is: if the defendant is under age, in military

[1] Ion Neagu – *Drept procesual penal,* Global Lex Publishing House, Bucharest, 2002, p.201-202;

service, concentrated or mobilized soldier, enlisted in a military educational institution, admitted in a reeducation centre or an educational medical institute, under arrest in a different case or when the prosecution or the court consider that the defendant is not able to defend himself, as well as in other cases mentioned by law.

During the trial, legal assistance is also compulsory in the cases when the law stipulates the penalty of life imprisonment or a sentence over 5 years in prison for the crime committed.

Legal assistance provided as a result of the party's request is called optional legal assistance, and the lawyer becomes chosen defense counsel.[1]

If the provisions on the compulsory legal assistance of the defendant are not observed, the sanction is the nullification of the act that has taken place in the absence of the defense counsel.

First and foremost, it is worth mentioning that the defense counsel has general rights, specific to the lawyer's profession, and special rights, determined by the specific activities occurring at each stage of the trial. The lawyer's rights and obligations in the criminal trial have acquired a greater importance as a result of the amendments granted by Law no. 32/1990, Law no.45/1993 and Law no.51/1995.

According to Law no.51/1995, the defense counsel has the following rights:

-to assist and represent the physical and juridical persons in all courts, authorities and institutions, as well as other persons;

- to insist on granting free access to justice and a fair trial;

-to provide consultancy, to draw up judicial requests, to draw up legal papers, with the possibility to certify the parties' identity, the content and the date of the documents, to defend the rights and liberties of physical and juridical persons in front of the jurisdiction and prosecution organs, as well as to use any other mans and ways suitable to exercising the right to defense by law;

-the right to a fee and the reimbursement of expenditure incurred in the interest of his client;

-to renounce the contract of legal assistance concluded with the client, in the conditions stipulated by law;

-the right to a professional practice within the constituency of the bar he belongs to, as well as to secondary professional practices within the constituency of the bars he does not belong to;

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[1] Grigore Theodoru – *Drept procesual penal. Partea generală*, Cugetarea Publishing House, Iaşi, 1995, p.161;

-to perform, taking into account the extent of the powers given by the client through the contract of legal assistance, any other acts specific to the profession, which the lawyer deems necessary in order to meet the client's interests.[1]

The defense has certain rights, depending on the stage of the trial. Thus, in he prosecution stage, he is entitled to assist the actions of prosecution, the prosecution organs being compelled to notify him on the date and place of their performance; the right to formulate claims and submit memos; the right to contact the accused in custody in order to build the defense; the right to complain, if his requests have not been granted, against the prosecution's actions. As regards the defense's right to contact the accused, it should be mentioned that he may not be hindered or pressured, directly or indirectly, by any state organ.[2]

In the judgement stage, the defense is entitled to assist the defendant in all the acts of the trial, to exert all the rights of the party (the possibility to gain knowledge about the charges, the right to formulate claims, the right to raise exceptions and draw conclusions, including written notes), the right to contact the accused in custody.

As far as the express obligations of the lawyer, provided by the statute of the advocate's profession, they are as follows: he has the obligation to practice his profession in a free and dignified manner, showing conscience, independence, probity, humanism, honour, loyalty, discretion, moderation, tact and on the basis of the feeling of co-fraternity. These obligations should be observed both in the professional and the personal life.[3]

According to the provisions of the law on organizing and exercising the lawyer's profession, the lawyer has the following obligations:

-to thoroughly study the cases entrusted to him, on hire or ex officio;

-to be present to each trial term in court or the prosecution organs or other institutions according to the warrant served;

-to plead in a dignified manner in front of the judges and the parties;

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[1] Gheorghiţă Mateuţ – *Procedură penală. Partea generală,* vol.I, "Chemarea" Foundation Publishing House, Iaşi, 1997, p.128;

[2] Ligia Dănilă – *Organizarea şi exercitarea profesiei de avocat,* Lumina Lex Publishing House, Bucharest, 1999, p.166;

[3] Ligia Dănilă – *Organizarea şi exercitarea profesiei de avocat,* Lumina Lex Publishing House, Bucharest, 1999, p.166;

-to submit written conclusions or notes each time the nature or difficulty of the case requires it or the court asks so;

-to wear a robe in court, except tribunals, and to wear the badge, even in the cases when the law does not provide for the robe;

-to grant legal assistance in the cases to which he was appointed ex officio or pro bono by the bar;

-to honour the solemnity of the court sessions, being forbidden to use language that might offend the judges, the other lawyers or parties in the trial;

-not to use, either directly or through intermediaries, procedures incompatible with the professional dignity, or publicity means aimed at attracting clients.[1]

The lawyer has the obligation to keep records on the contracts of legal assistance, to have the register of the contracts concluded with his clients, and the register book of the legal documents attested by the lawyer regarding the parties' identity, the content and date of the documents.

Debates, being the stage when the judging activity is in full swing with the participation of all the process functions (prosecution, defense, judges) are rightfully considered the climax of the criminal trial.[2]

In the legal lexicon, the term is used in a double meaning. In a broad sense, a debate is defined as the entire public display, oral and contradictory, of the court session. However, the Penal Code never employs the term in this sense. In the legal context, the debates represent a certain moment of the court session, taking place after the prosecution has been completed, according to the provisions of article 340 in the Penal Code.

In a narrower sense, debates represent that part of the court session when the prosecutor and the parties get the floor to present their point of view on the de facto and de jure situation resulting from judicial research, as well as on any other issue in the case.[3]

In this stage, a contradictory treatment is applied to the entire content of the criminal trial.

As shown above, debates focus on the core of the case, referring to the existence of the deed, the defendant's guilt, the real or personal circumstances, the resolution of the civil side and so on.

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[1] Gheorghiţă Mateuţ – *Procedură penală. Partea generală,* vol.I, "Chemarea" Foundation Publishing House, Iaşi, 1997, p.132-133;

[2] Ion Neagu – *Drept procesual penal*, Global Lex Publishing House, Bucharest, 2002, p.644;

[3] Nicolae Volonciu – *Drept procesual penal*, EDP, Bucharest, 1972, p.360;

Unlike judicial research, in debates the order set by law is mandatory.

Given that the entire judgement stage is governed by the principle of contradictoriality, legal provisions state that it is possible for the president of the court to give the floor in reply, in which case the same order must be observed.

Not giving the floor during the debates to the parties or their defense leads to mistrial which cannot possibly be remedied unless the verdict is nullified.[1]

In debates, the parties may take the floor personally or through their defense counsel.

In their pleas, the parties have to debate the issues pertaining to the case under study. The president of the court is entitled to interrupt the people speaking if they go beyond the limits of the case on trial.

As compared to judicial research, debates have lower possibilities of continuance, as reasons for continuance are much rarer in judicial practice.

Due to the fact that it is necessary that the court, with a view to giving a verdict, should have as recent a view as possible on the debates that have taken place in the trial, it is recommendable that this stage of the judgement should not be interrupted or fragmented. If there are solid grounds (debates may sometimes last for days on end), debates may be interrupted. According to legal provisions, this interruption may not exceed 5 days (art.340 alin. final).[2]

In order to observe another principle that governs the judgement stage of the trial, the orality in court, the parties are given the floor in order to present the points of view on all the aspects related to solving the case. In some cases, due to their nature or complexity, the court may ask the parties, at the end of debates, to submit written conclusions.

Article 342 alin.2 in the Penal Code states that the parties or the prosecutor may submit written conclusions, even if they have not been requested by the court.

As shown above, in the judgement stage, the defense is entitled to assist the defendant in all judgement stages, to exert all the rights of the party (the possibility to gain knowledge on the details of the case, the right to formulate requests, the right to raise exceptions and to draw conclusions, including written notes), the right to get in contact with the defendant under arrest.

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[1] Nicolae Volonciu – *Drept procesual penal*, EDP, Bucharest, 1972, p.360;

[2] Ion Neagu – *Drept procesual penal,* Global Lex Publishing House, Bucharest, 2002, p.645;

Concerning the position of the defense counsel within the trial, it is obvious that he fulfills the function of defense. By his activity the defense counsel has an important social function.

In order to be a collaborator of justice, a lawyer is granted by law a number of rights and possibilities to use honestly and in the legitimate interest of the defendant. At the same time, the defense in his entire activity should exhibit judicial conscience, permanently aiming at the honest service and dedication to the tasks of the justice.[1]

Within debates, the defense plays an extremely important role due to the characteristics of this judgement stage. The party may take the floor himself or through the defense counsel. Since this stage is very close to the deliberation stage and the verdict, the conclusions drawn are extremely important.

In his speeches, the defense has to discuss and reveal only the issues that are favourable to the interests of the defended or represented party. He has to support his arguments on those circumstances and issues which are in favour of the defended party.

The defense's position is independent in relation to the party. Even if he represents the party's interests, being bound in many ways by the latter's will, the defense becomes independent by the fact that he is called to defend only the legitimate interests of the party and only within the legal bounds.

Also, the defense is independent in relation to the prosecution, as his activity may not be prescribed or limited by the latter, unless he steps out of the legal frame.

The defense's function differs from the prosecuting function by its unilateral character. The prosecutor is the impartial and objective instrument of the law, while the defense counsel, by his very role, is a unilateral advisor of the defendant, even if he is bound to a certain legal frame that he may not transgress.[2]

In his arguments in the debate stage the prosecutor is under the obligation to submit arguments drawn from the evidence in the file, both in his and the defendant's favour. The defense, on the other hand, has the obligation to bring forth only the arguments pleading against the charge.

The defense also has to submit written conclusions to the case file in the event the court requires it or he considers that it is necessary due to the nature and complexity of the case.

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[1] Nicolae Volonciu – *Drept procesual penal*, EDP, Bucharest, 1972, p.98;
[2] Ibidem, p.99;

To be able o participate effectively in the trial, it is imperative that the defense show thorough legal training and vast general knowledge, manifest among others in mastering aspects pertaining to literature, politics, knowledge of the state and society.[1]

Mainly in the debate stage, a good lawyer has to show solid logic, spontaneity and flexibility in discussions, thoroughness in preparing his arguments and eloquence.

In addition to being able to take the floor in favour of the party whose legitimate interests and rights he defends, the court president may also give the floor in reply in order to try and counteract the arguments of the other participants in the trial.[2]

The obligation taken over by the lawyer by the contract of legal assistance is one of prudence and diligence (obligations of means), their characteristic being the fact that the debtor does not have the explicit duty to reach a certain determined result, but instead has the duty to make all the necessary efforts so that the desired result is attained.

Not reaching the desired result does not presuppose ipso facto the lawyer's lack of diligence, viz. his lack of skills and thoroughness, which is non-fulfilling his very obligation. The client has to prove the guilt that the lawyer might have shown in carrying out his duties, which, unlike the situation when the lawyer does to fulfill his obligations of result, is not a presumed guilt.[3]

Depending on the party whose interests he defends, the lawyer's conclusions may be of acquittal or discontinuance, or may refer to mitigating circumstances for the defendant (real or personal), if he serves the interests of the defendant, or of conviction if he is the defense of the injured or the civil party. If he is the counsel of the defendant or the party who is liable in a civil suit, he will argue about the circumstances that justify the removal of their civil liability, such as for instance that the damage is not the result of the crime on trial, that the amount of financial loss is smaller, etc.

Even if he is not a party in the trial, the defense counsel is situated on the position of the party whose rights and interests he supports and defends. In the judgement stage he enjoys a broad range of rights, being theoretically able to exert all the rights of the party he defends.

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[1] Ion Neagu – *Drept procesual penal,* Global Lex Publishing House, Bucharest, 2002, p.201;
[2] Ibidem, p.201;
[3]Ligia Dănilă – *Organizarea şi exercitarea profesiei de avocat,* Lumina Lex Publishing House, Bucharest, 1999, p.194;

The essential, traditional role of the lawyer consists in taking over the obligation of defending the rights and interests of an individual and argue in the latter's favour, to develop, mainly orally, the arguments at the basis of the legal defense.[1]

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[1] Ligia Dănilă – *Organizarea şi exercitarea profesiei de avocat,* Lumina Lex Publishing House, Bucharest, 1999, p.175.

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THE RIGHTS OF EUROPEAN CIVIL SERVANTS

Abstract

The paper conteins an analysis of the rights of the european civil servants stipulated in the Statue of Public Servants of the European Communities. The presentantion also conteins a comparison with the rights that are established in the national laws of european states regarding the public servants.

This article is divided in 12 sections each representing a right of the public servants of the European Communities: 1) The right to freedom of speech and opinion; 2) The right of association 3) The right of going on strike 4) The right of yearly leave of absence 5) The right to stand for election 6.) The right to a career 7.) The right to remuneration for services rendered 8.) The right to pension 9.) The right to professional improvement 10.) The right to aid and assistance. 11.) The right to be informed in writing about any individual decision concerning the public servant 12.) The right to petitioning and free access to European justice.

As a result of this study we feel intituled to draw the following conclusion: most of the rights of the european civil servents can be also found in the national law systems of the european countries but the first contain special dispositions due to the international character of their function.

The core of the topic is represented by Title II of the Statute of Public Servants of the European Communities, named "The rights and duties of public servants". According to these regulations, public servants benefits from the following rights:

1) The right to freedom of speech and opinion

This right is also stipulated in the European Convention of the Human Rights[2] in article 10 which states that "*any individual is entitled to freedom of expression. This right comprises the freedom f opinion and the freedom to receive or communicate information or ideas without the interference of public authority or considering borders.*"

As far as this right is concerned, specialised literature considers that it has to be analysed differently in service and outside service.[3] While

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[2] The European Convention of Human Rights was ratified in Romania by Law no. 30 / 13 May 1994.

[3] Jean Marie Auby, Jean Bernard Auby, – *Institutions administratives. Organisation générale. Fonction publique. Contentieux administratifs. Interventions de l'administration dans l'économie. Prix. Planifications. Aménagement du territoire,* Dalloz, Paris, 1996, 7e édition.

performing his job-related duties, the public servant has an obligation of neutrality. Thus, they have to show loyalty towards the institution they are part of.

Outside service, public servants have to obey an obligation of reserve, of measure in expressing their personal opinions so that not to harm their own prestige or the institution where they exert their professional duties.[1]

The obligation of reserve is expressly stipulated in the legislation of certain member states of the European Union, and in others, such as France, it has no legal basis, being in these cases a jurisprudence issue in its nature.[2]

According to art.17a (96), public servants are entitled to freely express their opinion provided they abide by the principles of loyalty and impartiality. The Statute further states that the public servant who wishes to publish, on its own or in collaboration, a text that might relate to the activity of the community institution, he has the obligation to previously notify the Appointing Authority. If the Appointing Authority considers that the text is harmful to the Communities' interests, it will have to inform the public servant in question about its decision, in writing, within no more than 30 working days since receipt of the text. In case this decision is not communicated within this term, it is considered that the Appointing Authority has raised no objections.

2) The right of association

This right is stated in article 24b(96) of the Statute which stipulates:"*public servants have the right of association; especially, they may be members of unions or professional organisations of European public servants*".

The right of association represents the possibility of the citizens "*to freely associate into parties or political formations, unions, employers' associations, or other forms or types of organisations, leagues or unions, to the purpose of participating in the political, scientific, social and cultural life, in order to meet a number of legitimate common interests*".[3]

Thus, the above definition leads to the idea that the right of association comprises several components. Article 24 b (96) states that

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[1] Dana Apostol Tofan – *Drept administrativ*, vol I, All Beck, Bucharest, 2003, *op.cit*, pp.306-307.

[2] Simona Cristea – *Libertatea de opinie a funcționarilor din România. Studiu comparat cu Franța*, in Curierul Judiciar no.12/2003, p.114.

[3] Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu – *Constituția României, revizuită, comentarii şi explicații*, All Beck, Bucharest, 2004, p.82.

especially European public servants may be members of the unions and professional associations of European public servants.

The right of union association is also included in the European Convention of Human Rights, together with the right of peaceful association (art. 11 alin.1) and article 5 in the European Social Chart entitled "union law".

The public servants' right of association was also reassessed by the covenant of September 1974 regulating the relations between the Community and the unions and professional bodies.

At preset there are several unions in existence[1], the most important being The European Public Function Federation (F.F.P.E) which was set up in 1962, whose mission includes the defense of the interests of the agents of European institutions, the independence and excellence of the public function (predominantly professional orientation and not so much union-related) and l'Union Syndicale (Union Organisation). The two unions are the most important as they are present n all community organisms.

3) **The right of going on strike**, which despite the fact that it is not expressly regulated in the Statute, is also acknowledged for European public servants.

The laws of the European states are different in regard to acknowledging the right of going on strike for the public servants. Thus, they may fall into several categories:[2]

- states not acknowledging this right of the public servants, such as Belgium, Denmark, Portugal, Germany;
- a second category consists of the states whose legislation does not expressly provide for the right of going on strike, but exercising this right does not trigger sanctions (U.K., Northern Ireland);
- states where there is a general interdiction of strikes in public service, which, when breached, triggers disciplinary or even penal sanctions;
- the final category is made up of states that expressly provide for the public servants' right of going on strike, but with the exception of certain categories of public servants, such as members of the military, or

[1] The Union of International and European Public Servants, the Union of European Public Servants, The Association of the European Public Servants, Renewal and Democracy.

[2] Verginia Vedinaş – *Legea nr.188/1999 privind Statutul funcţionarilor publici comentata,* 3rd edition, Lumina Lex, Bucharest, 2004, pp.85-86, Verginia Vedinaş, Constanţa Călinoiu –*Statutul functionarului public european,* 2nd edition, Universul Juridic, p.63.

police officers. This category includes states such as France, Spain, Greece, Italy and Luxembourg.

4) The right of yearly leave of absence

According to art.57 in the Statute, the public servants are entitled to a minimum of 24 working days and a maximum of 30 days. In addition to this leave, European public servants may also benefit from a special leave of absence at their request. The means of granting the leave are specified in Annex V of the Statute. According to it, the special leave is given in certain cases expressly stated, such as: marriage, changing the place of residence, child birth, death of a relative, etc.

Furthermore, independent from the leaves mentioned above, pregnant women are entitled, on the basis of a medical certificate, to a 20-week leave, starting at most 6 weeks before the likely date of birth and ending no sooner than 14 weeks after the date of birth.

5) The right to stand for election

In case the European public servant was elected to such an office, there are 2 possibilities: the public servant may perform both functions, i.e. public and elective, as the Statute mentions the fact that the former may be performed either the same as before the elections, or on a half-time basis, or the public servant is considered on a personal leave of absence during the term of election. The appointing authority will opt for one of the possibilities, taking into account the importance of each function and the duties bearing on the individual.

Thus, it may be concluded that the Statute provides the public servants integrated in community structures with the possibility to stand for election, but exerting this right presupposes, in some cases, requiring a personal leave of absence for the term of holding office.

As for the public servants' possibility to stand for election, the legislative systems of the member states of the European Union display a variety of situations.

In the English law system, there are several categories of public servants in point of their right to stand for election. According to this criterion, there are:[1]

- wage earners and manual labourers, who have no interdictions to standing for election;
- the second category groups together the individuals who can take part in activities with a political or elective character, at a national or local level, provided they obtain a prior authorisation to this effect;

[1] Verginia Vedinaş, Constanţa Călinoiu – *op.cit.,* p.66.

- superior public servants, who include the individuals whose ranking is similar to a minister's or whose activity imposes an important contact with the public, who are forbidden to participate in political or elective activities on a national level. They may participate in such activities locally only on condition they obtain a prior authorisation to this effect.

There are similar regulations in Ireland. This conception is based on the principle of *political neutrality of the public servant,* which requires the individual in question to choose between a career in administration or in politics.[1]

In other states such as France and Germany, the situation in this matter is totally different. Thus, in France public servants may elect and be elected. Those public servants who have been elected for a local office (municipal, general or regional councillor) may cumulate the office with the function. However, there are norms included in the Elections Code which provide incompatibilities. In this respect, the public servant who has been properly elected has to choose between the office and the public function. In case he chooses the office he has been elected in, he may request to be detached on that position. If the public servant is elected for Parliament, he is lawfully detached.[2]

So, in these situations public servants preserve the right to return to the public function at the end of the term, as well as the right to be promoted and retire from this position.

Similar regulations are to be found in other European states, such as Portugal, Spain, Italy, Denmark, Sweden, etc.

Other European states provide for the public servants' right to stand for election, but it has certain negative consequences, such as the obligation to step down from the public function (the Netherlands) or the loss of certain career benefits (Belgium).[3]

6.) The right to a career

In specialised literature, career is defined as the development over time of the professional situation of a public servant, starting from recruitment and until the cessation of this function.[4]

The laws of the member-states of the European Union show a marked preoccupation towards regulating this right of the public servants, mainly imposing the right to stability in function. Thus, the public servant

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[1] Verginia Vedinaş, Constanţa Călinoiu –*op.cit.*, p.63.
[2] J.M. Auby, J.B. Auby, *Droit de la fonction publique, op.cit.*, p.173. in Verginia Vedinaş, Constanţa Călinoiu –*op.cit.*, pp.66-67.
[3] Verginia Vedinaş, Constanţa Călinoiu –*op.cit.*, p.67.
[4] Verginia Vedinaş, Constanţa Călinoiu –*op.cit.*, p.63.

is not supposed to be"*a drifter, a passing character in the life of a local community or a national public service.*"[1]

At the level of community institutions, the issues regarding the career of European public servants pertain to the attributions of the personnel committee.

A normal career allows European public servants to advance within the same category, with certain specific aspects for each of them. Article 44 (96) of the Statute states that the public servant who has a 2-year standing on a level in his rank automatically passes on to the next level of this rank.

The career of European public servants is regulated by Title III of the Statute. So, it regulates the issues pertaining to recruitment, administrative status, with all its stages. Article 43 institutes the rule of drawing up a **report** every two years, comprising the evaluation of the competence, results and conduct of each public servant, each institution establishing then the norms of the right to contestation.

Promoting European public servants falls to the decision of the appointing authority. It means that the public servant is appointed to a higher rank of the category he belongs to.

7.) The right to remuneration for services rendered

According to art.62 in the Statute of the Public Servants in the European Communities, it is stated that the public servant is entitled to the remuneration corresponding to his rank and level by his very appointment to his position, being an inalienable right.

The remuneration of European public servants comprises **the base salary, family allowances and other indemnities.**

The retribution of European public servants is in Euros and it is paid in the currency of the country where they work. In case the retribution is paid in a currency other than the Euro, it is calculate depending on the exchange rate used for the general budget of European Communities on the 1st of July of the previous year.

The judicial regimen of the remuneration of European public servants has the following characteristics:[2]

- it is a right of European public servants;
- it is expressly stated that this is an inalienable right;
- it is granted according to rank and the level related to the function filled, representing an effect of the act of appointing in the community function;

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[1] Antonie Iorgovan – Iorgovan, Antonie – *Tratat de drept administrativ*, vol.I, 4th edition, All Beck, Bucharest, 2005, p.614.

[2] Verginia Vedinas, op.cit., pp.74-75.

- the retribution is paid in Euros and in the currency of the country where the public servant is exercising his attributions;
- the remuneration is subjected to annual examinations and corrections aimed at protecting the public servant by granting him a suitable salary that reflects the changes which may occur.
- the amount of the retribution is set by art.66 in the Statute of the Public Servants of European Communities, viz. it is legally binding.
- besides the salary, European public servants benefit from other pecuniary rights (increments and indemnities). Art.67 in the Statute also regulates family allowances, i.e. indemnities for habitation, children and education. The Statute also contains a repatriation (settlement) indemnity, to the amount of 16% of the base salary, family allowance and child allowance, whose level cannot be under 442.72 Euros per month.
- European public servants are acknowledged the right to reimbursement of expenses incurred in their starting a new job, settlement, transfer or termination of the function, as well as the expenses incurred in the exercise of their function.

Finally, it may be concluded that European public servants are in a similar situation to national public servants, i.e. their due retribution is made up of two parts, as follows: the salary (a fixed part) and other increments and indemnities (a variable part).

8.) The right to pension

This right is to be found in Chapter 3 of Title V called"Pensions and disability allowances". According to the provisions of this chapter, the public servant that has at least 10 years' standing is entitled to receive a pension of seniority. In addition, the public servant who has turned 63 is entitled to a pension irrespective of the duration of service, if he could not be reintegrated during a period of redundancy or in case of retirement for professional reasons.

In community law, the right to seniority pension is acquired at 63 years of age.

The right to disability pension is acquired when the public servant suffers from permanent disability, considered as total, which makes it impossible for him to perform a function suitable to a position adequate for his professional background.

9.) The right to professional improvement

The legal basis of the improvement of professional training is to be found in art.24 (8) (96) paragraph 3, stating that "*the Communities facilitate the professional improvement of the public servants' training to the extent that it is compatible to the requirements of the smooth operation of services and according to the public servant's own interests*".

The training and improvement programmes are considered in career advancement.

In the national systems of public function it is extremely important to train and improve public agents due to the need for a system that may enable them to adapt to the job requirements.

10.) The right to aid and assistance.

The provision of this right is to be found in art.24 (8) (96) stating the duty of Communities to assist the public servant in any judicial action against authors of menaces, offences, slander or attempts against him or his family, by virtue of his function.

In addition, it states the principle of solidarity between the institution and the public servant for the damages caused by the latter. The application of this principle is nevertheless limited, thus it cannot be put into practice if the European public servant has willingly caused harm or by gross negligence.

11.) The right to be informed in writing about any individual decision concerning the public servant.

This right is stated in art.25 (8) (96) alin.2 saying that"*any decision referring to a certain individual and taken in the application of this Statute shall be immediately communicated in writing to the public servant concerned*".

Also, the Statute holds that the decisions regarding the appointment, tenure, promotion, transfer, determination of the administrative status and the termination of a public servant's function are published by the institution where the public servant works. The publication has to be accessible to the public servant for an adequate period of time.

This right is also to be traced in the national systems of public function. In the French law system, art.18 of the Law of 13 July 1983 states that public servants have free access to their individual file in the circumstances provided by law.[1]

Any provision which is repressive in character should be motivated both de facto and de jure in order to clearly show the public servant the elements leading to taking the respective measure, and also to facilitate the jurisdictional control over it.

According to the provisions of art.26 (96) the personal file of the community public servant should contain:

a) all the documents concerning its administrative situation and all the reports on his ability, efficiency and conduct;

[1] Jean-Marie Auby, Jean-Bernard Auby – *op.cit*., p.450.

b) the public servant's observations on the above mentioned documents.

Within the personal file the documents are registered, numbered and classed without discontinuities. The above documents may not be used or quoted by the community institution against a public servant prior to registration.

Communicating an act may be proved by the public servant's signature or by recommended letter sent to the last known address communicated by the public servant.

For each file there only one personal file. The right to know the content of the file still remains even after the termination of the European public servant's activity.

The personal file is confidential; it may only be examined in the offices of the administration or on a secured source of electronic information. As an exception, the file is transmitted to the Court of Justice of the European Communities in case there is a dispute concerning the public servant.

12.) The right to petitioning and free access to European justice

Title VII in the Statute of the Public Servants of European Communities is entitled "Appeal ways" and it stipulates two fundamental rights of the individuals under the incidence of the community provisions in the Statute.

It is the right stated in art.90 alin.1 viz. the right to petitioning the appointing authority, the competent administrative authority. The right to petitioning is included among the rights-guarantees. It allows its holder the right to submit a request to the appointing authority, so that the latter makes a decision in his regard.[1]

The petitioning term for the appointing authority is 3 years since:

- the day the act is published, if it ahs a general regulatory character.
- the date when the recipient is notified about the decision and, at the latest, the date when he gained knowledge of the existence of the act, if the act is individual in character.
- the date when he found out about the harmful deed, in case the complaint is directed at an act with an individual character addressed to another de jure subject, or the day of the publication at the latest;
- the date of the expiration of the term at which the authority was due to issue a certain act, if the action is directed against an implicit decision of rejecting the request.

[1] Verginia Vedinaş, Constanta Călinoiu – *op. cit.*, p.192.

The appointing authority has the duty to make a well-grounded decision regarding the claim of the public servant, which will be obligatorily communicated within 4 months since the date the request was submitted.

Thus, within this term of 4 months, the appointing authority may make a decision related to the request. In case it doesn't make a decision, it is automatically assumed that the request was denied and so arises the right of attacking the decision as provided in art.90 (8) (96) alin.2.

At this stage of the procedure, by exercising the right of petitioning the public servant does not attack a harmful act, but only requires the authority to which he belongs to make a decision in his regard.

Only in the event the appointing authority decides to deny the request or does not observe the term of making a decision does the public servant acquire the right to bring the issue in front of the community jurisdiction organs.

The second right stipulated in art.90 is represented by **free access to European jurisdiction.**

Prior to opening the action to the Court of Public Function of the European Union, the public servant has to go through the **preliminary proceedings.** At this stage, the community public servant should address first the appointing authority, and only if his request was denied by its decision should he resort to the competent jurisdictional organism.

It is obvious that exercising the right to bring an action in front of the organisms having jurisdictional attributions may have one of the following premises:

- in suits dealing with the legality of an act issued by the community institution he belongs to, in case the public servant is not content with the express or implicit decision adopted by the appointing authority;
- in financial damage lawsuits, when the act issued causes losses to the public servant, case in which the Court of the Public Function of the European Union has full jurisdiction.

In the former case the actions have the nature of an action in annulment.[1] In this type of legal action the objective is the annulment of the decision, without the possibility of claiming its reformation. So, this type of action may only deal with aspects related to the legality of the act.

The action in annulment is that action aiming only at the annulment of a decision, and not at its alteration. As shown above, it can only be

[1] Octavian Manolache – *Drept comunitar. Justitia comunitara*, vol.3, 2nd edition, Bucharest, 1999, pp.112-113;

founded on the unlawfulness of the decision under attack and not on issues pertaining to its opportunity.[1]

In general, the action in annulment can be divided into two broad categories:

- appeals to decisions of a jurisdictional character, and
- appeals to administrative decisions.

If the action is justified, the court will be able to decide the annulment of the act. The possibility of the partial annulment of an act is also acknowledged, to the extent that this is feasible.

As regards the latter situation, as the court has full jurisdiction, its powers are broader and thus may also decide the alteration of the amount of the sums mentioned in the decision under appeal.

Full jurisdiction legal action is the one which "sets in motion the entirety of the judge's powers"[2]. Thus, he is entitled to remedy the situation both by annulling the act, and also by inflicting sanctions.

In conclusion, the specificity of full jurisdiction legal actions refers to the fact that the decision given by the judge may also contain other measures, such as: acknowledging subjective rights, damage payments, reforming an act or an administrative decision, restitutions, reintegration.[3]

As regards the acts that can be contested, it is worth mentioning that European public servants may bring an action in court against any act they see as harmful, even if the act was not personally addressed to them, but to a third party. It is essential that the content of the act causes harm to a legitimate interest or right of the public servant. In this case, the public servant must bring an action in court in order to protect his own concrete interest.[4]

Art.90 (8) (96) alin.2 in the Statute of the Public Servants of the European Union states that "any individual to whom this statute applies may resort to the appointing authority by requesting redress against an act that incriminates him, in case the above mentioned authority made a decision or abstained from taking a measure imposed by the statute".

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[1] Louis Cartou, Jean-Louis Clergerie, Annie Gruber, Patrick Rambaud – *L'Union europeenne*, 4e édition, Editions Dalloz, Paris, 2002, p.120.

[2] Jean Rivero, Jean Waline – *Droit administratif*, 16e édition, Dalloz, Paris, 1996, p.183;

[3] Louis Cartou, Jean-Louis Clergerie, Annie Gruber, Patrick Rambaud – *op. cit.*, pp.133-134.

[4] Octavian Manolache –*op. cit.*, p.806.

The provisions of this article lead to the conclusion that there is in this matter the possibility to attack an act not only in its typical form, but also others assimilated to it. A typical act is an act issued by the competent authority, and the assimilated form occurs in the cases where the authority has not issued an act, even if it had the duty to do so.

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LE BÉNÉFICE - LA VIE DE L'ENTREPRISE COMMERCIALE, L'OBJECTIF PRINCIPAL DES ASSOCIÉS OU MOYEN DE DÉVELOPPEMENT DURABLE[1]

Rezume

Le but de l'entreprise commerciale est d'obtenir du profit de l'activité commerciale développée et de le partager entre les associés.

Le profit représente le gain évaluable, résulté de l'activité commerciale. Généralement, le profit désigne un gain matériel qui, réparti sous la forme des dividendes, augmente le patrimoine des associés.

Durant la société, les associés son convenus des parties de bénéfices selon le bilan comptable et après la dissolution de la société, des partie convenues après la liquidation.

La cote partie du profit qui se paye é chaque associé constitue un dividende.

Les dividendes se répartissent aux associés proportionnellement à la cote de participation au capital social versé, si on ne prévoit pas d'une autre manière. Ceux-ci se payent au terme établi par l'assemblée générale des associés ou, selon le cas, établi par les lois spéciales, mais non plus tard de 6 mois de la date de l'approbation de la situation financière annuelle afférente à l'exercice financière conclu. Au contraire, la société commerciale payera des préjudices-intérêts pour la période de retard, au niveau de l'intérêt légale, si par l'acte constitutif ou par`la décision de l'assemblée générale des actionnaires qui a approuvé la situation financière afférente à l'exercice financier conclu il n'a pas été établi un intérêt plus grand.

1. Notions introductives

Le début dans l'activité commerciale se réalise par les individus par la prise de la décision de s'associer. L'association représente l'activité de s'unir, de se grouper avec quelqu'un pour atteindre un but commun, de prendre part ou de faire prendre part, avec les autres, à une action, à une initiative. De point de vue étymologique, le terme provient du français « *associer* » qui a à sont tour l'origine dans le latin « *associare* ».

Cette intention des individus consistant dans le désir d'unir leurs forces pour développer plus facilement une activité ensemble porte la dénomination de *affetio societatis,* dans la matière du droit commercial.

Le concept classique du droit commercial définissait cet élément du contrat d'entreprise active comme étant la coopération volontaire et active,

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intéressée et égalitaire des associés. Un concept moderne considérait que *affectio societatis* représente la volonté d'unité ou une convergence d'intérêts. Actuellement, l'opinion dominante dans la doctrine, qualifie l'intention des associés comme une manifestation de volonté qui anime les associés de collaborer dans le déroulement des activités commerciales, volontairement, d'effectuer une activité en commun, supportant les risques du commerce, pour obtenir et partager le profit.

La collaboration des associés doit être convergente, c'est-à-dire être subordonnée à l'objet d'activité commerciale, connaissant la spécialité de la capacité d'usage des entreprises commerciales.

En ce qui concerne le statut des associés il se présente dans le plan des rapports entre eux sur les positions d'égalité juridique. L'égalité juridique dans la matière du commerce ne suppose pas limitativement que les associés aient la même participation à la formation du capital social ou un nombre proportionnel de parties sociales, des parties d'intérêt ou des actions. L'égalité entre les associés implique qu'ils aient les mêmes droits sociaux: le droit de propriété sur les divisions du capital social, le droit à l'information, le droit de participer à l'assemblée générale, le droit de voter, le droit d'élire et de destituer les membres des structures de direction, le droit de contrôle, le droit aux dividendes, le droit de préférence, le droit à un prix égal, le droit à une cote du patrimoine social dans le cas de la liquidation, le droit de participer à la direction de l'entreprise, le droit à la protection des actionnaires minoritaires.

Bien entendu que, le corollaire de ces droits communs de la matière commerciale sont représentés par les droits des personnes physiques en tant que droits fondamentaux de l'homme ou les droits constitutionnels, que tout individu a, sans discrimination en fonction de la race, du sexe, de l'âge, de l'origine ethnique, de la religion, de l'appartenance politique, des points de vue doctrinaux, etc.

2. La volonté sociale

Du moment de sa constitution une fois avec l'immatriculation dans le registre du commerce en vertu de la conclusion du juge délégué, l'entreprise commerciale acquiert de la personnalité juridique

La personnalité juridique est l'une des particularités fondamentales qui existe entre l'entreprise commerciale et les associés. La personnalité juridique est l'attribut exclusif de l'entreprise commerciale, ce qui rend la distinction des associés qui la forme. C'est plus qu'un contrat d'entreprise, c'est un sujet de droit distinct, avec son propre patrimoine qui lui permet

de participer au circuit civil par assumer les obligations et l'exercice des droits en nom propre.

Bien que l'entreprise soit composée, formée des volontés de tous les associés, sa volonté ne représente pas leur cumul mais c'est une volonté nouvelle, distincte de ses composantes. Ainsi les volontés individuelles des associés, manifestées lors de l'assemblée générale, deviennent une volonté sociale de l'entreprise.

Parce que la volonté sociale est la volonté de la majorité, elle est obligatoire et décisive dans la vie de l'entreprise commerciale. Le caractère institutionnel de l'entité collective fait que sa volonté transcède les volontés des associés prenant sa propre autonomie. Même la pratique judiciaire a statué ces questions, la Cour Suprême de Justice, le département commercial, disposant dans la décision 293/19.07.1993 la « volonté de la personne juridique, comme sujet de droit, produit des effets juridiques dans les conditions dans lesquelles elle s'exprime dans la loi. Au sein des entreprises commerciales, la volonté de la personne juridique se réalise par la volonté de ceux qui la constituent, dans l'assemblée générale des entreprises ». Une autre décision de la Cour Suprême numéro 2310/1997 dispose: « les volontés individuelles (...) exprimés dans l'acte additionnel mentionné sont devenues une volonté collective qui constitue la volonté sociale respectivement la volonté de l'entreprise commerciale comme personne juridique ».

Cependant, sur la durée de la vie de l'entreprise commerciale, le rôle des volontés des associés ne se réduit pas seulement à la formation de la volonté sociale distincte pondérée dans les proportions établies par la loi et l'acte constitutif mais ceux-ci subsistent aussi indépendamment de la volonté sociale.

Ce principe de la volonté sociale et de son obligation est stipulé par l'article 132 de la Loi no. 31/1990 « Les décisions prises par l'assemblée générale dans les limites de la loi ou de l'acte constitutif sont obligatoires même pour les actionnaires qui n'ont pas pris part à l'assemblée ou ont voté contre ».

3. La notion de profit

Par profit, étymologiquement, on comprend ce qui représente un gain (matériel ou spirituel) pour quelqu'un ou quelque chose, bénéfice, avantage, le revenu apporté par le capital utilisé dans une entreprise, représentant la différence entre les encaissements effectifs et le total des dépenses afférentes, bénéfice obtenu par une entreprise.

Par profit, dans l'acception plus technique du droit commercial, on a en vue le sens de profit net qui représente la différence entre les revenus totaux et les dépenses totales desquelles l'impôt sur profit et les autres dépenses avec les impôts seront réduits. Dans le cas où, suite à cette opération, le résultat est positif alors on a enregistré un profit net; si le résultat est négatif alors la résultante sera considérée comme perte.

La doctrine classique a limité la notion de profit seulement au gain matériel, ce qui augmente le patrimoine des associés. Les avantages évalués même en argent qui ne contribuaient pas directement à l'augmentation du patrimoine des associés, mais seulement ils contribuaient à la réalisation des économies ou à la réduction des coûts n'ont pas été pris en compte dans l'interprétation de la notion de profit. Le concept actuel a beaucoup évolué et la notion de profit inclut aussi les façons d'acheter d'une manière plus rentable des biens ou des services qui conduisent aux économies importantes.

Un nouveau concept, spécifique au droit anglais est celui de goodwill. Selon à une opinion, par goodwill on comprend l'excédent de valeur de l'entreprise commerciale par rapport à ses actifs. En fait, le goodwill représente la différence entre la valeur comptable de l'entreprise commerciale exprimée par ses actifs et sa valeur au moment de l'acquisition ou de la fusion. Ce plus de valeur est exprimé en règle générale par les éléments incorporels du fond de commerce : l'enseigne, le logo, la place commerciale, la clientèle, les droits d'auteur, les droits de propriété industrielle. Évidemment, on en tient compte seulement dans le cas des fusions ou de reprises d'entreprises commerciales, mais ils peuvent être inclus dans la sphère des bénéfices des associés.

Le profit se détermine à la fin de l'exercice financier annuel et il peut être reparti aux associés seulement si sa valeur est positive, est supérieure à la valeur du capital social cumulée avec la valeur des réserves légales, s'il est réel et utile.

Le profit, comme on a énoncé la définition du Dictionnaire explicatif de la langue roumaine, est synonyme avec le terme de bénéfices. En fait, même la Loi no. 31/1990 utilise dans l'art. 66 la notion de bénéfices – sur la durée de l'entreprise, les associés sont revenus des parties de bénéfices selon le bilan comptable et après la dissolution de l'entreprise sur la partie qui leur reviendrait par liquidation.

Comme on a analysé, le profit représente le gain évaluable en argent résulté de l'activité commerciale. En général le profit représente un gain matériel qui, réparti sous la forme de dividendes, augmente le patrimoine de associés.

La cote partie du profit qui se paye à chaque associé constitue un dividende.

La modalité pratique de paiement, de répartition du bénéfice réalisé aux associés se fait par l'entreprise commerciale par l'intermédiaire du dividende. Je considère le dividende un moyen de paiement d'une somme d'argent, sans exagérer son importance en ce qui concerne le domaine fiscal et d'imposition. C'est parce que le droit de l'associé de réclamer et de recevoir la somme d'argent afférente à sa contribution à la formation du capital social naît du moment de la réalisation du profit net.

Alors, l'art. 67 paragraphe (2) de la Loi no. 31/1990 dispose : « les dividendes se répartissent aux associés proportionnellement à la cote de participation au capital social versé, si par l'acte constitutif on ne prévoit pas autrement. Ceux-ci se paient au délai établi par l'assemblée générale des associés ou, selon le cas, établi par les lois spéciales, mais pas plus tard de 6 mois de la date de l'approbation de la situation financière annuelle afférente à l'exercice financier conclu. Contrairement, l'entreprise commerciale payera des dommages intérêts pour la période de retard, au niveau de l'intérêt légal, si par l'acte constitutif ou par la décision de l'assemblée générale des actionnaires qui a approuvé la situation financière afférente à l'exercice financier achevé on n'a pas établi un intérêt plus grand ».

Par conséquent la loi ne conditionne l'existence du droit de l'associé de lui payer la somme d'argent obtenue par le développement de l'activité commerciale du paiement effectif du dividende. Du patrimoine de l'associé est né le droit de créance contre l'entreprise, lui pouvant exercer des actions en justice pour la réalisation de son droit. C'est aussi l'interprétation donnée par la Haute Cour de Cassation et de Justice, décision numéro 5090/2005: « (...) le droit de créance des actionnaires à l'encaissement des dividendes est né à la date du bilan et du compte de profit et de pertes liés à l'an calendrier précédent et il ne sera pas nécessaire l'établissement d'un autre délai où les dividendes soient versés. Dans la même note, la Haute Cour de Cassation et de Justice par la décision numéro 314/2005 établit : « l'obligation de paiement des dividendes, assumée par le contrat d'entreprise, devient exigible à la date convenue par les parties et en l'absence de telle stipulation, à la date de la du dépôt du bilan comptable, une fois qu'il a été approuvé. La décision de la Cour Suprême de Justice nombre 2310/1997, précise, relatif aux dividendes : « la personne juridique a son propre patrimoine, distinct de celui des associés, si que, de façon adéquate (...) pour payer seulement l'entreprise commerciale peut être appelée devant le tribunal en tant que défendeur non pas les associés restés dans l'entreprise ».

Pour pouvoir distribuer le profit aux associés en tant que dividende, il doit répondre aux conditions suivantes.

Premièrement, il doit être réel, c'est-à-dire qu'il doit être le résultat du déroulement de l'activité commerciale et il doit représenter un excédent, un montant d'argent qui soit plus grand que le capital social.

La seconde condition que le profit doit satisfaire est d'être utile, c'est-à-dire de représenter le solde resté suite au complètement du capital social, suite au déroulement des opérations commerciales dont le capital social s'est diminué.

L'art 69 de la Loi no. 31/1990 dispose: « Si on constate une perte de l'actif net, le capital social souscrit devra être complété de nouveau ou réduit avant de pouvoir faire une répartition ou une distribution de profit ».

Les associés ont la liberté concernant la répartition du profit, associés qui établissent par l'acte constitutif la modalité de partage des avantages découlant de la conduite d'un projet commun des activités commerciales. Il s'agit d'un principe de déroulement de l'activité commerciale qui établit que tous les associés doivent participer aux bénéfices mais aussi aux pertes subies par l'entreprise dans l'exercice financier. Toutefois, la cote de participation des associés ne doit pas être mathématiquement égale, mais elle est déterminé selon la cote de participation à la formation du capital social, chaque associé étant attribué un pourcentage correspondant à la valeur du capital social souscrit et versé.

A la distribution du profit la loi vient et impose que tous les associés participent d'une manière proportionnelle aux résultats obtenus par l'entreprise : profit ou pertes. L'explication réside dans la définition de l'entreprise commerciale qui est un groupement de personnes constitué sur la base du contrat d'entreprise commerciale et bénéficiant d'une personnalité juridique où les associés comprennent mettre en commun des biens pour l'exercice des faits de commerce dans le but de la réalisation et du partage du profit. Bien entendu que l'idéal de l'activité de l'entreprise est celui d'obtenir du profit, mais les ténèbres de l'activité commerciale peuvent mettre l'empreinte sur les opérations de l'entreprise si qu'elle réalise des pertes qui seront subies par les associés.

La loi, par l'art. 1513 C.civ interdit les clauses léonines, les soi-disant « partie du leu » ces accords-là qui favorisent certains associés par le fait que ceux-ci participeront seulement au partage des bénéfices ne subissant pas les pertes. L'article 1513 C.civ. Prévoit : « Il est nul le contrat par lequel un associé stipule la totalité des gains. De même, la convention par laquelle

on a stipulé que l'un ou plusieurs associés soient exonérés de participer à la perte est nulle ».

La Cour Suprême de Justice, la section commerciale, a établi dans l'arrêt no. 2367/2001 : « le droit d'encaisser les dividendes est un droit fondamental de l'associé d'une entreprise commerciale ».

Le code commercial italien prévoit dans l'article 2247 le fait que l'activité économique développée en commun par les associés finit par la distribution des bénéfices utiles. La notion de « utiles » du droit italien inclut tant les sommes d'argent, c'est-à-dire le profit direct mais également les autres avantages de l'entreprise et le profit indirect, exonérant l'entreprise de dépenses. Dans la législation italienne on retrouve aussi l'interdiction des clauses léonines, respectivement dans l'art. 2265 du Code commercial italien.

Dans le droit espagnol on retrouve les mêmes principes, respectivement dans l'art. 243 du Code commercial espagnol, qui reprend le principe de la participation des associés aux résultats de l'entreprise. En vertu de l'art. 239 la participation aux bénéfices et pertes sera réalisée proportionnellement avec la cote de participation au capital social.

Tant le code commercial italien que celui espagnol laisse à la latitude des associés, par l'acte constitutif, d'établir les modalités par lesquelles les associés partageront le profit ou subiront les pertes.

Le code commercial français maintient l'idée de deux codes et établit dans la Loi 225-100 et dans la Loi 232-12 paragraphe (1) le fait que le dividende est la parties de bénéfices que l'entreprise octroie aux associés. Dans la conception française le dividende se paye en argent mais en vertu de la loi du 03 janvier 1983 l'entreprise peut offrir à ses associés une option entre le payement en espèces et le paiement en actions. Cependant ce droit des associés n'est pas absolu, dans le sens que chaque année ils recevront les dividendes, pouvant être privé de dividendes pour le cas où la situation financière n'a pas été positive.

C'est toujours la législation française qui interdit expressément dans l'art. 348 de la Loi du 24 juillet 1966 la fixation par des actes constitutifs ou des statuts d'un dividende fixe ou d'un intervalle de sa valeur.

Dans la législation anglaise, l'article 829 de Companies Act 2006, la « distribution » se définit comme étant toute répartition faite aux associés des biens de l'entreprise soit en argent ou en autres biens. L'article 830 stipule encore que la distribution des bénéfices sera réalisée des fonds spéciaux créés à cet égard pour les associés.

La législation européenne est plus nuancée dans, si que la IIe Directive no. 77/91/CEE prévoit à l'art. 15. (1): « Excepté les cas de réduction du capital souscrit, il ne peut pas être distribué aux actionnaires

si, à la date de la conclusion du dernier exercice financier, l'actif net résultant des comptes annuels de l'entreprise est, ou après une telle distribution, réduirait sous le montant du capital souscrit et les réserves qui ne peuvent plus être distribuées en vertu de la loi ou de l'Etat, (b) si la partie non versée du capital souscrit n'est pas incluse dans l'actif du bilan, ce montant se déduit du montant du capital souscrit visé à la lettre (a); (c) le montant de la distribution aux actionnaires de peut pas dépasser le montant des bénéfices à la fin du dernier exercice financier et les éventuels profits reportés et les sommes retirées de réserves disponibles à cet effet, moins toute perte reportée et sommes déposées à la réserve conformément à la loi et à l'Etat ; (d) la notion de «distribution», utilisée aux lettres (a) et (c), englobe notamment le payement des dividendes et des intérêts pour les actions ».

4. Les réserves légales

L'un des aspects importants de l'entreprise le représente la constitution des réserves légales. En vertu de l'art. 183 de la Loi no. 31/1990 « du profit de l'entreprise il sera pris, chaque année, au mois 5% pour la formation du fond de réserve, jusque celui-ci atteindra au minimum la cinquième partie du capital social. Si le fond de réserve, après constitution s'est diminué d'une certaine cause, il sera complété, avec le respect des prévisions du paragraphe (1). On inclut également dans le fond de réserve, même si celui-ci a atteint la somme prévue ci-dessus, l'excédent obtenu par la vente des actions à un cours plus grand que leur valeur nominale, si cet excédent n'est pas utilisé au paiement d'émission ou destiné aux amortissements ».

Toutes les réglementations européennes consacrent des espaces larges pour souligner méthodiquement les modalités par lesquelles les entreprises commerciales doivent prélever des ressources pour survivre à certaines difficultés du cycle de production.

Dans notre législation on accorde une importance particulière au fond de réserve de l'entreprise. En vertu de l'art. 272 paragraphe (1) point 4 on punit avec le prison de 1 à 3 ans le fondateur, l'administrateur, le directeur ou le représentant légal de l'entreprise qui n'accomplit pas l'obligation prévue par l'article 183, de constituer le fond de réserve.

5. Le bénéfice rapporte à la vie de l'entreprise commerciale

Pour l'entreprise commerciale qui, après une analyse synthétique, acquiert une volonté sociale distincte et elle apparaît dans la palette des

activités commerciales comme sujet distinct de droit, la réalisation d'un excédent suite à l'accomplissement des faits de commerce représente la condition sine qua non de la perpétuation de sa vie.

Le but pour lequel l'entreprise produise, conclut des actes juridiques, entre dans la sphère des obligations commerciales, le représente la satisfaction des besoins des associés. Pour une entreprise il est essentiel de réaliser annuellement ces dividendes et non pas la destination finale des dividendes payés aux associés, la façon de leur utilisation. Par conséquent, on peut dire que le bénéfice est la vie de l'entreprise commerciale.

Par la réalisation de bénéfices l'entreprise pourra calmer la soif des associés, qui, souhaitent, comme unique objectif le transport des sommes d'argent de l'entreprise pour l'usage individuel.

De même, le bénéfice est vital pour l'entreprise pour maintenir intangible son espoir de vie, comme entité distincte, vie qui est indissolublement liée à la réalisation de l'intérêt à cet égard.

Dans la mesure où les associés ne sont pas satisfaits de leur rentabilité de leur produit, si l'entreprise créée ne répond pas à leurs attentes, si el rendement n'est pas élevé, ils cesseront sa vie brusquement, ils cesseront ce qu'ils ont commencé, sans tenir compte de l'autonomie sociale.

À cet égard, l'art. 17 de la IIe Directive no. 77/91/CEE stipule: « dans le cas d'une perte significative de capital souscrit, il faut convoquer une assemblée générale des actionnaires dans le délai prescrit par les lois de l'État membre concerné, afin de déterminer si l'entreprise commerciale doit être liquidée ou il faudrait prendre d'autres mesures ».

En résumé, il est indéniable la vitalité du profit dans l'existence de l'entreprise, son absence conduisant au vieillissement et à la maladie de l'esprit social aboutissant avec sa fin societatis dans les bras des artisans qui l'ont créé.

6. Le bénéfice rapporté aux associés

Comme on énonce par la définition de l'entreprise commerciale celui-ci est un groupement de personnes constitué sur la base du contrat d'entreprise et bénéficiant de personnalité juridique où les associés conviennent de mettre en commun certains biens pour l'exercice des faits de commerce dans le but de la réalisation et de la distribution du profit.

Donc, le but final du déroulement de l'activité commerciale en commun par les associés est la réalisation et l'obtention du profit.

Le mobile qui met en mouvement l'action consciente est le gain matériel qu'il doit obtenir pour pouvoir justifier la déposition des efforts

soutenus dans le cadre de l'entreprise. Cependant pas toujours l'entreprise commerciale réussira répondre aux exigences des associés, sollicitant beaucoup leur patience et tolérance dans le cas de l'obtention répétée de pertes.

L'associé regardera, d'une manière indubitable et incontestable, à la fin de chaque cycle de l'évolution de l'entreprise, l'exercice financier et il participera avidement à l'anniversaire de chaque conclusion de l'année fiscale attendant impatiemment les rémunérations conférées par la situation financière annuelle.

La comparaison peut être considérée cruelle et peut-être non conforme mais, en se rapportant à la manière violente de mettre fin à l'entreprise - par liquidation suivie de la radiation du registre du commerce il existerait des prémisses pour prendre en considération l'exercice d'imagination proposé.

7. Le bénéfice comme moyen de développement durable

Si on fait abstraction des objectifs immédiats des associés mais de l'entreprise commerciale aussi on réussira peut-être de regarder dans la perspective du développement durable de l'entreprise.

Tant les associés que l'entreprise commerciale doit regarder à long terme e ce qui concerne le développement durable et la conséquence de la réalisation des revenus. Les bénéfices issus de l'atteinte de l'objectif d'activité doivent être réinvestis d'une manière intelligente et responsable assurant ainsi des réductions considérables en ce qui concerne les consommations de matières premières, les coûts de production, l'efficience, le rendement et le temps.

L'évolution surprenante des réalités sociales détermine un progrès technologique immédiat avec des répercussions sur la viabilité du commerçant sur un marche concurrentiel in continu élargissement.

Le gaspillage des ressources obtenues sur une période d'explosion du marché et dans le contexte de demandes massives de consommation conduit à la perte sûre du soutien du rythme accéléré de la production dans la sphère du commerce.

Les bénéfices de l'entreprise doivent être tout le temps utilisés pour le développement de la capacité de l'entreprise de faire face au marché, d'être un concurrent important dans la sphère du commerce, pour assurer le futur es associés mais de la vie de l'entreprise aussi.

Une autre approche en ce qui concerne le développement durable la constitue la formation des réserves de l'entreprise en quantités plus grands pour qua l'entreprise réussisse faire face à des syncopes de la

consommation, pour pouvoir dépasser certaines difficultés économiques mais aussi pour avoir de la sécurité en vue de l'atténuation du choc.

Dans le contexte de la crise économique *pendinte* le commerçant diligent utilise ce qu'il a épargné pour des temps difficiles, il va amortir le choc de l'absence des opérations commerciales avec de ressources propres financières et va constituer ainsi un futur sûr pour l'entreprise mais aussi pour ses associés.

Je considère que les bénéfices résultés suite au développement des opérations économiques doivent être utilisés premièrement pour la consolidation de la capacité du commerçant pour renforcer la position sur le marché et pour l'assurance de la modernisation permanente de l'efficience et du rendement en vue du respect des desiderata contemporaines.

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REFLECTIONS ON THE MEASUREMENTS MADE WITH THE RADAR DEVICE IN THE CASE OF TRAFFIC OFFENCES CONNECTED TO EXCEEDING THE SPEED LIMIT

Abstract

According to the Road Traffic Code, over-speeding is sanctioned differently, by stages, depending on the speed the driver rides with. The sanction therefore depends on the exact measurement of the vehicle speed. The speed is determined by technical means (radar devices) homologated and metrologically verified. According to the Rule of Metrology 021-05 issued by the Romanian Bureau of Legal Metrology, for a radar device to pass the metrological inspection, it needs to have its measurements within certain maximum error limits. This means the radar device does not measure exactly the speed of the vehicle. In the case where the accuracy of the measurement is disputed before the court, and by applying the maximum errors to the measured speed it is found out there may intervene a more lenient contravention, we deem it is imposed to either void the report, or to retain the more lenient contravention and reduce the fine. The court must also take into account other reasons which determine the impossibility of using the measurements of the device, in the trial.

1. Introductive reflections. In the case of breaching the road traffic rules connected to exceeding the legal speed, the committed contravention is determined and the sanction is applied according to the speed of the vehicle. Thusly:

– According to art. 99 par. 2, art. 108 par. 1 letter a point 4 and art. 98 par. 4 letter a, of the Government Emergency Ordinance no. 195/2002 on driving on public roads[1], exceeding the maximum permitted speed by 10-20km/h on the road sector for the category which the vehicle is part of is sanctioned with 2 or 3 fine-points and 2 penalisation points;

– According to art. 100 par. 2, art. 108 par. 1 letter b point 2 and art. 98 par. 4 letter b of the same normative act, exceeding the maximum permitted speed by 21-30 km/h on the road sector for the category which the vehicle is part of is sanctioned with 4 or 5 fine-points and 3 penalisation points;

– According to art. 101 par. 2, art. 108 par. 1 letter c point 3 and art. 98 par. 4 letter c, exceeding the maximum permitted speed by 31-40

[1] Republished in "The Official Journal of Romania", Part I, no. 670, dated 3rd August 2006, with further amendments.

km/h on the road sector for the category which the vehicle is part of is sanctioned with 6 to 8 fine-points and 4 penalisation points;

– According to art. 102 par. 2, art. 108 par. 1 letter d point 3 and art. 98 par. 4 letter d, exceeding the maximum permitted speed by 41-50 km/h on the road sector for the category which the vehicle is part of is sanctioned with 9 to 20 fine-points and 6 penalisation points;

– According to art. 102 par. 3 letter e and art. 98 par. 4 letter d, exceeding the maximum permitted speed by more than 50 km/h on the road sector for the category which the vehicle is part of is sanctioned with 9 to 20 fine-points and by suspending the right of driving vehicles for a period of time of 90 days;

Framing a certain deed incriminated by the contraventional law therefore depends on the accurate measurement of the speed of the vehicle driven by the offender.

In order to provide an accurate measurement as much as possible in all cases, the law stipulates the speed is determined by a technical device (the radar device, which is scientifically called a kinemometer) homologated and metrologically verified.

The metrological inspection is the legal metrological control by means of which it is found out and confirmed the measuring means meets the requirements stipulated in the regulations of legal metrology (point 32 Annex 1 of the Government Ordinance no. 20/1992 on the metrology activity[1]).

The inspection is done initially, before commissioning the device, as well as periodically, at regular time intervals set forth in the official List of measuring devices subject to legal metrological control, which is published in the "Official Journal of Romania", part I.

2. *The operating principle of the radar device:* the radar device is based on measuring the Doppler Effect[2]. When a radio wave of a certain frequency is emitted towards a moving object, the wave reflected by the object back to the transmitter shall have a different frequency, which depends on the moving speed of that object. Based on a mathematical formula, the speed of

[1] Published in "The Official Journal of Romania", Part I, no. 212, dated 28th August 1992, with further amendments.

[2] See the Encarta Encyclopaedia, *Doppler Effect*, at the web address http://encarta.msn.com/encyclopedia
_761577312/Doppler_Effect.html

the object may be determined according to the difference between the frequency of the emitted wave and that of the reflected wave.

3. Errors of measurement. Measurement cannot however be done with full accuracy, due to some factors such as: internal error of the transmitting block, error of the receiving block, the atmospheric conditions etc. Therefore, the rule of metrology sets forth a series of maximum errors of measurement where the device must be situated. If these limits are complied with, the radar device shall pass the inspection and the metrological inspection bulletin shall be issued for it.

It is important to keep in mind the metrological inspection does not confirm the measurement run by the device coincides to the real speed, but only that the measurement is within the established maximum limits of error.

These errors are not perfectly correlated with the legal norms incriminating the exceedance of the legal speed.

According to point 3.1 of the Rule of Legal Metrology no. 021-05, "Devices for measuring the driving speed of vehicles (kinemometers)"[1], issued by the Romanian Bureau of Legal Metrology (hereinafter referred to as the "Rule of Metrology"), the maximum permitted errors when measuring the speed with the radar devices differs according to the way which the device is built in to operate only in the stationary mode, meaning only when the police vehicle equipped with this device is stopped or in the stationary mode as well as in the driving mode, meaning when the police vehicle is moving.

The rule also sets forth more acute errors when measuring speeds under laboratory conditions (point 3.1.1 letter a), as well as more permissive errors when measuring *in vivo*, under normal traffic conditions (point 3.1.1 letter b).

[1] Authorised by the Order of the General Manager of the Romanian Bureau of Legal Metrology, no. 301 dated 23rd November 2005, published in "The Official Journal of Romania", Part I, no. 1102 and 1102 bis dated 7th December 2005, modified by the Order of the General Manager of the Romanian Bureau of Legal Metrology, no. 153 dated 29th November 2007, published in "The Official Journal of Romania", Part I, no. 622 dated 10th September 2007. The text of the rule in its initial form may be downloaded from the web address www.brml.ro/downloadNML/NML_etapa4/NML021-05/NML021-05.doc

We shall further analyse the maximum errors of measurement permitted under normal traffic conditions.

Thusly, according to point 3.1.1 letter b and point 3.1.1 letter c, the maximum tolerated error is:

1. When the device operates in the stationary mode:
   - ± 3 km/h for speeds of the target below 100 km/h;
   - ± 3%/h for speeds of the target of at least 100 km/h;
2. When the device operates in the driving mode:
   - ± 4 km/h for speeds of the target below 100 km/h;
   - ± 4%/h for speeds of the target of at least 100 km/h;

A consequence of the metrological certification mode is the fact that the speed measured by the radar device does not always really coincide with the exact speed of the target. For example, for a speed of the target measured by the radar device at 100km/h, the real speed may be any speed within the range 100-3%...100+3%, meaning within the range 97km/h…103km/h.

4. Legal consequences. Legally, the distinction produces consequences as the contravention sanction is differentiated by stages, according to the speed measured by the radar device. Thusly, in the above mentioned example, by supposing the maximum permitted speed on the road sector is of 50km/h, driving with 97km/h is framed in the contravention stipulated by art. 102 par. 2 and art. 108 par. 1 letter d, of the Government Emergency Ordinance no. 195/2002 and sanctioned with 9 to 20 fine-points and 6 penalisation points, and driving with 103km/h to the contravention stipulated by art. 102 par. 3 of the same normative act and is sanctioned with 9 to 20 fine-points and by suspending the driving licence for a period of time of 90 days.

What solution shall be provided by the court vested with solving a contravention claim by means of which the measurement of the radar device is contested?

Firstly, according to its active role, the court shall need to determine from the managed evidences whether the radar device is in stationary mode or driving mode, and it can ask for information from the police bureau. It would be useful if the police officer stipulated this in the contents of the report.

The court shall need to also request from the police bureau photographs from the recordings done by the radar device.

According to art. 18 par. 2 of Methodology regarding the way of using and exploiting the vehicles' driving speed measuring equipment[1] (hereinafter referred to as "Methodology"), 3km/h shall be subtracted from the speed recorded by the system, the result being the one noted down in the contravention finding report. According to par. 3, this value represents the tolerance specified by the aforementioned Rule of Metrology. It is however noticed this is not exactly accurate, as the error varies according to the speed of the target and measuring mode.

The police officer does not normally do this subtraction; this is why it is important the court requires the photographs in order to compare the speed measured by the radar device to the one noted down in the report.

By showing what the speed measured by the radar device is, the court shall then calculate the maximum error and see whether the range may draw the incidence of another contravention. For example, if the measured speed is of 72 km/h, the real speed of the vehicle may be any speed within the range 72-3...72+3, meaning 69…75km/h, range framed in two different contraventions.

Taking into account the similarities between the contraventional law and criminal law[2], the plaintiff takes advantage of the presumption of innocence, reason for which the police officer firstly has the task of evidencing within the procedure performed before the court, and not the plaintiff (at least in those situations where the commitment of wrong was not found out by own senses of the official examiner).

Consequently, we deem it is imposed to apply the principle according to which the doubts are of profit to the accused one (*in dubio pro reo)* and to learn the police officer did not prove the commitment of the contravention beyond any doubt.

Regarding the solution the court shall adopt, two possibilities are created:

- Cancellation of the report;

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[1] Authorised by the Command Provision of the General Inspectorate of Romanian Police, unpublished

[2] See: The European Court of Human Rights, decision date 21st February 1984 pronounced in the case of Öztürk against Germany; The European Court of Human Rights, decision of 1st February 2005 pronounced in the case of Ziliberberg against Moldavia, available at the web address www.echr.coe.int; O. Podaru, R. Chiriţă, *Government Ordinance no.. 2/2001 concerning the legal regime of contraventions. Commented and annotated*, The Sfera Juridica Publishing House, Cluj Napoca 2006, page 4; Streteanu, *Drept penal (Criminal Law) General part*, vol. I, Rosetti Publishing House, Bucharest, 2003, page 44;

– Retaining the more lenient contravention and therefore reducing the fine and number of penalty points and, if applicable, the elimination of the complementary sanction of suspending the right of driving.

The first solution starts from the premise a fair description of the deed has not been done (reason of nullity stipulated by art. 17 of the Government Decision no. 2/2001 concerning the legal regime of contraventions[1]) or the deed was given a wrong legal framing. This solution is better substantiated theoretically, taking into account the court is exclusively vested with examining the legality and rationality of the finding report on a certain contravention[2] and therefore the police officer cannot be substituted and find out the occurrence of another contravention.

We however opine for the second solution, at least until clarification in jurisprudence of the issue shown herein, as the existence of the more lenient contravention is clearly proven and thus the premises of the driver's unjust exoneration of contraventional liability would be created.

In the situation where the offender admits to having driven with the speed measured by the radar device[3], we deem there are no more doubts regarding the commitment of the same contravention and therefore it is not a matter anymore of cancelling the report or retaining the more lenient contravention.

5. Other causes that may determine the inaccuracy of the measurements. According to point 4 of the Rule of Metrology, the measurements performed cannot be evidences for applying the road traffic legislation if:

– The measurement has not been done by a qualified operator, trained according to the legal regulations;

– The period of validity of the metrological inspection bulletin has expired;

– If the measurements have been done under conditions of fog, rain, snow or storm;

– If the kinemometer is tested only for being used in stationary mode, and the measurements have been done with the moving kinemometer;

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[1] Republished in "The Official Journal of Romania", Part I, no. 410, dated 25th July 2001, with further amendments.

[2] See M.A.Hotca, *Regimul juridic al contravențiilor (The legal regime of contraventions). Comentarii şi explicații (Comments and explanations)*, 2nd Edition, C.H. Beck Publishing House, Bucharest, 2007, page 294;

[3] The situation is encountered in practice when the plaintiff admits to having driven with a certain speed and requires the replacement of the fine by admonition.

– If during the measurement more than one vehicle is placed simultaneously within the measuring range of the device, and the target vehicle cannot be clearly distinguished.

No obstacle should be interposed between the radar and target (in the path of the radar beam), such as: tall grass, shrubs, sand or snow stacks, pillars etc. (art. 5 par. 2 of Methodology), as these may alter the measurements.

It is also prohibited to the operator to focus the video camera on the opposite side or on another direction than the one where the radar antenna acts (art. 9 par. 2 of Methodology), as thusly a speed from another vehicle can be imputed to a target.

The court of law vested with solving the contraventional claim shall need to dispose the cancellation of the report if it retains the existence of these cases from the administered evidence.

The police officer must carry the qualified operator's certification and metrological inspection bulletin of the system (art. 45 of Methodology). We believe their lack from the vehicle board or the refusal to be shown them cannot be a reason for cancelling the report. The official examiner is prohibited from stopping the recording and rewinding the video tape for showing the offender the recorded irregularity.

The police officer's activity is performed according to the daily schedule also including the patrol variants, thus eliminating the need for a duty order.

The measurements may also be erroneous when the device is used in other conditions than those the metrological inspection was done for; for example, when the kinemometer was used in movement, but it was metrologically inspected only for the measurements done in stationary mode or when the device is mounted on another vehicle than the one stipulated in the metrological inspection bulletin.

In these cases, as well as in other situations where it is deemed the way of using the device may be incorrect, the court of law has the possibility of requesting the point of view of the Romanian Bureau of Legal Metrology, by requesting it to state to what extent a certain way of using the device may alter the precision of the measurements.

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Elisabeta SLABU *

ASPECTS REGARDING THE STATUTE OF CIVIL SERVANTS IN EUROPEAN COMMUNITIES AND THE STATUTE OF CIVIL SERVANTS IN ROMANIA

Abstract

The notion of public position is attached on the public administration activity. The public activity generally comprises the following three elements: competence, material and financial resources and staff. In turn, the staff is assigned by departments, hierarchical level and positions. But only some of them are public positions. The public institutions personnel are practically divided into two big categories: contractual personnel – who work under a labour contract basis and civil servants – appointed to a public position. The occupant of a public position is called civil servant and the legal relationship between him and his public institution or authority is called work relationship.

In European Community structures, agents subjected to special norms – called European or Community civil servants as well as contractual personnel are carrying out their service obligations. The Statute of Community servants may be considered as a potential model for the structuration of the minimum requirements necessary to carry out the public position in European countries, anticipating the future setting up of a Common Administrative Space for public activity. The adoption of the statute exercised an influence on the general regime of the Community public position since it's meant to group together the most important problems implicated in legal condition of the employee. Besides this unique Statute, a series of special regulations regarding the servants of technical and scientific departments have been drawn up.

The Statute of Romanian civil servants foresees that the public position „is the aggregate of competences and responsibilities established on the grounds of law for the purpose of carrying out the public power prerogatives of the central and local administration", and the civil servant is „the person appointed to a public position".

The similitudes and differences of the two Statutes shall be carefully examined in order to carry out a real integration of the Romanian legal system into the European system.

1. Introductive notions concerning the public position, the working relationship, the civil servant and the statute of civil servant

The concept of public position is closely connected to the activity of public administration. The activity of a public authority or institution generally comprises three elements: competence, material and financial resources and staff. In turn, the staff is assigned by departments, hierarchical level and positions (Apostol Tofan, 2008) . But only some of them are public positions. The public institutions personnel are practically

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divided into two big categories: contractual personnel – who work under a labor contract basis and civil servants – appointed to a public position. As a rule, but not always, the occupant of a public position is a civil servant and the legal relationship between him and his public institution or authority is called work relationship. Besides professionalism, responsibility, efficiency, loyalty and dynamism, the public position must observe the legal provisions and to focus on citizens' needs (Manda, 2007).

All states have traditions regarding the regulation of the public position, but they must not be confounded with the notion of General Statute of public function.

The name Statute originates from the Latin word statutum, derived from the verb statuere, meaning to pronounce upon, to decide, to command.

The Statute means *an aggregate of legal rules comprising the will of the state to authoritatively regulate a certain category of social relations or legal institutions* (Negulescu, 1934 ; Prisãcaru, 2002).

The first Statute of the public function was adopted in Spain in 1852, after that in Luxemburg, in 1872 and in Denmark, the first law concerning the servants was adopted in 1899. The first *Statute of State Civil Servants* was adopted in Italy in 1908 while in France, even if the traditions regarding the public function precede the Revolution of 1789, the first statute of the public function was adopted only in 1941 (Ziller, 1993).

The interwar Romanian doctrine was always in favour of adoption of a Statute "meant to impede the arbitrary intervention of political bodies, to cease the incertitude of the civil servants from central and local administration and to strengthen the warranties for good performance of public services". This Statute has to assure "warranties for the administration impartiality and neutrality" and to protect the civil servant from government or administration pressure. Consequently, the interwar Romanian doctrine defined the notion of Statute of Civil Servants as a complex of legal regulations fixing the legal situation of civil servants and determining their fundamental rights and obligations (Negulescu, 1934).

The name *The Statute of Civil Servants* was used for the first time in the article 8 of the 1923 Constitution of Romania, establishing two principles: only Romanians were admitted in public positions and dignities and the necessity of adopting a special law concerning the statute of civil servants (Oroveanu, 1998). Thus, the first special law was adopted on June 19, 1923, as a result of the principles stipulated in 1923 Constitution and came into force only in 1924.

On the basis of the Statute of 1923, a Regulation concerning the legal regime of civil servants was adopted. These Regulations represented the

common law of civil servants and was valid until 8 June 1940, when the Code of Public Servants was promulgated. The Code comprised two parts, the first contained dispositions for all civil servants from overall services and the second part referred just to administrative personnel and specialised personnel, excepting the categories specially specified, for which special regulations were adopted (i.e. judges, military officers, academic staff, lawyers, doctors, engineers, priests a.s.o.). After many modifications, the Code of Public Servants was abrogated after 1944, and several Regulations have been adopted: a new Law on the Statute of Civil Servant was adopted in September 1946 and abrogated after 3 years. From 1959 until 1989, the provisions of the Labour Code and special regulations were applicable to civil servants (Apostol Tofan, 2008).

Finally, after many years of debates on the problems of the public function and civil servant, as a result of assumption of responsibility by the government before the Parliament, the Law on the Statute of Civil Servants was adopted in the Joint Meeting of Chambers, and became the Law 188/1999[1]. Afterwards, the law was amended and completed several times and republished in 2004 and after that in 2007.

The Law on the Statute of Civil Servants regulates "the general regime of the legal relationship between the civil servants and state or local public administration by autonomous administrative authorities or public authorities and institutions of central and local public administration, hereinafter referred to as work relationship".

The goal of the law is to ensure a stable, professional, transparent efficient and impartial, in the interest of citizens and public authorities and institutions of central and local public administration, according to legal dispositions

The recent doctrine considers that the existing formula don't really cover the goal of the regulation, a more comprehensive definition aims to establish the legal statute of civil servant, the organization of public function and the relationship between the public servants and public authorities and administration of central and local public administration (Vedinaş, 2004).

The doctrine of public law concerning the statute of civil servants was indissolubly based on the analysis of notion and, implicitly, the legal nature of public function; this has led to two different positions.

On one hand, the theory of the „contractual situation" tries to define the public function by the agency of the institutions of civil law, in

[1] Published in the Official Gazette of Romania, 1st Part, no. 251/2004, republished in the Official Gazette of Romania, 1st Part, no. 365/2007

this case the contract of mandate or through institutions of administrative law, in this case the administrative contract.

On other hand, according to the theory of the „legal statute", defended by the French authors, the State function is considered a legal statute, the setting up instrument is an authority instrument and the person in charge exercises the State authority and not the rights resulted from a contractual situation.

Thus, the interwar doctrine defined the public function as „a complex of powers and competencies, organised by law in order to meet a general interest, aiming to be temporarily occupied by one or more holders, individual person who is exercising hid powers within the limits of competence, aiming to achieve the goal for which the function was created" (Negulescu, 1934; Apostol Tofan, 2008).

The interwar doctrine also founded two opposite thesis concerning the legal nature of the public function (Iorgovan, 2005).

On one hand, the civil and labour law specialists defend the thesis of a unique source for the legal labour relations and all legal consequences resulted.

On other hand, the initial orientation of the authors of administrative law and labour rights was based on the idea of a double judicial relation of civil servant, as subject of a *service relationship* as well as subject of a *labour relationship*. Afterwards, these two categories of relationships were considered as an indestructible dialectic unity leading to an independent relationship – the position relationship.

Thus, the second acceptation of the concept of State position was based on the idea of the subject of law and aiming at the legal situation of the servant invested with the attributions of the position, as a subject of a legal relationship (Iorgovan, Gilescu, 1986).

The public function represents the judicial situation of the person invested legally with the capacity of action in order to carry out the competency of a State organism; this thesis is valid and in accordance with the actual legislative framework if the concept of State organism is replaced by the concept of public authority.

In a legal situation, the coordinates of the position of civil servant are established by law and his attributions are general, provided by law and in the interest of public service.

As concerns the regulation of public function, according to the comparative law, the old dispute between the other countries of the European Union is maintained and focused on the idea of the legal statute

leading to an unilateral legal regime of public law and the concept of contractual State leading to the regime of private law (Iorgovan, 2005).

Even they didn't reach a common denominator, we can implicitly speak about the public position as a legal statute or about the public position as a private law relationship, without necessarily having to oppose one against other (Apostol Tofan, 2008).

According to Law 188/1999, republished with subsequent modifications and completions, "the civil service represents the ensemble of attributions and responsibilities established according to the law in order to achieve the prerogatives of public power by central public administration, local public administration and autonomous administrative authorities". The public functions are provided in an annex to the law.

The principles that are at the basis of exercising the public position are[1]:

a) legality, impartiality and objectivity;
b) transparency;
c) efficiency and efficacy;
d) responsability, according to legal provisions;
e) orientation towards the citizen;
f) stability in exercising the public function;
g) hierarchical subordination.

Mention must be made that these are guiding principles for civil servants and not for public functions (Prisăcaru, 2002).

After 1989, the constitutional basis for the public function in Romania can be found in the contents of the Article 16, paragraph 3 and Article 73, paragraph 3, letter j) of Constitution.

Thus, the Article 16 of the Constitution of Romania, modified and completed by the Law of Revision, establishes the following principle: "access to public, civil, or military positions or dignities may be granted, according to the law, to persons whose citizenship is Romanian and whose domicile is in Romania. The Romanian State shall guarantee equal opportunities for men and women to occupy such positions and dignities".

Two essential modification of the initial disposition have been made.

Firstly, the condition of Romanian citizenship to occupy public positions or dignities has been eliminated because under the European regulations, the interdiction on Romanian citizen holding another

[1] Art. 3 of the Law no. 188/1999 on the Statute of Civil Servants

citizenship (regularly from the European zone) to occupy a public position or dignity was not justified.

Secondly, the guarantee of equality between women and men to occupy such positions was provided; this guarantee corresponds to the trend of ideas specific to the development of contemporary democracies and presents the signification of a positive discrimination in favour of women to enhance the role that women can play in the public life.

Another constitutional disposition is provided by Article 73, paragraph (3) and concerns the classes of law regulated through organic law; the statute of civil servants is mentioned at letter j). As the "general rules covering labour relations, trade unions, employers' associations, and social protection" are mentioned in the same Article, letter p) as a matter of organic law, it results that the legislative has intended to assign a statutory regime for civil servants and a contractual regime for the other employees.

The aspect of the sphere of civil servants concerns the organic legislative; a civil servant out of the general principles of the Statute is unconceivable since these principles are regulating a civil law regime, more exactly an administrative law regime.

The position of civil servant is established by an appointment, representing an administrative certificate of authority and not a subject of labour law. On the basis of the appointment, the legal service relationship begins aiming the setting up of the civil power.

In conclusion, *the service relationship represents a contractual administrative law relationship and not a labour law relationship, even if the two relationships presents some common features* (Apostol Tofan, 2008).

This point of view has been adopted by the legislative too, expressly defining the *service relationship* as the relationship "arising and exercising on the basis of the appointment issued according the law" and specifying that "the exercise of service relationship is carried out for an undetermined period of time" and, only by exception to this provision, "the temporary vacant civil positions for more than a month can be occupied for a fixed-term period as expressly provided by law"[1].

2. General notions regarding the European civil servants and the European contractual employees

The European Community organisms are served by agents acting according to special norms and called ***European or Community civil servants***. The statutory regulations regarding the European civil servants

[1] Art. 4 of the Law no. 188/1999 on the Statute of Civil Servants

showed a certain evolution during their three stages of regulation (Vedinaş, Călinoiu, 2007).

The statute of civil servants and the regime applicable to other agents of CEE and CEEA was applied in the first stage of regulation and was edicted by Council on the basis of Article 212 CEE and 186 CEEA (JOCE from 14-6.1962), containing derogatory provisions to the Personnel Statute CECA from 28.01.1956. The difference of regime between the servants of the three communities principally aimed the following aspects: the different hierarchy of classes, the general level of salaries, the regime of pensions. The fact that three Communities were not established at the same time determined, in the first phase, the superposition of three bodies of agents under different regimes.

Thus, the Article 24 of the of the Fusion Treaty from 8 April 1956 imposed "the setting up of the regulation regarding the personnel unique and common for all Community institutions…". This unification is considered the second stage of the regulation regarding the statute of European civil statute and was carried out according to CEE, CECA, CEEA Regulations no. 259/68, published in JOCE no. L56 from 04.03.1968 and modified several times. This Regulation and other texts are gathered in an internal document of Communities entitled "**Statute**" and with the subtitle "**Rules and regulations applicable to officials and other servants of European Communities**".

The third is represented by the actual regulation, respectively the Statute of servants of the European Communities, adopted by the Council Regulation (CE, EURATOM) no. 723/2004 regarding the modification of the Statute of the civil servants of European Communities as well as the regime applicable to other categories of servants, published in JOCE no. L124 from 27.04.2004.

The adoption of the statute influences the general regime of the Community public function as it is meant to group the main problems of servant legal status. Besides that unique statute, some special regulations regarding the technical and scientific servants have been drawn up..

This statute comprises four parts:

- the first part is dedicated to "The Statute of Community servants"
- the second part is dedicated to the regime applicable to other categories of European servants
- the third part comprises other regulations applicable to officials and servants of European Communities
- regulation adopted commonly agreed by the institutions of the European Communities and applicable to other Community servants

From specialists' point of view, the adoption of this Statute "has placed the Community public function into the category of the **so-called closed public functions**" (Boulouis, 1997). In the same time, this system is considered "similar to the French or German public function where the authentic servants are permanent post holders and dedicated to a vocational career" (Isaac, 1997) .

The European institutions have their own personnel policy grafted onto a statute common to all European civil servants. Each European institution has its own personnel; the continuous personnel increase registered from setting up till today is due to the implicit development of the activity in these institutions.

The definition of notion of Community servant is detailed in the Article 1a(96) of the Statute: "**in the sense of the present Statute, the Community servant is any person appointed to a permanent position in one of the Community institutions by the appointing authority within the conditions provided for by this Statute"**.

This definition makes difference between the **Community servants and other category of servants**, eventually **employed under a contractual regime**. The category of contractual employees is regulated by the Regulation no. 2615 din 1976, published in JOCE no. L 290 from 29.10.1976.

Consequently, the civil law notion of personnel comprises two categories:

- ***Community servants***, subject to the provisions of the present Statute
- ***other contractual agents*** **– contract employees**, who can be employed under different types of contracts to whom the Community or national law is applicable

The second category of personnel comprises the so-called "**contractual** agents" and is divided into two categories: contractual agents under Community law and contractual agents under local civil law.

Other authors are using for this category the syntagm "**temporary agents**" admitting that "besides permanent servants, temporary servants are usually national servants and may be recruited under a fixed-term contract" (Rideau, 1996).

The temporary Community law employees are divided into several categories:

- **temporary employees –** who occupy a position included in the personnel scheme but the budgetary authority decided to modify the character of the respective position; also, the research personnel may be placed into this category of temporary positions.

- **Auxiliary personnel** – represented by the persons « employed to carry out precarious tasks or to take place of the absent titular (Isaac, 1997)
- **Special counsellors** – are personalities employed in Community institutions, notable for their knowledge, fame and recognised professional qualification.

The contractual agents under local civil law are employed to carry out different material tasks or services. The legal recruitment document is represented by the contract for hiring services (or service contract) concluded according to the legal provisions of the country in which local agent is carrying out his duties.

3. The career of the European civil servant and the career of the Romanian civil servant

The concept career used by contemporary civil law designates "the development over time of the legal situation of servant, **from recruitment till the end of professional activity** consequently from the issuing of the document foreseeing the beginning of the civil relationship till the issuing of the document setting out the cessation of this relationship" (Vedinaş, Călinoiu, 2007).

In connection with the two concepts – the relationship between the civil position and the career of the civil servant – the French authors are speaking about the **civil service law**, i.e. "the ensemble of definitions, fundamental principles and general structures meant mainly to study the composition and legal situation of the administrative personnel, the sources of the civil service law, the general characteristics and tendencies of French concept on public function, the general organisation of public function". The civil service law stipulates **the civil servant right to a career** and consequently regulations concerning **the setting up of public function relationship, modification, suspension or termination of this relationship**. Therefore, reputed specialists say that we already can speak about **an European civil service law** at European level, defined as "the ensemble of norms governing the regime of the European civil service law, deducted from the European regulations and completed with the jurisprudence principles of the European Court of Justice" (Vedinaş, Călinoiu, 2007).

According to the actual statute, the specific elements of the European civil servant career are as follows:

- European civil servants recruitment
- administrative statute (activity, detachment, personal holidays, layoff, military leave, parental leave, parental or family leave)

- Relationship, step by step promotions, , promotions
- definitive termination of employment relationship (resignation, obligatory resignation, interruption of activity for job purposes, dismissal for professional deficiencies, retirement, honorarium).

In Romania, the Article no. 2 of the Government Decision no. 611/2008[1] regarding the approval of norms for the organisation and development of civil servant's career defines the **career in civil service** as: "the ensemble of judicial situations and their effects from the beginning of the employment relationship till the termination of this relationship under law provisions". Also, the Article no. 3 letter c) defines the concept of **the development of civil servants' career** as the evolution of the ensemble of judicial situations and effects produced by mobility, promotion to a superior civil service position and on the scale of wages, situations occurring from the beginning of the employment relationship till the termination of this relationship".

According this legislative act in force, the defining elements of the development of the Romanian civil servants' career are as follows:

- appointment to a civil position
- completion of the probation period for the beginning civil servants
- evaluation of individual professional performances of civil servants
- promotion of civil servants
- mobility of civil servants

On the other hand, the Statute of civil servants approved by Law no. 188/1999 do not define the concept of civil servants' career, but presents the following defining elements: recruitment of civil servants, probation period, appointment of civil servants, , promotion of civil servants and evaluation of professional performances, mobility (included in the chapter regarding the civil servants' career).

After taking into consideration the two regulations, we are getting near the meaning of the European civil servants' career. The careful analysis of the two Statutes: European and national, revealed the resemblances and differences between the basic elements of the European and national civil servants' career.

In both situations, the recruitment is made by competition. The participating persons must comply with the conditions specified in the regulations in force and the non-discrimination principle must be observed. Before the competition for European civil servants' positions, a preceding verification procedure shall be initiated in order to control the availability of positions for transfer, appointment or promotion. We would appreciate

[1] Published in the Official Gazette of Romania, Part I, no. 530/2008

if a similar procedure would be included in the Statute of Romanian civil servants due to the fact that the promotion possibilities are very difficult within the Romanian system and a civil servant with the necessary knowledge and expertise in the activity of recruiting institution should have priority in comparison with other persons who do not know the specific of the institution, even if they fulfil the condition provided in recruitment announce.

We consider that the **probation period** is necessary for any beginning civil servant in order to establish the beginner's capacity / incapacity to perform the respective tasks.

As regards the **evaluation and step by step promotion** of civil servants at European level, the results of the periodically evaluation are gathered every two year and the report is obligatory communicated to the civil servant in order to add his own remarks. The governing rule of European civil servants is the seniority-based promotion,

On the other hand, the European civil servant has also the right to **promotion** after a selection procedure carried out on the basis of a comparative examination of the candidate civil servants' merits and the decision of designated appointment authority. In consequence, the mixed system for the civil servant promotion is based on seniority and special merits of the civil servant. The Statute of Romanian civil servants does not provide very clear the seniority-based promotion right, but recognises the possibility of promotion after period of time provided by law, but on condition to include the next superior position in the occupational planning and to fit inot budgetary resources. The lack of financial resources and non-inclusion in the occupational planning of positions necessary for civil servants' promotion may lead to civil servants' demotivation and implicitly to the decrease of efficiency in carrying out their tasks.

The notion of **mobility of civil servants** is provided only in the Romanian legislation. Thus, the Article 87, paragraph 1 of Law 188/1999 foresees: "The mobility within the body of civil servants shall determine the modification of work relationship as follows:

a) efficiency of the activity of public authorities and institutions;
b) public interest;
c) civil servants; interest, the developing of civil servants' career."

The notion of mobility is stipulated at paragraph 2 of the same article as follows: «The modification of office relations takes place in the following conditions:

a) delegation;
b) secondment;
c) transfer;

d) moving into another department or other structure without legal personality within the public authority or institution;

e) the temporary exercise of management public positions".

Paragraph 3 establishes that "if the mobility of executive and management civil servants is ordered in the **public interest** and according to law, the civil servant may not refuse the measures provided in paragraphs (2) letters b) and c), excepting the measures mentioned in Article 89, paragraph (3), if not, dismissal from position is ordered".

These constitutive elements may be partially found in the legislation regarding the European civil servant, even if this notion of mobility is not expressly mentioned.

4. Conclusions:

The *Statute of Community civil servants* may be considered as a model for the structural distribution of minimum requirement concerning the public function in the European countries, anticipating the future *Administrative common space* for the public function. If every Member State of the European Union shall constantly adapt the public administration to the tasks provided by law (Manda, Manda, 2008), this objective shall be possible.

The administrative reform is frequently included in the governmental programs, the Romanian programs included, in order to improve the functionality of the administrative apparatus and to adapt it to the new social requirements.

In Romania, even if a strategy concerning the acceleration of public administration reform was adopted[1] in 2001, another strategy regarding the acceleration of public administration reform was adopted[2] in 2005. Till today, a structural and functional modernisation of the public administration has not been carried out. Among the priorities of the reform, the public function reform should help the organisation of a professional body of civil servants, stable and neutral from political point of view (Manda, Manda, 2008). That will happen if new procedures for recruitment, management and training of civil servants shall be carried out. Also, a motivating, transparent and unitary wages system and the increase of the administrative act should be useful.

[1] HG nr. 1006/2001, published in the Official Gazette of Romania no. 660 / 2001
[2] HG nr. 306/2005 , published in the Official Gazette of Romania no. 355 / 2005

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THE EUROPEAN JUDICIAL CONVERGENCE IN THE FIELD OF CONSUMERS`PROTECTION

Abstract

Taking into account that the main priciple of the integration is that of applying/implementing the European communitarian law, it is absolutely necessary that the regulations from the primary and derived communitarian legislation should be correctly understood and put into practice.

Expressed normatively in the plan of a sui generis judicial order, known as communitarian law, the European judicial convergence is a process that involves specific mechanisms for the making and the applying of the communitarian law.

The field of the consumers' protection has drawn and draws the attention of both the communitarian legislator and the national ones, the commun denominator of the measure of normativizing the consumers' prerogatives being represented by the assurance of the necessary frame in the free access to products and services, to complete correct and precise information and to the guarantee of their legitimate interests and rights as well.

The consumers' protection is part of the social policy of each state.

At the same time, due to its importance, it must become a policy itself with objectives, priorities and instruments.

During the last decades, the problems of the consumers' protection is in the spotlight of the judicial economical practice and theory of the entire world. These concerns that became more complex through content and especially through the demanded solutions, must remain circumscribed to the priviledged domains from the perspective of the social relevance.

In the European Union a series of norms have been elaborated, norms that at a national level are materialized into laws, regulations with a compulsory character, which mainly consider the security of products, the delusive advertisement, the producers' responsibility for the damaged products, the credit for consumers, the labelling of products

1. Generalities

The consumers' rights represent a very important field in the process that recognises and protects citizens as consumers, assuring the necessary frame for the free access to products and services, to complete correct and precise information, and to the guarantee of their rights and legitime interests as well.

A shape of the consumers' rights has begun to be noticed in the 18th century, but the social actions and the judicial efforts necessary to protect

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the consumers' interests have definitely been imposed only in the second half of the 20th century.

Thus, a decisive part in this field was played by the USA president, John F. Kennedy, who in his speech about „The consumer's protection", on March 15th 1962, stated the four fundamental rights, namely: the right to safety, the right to knowledge, the right to choose and the right to be heard.

Starting with the years 1960 – 1970, in many European states such as Sweden, Denmark, Great Britain, Germany, Belge, France and the Low Countries, laws regarding the consumers' protection were promulgated.

2. The notion of „consumer"

The Europeans and the North Americans are still arguing over who were the first to use the notion of „*consumer*". While the latter state that the president John F. Kennedy was the first to use it in front of the Congress, in 1962, saying the famous words: „*Consumers, by definition, include us all*", the Europeans state that the economists used it during the economic crises in 1930.

No matter where and when he was named that way, the consumer has existed since ancient times. Buyer or user, he has been protected since Antiquity against the flaws of the purchased item. In the sale-purchase contract in the Roman law, the famous „*pactum disciplinentiae*" could be added, being in favour of the buyer who had the opportunity to return the item during a certain period of time if he realized he did not like it. This power of the consumer to take his word back has begun to be part of the regulations of the consumer's protection in nowadays Europe. (Ungureanu, 1999)

In Middle Ages, the consumer was on a second level. The interest of the whole society was directed towards industry that was in the beginning. Although products on the market showed a great risk for consumers, the idea of encouraging the industrial development made law representatives be lenient to the manufacturers, advising buyers to take into account the wise saw „*caveat emptor*" in their transactions.

With the development of science, technique and technology, trade and markets, the consumer began to come in touch with more complex products. Thanks to means of communication and information, to commercial advertisement, the consumer comes in touch with a market where the economic agent (manufacturer, distributor, trader) has the absolute power. Having a great economic power, he imposes his products on the market, making the consumer buy them whether they correspond to his needs or not. The market is no longer the place where the consumer

expresses his needs in the shape of a request, allowing the manufacturer to satisfy them, but it has become the means that allows the professional to get more money.

On the other hand, the contractual vision of the consumption was left without a basis. Goods are obtained by concluding standard contracts, to wich the consumer expresses his adhesion without being able to negotiate the contractual clauses. In these conditions, a lack of balance appears in the exchange report; on one hand there is the professional (producer, distributor, trader), economically strong, well informed and well organized; on the other hand the consumer, poorly informed, without the power to negotiate, financially and judicially weak.

In this context, protecting the weak part is a necessity that materialized in a legislation relative to the consumer's protection.

In Romania, the interest regarding the consumers' protection appeared after 1989, influenced by the wish of integration in the European structures and by the new conditions in the Romanian economy.

The notion of „*consumer*" has received two acceptions in the specialty literature: a subjective and objective one.

According to the objective acceptation, the consumer is the whole world. Thus, in this category there are:

- producers, manufacturers, traders – that is the economic agents that purchase goods for their activity.
- Acquirers of products for their own use
- Bystanders that do not have a direct relation with the product, but that suffered because of its flaws.

The advocates of this definition showed that everyone must be protected no matter their direct or indirect relation to the product. A bystander must be protected even more because he does not have the possibility od inspecting the flaws of the product and choosing those that assures him a greater security, as buyers do.

This excessive extent of the notion of *consumer* is not in the interest of the weak part in a consumption relation, the part that needs protection the most.

According to the subjective acception, in order to have the consumer quality, a person must fulfill at least two conditions:

- to acquire, possess or use a product (service)
- the acquisition, possession or use must have a private purpose

The assimilation of the consumer to the buyer is frequent in practice. The notion of *consumer* is even wider. The consumer can acquire a product or service not only by buying it, but also as an effect of the location

contract or even deposit. Possession may result not only from a contractual relation but also from a judicial report to which the possessor has not expressed his will. (for example, the delivery at the consumer's residence of some products he did not order.)

The private purpose of the acquisition, use or possession of the product represents the lack of a connection to the professional activity. Private means personal, family (when the consumer's family use the acquired product) or collective (when the product is used by many persons related to each other).

3. The notion of *consumer* in the European Union legislation and in the international conventions

The Maastricht Treaty, on February 7th 1992, that establishes the European Union, states the notion of *consumer* in its disposals without defining it. According to the article 129A, they have in view the accomplishment of a high level of consumers' protection by means of measures taken in the formation of the sole market.

The term of *consumer* is used, but not always defined, in regulations – the main communitarian normatives that realize the consumers' protection.

The 84/450/CEE regulation regarding the appropriation of the legislative, reglementar and administrative disposals of the member states on fake adverstisement, is also for the consumers' protection; however the notion of *consumer* is not defined.

The 85/374/CEE regulation regarding the appropriation of legislative, regelmentar and administrative disposals of the member states for flawed products, imposes an objective responsibility of producers that also functions for the prejudiced consumers; however the term is not defined here either.

The 85/577/CEE regulation about the consumers' protection in case of contracts negotiated outside the commercial centres, defines the consumer as being any physical person who concludes transactions with a different purpose than that of his professional activity.

The 87/102/CEE regulation regarding the credit for consumption considers the consumer to be any physical person who, for the transaction belonging to the regular field of the regulation, takes action in a way that is foreign to his commercial or professional activity.

The 93/13/CEE regulation concerning the abusive clauses of the contracts concluded by consumers, considers the consumer to be any

physical person who takes action in ways that do not correspond to his professional activity.

Therefore, the communitarian conception of the consumer is circumscribed to the subjective definition. The consumer is only a physical person who concludes certain transactions without any connection to his professional activity.

There are similar definitions in the conventions applied to the European states, containing regulations destined to protect consumers. Thus, in the July 5th 1980' Brussels Convention regarding the jurisdictional competence in commercial and civil matters, the consumer is the person who concludes a contract without any connection to his professional activity (article 13). The same thing is stated by the 1980 Rome Convention on the law applied to contractual obligations (article 5(1)).

In Europe they have concluded conventions with a larger scale of applicability, including the consumers' protection as well; however they do not use the notion:

- The 1973 Hague Convention concerning the law applicable to the responsibility for products.
- The 1977 Strasbourg Convention of the European Council on the responsibility for products in case of injuries or death as well as conventions which explicitly exclude the consumption contracts.
- The 1980 Vienna United Nations Convention regarding the international goods sale contracts

4. The civil responsibility for flawed products in the Romanian normativ

4.1 The transposition of the 85/374/CEE regulation on July 25th 1985 – an obligation of the European Union member states

The improvement of the market economy mechanisms, in the European communitarian space, has led to an unprecedented growth of the industrial production, as well as the variety and growth of the qualitative level of products on the market.

These realities imposed, as a corollary, preoccupations referring to products general security, meant to protect the consumers' life, health and safety.

Initially, the communitarian legislator imposed specific rules for each product which forced manufacturers to release safe products.

Next, the economic agents in the production and trade chain had to be sure that the released products were safe and to inform the consumers about the risks in using or consuming them.

The obligation regarding the consumers' safety was consecrated later in the communitarian law, thanks to the 85/374/CEE regulation on the manufacturer's responsibility, adopted by the European Council.

The regulation stipulates the harmonization of the European member states' legislation concerning the manufacturers' responsibility for the prejudices caused by flawed products, in order to protect the consumers' life health and safety, no matter what the origin state of the product is.

As the abundance of regulations in the field of the consumer's protection shows, the European legislator preferred to elaborate flexible concepts, easy to adopt and apply, without complementary doubts (Popa, 2005).

According to the article of the regulation, the member states of the European Union had to put in force legislative, regular and administrative disposals 3 years the latest from its notification. The regulation was notified on July 30th 1985.

After a failed attempt (the government order nr 87/2000 concerning manufacturers' responsibility for the damage realized by flawed products), the regulation was transposed in the Romanian Law by the 240/2004 rule on the same responsibility.

4.2 The characteristics of the Law no. 240/2004

The intern normative act of transposition of the above analyzed regulation, assumes the legislator's approach as the setting up of an objective responsibility for the prejudices caused by flawed products which excludes manufacturers' guilt.

As far as the notion of product is concerned, the Romanian legislator does not obey the communitarian' provisions, excluding the possibility to attract manufacturers' responsibility in the agro-food field for the prejudices caused by the flawed products, as long as our law does not include the agricultural products in the notion of *product*.(Balan, 2004).

If the Romanian legislator is thorough when defining the notion of "flawed product", his interest in explaining the notion of "circulating product" is not noticed at all.

It is not relevant whether the prejudiced person possesses the quality of buyer, resident, user, tenant or third party or whether he

concluded the contract with a person responsible for the prejudice caused by the flawed product.

In exchange, the law requires that the prejudiced person should have used the flawed product for private use or consumption.

When defining the manufacturer, the Romanian law is confused. Whereas the communitarian legislator clearly specifies that the manufacturer is the maker of the finite product, of the raw material or of a part of the product, the Romanian law ignores the professional character of a manufacturer's activity, limiting to the sphere of manufacturers to the category of manufacturers of finite products, materials or component parts.

Apparently, thanks to the omission of the law, the legal disposals are also incidents for the non-traders, a hypothesis that was not taken into consideration by the communitarian legislator and probably, not even by the Romanian one.

In order to possess the quality of trader, it is necessary that the person should commit commercial actions with the character of profession, which may be viewed as a permanent occupation because the accidental committing of some trade actions is not enough to acquire the quality of trader. (Campenaru, 2002).

The Romanian legislator assumed the configuration of the objective responsibility stimulated by the stipulation of the regulation.

In the system of the objective responsibility, the responsibility for the prejudices caused by flawed products is established on the flaw of the product and not on the manufacturer's guilt.

Conceived in this manner, the judicial regime of the responsibility for the prejudices caused by flawed products does not suppose to prove the manufacturer's guilt, unlike the system of the actual Civil Code that is the basis for the whole civil offence responsibility on the idea of guilt.

The flaw of the product configures the fundamental element of the manufacturer's responsibility and establishes *ipso facto* the generating fact of the responsibility for the prejudices caused by flawed products.

The derogatory and aggravating responsibility for flawed products in comparison to the civil offence responsibility has been introduced to ensure the protection of the consumers' life, health and safety, conditioned by the impetuous development of modern technique.

4. The regime of the manufacturers' responsibilty for the damage caused by flawed products.

The special responsibility we analyse implies, as any other judicial responsibility, the cumulative existence more of damage, of the flaw and of the causality report and less of a fault.

Our law contains many nuances regarding all 3 elements-conditions, without pointing out the divergences of approach when considering the content of the regulation.

The accuracy of the regulation is to be noticed in the causes of exonerating responsibility where it is specified the "level of the existing scientific and technical knowledge at the moment the product was released on the market" that "did not allow the detection of the respective flaw".

This cause of exonerating responsibility of the manufacturer configures the concept of development risk (Balan, 2004).

This notion of German origin has led to vivid controversies and even divergences among the member states of the European Union.

The acception of development risk is that of unknown risk at the moment of conceiving, making or marketing a product and that is unpredictable compare dto the level of scientific and technical knowledge.

5. Difficulties in transposing the communitarian legislation

The socio-economic context in a continuous transformation requires the explanation not only of the legal disposals with internal vocation, but also the explanation of the communitarian ones concerning the consumers' protection.

If internally the corroboration of the relevant normative acts, the constructive disputes over the doctrine or nuances offered by jurisprudence are capable of eliminating the prolix from some wordings by revealing the legislator's will, at the communitarian law level, the solution is easier, the institution of the preliminary appeal leading to the explanation of some judicial norms by reference, and to the factual circumstances of certain concrete causes, but not hypothetical.

As an example, we present two of the solutions offered by the Court of Law of the European Communities regarding the limits of application or the significance of the direction that the present paper aims at.

The jurisprudence of the Court is constant in accentuating the idea that the prerogative of appreciation, available to the member states in order to establish the responsibility for products, is entirely determined by the direction and must be deduced from its formulation, objective and economy. Therefore, it results that the direction has in view, through the aspects it regulates, the complete harmonization of legislative, regular and administrative disposals of the member states.

Articles 1 and 3 in the direction do not limit themselves to settling the responsibility for a flawed product, but determines, from among the operators who participated to the production and marketing processes, the one who has to take responsibility issued by the direction (January 10th 2006 decision in the C402/03 cause).

As for the notion of opening to free circulation taken into consideration by article 7 in the direction, the Court has decided that the exonaration of responsibility on the grounds of the absence of freely circulating the product takes into consideration, first of all, the cases in which a person, other than the manufacturer, has removed the product from the manufacturing process. To equal measure, there are excluded from the field of the direction the uses of the product against the manufacturer's wishes, for example when the manufacturing process has not been finalised , as well as the uses for private purposes or under similar conditions. In the same context, the Court has decided, at point 15 in the Veedfald decision, that the situations listed in a limitating way in article 7 from the direction, in which the manufacturer may be exonerated of all responsibility, have to be the object of a strict interpretation. Such an interpretation is done with a view to safeguard the interests of the affected persons by a damage caused by a flawed product.

However, article 11 in the direction, having as its objective the time limitation of the rights conferred by the direction to the damaged people, has a neutral character. Indeed, as it results from the tenth reason of the direction, the finality of this provision is to satisfy the juridical safety needs in the interest of all parties involved. Therefore determining the time limits within which the action of the damaged person has to be filed has to meet some objective criteria.

In the light of these reasons, a product may be considered as marketed/ circulating, as according to article 11 in the direction, when it is out of the manufacturing process made by the manufacturer and when it has entered the trading system, where it is at the stage in which it is to be offered to the public in order to be used or consumed (decision approved in February 9th 2006, Cause C-127/04).

6. The application priority of union law on the home law of the member states

In the structuring process of the European Communities and of the establishment and gradual consolidation of the european Union, the rapport between union law and home law proved to have a complex nature. Thus, although the main characteristic of this rapport has benn and

still is cooperation, in the union lawful order and the national juridical one there are recorded conflictual moments and evolutions as well, marked by certain difficulties of the assimilation of the union standards and of their application in the national juridical systems (Nicolescu, 2008).

As part of the dialogue and cooperation which are manifested between the national couts and the Luxembourg Court by means of the prejudicial sending, the latter offers the national judges elements for the interpretation of the union law which are necessary for them to solve the litigations they are called to settle. Moreover, as it has also been shown in the direction, the development of the union's judicial order is, to a great extent, the result of the collaboration which has been created on the way to the prejudicial procedures between the EU Court of Justice and the national judges.

7. Conclusions

Appeared as a respons to the new conditions of the market economy and to the necessity of harmonizing the Romanian legislation with that of the member countries of the European Union, with a view to its integration, the consumers' protection against flawed products is a necessity. The Romanian legislator has become aware of this necessity by adopting some normative bills which proved to be very important in this direction, Law no.240/2004 remaining the most relevant in the legislative ensemble in the field of the protection of the consumers. The Romanian legislator has been preoccupied with the protection of the consumers when they have sensed the possibility of some law conflicts regarding the consumers' protection, articles 114-116 in Law no. 105/1992 regarding the settlement of the rapports of private international law offering solutions to such conflicts. Such a settlement is justified by turning the Romanian consumer into one with international vocation. Thus, the circulation on the Romanian open market of import goods, the development of international tourism and of the modern means of communication across borders facilitates the appearing of private international law litigations.

The existant legilation differences between the member states of the European Union prevents the achievement of a uniform protection of the consumers.

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LE REGIME SANCTIONNAIRE APPLICABLE AUX INFRACTEURS MINEURS – REGLEMENTATIONS ACTUELLES ET PERSPECTIVES

Section I – Le concept de mineur infracteur

Le premier article de la Convention O.N.U. concernant les droits de l'enfant, ratifié par notre pays par la Loi 18 / 1990 et publié dans le Moniteur Officiel no. 109 du 28.09.1990, définit l'enfant comme : « tout être humain qui a moins de 18 ans, excepté les cas où la loi applicable à l'enfant établit la limite de la majorité au-dessous de cet âge ».

Apportant des atteintes aux normes de conduite généralement acceptées, le mineur, en fonction de l'accomplissement des conditions de la responsabilité pénale, se transforme en délinquant et pose des problèmes en ce qui concerne l'établissement de la responsabilité juridique, ou prédélinquant, en imposant l'application de mesures de protection et éducation.

Le Code pénal roumain en vigueur, donnant son avis sur l'ensemble des conditions psycho-physiques normales, établit le début de la capacité juridique de droit pénal à l'âge de 14 ans, conformément aux articles 99 et 50 du Code pénal, dans les limites fixées par l'article 99 regardant le discernement.

Le projet du nouveau Code pénal, approuvé en séance de Gouvernement du 25.02.2009, institue dans l'article 27 la minorité comme une cause de non-imputabilité, pour le mineur qui, à la date de l'infraction, n'accomplissait pas les conditions légales pour répondre de manière pénale. Le titre V considère cette institution, avec des changements importants, en ce qui concerne la limite d'âge de la responsabilité pénale (les dispositions des articles 114 prévoient l'âge minimal de 13 ans) et le régime sanctionnaire, prévu dans les articles 115-124.

Concernant l'âge auquel on peut parler de responsabilité pénale, on en a beaucoup parlé dans la littérature de spécialité ; il est évident que le milieu social a de l'influence sur le contexte individuel de développement physique et psychique et détermine des nombreuses situations variables.

D'ailleurs, les réglementations européennes donnent à chaque état la liberté d'établir cet âge, l'article 40, point 3 de la Convention concernant les droits de l'enfant établissant que : « Les états membres vont s'efforcer à établir un âge minimal au-delà duquel les enfants seront présumés comme n'ayant pas la capacité de transgresser la loi pénale ».

De la même manière, les Règles de Beijing, adoptés par la Résolution 40/33 du 29 novembre 1985 par l'Assemblée Générale des

Nations Unies, établissent que la notion de capacité pénale doit être clairement définie, et que la limite de la responsabilité pénale ne doit pas être fixée à un trop petit âge, tenant compte du degré de maturité émotionnelle, psychique et intellectuelle de l'enfant.

Ainsi comme il résulte de l'exposition des raisons qui accompagne le projet du nouveau Code pénal, pour justifier la diminution de la limite d'âge, on a pris en considération l'augmentation continue des infractions faites par des mineurs de moins de 14 ans, qui tirent profit de l'impossibilité de leur poursuite pénale et le fait que le progrès technologique et le milieu social contemporain favorisent une maturité plus rapide des adolescents par rapport à la période d'il y a quatre décennies. Nous avons aussi analysé de manière comparative d'autres systèmes de droit, et nous avons constaté que la modification s'inscrit dans une tendance générale dans le droit européen des mineurs, car la limite d'âge à laquelle le mineur répond de manière pénale est de 10 ans en France (art. 2 de l'Ordonnance du 2 février 1945, modifiée en 2002), en Grande Bretagne (art. 34 Crime and Disorder Act 1998) et en Suisse (art. 3 de la Loi du 20 juin 2003, en vigueur le 1 janvier 2007), de 12 ans en Grèce (art. 126 Code pénal) et aux Pays-Bas (art. 77 b Code pénal), pendant qu'en Espagne, de nos jours, l'âge établi est de 14 ans mais il y a un projet de loi en débat parlementaire qui prévoit une baisse jusqu'à 12 ans.

La réduction de l'âge à 13 ans, période finale de la puberté, à la limite vers l'adolescence proprement-dite, signifierait une aggravation des conditions où survient la responsabilité pénale, dans l'essai de répondre à une réalité contemporaine, mais cette disposition doit être corrélée avec les autres dispositions concernant le régime sanctionnatoire. Ainsi a-t-on éloigné, par les changements apportés, la possibilité de l'application des punitions pour les mineurs entre 13 et 18 ans, la règle étant d'appliquer des mesures éducatives non-privatives et seulement exceptionnellement des mesures privatives, ce qui représente, évidemment, une atténuation du régime sanctionnatoire et l'adaptation des dispositions pénales regardant la minorité aux demandes actuelles similaires aux autres législations européennes.

Section II – L'Evolution des conceptions concernant la sanction de la délinquance juvénile

Une des préoccupations fondamentales de la société moderne prend en compte le perfectionnement de la législation concernant les mineurs, comme une demande adressée non seulement aux organes législatifs mais à

la société toute entière, pour identifier des méthodes efficaces de récupération.

Du point de vue historique[1], les premiers principes de la justice juvénile se concrétisent par l'apparition de l'instance pour les mineurs de Chicago, en 1899, des juridictions séparées et des lois pour les enfants aux Pays-Bas en 1905, ensuite en Grande Bretagne en 1908, la création des Tribunaux spéciaux pour les enfants de Belgique et de France en 1912.

Après les années 1960, on a constaté une tendance d'amélioration du système de protection du mineur, les organismes spécialisés du Conseil de l'Europe étudiant le problème de l'efficacité du traitement de courte durée et insistant aussi sur la nécessite des mesures non-institutionnelles et non-judiciaires[2]. Les différentes législations s'adaptent à cette tendance, par exemple par l'adoption du système belge de protection des jeunes adopté en 1965, la création des tribunaux pour enfants dans la législation hollandaise en 1965, l'établissement des options de réhabilitation dans le système italien dans les années 1934-1956-1962.

A la fin des années 1980, l'augmentation de la délinquance juvénile a apporté des modifications dans la législation de certains états, par des réglementations avec des punitions plus sévères, en Italie en 1988, en Angleterre et au Pays de Galles en 1988-1989, en Allemagne en 1990, en Belgique en 1994 et aux Pays-Bas en 1994-1995 ; en France on adopte en 1980 la Loi «de la Sécurité et de la Liberté » qui aggrave les punitions, pour les mineurs y-inclus.

Dans ce contexte, la Convention Européenne pour les Droits de l'Enfant adoptée en 1989 s'intéresse aux problèmes liés à la justice juvénile notamment dans les articles 37 et 40. On établit que l'arrêt, la détention ou l'emprisonnement d'un enfant doivent être faits conformément à la loi, comme dernière solution et pour la moindre période (article 37), l'obligation de la fixation de l'âge minimal pour la capacité pénale, quand il est possible d'aborder les enfants sans faire recours aux procédures judiciaires, le droit d'appel, le droit d'assistance gratuite d'un interprète, le respect de l'intimité de l'enfant, des alternatives au soin institutionnel, comme des sentences de conseil et de surveillance, la probation, le soin offert par les assistants maternels, les programmes d'instruction vocationnelle et éducationnelle pour que le traitement des enfants soit fait

[1] Raluca Ungureanu, "Standarde internaţionale privind justiţia juvenilă", Revue Doctrină şi jurisprudenţă, 2/2005, éditée de Parchetul de pe lângă Înalta Curte de Casaţie şi Justiţie, pagina 182;

[2] Dans ce sens, Ortansa Brezeanu, "Minorul delincvent", Revue de Droit Pénal 4/1997, page 128;

en conformité avec leurs intérêts et de manière proportionnelle avec les circonstances personnelles et le délit commis.

Pour compléter, l'Organisation des Nations Unies a élaboré les Règles Minimales Standard des Nations Unies pour l'Administration de la Justice Juvénile, les «Règles de Beijing », destinéss à créer une justice réelle pour les mineurs délinquants, avec la protection de la dignité du mineur et de ses droits fondamentaux.

On remarque dans le même domaine, le « Guide des Nations Unies pour la prévention de la Délinquance Juvénile » 1990 et les Règles Minimales pour des Mesures sans Détention 1990 (Les Règles de Tokyo), qui mettent l'accent sur l'implication de la communauté dans l'administration de la justice, les Règles des Nations Unies pour la Protection des Jeunes qui manquent de liberté, adoptées en 1990, la Charte Africaine pour les Droits et l'Assistance Sociale de l'Enfant, qui met en évidence combien il est important que l'enfant reste dans sa communauté et sa famille.

Dans le droit pénal roumain, l'analyse temporelle des sanctions appliquées aux mineurs démontre leur caractère atténué et différencié.

Conformément à la loi roumaine ancienne, les enfants jusqu'à 7 ans ne purgeaient pas de peine, et ceux entre 7 et 25 purgeaient aussi des peines réduites.

Le Code pénal de 1850, prévoyait que les mineurs jusqu'à 8 ans étaient protégés de la punition, ceux entre 8 et 15 ans étaient punis si on constatait qu'ils avaient adroitement agi, et ceux entre 15 et 20 ans purgeaient des peines réduites comparé aux adultes.

Le Code pénal de 1864 a repris la même partition en fonction d'âge, établissant des punitions réduites pour les mineurs : celles-ci n'étaient jamais considérées de punitions criminelles même si le fait était un crime, et ceux qui ne purgeaient pas de peine étaient confiés à leurs parents ou à un monastère spécial.

Le Code pénal de 1936 établissait la responsabilité pénale à partir de 12 ans, conditionnée par la preuve du discernement, et de manière non-conditionnée, initialement, pour ceux entre 15 et 19 ans et ensuite à 18 ans. On pouvait appliquer des peines, moins sévères que pour les adultes et des mesures de sécurité pour ceux qui répondaient de manière pénale ; les autres bénéficiaient de mesures de protection.

En ce qui concerne le Code pénal de 1968, il a été modifié par le Décret 218/1977 regardant certaines mesures transitoires de sanction et rééducation par le travail des personnes qui ont commis des faits prévus par la loi pénale : être confiés à des collectifs de travail ou apprentissage ou être envoyés dans des écoles spéciales de travail ou rééducation. Plus tard,

la Loi 104 / 22 septembre 1992 qui a modifié le Code pénal, a établi un régime sanctionnatoire mixte, différent de celui des adultes, qui consiste soit dans l'application de mesures éducatives soit de punitions.

L'article 100 alinéa 1 thèse I du Code pénal en vigueur établit qu'envers le mineur qui répond de manière pénale on peut prendre des mesures éducatives ou on peut appliquer une peine, seulement si on apprécie que la mesure éducative n'est pas suffisante.

Vu ce régime spécial de sanction, l'individualisation implique deux étapes distinctes, la première s'appuyant sur les préventions de l'article 100, qui prend en considération l'option manifestée pour une punition ou une mesure éducative, et la deuxième qui considère la fixation de sa durée conformément aux critères généraux prévus par l'article 72.

L'article 100 du Code pénal actuel établit les éléments qu'on considère lors de la manifestation de l'option pour une des sanctions regardant les infracteurs mineurs : le degré de péril social du fait, l'état physique, le développement intellectuel et moral, le comportement, les conditions de vie et d'éducation et tout autre élément qui caractérise la personne du mineur.

On doit remarquer qu'il ne faut pas faire de dissociation stricte entre les deux catégories de critères, dans la majorité des cas le législateur tenant compte des mêmes éléments qui visent les circonstances réelles et celles personnelles.

Ainsi les critères généraux d'individualisation des punitions, prévus par l'art. 72sont-ils liés au cadre légal de l'individualisation, c'est-à-dire : les dispositions de la partie générale du code, les limites de punition fixées dans la partie spéciale, et les éléments qui caractérisent le fait et la personne : le degré de péril social de l'infraction, l'infracteur et les circonstances qui atténuent ou empirent la responsabilité pénale.

La Loi 301/2004 a maintenu ce système dualiste de sanction des infracteurs mineurs, et a introduit des mesures éducatives nouvelles et des modalités d'exécution différentes.

La tendance des systèmes de droit contemporains, appuyée les préventions de l'art. 40 de la Convention concernant les droits de l'enfant souligne qu'il est préférable que les mineurs ne soient pas soumis aux procédures juridiques standard et à l'institutionnalisation, en fixant une gamme de dispositions concernant le soin, l'orientation et la surveillance, les périodes d'épreuve, le placement familial, les programmes d'éducation générale et professionnelle et les solutions alternatives pour le soin dans un cadre institutionnel.

De la même manière, la modification importante apportée par le projet le nouveau Code pénal, adopté en séance de Gouvernement du

25.02.2009, consiste dans l'introduction d'un régime sanctionnaire spécifique aux infracteurs mineurs, qui implique seulement des mesures éducatives.

On a ainsi essayé une assimilation de certains modèles provenant de différentes législations, respectivement la Loi Organique no. 5/2000 concernant la réglementation de la responsabilité pénale des mineurs en Espagne (modifiée par la Loi Organique no. 8/2006), mais on a aussi pris en considération des réglementations du droit français (Ordonnance du 2 février 1945 avec les modifications ultérieures), le droit allemand (La loi des tribunaux pour les mineurs de 1953 avec les modifications ultérieures) et le droit autrichien (La loi concernant la justice juvénile de 1998), par leur adaptation conformément au propre système de droit.

Ainsi l'article 115 du nouveau Code établit-il, de manière différenciée et limitée, les critères qui peuvent déterminer l'application d'une certaine mesure éducative, la règle générale étant celle de l'application d'une mesure éducative non-privative de liberté, envers le mineur qui, à la date de l'infraction, faisait partie du groupe d'âge 13-18 ans. De manière exceptionnelle, on peut prendre une mesure éducative privative de liberté au cas où il fait preuve de persévérance infractionnelle ou il a commis une infraction grave, comme :

a) s'il a commis encore une infraction, pour laquelle on lui a appliqué une mesure éducative qui a été exécutée avant de commettre l'infraction pour laquelle il est jugé ;

b) quand la punition prévue par la loi pour l'infraction commise est l'emprisonnement pour sept ans ou plus ou la détention pour la vie.

Quand on se confronte au problème de choisir une certaine mesure éducative, après avoir appliqué l'article 114 du projet de Code pénal, on se rapporte aux mêmes critères d'individualisation comme pour les punitions, prévues dans l'article 74 du projet de Code pénal. De ce point de vue, quand on établit la sanction on doit analyser et prendre en compte les suivantes : les circonstances concernant l'état de péril social, ou les circonstances et la manière de commettre l'infraction, tout comme les moyens utilisés, l'étendue du préjudice matériel, la raison et le but de l'infraction, la personne de l'infracteur, du point de vue de son passé infractionnel - par rapport à la nature et à la fréquence des infractions qui constituent des antécédents pénaux – du point de vue des aspects physiques, concernant l'âge, l'état de santé (critère qu'on prend en compte lors de l'individualisation de la sanction, et à son choix, par exemple par l'hospitalisation dans un institut médical éducatif ou le choix de la modalité d'exécution) et du point de vue intellectuel et moral, rapporté au niveau d'éducation et au milieu familial et social, capable d'offrir des

détails sur les causes déterminantes pour la modalité d'agir après l'infraction et pendant le procès pénal.

Pour une meilleure compréhension du comportement des infracteurs mineurs, le Code actuel de procédure pénale prévoit dans l'article 482, l'obligation d'effectuer le rapport d'évaluation, au lieu de l'enquête sociale, par les services de réintégration sociale et de surveillance de l'exécution non privatives de liberté, qui fonctionnent auprès des instances du tribunal.

Les modifications apportées aux dispositions pénales et procédurales pénales ont pris en compte exactement ces aspects, par l'introduction de l'article 117, dans le cadre du titre regardant « La minorité », au sens de l'évaluation du mineur, par la sollicitation de la part de l'instance au service de probation de rédiger un rapport qui contiendra aussi des propositions motivantes concernant la nature et la durée des programmes de réintégration sociale que le mineur devrait suivre, et d'autres obligations qu'on pourrait lui imposer.

Le rapport a un contenu ainsi établi par le texte de la loi qu'il contient aussi des propositions motivantes ; il est obligatoire non seulement au moment où on établit des mesures éducatives mais plus tard aussi, à tout moment où l'instance dispose sur les mesures éducatives ou sur la modification ou la cessation de l'exécution des obligations imposées, tout comme à la fin de l'exécution de la mesure éducative, conformément à l'alinéa 2 du même texte.

Le Code pénal en vigueur prévoit la possibilité de prendre les mesures éducatives suivantes envers l'infracteur mineur : la réprimande, la liberté surveillée, l'internement dans un centre de rééducation ou l'internement dans un institut médical éducatif.

Le projet du nouveau Code pénal écarte les punitions, comme sanctions possibles applicables aux mineurs et introduit un nouveau système des mesures éducatives non privatives de liberté : le stage de formation civique, la surveillance, la consigne à la fin de la semaine, la surveillance permanente et privatives de liberté : l'internement dans un centre éducatif et l'internement dans un centre de détention.

Si on examine le contenu des mesures éducatives non privatives de liberté, on constate le caractère nouveau rapporté aux réglementations actuelles, d'inspiration française et espagnole. Elles sont prévues dans l'ordre croissant de leur gravité, et se remarquent par une diversification des méthodes qui ont comme but la réintégration sociale du mineur infracteur et son rééducation, l'implication beaucoup plus importante du service de probation, pour Controller et guider le mineur.

Les obligations que l'instance peut imposer au mineur, en même temps avec une des mesures éducatives non privatives de liberté prévues par l'article 122 permettent une adaptation en fonction de la personne et la conduite du mineur et du spécifique de l'infraction commise.

Si le mineur n'accomplit pas les obligations imposées ou ne respecte pas les conditions établies pour exécuter la mesure, on peut disposer la prolongation de la durée d'application, le remplacement avec une mesure non privative plus sévère ou avec une mesure éducative privative.

En ce qui concerne les mesures éducatives privatives de liberté, elles sont les mêmes que dans la réglementation actuelle, l'internement dans un centre éducatif et l'internement dans un centre de détention, avec des modifications en ce qui concerne la durée, de 2 à 5 ans ou, de manière exceptionnelle, de 5 à 15 ans, seulement dans l'hypothèse d'avoir commis des infractions très graves, pour lesquelles la loi prévoit la détention pour la vie ou l'emprisonnement pour au moins 20 ans.

On a aussi prévu la possibilité de remplacer ces mesures avec l'assistance permanente, seulement après l'exécution de deux tiers de leur durée et la preuve de l'intérêt constant pour l'acquisition de connaissances scolaires et professionnelles et des progrès évidents ayant comme but la réintégration sociale ou la libération si le mineur a accompli ses 18 ans, en établissant une ou plusieurs obligations prévues par l'art. 122. Si on ne respecte pas ces dispositions, l'instance peut revenir et disposer l'exécution dans le cadre des centres.

Apres avoir accompli les 18 ans, alors qu'il manifeste un comportement par lequel on influence négativement ou on empêche le procès de récupération et réintégration des autres personnes internées, l'instance peut disposer la continuation de l'exécution de la mesure éducative dans un pénitentiaire. Dans ce cas on réalise l'exécution d'une mesure éducative dans le pénitentiaire en imposant dans ce sens l'introduction de plusieurs dispositions correspondantes liées à l'exécution.

On a aussi réglementé les hypothèses de pluralité des infractions commises pendant la minorité, et celles où pour certaines infractions on a établi une mesure éducative, et pour les autres on a appliqué des punitions (article 130) ; on a prévu des termes spéciaux de prescription de l'exécution des mesures éducatives (article 133) et on a maintenu, en même temps, la réglementation actuelle en ce qui concerne le calcul des termes de prescription de la responsabilité pénale (article 132).

Section III – Conclusions

On a défini la délinquance juvénile comme le résultat de « l'interaction génétique entre la personnalité encore trop jeune pour tenir tête aux frustrations, entre l'univers spirituel limité, obtuse, essentiellement égocentriste de quelques mineurs ou jeunes et les dysfonctions, les fissures aléatoires et transitoires de certains procès de socialisation, d'intégration sociale et de contrôle social autochtones ». (A. Dincu, 1993)

Pendant cette période de transition, du point de vue de l'analyse comme phénomène social, outre les théories criminologiques classiques, la délinquance juvénile a des causes multiples, comme l'échec de la socialisation, l'affaiblissement du contrôle social, la désorganisation des familles et le déclin de ses fonctions éducatives traditionnelles, des rapports tendus avec les parents ou les professeurs, l'insécurité affective, la constitution de sous-cultures ou contre-cultures[1].

L'adaptation du système législatif à la réalité de cette causalité, suppose l'identification de plusieurs mesurer de réintégration viables, ayant comme but la récupération sociale, qu'on doit mettre en pratique. Il est évident qu'un système sanctionnatoire basé notamment sur les punitions n'est pas adéquat et efficace pour réaliser le but final de la rééducation, idée prise en compte aussi par les modifications récentes du Code pénal.

Dans ce sens, on véhicule récemment l'idée de justice réintégratrice, basée sur la réconciliation, plus que sur des mesures punitives. « Cette théorie part de la notion conformément à laquelle dans une société qui ne fonctionne pas bien, il y a un équilibre entre les droits et les responsabilités. Quand il y a un incident qui bouleverse cet équilibre, on doit trouver des méthodes pour le refaire ; ainsi apparaissent les méthodes communautaires qui impliquent l'infracteur et la victime, les détermine d'accepter cet incident-là comme réel et de continuer leur existence ». (A. Skelton, 1999, R. Ungureanu, 2005).

La délinquance juvénile est un phénomène complexe et grave, par ses conséquences négatives sur les mineurs et sur la société en général, de sorte que la problématique des mineurs infracteurs et de leurs droits doit être considérée à un niveau qui dépasse seulement les dispositions sanctionnatoires.

[1] Adina Bereczki, C. Rebeleanu, Dan Perju-Dumbravă , "Abordări sociologice în etiologia delincvenței juvenile", Revue de Criminologie, criminalistique et pénologie 2/1999, pagina 68

Si on remarque, par exemple, la reformation du système de punition en ce qui concerne aussi les peines, pour avoir de l'efficacité, les nouvelles dispositions légales concernant les mineurs doivent être complétées par l'existence de plusieurs services sociaux communautaires ou des organisations non-gouvernementales, qui conseillent et suivent leur évolution pour assurer la finalité de la sanction applicative, et aussi une assistance pst-pénale. Il est nécessaire de former les personnes qui travaillent directement dans ce cas et d'assurer les dotations nécessaires[1].

Comme dans toute autre situation concernant la criminalité, il est essentiel de développer une stratégie de prévention de la délinquance juvénile, avec des programmes concrets, l'implication des mineurs qui font partie de groupes de risque dans des programmes d'assistance et conseil.

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[1] Dans ce sens, voir les propositions faites comme suite au projet « Pratiques et normes concernant le système de justice juvénile en Roumanie » réalisé comme suite au partenariat entre le Ministère de la Justice et UNICEF, page 140 ;

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Elena POPA[1]

THE AMICABLE CONSTANT OF ACCIDENT

Abstract

Insurance is one of the areas in our country that has suffered the most profound changes due to European Integration. A series of legislative changes envisaging harmonization with the acquis communautaire have been made during the accession to the EU.
The need of harmonizing with EU practices, aligning with European standards of road legislation in Romania, resulted in changing insurance laws. "Amicable constant" was introduced in case of road traffic accidents which resulted in material damage only. This is a procedure designed to facilitate faster settlement and less bureaucratic activities in a traffic incident involving plugging light road without breaking the law in force.

Insurance is one of the areas in our country who have suffered the most profound transformation in the view of European Integration. The preparation for accession to European structures has produced a series of legislative changes which were intended to harmonize with the acquis communautaire.

As a European Union member, Romania was induced into adopting a series of best practices by comparing Romanian and European insurance experience. The number of vehicles has had a spectacular growth in recent years, which favoured a greater number of accidents and increased requests to insurance companies to recover losses.

Law no. 304/2007 amending and completing Law no. 136/1995 on insurance and reinsurance in Romania[2], introduced the concept of "amicable constant" in case of road traffic accidents which resulted in material damage only.

The use of the "amicable constant" of accident, leads to shorter recovery procedures in case of traffic accidents which resulted in material damage only, representing an alternative to solving them, but the protocol held by the police remains in force under the law.

But the distinction is made regarding the introduction of the amicable constant of accident, between voluntary auto insurance (CASCO) and binding insurance (RCA).

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[2] Published in Monitorul Oficial al României, Partea I, nr. 784 din 19 noiembrie 2007.

The amicable constant of accident insurance for RCA

The need to harmonize with EU practices, the alignment to European standards of road legislation in Romania, resulted in changing insurance laws. Intended as a supplementary aid, the Commission of Insurance Supervisors (CSA), to the recommendations of specialty European missions, adopted Order No. 21/18.12.2008 for the implementation of the Norms concerning the use of the form for amicable finding of accidents[1]. This kind of document was meant to facilitate (the process becoming faster and less bureaucratic) the settlement of minor traffic incidents without breaking the law in force. The present norm applies to insurance policies for compulsory auto liability (RCA) which runs from the date of publication.

Thus, if light traffic accidents occur (i.e.without injuries to persons), information to insurance companies can be done on a form issued by the insurer, known as the "amicable constant of accidents". On that form, drivers of vehicles shall record the circumstances producing the event, the identification of persons and vehicles involved, and those of insurers.

The form "amicable constant of accidents" will be printed and distributed by each insurance company to its own RCA clients, together with the policy of RCA insurance. The insured person may ask for one or more such documents during the period of validity of the policy, in case the first one he initially acquired was used, alienated or lost.

The amicable constant of accidents involving two vehicles and resulting in material damage only, comes into force on 1st July 2009. Mild injuries will be resolved by agreement between the parties both drivers involved signing the form for amicable constant of accidents.

The form for amicable constant of accidents contains information on date and place of accident occurrence, the particulars of the drivers involved, the owners of vehicles involved, the vehicles involved and their RCA insurance no., and the circumstances of the accident occurred.

Finding an accident by either party involved means prejudice and requires the insurer to open a damage file and shorten the proceedings to recover losses.

According to present rules, it is prohibit to the insurer to direct the injured parties to have their conflict protocoled by the road police.

RCA insurers, once noticed by the production of a minor road event with the form of amicable constant of accidents, are obliged to issue the document for necessary repairs.

[1] Published in Monitorul Oficial al României, Partea I nr. 876 din 24 decembrie2008.

Insurance companies authorized to sell RCA policies are supposed to conclude a protocol on how to establish a right compensation for owners / users of vehicles involved in the accident, within 60 days from the time the CSA standard was issued. Mild injuries will be resolved by agreement between the parties both drivers involved signing an amicable constant of accidents form. This will significantly shorten the duration of car damage settlement.

Insurers authorized to practice RCA insurance are required to take all the necessary measures to implement the rules and be responsible for proper training of their own staff and intermediaries on the settlement of damages in appropriate circumstances, compliant with legal provisions in this area.

Thus, the minor road accidents occurred in Romania during the second half of the year can be solved without finding documents issued by the police, provided that the form is completed and signed by both drivers involved in accidents. Once completed with the names of drivers, accident data and signed by the two drivers, the form must be submitted to the insurance company which, under it, will issue the necessary documents for entry repair of vehicles.

Amicable constant of accidents for optional insurance (CASCO)

Holders of CASCO car policies involved in a traffic incident resulting minor damage to their vehicle, or finding a damage occurred in circumstances other than in a traffic accident (fallen trees, cars found damaged in the parking lots etc.) no longer have to go to the police to get the necessary documents to have the vehicle repaired, but they can address directly to the insurance companies. The procedure is stipulated in the Order no. 12/2008 on the implementation of rules on the procedure for preparation and release of the document for having the vehicles repaired, issued by the CSA[1].

According to the present norms, insurance companies and specialized services mandated to finding and liquidation of damages may designate staff responsible for checking that injury settlement files and release documents for the repairing of vehicles in case the insured has a valid optional CASCO insurance, issued by the insurer and notifies the production of material damage to the vehicle insured under the terms of

[1] Published in Monitorul Oficial, Partea I, nr. 556 din 23 iulie 2008, care a intrat în vigoare la 01 ianuarie 2009.

Government Emergency Ordinance no. 195/2002 regarding the traffic on public roads[1].

Vehicle repair establishments are required to accept form called "Introduction to repair" vehicles issued by insurers, which are equivalent to those issued by the Road Police under the name "authorization to repair".

The present norms emphasize that the insurance companies have to issue the document necessary for introducing of the vehicles to be repaired, but that does not constitute final technical note finding damage and no obligation to pay from the insurer, as it is otherwise stated in the document.

The introducing of the vehicles to be repaired, which will be issued by the insurer in duplicate (the original being given to the applicant) will bear a register number, having the following format:

- for authorized insurers in Romania: RA-xxx / JJ / ....., where RA-xxx is the unique number of registration in the Insurers and Insurance Brokers Register of the insurer and, "JJ" is the abbreviation for the county where the document is issued by the introduction and repair of the damage taken, all these are followed by a serial number allocated by the insurer to manage file damage.
- for authorized insurers in other Member State of the European Union developing activity and practice of insurance in Romania under the free movement of services or the right of establishment: RX-yyy / JJ / ....., where: RX-yyy registration code is assigned by the CSA, JJ has zero value, the form "00", all these are followed by a serial number allocated by the insurer.

The information contained in this document will be maintained and emphasized in a mandatory database of each insurer engaged in compulsory or optional insurance of vehicle and kept for a period of ten years.

Entry into force on 1st July 2009 of the amicable constant of accidents determines some rumours on the insurance market in Romania. On the one hand, there are some insurers who are concerned about the increase fraud in the system, but also the costs of organizational changes that are supposed to be operated within the structures, while on the other hand, there are the Police and the Road customers dissatisfied with the interminable queues that you need to walk even if there are minor damages implied.

Fears on the amicable settlement are, somewhat, unfounded, since, in most European countries, it has already operated successfully for many years.

[1] art. 79 alin. (2) lit. b), art. 80 alin. (2) si art. 81.

Excluding the minutes of infraction issued by road police means a great practical advantage:

- firstly, with the current system, insurers can not challenge this report in front of the justice court, which is only possible on the initiative of any party involved in the accident. With the amicable constant of accident, this impediment will disappear.
- secondly, the introduction of the procedure will make the damage services to develop in a more accelerated way. Such a neutral external entity does not allow mistakes for fear not to lose customers and damage their image.

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Stelian LUPU

PENAL JUSTICE vs RESTORATIVE JUSTICE ?

Abstract

The end of 20th century saw the idea of a new way of dealing with conflicts in penal matters as against traditional approaches to criminality, consensual models being promoted as alternative to classic system.

The paper herein undertakes to make a review of all principles lying at the basis of Restorative Justice (where mediation and mutual understanding between parties involved play a dominant role) as against the principles of Retributive Justice (where the penalty of the offender is as per the breach committed.)

The paper herein most certainly does not solve the issue of the eternal question "SHOULD WE PUNISH OR RECOVER?". Nevertheless, the same undertakes to be a defence for the ones that believe that Restorative Justice offers viable solution for solving legal disputes and stands for a promising way of restructuring the penal law.

As a way of solving the victim-offender conflicts in terms of penal law, along with the appearance of the state, the penal justice was both a manner of incriminating the acts that were dangerous for the social values, and a legal framework of applying the sanctions on those that commit this kind of acts, justice contributing thus to the protection of social order.

What does penal (retributive) justice represent?

It constitutes the totality of penal juridical norms that protect the inter-human relationships within which the conduct of one person may be according to the norms legally established by society or it may be in conflict with them. Breaking the norms of social cohabitation has the following effects: *disturbing the public consciousness* on the one hand, and *setting the mechanism of penal justice in motion*, on the other, materialized into coercive actions of the state. *Disturbing the public consciousness* or the *"social alarm"* reaction generated by the socially dangerous act is the consequence of human solidarity with the victim or sometimes the individual's fear that he/she himself could be the victim of a similar act. The consequence of this "social alarm" is manifested into the official disproval of the criminal act manifested by applying the penal justice to a legally established gradual punishment system. Sometimes however, the disproval may stir the atavist feeling of revenge in individuals who, even if not directly involved, were pure and simply present when the crime was committed (for instance, the case of offenders caught in the act).

Some authors state that penal justice is as old as humanity, being the natural expression of the individual and collective instinct of

preservation and by virtue of which any living creature reacts against any actions that might harm their living conditions. In time, the punishment of the offender for committing an act condemned by society has taken many shapes, starting with the instinctive and primitive reaction of ***revenge*** – "the revenge of the blood" – considered a compulsory duty for the victim's descendants and which perpetuated at some peoples till today evolving into ***"the law of the talion"*** – "a tooth for a tooth and an eye for an eye" and into ***"the law of composition"*** which allowed the author of a harming act to pay in money, weapons, tools, animals, etc. The punishments previously mentioned were taken over by the laws of antique Greece, an age in which the fundamental distinction between *public offences* and *private offences* becomes clearer and clearer and the concept of **penal justice** appears as a sovereign function of the state.

The functions of penal justice (*preventive* and ***repressive*)** are practically to be found among the functions of the state. The function of protection of the citizens or internal defense is exerted by the state either onto the persons potentially dangerous for the public order, or onto the authors of antisocial acts. Thus, two things are accomplished: ***the preventive defense*** which may have a *positive* expression (of assistance, guidance, cooperation) or a *negative* one (disciplinarian and eliminating any form of antisocial activity) and ***the repressive defense*** (the punishment of the offender), which presupposes the coercive intervention of the specialized state bodies as a result of committing certain antisocial acts. As a matter of fact, the DEX defines punishment as a repressive measure taken against the one who committed an offence. Referring to punishment, Cesare Bonesana, marquis of Beccaria, doctor in law, the founder of the modern penal law and precursor of criminology, stated in the "*Treaty on offences and punishments*", published in Milan in 1764: **"In order for a punishment not to constitute an act of violence against the citizen, it should be essentially public, prompt, necessary, the weakest of the applicable punishments under the given circumstances, proportional with the offence and established by law"**.

In time, punishments have taken a multitude of shapes, one bloodier than the other, starting from corporal punishment (sometimes even mutilation) administered in public and ending with imprisonment. The supporters of penal justice, who say the coercive manner of reforming the guilty ones would be the punishment, have brought multiple arguments to justify its application. According to them, penal justice *serves for re-establishing the legal order* since the punishment calms the reactions generated by "social alarm" and it is ***a retributive means*** through which society condemns the offender according to the seriousness of the offense.

By *temporary isolation* (imprisonment for a certain period) or total elimination (life detention) the offender is *prevented* from committing another antisocial act. Preventing the offender from committing a new offense or making it impossible for him to do it was also done in the old days by cutting the thief's hand, castrating the sex offenders or disfiguring the prostitutes or other punishments. The supporters of early criminology considered that by freedom deprivation the convict is also *rehabilitated*, since during the detention, due to the regime, the convict has time to reflect and repent (e.g. the detention regime introduced in 1790 into a prison in Philadelphia where the convict is completely isolated from the rest of the convicts and even from the guards – Stanisor E., coordinator s.a, "*Penologie*", Ed. Oscar Print, Bucuresti, 2002, pp. 27-30). Moreover, the punishment has the advantage of *intimidation*, as there is the belief that by conviction the offender is prevented from committing other offenses (individual prevention) and, at the same time, the punishment constitutes an example for the others (general prevention) who will be discouraged from committing antisocial acts.

Nevertheless, at the end of the 20th century the idea appeared that there might be new ways of solving the conflicts of penal nature, others than punishment and opposite to the traditional approaches to criminality. ***The consensual models*** are promoted as the alternative to the classic penal system of conflict solving, the literature giving them different names: *communitary justice*, *restorative justice*, *informal justice*. Irrespective of their name, the consensual models are based on the process called **mediation** which is the basis and the main form of Restorative Justice. The concept of restorative justice represents a promising perspective of rearranging the penal law, which wishes to provide a new way of approaching and understanding of all the notions the professionals of the penal systems work with: offense, offender, victim, penal suit, penal punishment, prison, etc.

What is in fact restorative justice?

It constitutes a rediscovery and a refining of the practices specific to the ***"acts of justice"*** that are found in the not very old history of social communities. We refer to those times when the interest of the ***"community"*** preceded the ***"individual"*** one and when the ***"wrongdoer"*** and the ***"harmed party"*** came in front of the collectivity at the ***"elders council"*** and presented their viewpoints regarding the ***"conflicting situation"*** that appeared between the parties before, during or after the committing of an act that did not agree with the ***"rules of cohabitation"*** established by that community. Most often than not "the council" listened to the opinions of all

parties involved, took note of the moral or material harm done and the "*process*" was closed by solving the situation through dialogue and negotiation between the parties, with the participation of all that were directly or indirectly affected by the conflict. Such practices are found in the history of all peoples be they the Celts, the Getae, the Francs or other European peoples, or the Maori in New Zeeland or the aborigines in Australia, or the North-American Amerindians or other peoples whose existence is mentioned in world history.

The concept of "*restorative justice*" has Anglo-Saxon origins and its practical appliance has been achieved in the countries of the same origin: Australia, Canada, Great Britain, New Zeeland and the United States of America. This new manner of solving conflicts was first applied in Ontario, Canada in 1974. On the European continent, the term in its Anglo-Saxon form of restorative justice is less known, but the first theoretical debates on the consensual manner in which the consequences of offenses could be solved by those directly involved started to be felt at the beginning of late 1960s.

One of the most complete definitions of the concept of Restorative Justice is that of Dr. Mark S. Umbreit (University of Minnesota, USA): "***Restorative Justice*** *is an answer given to crime, which provides those that are the most affected by it: the victim, the offender, their families and community the opportunity to be directly involved in solving the harm done by the crime*". The author also mentions the purposes of the Restorative Justice as follows: to offer support and assistance to the victims; to hold offenders more accountable to their victims and communities; to restore the victims' emotional and material loss (as far as possible); to provide a wider range of dialogue and solving the problems between victims, offenders, families and other persons; to provide the offenders with enhanced possibilities of reintegration in the community life; to reinforce public safety through communitary construction.

The British criminologist Tony Marshall gave, in 1996, the following procedural definition of the concept: "***Restorative justice*** *is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future*".

Canadian Susan Sharpe, in her book "*Restorative Justice: A Vision for Healing and Change*" (Edmonton, Alberta, 1998), suggests the following five principles of Restorative Justice that help clarifying the previous definition:

1. – *invites full participation and consensus*, which means the penal process involves both victims and offenders, but also other persons that were directly or indirectly affected by the crime: families, friends, neighbors, etc.

2. – *tries to heal what has been broken*;

3. – s*eeks full and direct accountability*, i.e. the offender not only admits that he broke the law, but has the obligation within limits of restoring the harm inflicted;

4. – *tries to reunite what has been divided*, principle according to which after a crime is committed a fracture appears between people and communities and this is why Restorative Justice reconciles the victim with the offender, both of them waiting to be reintegrated into the community;

5. – *helps the community to prevent further offending acts*.

The general principles of restorative justice reflect the essential elements of this method of approaching crime, elements that underline the important place that mediation may take in the penal justice system. Restorative Justice is based on a series of principles that confer specificity to this new model of crime prevention and control which, according to the European norms has the following general coordinates:

- crime is perceived as a prejudice;
- the restorative activity is centered more on the prejudice caused by the offence rather than on the transgression of the penal norm;
- pays equal interest to the victim and the offender, involving them to the same extent in the act of justice;
- emphasizes the victims' rehabilitation and provides them with support and counseling;
- provides the offenders with support, encouraging them to understand, accept and fulfill their obligations towards the victim and community;
- the victim's viewpoint is essential in choosing the manner and the extent to which to restore the harm caused by the crime;
- provides the opportunity for a direct or indirect communication between the victim and the offender;
- encouraging the cooperation of the parties, the victim's rehabilitation and offenders' reintegration, the community is an essential mediation factor;
- shows respect towards all parties involved: victim, offender, community;
- the results of the act of justice are assessed by the degree to which the moral and material restoration has been accomplished and not by the severity of the applied punishment. (Recommendation no. 22/2000 of the Council of Europe on "Improving the implementation of the European rules on community sanctions and measures").

The major question to ask is:
Do we PUNISH or RESTORE?

Does the *Restorative Justice* based on mediation offer the certainty, or at least bigger chances of obtaining results of better quality and a radical change of attitude of both the victim and the offender as well as of the community as compared to Penal or Retributive Justice which focuses on punishing the offender?

The literature in the field provides answers to this kind of questions, starting from the ***Paradigms of Justice*** as follows:

- in Penal (Retributive) Justice:

- the crime is a violation of the State and of its laws;
- the focus is on establishing the blame, so as the punishment should inflict the dosage of sufferance and pain corresponding to the crime committed;
- the act of justice is perceived as a "conflict" between the lawyer and the prosecutor, the offender and the victim being passive and most often than not ignored;
- the offender is held accountable by taking the punishment and the social reaction is focused on his/her past behaviour (the offender is labeled accordingly);
- the trial is a strictly rational process, dependent on rules and intentions that influence and guide the results on a state intended direction: one side wins and the other looses.

- in Restorative Justice:

- the crime is defined as one violation of a person by another;
- the focus is on identifying the rights, the needs and the obligations of both the offender and the victim;
- the focus is on resolving the problem so as the created situation and the harm done could be repaired, the offender and the victim having major and active roles;
- the offender takes responsibility for the offense proving empathy and helping directly to repair the harm done, the reaction being focused on the consequences of the offending behaviour;
- free expression of emotions and feelings is allowed, all parties directly or indirectly affected by the crime are involved, responsibilities are taken, needs are satisfied and the healing of the victim, the offender, the community and of the relationships among these is encouraged.

In the traditional system of penal justice or **Retributive Justice**, the victim is, at best, used as a witness of the state in prosecutor's attempt to

establish the offender's guilt and to ask for his/her conviction, and the offender, represented by the lawyer that speaks on his/her behalf, is fighting to prove his/her innocence and not to assume responsibility for the consequences of the acts committed. The trial ends almost every time with the offender's statement that he/she *"regrets the offense"* and that he/she *"leaves the decision to the judge's discretion"* but this should be as favorable as possible for him/her. In most cases, both the victim and the offender leave the court room with a strong feeling of dissatisfaction: the offender because he/she considers the punishment, almost invariably, too harsh, and the victim because nobody asked him/her which his/her true feelings about the matter are. Neither the offender, nor the victim actively participates in the trial where, after all, their lives are the main subject. In this system, the **PUNISHMENT** which should be ***a means of education*** becomes ***a purpose in itself***, and its appliance relaxes the "public consciousness" and "calms the social alert" since the offender, once convicted, is isolated for a certain period and thus society is protected, therefore justice has been served.

With a different approach regarding social and inter-human relationships, the American sociologists James Wilson and George Kelling, both of them professors at Harvard University, in the parable *"Broken windows"* from the study with the same title, tackle the theory of *"zero tolerance"* in the relationships among people, underlining a somber situation on this field. The authors try to open humanity's eyes for one of the most terrible calamities of modern society, which tends to encapsulate human communities more and more, i.e. *social indifference*. Day after day, each of us is more and more interested in his/her own person and we become more and more indifferent to everybody and everything around us. Consequently, the vast majority of our actions start *from* and sustain *only the prosperity of our own EGO* and hurt, unfortunately, too many times, other human entities who collapse into the abyss, forgotten by their peers and with less and less chances of being recovered.

In the same register, Howard Zehr in the volume *"Changing lens"* published in 1990, shows that modern society with all its facilities does nothing else but reduces the entire social life to a small *"individual sphere"*, to a private *"small empire"*, intangible and inalienable. We forget though that on the other side of the wall, a few centimeters away, there lives another soul, maybe equally lonely and subjected to this human *"robotization"* of production, consumption and information. The author describes every day life, showing that we meet each other in the street, on the stairs or in the elevator and, maybe, we say *"hello"* on the run, but we would rather pass each other with indifference running to hide in our own

"tower of defense" in which we live with the illusion of safety and from where we, sometimes, declare pathetically: "What can I do? I am small and powerless". Along the book, the author asks himself and society also questions of a significant depth: don't we prove by our attitude that we have started to forget that MAN is by excellence a social being? Haven't we started to forget the beauty and importance of a family, a group of friends, a collectivity that share troubles and joys and where everybody runs to help somebody in need? Isn't this forgetfulness a first sign of a somber future in which we will look at the others at best with indifference? Will all the education accumulated in millennia end up diluted into an ocean of egocentricity and meanness? Do KINDNESS, LOVE for your peer, FORGIVENESS, MERCY and GOOD SENSE mean only some utopian concepts? Haven't we learnt anything from the tormented history of mankind? Has it all been in vain? … The author offers himself some answers to these questions: if we want to be considered and respected as human beings, we have to rediscover the morals in the name of which so many generations fought and sacrificed themselves, we have to remember that what really distinguishes us from the rest of the creatures is humanism. The author concludes like this: ***"I believe it is the moment we reconsidered our position towards ourselves and our peers and we should not forget for a moment that both they and us are humans, and being HUMAN means, first and foremost, to be moral. It is still not too late! ...".***

In this context, ***Restorative Justice*** **is not a parallel movement or a movement against the contemporary systems of penal justice**. It is not only a certain method, technique or program, but a global vision of justice and another way of approaching this. The Restorative Justice represents another manner of resolving disputes, without resorting to standard judicial procedures and constitutes a participatory method of resolving conflicts. By a real process of negotiation and reconciliation that includes the offender, the victim, their families and other persons that might offer active support, Restorative Justice gives the offender the opportunity to become aware of his/her act's aftermath and take responsibility for these and, at the same time, offers support to the harmed party in order to recover from trauma.

Recommendation 19/1999 of the Council of Europe on *"Mediation on penal matter"* uses the notions of ***mediation*** and ***mediator***.

The *term of mediation* in its broad meaning (term which is not specific for the penal context) is normally destined to the process of conflict resolving through this procedure and involves the participation of a third party (neutral) with the purpose of encouraging an agreement reached by the free consent of the parties participating in this process. *Mediation in*

penal matter is defined as a process between the victim and the offender, parties that have the possibility to voluntarily and actively participate in solving the aftermath of an offense, benefiting from the help of a third neutral party which, according to the *Explanatory memorandum to Recommendation 19/1999 of the CE*, is a professional mediator or a member of the community. Mediation in penal matter operates directly or indirectly, meaning that parties meet *together* in front of the mediator (the direct way) or *separately* with him/her (the indirect way). In both cases it is essential and compulsory for the mediator to be neutral, and the participation of the parties should be voluntary. Being a flexible process, mediation may happen in any phase of the penal process – penal investigation or trial phase – being called pre-conviction mediation or, after the court has given a definitive sentence, post-conviction mediation, case in which restorative justice is a complementary instrument, used for the purpose of social reinsertion of the offenders. *The participants in the mediation process* are: *The Mediator*, who is especially trained for such activities and could be a person that belongs to organizations or authorities which carry specialized activities in this direction at the level of: police, system of justice, service of social reintegration, prosecutor's office, courts of law or independent communitary organizations. The independent mediation programs are carried on by organizations involved in supporting crime-victims or by organizations whose main activity is the offenders healing and reintegration into the community, or can even be specialized in mediation activities. *The Victims* have a central active role in Restorative Justice, the participation to the mediation constituting a curative method with positive effects in time, the finality of the process meaning first of all the restoration of their dignity, moral and material restoration the punishment being less important; *The Offenders* have also an active role in the restorative model and are directly involved in conflict resolving and in the moral and material restoration. The direct contact with the victim makes them take responsibility for the harm done and become aware of the sufferance caused and mediation opens communication bridges between offenders and society and favors the re-establishment of the relationships with the community as well as the social reinsertion; *The Community* has the same importance in Restorative Justice as the victim and the offender with whom it interacts when solving the conflicting juridical reports. Communitary justice, like restorative justice and informal justice, is generated by the movement which promotes the resolving of penal conflicts in a consensual manner, treating each member of the community (including the victims and the offenders) as a partner, which presupposes the participation of the

community in reaching the following goals: rehabilitation of victims, social reinsertion of offenders, solving certain problems related to criminality.

One may conclude by saying that Restorative Justice tries to redefine crime, considering it not as much a violation of laws or a crime against the State, but as harm or damage produced to another person. In the Restorative Justice theory, the offense is considered a case of lack of respect of the offender for another human being and a case of not taking responsibility for the aftermath of the crime he/she committed. In this context, the act of justice should not represent just an act of establishing the offender's guilt and imposing a punishment, but it should be regarded and applied first of all as a moral act of restoring the harm done by the offender and then of emotional and material restoration of the victim. From the Restorative Justice perspective, the fulfillment of the act of justice – in which it is absolutely necessary for both the offender and the victim to be not only represented but actively present – should be beneficial both for the offender – who comes to learn that he/she should respect his/her peers, to take responsibility for his/her actions and understand their seriousness and unfortunate aftermath, and for the entire communitary ensemble which, by actively participating in this process, manages to reinforce the relationships among its members, thus enhancing the feeling of public safety. Using the means of Restorative Justice, even the action of punishing gains a strong moral charge, and through all the activities carried on with convicted persons a series of goals are kept in mind, such as: ***accountability***, ***respect***, ***reconciliation***, ***reintegration***, ***restoration***, ***avoiding labeling***, etc.

The purpose of the restorative concept in penal matter is to *"heal the wounds"* inflicted on the victims, to identify the needs of the community and of the offenders, and to regulate the relationships among these by their active involvement in finding the best solutions. In Restorative Justice, all parties are provided with the opportunity to express their emotions and feelings and to become aware of their acts and its aftermath, and all of them may decide together what is to be done to "*straighten things up*". The need that this concept should be applied on as large a scale as possible is synthesized by a professional in the field of penal process, president of a criminal court for minors in New Zeeland: ***"In a society so busy with punishing, the offenders are "hidden" and are not held responsible for their actions, and the victims are simply forgotten"***.

"After all, everything is about bringing peace into our lives and worlds. This fact does not require changing the human nature but only to admit that absolutely everyone of us, irrespective of origin or behavior at a given moment, is characterized by a good side also and that we could, at

any given moment, reorient the energies from violence towards kindness. We learn to respect if we are respected and not if we are treated without any trace of respect. A justice that heals is a justice that respects". (Butoi T., coordinator, " *Victimologie. Curs Universitar* ", Ed. Penguin Book, Bucuresti, 2004, page 205)

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Veronica NEGUȚU

MARRIAGE VS. CONCUBINAGE

Abstract

Preference for consensual union is reflected in the decline of marriage. According to the INS, in 2002 were 129.018 registered marriages, 30% less compared to 1990. Among those who said they live in consensual union, 73.6% were unmarried, 17.9% divorced, 7.1% widow and 1.4% married (in this case, they recognized that, apart the legalized relationship, they have a relationship with a lover / a mistress).

Many of the couples living in consensual union are made up of young people. The partners have never been married and consider the arrangement an optimal variant for their age and their existing status. On the basis of preference for consensual union are some factors like: economic ones, social ones and change of mentality. Obviously, there are couples who stay longer in consensual union, because either partners or only one of them was married and has no courage to legalize their new relationship.

Marriages have fallen dramatically Preference for consensual union is reflected in the decline of marriage. According to the INS, in 2002 were 129.018 registered marriages, 30% less compared to 1990. Among those who said they live in consensual union, 73.6% were unmarried, 17.9% divorced, 7.1% widow and 1.4% married (in this case, they recognized that, apart the legalized relationship, they have a relationship with a lover / a mistress).

Many of the couples living in consensual union are made up of young people. The partners have never been married and consider the arrangement an optimal variant for their age and their existing status. On the basis of preference for consensual union are some factors like: economic ones, social ones and change of mentality. Obviously, there are couples who stay longer in consensual union, because either partners or only one of them was married and has no courage to legalize their new relationship.

- Since many of the couples living in consensual union are made up of young people, in which the partners have never been married and they consider the arrangement an optimal variant for their age and present statute, determined me to choose as target of study for this work the following aspects:

❖ Observe of married \ unmarried status influence on marital relations / concubinage with a focus on identifying the functionality of the relationship, the level of jealousy, marital satisfaction and conflict dynamics.

Consistent with the objective noted above, the assumptions of the research paper are:

1) In the group with unmarried status is located a functionality in the relationship significantly lower compared with the married status.

2) The level of jealousy between the unmarried group status is significantly increased compared to the jealousy of married status group.

3) The level of marital satisfaction between unmarried partners is significantly lower compared with levels of marital satisfaction of married partners.

4) The number and impact of conflicts between unmarried partners are significantly increased to the number and impact of conflict between married partners.

This work is carried out by over a non-experimental design, type 4x2, in which independent variables are:

- Group status unmarried versus married status group.

Observed dependent variables are:

- Functionality of the relationship;
- Level of jealousy;
- Level of marital satisfaction;
- The number and impact of conflicts.

There were taken in study two groups of subjects, each consisting of 25 heterosexual couples. The two groups were from Constanta, in which one of the groups had a relationship of concubinage minimum for 3 years and the other group members had married persons at least for 3 years.

The subjects were aged between 24 and 30 years and all have the same level of education, namely higher education.

To verify the proposed research hypotheses, we used a method of investigation for each aspect that we follow. Thus, to investigate the functionality of the marital relationship, we used "***The family functionality questionnaire***", produced by M. Minulescu, which aims to measure the level of functionality within the family.

To investigate the conflicts of the couples studied, we used "***Beier-Sternberg discord questionnaire***" composed by Ernest G. Beier and Daniel P. Sternberg, measuring marital conflict and marital unhappiness.

To investigate the level of jealousy of the couples studied, we opted for using the ***Hypothetical Jealousy-Producing Events Scale (HJPE)***, made by Gary L. Hansen, which pursues measurement of marital jealousy.

In order of highlighting the level of marital satisfaction in the couples studied, we used the ***Kansas Marital Satisfaction Scale (KMS)***, made by Walter R. Schumm, Lois A. Paff-Bergen, Ruth C. Hatch, C. Felix Obiorah, Janette M. Copeland, Lori D. Meens, and Margaret A. Bugaighis which aims to measure marital satisfaction.

The results of this study regarding the functionality of the family and marital satisfaction, have confirmed the research hypotheses, showing that they are significantly lower in the unmarried couples compared to married couples.

Also, the statistical results showed that the level of jealousy, but the number and impact of conflict are increased in the unmarried couples compared to married couples.

The explanation for these results lies in the fact that in marriage is less suspicion and jealousy, infidelity, stability, mutual trust and communication. Results are explained by the fact that the status of married men engages more obligations in the view of society and family. In a way it is perceived a married man, seated at his house, which no longer can go to a beer with the boys, and the other a single.

Unmarried couple is characterized by instability, the relationship is still fragile. In concubinage we don't meet very many children. Sexual activity is strictly controlled, the partners are anxious to avoid an unwanted pregnancy.

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THE EUROPEAN SOCIAL CHARTER: AN ESENTIAL TEXT FOR THE SOCIAL AND TRADE-UNION RIGHTS

1. Introduction: an esential Charter for all the european workers.
2. Historical context: how the Charter was made?
3. The Charter limits: what didn't CES succeded?
4. What can this Charter offer me as an european employer?
5. A Charter with the power of law.

Abstract

*It is a document ellaborated **by the European Committee**, in Torino, on the 18th of October 1961, and enforced on the 26th of February 1965. Until the adoption of the (revised) European Social Charter, in Strasbourg, on the 3rd of May 1996, The 1961 Charter was successively modified and completed in 1988, 1991 and 1995.*

*The European Social Charter represents not only a solemn, **abstract declaration**, with pragmatic vocation, but also an assembly of fundamental rights in the areas of work, employment, social relationships ans social security. In its essence, the European Social Charter is a mixed text which states the objectives of the social policy that must be pursued by the member states of the European Committee, and also a juridical part, by which the state that ratifies it assumes a series of obligations.*

*The revised Charter is part of the great treaties of the European Committee in the area **of human rights** and it is the reference european instrument for social cohesion. Not by chance, the revised Charter was named "**Social Charter of the 21st Century**".*

The european Charter of fundamental rights has a great importance in the evolution of E.U.(European Union) and therefore, for the trade-union movement and social communitar politics. For the first time since the European Economic Community creation,in 1957,the Charter exposes in one text ,the aggregate of the political,civil, economical and social rights whom all the european citizens can benefit.

It's also the only text of this type on international scale. It's about rights, principles and indefeasible values which the E.U. institutions must consider when they build and aply the european legislation.

Though this Charter wasn't integrated in the EU papers(which represents the juridical base that the European Union works) she represents

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[2] Birou Executor judecatoresc Bd. Al.I. Cuza nr. 5, bl. Duplex, ap. 12 tel 0239/612.103

an important constituent of the project of EU constitutional Treaty. Since 2000 the Charter had an greater and greater impact on every E.U. institutions, including european courts where the advocats mentioned it in many cases.

1. Introduction

An essential Charter for all the european workers. What does it says?

The european Charter of the fundamental rights contains six categories of rights: the dignity, the freedom, the equality, the fellowship, the citizenship and the justice.

These chapters also contain orders which are the base of legislation regarding working relationnship and industrial relationship in Europe, covering the trade-union and social rights. Why do the european employee need a fundamental rights Charter?

Since its constitution, the E.U. was perceived first as an economical entity based on the economical cooperation, a common market and an unique currency. The economical prosperity it's necessary for the social progress, but this kind of economic union can only work properly in a society where the benefits are equitable shared.

It will take time and a lot of energy for the social problems to be seriously regarded.The adoption of the fundamental rights Charter, in 2000,represents a crucial moment for citizens, employee and trade-union organizations.

Why do the fundamental rights are so important at the european level?

The Charter offers ethical legitimacy for the E.U. in her political entity quality.

She expresses common values which form the base of our democratic society.

She settles rights and responsabilities for the social partners an the workers.

Establishing some social standards on european level it's an very important point of consolidating and developing the social dimension of the european integration. If the european citizens feel no progress in improving the living conditions, then the whole future building of the european project will be unlikely.

Finally,in an situation of social instability, the role of the trade-unions in obtaining the rights which haven't been granted untill now, it's the most important. The Charter contributes in reaching this goal.

What are the other fundamental rights that the trade-union movement militates for?

In addition of what it's already included in the Charter, the european trade-unions request:

*The acces to work for everybody without any discrimination.

*Active politics on the labour, dedicated to the suporting of the employee in case of reorganisation or delocalization (as in northern region),by the acces to continuous training and profesional reconversion, support in the reabilitation on older employee market or the right to pension for all.

*The right to a minimum income for all the europeans workers, depending on the normatives of their countries.

Does the Charter represent a minimum threshold or a ceiling?

For the european trade-union movement the Charter represents a landing point not an end of road.

The Charter provides universal and inalienable rights. She warrants especially, the right to collective actions, which, as in the recent case"Vaxholm"(Laval) in Sweden, it's vital for trade-unions. In the city of Vaxholm, the sweddish trade-union Byggnads and other trade-unions affiliated at L.O. an organization member of European Confederation of Trade-unions (CES),organised protest movements given by the employings of lettonian workers with lower salary and conditions than the sweddish standards,by the Laval company. As the trade –union pointed ,this kind of situation saps the sweddish collective contracts, representing a real case of social dumping. This situation came in contradiction with everithing that E.U. should represent for bringing the working conditions for the poor member states to the others country level.

2. Historycal context:how the Charter was made?

December 1999- october 2000:the writing of the fundamental rights Charter by the first E.U. Convention.

December 2000:by the call of E.U.C.,60.000 workers participated in Nice to a demonstration, where the European Councill met, asking for the endowment of the document with juridical power.

December 2001:The European Councill from Laeken (Belgium) decide to create the second Convention in order to make a Constitution for Europe.

July 2003: finishing working at the second Convention and forwarding the text to the E.U.C. chairman.

October 2003-october 2004: takes place the intergovernmental Conferrence (IGC) in order to elaborate the final content of the constitutional Convention.

29 october 2004:signing in Rome of the Convention that instituted a Constitution for Europe and the beginning of ratifyings. The Charter of fundamental rights is included in the second part of the Constitution.

The European Confederation of Trade-Unions has pronounced for ratification of Constitution.

3. The Limits of Charter:

What didn't C.E.S. succeded?

Some important rights for workers didn't appear in the Charter. The Trade-Union E uropean Confederation proposed:

*The recognition of transnational rights for employee (namely the right to informing and consultations in enterprise; the freedom of meetings and associations, the collective contracts and the trade - unional action) in a manner which fully sustains the national sistems of negotiation and collective action.

*Autonomous rights for social partners on the national and transfrontallier level.

*The obligation for the member states to regard the equivalent rights inside the international and european institutions.

4. What can this Charter offer me as an european employer?

The Charter guarantees the trade-unional and social rights and the right to work.

1.Trade-Unional rights
Art.II-72: The freedom to meet and associate;
Art.II-87: The employee's right to information and consultation inside the institution.
Art.II-88: The right to negociation and collective actions.

2.Social rights:
Art.II-81: Non-discrimination;
Art.II-83: Equality between men and women;
Art.II-94: Social security and social assistence;
Art.II-95: Medical assistence;

3.The right to work
Art.II-75:The freedom to choose a place of work and the right to practice a job;
Art.II-90:Protection in case of unjustified dismissal;
Art.II-91:Fair and equitable working conditions;
Art.II-92:Restricting the children work, the protection of young men at the place of work Encouraging the social dialogue and the coordonation of the employing politics, the Charter will be able to influence the life of european citizens.

The new recruiting contract in France-dismissing without justification.

The Charter protects the workers in case of unjustified dismissing.(art.II-90).A new law since july 2005,which creates a new type of working contract,the first employment contract reserved for the companies with less than 20 employee,defies the laws which establish the dismissals.In the course of the first two years,a worker can be fired immediately without the employers obligativity to establish a "real and serious cause",as the french law stipulates regarding the other contract forms –permanent or defined.

Raising the equality of chances at the working place.

The Charter says(art II-83) :"The equality between men and women must persist in all fields,including the acces on working market,the working conditions and the remuneration" In the whole E.U. the difference between the medium payment for men and the medium payment for women decreased a litlle since 1988,the women payments remaining with 15% lower than the men's payments.The unemployment instalment on women is also higher.Even if the equality of the payments for an equal valued work it is already stipulated in the comunion right the Charter makes the equality a fundamental right for all the european citizens.

Supporting the collective movement

The Charter guarantees the freedom of association (art II-72). Durring last years some national governs inside E.U. made laws for the restriction of the trade-union rights,the collective movement,bringing in for example ,stiff and complicate proceedings for authorising strikes or restricting the solidarisation actions.These actions involve also the interference in the internal problems of trade-unions,arranging some obstacles in their admitting by the employer or limitting the acces of their leaders inside the institution or the right to settle sindical actions.

A global example of the fundamental rights

When the Charter will gai power by law,the E.U. will be stronger in imposing some political,civil,social requires or relating to enviroment when

they negociate conventions and international treaties. This aspect will have a crucial importance for the wholle world workers, especially for those from the countries in course of development. For example durring the last ministerial meeting of Global Trade Organisation which took place in 2005 in Hong Kong, the EU negociators have had a stonger position in defending the equitable treatment as well as the social environmental standards durring comercial agreements.

5. A Charter powerfull by low

When the Charter of fundamental rights will be a part of communion law she will have the power of law in all the member states who will have to admit supremacy of european law. The statute of social rights law will also determinate the EU to propose ideas in order to use them. Thought the european Constitution hasn't been adopted by all the member states, the Charter has its foundation in all the writtings and it is already noticed in the european jurisprudence.

EU can sue the member states if these are violating the fundamental principles (art. 7 from EU Treaty) which also is aplyable to all the new members (art. 49 EUT). Tre Treaty also empowered the Justice Court in Luxembourg to be sure that the EU intitutions are following the fundamental rights of citizens (art. 46 EUT).

Sueing

When the Charter will be a part of the Treaty the Justice Court of EU will be juridically forced to make sure that this will be considered. The Charter offers juridical fundament which the Justice Court can use in order to respect the fundamental rihgts.

The nuwadays impact

Since 2000 the fundamental rights Charter proved that appeared in the same time a source of inspiration and a starting point for european Courts of law. After two years since its proclamation, the main advocats of the european justice Court mentioned it in more than a half of the cases of human rihgt they had . The Charter it is not just "a simple panel of moral principles, without consequence" In the main advocate Tizzano's opinion she is " an important refference for every participant, member states, institutions, phisycal and juridical persons".

The Charter has the potencial to became necessary because it is made in the EU jurispredence.

The First Instance Court and even the Europesn Court of Human Rights made refferences about the Charter durring their verdicts.

This aspect it is essential for the trade-union movement. For example, the Broadcasting, Entertainment, Cinematograph and Theatre

Union (BECTU) made an complaining to EU against the manner in which the british govern used a part of an order about working time. A great number of BECTU members are temporarly employed in mass-media and the british law force the employee to work for the same employer for at least 13 weeks continuously in order to have anually payable holiday. The lawer Tizzano speaks from art. II-91 in the Charter about the fact that the right to an anually payable haliday it is an fundamental right.

Conclusion

The Charter creates a dinamic policy. Declaring it, the member states adopted it, unanimously, principles which mark the trade-union, social and working rights. Basing on this agreement, the european institutions will have the responsability to aply them. So, the social partners will possess an instrument in which they will be able to convince all the national and european level involved actors to work for the social dialog benefit.

The Charter represents a foundation. Its integration in a future comunional treaty will guarantee the full and anlimited recognition of fundamental rights from this Charter. These rights must be developed for example recognising the right to international solidarity stike or the evolution from the right to work to everyone's right to have a decent place of work. Near the fundamental rights there are some social rights to win through frame agreements and directives. For example, the revision and the improvement of the directives about information and consultation in working time.

This is the only way we can build Europe together and we can contribute to define and make better the social european model.

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INSTRUCTION AND EDUCATION WITHIN THE THEMES OF SOME INTERNATIONAL CONFERENCES. AN EVALUATION OF THE SUBJECTS APPROACHED BY THESE FROM THE ANGLE OF SOME REPORTS, RECOMMENDATIONS AND DECISIONS

Abstract

In the last decades, both on an international and European, as well as international level, Instruction and Education were not only the object of a specific legislation, but the subject of some scientific communications and of some academic debates within some International conferences. Usually, the participants in these international conferences have approached the proposed subjects in the ideatic light of the text drafted by the Council of the European Union – mainly through its Education Commission – the European Parliament etc. and published in the form of Resolutions, Decisions, Reports, Statements etc.

The assessment – be it brief – of the texts or of the Conclusions of these International conferences gave us the possibility to better know both the thematic debated in their work Sessions, as well as the way how their problems were thought and solved. Also, this assessment allowed us to find that within the Romanian education system, the reform thought and proposed by the Council and the Parliament of the European Union, by the respective Resolutions and Decisions, was not yet thoroughly applied and that the legislation of our country – regarding this system – is not yet thoroughly harmonized with the principles issued by these, where from the stringent necessity of knowing and making known the themes of International conferences, as well as the text of the international instruments regarding Instruction and Education.

Up to the present, in the Romanian, specialised literature, the themes of the international Conferences, regarding higher education, have not yet been the object of a research study, with an inter- and multidisciplinary character, where from the necessity of a careful and specialised examination of their text. However this necessity is also imposed by the fact that the proposals, the recommendations and the conclusions from the text of these Conferences – organised by UNESCO, by the Council of Europe, through the Education Commission or by various European and international Organisations and Associations, regarding instruction and education, - must not be known, acquired or transmitted only by the experts in the field of higher education, but also by the ones who carry out their activity in the public life (political, social, legal), to be thus kept and stated also in the text of the legislation regarding education. That is why, in order to better understand and assess the way

how these were or were not registered also in the text of the legislation of European Union`s states, therefore also in Romania, we shall make a presentation and an assessment of the themes of some representative international Conferences, in which we actually find out the way how the whole education system was thought, assessed and expressed, both at an European and at an international level.

In some States of the world, Conferences organised by Education Law Associations also take place. One of these is the „Educational Law Conference", organised by the „Education Law Association"[1] from the U.S.A., gathering people from the higher education and socio-political fields.

This American Association promotes the interest for the knowledge of the legal system of education (students`, professors`, parents` rights, etc.) and its main objective is inform up to date regarding the legislation on instruction and education.

In the United States of America, the Conferences on educational law have approached – in the last 15 years – various and convincing themes on educational law and policy, for a heterogenous public, made up of lawyers (academics and practitioners), politologists, sociologists, phylosophers, theologists, parents of the children etc.

Within these Conferences it was asked that any teacher (high-school one or academic) should know the way how laws can have an impact on the young people in Schools and Universities.

A future Conference – of this kind – is programmed in Portland, Maine, for the period June 20 to June 23, this year.

There is also a „Educational Law Association (ELA)" in Australia. Initially, this was entitled the „National Organisation on Legal Problems of Education".

Founded in 1954, this „Educational Law Association" „... ensures unbiased informtion on the present law issues regarding education and the rights of the ones involved in education, both public and private (Schools, Universities and Colleges)".[2]

At the present, there is also „The International Association of Law Schools (IALS)" (Asociația Internațională a Facultăților de Drept), founded in the year 2005 by the adoption of the Istanbul Charter (Turkey).

Among other, this Charter also stated that the Association also pursued „the quality of legal education", that can only be achieved when

[1] Such an Association was founded in the year 1954. În 1977, this was moved to the Campus of Dayton University (Ohio-USA) - *http://educationlaw.org/aboutELA.php*
[2] Cf. *http://www.educationlawassociation.org.uk/*

„... the students learn about other cultures and legal systems and about the various approaches in solving the problems of those systems".[1]

Some jurists of our days think that „the two separate worlds", namely, „Law Reform" and „Legal Education", must be brought together, bacause this separation – they say – is not beneficial both to the legal profession and to the subject of Law.[2]

Law Reform and Legal Education Reform must be thought as a unit, because the reform of „Juris" can also have a positive impact on the legal education system. But it is equally true that we cannot have a real Law reform if there is not a legal education that could really contribute to that. Of course, it would be desirable that, also in our country, the two separate worlds be thought not only in the light of the idea of law (jus), but of that aequitatis (equity) and of that iustitiae (justice)[3] about which Ulpianus (IInd century), the parent of those utterances or statements („jurisprudentiae") about Roman law, once talked about.

In different States of the world there are also Associations aiming at the promotion of research, of study, of debates and of information dissemination regarding the legal aspects in the education systems, of the organisation and promotion of the participation in Conferences and meetings with subjects related to law, of cooperation and information exchange with Associations, bodies and persons on the subject of the laws regarding education etc.

Such an Association is also „Australia and New Zealand Education Law Association (ANZELA)"[4], that was founded in 1991 with the purpose of gathering together academics and jurists (theoreticians and practitioners), corcerned with the problems of Education.

Between October 4th-6th, 2006, this Association (ANZELA) organised an international Conference in Tasmania, where papers with a mainly legal content were presented. Among these, we mention: a) „How to keep our students safe from thiefs, parents, professors and themselves: What do Australian laws do to maintain the safety of the students?"; b) „Violence against children: Reflections on the abrogation of corporal punishment in the United Kingdom and the impact on children and the

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[1] Cf. *http://www.ialsnet.org/*

[2] Cf. Michael Coper, *Law Reform and Legal Education: Uniting Separate Worlds*, in The University of Toledo Law Review, vol. 39, no. 2, Winter 2008, p. 233-234.

[3] See Nicolae V. Dură, *The Idea of Lawt. „Law", „Justice" and „Morals",* in Ovidius University Annals, the Series: Law and Administrative Sciences, no. 1, 2004, p. 15-46.

[4] Cf. *http:/www.anzela.edu.au*

teachers` safety"; c) „The right to a safe educational environment in Schools"; d) „The intellectual rights in education institutions" etc.[1]

In the year 2007, ANZELA Association organised an international Conference on the subject „Contention and Controversy in Education Law"[2]. We refer to the Conference taking place between September 28th-29th in the Campus of USQ's Fraser Coast University (Australia), in which over 100 delegates participated (lawyers, prosecutors, ministers, senators, academics etc) from the United States, Malaesia, South Africa, Singapore, New Zealand and Australia.

Among other, the participants discussed the massacre at Virginia Tech University, asked themselves if the ones who don`t provide a quality education can be called to account and on what legal way, they talked about the inadequate behaviour in Schools and Universities, about the civil responsibility of teachers, about school violence and the situations created by that, that could endanger one`s life, etc.

ANZELA Association also organised an international Conference last year, between October 8th-10th, 2008, in New Zealand at Christ Church, on the theme: „Achieving Excellence. Lawyers and Educators Working Together"[3].

By this international Conference – in which people concerned with Law and Education took part (jurists, professors, school principals, education experts etc.) – there have been debates on „the teachers` professionalism", „the current problems of Schools", „the impact of legislation on the children with social, emotional and behaviour problems", „the relation between politics and law", „the exploration of professor-student relation in the education of adults" etc.

Between October 8th-10th, 2008, in Monterrey (Mexico) the works of an international Conference organised by the „Consortium for North American Higher Education"[4] have been carried out. The Conference theme, „Higher Education Collaboration: Local Reponses in a Global Context", gave the participants the opportunity to approach various and complex subjects, such as, e.g.: a) „The Bologna Process and its implications in the North-American Colleges and Universities"; b) „The development, implementation and promotion of international student`s mobility by

[1] ANZELA Conference, October 4th-6th 2006, Mercur Hotel, Hobert, Tasmania – *http://www.cdesign.com.au/procedings_anzela2006*
[2] Cf. *http://www.usq.edu.au/newsevents/news/anzelaconference.htm*
[3] Cf. *http://www.anzela.edu.au*
[4] Cf. *http://nnasc-renac.ca/recentevents.htm*

bilateral exchanges and agreements"; c) „Multicultural education, from theory to practice", etc.

The United Nations have initiated a „Decade of Education for Sustainable Developement (2005-2014)"[1], namely a Decade of education for the support of its development, by which UNESCO and the Council of Europe had their intiative and contribution share. The aim of this „Decade", initiated by the United Nations, is to integrate the principles, values and practices of a sustainable developement in all the aspects of instruction and education.

Concerning UNESCO, we must make known the fact that this Organisation of the United Nations supports the governments and institutions worldwide in their actions of capacity building and of formulating the policies and strategies regarding higher education.

At the level of the European Union, Europene, the policy and strategies regarding the integration and assertion of the principles and values of higher education is made by the Council of Europe. In the fields of Higher Education and Research, its activity is focused on problems related to the recognition of qualifications, the public responsibility for higher education, higher education governance amd other fields relevant to the establishment of the future „space of Euroipean higher education" (European Higher Education Area - EHEA).[2] Anyhow, we should bear in mind that, as regards the institutional recognition of qualifications, this one is within the competence of national authorities only.

The program of the European Council for higher education is supervised by a Governing Board, which is a Pan-European forum, gathering representatives of the ministries responsible for this kind of education.

In Asia, ever since the year 1965, there is the SEAMEO Organisation, namely „The Southeast Asian Ministers of Education Organisation" (the Organisation of Education Ministers in South-East Asia), with the prupose of promoting cooperation in instruction, education, science and culture in Southeast Asia region.

Between 24th-24th February 2009, SEAMEO has debated – within the 43rd international Conference – the subject regarding „Identification of Good Functioning Models in the Use of Mother Tongue in Instruction".

The process of instruction and of education in general, also includes the obligation of disseminating knowledge and of acquainting young

[1] Cf. *http://portal.unesco.org/education/en/ev.php*
[2] Council of Europe. *Higher education – http://www.coe.int/t/dg4/highereducation*

people (pupils and students) with the problems of human rights and their legal protection[1], which has actually made up the subject of many international Conferences, held not only in the European geographical area, but in the Asian, American, African one etc.

Such a Conference was held between 22nd-24th May, 2006 at Soochow University of Taipei (Taiwan)[2], where academics and experts in the fields of human rights and their legal protection have debated the problem of human rights education in Asia.

Among others, the participants in the Taipei Conference proposed the creation of human rights „fortresses", the initiation of an educational process regarding world peace, civic education, human rights study in Faculties of the Universities etc.

As the notable persons present to this Conference have also specified, by setting up human rights „fortresses", one can ensure the opportunity of incorporating the contribution of these people in the policies and programs of the local administraton, thus facilitating educational activities at a local level.

One of the prominent person present in this Conference, professor James Seymour, wanted to mention the fact that, in Asia, the statement accroding to which the assertion and protection of human rights would undermine the „Asian Values" (the values of the Asian civilization and culture) is still being circulated. However, as we know, one of the main religions of the Asian world, Buddhism, is the very one that has been promoting, for more than two millenia, the respect for the human being and for the human dignity, without having ever undermined the values of Asian culture an civilization, where from the obligation that their assertion and legal protection be an integral part of the componence of these values among which – according to Buddha`s statement, the founder of the phylosophical, moral and religious system known under the name of Buddhism – the moral value[3] is the main element.

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[1] On human rights, in specialised literature, see Nicolae V. Dură, *The fundamental human rights and liberties and their legal protection. The right to religión and religious liberty*, in Ovidius University Annals, the Series: Law and Administrative Sciences, no. 1, 2005, p. 5-33. Idem: *Human rights and liberties in the European legal thinking. From "Justiniani Institutiones" to "The Treaty initiating a Constituțion for Europe"* in Ovidius University Annals …, no. 1, 2006, p. 129-151; Idem, *The right to human dignity (dignitau humana) and religious liberty. From "Jus naturale" to "Jus cogens"*, in Ovidius University Annals …, no. 1, 2006, p. 47-128.

[2] Cf. *http://www.hurights.or.jp/asia-pacific/044/04.html*

[3] About the meaning and importance of this value in law, see Nicolae V. Dură, The idea of law…, p. 15-46

On December 21, 1979, in Paris, the text of a „Convention regarding the recognition of studies, diplomas and titles in higher education institutions in the states belonging to Europe"[1] was drafted within an international Conference organised by UNESCO.

In the year 1997, the text of this Convention was reactivated and updated by the adopted Convention - „under the joint auspices of the Concil of Europe and UNESCO" – in Lisbon, on May 15, 2006.

Among other, the Convention of Lisbon, which „... ensures the legal framework for a greater development of recognition practices in de Europe", specifies that „... the right to education is a human right" and that „Higher Education", which is indespensable in knowledge dissemination and acquisition, „is an exquisite cultural and scientific good, both for the individuals and for society" (Preamble).

The same Convention adopted in Lisbon estimates that „Higher Education" should play a vital role in promoting peace, mutual understanding and tolerance, as well as in creating a state of mutual confidence among indivduals, peoples and nations. As well, the Convention asks the signing States to faciliate the access of all their citizens to all education systems, as only this state actually reflects the cultural, social, political, phylosophical, religious and economic diversity of our continent. Thus, they asked that the students of any EU state have access to the education resources of any other States, so that they canj pursue their studies and finish them. Of course, as it is known, up to the present, this request is only partially accomplished, as not all young people of the new EU States have the possibility to accede to the education resources of the other States, mainly of the strongly industrialised ones.

From the text of the same Convention, we also keep in mind that, by the recognition of studies, certificates, diplomas and titles obtained in another country of the European region, we contribute to the promotion of academic mobility among Parties and that „... the recognition of qualifications ... is a key element of Educational Law".

From 1991 up to the present, Eurashe[2] (the European Association of Higher Education Institutions) has organised different Conferences regarding Education. Among these, we specify:

a) The Conference held in Setubal (Portugalia), in the year 1991, with the theme „The Role of Higher Education in the Development of Human Resources"

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[1] *Convention on the Recognition of Studies, Diplomas and Degrees Concerning Higher Education in States Belonging in the Europe Region 1979 – http://portal.unesco.org/en/ev.*
[2] *Ibidem.*

b) In the year 1998, in Budapest (Hungary) a Conference on the subject „Changing Relations Between Governement and Higher Education in Terms of Autonomy, Quality and Finance" was held.

c) Two years later, namely, in the year 2000, the works of the Conference held in Chania (Greece) took place, where another to-date and important subject regarding Higher Education was approached, namely, „Higher Education in the 21st Century, Challenges and Potentials".

d) In the year 2005, the same European Association of Higher Education Institutions – known under the name of Eurashe – organised the Conference with the title „University Colleges in the Bologna Process: Quality Culture and Applied Research".

e) Another international Conference – organised by Eurashe – took place in Copenhaga (Denmark) between 26th-27th April, 2007, having among the themes a subject called „The Social Dimension of Higher Education". Among the representative ttles of the scientifical communications presented in this Conference, we mention: „Lifelong learning and the context of European qualifications" and „Higher education, democratic culture and social responsibility".

f) Also in Copenhaga (Denmark), but in the year 2008, another international Conference was held, on the subject „Research and Innovation and Social Dimension of Higher Education, Towards a Broader Interpretation".

g) Between 8th-9th May 2008, in Malta, the works of the XVIIIth General Meeting and of the Annual Eurashe[1] Conference, took place, having as a main theme a subject regarding „the context of qualifications in Europe". Among the presented Communications, some aimed at Instruction and Education, being actually suggestively entitled: „The context of qualifications in the area of European higher education: how did we get here and why?"; „Strenghtening the relations between tertiary education and labour market"; „Lifelong learning. The academic perspective" etc.

As you could see, the European Association of Higher Education Institutions organised Conferences on varied and to-date subjects, within which they asked not only for the change of the relations between EU States` Governments and Higher Education Institutions, but in the quality of the education process, that also has to take account of the dimension of social life, implicitly of lifelong learning.

Between October 21st and November 21st, 1997, in Paris, under the auspices of UNESCO – the works of an international Conference, that has

[1] *Ibidem.*

drafted and published „Recommendations regarding the status of higher education staff" were carried out.

Among other, on the occasion of this Conference – held within the framework of the XXIXth UNESCO Session – .they emphasized the preocupation, as well as the anxiety of this Organisation of the United Nations regarding the vulnerability of the academic community in the face of political pressure, affecting its freedom, and, ipso facto, its authonomy. Actually, in the text of these „Recommendations", it is decisively stated that „the Academic Freedom" implies „the autonomy of institutions of higher education".

But how can we define this authonomy? For the UNESCO Conference, of the year 1997, this kind of „authonomy" is thought and expressed as an „institutional form of academic freedom and a necessary precondition for ensuring the adequate fulfillment of the functions entrusted to the staff and the higher education institutions" (cap. V A, 17). In addition, in the text of these „Recommendations", they mention that the right to instruction, education and research cannot be exerted but in an atmosphere of academic freedom and of autonomy of higher education institutions. That is why, the „ member States" of United Nations Organization (UN) are obliged to „ensure the protection of the autonomy of higher education institutions as regards the warnings from any source", and „self-government, fellowship and adequate academic governance, are – they mention in the text of those „Recommendations"– the esential components of the meaning of authonomy for higher education institutions" (cap. V A, 20 and 21).

In the text of the same „Recommendations", they state that „higher education staff, ..., must enjoy all civic, political, social and cultural, international rights recognised to all citizens. Thus, the entire teaching staff in higher education institutions must exert – these „Recommendations" state – the right to freedom of thought, of conscience, of religion, of expression, of meeting and association, as well as the right to the freedom and security of human beings and to free circulation" (cap. VI A, 26).

Anyhow, the states of the world are not only obliged to grant the higher education staff the constitutional framework regarding the fundamental human rights and liberties, but also their legal protection.

As regards the remuneration of the members of the teaching body in higher education institutions, the UNESCO Conference – held in Paris in 1997 – recommended that the Party States take all necessary measures „... to grant the teaching staff in higher education a salary so that they could dedicate themselves in a satisfactory way to their responsibilities and allocate themselves the necessary time for continuing instruction and the

periodical renewal of knowledge and qualifications, which are essential at the level of teaching (cap. IX F, 57). To that, the States are obliged „... to provide the members of the academic teaching staff the necessary conditions, that would ensure both for them and their families, a decent living standard", to pay them „regularly and on time". At the same time, the salaries of those must be „periodically" revised and take into account all social factors, such as , e.g. the raise in costs and living standard, as a consequence of a raise in productivity or of a general movement, of protest, for a raise in the salary" (cap. IX F, 59 şi 60).

Beyond doubt, all the States of the world have to take these „Recommendations" into account. But, reality certifies the fact that – in some States – the staff of the teaching body does not enjoy a decent life becuase of a precarious remuneration.

Between October 5th-9th, 1998, at UNESCO headquarters in Paris, too, the works of an international Conference with themes interpellating the men of the XXIst century took place. Indeed, the subject of this Conference was suggestively entitled „Academic education in the XXIst century. Vision and action".[1]

This Conference – in which representatives from over 180 countries participated – also rendered public a „World Declaration" regarding higher education in the XXIst century, in which they established – among other – the „missions and functions" of this education of the century we have entered in.

According to the text of this Declaration, the mission of the academics of this century is „to educate, to train and to undertake research", to offer „opportunities ... for academic courses for the entire life", „to promote and trasnmit the national and regional, international and historic cultures, in a context of cultural pluralism and diversity", to protect and enhance „societal values by training of young people in the spirit of the values making up the basis of democratic citizenship", and „to contribute to the development and improvement of education at all levels, also by teacher training" (art. 1, let. a-f).

The same Declaration outlined a new vision regarding higher education, in the spirit of which the emphasis on „equity of access to higher education", must become a reality of our century. Consequently, „no form of discrimination in granting the access to higher education should be accepted, on reasons of race, gender, language, religion, economic or social status or physical disabilities" (art. 3, let. a).

[1] UNESCO - *http://portal.unesco.org/education*

The Declaration also asks for the accomplishment of the following desiderata: a) the participation and promotion of women in higher education system; b) the advancement of knowledge through research (in science, in arts, in the field of human sciences etc.) and the dissemination of its results; c) the assurance of political impartiality – from the part of the teaching staff – and critical abilities for a better assessment of societal problems and of the own field of activity etc.

In the text of the same Declaration, they mention that the new types of higher education institutions – known under the name of „tertiary institutions", and being public, private and non-profit etc., - must be able to offer a greater variety of opportunities related to instruction and education: traditional diplomas, long-term courses, part-time study, flexible schedules, modular courses, distance assisted teaching etc.

Also, the Declaration provided that the promotion of multilinguism and of the exchange program, for Faculties and students, be integral part of all the higher education systems.

Finally, they asked that the partnership, based on mutual interest, respect and credibility, should be a fundamental instrument in the reform of the higher education system.

In 1993, „The Academic Cooperation Association (ACO)", namely „the Academic Association of Cooperation", was set up, with the headquarters in Bruxelles. This Association is an European, academic organisation, dedicated to the training of inter-university cooperation in Europe and in other parts of the world, regarding higher education and instruction.

In its 16 years of existence, ACO has drafted and made up Projects and Programs regarding higher education in foreign languages and has gathered renowned participants at international Conferences on various themes, such as, for example: a) „The network of Agencies for promoting academic cooperation, mobility and mutual exchanges" (year. 1994); b) „The instruction and education Programs of the European Union and of the third world" (year. 2000); c) „Internationalization in a context of continual change" (year. 2003) etc.

By the utterance of the titles above, we can easily notice that this Association promotes inter-university relations and establishes education and instruction programmes stretching beyond the borders of Europe.

The first international Conference on the theme of adults` education was held in Elsinore (Denmark) in 1949.

Between 6th-9th November, 2002, 200 delegates from Europe, North America and Central Asia participated in an international Conference with almost identical subjects, namely, „lifelong learning", taking place in Sophia (Bulgaria)[1].

Among the participants in this Conference, there were: ministers, parlamentarians, Government and international Organisations` officials, representatives of some non-governmental bodies, researchers and experts in the process of adult education etc.

From the Conference in Sophia – where some importante mentions, proposals and recommendations were made – what was mainly kept in mind is that in some countries a low priority is given to lifelong education policies and, at the same time, a Europe-Africa (EFA) partnership was recommended.

In Mexico City (Mexico), between 10th-13th September, 2003, the works of the VIth regional Conference for Latin America and the Carribean regarding the education of adults took place, thus continuing a tradition initiated immediately after World War II.

The theme of this Conference was entitled „From Literacy to Lifelong Learning: Towards the Challenges of the 21st Century"[2].

Among other, in Mexico City they asked for an implication on the side of local and national Governments in the creation and support of resolutions regarding a quality lifelong learning, that would take into account the cultural, linguistic, racial, ethnical particularities and the ones related to gender equality.

Between 25th-27th April, 2007, in Quebec (Canada) a Conference on North-American higher education took place. The theme of this Conference, „Rethinking North America: Higher Education, Regional Identities and Global Challenges"[3], emphasized both the necessity of identifying the causes of the present challenges in North-American higher education, and the imperative request of improving the mechanisms of the educational system in order to promote quality insurance and mutual recognition of courses and diplomas in North America and outside it.

[1] Cf. *http://www.unesco.org/education/efa/news_en/confitea_vagenda.shtml*
[2] Cf. *http://www.unesco.org/en/confinteavi*
[3] Cf. *http://www.conahec.org*

In the same year, 2007, in June (23 to 27) the works of an international Conference in Israel took place, debating – in an inter- and pluridisciplinary manner – the social dimension of Education.

Among the subjects dealt with within this Conference – with the theme „Teacher Education as a Social Mission: a Key to the Future"– we mention: a) Education: how it manages facing the inequality between educational systems; b) The Vision of Education and politics; c) Ideologies in Education and in teacher training; d) Identity and the professional identity; e) The training for disciplinary and interdisciplinary studies; f) Education and social problems.

From the subjects approached by the participanțs reunited in the Conference in Israel, it therefore follows that, for these ones, Education must be really involved in the problems of social reality, local and international, because, only through such an involvement of its servants – of all levels – they can contribute to the fashioning of the future society.

Between 19th-21st November 2007, at „Université du Littoral Côté d'Opale à Boulogne – sur – Mer" (France) the works of an international Conference took place, on a theme that was not only challenging, but to-date. Indeed, by this Conference they talked about „Dieu à l'École: Éducation et Religion en Europe du Nord-Ouest et en Amérique du Nord de 1800 à nos jours"[1] (God in schools: Education and Religion in North-West Europe and North America from the year 1800 to our days).

Both the organisers and the participants in this international Conference wanted to specify that the debate regarding Religion in Schools is far from being closed, as it can be seen from the impetuous controversies regarding the carrying of religious signs, from the argument between the followers of the two doctrinaire Schools, and, namely, „Creationism" and „Evolutionism", from the community options etc.

It is worth noticing that by this Conference there were also approached subjects aiming deliberately at the religious reality in France. Among these subjects, we mention: a) „Religion as reference in educational systems"; b) „The place held by Religion in school programs and practices and in behaviour"; c) „Religious traditions in the French education system" etc.

In the month of May, 2008, in Berlin (Germany) the works of the Asem Conference took place (The Asia-Europe Meeting of the Ministries

[1] Cf. *http://www.univ-littoral.fr/muselcem.htm*

Responsible with Education and Training for future), within which the „Common perspectives in Asia and Europe"[1] were discussed and assessed.

The debates of the Conferences focused on strenghtening the cooperation in Higher Education by the creation of some strategic partnerships and they stressed the fact that, by the insurance of quality and competitiveness of the systems in this education, we shall get to the building up of some citizens that are qualified and able to work and, ipso facto, this will contribute to the economic development in Asia and Europa. Also, they requested the continuation of the internationalization process in the field of higher education in both regions (Europe and Asia).

On June 9, 2008, in Portorož (Slovenia) there was a Conference organised by EMUNI Centre, The Minister of Education, Science and Technology of Slovenia and of the Forum of the Euro-Mediteranean University.

The objective of the Conference – with the subject „The intercultural dialogue and higher education"[2] – was to debate and explore the role of higher education, as a key element, for the human and social development in the Euro-Mediterranean space. To that, it underlined the necessity of intercultural competencies in higher education and emphasized the role of „cultures, languages and religions in pedagogical studies", where from the imperious importance of the intercultural dialogue within higher education institutions. Actually, the participanțts in this Conference also wanted to mention the fact that education is seen as an opportunity „... to improve intercultural, ethnical relations, and to help students acquire the knowledge and competences necessary for the challenges of nowadays world".

Between 3rd-5th December, 2008, in Budapest (Hungary), the „Regional Preparatory Conference for Europe, North America and Israel" took place, having as a theme „Adult Learning for Equity and Inclusion in a Context of Mobility and Competition"[3].

The final document of the Conference includes recommendations regarding the governance and financing forms of the adults` equitable access to the process of education.

In Amsterdam (Holland), between 11th-12th December 2008, the works of an international Conference regarding „Recognition of the priority of education, Quality Insurance and Procedure Implementation (in higher education)"[4] took place. By the works of the Conference, under the

[1] Cf. *http://www.bmf.de/pot/download.php*
[2] Intercultural Dialogue and Higher Education – *http://www.emuni.si/en/strani/*
[3] Cf. *http://www.unesco.org/en/confinteavi/preparatory-conferences/*
[4] Cf. *http://www.ond.vlaanderen.be/hogeronderwijs/bologna*

patronage of the Government of Holland, the following priorities were established: a) Ensuring the achievements of an economy based on knowledge (new jobs and services); b) The improvement of access to the systems regarding Formal Education; c) Alternative ways for the participation in labour market: the access to jobs and professions, and d) The partnership with the actors on the Labour Market.

In 1991 „The World Economic Forum" was established, gathering yearly in Davos.

After the model of this Forum – that brings about debates regarding the socio-economical problems of the planet – the „World Universities Forum"[1] was soon established, wanting itself to be a dialogue partner of the Forum of the economic sphere, by the means of which to exchange ideas of common interest.

The World Universities Forum organised - between 16th-18th January 2009 – an international Conference at Mumbai (India), that examined the role and future of the University in the world of tomorrow.[2]

Between 19th-22nd May, 2009, the works of an international Conference – under the aegis ... of UNESCO – will take place in Belém (Brazil), with the title „Living and Learning for a viable Future – The Power of Adult Learning".

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By the assessment of the themes approached by the respective international Conferences, we could notice that their problems focused mainly on higher education, a thing that fully proves that this is a major preocucpation of the human society of our days. Actually, by examining the text of the international Conferences, mentioned in the lines above, we could easily understand that both the States of the European Union and the other States of the world, have made from „Higher education" a policy and a strategy, being aware of the fact that on its reform and development depends the evolution of human society itself, the members of which must be educated in the spirit of knowledge and of legal protection of the fundamental human rights and liberties. That is why, we consider that we cannot dissociate the themes of these international Conferences from the way how the world`s Schools and Universities instruct and educate their young people in the spirit of knowing and of respecting the fundamental human rights and liberties and, ipso facto, of their training in the spirit of the values also providing consistency to the theme of democratic citizenship.

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[1] Cf. *http://wuy.publisher.com*

[2] Cf. *http://www.indobase.com/events*

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THE IMPACT OF THE EUROPEAN FINANCIAL INSTRUMENTS AND THE COMMON INITIATIVES ON THE REGIONAL DEVELOPMENT

Abstract

The paper is focuses on the impact of the European financial assistance on the sustainable development. For the beginning, we talk about the ERDF and its objectives during 2007-2013 and about the European Social Fund and its horizontal policies' implication. More, the paper analyses the role of the Cohesion Fund as the main instrument of the European Cohesion Policy.

Another part of the paper deals with the complementary financing: the European Fund for Agriculture and Rural Development, the European Fund for Fisheries and the European Union Solidarity Fund, giving examples for their implementation in the Member States.

A distinct part of the paper operates with the support of the international financial institutions. So, there are analysed the foreign credits from the European Investment Bank, the European Rebuild and Development Bank, the World Bank and so on.

The second great part of the paper deals with the common initiatives like: Intereg IV, Equal, Leader+ and Urban II, and with other financial instruments: JASPER, JEREMIE and JESSICA.

The last part of the paper analyses the distribution of the European Funds across the E.U. in 2008.

The conclusions aren't so positive from the Romania's point of view. There are some challenges for our country in order to obtain a high regional development using the European Funds like the following: the legislative instability, the institutional deficit and the electoral factor, as well.

The Structural Funds represent the financial instruments used by the E.U. in order to eliminate the regional socio-economical disparities and to realise the socio-economical cohesion, as well. During 2007-2013, the Member States can access the European Regional Development Fund

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(ERDF), the European Social Fund (ESF), the European Cohesion Fund (ECF) and three complementary financings: the European Agricultural Fund for Rural Development (EAFRD), the European Fisheries Fund (EFF) and the European Solidarity Fund (ESF).

The European Regional Development Fund (ERDF) was implemented in 1975 and has the greatest rate in the Structural Funds. ERDF supports the socio-economical cohesion by decreasing the European regional disparities, supporting the regional development and structural conversion. ERDF supports the finances for the programs focused on the regional development, the efficiency growth and the territorial cooperation. As a result, the investments will focuses on the basic infrastructure development, the R&D, the culture, the tourism, the education and the SMEs.

According to the Article no. 160 from the Treaty, ERDF is focused on the decrease of the main regional disparities using the decrease of the disparities between the regional development levels, especially those regions less developed, including the rural areas.

During 2000-2006, the value of the financial assistance under the Structural Funds was 200 billion Euros. The ERDF benefited by 60% from this assistance in order to achieve the following objectives:

- ✓ the productive investments for new sustainable jobs;
- ✓ the infrastructure investments, which were able to improve the access to the economic and industrial areas in decline, the urban inactive areas, the rural areas and the areas which are dependent for fisheries;
- ✓ the local development initiatives and business activities of the SMEs, in order to develop the services for the enterprises, the technological transfer, the development of the financial instruments, the support for the investments and the local infrastructure development;
- ✓ the investments for education and health in the regions under the Objective 1.

During the present financial perspective (2007-2013), the ERDF develops a less number of essential objectives focused on: the productive investments, the infrastructure, other development initiatives and the technical assistance.

Under the convergence objective, the ERDF will support the integrated local and regional development of: the research and the economic development, the information society, the environment, the natural and technological risks preventing, the tourism, the transport, the energy, the education, the health and the direct investments in the SMEs.

Under the regional efficiency and employment objective, the ERDF will focuses on: the innovation and the knowledge economy, the

environment and its risks and the access to the transport and telecommunications outside of the great cities.

Moreover, under the European territorial cooperation, ERDF will focuses on: the development of the trans-border socio-economical activities using the common strategies for a sustainable territorial development, the establishment and the development of transnational cooperation, including the bilateral cooperation between the maritime regions and the intensification of the regional policy using the promotion of the networks and the experience exchanges between the local and the regional authorities.

The European Social Fund (ESF) was implemented in 1958, as a main instrument of the common social policy. The ESF is focused on the employment opportunities on the labour market by supporting the mobility growth and by covering the facilities of the adaptation to the industrial changes. We talk about the vocational training and re-training and the new recruiting systems.

The ESF is based on the Regulation no. 1081/1999 and it will support the programs/projects which are under the European Employment Strategy and it will be focused on: the labour and enterprises adaptability growth, the growth of the participation on the labour market, the support to the social inclusion and the partnerships for the employment reforms and social inclusion, as well.

On the other hand, ESF covers three horizontal aspects of the common policies: the promotion of the local employment initiatives, the social dimension and the employment in the informational society and the creation of the equal opportunities for men and women (Patueli R., Reggiani A., Nijkamp P., Blien U., 2006).

The Cohesion Fund is described by the Regulation no. 1084/2006 and it represents the financial instrument which supports the investments in the trans-European transport infrastructure and the environment improvement. During 2000-2006, the CF financed only the projects which were direct negotiated with the European Commission. Nowadays, the CF supports the multiyear investments programs.

The CF was created in order to decrease the weight of the public expenditures for the structural investments in the less developed Member States. As a result, the CF will support these Member States to decrease their national budgetary deficit. The financial support of the CF is 80-85% without any co-financing rule.

The cohesion policy is based on the idea that the economic disparities affect the sentiment of community across the E.U. Moreover, the disparities between the regions and the countries can create greater

tensions than those between the rich and the poor citizens in a specific geographic area as a result of the powerful nationalist sentiment in the European area.

The cohesion policy is focused on the promotion of the socio-economical progress and the elimination of the disparities between the standards life in different regions and Member States. The concept of the socio-economical cohesion was created under the Single European Act (1986) and it was correlated to the EMU under the Maastricht Treaty (1992).

During 2007-2013, the CF will support: Bulgaria, Cyprus, Estonia, Greece, Latvia, Lithuania, Malta, Poland, Portugal, Czech Republic, Romania, Slovakia, Slovenia and Hungary. Spain is eligible on a transitory base because its GNP/capita is less than the E.U.15 average (Popescu C.R., 2003).

The CF finances actions connected to the trans-European transport networks and the environment. Moreover, the CF can finance projects in energy and transports as long as they have a positive impact on the environment (the energetic efficiency, the use of the regenerated energies, the development of the rail transport, the intermodal transport and the public transports, as well). (Busch D.E., Trexler J.C., 2003)

There are complementary finances, as well. The first such a fund is the European Agricultural Fund for Rural Development (EAFRD), which was created in 1958, in order to finance the rural development and to support the farmers especially from the less developed regions. Moreover, the EAFRD improves the efficiency of the production and marketing structures and the local potential in the rural areas. It represents the correspondent of the SAPARD, which can be accessed by the Member States, and it supports the agricultural goods market and the agricultural restructure.

EAFRD represent the financial instrument which supports the rural sustainable development ant it is complementary to the Common Agricultural Policy (CAP), the Cohesion Policy and the Fisheries Policy, which support the market and the revenues.

The CAP covers a set of the rules and mechanisms which regulate the production, the processing and the trade of the agricultural goods across the E.U. and which support the rural development.

During 2007-2013, the rural development needs a rigorous delimitation between the responsibilities of the Member States and the European Commission. This means the respect of the complementarily principle, the coherence and the conformity under the public-private partnership and a non-discriminatory access to the development between the men and the women.

During 2007-2013, the framework of the EAFRD is defined by the European Council's Regulation no.1698/20th of September 2005. The Romanian rural area will receive 7.5 billion Euros from the EAFRD. This fund is based on the co-financing principle for the private investments projects. The access to the European Funds in Romania is regulated by the National Program for the Rural Development.

The European Fisheries Fund (EFF) is the implementation instrument of the Common Fisheries Policy and it is based on some principles, like: the equilibrium between the existing resources and their use, the growth of the fisheries efficiency and the development of the fishing areas and utilities.

The EFF support the socio-economical and environmental sustainable development by the decrease of the fishing effort and the maritime environment protection. Romania is focused on the facilities for EFF implementation and the activities diversification in the fisheries communities.

The reform of the Common Fisheries Policy from 2003 reoriented the priorities to the preservation and the sustainable exploitation of the fish resources, which have to be correlated to the common structural actions in the fisheries activities.

The European Solidarity Fund (ESF) is the latest fund of the regional policy and it was implemented in November 2002, as a result of the great flooding from France, Germany, Austria and the Czech Republic.

The main objective of this fund is to facility the European solidarity toward the population of a Member State or an adhering Member State which was affected by a major natural disaster. This fund allows a rapid, efficient and flexible reaction according to every specific situation. The ESF has a yearly financial allocation of 1 billion Euros (Ionescu R., 2008)

In order to ensure the co-financing for the European Fund or to finance the important investments projects which are similarly with those financed from the European Funds, the Member States can use the foreign credits from the international financial institutes like the European Investment Bank, the European Reconstruction and Development Bank, the World Bank and the European Council Development Bank.

On the other hand, the national public sources of financing are used for the co-financing of the European Funds and for the financing of the similarly investments projects. The greatest part of these financings is focused on the transport infrastructure development and the support of the human resources under the P2 and P4 priorities from the National Development Plan. Moreover, there are stipulated the investments expenditures in the local budgets for education, health, culture, religion

and the young people, public services' development, environment protection, agriculture, transports and telecommunications (Dawkins C., 2003). Almost all these investments were assimilated under the priority P6 from the National Development Plan, named "The Decrease of the regional development disparities".

The private financing sources represent 9% from the National Development Plan's resources.

There are other four common initiatives which are financed from the Structural Funds, as well. They represent 5.35% from the Structural Funds' total budget.

Interreg IV is financed by the ERDF and promotes the trans-border cooperation (the component A), the trans-national cooperation (the component B) and the inter-regional cooperation (the component C).

The component A promotes the regional integrate development between those regions which have common borders across the E.U. It covers 50% from the whole Intereg budget and has the following priorities:

- ✓ the support for the urban, rural and coast development;
- ✓ the development of the entrepreneurship abilities, the tourism and the local initiatives in those areas;
- ✓ the cooperation between the domains like juridical, administrative, research, education, culture and health;
- ✓ the environment protection;
- ✓ the basic infrastructure development, the implementation of a single integrated labour market and support for the social inclusion;
- ✓ a better borders' security and the human resources' training in order to realise the trans-border cooperation.

The component B supports the harmonious territorial integration across the E.U., the candidate countries and the neighbour countries, as well. The trans-border cooperation covers 14% from the Interreg budget, in order to finance the spatial development strategies, the development of efficient and sustainable transport systems and the access improvement to the informational society. Moreover, this component promotes the environment and a quality management for the cultural heritage and the natural resources and offers technical assistance for the trans-national partnerships. This component B respects the recommendations of the European Spatial Development Perspective.

The component C improves the regional development instruments and policies by creating the assistance networks which are able to support the cooperation between regions, especially of those regions under the economic reconversion. The component C covers 6% from the Interreg budget.

Other common initiative is Equal, which was implemented in 2000 and which is financed by the European Social Fund. Equal tries to discover new way to eliminate the labour market's discrimination under the trans-national cooperation and facilities the social and professional integration of the immigrants.

In order to obtain financing under the Equal, every Member State has to send a Common Initiative Program to the European Commission, in which there are described the national strategy and arrangements for the Equal implementation.

Equal uses the development partnerships, which can be the geographical development partnerships and the sector development partnerships, as well.

The common initiative Leader+ is financed by the EAFRD and it will benefit by 2.02 billion Euros during 2007-2013. Leader+ is focused on the local development strategies, especially in the rural areas.

Another common initiative is Urban II, which is financed by the ERDF, in order to support the development of the underprivileged urban areas. The Urban II is characterised by a high implication of the local authorities.

The European Commission, the European Investments Bank and the Development Bank of the European Council created three new financial instruments in order to improve the funds absorption for the cohesion policy (Hudson, R., 2003). These new instruments are JASPER, JEREMIE and JESICA.

JASPER (Joint Assistance in Supporting Projects in European Regions) is focused on the great projects which are financed by the Cohesion Fund and the ERDF. The financial support is 25 million Euros for the environment projects and 50 million Euros for the transport projects, as well.

JEREMIE (Joint European Resources for Micro and Medium Enterprises) supports the SMEs' access to the finance and a better access for micro-credits during 2007-2013.

JESSICA (Joint European Support for Sustainable Investment in City Areas) is the result of the cooperation between the European Commission, the European Investments Bank and the Development Bank of the European Council, in order to offer key solutions (non-callable credits, loans and other financial produces) for the implementation of the integrate projects of urban development and regeneration.

In 2007, Romania benefited by 1.602 billion Euros from the European Funds. 315.4 million Euros were compensated and Romania supported the European budget with 930.9 million Euros, as well.

Moreover, the E.U. paid 444.6 million Euros as compensations in 2007 (Comisia Națională de Prognoză, 2007).

The E.U. had 114 billion Euros in 2007. 44 billion Euros (38.4%) were used for the sustainable development. Romania benefited by 451 million Euros for its sustainable development.

The E.U. allocated 54.648 billion Euros for the agriculture and the rural development. Romania received 23.9 million Euros for its agriculture.

Moreover, the E.U. spent 1.049 billion Euros for the chapter citizenship, liberty, security and justice and 6.805 billion Euros for administration. Romania received 4.3 million Euros for the above first chapter and 18.8 million Euros for its administration.

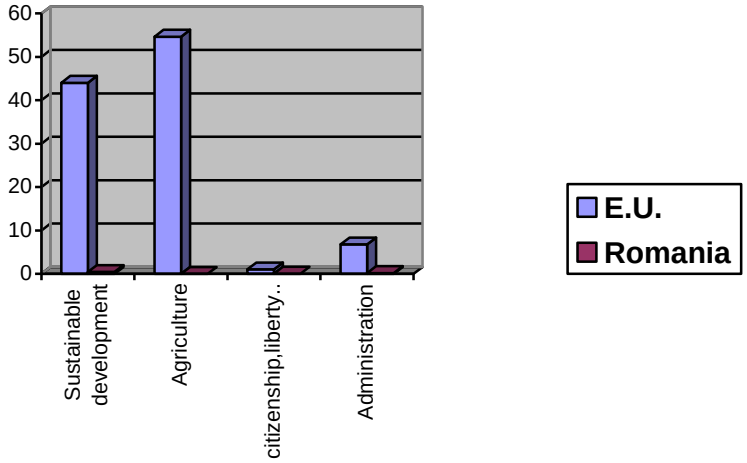

Figure no.1: The financial allocations for the E.U. and Romania in 2007

The greatest European Funds were accessed by France (more than 10 billion Euros), Spain (7 billion Euros), Germany (7 billion Euros), U.K. (6 billion Euros) and Poland (3.1 billion Euros). In the euro zone, only Ireland and Finland succeeded to spend whole their allocated funds (Eurostat, 2007, 2008).

We can conclude that the European financial instruments are important for the national development only if they are accompanied by the national financial support under a coherent national strategy for the sustainable development (Dobre D., Popa C., 2006).

But Romania isn't able to realise this because it presents dysfunctions connected to the legislative instability, the institutional deficit and the elective factor, as well.

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SPATIAL PLANNING AS INSTRUMENT FOR SUSTAINABLE DEVELOPMENT

Abstract

The paper presents the spatial planning as the unique action having the potential to integrate the three interdependent dimensions of sustainable development: economic, social and environmental whatever is the context. By this it becomes an instrument to coordinate socioeconomic development by preventing environmental problems and simultaneously protecting the natural environment and the cultural environment. Spatial planning can coordinate various aspects of socioeconomic development across the sectors of society: regional and urban development, development in rural districts, urban-rural relationships, the development of infrastructure and environmentally sound use of land and natural resources even in the crisis period. Planning procedures are based on and should be developed further to ensure the involvement of the public in a real and productive decision-making process so that various societal interests can be weighed and balanced in decisions on development.

Introduction

Spatial planning is the unique action having the potential to integrate the three interdependent dimensions of sustainable development: economic, social and environmental and by this it becomes an instrument to coordinate socioeconomic development by preventing environmental problems and simultaneously protecting the natural environment and the cultural environment. The new purpose for planning is to ensure the efficient use of limited land resources and to contribute to balanced regional business development and balanced use of resources, including natural and landscape resources, soil, water and air, but especially those represented by human potential. One of its principles is the long-term perspective, according to the principles of sustainability.

Spatial planning can coordinate various aspects of socioeconomic development across the sectors of society: urban development, development in rural districts, urban-rural relationships, the development of infrastructure and environmentally sound use of land and natural resources. Planning procedures are based on and should be developed further to ensure the involvement of the public in a democratic decision-

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making process so that various societal interests can be weighed and balanced in decisions on development.

Integrating sectors through spatial planning

Regional planning and business development

The regional approach to planning provides comprehensive development while respecting the distinctive characteristics and competencies of regions and local areas.

Regional business development relies on the competencies and strengths of a region in meeting the challenge of international competition. This requires increased cooperation between urban regions instead of attempts to vanquish potential competing cities within the region. Planning and extensive cooperation between cities in the form of city networks can ensure that the region's infrastructure and service functions are used more efficiently. The changes in business development are forcing regions to redefine their role in meeting the challenges of increased globalization and international competition and to focus on their strengths. Based on analysis of a region's competencies and distinctive characteristics, planning can contribute to finding initiatives that can promote business development. Such analysis should determine the need for business sites, the designation of undeveloped land for business purposes and location requirements applicable to the specific type of business development in the region. Business development in the central and southeastern countries is becoming increasingly oriented towards services and knowledge-intensive industries. This changes the requirements for the physical surroundings compared with previous production processes. These changes in business development mean that economic growth may be decoupled from increasing the environmental impact.

National guidelines for land use

Regularly, each national government must adopt national guidelines for land use, especially in the crisis period. A national guideline details the general aims of the land use which are to organize land use such that it creates the basis for a favorable living environment and to promote development that is ecologically, economically, socially and culturally sustainable. Generally, the guidelines shall promote also the implementation of international conventions and agreements in the

protection of the cultural environment, biological diversity, climate change and regional development in perspective.
Such, the guidelines could be divided into the following categories:
- a well-functioning regional structure;
- a more coherent settlement structure and the quality of the living environment, the cultural and natural heritage, outdoor recreation and natural resources;
- a well-functioning communication network and energy supply;
-a special issues related to the region and areal entities of outstanding interest as natural and cultural sites. The prerequisites for achieving the guidelines are promoted through spatial planning and the initiatives adopted by state authorities, which are required to promote opportunities to achieve the guidelines as part of their activities.

Sustainable urban development

Spatial planning contributes to achieving balance in urban development between using undeveloped land versus reusing old urban sites and promoting compact urban development.

Sustainable urban development requires preventing uncontrolled urban sprawl in the open landscape. Urban sprawl results in problems in land use and the environment such as increased use of undeveloped land, more transport and dependence on car transport, excessive infrastructure costs and increased use of energy. Compact development reduces the use of new land for urban development. For example, spatial planning can revitalize old industrial and harbour sites or districts by converting them to take on new urban functions. Reusing old urban districts allows various urban functions to be integrated if this does not cause excessive adverse effects on the community environment. The new service and knowledge-intensive businesses can be integrated with other urban functions since they do not cause as many adverse environmental effects as does traditional industry. Mixed use can reduce the volume of commuting transport and promote the use of more environmentally sound modes of transport, especially public transport. The planning process can inspire new forms of cooperation and dialogue between various stakeholders in urban regeneration and potentially achieve public-private partnerships in implementing revitalization projects.

If undeveloped land is to be used in urban development, spatial planning can ensure that priority is given to areas in which development is scheduled to be followed up by investment in infrastructure instead of areas intended to be developed in the longer term.

Transport and the environment

An appropriate location strategy can rationalize transport and thereby contribute to reducing transport-induced environmental impact.

Spatial planning can ensure that enterprises with commuting employees are located near stations to maximize the use of public transport. In addition, planning can promote the use of environmentally sound goods transport chains that combine several different modes of transport (intermodal transport). The demand for transport is increasing. Rising international competition increases the division of labour between enterprises with divergent transport needs. Companies are implementing new business principles, such as just-in time inventory, and inventory functions are being increasingly centralized.

When the spatial planning process has designated transport regions and regional location strategies for enterprises and other functions have been prepared, the planning process can designate locations for transport and other technical installations, including goods transport centres, and zones for specific companies and institutions. A transport-related strategy for determining location can also be the starting-point for planning that ensures the efficient utilization of existing infrastructure instead of building new infrastructure, which can save land for other purposes.

Tourism

Spatial planning contributes to developing tourism so that it promotes the protection of the landscape and conservation of cultural environments and encourages local employment.

Spatial planning can prevent the natural heritage from being further destroyed. Vulnerable natural areas such as beaches and mountain areas are especially endangered by increasing tourism but also by the recreational needs of urban populations. Designating areas for holiday and recreational purposes can be based on a strategy seeking to develop the quality of such areas. For example, this means improving facilities for tourists and developing a type of tourism that respects the distinctive characteristics of the location, protects urban environments and natural and cultural environments and creates local employment.

Biological diversity

Spatial planning can manage appropriate land use to ensure that nature is protected and biological diversity promoted and can contribute to integrating nature protection into the planning of agriculture, forestry, fisheries and installations in the open country.

Spatial planning can designate the location of valuable natural areas, vulnerable natural areas, buffer zones from which certain activities can influence vulnerable natural areas and wildlife dispersal corridors. Thus, spatial planning can comprise the basis for formulating differentiated demands and conditions applying to companies and farms or in connection with extracting raw materials, constructing transport installations and other activities. In addition, priority areas can be designated for special initiatives in nature protection and nature restoration.

Other interests associated with land use that influence biological diversity are related to such areas as valuable agricultural and forestry areas, coastal areas, wetlands or afforestation areas. Planning can establish a geographical overview of the areas with which the various interests in land use are associated. The planning process can weigh the numerous and varying interests in land use, such as urban growth, transport installations, intensive agriculture, intensive livestock farming and interests in recreation or protection, and this can create a balance between use and protection.

Conclusions

This above lines has described how spatial planning can promote sustainable development by integrating sectors of society. Business development, urban development, urban-rural relationships, the transport structure and tourism should receive special attention in border regions, since development does not stop at national borders, and regions are created regardless of these borders. Various types of country-specific regulation and practice, such as different rules governing retail trade or the labour market, collide and pose problems for appropriate development in the region. In addition, the borders determine the economic and monetary framework, taxes and fees and often language, culture, habits, products and consumer priorities. Cross-border cooperation in spatial planning is especially important to ensure that the differences in regulation and practice do not result in inappropriate spatial development in these regions.

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SEVERAL CONSIDERATIONS ON THE DEONTOLOGY OF PUBLIC SERVANTS IN ROMANIA AT PRESENT

1. Terminology issues
2. Fundamental aspects of professional ethics and deontology today
3. Can we speak of a deontology of public servants in Romania?
4. Deontological aspects of the Public Servants' Code of Conduct established by Law no. 7/2004
5. Conclusions

Abstract

The scope of our research is represented by the deontology of public servants whose employment regime is regulated by Law no. 188/1999 on the Public Servants' Statute, with all its subsequent amendments, as well as by Law no. 7/2004 regarding the Public Servants' Code of Conduct. Our study aims to clarify several important aspects concerning the ethical values and rules that public servants should abide by in their conduct. In as far as methodology is concerned, we used the principles of general logic in our analysis based on legislation and studies in the field. We believe that the conclusions we reached may be useful for those who are interested in the improvement of morals and professional ethics in the Romanian public administration.

1. Terminology issues

The term 'deontology' was used for the first time by the British jurist, philosopher and moralist Jeremy Bentham (1748-1832). In his work *Deontology or The Science of Morality*, Jeremy Bentham considered that moral worth of an action is determined exclusively by its contribution to overall utility: that is, its contribution to happiness or pleasure of all persons. An action is thus good or bad according to the amount it increases (or diminishes) general happiness, compared to the amount that could have been achieved by acting differently. Bentham found pain and pleasure to be the only intrinsic values in the world. From this, he derived the rule of utility: the good is whatever brings *the greatest happiness to the greatest number of people*[1]. This is one of the reasons why he was considered the initiator of the school of thought known as utilitarianism. Thus, we can

[1] M. P. Mack, *Jeremy Bentham: An Odissey of Ideas*, Columbia University Press, 1963, p. 204

state that in Jeremy Bentham's view 'deontology' is the name given to an ethical theory.

The word deontology comes from the Greek roots deon, deontos which means duty, obligation and logos, which means science, discourse.

Today, in a broad sense, we understand by deontology a set of rules that establish the norms of conduct and ethical obligations of a profession. These rules regard the conduct of the members of a certain profession in their relationships with each other and with their clients[1].

The Random House Webster's College Dictionary[2] explains deontology as *ethics dealing especially with duty, moral obligation and right action*. The Wiktionary[3] (the wiki-based open content dictionary) considers deontology as *the ethical study of morals, duties, obligations, and rights, with an approach focusing on the rightness or wrongness of actions themselves and not on the goodness or badness of the consequences of those actions*. Comparing all these dictionary definitions, we can remark that in its broad sense deontology is understood as 'professional ethics'.

In a more restrictive sense, deontology means a coercive system, made up of regulations originated as rules of ethics and the sanctionatory mechanisms applicable to a profession. It is very important to mention that these ethical rules are introduced into law (changing from ethical into legal rules) and that the established sanctions are applied by professional jurisdictions.

In this context we find necessary to discuss the senses in which the word 'profession' may be used. A first sense of the term 'profession' refers to a set of theoretical notions and practical skills that define the training of a person or group of persons performing a specialized activity[4], requiring, as a general rule, a university degree. As such, the term is also used with the meaning of occupation or job. Whenever we will refer to profession in its first meaning we will use the word 'specialization' in order to avoid the confusion with the second sense. The second sense of 'profession' designates the organized social group formed by the persons carrying out a specialized activity that requires a set of specific theoretical notions and practical skills.

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[1] See *The Romanian Language Dictionary*, 2nd ed., Ed. Univers Enciclopedic, Bucureşti, 1996, p. 278

[2] The Random House Webster's College Dictionary, Random House New York, 2001

[3] http://en.wiktionary.org/wiki/deontology

[4] B. Duțescu, *The Professional Ethics of Doctors*, Ed Didactică Pedagogică, Bucureşti, 1980, p. 9

A final observation must be made on the meanings of the notion of 'public servant'. In a very broad meaning, by 'public servant' we understand a person who performs a more or less specialized activity, under a legal regime which is different from the general labor law, that person being remunerated from public funds. In this sense the notion of 'public servant' comprises a large group, made up by the majority of the employees in the public institutions[1]. In a restrictive sense, that which will be made use of throughout our analysis, 'public servant' refers to the sense given by the article 2 of Law no.188/1999[2], on the Statute of Public Servants, i.e. the person appointed in a public function within the system of the central public administration, the local public administration and the autonomous administrative authorities.

2. Fundamental aspects of professional ethics and deontology today

According to a French author[3], deontology, in its restrictive meaning, presents the following characteristic features:

A. The introduction of ethical rules into the law in force

Whenever professions become organized groups they elaborate a system of rules that establish the obligations of their members. If we take the example of the two classic liberal professions, doctors and lawyers, we can remark that their deontological rules are very detailed and have acquired an authoritarian character. They were issued by the official internal bodies of that profession and they became true codes of solid deontological rules based on real facts and experience. One possible explanation of this phenomenon may be the fact that these professions (which are considered to be more closely related to the fundamental human needs) prove to be the most interested in the codification of their deontological rules, in the maintaining of high standard morals and of their social reputation because the social prestige is essential for the success of a profession.

Generally speaking, deontology tries to offer, in a prescriptive manner, the accurate practical solutions to the problems with which professionals have to cope with in their activity, defining their obligations, the sanctions that may be applied to them, as well as the application

[1] V. I. Prisăcaru, The Public Servants, Ed ALL BECK, Bucureşti, 2004, pp. 20-27
[2] Law No.188/1999 on the Statute of Public Servants, republished in the Official Journal of Romania, Part I, no.365/29.V.2007.
[3] R. Savatier, Encyclopedia Universalis, Paris, vol. 7, 1993, pp. 188-191

procedure of these sanctions. The regulation of these aspects, together with the organizing rules of their profession, including the conditions of access into that profession, were introduced into the law in force, especially under the form of professional disciplinary law. This law appears to be a self-protection mechanism by legal devices put into practice by social groups formed on the basis of shared professional criteria. But one must not confuse deontology with the entire disciplinary law. There is no doubt that, the disciplinary law is an instrument by which the authorities of a professional group, on behalf of that group, may apply sanctions for the breaching of ethical obligations that are to be respected by their members. But a system of penalties for failure in the achieving of obligations is to be found in all categories of organizations, not only within professions.

The most important aspect resulting from the analysis of the legal texts is that when a profession is officially organized (i.e. it has a legal status) the texts regulating its organization never omit the main deontological aspects.

B. The impossibility to codify all deontological rules

It is a known fact, acknowledged by many codes and regulations establishing deontological norms, that not all deontological rules can be systematized in the form of a code. Nevertheless these rules are imperative for all members of a profession. Such an example may be the expression 'actions that may harm the honor and prestige of the profession' that we can find in the article 70 of the Law on the organization and practice of the profession of lawyer[1]. The harm that may be caused to the honor and prestige of the profession is not a clearly determined notion, because its content is too vague and relative. That is why such a notion cannot be defined in a very determinate manner in law texts and there is no such thing as a rule that may take into consideration all possible situations. Such cases impose as a necessity that disciplinary jurisdictions should be very specific and express in a definite manner the requirements and the moral rules to be respected in each case when they will analyze the conduct of professionals that may affect in a negative way the confidence and respect that the profession needs in order to be successful.

Other rules that cannot be codified are those regarding immoral acts, since these acts may harm a professional's reputation, even when they are not directly connected with its professional activity. This is the reason

[1] Law no.51/1995 republished in the Official Journal of Romania, Part I, no.113/6.III.2001

why, a series of general ethical rules can be included in the profession's deontology if they are not connected with situations that affect the status of the entire profession.

Deontology includes as well certain rules whose purpose is to maintain order within a profession and that regard the relationships between professionals. These rules establish patrimonial and non-patrimonial obligations, but they are not codified entirely, because of the elusiveness and relativity of certain terms borrowed from ethics and which cannot be given up.

C. Only disciplinary sanctions can be applied for the breaching of deontological rules

Among disciplinary sanctions that may be applied, there are purely moral censures which affect negatively the image and the honor of the professionals who do not fulfill certain obligations. In this case, it is the esteem for these persons, in their relationships with both their colleagues and their clients, that it is affected negatively. In this category we may include verbal reprimand and written reprimand. Warning, too, may be a disciplinary sanction, but it has a menacing character and its purpose is to prevent the breaching of other deontological rules.

In the case of other professions, such as doctors and lawyers, it is generally admitted to apply disciplinary fines to the members who do not observe the rules established by the professional bodies.

The most serious disciplinary sanctions are the suspension and the exclusion from the professional group. In the case of those professions that are not organized by law, the suspension and exclusion are valid only for the group that applied the disciplinary punishment. In the case of professions whose organization and discipline are regulated by law, the jurisdiction of that profession is authorized to forbid the practice of the profession itself. This is the most severe disciplinary sanction to be applied, because in this way, the professional found guilty is excluded from the profession. This could be the case, for instance, of doctors and lawyers.

Mention must be made of the fact that the legal texts that enumerate the disciplinary sanctions are restrictive, i.e. not any other disciplinary sanction may be applied.

D. Professional legislation

The professional legislation is based on the democratic principle of the autonomy of the profession. The professional group has the right to establish its own legislation, and public authorities recognize it. The state has control over the way professions exercise their internal rights. This

power of the state control differs from one profession to another and concerns both the jurisdictional power of the respective profession and its legislation.

Professions that are not regulated by the national law, and as a consequence have no unitary organization, have to right to establish by vote their own regulations. These regulations include the obligations to be observed by their members, as well as the applicable sanctions. Whenever a profession is not organized by law, its members have the possibility to freely unite into groups that may define some rules of conduct for their members. But these are not legal rules, because their observance is not imposed by the state.

In the case of the professions organized by law, the democratic character of their internal legislation diminishes because of the control of the state. But the respect of the professional rules is guaranteed by the state.

E. Professional jurisdictions

The authority of the profession over its deontology implies the recognition of its jurisdictional competence. Professional jurisdictions, established by elections within the profession, can apply only disciplinary sanctions for the breaching of the deontological rules. The autonomy of the professional jurisdictions is large since these jurisdictions are established by the professional group itself. The internal bodies of the profession have no right to apply condemnations directly; condemnations can only be enforced by law courts. The professional jurisdiction can remind a professional his obligations, by a warning (as a disciplinary sanction). If the obligation is a legal one, then the disciplinary jurisdiction has the possibility to determine the involvement of public authorities.

The decisions taken by the professional jurisdiction can be annulled by courts if they are contrary to the law. This control has several important aspects. On the one hand, courts assure the respect of the accused professional's right of defense. The protection of the right of defense, including the right to a defender, is a universally accepted right, and as such is acknowledged by all jurisdictions. On the other hand, a disciplinary condemnation will be annulled if the breached deontological rule is contrary to the liberties guaranteed by the state. Finally, in certain circumstances, law courts may assume the right to verify that the misconduct really took place and that the action can be considered as a breach of a deontological rule.

The professional that was unjustly applied a sanction, has not only the right to solicit the annulment of that sanction, but also to claim the condemnation of the professional group to the payment of moral damages.

F. The deontological law may be applied only within the profession and is relatively independent from the law in force

By deontological law we understand the deontological rules and other rules connected with them introduced in the law in force, either directly, or in the form of codes of deontology established by the bodies of the profession. The deontological law comprises: the deontological obligations, the sanctions applicable for the breaching of rules, the professional jurisdictions and the procedure of application and of contest of the sanctions.

First of all, we have to mention that the deontological law has a restrictive applicability, because it can be applied only to the respective profession. If the profession is allowed to codify the obligations of its members, the code can be applied only within that profession. As a consequence, the deontological rules of a profession may not be enforced on members of other professions.

Another characteristic of the relationship of the deontological law and the law in force is the fact that the deontological law is relatively independent[1] from the law in force. Thus, the decision of a disciplinary jurisdiction is independent from the decisions of civil or penal jurisdictions for the same doing.

If a disciplinary jurisdiction is notified with regard to a breach of duty and prior to this notification there was also a notification made to a penal court, the disciplinary jurisdiction is not forced to postpone its judgment until the penal jurisdiction has issued its decision, on condition that there is no contrary legal rule in this sense. As a consequence, with the exception of several crimes classified as special, the disciplinary jurisdiction may discharge the accused convicted by the penal jurisdiction and the other way around. Nevertheless, the disciplinary jurisdiction may not decide to discharge or convict the accused on the basis of an action that is not incriminated by the penal law.

The reason of these different decisions consists in the fact that their object is different. Thus, in the domain of penal law, the court cannot apply a punishment if the action is not incriminated by law, whereas in the disciplinary field, misconducts considered contrary to the morals and that are not regulated by law can be punished, especially if they are thought to harm the honor of that profession.

[1] This independence is a relative one, since the deontological law is part of the law system and as such it is connected with other legal norms.

We mention that there is no rule to deny the cumulative application, for the same action, of the disciplinary sanction and of the punishment applied by the penal court[1]. For instance, there can be two different decisions of suspending of the right to practice a profession, one issued by the disciplinary jurisdiction, the other one, by the penal jurisdiction.
At the same time, the deontological law is independent from the civil law. For example, an action may not be considered contrary to the deontology of a profession but it may establish the civil responsibility of the accused and the other way around.

An important remark to be made is that the deontology and disciplinary sanctions specific to a profession are also independent from those of other professions in the case of a person who may perform several professions at the same time. E.g.: a professor at a faculty of medical science and doctor in a hospital may be brought before a disciplinary jurisdiction, the Medical College in this case, before the disciplinary jurisdiction of the hospital, but also before the disciplinary jurisdiction of the university. The decisions of all these three jurisdictions are independent from each other.

The independence of the deontological law does not prevent each of the jurisdictions from taking into consideration the obligations that are common to those professions, usually obligations towards society and profession itself. Thus, if the professional is brought before a civil court the professional's obligations towards its clients will be taken into consideration by that court. But as a general principle, the deontological rules are not mandatory for civil and penal jurisdictions.

Taking into account all the above commentaries on the characteristic features of the deontology today, it may be said that deontology, in its restrictive sense, has the following elements:

a. the organization of the profession is regulated by law, and the profession is organized by its professional law;

b. the internal bodies of the profession are recognized the competence to establish deontological norms and to apply sanction for the breaching of these rules;

c. the profession has a deontological law, i.e. the professional law includes deontological rules and sanctions that guarantee the fulfillment of the mission of that profession in conformity with the ethical rules; the deontology of each profession defends a specific set of values and

[1] The principle of the unique punishment, demands that a single penalty of the same nature should be applied for the transgression of a legal norm. But when by the same action, several legal rules were transgressed, then all sanctions provided by these rules will be enforced.

principles and these values are determined by the mission of that profession.

The professional groups are the ones to establish the conditions for the access to a profession and they require, as a rule, the swearing of an oath as a guarantee of the observance of deontology. The text of the oath makes reference to the ethical values specific to that profession. For instance, the oath sworn by lawyers[1] refers to the practice of the profession of lawyer with 'honesty and dignity'.

If one analyzes closely the social life, one can understand that deontology cannot be reduced to the aspects we have discussed so far. These elements that are easily noticeable represent what we call the *objective side* of deontology.

Equally important is the subjective side of deontology which implies that the ethical values defended by deontology have to become an active part of the mindset of the members of a profession. Professionals have to believe in the ethical values and principles of the profession and to be convinced of the necessity of the observance of the deontological law, so that the respect of deontology offers them a state of inner equilibrium resulting from their being at peace with their own consciousness. It is only in this situation that deontology will truly govern the morals of a profession. The success of the subjective side of deontology may be secured by a continuous effort in the domain of education (through information, through the increasing of the degree of awareness and assimilation of the ethical values) and efforts for inducing and developing of a deontological behavior.

The objective and the subjective elements of deontology have to be considered as a whole. Without the subjective component, the objective one becomes an empty form and the morals of a profession will not be in keeping with deontology. The respect for deontology should be a characteristic feature of the conduct of the great majority of the professionals and breaching of duties should constitute exceptions for which disciplinary sanctions can be applied. If the breaching of deontological rules represents the norm, then deontology will be ineffective, a useless empty form, because the will and rule of the majority cannot be repressed.

The conclusion is that a professional group may be said to have a real deontology if both sides – objective and subjective – exist and are observed.

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[1] Article 21 of Law no.51/1995 concerning the organization and practice of the profession of lawyer, previously cited.

3. Can we speak of a deontology of public servants in Romania?

In order to establish if we can speak of a deontology of public servants, in the restrictive sense of this notion, we have to answer the following questions:

I. Does the public function represent a profession?
II. Is there a professional law for the public servants?
III. Are there professional bodies of the corps of public servants, and if yes, are they competent to elaborate deontological norms and to sanction their breaching?
IV. Does the corps of the public servants have a deontological law, and if yes, are these principles characteristic for their profession?

I. As already discussed above, by profession we understand a social group made up of the persons who perform a specialized activity requiring specific theoretical knowledge and practical skills. The problem is to know if the public function, understood as the social group comprising all public servants, may be considered a profession. Well, the simple fact that the legal statute of the public servants is regulated by organic law[1] proves that the public servants make up an organized group. But the unity of this group is not provided by the fact that the professionals share the same specialization and carry out the same activity. The unity is assured by the legal statute and by their general mission which is the achievement of the public interest by the activity of public administration. According to the provisions of Law no. 188/1999 on the Statute of the Public Servants[2], there are many categories of public servants classified on different criteria and with a diversity of specializations. Thus, there is a first classification in accordance with the nature of the functions attributed to them, namely positions of general administration and of special administration.

A second classification of public service positions according to the level of attributions divides the public service into three categories, namely high-ranking positions, leading positions and ordinary public servants – public servants of execution.

A third classification, in accordance with the academic credentials required to occupy a position, divides public service positions into classes I, II and III. In this way a distinction is made between public servants for whom a university degree is required (in different domains, such as:

[1] Law no. 188/1999, previously cited
[2] Chapter II: *Classification of public functions. Categories of public functions*, and Chapter III: *The high-ranking public servants*

administrative sciences, law, economics, engineering, medical science) and other categories of public servants.

A fourth classification differentiate the public servants occupying positions at the level of central public administration (in the ministries, the specialized organs of the central public administration and autonomous administrative authorities) and those working in the local public administration. At this level there are territorial public functions (within the institution of prefect, within the public services of the ministries and of the other organs of central public administration functioning at the level of territorial-administrative units) and local public functions (within the apparatus of the authorities of local public administration and their subordinated public institutions). The public function is a profession, but a profession with a general legal statute shared by all categories of public servants, heterogeneous with regard to the specialization and the nature of its activity, comprising several sub-groups and consequently presenting a low degree of cohesion. An important remark to make is that unlike the liberal professions, such us doctors and lawyers, whose organization was regulated by rules created by the profession itself and recognized by the law in force, the organization of the public function is, *ab initio*, the state's enterprise.

II. As mentioned above, the professional law is represented by a set of legal rules organizing a profession. At present, there is an ample legislative corpus that regulates the public function in Romania:

- Law no.188/1999 regarding The Public Servants' Statute[1],
- Law no.7/2004 regarding The Public Servants' Code of Conduct[2],
- Law no.340/2004 regarding the prefect and the institution of the prefect[3],
- Law no.571/2004 regarding the protection of personnel of the public authorities, public institutions and other units that notify the cases of the breaking of laws[4];
- Government Decision no.1000/2006 regarding the organization and functioning of the National Agency of Public Servants[5],

[1] To which all references will be made as The Public Servants' Statute or simply as The Statute
[2] Republished in the Official Journal of Romania, Part I, no.525/2.VIII.2007
[3] Republished in the Official Journal of Romania, Part I, no.225/24.III.2008.
[4] Published in the Official Journal of Romania, Part I, no.571/17.XII.2004.
[5] Published in the Official Journal of Romania, Part I, no.698/15.VIII.2006.

- Government Decision no. 341/2007 regarding the entry into the category of high-ranking public functions, the management of the career and the mobility of the high-ranking public servants[1],
- Government Decision no. 833/2007 on the rules of organization and functioning of the joint committees and the collective agreements[2],
- Government Decision no.1344/2007 concerning the norms of organization and functioning of the disciplinary committees[3],
- Government Decision no.611/2008 for the approval of the rules regarding the organization and development of the public servants' career[4].

This legal corpus regards the following important aspects: the public functions, the conditions and ways of access to a public function, the general principles of the public function, the management of the public function, the public servants' rights and duties, the professional ethics and the deontological principles, the public servants' career, ways of representation for public servants in their relations with the administration where they perform their activity, public servants' responsibility, the breaching of disciplinary rules, disciplinary sanctions and the procedure of their application. As a consequence, we can state that the existence of the professional law of the public servants is an evident fact.

III. The Statute provides two organizational forms of the public servants' corps at the level of the authorities and institutions of the public administration, i.e.: *the joint committee and the disciplinary committee.*

According to articles 73 and 74 of the Statute, joint committees are formed within the authorities and institutions of the public administration. These committees are made up of an equal number of representatives designated by the chief of these authorities and institutions and by the public servants' union. When there is no union, the members of the joint committee are designated by the vote of the majority of the public servants from that authority or institution.

These committees are consulted with regard to the measures that should be taken to improve the activity of the authorities and institutions in which the committees function; with regard to the professional training of public servants, this activity being paid from budget; when the schedule of the public servants' work is established by the leader of the authority or institution; with regard to the public servants' right to form a union. We can remark that the general expression 'measures for the improvement of

[1] Published in the Official Journal of Romania, Part I, no. 247/12.IV. 2007.
[2] Published in the Official Journal of Romania, Part I, no.565/16.VIII.2007.
[3] Published in the Official Journal of Romania, Part I, no. 768/13.XI.2007.
[4] Published in the Official Journal of Romania, Part I, no. 530/14.VII.2008

the activity' provides also the possibility to elaborate deontological norms. The legal device used by the joint committees is the advisory notice.

According to the provisions of article 79 of the Statute and of the Government Decision no.1344/2007 regarding the norms of organization and functioning of the disciplinary committees, disciplinary committees are constituted within the authorities and institutions of the public administration. These committees are deliberative structures, without legal personality, independent in the exercise of their duties, being competent to analyze cases of professional misconduct when disciplinary rules have been breached and to propose the solution for each case either establishing the disciplinary sanction applicable or declaring the case closed. The disciplinary committee is made up of 3 members that are qualified, permanent public servants. Two of the members of the committee are nominated by the chief of the authority or institution of the public administration, whereas the third is designated by the public servants' union or, if there is no union, by the vote of the majority of the public servants from that authority or institution. The disciplinary committee has the competence to initiate the disciplinary procedure, and its activity is governed by a set of principles that are similar to those of any other jurisdictional authority. The disciplinary procedure is set in motion with the notification of the disciplinary committee, it continues with the investigation which involves hearings of different persons and the presentation of evidence. The next stage is the discussion of the case by the committee and the procedure ends with the preparation of a report. The report presents the committee's motivated proposal to apply a disciplinary sanction or to dismiss the case. This report is handed in to the authority having the legal competence to apply the disciplinary sanction and that will issue the administrative act by which the sanction will be applied. If the authority competent to apply the sanction will apply other sanction than the one proposed by the disciplinary committee it has the obligation to justify its decision. As a conclusion, the disciplinary committee is a professional jurisdiction, but it has a limited competence, since it only propose, and cannot apply a disciplinary sanction. From the analysis of the above presented facts, it results that the public function as a profession presents internal organizational forms by which the public servants have the possibility to contribute to the elaboration of deontological rules and participate in the process of the application of the disciplinary sanctions. But these bodies have not a decisional power as it is the case of the liberal professions of doctors and lawyers. At the same time, there are no guarantees for their being independent of the leading staff of the institution.

IV. The deontological law is a component of the professional law that comprises the deontological rules created to assure the fulfillment of the mission of a profession in accordance with the ethical rules and the observance of deontological rules is guaranteed by a sanctionatory mechanism. Or, in other words, the deontological law is that part of the disciplinary law of a profession that assures the observance of rules which are ethical either in nature or origin. In order to have the characteristic features of a deontological law, the professional law should provide ethical obligations and principles, characteristic of that profession, to qualify the infringement of these rules as infraction of discipline (breach of duty), to establish the disciplinary sanctions and the procedure for the application of the sanctions. In order to prove that the public function has a deontological law, we have to bring evidence that the professional law provides ethical obligations and principles, establishes that the infringement of these rules represents a breach of duty which determines the application of a certain sanction within a certain procedure.

The fundamental goal of public administration and its 'raison d'être' is the pursuit of public good, the general interest of the citizens. And since the general interest is expressed by law, the mission of public administration is to enforce the law and to organize the activities necessary for the implementation of law. That is why the oath sworn by public servants includes ethical obligations such as: the respect of the fundamental human rights, honesty and impartiality in the activity of the enforcement of law, correctness and faithfulness in the fulfillment of duties specific to the public function, the observance of professional ethics and of norms of conduct in society. The oath is provided by article 62-(6) of the Statute: 'I swear to respect the Constitution, the fundamental human rights and liberties, to apply correctly and objectively the laws of the country, to fulfill the duties of the public function I was appointed to, to keep the professional secret and to observe the rules of professional ethics and good conduct in society'.

Ethical obligations and principles are provided by the Statute, for instance in article 43, and especially by Law no. 7/2004 regarding The Public Servants' Code of Conduct which will be analyzed further.

Article 77-(1), letter g of the Statute qualifies as infractions of discipline 'any actions that damage the prestige of the public authority or institution. A similar expression is to be found in the article 23-(1) of Law no. 7/2004 on The Public Servants' Code of Conduct. According to the provisions of the article 77-(3) of the Statute, the disciplinary sanctions applicable to the public servants are: written reprimand; diminution of the salary rights with 5-20% for up to 3 months; suspension for advancing

within the salary degrees, or promotion within the public function stages for a period from 1 up to 3 years, demotion from the salary degrees or demotion within public service, for up to one year; destitution from the public service position. The procedure by which breaches of duty are sanctioned is regulated in detail by the Government decision no. 1344/2007 concerning the rules of organization and functioning of the disciplinary committees.

Taking into consideration all the facts presented above, we state that the public function has a deontological law.

As a consequence of the analysis of the elements that form the content of deontology, in its restrictive sense, we conclude that, in the case of the public function, these elements certainly exist. To be more precise, we can remark, first of all, that the organization of the profession is regulated by law; there are internal bodies at the level of public authorities and institutions by which public servants are given the opportunity to take part in the creation of deontological rules and in the application of disciplinary sanctions; the profession has a deontological law. We also point out that in the case of the deontology of the public service the objective side exists. The deontology of the public function differs from that of the liberal professions by the fact that the internal disciplinary bodies of the profession have a restricted competence. They are consulted with regard to the deontological rules and participate to the enforcement of disciplinary sanctions, but it is the head of the public authority or institution that decides over the deontological rule that was breached and over the disciplinary sanction to be enforced. It results that the deontology of the public function has an authoritarian character and that it is more the endeavor of the high-ranking public servants, than of the internal bodies within the profession. Unlike the democratic deontology of the liberal professions, the deontology of the public function operates in a strictly hierarchical system.

4. Deontological aspects of the Public Servants' Code of Conduct established by Law no. 7/2004[1]

Despite the neutral expression in the title – 'Code of Conduct' – we will argue that in fact we are in the presence of a true deontological code. The goals established in article 2 give us the right to claim that the regulations of this code have a strong deontological aspect. The purposes of this code are:

[1] That will be subsequently referred to as The Code of Conduct or simply The Code.

a) the elaboration of the rules of conduct necessary in the development of social and professional relationships which maintain a high level prestige of the public function, as a social group, and of each and every public servant;

b) the information of the public with regard to the public servants' conduct during the exercise of their duties;

c) the effort to create and maintain relationships based on respect and mutual trust between the citizens and the public servants.

In order to achieve these goals, the Code of Conduct stipulates the principles that must govern the professional conduct of the public servants, establishes the general norms of conduct and provides the measures of coordination, monitoring and control concerning the enforcement of the rules of conduct that it provides.

The deontological principles governing the professional conduct of public servants are presented in article 3 of the Code. These principles are:

a) the priority of the public interest, a principle that expresses the ethical concept of 'duty', according to which, in the exercise of their function, public servants should consider the pursuit of the public good as superior to their personal interest;

b) public servants should assure an equal treatment of the citizens in their relation with public authorities and institutions, a principle that renders the ethical concept of equity, according to which public servants have the duty to apply the same legal rules in identical or similar situations;

c) professionalism, a principle establishing the public servant's obligation to perform his tasks with responsibility, ability, efficiency, accuracy and dedication;

d) objectivity and independence, a principle that expresses the ethical notion of impartiality according to which public servants should demonstrate neutrality towards any political, economic, religious or any other interest, during the exercise of their duties;

e) moral integrity, a principle which forbids the public servant to solicit or accept, directly or indirectly, for him or others, any benefit or advantage with regard to their function, or to abuse of the prerogatives of his function;

f) honesty and loyalty, a principle which imposes that public servants should perform with good faith their duties and competences;

g) openness and transparency, a principle which renders the ethical concept of sincerity according to which the activities carried out by the public servants in the exercise of their function are public by their nature and therefore they can be the subject of the citizens' monitoring.

The most important norms of professional conduct for public servants are those which establish the 'loyalties'. The first loyalty, provided by article 6-(1) of the Code, is the loyalty toward the Constitution and law: 'Public servants have the obligation to respect the Constitution, the laws of the country and to act in order to ensure the enforcement of the legal provisions, in accordance with their competences and observing the professional ethics.' Some commentaries are to be made concerning the manner in which this article was formulated. The syntagm 'laws of the country' refers to the national law as well as to the European Union law, because the EU law is part of the internal, national law. In the case when there is conflict between the national law and the EU law, the principle that applies is that of the priority of the EU law. We consider that the expression 'professional ethics', which is not defined by the legal text, should be understood as deontological principles and obligations that are regulated by law. It is normal that the first loyalty of the public servants should be the one towards the Constitution and law, because these are the legal expressions of the public good that the public administration has to achieve.

The second loyalty, provided by article 7 of the Code, is the loyalty towards the authorities and institutions of the public administration. This second loyalty has the following major aspects:

I. Public servants should defend with loyalty the prestige of the authority or institution where they perform their activities and restrain from any action that may harm the image or affect negatively the legal interests of the profession.

II. The public servants are forbidden:

a) to express publicly judgments that do not correspond to real facts, concerning the activity of the public authority or institution where they work, or in connection with the strategies, the methodologies applied or projects of legal or individual acts;

b) to express unauthorized opinions concerning matters that are still in litigation, the public authority or institution being one of the parts involved in a lawsuit;

c) to breach the secrecy and confidentiality principle, either by disclosing information which is of public interest, or by disclosing information to which they have access while in the exercise of their competences, if this disclosure is aimed at obtaining benefits or at damaging the reputation or the rights of the institution and of the public servants and of other physical or legal persons;

d) to assist and offer counseling to physical or legal persons wanting to take legal actions against the state or the public authority or institution where the public servant carries out his activity.

We can observe that the loyalty towards the public authorities and institutions entails important limitations of the freedom of expression.

The issue of loyalty raises some questions to which there are no easy answers. One such question would be: What happens when the public servant's loyalty towards the public administration collides with his loyalty towards the law? That is, when the institution breaks the law, either in its internal activity or in its relations with third parties. Which of the two loyalties comes first? As a general principle and bearing in mind the order in which they are stated in the Code, we consider that the loyalty towards the law is above any other type of loyalty. Public administration is considered the state power whose fundamental goal is the pursuit of the public good by the enforcement of law and by its activity of implementing the law. That is why any transgression of law by the public authorities equates with the public administration's failure to fulfill its mission. As a consequence, the public servant is no longer bound to manifest loyalty towards the administration when this one breaks the law. Moreover, he has the right to act in order to assure the observance of law. This solution to the issue of the conflict between the loyalty toward administration and toward the law, is unequivocally expressed in article 7-(5) of the Code: 'The provisions of this code of conduct cannot be interpreted as an exception to the principle of the legal obligation of public servants to offer information of public interest to the interested ones, in keeping with the conditions established by law, or as an exception to the public servant's right to notify transgressions of the law as stipulated by Law no. 571/2004 on the protection of persons within the public authorities, public institutions and other units, who notified violations of the law.

Law no. 571/2004 regulates certain actions regarding the protection of persons who claimed or notified violations of the law within the public authorities, public institutions and other units, committed by persons holding management or execution positions. Other aspects that are regulated by this law are: the list of the units of the public administration to which the provisions of this law may apply, the definition of the terms used by the law, the principles governing the protection of the persons who notified the violations of the law, the enumeration of the wrongdoings that justify a notification, the authorities that can be notified in case of transgression of the law and the measures of protection of the public servants who make the notification. These public servants are called 'warning persons' or 'whistleblowers'. When the notification concerns

corruption offences or offences against financial interests of the European Union, all information concerning the identity of the whistleblower is kept secret. In other situations the law stipulates certain measures that aim to protect the warning person against the excessive application of disciplinary sanctions. Thus, in case the person denounced by the warning in public interest is a hierarchical direct or indirect superior, or has duties of control, inspection and assessment of the warning person, the discipline committee or other similar body shall ensure the protection of the warning person, by keeping secret his/her identity. If the whistleblower is investigated for disciplinary reasons, he/she has the right to request to the disciplinary committee to invite the press and one representative of the trade union or of the professional association. In relation to the work disputes or those concerning the work relationships, the court may decide the annulment of the disciplinary or administrative sanction enforced to a warning person, if the sanction was enforced as a result of a public interest warning made in good faith. If the sanction was enforced to the warning person for breach of duty, the court shall verify if the principle of proportionality was respected.

The body responsible for the coordinating and monitoring of the enforcement of the norms of conduct is The National Agency of the Public Servants. This Agency ensures the application and the observance of the Code of Conduct within the authorities and institutions of public administration, elaborates studies and reports on the observance of the norms included in the Code of Conduct, cooperates with the NGOs whose activities focus on promoting and protecting the legitimate interests of the citizens in their relation with public servants. The National Agency of the Public Servants has the obligation to make public the cases in which the norms of conduct were breached. Thus the annually Report on the management of public service positions and public servants, published by the Agency, comprises the following data:

a. the number and subject matters of complaints about cases of breaching of the norms of conduct;

b. the categories and the number of public servants who breached the norms of moral and professional conduct;

c. the causes and the consequences of the failure to observe the provisions of this Code of Conduct;

d. the register of those cases when public servants were asked to act under political pressure.

Article 21 of the Code stipulates that the coordination and monitoring of the application of the rules of professional conduct is also an obligation of the authorities of public administration at local and central level. Thus, the head of the institution will nominate a person, usually a

person working within the human resources department, in order to offer ethical counseling to the public servants and to control the observance of the norms of conduct. This person will elaborate reports concerning the observance of the norms of the Code of Conduct. These reports are handed in for approval to the head of the institution and then they are sent to The National Agency of the Public Servants.

Finally, on the grounds of the analyzed facts, we may sustain that the Code of Conduct of the Public Servants represents a true deontological code.

4. Conclusions

We consider that the results of our research give us reason to claim that in Romania, the objective side, i.e. the formal, legal dimension, of the deontology of the public servants presents all the fundamental elements that make up the substance of deontology. We also consider that the deontology of public servants in Romania is in keeping with the principles and rules of deontology as envisioned by Western European thought according to which the public function is grounded on professional skill and merit system.

But in order for deontology to be effective, i.e. the objective dimension of deontology shapes and controls the morals of the profession, the subjective side of deontology has to be observed and applied in the relationships of public servants with other public servants and with the citizens. The subjective dimension of deontology requires that the deontological rules, the ethical values that it defends have become a part of the collective consciousness of the profession. In the analyzed situation, it would be necessary that the great majority of the public servants observe the deontological law and the professional ethics out of conviction. This conviction should be so profound that only a conduct in accordance with deontology would offer the public servants a state of psychological comfort resulting from their being at peace with their own consciousness.

The accomplishment of the subjective dimension of deontology requires efforts towards education (by information, by raising awareness of the necessity of deontology, the assimilation of deontological rules and values) and efforts for the creation and the maintaining of a deontological culture of the profession. More clearly, public servants should be initiated and educated in the spirit of deontology. Since public administration is a system based on a strict hierarchy, the assimilation of a conduct in compliance with the de deontological norms should begin at the level of head and high-ranking positions within the public authority. The

responsibility to ensure the respect of the moral rules and values of a profession belongs to the hierarchical chiefs of the authorities and institutions of the public administration. Given the high position they have in the public service these leading public servants should be a positive role model for the other public servants. Under these circumstances we should proceed with an analysis of whom these public servants should be and who they are.

According to the provisions of the Statute, the recruitment and promotion of the public servants should be based on correct competition and exams, according to the principles of competence, experience and professional merits without any political discrimination. Unfortunately, especially the promotion to leading positions has been made on political criteria, disregarding the law.

There are some voices claiming that the politisation of the public function began in 1992[1]. Anyway, this process became obvious in 1996, when the Romanian Democratic Convention[2] came to power. Back then, the access to the 'attractive' public positions within administration was restricted to a political clientele. Political clientage affected negatively the access and promotion to the public functions not only within public administration, but also within private and state-owned companies, within the banking system, and has been based on a political 'algorithm'. Ever since, it is a known fact that political changes taking place with the elections determine inexorably the replacement of an important part of the leading staff of public administration. Thus, contrary to the law that proclaims an administrative system based on professional merits, practice imposed the 'spoils system'[3] as political-administrative reality in Romania.

Law no. 188/1999 concerning the Public Servants' Statute was adopted without the parliamentary debate and with the Government assuming its responsibility before the Parliament for the passing of the law. This law paves the way to the politisation of public function because it recognizes, with very few exceptions, the right of the public servants to be

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[1] C. Pirvulescu, Spoils System, journal article in Free Romania, December 31st 2008.

[2] The Romanian Democratic Convention was an electoral alliance of several political parties of Romania, active from early 1992 until 2000. CDR won the 1996 Romanian elections, and their candidate Emil Constantinescu became president (source:http://en.wikipedia.org/wiki/Romanian_Democratic_Convention).

[3] A characteristic of the American political-administrative system during the 19th century when the loyalty to the party was a criterion for the assignment of public functions as opposed to the merit system in which offices are awarded on the basis of competence.

members of political parties. Even though the drafts of the Statute that was under debate in the administrative environment provided the interdiction for the public servants to join political parties in order to protect them from political pressure, the government eliminated the interdiction, hoping to establish its political clientele already occupying key-leading positions. Of course, this did not happen, the members of the political parties that lost the elections were immediately removed from their positions under the accusation of being appointed on political criteria.

A fact that undermined the principle of merit-based criteria for the access and the promotion to a public function was the so-called 'de-politisation' of the positions of prefect and sub-prefect, which proved in fact to be only a charade. The process of de-politisation was set in motion by Law no. 161/2003 regarding certain measures aiming to provide transparency in exerting public dignitary positions, public positions and within business environment, prevention and prosecution of corruption[1]. According to this law, the prefects and sub-prefects were to be considered as high-ranking public servants to whom was strictly forbidden to join political parties. The prefects and sub-prefects in position, appointed on political criteria, were to become high public servants on condition to resign from the party and to pass an exam of confirmation in that position. As far as we know, nobody failed this exam. Moreover, the requirements concerning the specialization and professional experience clearly prove that the access to those positions is not opened to the professionals. Thus, according to provisions of the article 9 of Law no. 340/2004 concerning the institution of the prefect[2], this position may be occupied by a person who, among other things, must fulfill two important terms: has graduated a long-term superior education with license or equivalent diploma and has 5 years of service for the function of prefect, 3 years respectively for the sub-prefect; has graduated a training program for the improvement of the administrative skills or has exercised a complete parliamentary term. In keeping with these 'exigencies' the position of prefect, a high public servant, can be occupied, for instance by a sports professor, having 5 years of service in the educational system and having exerted completely a deputy term!

The operation of confirmation on position of the prefects and sub-prefects appointed in keeping with the principle of political loyalty and who resigned from their parties came to and end on December the 31st

[1] Published in the Official Journal of Romania, Part I, no.279/21.IV.2003
[2] Published in the Official Journal of Romania, Part I, no.658/21.VII.2004

2005. These apolitical prefects and sub-prefects were dismissed from their functions between February and April 2009 and replaced by others as 'apolitical' as them. The process of removal from the public service of the heads of the de-concentrated organs of the ministries is in progress.

In these circumstances, we find difficult to believe that a leading public servant appointed on grounds of his loyalty to the party will fulfill his duties of impartiality and equity in the exercise of his function. The loyalties provided by The Code of Conduct, towards the public interest and the institution, will be replaced by the principle of loyalty to the party. Even more, the faithfulness towards the institution that is required from the executive public servants changes into faithfulness towards the hierarchical chief and head of the institution. Executive public servants, because of their total subordination to their chiefs, will conduct as required by their chiefs. There are no real guarantees against the harassment of those who would have the courage to notify the breaches of rules by the leading public servants. In this way the entire deontological edifice crumbles to dust.

The final conclusion is that in Romania there is no real deontology of the public function at present. We do not mean that the public function has no professional ethics at all. There is no doubt that a great part of the public servants act in accordance with deontological rules, but this is not the result of a systematic effort to educate a deontological conduct, and is certainly not the result of the sanctions enforced for the breaching of deontological rules. It has rather a spontaneous character as a result of the common sense and morality of each and every public servant.

Keeping in mind all the above mentioned aspects, we believe that in order to improve the morals in the Romanian public administration it is imperative to embark upon the de-politisation and professionalizing of the public service, a process that can begin only when the morals of the entire political class will be changed and fundamentally improved. But this is another problem that we will not discuss here.

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EQUALITY OF CHANCES AND TREATMENT ON THE MARKET LABOUR OF MEN AND WOMEN

Abstract

Unequal treatment of men and women is very old-established.

Although the civil society and, especially, the associations militating for women's rights have long ago emphasised the inequalities between women and men in Romania, the public institutions have only started to approach the issue of sex equality only in the context of the negotiation process in view of joining the European Union, as fulfilling the standards in this field is one of the accession criteria.

The elaboration of a broad legislative framework regarding the equality between the sexes is a developing process and a lot of important steps have already been taken.

The multidisciplinary approaches of woman's economical situation from the historical perspective, law and sociology and psychology highlight conjoint evolutions, with some particularities from one country to another, depending on the economical habit and traditions, particularities which do not invalidate, but validate, the general tendencies, which are extremely alarming.

The legal acknowledgement and attempt to protect women's rights at an international level has begum in 1919, concomitantly with adopting the Convention no. 3 concerning the protection of maternity. By adopting this convention, the International Labour Organisation was the first international institution adopting norms of legal power in favour of women's rights. The notions of equality of chances and equality of treatment started to be used in 1958, when the same organisation adopted the Convention no. 111 regarding the discrimination in the domain of labour force and exercise of the profession.

Even since it was created, the United Nations Organisation has militated for devoting and translating in life the principle of equality, without distinction of race, sex, language and religion, written in 1945 in its Charter.

Throughout the over 50 years of activity, the top international forum has played and still does, a decisive role in proceeding for accomplishing de jure equality, by creating and improving the international legal framework and de facto equality, by a continuous sensitisation of the public opinion and state authorities to the discriminatory acts in relation to women.

It is significant that one of the first commissions formed within the UN system, since 1946, was the Commission on the status of women, the

main intergorvernmental body on issues concerning women, commissioned with elaborating reports and recommendations for promoting women's rights in the economical, social, political and educational domain and, concurrently with the function of "universal consciousness" and protection of women's rights.

By the Resolution no. 217 A (III) of 10th December1948 of U.N. General Assembly, the Universal Declaration of Human Rights was adopted, by highlighting it represents "a targeted ideal". It has gained in time the acknowledgement as a fundamental reference document, which "states the conjoint conception, which worldwide people have on the inalienable and inviolable rights incidental to all human family members and represents an obligation for all international community's members".

Being at the origins of a vivid debate of human rights, the Declaration was followed by the adoption of some international instruments of regional or universal feature of great significance.

Among these, the following may be recalled: The European Convention on human rights (1950)[1], the International Pact on civil and political rights (1966)[2], sanctioning the principle of equality on what we are used to name the fundamental rights: the right to life, liberty, safety of person, vote, participation in public and political life, the Pact on economical, social and cultural rights (1966), the so-called second generation rights – gravitating around the right to labour, sufficient remuneration, health, social security, education, cultural life etc., premises necessary for devotion assigned after the "third generation" rights to development, peace, healthy environment, conjunctly approved as an indivisible set and which refuses the ranking method based on the criterion of importance.

Although it was clearly specified by means of the Universal Declaration that no-one may be subject to discrimination based on the sex criterion, and the international instruments adopted afterwards have implicitly or explicitly recognised the principle of equality, women's real situation has proven these necessary stipulations are not sufficient for also making a constant improvement.

After five years of consultations carried out by the General Assembly of the UN, on 18th December 1979, in various work groups and in

[1] Romania has ratified the European Convention on Human Rights on 20th June 1994

]2] Romania has ratified the Pact on 31st October 1974, by the Decree no. 212, published in the "Official Bulletin of Romania", part I, no. 146 of 20th November 1974.

the Commission on the status of women, the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women – CEDAW[1] – was decisive in propelling the instauration of equality in rights for women.

In the sense conferred by the Convention, the collocation *discrimination against women* is defined by "any distinction, exclusion or restriction made on the basis of gender which has as effect or purpose of nullifying the recognition, enjoyment or exercise by women... of human rights". This document of special importance, containing 30 articles with mandatory force, states the international principles accepted and stipulates measures destined to ensure the equality in rights of women worldwide in the political, economical, social, cultural and civil domains, regardless of their marital status. It is actually a matter about accessing the political and public life, education under conditions of equality with men, non-discrimination regarding the occupation and remuneration, healthcare, keeping the job in case of marriage or maternity, changing the schemes and old-fashioned socio-cultural patterns, based on the idea of women's inferiority.

Regarding the family life, the Convention highlights the principle of equality of women's and men's responsibilities and emphasises the need (especially acute under the current conditions in the transition countries, which Romania is also part of) of developing the social services to the extent of releasing the couple of certain obligations, so it can participate in the professional and public life.

The theme specific to women in the rural area enjoys a special attention, treated in a distinct article (art. 14).

Even though the reports from our country, created as international monitoring mechanisms, have been tardily presented (in 1987 and 1993), the efforts done for applying the stipulations of the Convention are obvious. Furthermore, the reservations formulated in the past towards some articles which aimed the mandatory jurisdiction of the International Court of Justice have been withdrawn in 1990.

Since September 1993, Romania has acceded to the European Council[2] which emphasises, among other, the obligation of the legal

[1] „The Convention on the Elimination of All Forma of Discrimination Against Women (CEDAW) was adopted by the General Assembly of the United Nations, by the resolution no, 341/180 of 18th December 1979 and came into force on 3rd September 1981. It contains a number of 30 articles organised in six parts.

[2] Romania has ratified the Statute by Act no. 64 dated 4th October 1993, published in "The Official Journal of Romania", no. 238, dated 4th October 1993.

protection against discrimination based on gender, which, in time, it results from ratification of some important regulations of a regional feature.

Edited during an age when the European society was yet not ready to accept the idea of an equal legal treatment for women and men, the European Convention on Human Rights (1950) prohibited the "distinction" based on gender, among other, without expressly devoting the principle of equality with application to this domain, similar to UN Pacts, adopted afterwards.

But, during its activity as defender of human rights and democracy, the European Council was more intensely preoccupied to promoting the equality and eliminating the discrimination.

If this regional forum especially focused on women's legal status and professional situation ate first, since 1979 it went on to a global approach of the issue of equality, by concomitantly organising the European Committee for equality between women and men (CEEG), with leadership attributions, organisation and stimulation of specific activities.

Among the main problems studied and collected into an Action Programme for promoting the equality, women's situation in political life, remedies and sanctions in case of discrimination, equality in education and violence against women were included.

In this context, the Protocol no. 7 of the European Convention on Human Rights, opened for signature in November 1984, shall include the principle of weds' equality regarding the rights and responsibilities within marriage.

The Additional Protocol to the European Social Charter, opened for signature in 1988, devotes the equality of chances and treatment regarding the occupation and profession, without discrimination based on gender, in compliance to the International Labour Organisation.

During that same year, the Committee of Ministers adopted based on a proposal of CEEG, the Declaration on equality between men and women, where it was emphasised that any breach of this principle by discriminatory practices, affirmed as fundamental right in various instruments, "forms obstacles in recognizing and exercising human fundamental rights and liberties."

Consequently, from now on, the problem of equality was integrated within the domain of activities devoted to human rights. Furthermore, as an expression of the enhanced importance given by the Council to promoting women's rights, CEEG was raised to the rank of Directing Committee.

By emphasising the connection between equality and democracy,

the Committee elaborated based on some ample studies, the concept of parity democracy as well as strategies aiming the enhancement of the number of women at levels of decision. Devoted to this theme, the Conference "Equality and democracy: Utopia or challenge", which was carried out in Strasbourg in February 1995, represented a specific contribution of the European Council to preparing the fourth World Conference on Women, which took place in Beijing in September of that same year.

If a historical incursion is attempted into women's legal status, it may be found out woman's emancipation in our country coincides with the general process of woman's emancipation in those countries with the oldest democratic tradition.

In the Community Law, the equality between men and women regarding the access to labour is treated by the Directive 76/207/CEE of 9th February 1976, which stipulates in paragraph 1 of art. 1, that it implements the principle of equality of treatment between men and women in the member states, regarding the access to labour, promotion, professional formation and labour conditions.

The Court of Justice has shown the directive is also applied to the labour relations within the public service, as no discrimination can be accepted regarding the application of the principle of equality of treatment between men and women in relation to some categories of workers, which refers to the entire professional activity[1]. The provisions of Directive 76/207 is applied regardless of the nature of the performed activity, of the professional sector where the labour is done, of the private or public feature of the unit[2], including the armed forces[3].

The principle of equality of treatment implies the absence of any discrimination based on gender, may it be directly or indirectly, by reference to the marital or family status. However, art. 2 paragraph 2 is an exception, allowing the member states not to apply the stipulations of the directive of professional activities which gender represents a determining condition, due to their nature and conditions of exercise.

Of the jurisprudence of the Court of Justice in connection with application of art. 2 paragraph 2 of the directive 76/207, it results some

[1] Decision of 21st May 1985, for the matter 248/83, cited by Ovidiu Tinca, Drept social comunitar (Social Community Law), Lumina Lex Publishing House, Bucharest, 2002, page 200.
[2] C.J.C.E., decision of 21st May 1985, for the matter 248/83.
[3] C.J.C.E., decision of 21st May 1985, for the matter 97/98.

derogations may be permitted, whereas other may not. Thusly, by evaluating that, due to the conditions of exercising the activity as a police officer, gender represents a determinant condition, a member state, by taking into account the requirements of public order and internal situation featured by frequent assaults, may only bind armed men to the general tasks of the police. On the other hand, maintaining a distinct system of recruitment, in relation to gender, for the leading, technical and professional formation personnel, of external services of the administration of penitentiaries in France, as well as in the five bodies of the national police in the same country, it was deemed as an inexecution of the liabilities the French State has[1].

Art. 2 paragraph 3 of the Directive 76/207 of 9th February 1976 states this is not against the provisions of the national legislations providing protection to women and especially when they are during pregnancy and maternity times. The protection of the woman's biological conditions is thusly ensured during pregnancy and after giving birth, until her psychological and physical functions are getting back to normal and, on the other hand, the protection of the special relations is provided between the woman and her child, avoiding the disturbance of these relations by the mother's exercise of a professional activity. Therefore, the allowance of a leave for the pregnant woman or whom has just given birth, by excluding another person, is under the incidence of the stipulations of art. 2 paragraph 3 of the Directive 76/2007. The directive lets the member states decide the evaluation of the special measures necessary to providing woman's protection, regarding the state of pregnancy and maternity, as they have a margin of reasonable evaluation referring to the nature of the protection measures and actual means of accomplishing them. But, the differences in treatment between men and women allowed of by art. 2 paragraph 3 of the Directive 76/207, for women's protection, does not refer to risks and dangers such as those which an armed police office is exposed to, whom is exercising his/her job in a given situation.

Art. 4 paragraph 4 of the Directive 76/207 stipulated the member states may take measures which would aim the promotion of equality in chances between men and women, especially for actually remedying the inequality affecting women's chances in the domains aimed by art. 1 paragraph 1 of the directive. By analysing these provisions, the Court of Justice has deemed they are against a national regulation automatically allowing priority to women candidates, to equal qualifications between candidates of different genders upon promotion. The directive allows

[1] Decision of 30th June 1988, for the matter 318/86.

national actions in the domain of accessing a job, including a promotion, which, by especially favouring women, pursue to improve their capacity of competing on the labour market and carrying through a career based on equality with men. However, a national regulation is not a measure of this type, which provides women's absolute and unconditioned priority when being employed or promoted, as this regulation surpasses the equality of chances.

The provisions of the directive 76/207 are grouped by the following main aspects:

1. The principle of equality of treatment implies the absence of all discrimination based on gender, regarding the access conditions, including the selection criteria, at the wok place or positions, regardless of the sector or branch of activity and at all levels of the professional hierarchy[1]. To this effect, the member states are bound to take the following measures[2]:

- To suppress the legislative, regulation and administrative provisions contrary to the principle of equality of treatment;
- To take rules into account, to invalidate or amend contrary provisions that are included into the collective conventions or individual labour agreements, into the internal regulations of the enterprises, as well as in the statuses of the independent professions;
- To revise the legislative, regulation and administrative provisions, contrary to the equality of treatment, which have no more basis, and in the case of the conventional provisions of the same kind, the social partners should be invited to act on revising them.

The Court of Justice as deemed an employer breaches the principle of equality of treatment stipulated at art. 2 paragraph 1 and art. 3 paragraph 1 of the directive 76/207 if it refuses to conclude a labour agreement with a woman deemed as apt for the activity proposed, for the reason she might suffer various prejudices, as the woman is pregnant, a situation which assimilated by the national legislation with that where the employee cannot exercise the activity due to illness. The Court has highlighted that to the extent where the refusal of employing represents a direct discrimination, based on sex, it is not a matter of establishing whether the national right assimilating the pregnancy state with the illness exercises onto the employer a real pressure, which makes them not to employ a pregnant woman. There may occur a discrimination based on the sex criterion even when one woman is employed, from several women

[1] See art. 3 paragraph 1 of the directive 76/207 of 9th February 1976.
[2] To this effect, art. 3 paragraph 2 of the directive 76/207 of 9th February 1976 is stipulated.

candidates, for another woman's position, also a victim of discrimination.

The circumstance that no male candidate has shown up for occupying a position is not likely to exclude the hypothesis there may occur a violation to the principle of equality of treatment[1].

As for the employer's responsibility, art. 2 paragraph 1 and art. 3 paragraph 2 of the Directive 76/207 it is not accepted for the national legislative provisions to condition the remedy of the prejudice created by discrimination to the employer's guilt, prejudice caused by discrimination based on gender while employing a person. When the member state has introduced into the legislation a provision by means of which it sanctions the violation of the interdiction of discrimination between the male and female employees within an employer's regime of civil responsibility, the violation of the interdiction of discrimination is sufficient for hiring the entire deed author's responsibility, just based upon it.

The allowance given in such a situation must provide the efficient protection, adequate to the non-material damage suffered and to have a dissuasive effect for the employer. Sanctioning the violation of the interdiction of discrimination must also occur under basic conditions and analogue procedure applicable in the case of violating the national right, of similar importance and nature.

The Court of Justice has deemed it is admissible for a national legislation to set the level of the indemnification which a person trying for the job may claim a priori for a maximal ceiling of three monthly salaries, when the employer may prove that, due to the superiority of the hired one's professional skill, might not have gotten the job, even if the selection of candidates upon employment had been done without discrimination.

But, Directive 76/207 of 9th February 1976 "contrary to the national legislative provisions, which, unlike other national provisions of civil rights and labour law sets a priori a global ceiling of six monthly salaries for the level of the cumulated indemnifications, which the employees whom have been discriminated based on sex during a recruitment for a job may ask for, when several candidates ask for an indemnification".

2. Applying the principle of equality of treatment regarding the access to all types and all levels of professional orientation, formation, improvement and recycling, according to art. 4 of the directive, needs for the member states to take measures necessary for:

- Suppressing the legislative, regulation and administrative provisions contrary to the principle of equality of treatment;
- Nullifying or to be able to declare as null or to amend

[1] Decision of 8th November 1990, for the matter 177/80.

provisions contrary to the principle of equality of treatment that are included into the collective conventions or individual labour agreements, into the internal regulations of the enterprises, as well as in the statuses of the independent professions;

- Orienteering, forming, improving and professional recycling to be accessible without discrimination based on sex.

All collective conventions are aimed by art. 4 letter b of the directive 76/207, as even if in some cases they do not have mandatory legal effects for the parties or for the labour relations, they set what the workers have earned and that is why the clauses incompatible with the obligations the directive imposes to the member states must not be applied, eliminated or amended.

3. Applying the principle of equality of treatment regarding the labour conditions, including the leave conditions, imposes the provision of the same conditions for both men and women, without discrimination based on sex[1]. To this effect, the member states are bound to take the following measures[fn]:

- To suppress the legislative, regulation and administrative provisions contrary to the principle of equality of treatment;
- To nullify or to be able to declare as null or to amend provisions contrary to the principle of equality of treatment that are included into the collective conventions or individual labour agreements, into the internal regulations of the enterprises, as well as in the statuses of the independent professions;
- Review the legislative, regulation and administrative provisions contrary to the principle of equality of treatment;

In connection with art. 5 of the directive 76/207, the following more important aspects result from the community jurisprudence.

- According to art. 5 paragraph 1, it is not permitted to fire a transsexual for reasons connected to their sexual conversion[2];
- notion of dismissal from the contents of art. 5 paragraph 1 must be broadly understood, including the cessation of the ratio of labour between the employer and their employee, even within a regime of employee's voluntary departure;
- It is not a discriminatory provision the conventional provision according to which, in case of collective dismissal which gives the possibility of obtaining an anticipated pension, the retiring age is the

[12] See art. 5 paragraph 1 of the directive 76/207 of 9th February 1976.
[2] Decision of 30th April 1996, for the matter C-13/94.

same for men and women, although the normal retiring age is lower for women;

- By apprehending from art. C 213-1 of the Labour Code, the interdiction for women to work during night in industry, while this interdiction does not apply for men, France did not meet its obligation which it had from the provisions of art. 5 paragraph 1 of the directive[fn];
- The stipulations of art. 2 paragraph 3 and art. 5 paragraph 1 of the directive do not allow the application of a national regulation which would not admit the establishment of noting a woman on duty, due to her having been on maternity leave, and thusly she cannot be promoted[1];
- Dismissing a woman, during the pregnancy, for absences due to an incapacity of working caused by an illness originating from her pregnancy state is contrary to the directive[2] in such a situation, "the circumstance the employee has been dismissed during her pregnancy based on a contractual clause which allowed the employer to dismiss the employee, regardless of sex, after a set number of weeks of continuous absence, is not without incidence".
- Dismissing a woman based on the sole reason she has reached or exceeded the age when she has the right to a state pension and which is different for men and women represents a discrimination based on sex, in compliance with the national legislation;
- The directive does not impose for a discrimination based on sex during access at a work place to be sanctioned by binding the employer, the author of the discrimination, to conclude a labour agreement with the person whom has suffered the discrimination;
- In the situation where the member state sanctions the breaching of the discrimination interdiction by providing indemnifications, in order to provide efficiency and its dissuasive effect, this must be adequate in relation to the damage suffered and should not represent just a symbolical indemnification by means of which the expenses occurred by the presentation to the action of selecting the candidates for that respective position
- Art. 5 of the directive is precise enough for creating the obligation, in the member states, of not imposing the legislative principle of the labour interdiction during the night for women, even though this obligation bears derogations, if there is no interdiction for men to work at

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[1] Decision of 30th April 1998, for the matter C-136/95 – Caisse nationale d'aasurance.

[2] Decision of 30th June 1998, for the matter C-394/96 - Mary Brown; 29th May 1997, for the matter C-400/95.

night;

- The member state which has forbid the work at night for both men and women cannot maintain different derogatory regimes, which are distinguished mainly by the procedure of adopting the derogations and by the duration of the authorised work during the night, if such a differentiation is not justified by the need of providing protection for women, especially during her state of pregnancy and maternity[1];
- The national judge is bound to provide the compliance with art. 5 of the directive, by leaving unapplied any contrary provision from the national legislation, besides the case where the application of such a provision is necessary for providing the execution by a member state, in compliance with art. 307 par. 1 TCE, of an obligation resulted from a convention concluded with a third party state before the EC Treaty came into force[2].

4. Based on art. 6 of the directive, the member states are bound to introduce into the internal legal order the measures necessary for allowing any person whom is deemed as injured by non-application of the principle of equality of treatment, in the sense of art. 3, 4 and 5, to jurisdictionally exploit her/his rights.

Thusly, the member states must take sufficiently efficient measures for reaching the objective of the directive and go in such way so these measures may be efficiently invoked before the national court houses by the interested people.

The Court of Justice has ruled art. 6 of the Directive 76/207 devotes the principle of a real jurisdictional control, so that it is not permitted for the certificate issued by a national authority, by means of which it is sustained to fulfil the conditions required for derogation from the principle of equality of treatment between men and women for defending the public security, to have the feature of an irrefragable evidence, which may not be controlled by the court of law. The Court of Justice has also shown the provisions of art. 6 of the directive, according to which the person injured by a discrimination based on sex has the right to a jurisdictional appeal, may be invoked by the natural persons against a member state which has not provided the integral transposition of the directive in the internal legal order.

Regarding the sanctions that may be applied for breaching the

[1] Decision of 3rd February 1994, for the matter C-13/93 – Office national de l'emploi.
[2] Decision of 3rd February 1994, for the matter C-13/93.

provisions of the directive 76/207 on 9th February 1976, the Court of Justice has assessed these may consist in the employer's obligation of paying the discriminated person a corresponding indemnification, followed by a fine, if applicable[1]. It is worth noting the directive does not set determined sanctions, but it leaves this up to the member states. In the case where the member state has chosen the sanctions specific to the civil responsibility, any breach of the interdiction of discrimination is sufficient to hire the responsibility of its author, without taking into account the clauses of exoneration stipulated by the national law.

5. The employees must be protected against dismissals which could represent employers' reactions towards complaints formulated at the level of the enterprise or for initiating certain actions before the court in order to comply with the principle of equality of treatment between men and women at work.

In a decision dated 21st May 1985, the Court of Justice has shown[2] "the explicit stipulation in Germany's fundamental Law of the principle of equality in rights for men and women, by expressly excluding any discrimination based on sex and affirmation of the equality regarding the German citizens' access to a work place in the public service, it had a direct application, combined with the existence of a system of jurisdictional appeal, including the possibility of an appeal before the Consitutional Court, forms an adequate guarantee in order to accomplish the principle of equality of treatment stated by the Directive 76/207, in the domain of public administration. The same guarantees have been repeated in the legislation on public function, which expressly stipulates the acceptance to the work places into the public service must be done in relation to objective criteria, without differences due to sex."

Instead, by means of another decision[3], the Court of Justice has highlighted that France, "by not taking all measures for providing the full application of the directive of 9th February 1976 within the set term, which refers to putting into practice the principle of equality between men and women regarding the access to a job, formation and professional promotion and labour conditions, did not comply with the obligations which are attached in virtue of the treaty."

The member states are bound to completely and controllably set the professions and activities which are an exception from applying the

[1] Decision of 10th April 1984, for the matter 14/83.
[2] Decision of 21st May 1975, for the matter 248/83.
[3] Decision of 25th October 1988, for the matter 312/86.

principle of equality of treatment and communicate the Commission's result, which must verify the application of this provision in the directive.

In Romania, with the efforts of modernising the internal legislative and institutional framework, special attention was given to the international standards, including women's rights. Even since 1990, it was acted upon withdrawing all reservations formulated in the past to a series of international conventions, among which the Convention on the elimination of all forms of discrimination against women, ratified by Romania by means of the Decree no. 342 since 1981, as well as the Convention on the political rights of women, reservations which aimed the mandatory jurisdiction of the International Court of Justice.

After December 1989, in the process of renewing and reviewing the legal framework, the legislator has permanently taken into account the international principles and standards, implicitly and explicitly including them into the legislation, starting with the fundamental law treating the woman as a citizen with equal rights to the man, and not as one in a lower category.

Thusly, according to art. 4 of the Constitution of Romania, adopted on 8th December 1991, "Romania is the conjoint and indivisible country of all its citizens, regardless of race, nationality, ethnical origin, language, religion, sex, opinion, political appurtenance or fortune or social origin".

Non-discrimination, including depending on the sex criterion, it also clearly results from the stipulations referring to citizens' equality before the law and public authorities (art. 16), the right of voting and being elected (art. 34 and 35), the right to education (art. 32).

The consecration of the unconfined right to work is followed by other stipulations indicating a preoccupation for actually providing the non-discrimination, by equal salary at equal work and labour social protection measures, of security and hygiene at work, with specifications for women (art. 38), corresponding to certain economical and social rights the compliance of which the substantiality of other rights depends upon.

By stipulating an additional guarantee of recognising and complying with the human rights, including therefore woman's rights, art. 20 stipulates the constitutional provisions regarding citizens' rights and liberties shall be interpreted and applied in concordance with the Universal Declaration of Human Rights, with the pacts and other treaties which Romania is part of and in case of disaccord with the internal legislation, the international regulations are those taking priority.

In the domain of labour legislation and social protection, it is distinguished that besides recognising the principle of equality, it is necessary to insert some regulations with direct, special and specific

references to women's rights, inspired by the preoccupation for a protection adequate to their condition.

In compliance with the Labour Code, adopted by Act no. 53/2003[1] In Romania, a high valuation is given to woman's work, by ensuring her the right of having any position or job, in relation to her education and capacity, by concomitantly creating the conditions for multilateral development of her personality.

The principle "at equal pay for equal work to man" is applied when remunerating the work she performs.

Employed women also profit by special measures for healthcare and conditions necessary to looking after and educating children. Pregnant women and those nursing cannot be used at work places under harmful, hard or dangerous conditions or medically contraindicated and cannot be called for working overtime, and if they are employed in such places, they shall be transferred to other work places, without having the salary decreased. Women's work at night is only allowed in certain restrictive conditions, expressly set forth by law.

In its turn, the legislation in the domain of social insurance rights and pensions stipulates a series of specific rights for women, among which allowances for maternity leave which is provided to all reimbursed mothers, regardless of the sector they work in and allowances for leaves for looking after the sick child during the first years of its life. Women may be retired with an age reduction and years of service of 5 years in relation to men.

Furthermore, women with 25 years of service, whom have given birth to at least 3 children and raised them up to the age of 20, may request retirement before the age stipulated by law: by one year for 3 children, 2 years for 4 or more children.

Those periods of time when a woman has been employed part-time for looking after the preschool child are taken into account when determining the years of service for retirement as integral worked time.

In the domain of social security, the Romanian legislation stipulates a support for women with no income and small incomes.

The question asked here is whether "the positive discrimination" is

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[21] Published in the Official Journal no. 72, dated 9th February 2003

sufficient, if it covers all aspects where there is a need for special protection, corresponding to an increased social vulnerability, a protection necessary for guaranteeing the actual equality.

We must acknowledge reality is still far from the principles and standards devoted by law, especially in the domain of woman's participation to the activity of the state's bodies or taking decisions, of accessing economical or administrative functions.

It cannot be here a matter of that woman's promotion under the aspect of numbers and mandatory percentages, put into practice during the sad times of the totalitarian system, for propaganda aims, based on political criteria or relation with the nomenclature, foreign of a real hierarchy of values and which has determined a reaction of rejecting the image of the leading framework-woman.

Taking into account this negative experience, under the new conditions, the woman has the difficult mission of conquering the reticence and of gaining the place she deserves.

The data of the last 50 years indicate the fact the percentage of women in the population's assembly has been averagely situated over 50%. On the labour market, the statistics also indicate the number of active women is increasing, and they dominate economical sectors such as: education, health, social security, commerce, agriculture, mail and telecommunications, as well as banking, financial and insurance activities which mainly have female employees.

Although it is part of the European Union and the legislation is in line with the community norms, in fact our country still has problems concerning the discrimination against women. The studies indicate this is especially highlighted when it is a matter of remunerating the female employees. The same data supplied by the National Institute of Statistics also disclose the fact that men earn by about 20% more in most domains. Women have succeeded to impose themselves from a financial point of view only in the domain of real estate transactions.

Women's salaries are, as a general average, by 20% lower than those of men, but this can only be partly explained by an incorrect treatment, as the feminine labour force is better represented exactly in those sectors where salaries are generally lower (agriculture, light industry, commerce and other services etc.). It must be however acknowledged the practice of negotiating individual labour agreements, which is subject to the principle of confidentiality, favour the procurement of lower salaries for women, whom profit by bounties and other salary additions, to a smaller extent.

Women are weakly represented in leading positions (approximately a quarter) and their progress in their career is comparatively slower. Only

0.6% of women are proprietors and around 16% are freelancers.

It is found out the female labour force is segmented and unequally distributed by branches and economical sectors, the domains of feminine preponderance also being furthermore those weakly paid, even under the conditions of an equal salary for equal work, but within the same sector, between the average level of remunerating women and that of remunerating men there occur differences favourable to the latter. Not even the entrance of the feminine labour force into domains traditionally reserved for men, the experience the countries now in transition went through, does not prove to be a happier solution as in the frequent situation of limitations of activity, women are mostly exposed to losing their job.

Other statistical indicators emphasise disparities between men and women when it is a matter of accessing the promotion and career. Thusly, in the category of the superior servants in public administration and economical-social units, the number of women is much smaller than that of men. In return, men continue to refuse to occupy positions deemed by tradition as "feminine". nursery teachers, nurses, secretaries, baby-sitters. Nevertheless, in the past years, an increase has been noticed in the number of demands from men to go on paternity leave.

For the discriminations on the labour market, the most eloquent proof is the ponderosity of unemployed women, the comparative analysis of the statistical data showing an emphasised increase of the unemployment among women. Another alarming fact is that some statistical data indicate women are more vulnerable in front of changes.

For equal qualification, women are more vulnerable than women. This vulnerability is featured by limiting the access to jobs in general and to well-paid jobs, as they are especially the first and most often victims of the dismissals of personnel, whom face a long term unemployment and are those with fewer chances of being employed.

Among the feminine population, there is also the greatest number of people working illegally. This phenomenon is generally recorded among women whom have at most high school studies and whom accept to work under any kind of conditions, even with the risk of not profiting by free medical insurance and social securities.

Upon the unwritten rule "First In, First Out", the newly graduated of various forms of education or employed with a short term experience are especially the target of this danger, as well as the unskilled or of inferior skill ones.

Women's situation is not a simple one, besides career, they must also cope with the role of being a mother and housekeeper. For this reason, women are sometimes facing the choice of giving up to their aspirations

regarding the career.

The frequency of cases of dismissal is extremely alarming among women with small children whom interrupt their activity for their upbringing and refusal to employment due to the perspective of some maternity leaves of family obligations, generally unconfessed.

For this, many women need to accept temporary employment, without payment of insurances and at levels of remuneration far below the level of their qualification.

From the sociological inquiries, it results unemployment has harmful effects not only onto this person, but also onto her family, in her relationship with the husband and children – altered by conflicts fed by the financial problems – as well as onto the physical and mental health. Furthermore, the insecurity of tomorrow, the living below the poverty level and high costs of maintaining the home invoked by subjects interviewed also changes the demographic behaviour. They represent a source of preoccupation for the eventual mothers and generate insurmountable loads for mothers of several children, especially in the case of the families with one parent.

All this proves the discrepancy between the *de jure* and *de facto* situation of women.

Concomitantly with its poisonous effects onto women's condition, the occupational discrimination deprives horizontally and vertically the society of an important contribution of the population's majority segment.

From here, the necessity of adopting actual measures for providing the real equality in chances and opportunities, especially for satisfactorily protecting the most under-privileged categories, various modalities of intervention, such as: interventions at the level of the social dialogue, of collective negotiations, conjoint recommendations and actions of the important social factors etc.

The collective negotiation is an efficient mechanism of providing the fact that male and female employees' rights are complied with. In many European states, the collective negotiation is recognised as being a key-means of action for promoting the equality of chances for men and women. The collective negotiation may lead to representative collective labour agreements, which would take into account the specific needs and interests of men and women in unions, especially taking into account these are not always adequately taken into account by the labour legislation.

It is important the unions include the kind problematic on the agenda of collective negotiations, especially because women represent a significant percentage of the total of the labour force, and the mandate of the unions is that of defending and promoting all their male and female

members. Furthermore, the persistence of the stereotypes and prejudices in connection with women's role and contribution on the labour market may form a source of discrimination based on gender. Including the gender problematic onto the unions' agenda may significantly contribute to fighting such stereotypes and prejudices, thusly contributing to protecting male and female employees against ant forms of discrimination.

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THE EUROPEAN COMPETITION POLICY: ROMANIA'S SITUATION

Abstract

The competition and the market guarantee the consumers' welfare. So, we start this analysis with the evolution of the competition policy. We used two distinct periods (1958-1972 and 1973-1981) in order to define the basis of this policy. Then, we made an inventory of the specific legislation and the main actors of this policy.

The second part of the paper deals with the policy connected to the cartels and with its specific legislation, including the secondary one.

The next part of the paper treats the anti-monopoly policy and the dominant position interdiction. More, we talk about the control on concentrations and the simplify procedure for decreasing the administrative constrains, as well.

We analysed the necessity of the control of the public interventions which are able to distortion the competition between the enterprises (the public incentives and the public enterprises) in order to understand the necessity of reform in this policy.

The next chapter of the paper deals with the competition policy in Romania. We talk about the framework of the Romanian specific policy and the antitrust policy evolution, as well.

The last part of the paper supports the necessity of harmonization between Romanian and European competition policy in order to create equal conditions for the Romanian and the foreign enterprises on the European markets.

We conclude that a common competition policy across the E.U.27 is the best way to obtain efficiency for all enterprises, including the Romanian ones.

The main reason for the competition policy's existence is that the market isn't able to work well. As a result, there are necessary some interventions which can ensure it an optimal evolution.

On the other hand, the market and the competition guarantee the consumers wealth, the optimal repartition of the resources and a greater stimulus for the growth of the production efficiency and quality.

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Moreover, the contemporary open economy implies a constant monitoring in order to allow the market mechanisms to function well. This element is very important under the globalization impact on the markets integration.

There are a lot of elements which support the necessity of common rules about the competition. They evaluated beginning to the Sherman Act (1890) in the U.S.A.

The European competition regulations from the 20th century tried to ensure equilibrium between the economic benefits generated by the enterprises' cooperation and the economical and political risks of these. Moreover, the allied forces implemented an anti-monopoly legislation in Germany and in Japan in the end of the 4th decade.

The same reason represented the basis of the European Treaty from 1954, which included regulations about the concentrations control.

Under the European Treaty from 1957, the competition regulations were focused on the trade restrictions elimination between the Member States and on the monitoring of the multistate cartels apparition.

Under the actual common regulation, the competition policy isn't a scope itself, but it is a condition to realize the common market. Practically, the article no.3 (g) from the European Treaty considers that the competition has to implement a regime which is able to ensure a non-distortional competition on the common market.

The objectives of the competition policy are divided into three categories:

- ✓ to guaranty the unity of the internal market and to prevent the agreements between the enterprises which can affect the intra-community trade and the free competition;
- ✓ to prevent the situation in which one or more enterprises exploit in a abusive manner their economic power comparing with other less powerful enterprises;
- ✓ to prevent the abuse of the dominant position on the market, as a result of the national governments' intervention, in order to create discriminations in favour of their public enterprises or to accord public aids for their private enterprises, as well.

The European competition regulations interdict only those comportments which can have a negative influence on the trade relationships between the Member States. On the other hand, some practices are accepted if they generate positive economic effects.

The analysis of the perfect and the monopoly competitions is based on the following hypothesis:

- ✓ the consumers maximize their utility and the producers maximize their profits;
- ✓ the market price represents the marginal value of a unit of a traded good;
- ✓ the consumer surplus is identical with that of the producer;
- ✓ the total surplus of the consumer and the producer has to be maximized in order to grow the welfare.

Under the economic framework, a structure is efficient even that it is able to generate the greatest total surplus. But this idea ignores the revenues' distribution into the economy. A comparison between the perfect and monopoly competitions demonstrates that the monopoly is inefficient, because it growths the prices and reduces the welfare, as well.

The business globalization implies a specific world trade structure and an articulation of the different competition rules in the world (Voicu M., 2005).

The European Treaty covers the competition as a common policy and specifies the Member States' obligatorily to adopt an economical policy according to the open market economy's principles, based on the loyal competition (www.europa.eu.int/comm/competition).

The competition policy represents a component of the industrial policy. The General Directorate of the Competition Commission influences the European internal industrial structures using the control of the enterprises' associations, the joint companies and the minority acquisitions. Moreover, it prevents the implementation of the industrial cartels (Ionescu R., 2006).

On the other hand, the notion of competition hasn't a legal qualification in the dispositions of the communitarian treaties.

In order to realise the common objectives connected to the competition, the E.U. introduced a system which is able to ensure the non-distortional competition on the single market, even that the competition is just an instrument of achieving the general common objectives (Diaconu N, Marcu V., 2003).

The juridical common norms about the competition can be axed on two main categories: the rules for the enterprises and the rules for the Member States and the public authorities. These juridical common norms are focused on:

- ✓the interdiction of the restrictive arrangements and anti-competition practices;
- ✓the interdiction about the abuse of dominant position;
- ✓the control of the enterprises' fusion;
- ✓the control of the public aids;

✓the implementation of the competition rules in the public sector.

The European competition policy is based on the Articles no. 85-86 from the Rome Treaty. The objectives of the competition policy are the following: the consumers' protection, the technical progress, the environment protection, the E.U. and its citizens' welfare and the cooperation between the enterprises in order to grow the socio-economical cohesion (Voicu M., 2005).

The principles of the competition policy are focused on (Bîrzea C., 2001):

✓ the interdiction of the concentration practices, the accords and the monopoly measures which affect the Member States' changes and limit the free competition on the single market;

✓ the interdiction of the use of the dominant position as an advantage on the single market;

✓ the control of the public aids give to national enterprises, especially of those which try to elude the insolvency or to prevent some special problems;

✓ the preventive control of the enterprises' fusions and concentrations;

✓ the liberalisation of the services market (electricity, transports, telecommunications), which are considered strategic sectors by opening this market to the competitors from other Member States.

Under the Amsterdam Treaty (1999), the competition is regulated into the Articles no. 81-82. These articles talk about the free competition across the E.U., under the European Commission's responsibility. As a result, the European Commission cooperate with the Member States.

The European Commission can amend the enterprises with anti-competition practices until 10% from their turnover. On the other hand, the enterprises can introduce recourse to the European Court of Justice.

The European Commission succeed in limiting the cartels' actions on the single market and against the prices' fixing and the quantitative restrictions, as well.

On the other hand, the Rome Treaty didn't defined explicit the notion of dominant position and the way in which an enterprises can achieve it. Moreover, the Treaty didn't mention the market cote which is necessary to consider an enterprise into a dominant position. As a result, the definition of the dominant position is a creation of the European jurisprudence. So, the European Court of Justice can present a universal acceptation for the notion of dominant position across the E.U. (Mihai E., 2004).

The present Court of Justice of the European Communities considers that the dominant position represents the situation of the economic force of an enterprise which is able to discourage the effective market competition and to obtain an independent position towards its competitors, clients and consumers. This definition is focused on the dominant position of a seller, but it can be apply to a buyer, as well.

The dominant position is a temporary one because the situation of an enterprise varies according to the relevant market fluctuations and the business structure (Manolache O., 1997). Moreover, the dominant position is analysed on the whole single market or on an important part of it (Mrejeru T. *et all.*, 2003).

The most frequent cases of the abuse of dominant position are the following (Mireuță C., 2004):

- ✓ the direct or indirect enforcement of the inequity prices, the tariffs or other contractual clauses or the refuse of negotiating with certain producers or payees;
- ✓ the limitation of the output, the distribution or the technologic development in the disadvantage of the users or consumers;
- ✓ the applying of unequal conditions to the trade partners for the equivalent services, in order to create a disadvantage in their competition position;
- ✓ the ask for supplementary services which are not connected to the contracts as a condition to accept a contract;
- ✓ the realisation of the imports, without the supply competition and the usual technical-trade negotiations, of those goods and services which determine the general level of the prices and tariffs in the economy;
- ✓ the practise of the excessive prices or the breakup prices in order to eliminate the competitors or the export of the goods under their production costs and covering the difference by using internal greater prices;
- ✓ the exploitation of the dependence of a firm to another firm which hasn't a alternative solution and the breakage of the contractual relations because the partner refuses to accept illegitimate trade conditions.

For the beginning, the dominant position of an enterprise on the market has to be demonstrated. The domination implies the exact delimitation of the market on which the domination is effective (Fuerea A., 2003).

As a result, we must define the relevant market, using three main elements: the good market, the geographical market and the temporal market, as in the figure number 1.

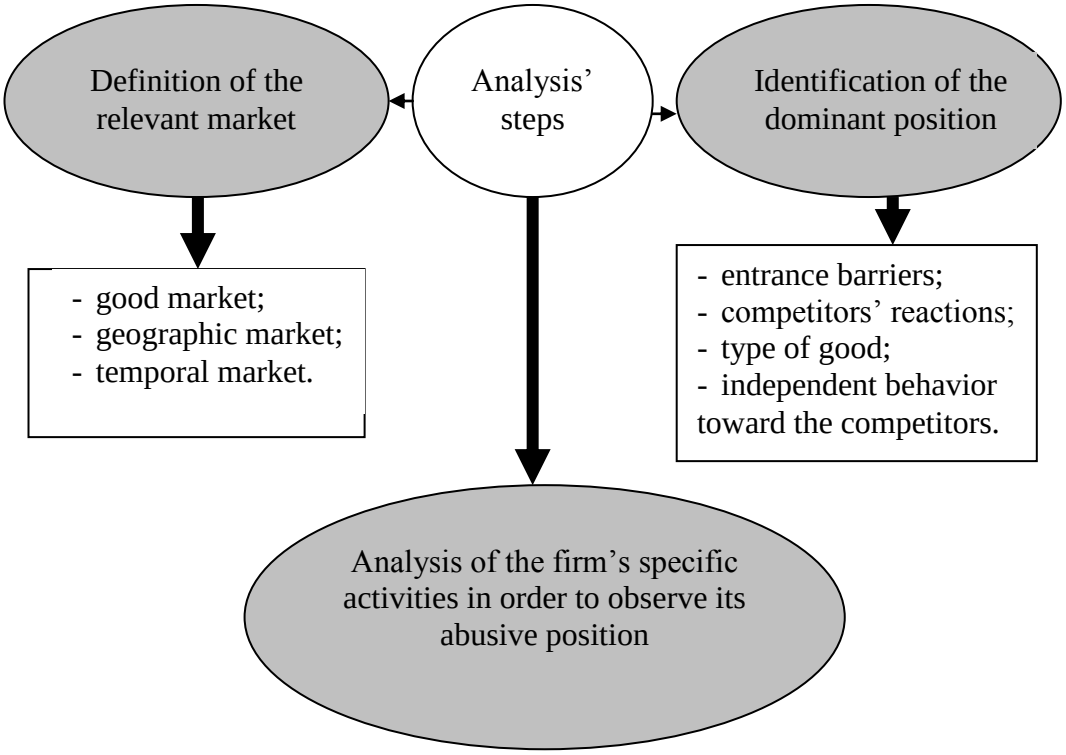

Figure no.1: The analysis of the dominant position on the market

The good market represents a material delimitation of the market according to the existence of the interchangeably goods.

The geographic market represents the territory in which the competition conditions are homogenous.

The temporally market is the structural changes market made during a specific time period. The evolution of the cases which were under the Articles no. 81-82 incidence is presenter in the figures no.2-3.

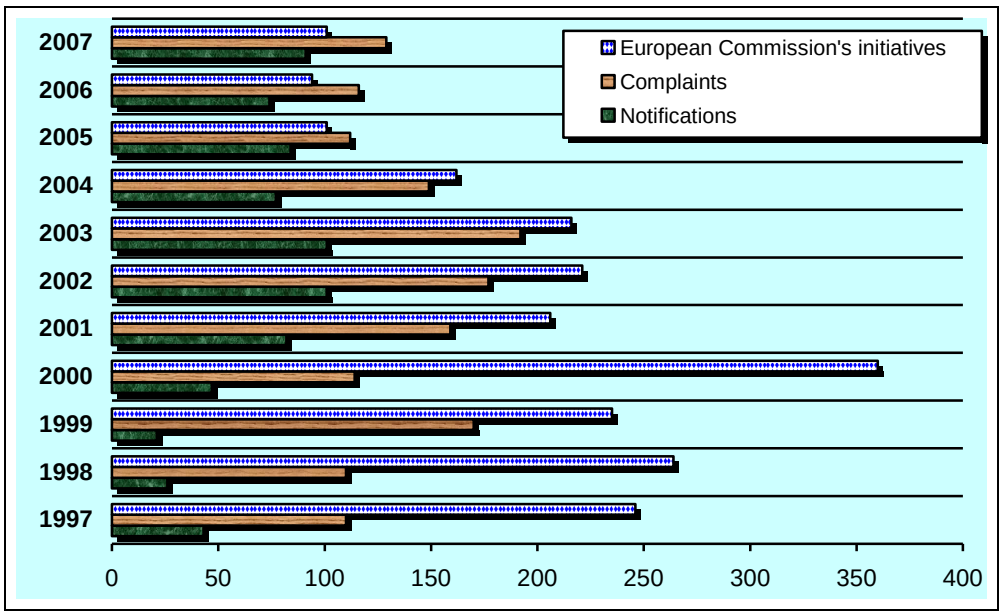

Figure no.2: The cases under the Art. 81-82

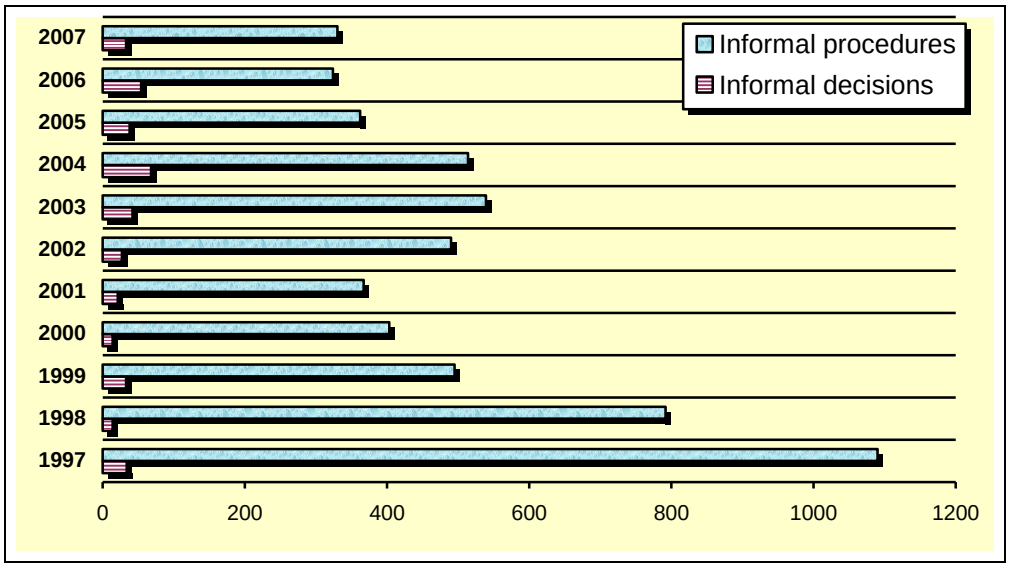

Figure no.3: The cases which were object of the Art. 81-82 regulations

Using the above two figures, we can see that the number of the investigated cases grew, but they didn't need punishment measures from

the European Commission. As a result, those enterprises were just pointed out.

The most usual dominant position is the individual domination, which appears when an enterprise has a monopoly position (Ignat I. *et all.*, 1998).

All monopoly types are under the prohibition of the dominant power abuse. Moreover, the communitarian business law don't realize any difference between the public and the private dominant enterprises.

The collective domination appears when some enterprises action together as a collective entity or then these enterprises adopt the same competition position.

A special case is that of the oligopoly, in which the communitarian jurisdictions pronounced contradictories solutions.

We can resume that there isn't an absolute criteria to determinate the domination. The usual criteria are:

- ✓ the criteria of the markets quotations: is the most pertinent criteria;
- ✓ the internal criteria connected to the firm: this criteria covers the stability of the firm's economic cycles as a result of the certitude about the inputs sources and the markets, the independence resulted from the industrial propriety rights, the imagine of its goods, the capacities of production, the efficiency and the technological advance;
- ✓ the external criteria connected to the market structure: are connected to the potential competition as a function of the market opening degree (Mihai E., 2004).

In the same category of criteria are the de jure or de facto monopolies. The de jure monopoly results from the industrial or intellectual propriety rights and it can create a domination situation on some markets. The de facto monopolies (administrative monopolies) are those which result from some privileges gave by the public authority.

The European Regulation about the Fusions Control allows the European Commission to control the fusions with "European" dimensions. That means a fusion which has a turnover greater than 5 billion Euros and which has at least two component firms with a turnover of 250 million Euros. An exception represents those firms which have more than 2/3 from their turnover in a single Member State. In this situation, the Regulation may not be applied.

The statistical aspects of the activities connected to the Fusions Control Regulation are presented in the figures no. 4-5.

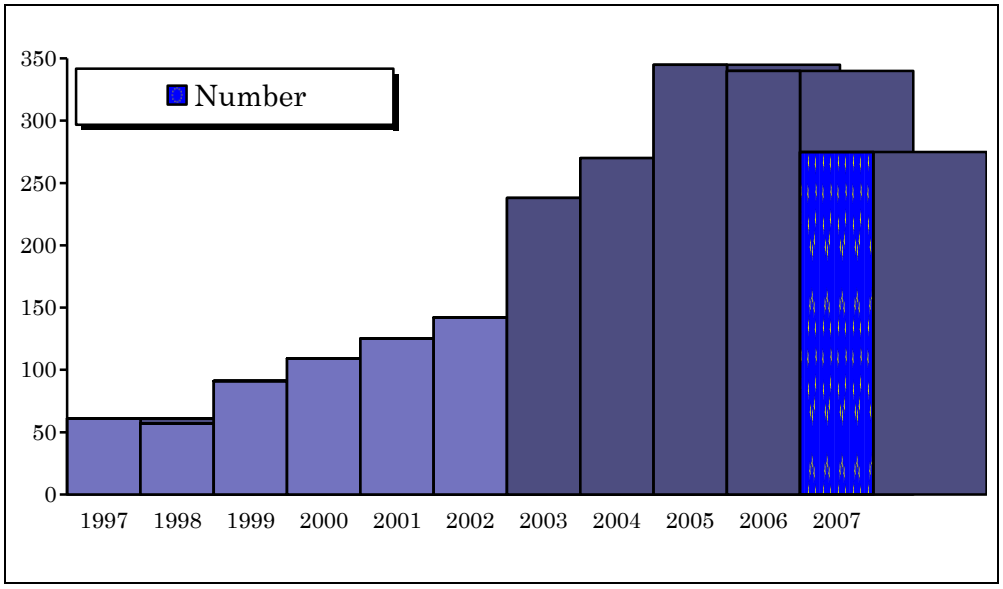

Figure no.4: The number of the adopted decisions of Control Fusion Commission

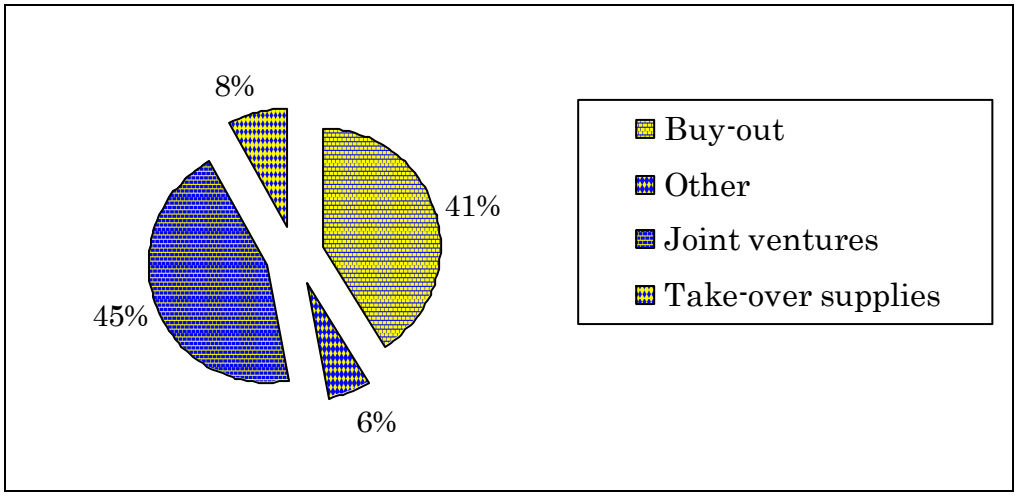

Figure no. 5: The fusion operations and acquisitions under the control of the European Commission

When the enterprises' fusions face to the European Commission's restrictions, the enterprises opt to abandon the fusion or to negotiate with the Commission the conditions for a new fusion.

On the other hand, the single market created opportunities for the firms in order to facility their access on the new markets and to develop new efficient distribution systems. These facilities are the following:

- ✓ the grow of the standardisation and the quality by the redistribution of the specialised outlets;
- ✓ the exploitation of the scale economies by the sells concentration on a limited number of outlets;
- ✓ the investments support for the introduction and the development of new brands.

Till 1999, the European Commission introduced new criteria for the restrictions analysis:

- ✓ the restrictions connected to two or more firms which buy, sell or resell goods;
- ✓ the restrictions connected to two firms which impose barriers to the acquisitions or the use of the intellectual propriety rights or know-how.

In Romania, was adopted the Law no.21/1996 about the competition protection and support in the consumers' advantage. The present Romanian competition law regulates: the concerted agreements and practises, the abuse of the dominant position and the control of the economic concentrations.

Romania doesn't forbid a dominant position on the market. The firms are under the incidence of this specific law only if they abuse by their dominant position by using anti-competition actions which affect the trade or the consumers.

An important element of the market competition is the public aids. O financial measure enters under the incidence of the Public Aids Law when: it favours only some firms, some goods or services, it is accorded by the state or from the public resources, it distorts or menaces the competition and it affects the Romanian trade with other Member States, as well.

We can conclude that the efficient businesses are focused on the market conquest till they can establish powerful positions.

The dominant position isn't a wrong of a firm, but it is a result of the efficient activity of that firm. Even that the firm uses its dominant position to affect the competition will be an abuse.

A firm has a dominant position when its economic power allows it to operate without connection to its partners and consumers. As a result, the firm can abuse by its position in order to maximise its revenues and to consolidate its position on the market.

Practically, the dominant firms can action in order to prejudice other market operators and to disturb the market competition.

The concentration of the economic power represents a threat for the real correct competition. It can have negative effects on long term.

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Doina MIHĂILĂ

ROMANIAN REGIONS - KEY STRUCTURES FOR INTEGRATION IN THE EUROPEAN UNION

In Romania[1], the regional development policy began to contour together with operation of Phare program, in **1996.** Two years later, in **1998,** it was established its legal frame of development, by Law 151/1998, which established the objectives of national policy in domain, implied institution, specific competences and instruments for promotion of regional development policy, currently being in force Law no. 315/2004 and Regulation of 10.27.2004.

This is completed by a series of other laws, ordinances and government decisions, by which there are created or regulated the implementation mechanisms of regional policy.

The relevant negotiation chapter (chapter 21) was opened in **2002** and establishes the criteria that must be fulfilled by Romania in the perspective of adhesion to EU and eligibility for FS and the *Cohesion Fund,* respective the community aquis and implementation modalities.

Irrespective by other negotiation chapters, the regional development acquis does not define how there should by created the specific implementation structure of the community requirements, but it only mentions which are these charges and let it under the Romanian liability. Therefore, although the community acquis should not be transposed, Romania has to create an appropriate lawful frame, which to allow the implementation of specific provisions to the domain.

If the basic document of the national regional policy development, according to the community standards and requirements is the *Position document* for chapter 21, it is completed by the *Partnership for Adhesion* – signed in 1998 and updated last time in 2003, after the departure of Romania and Bulgaria by the other candidate states of the Central and Eastern Europe[2] (which adhered in 2004, irrespective by 2007 – the date established for Romania), and by the Travel Notice for Romania (and

[1] For an analysis of the development policy in Romania, there also present importance the impact studies issued by the European Institute of Romania, in 2000, respectively Study 8 – „Compatibilities between the Romanian frame of regional policy and EU regulations, regarding the state aid" and Study 9 – „Cohesion policy of EU and economical and social development in Romania.

[2] It is about Hungary, Poland, Czech, Slovenia, Slovakia, Estonia, Lithuania and Letonia.

Bulgaria) – issued under the same context. The monitoring and evaluation of the progresses performed is presented in annual reports, both of Romania and European Commission, and the priorities and suggestions comprised by it are reflected by the issuance of *National Development Plans* (by Romania).

In accordance with the adhesion requirements to EU, as they appear in the appropriate documents, the Romanian performances in the view of adhesion have to prove:

- existence of a lawful frame, appropriate to the community one;
- territory organization, similar to the community one;
- programming ability;
- administrative ability;
- financial and budgetary management ability;

As preparation exercise in the fulfillment of these criteria, it is the access to the pre-adhesion instruments (Phare, ISPA şi SAPARD), which represent the equivalent o solidarity funds for the states during adhesion.

Due to the fact that the regional development policy represents an assembly of governmental measures that have as purpose the support of economical increase and improvement of life conditions, by efficient evaluation of regional and local potential, its main **objectives** take into account:

- the diminishing of existing regional unbalance, with an accent on the stimulation of equilibrated development and on the revitalization of disfavored areas (with delayed development) and prevention of creation of new unbalances;
- the preparation of institutional frame to answer to the integration criteria in the EU structures and FS access and cohesion;
- the integration of sector policies at regional level and stimulation of inter-regional cooperation (internal and international) in the view of long lasting economical and social development.

These objectives are performed into practice by adoption of measures and strategies, financing of projects and by different programs, all these being although developed based on a set of **principles** that are on the basis of their issuance and appliance, as follows:

- *the decentralization principles* of the process of taking up the decision, by passing from the central/ governmental level to the regional one;
- *the partnership principle,* by creation and promotion of partnerships between all the actors implied in the domain of regional development;

- *the planning principle,* in the view of attaining of the established objectives;
- *co-financing principle,* meaning the liability of financial contributions of the different actors implied in the issuance of programs and projects of regional development.

These national principles do not exclude and neither contradict the principles that are on the basis of operation of structural policy at community level, meaning:

- programming principle;
- partnership principle;
- supplementation principle;
- monitoring, control and evaluation principle.

Contrary, it underlines the directioning of national policy to the preparation of access to the financial instruments of community policy of regional development.

The implementation unit of regional development policy at territory level is represented by the development region, such a region being constituted by the gratuitous association of neighboring counties, without being a territory administrative unit and without having a legal entity.

Therefore, there have been constituted the following 8 development regions:

Table 2.1.: Development regions in Romania

Development region	Component counties
1 North –East	Bacău, Botoşani, Iaşi, Neamț, Suceava, Vaslui
2 South-East	Brăila, Buzău, Constanța, Galați, Tulcea, Vrancea
3 South Muntenia	Argeş, Călăraşi, Dâmbovița, Giurgiu, Ialomița, Prahova, Teleorman
4 South-West Oltenia	Dolj, Gorj, Mehedinți, Olt, Vâlcea
5 West	Arad, Caraş-Severin, Hunedoara, Timiş
6 North-West	Bihor, Bistrița-Năsăud, Cluj, Maramureş, Satu-Mare, Sălaj
7 Center	Alba, Braşov, Covasna, Harghita, Mureş, Sibiu
8 Bucharest-Ilfov	Bucharest Municipal Ilfov

Source: *Position document* for Chapter 21

The regional policy of EU is considered the key element that determined the occurrence of statistical areas and the development of regional statistics. In this respect, the regional statistics must allow both the measurement of regional economical situation and the foundation of intervention criteria of EU.

Currently, in EU, on the basis of regional statistics stay the two statistical schedules, issued and updated by Eurostat:

- Schedule of Statistical Territory Units (NUTS);
- Schedule "Statistical regions of EFTA states and Central European."

The schedule of Statistical Territory Units (NUTS) was created 25 years ago and it has been used since 1988. Along time, NUTS has been permanently updated (the last form dates from July 11th, 2003), it is only defined for the EU Member States and is organized on three statistical levels (Level 1 – 72 regions; Level 2 – 213 regions; Level 3 – 1091 regions).

NUTS is used for collection, improvement and harmonization of regional statistics at the level of the entire European Union, for the economic – social analysis of regions, but also for application of the development policies.

The economic – social analysis of regions is performed on all the three statistical territory levels and follows the identification of EU regional problems (by comparative analysis of NUTS 1 level regions), of regional problems of Member and Candidate States (by comparative analysis of NUTS 2 level), as well as of their local problems (by comparative analysis of NUTS 3 level regions).

The regional statistics at levels NUTS2 and NUTS3 are used by the European Commission for determination of the eligibility of regions to receive the financial support from the Structural Funds. Therefore, the most part of these funds is assigned to regions Objective 1, regions classified only at the territory – statistic level NUTS2.

The territory – statistic level NUTS2, territory level for which it is assigned the most part of Structural Funds, represents, with no doubt, the most important element of regional development policy. The level NUTS2 is both essential for Romania and for the other Candidate States, because the current criteria of assignment of the Structural Funds are based on statistical indexes computed at this level.

Although the Schedule of Statistic Territory Units has as purpose the increment of possibilities to compare the EU sessions, the lack of clear classification criteria of regions on the three levels led to the occurrence of significant relevance between the EU regions, located on the same NUTS

level. The most important differences aim the population, surface and economical development level.

Comparatively to the other European states, the Romanian regions are situated at a medium level from the point of view of the number of inhabitants and surface, but it registers significant discrepancies from the point of view of the economical development level.

To insure the collection, processing and dissemination of regional statistics in an harmonized means at the level of the entire European Union, the European Parliament and EU Council adopted, on the date of May 26, 2003, the Regulation (CE) No. 1059 regarding the establishment of a common classification of territory – statistic units. In quality of normative act, the regulation is both looking to manage the possible changes of the territory of administrative units of Member States and to minimize the impact of these modification on the availability and comparability of regional statistics. This regulation replaced the "Schedule of Territory Statistical Units", published by Eurostat in 1999, and incorporated all the modifications registered at the level of territory statistical structures of Member States, starting with 1999.

The same time, the Regulation (CE) No. 1059/2003 introduces a series of classification criteria of territory – statistical units. Therefore, in the case that the territory unit has an administrative structure, it represents the prime criteria of classification of the territory – statistical unit. Although, irrespective by the administrative structure, the regulation defines the NUTS levels, based on the population criteria:

	Level NUTS 1	**Level NUTS 2**	**Level NUTS 3**
Medium size of population (thousands of inhabitants)	3.000 - 7.000	800 - 3.000	150 - 800

In case that a Member State does not dispose by territory – statistical units, appropriate for the three levels above, it must perform an aggregation of territory structures of small sizes, taking into account the geographical, socio-economical, history, cultural conditions, environment problems, etc. Evidently, if the population of a state is inferior to one of these thresholds, the superior level regions are the state itself.

According to the classification criteria of the territory – statistical units, provided in the Regulation (CE) No. 1059/2003, the Romanian territory is only structured on levels NUTS 2 and 3. Therefore, the territory of development regions are considered statistical territories of level NUTS

2, and the territories of the 41 counties and the territory of Bucharest Municipal are considered statistical territories of level NUTS 3.

Figure 2 **Statistical regions of Romania**

All the eight development regions of Romania are qualified for Objective 1 and will be, after the adhesion of Romania to the European Union, eligible for all the Structural Funds (European Fund of Regional Development, Social European Fund), European Fund of Orientation and Agrarian Warranty, Cohesion Fund).

The programming documents of the national regional policy on the perspective of adhesion to EU, have as main document the National Development Plan (PND), which contains the strategic priorities of development, regional and sector, for a given period.

The National Development Plans are issued based on the *Regional Development Plans (PDR)* and reflect the National Development Strategy and Operational Programs (PO), regional and sector.

By now, there have been issued 3 PND, for the periods 2000-2002, 2002-2005 and 2006-2013, PND 2002-2005 identified 7 ***priority development axes,*** around which there have been constituted all the objectives, measures, programs and projects of regional development:

1) development of productive sector and connected services, strengthening of competitiveness of the economical activities and promotion of private sector;

2) improvement and development of infrastructure;

3) strengthening of human resources potential, of the labor force ability to adapt to the market requirements and improvement of social services quality;

4) support of rural agriculture and development;

5) protection and improvement of environment quality;

6) stimulation of scientific research and technological development, innovation, communications, information technology and creation of information society;

7) improvement of economical structure of regions, support of regional development, equilibrated and long lasting.

Together with PND, there are the Common Programming Documents (DCP), aim the development strategies and common priorities to the trans-border regions Romania – Bulgaria and Romania – Hungary and they are equivalents of "Single Programming Documents (DUP) at community level.

Also, they contain similar elements to the *Frame Document of Community Support* (DCSP) and Operational Programs (PO). We remember here that DCSP is the result of negotiation between the European Commission and Member States, relevant for the financing from structural funds, being founded by PND and transformed into PO – which details the specific measures to its implementation. It is to remember the fact that, although Romania is not yet eligible for the DCSP negotiation, there have been although identified the operational programs, necessary to be integrated in its frame, as follows:

- a Regional Operational Program – with 8 regional sub-programs, including priorities that may be financed by the European Fund of Regional Development and the European Social Fund;
- a Sector Operational Program for agriculture and rural development and fishing – eligible to be financed by the European Orientation Fund and Agrarian Warranty – Warranty Section and Financial Instrument for Fishing Orientation;
- a Sector Operational Program for the social and labor force occupation policy, eligible to be financed by the European Social Fund;
- a Sector Operational Program for research, technological development and innovation, eligible to be financed by the European Fund of Regional Development, and, possibly, by the European Social Fund.[3]

The institutional frame relevant for the issuance and implementation of programming documents is structured on two levels, regional and national. Therefore, at region level, the main **institutional actors** are:

The National Council of Regional Development has the following attributions:

- it approves the National Strategy for Regional Development and National Program for Regional Development;
- it presents to the Government the proposals regarding the constitution of National Fund for Regional Development;
- it pursues the use of funds allocated to the Agencies for Regional Development from the National Fund for Regional Development;
- It approves the use of structural type funds allocated to Romania by the European Commission.

The Council for Regional Development is the deliberative regional organism, without a legal entity, which is constituted and operates on partnership principles on the level of Development Regions, for the purpose of coordination of issuance and monitoring activities, which devolve from the regional development policies.

The Council for Regional Development has the following attributions:

- it analyzes and approves the strategies and regional development programs;
- it supports the issuance in partnership of the National Development Plan;
- it approves the regional development projects, selected on regional level in accordance with the priorities and methodology issued by the National Council for Regional Development, together with the regional specialized organisms;
- it transmits to the National Council for Regional Development, in the view of approval of financing, the projects portfolio for which it is applied a selection procedure at national level;
- it approves the criteria, priorities, assignment and destinations of resources of the Fund for regional development;
- it aims the use of assigned funds from the National Fund for Regional Development;
- it approves the annual proposals of incomes and expenses budgets issued by the Agency;
- it draws other financial contributions, local and regional, in the view of issuance of regional objectives, the sources drawn constituting as incomes to the Fund for Regional Development;

3 „Position Document of Romania, Chapter 21 – Regional Policy and Coordination of Structural Instruments"

- it coordinates and supports the development of regional partnerships;
- it coordinates the media activities at regional level of the regional development policies and objectives, of regional programs, financed by the European Union, as well as those regarding the use, at the level of funds' region, insuring the transparency and correct, fast and in real time information of citizens, mainly of producers.

The Regional Development Agencies (ADR) are constituted as non-governmental, non-profit organisms, of public utility, with legal entity, which act in the domain of regional development. The ADR's issue the regional strategies and programs of development, and, after their approval by CDR and ulterior by CNDR, have a role of its implementation.

The Agencies for Regional Development have the following attributions:

- they issue and propose the Council for Regional Development (of the respective region) the approval of Regional Development Strategy, of the regional development plans and of the management plans of funds;
- they insure the appliance of regional development programs and of the management plans of funds, in accordance with the decisions adopted by the Council for Regional Development, with the observance of legislation;
- they identify the problem areas within the development regions;
- they insure the technical specialty assistance to the natural and legal entities, which state capital or private capital, which invest in the disfavored areas;
- they manage the Fund of Regional Development, for the purpose of objectives provided in the regional development programs;
- it is liable by the correct administration of the assigned funds.

These institutions had since from the beginning the due to cooperate for the issuance of a development strategy, at national level and regional level. The Foundation of this strategy was issued based on the analysis of economical situation, which allowed the expression of principles and objectives on medium and long term, with determination of the priorities. The strategies issued since 1998 by now began, truly, from economic-social analyses, have concluded objectives and measures considered as priority, but they did not specify which are the financing

sources and which are the necessary resources (human, material, financial, informational) and those available that may be used.

The purpose for which these Development Regions have been created is similar to that pursued also by other countries that adhered or are adhering to the problems that pass away to the administrative borders, and which surpass the financial possibilities of this county. The Development Regions represent territory structures, where it is performed the implementation and evaluation of the national policy of regional development.

The development regions have as purpose the promotion of an economical policy of regional type, for the purpose of issuance of the equilibrated development and reduction of economical and social development discrepancies. For this, they use the funds made available by the Government and local authorities, as well as the pre-adhesion and post-adhesion funds of the European Commission.

The Regional Operational Program (POR) is a program that implements important elements of the National Strategy of Regional Development of the National Development Plan (PND), contributing, together with the other Sector Operational Programs (POS), to the issuance of general objective of the National – Regional Strategy, namely the diminishing of disparities between the Development Regions of Romania.

The regional program will be financed during the period 2007-2013 from the State Budget and co-financed from the European Fund of Regional Development – one of the Structural Funds of the European Union.

POR contains a comparative analysis of the Development Regions, detailed analyses on the economical and social development of Regions and a regional SWOT analysis, for the evidencing both of the evolution and of the current situation of Regions.

Consequently to the appearance and dynamics of these processes, it stresses the economical and social analyses, it has been established as **global objective of POR,** the supporting of regions rest behind from the point of view of development, and within the frame of regions few more prosper, of the less developed areas, by the evaluation of their specific resources, insufficiently exploited by now, in the view of acceleration of the economical increase of these domains.

The main way identified for attaining of this objective is constituted by the correlation of financial assignments on Regions, with the general degree of development of the Regions, namely, reversely proportional to the PIB/ inhabitant size, so that the less developed Regions to benefit, proportionally, by a higher financial assignment.

These funds will be used for the financing of **projects with a major impact on the regional and local development:**

- rehabilitation and modernization of transport, education and health infrastructure;
- Improvement of business environment by the development of business supporting structures (industrial, technological, business parks, etc.) and the supporting of the initiatives of particular producers;
- Evaluation of tourism and cultural potential, by the supporting of tourism infrastructure development and of the entrepreneurial initiatives in this domain;
- Supporting of development of the urban centers with potential of economical increment, to create them conditions to act as motors of regional and local development.

With no doubt, during the last years, Romania has been made significant progresses both in which regard the decentralization of decision at local level, and in which regards the regional implementation of development policies. To support the two processes, at the level of the eight development regions (organized as statistical regions), there have been created a series of decentralized structures of certain public central institutions, implied in the foundation of development policies (Divisions of Regional Statistics, Regional Compartments of the National Prognosis Commission, etc.).

Concluding, it may be ascertained that in Romania there is a new type of approach of the regional development problems, based on the decentralization principles, concentration of efforts, partnership and planning, principles promoted also by EU, which allow the authorities and local and regional communities to actively imply in the promotion of their own interests, by the initiation and promotion of projects and programs of regional development.

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HISTOIRE ET POLITIQUES TOURISTIQUES: REFLEXION SUR LES FACTEURS D'IMPLANTATION HOTELIERE AU CAMEROUN DE LA PERIODE COLONIALE A NOS JOURS

Résumé

Les hôtels du Cameroun traduisent trés imparfaitement la densité et la diversité de son parc hôtelier. En effet, certaines localités camerounaises sont plus pourvues en infrastructures hôtelières par rapport à d'autres. Ces inégalités hôtelières tirent leur origine de la période coloniale, et celles-ci ont continuées même après l'indépendance du Cameroun. Les administrateurs coloniaux français et anglais ont influencé de manière indélébile les implantations hôtelières au Cameroun. En prenant le relais, l'Etat camerounais a continué à perpétuer ces déséquilibres en ce qui concerne l'implantation spatiale hôtelière. Cet article se propose de présenter les raisons de ces répartitions spatiales hôtelières déséquilibrées de la période coloniale à nos jours; nous ferons ressortir au cours de notre analyse quelles influences ont eu ces différentes politiques tant coloniales que celles prônées par l'Etat Camerounais en matière de répartition déséquilibrée dont le Cameroun est sujet en ce qui concerne ses infrastructures hôtelières.

Mots clés: *histoire, politiques touristiques, facteurs, implantation, hôtel, période coloniale, cameroun, administrateurs coloniaux*

1.INTRODUCTION

Les hôtels du Cameroun ne reflètent pas la densité et la diversité de son patrimoine naturel et culturel, expression du potentiel éthnique de ce pays riche de plus de 200 éthnies, dont la mise en place remonte à plusieurs siècles. Situé au carrefour des civilisations bantoue, soudanaise et arabe traversé par trois écosystèmes depuis la forêt jusqu'au sahel en passant par la savane, le Cameroun surprend de par la manière dont il gère ses ressources naturelles, culturelles, héritages d'une longue histoire construite dans des environnements divers. Ces atouts naturels et culturels ajoutés à cela des facteurs politiques, économiques et industrielles drainent au Cameroun un nombre sans cesse croissant de visiteurs, qui ont besosin d'un hébergement. C'est un secteur en plein essor au Cameroun dont l'optique est de résorber le flux de visiteurs. Mais, il existe des inégalités dans la localisation géographique des hôtels. Certaines localités regroupent la majeure partie des hôtels du Cameroun, alors que les autres régions n'en comptent que trés peu. Cette situation tire son origine depuis la période coloniale, et elle s'est perpétué jusqu'à nos jours. Comment expliquer ces inégalités spatio-hôtelier qui ont leur racine dans la période coloniale (allemande, période sous tutelle), et sont encore appliqué par les différents gouvernements qui se sont succédés à la tête du Cameroun? Cette étude se

propose d'examiner les facteurs politiques ayant influencé ce déséquilibre dans la répartition géographique des hôtels au Cameroun; et nous avons premièrement comme axes d'études secondaires, la période coloniale, deuxièmement la période post-coloniale. La présente étude s'appuie sur des travaux antérieurs directement ou indirectement liés au sujet, et également sur des ouvrages.

2. LES IMPLANTATIONS HOTELIERES VALORISEES PENDANT LA PERIODE COLONIALE

Un rappel historique sur l'histoire du Cameroun s'avère primordiale. En effet, la Cameroun a connu successivement trois puissances coloniales: l'Allemagne (1884-1914), française et anglaise (1914-1960). Les allemands sont chassés au Cameroun par la coalition formée par les français et les anglais. L'histoire du Cameroun, après le départ des allemands se subdivise en deux périodes bien tranchées : la période sous-mandat, et la période sous-tutelle.

Les préludes à l'option de construire des hôtels remontent à un passé fort lointain, celle de la période coloniale allemande.

2. 1. LA PERIODE ALLEMANDE

Nous commençons cet aspect en faisant un rappel historique, car les allemands durant la période passée au Cameroun, de 1884 à 1914 n'ont pas eu à proprement parlé de politique touristique. Mais durant la période passée au Cameroun, cette option se manifeste d'abord, de façon inconsciente, par la mise en place des structures d'accueil: les gîtes d'étapes. Ceux-ci sont implantés tout au long des itinéraires emprunté par les allemands dans leurs déplacements exploratoires du Cameroun. Ces gîtes d'étapes sont localisés dans des endroits soigneusement choisis, offrant des conditions de sécurité, de salubrité et un cadre idéal de repos après une journée de marche à pied ou à cheval (Essono, 2000, p9).

Certains gîtes d'étapes, têtes de pont d'où partaient et revenaient les expéditions allemandes, sont devenus aujourd'hui des pôles de developpement et de concentration hôtelière à l'instar de Kribi. Celle-ci est une ville coloniale fondée par les allemands; elle a connue son heure de gloire sous la colonisation allemande. En effet, à l'époque allemande, Kribi était un petit port marchand d'où transitaient l'ivoire et le caoutchouc destinés à l'exportation. C'était également le cas de Yaoundé, Douala et Buéa. Yaoundé, station et capitale au temps des allemands, Douala porte d'entrée par voie maritime du cameroun, Buéa attire par son Mont-Cameroun(Klotchkoff, 1996, p.254).

Hérités de la période coloniale allemande, les gîtes d'étapes ont disparu de nos jours, seules les localités qui les abritaient ont subsisté et gagné en renommée.

2.2 LA PERIODE FRANçAISE ET ANGLAISE

Les interventions françaises depuis la fin de la première guerre mondiale viennent s'inscrire dans le même registre que celui pratiqué par les allemands avec des touches particulières comme la réalisation à travers le pays, des infrastructures hôtelières et cela dans des régions préalablement choisis selon certains critères. Ceux-ci vont imprimés leurs marques de façon indélébile et influencés les orientations futures de la politique touristique en matière d'investissement hôtelier au Cameroun.

Comme premier facteur de politique touristique mise en place pour l'implantation hôtelière sous la période coloniale française et anglaise, c'est que, la répartition géographique des hôtels au Cameroun, répondaient aux préoccupations de l'administration de tutelle. En effet, il en ressort que les investissements en matière de politique touristique étaient sujets aux besoins de repos et de vacances des militaires et autres responsables avec leurs familles en poste au Cameroun. Ceux-ci prenaient leur villégiature dans des régions où le climat était semblable à celui de leur pays; D'où comme deuxième facteur, les raisons climatiques. En effet, le choix de ces sites ne relevaient pas du hasard, il y fait un climat trés doux, frais pendant la majeure partie de l'année. C'est pourquoi, l'administration de Tutelle construit à Dschang en 1942 un centre climatique, celui-ci accueillait les occidentaux en poste au Cameroun. La même structure hôtelière est construite dans la localité de Babadjou en 1953; toujours à cette période, l'administration de Tutelle construit un hôtel à Buéa, le Muntain Hôtel; toujours dans la même optique, un hôtel est construit à Ngaoundéré en 1950; (A. Debel, 1977, p. 17).

Comme troisième facteur, il y a la promotion de la chasse et du tourisme de vision dans la partie septentrionale du Cameroun, d'où la construction des hôtels dans cette partie du pays, surtout dans les localités de Waza, Mokolo, Rhumsiki, zone de forte concentration d'animaux et de beaux paysages pittoresques.

Quatrième facteur de politique touristique pour l'implantation hôtelière, il y a la logique d'affaires avec les raisons d'achat et d'évacuation de certains produits de base dans les localités camerounaises comme Mbalmayo, Nkongsamba, Kribi. Ces régions produstrices de cacao, d'ivoire, de caoutchouc... se sont vu conférés une importance particulière dans la construction des hôtels pendant la période sous Tutelle(Essono, 2000, p. 56).

Cinquième facteur, la prépondérance de la fonction administrative et politique explique la nécessité de doter Yaoundé d'infrastructures hôtelières suffisantes.

Sixième facteur, la fonction économique de Douala dans l'économie camerounaise confère à cette ville une importance principale dans les investissements hôteliers (Confère Tableau).

Les promoteurs privés en matière d'investissements hôtelier ont également suivi de tout temps, la politique touristique soit des pays coloniaux, soit celle de l'Etat camerounais. C'est ainsi que, pendant la période coloniale le secteur privé s'est montré dynamique en construisant des structures hôtelières dans presque tous les centres d'intérêt initialement définis par les décisionnaires.

3. LES REALISATIONS SPATIALES HOTELIERES AU CAMEROUN DE 1960 A NOS JOURS:UN DESEQUILIBRE CONTINUEL

La tendance initiée pendant la période sous Tutelle sur la localisation spatiale des hôtels est la même que celle pratiquée après l'accession du Cameroun à l'indépendance. Divers réalisations, programmes et divers plans de developpement élaborés en vue de l'augmentation et de l'amélioration de ce secteur ont été mises sur pieds. Sur le plan spatial, toutes les réalisations entreprises répondent au canon des attractions qui justifient les investissements de ce secteur.

Les deux politiques touristiques appliquées au Cameroun post-colonial en matière d'implantation hôtelière vont toujours dans la logique coloniale qui consistait à privilégier certaines régions par rapport à d'autres.

C'est ainsi que Douala de par sa centralité dans les communications avec l'extérieur (port maritime du Cameroun), et également par sa fonction de capitale économique est priviligié pour la réalisation des projets hôteliers par les différents gouvernements post-coloniaux du Cameroun (Confère carte). En 1960, Douala a une capacité hôtelière de 34%(en chambres) dans l'ensemble du pays. Cette ville reçoit à elle seule prés de 83% des investissements réalisés soit par l'Etat, soit par le secteur privé(Archives du Ministère du Tourisme).

Les facteurs de fonction administrative et industrielle influencent également la politique touristique post-coloniale en matière d'implantation hôtelière. En effet, la fonction de capitale politique de Yaoundé a favorisé une augmentation de son parc hôtelier, cette ville a vu considérablement augmenté ses investissements hôteliers en 25 ans(Confère les deux cartes). La localité de Mbandjock doit sa capacité hôtelière à l'installation en son

sein des usines sucrières du Cameroun; Signalons que ces unités industrielles disposent de leurs propres structures d'accueil. Dans les villes comme Edea, Loum, Nkongsamba sont implantés des usines d'aluminium, des usines de production d'énergie, bref, il y a de nombreuses activités industrielles et commerciales: vente et traitement du café. Des structures hôtelières y sont concentrées, mais est surtout l'oeuvre des promoteurs privés et dans une moindre mesure celle de l'Etat(Akamba Mani, 2004, p. 56).

Comme autres facteurs, il y a les régions touristiques qui ont été plus valorisées dans la répartition spatiale hôtelière post-coloniale du Cameroun. En effet, la région du Nord-Cameroun(c'est-a-dire la région de l'Adamoua, du Nord et de l'Extrême-Nord), et la ville balnéaire de Kribi sont les localités les plus touristiques au Cameroun. Ces régions sont trés visités, ce qui a conduit à la construction d'infrastructures hôtelières. Ces régions du Nord sont également des zones d'échanges commerciales avec les pays voisins comme le Tchad, le Nigéria, la Centrafrique, ce qui drainent au Cameroun d'importants consommateurs hôteliers(Dobi Fanta, 2006, p.6).

Certaines localités comme celle du Sud Cameroun dont l'Est, certaines de l'Ouest Cameroun sont défavorisés dans cette répartition spatiale. Nous pouvons l'expliquer du fait de l'enclavement de ces régions et de leur bas niveau d'attraction.

4.CONCLUSION

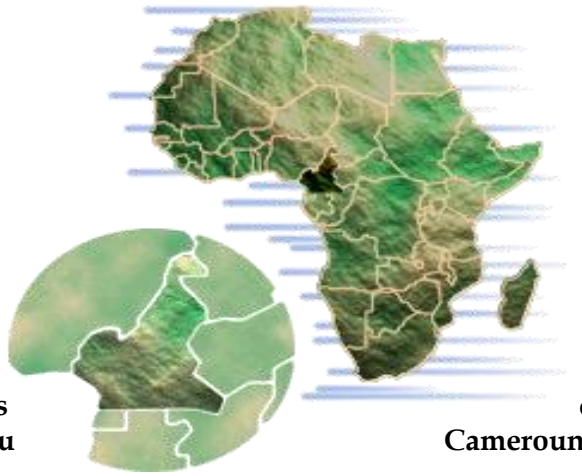
L'histoire dans laquelle s'inscrit, s'enracine et se developpe l'histoire des hôtels au Cameroun à travers ses facteurs, donne une idée des origines et des progrès accomplis au cours de son histoire. Cet article présente premièrement les liens entre les prémices initiées pendant la période coloniale et continué même après les indépendances. Deuxièmement, il dresse un inventaire des contributions successives de chaque protagoniste à l'édification de ce secteur; celui-ci a connu une évolution fulgurante au cours du siècle passé et au début du 21ème siècle

EVOLUTION ET REPARTITION GEOGRAPHIQUE DES INVESTISSEMENTS HOTELIERS

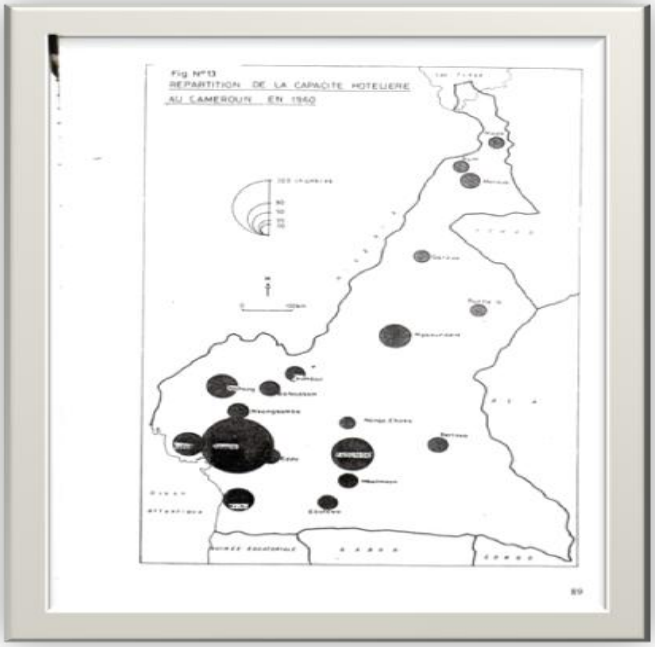
Périodes / **Localités**	**1920 - 1940**	**1940 - 1960**	**1960 - 1980**
Yaoundé	1 hôtel,	3 hôtels (40-80 chambres)	+ 492 nouvelles chambres

Douala	3 hôtels	206 chambre	+ 888 nouvelles chambres
Nord(région)		160 chambres	+ 460 chambres
Kribi (côte)		19 chambres	+80 nouvelles chambres
Victoria(côte)			+ 114 nouvelles chambres
Dschang		44 chambres	
Buéa		24 chambres	+ 30 nouvelles chambres
Bertoua			+ 50 nouvelles chambres
Nkongsamba		16 chambres	+ 10 nouvelles chambres
Mbalmayo		10 chambres	
Ebolowa		10 chambres	

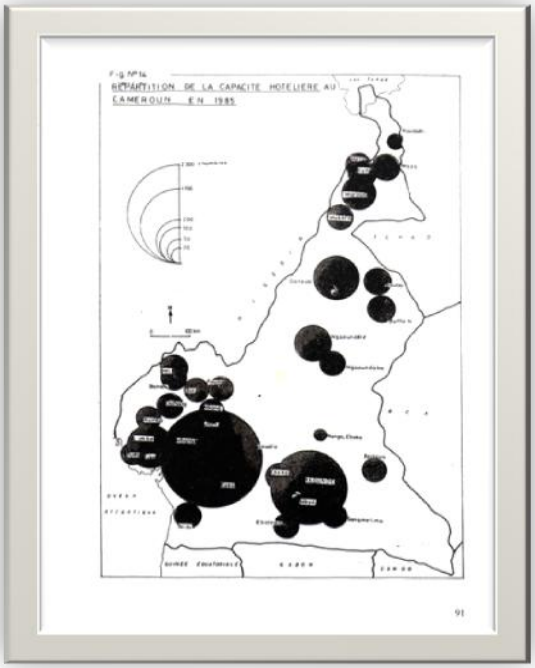
Carte1: LOCALISATION DU CAMEROUN



Carte 2: CAPACITE HOTELIERE AU CAMEROUN EN 1960 (Archives du ministère du tourisme du Cameroun)



Carte 2: CAPACITE HOTELIERE AU CAMEROUN EN 1985
(Archive du Ministère du Tourisme du Cameroun)



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THE FINANCIAL ASPECTS OF THE BUILDING SECTOR TO THE REGION 2 SOUTH-EAST

1. Introduction
2. Short historical of the building sector
3. Evolution of the main indicators at the national level
4. The evolution of the main indicators in the Region 2 South-East
5. Conclusions

Abstract

This paper shows the evolution of the building sector in period 2000-2006 both the national level and the regional level with particular emphasis on the Region 2 South-East. The main indicators analysed were: building sector share in GDP, net investments, net investments on financing sources, weighted average number of employees in the building sector in total employees, enterprises active in building sector, turnover and gross profit.

1. Introduction

Romania is in the first place in the European Union in line with the growth rate of the building sector production in March 2008, with an imprest of 32.5% as compared to the similar period of 2007, according to data from European Statistical Office Eurostat. Sweden (23.2%) and Slovenia (22.5%) were in the forthcoming places and the building market of Spain (-10.1%) and Portugal (-6, 5%) which lie in the top of the biggest decreases.

Such us shows that in Romania, the building sector was in full ascent, being forecast an upward trend of the production volume of 23% at the end of 2008, by making products able to meet the market needs.

Because of this spectacular evolutions of the building sector in Romania it occurred and the idea of such works, respectively to study the evolution of this sector.

2. Short historical of the building sector

Related to the progress on the building market may specify the following: "Before 1997, a few years in a row, the constructions volume

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dropped dramatically and with as many of 50-60% per year. No more was "command", as the years before '89. The state has not invested very little and divided the attractive objectives to private enterprises of the ridiculously low prices. A year of stake was 1999, in which this free fall has ended. Usually, the beneficiaries were the private enterprises, which have built economic, cautious, but with materials brought from import and with a great attention to building stages. In 2000, the building market has begun to grow very slowly but steadily. All these years, the private sector was the one who has invested heavily in this field, the percentage of total works being victory over 80 percent. There were started to appear private residential assemblies, new commercial centres, headquarters of large offices built from zero, projects with building materials and facilities to international standards for A class" (Sender, 2004).

The main factor of the building sector dynamic in '90 years has been the developing of the real estate market. Later, this role was taken over by the infrastructure large projects which benefit from support of the international financial institutions. In this market located in continuous increase operating a series of dynamic factors such as:

- the National Housing Agency strategy on the relaunch construction of houses;
- the programme to thermal rehabilitation of the buildings;
- the construction of the sports halls;
- further work on urban infrastructure commenced in many cities across the country.

Thus, in 2000, the building market can be considered one placed in full expansion, the statement backed by studies of foreign experts, the statistical data and the Romanian enterprises representatives in this field. Thus, a study published by Tradepartners UK in August 2002 shows that "Romania has the potential to become a building market of major importance in the European level (…). At present is a small market at a European scale, but there is a great potential for growth" (C.C.I., 2000).

In the recent years, the opportunities in the Romanian building sector are especially those concerning the construction of houses, construction of offices, large shopping malls, business centres but also for the infrastructure. In these sectors, there were funds made available by the World Bank, the European Bank for Reconstruction and Development and the funds of the European Union allocated by the PHARE, ISPA and SAPARD programs. In the next few years, the building sector will know a continuous growth, especially in urban areas, as a result of structural funds, of the support of government and the development of the mortgage loan.

3. Evolution of the main indicators at the national level

In the period 2000-2006 the building sector share in the national GDP had an increase trend, ranging between 4.05 percent and 7.43 percent of the total value, as a result of the factors above (Table 1.).

Related to the net investment on the main activities of the national economy, in the period 2001-2006, the building sector occupies penultimate place, mainly due to the reduced weighting at national level, the first place belonging to the service sector followed by industrial sector at a distance of about 7 percent on average. However, a positive fact is that the net investment weighting in the building sector had recorded increases from a year to another ranging between 6.5 percent and 15 percent (Figure 1.), the most share being achieved in 2006. The increase in the net investments amount from a year to another varied in the range 21.34-92.97 percent, to 2006 the net investment being the 8.3 times higher than in 2001.

The net investments at national level are represented by the investment for buildings, machinery, geological works and other investment expenditure. The investments in the building sector has been yielded in works by which have been achieved new objectives, in the reconstruction, development, modernization and rehabilitation of the buildings already existing, in the works of installation of the technological and operational equipments with the whole complex of operations in which there has been assembling of their components on the yards and fixing the foundations of them. Thus, at national level, the investments in machinery have the larger share by the total investments, and in second place falls investments in construction.

The share of net investments in construction in the total net investments made at national level has varied from a year to another, but the overall had an ascendancy trend within the range 32.38-48.53 percent (Figure 2.) and the maximum weights being reached in 2005. This positive development shows that the investments in construction increased of 7.72 times in 2006 to 2000, in a higher proportion than increased investments at national level, i.e. of 5.83 times.

The entrepreneurs have appealed for investments to the following financing sources: own sources, domestic credits, foreign loans, amounts to the state budget and local budgets, foreign capital and other sources. However, the own sources of financing have been more used, respectively in the proportion of over 68 percent in 2000-2006 (Table 2.). The own sources had a farmer trend throughout the analyzed period, so that in 2006, they rose by 5.42 times compared to 2000, taking a similar increase of the net investments, i.e. of 5.83 times.

Starting in 2002, as a result of more to the credit terms, the share of domestic credits in the total of funding sources had an upward trend until the year 2004, belonging to the range 3.53-10.41 percent. The 2005-2006, the share of domestic credits fell to 8.72 percent, respectively 8.47 percent, although their value in the year 2006 was by 14 times higher than the existent amount in 2000.

The foreign capital had the smallest share of the financing sources used to finance the investments (under 1.17 percent over time and changing values) but, overall, its evolution was positive because the foreign capital has increased by 22.67 times in 2006 to 2000.

If we are referring to the labour market, the share of employees in the building sector at the national level has been fluctuating and ranging between 6.57 percent and 7.63 percent, but as a whole was upward in the period 2000-2006 (Figure 3.), although in the recent years have shown an increased tendency of migration of labour in companies from European Western countries that offer much higher salaries. However, overall, this phenomenon was not visible at the national level as the number of employees had increased by about 1 percent in 2006 compared to 2000, and in the case of the construction sector the employees even increased by 11.39 percent in 2006 compared to 2000.

The 2005-2006, in the building sector level, the small enterprises had the most share in the turnover and the gross result value at the national, of 36.74 percent and 37.83 percent for turnover, i.e. 54.60 percent and 56.62 percent for gross profit, due to the weighting very high of the number of small companies at the national, but and the possibility of managing much better of the work. The medium-sized enterprises have contributed with 34.04 percent in 2005 and 36.01 percent in 2006 to the value of turnover at the national and with 26.53 percent in 2005 and 28.59 percent in 2006 to the value of gross profit at the national. The large enterprises, which are fewer as number have achieved only 29.22 percent in 2005 and 26.16 percent in 2006 on turnover, and i.e. 18.86 percent in 2005 and 14.80 percent in 2006 in the gross result at the national (Table 3.).

At the national level, the share of the active enterprises in construction in the total active enterprises registered an upward trend in the analyzed period, being between 3.90 percent and 7.82 percent (Table 4.). Also, it founded a significant increase of the number of enterprises in the building sector, with 200.43 percent in 2006 to 2000, compared with the increasing of the number of enterprises at national level of only 49.91 percent. The explanation lies in the ascending evolution to this sector and the opportunities offered by the attracting of the European funds.

After analyzing active companies in the building sector after size, we find that in 2005, micro-enterprises hold the most share (81.65 percent), compared with small (13.86 percent), medium-sized enterprises (3.93 percent) and large (0.55 percent), under Figure 4. Of these, 99.69 percent are private owned and only 2.33 percent of them having the foreign capital. Notice such a weak involvement of foreign investors in the building sector in Romania.

In 2006, micro-enterprises hold again the most share (81.62 percent), compared with small (14.36 percent), medium-sized enterprises (3.58 percent) and large (0.45 percent) under Figure 4. Of these, 99.79 percent are private owned.

3. The evolution of the main indicators in the Region 2 South-East

In the Region 2 South-East, the share of the building sector in the regional GDP was reduced, fluctuating and ranging between 6.08 percent and 7.60 percent (Figure 5.), but with about 1.5 percent higher than the weighting of the building sector in national GDP by the year 2004. In 2005, the national, the share of the building sector in GDP was greater with 0.49 percent than the share of the building sector in GDP of the Region 2 South-East.

In 2005, the average number of employees who worked in the building sector in the Region 2 South-East was the 43,614 people. Distribution to districts was in the next descending order of the employees' number: Constanta (16,151 persons), Galati (11,401 persons), Buzau (7,609 persons), Braila (4,429 persons), Tulcea (2,398 persons) and Vrancea (1,626 persons). The share of the employees' number in buildings by these counties is shown in the Figure 6.

The average number of employees who worked in the building sector in the Region 2 South-East in the year 2006 was the 44,313 people. Distribution to districts was in the next descending order of the employees' number: Constanta (17,503 persons), Galati (11,932 persons), Buzau (5,773 persons), Braila (4,588 persons), Tulcea (2,597 persons) and Vrancea (1,920 persons). The share of the buildings employees' number of these counties is shown in Figure 7.

The 2005-2006, the number of employees in building sector increased by 1.6 percent, but in the counties have been significant evolutions. Thus, the Figures 5 and 6 shows that for the counties of Braila,

Constanta, Galati, Tulcea and Vrancea the buildings employees' number has increased, while in Buzau County dropped by 24.10 percent.

In the Region 2 South-East, the situation was approximately the same as that of the national in connection with the distribution to the size of enterprises active in the building sector. But there were differences in the value of these weights: at regional level, the small, medium and large enterprises were more numerous than the national level. Thus, micro-enterprises held a weighting of 77.65 percent in 2005 and 77.88 percent in 2006, with about 4 percent lower than that of the national level, and in respect of small, medium and large weightings in the regional level were 15.78 percent, 5.56 percent and 1.01 percent in 2005 and i.e. 16.26 percent, 5.06 percent and 0.79 percent in 2006 higher than those of the national with 1.92 percent, 1.62 percent and 0.46 percent in 2005 and 1.90 percent, 1.48 percent and 0.34 percent in 2006 (Figure 8.).

The enterprises in the Region 2 South-East, which worked in the building sector got 10.32 percent in 2005 and 9.40 percent in 2006 on total turnover of the national level of the building sector. The national, the medium-sized enterprises have contributed the most able to achieve the turnover of the sector, i.e. with 36.60 percent in 2005 and 38.04 percent in 2006, small enterprises with 24.03 percent in 2005 and 26.19 percent in 2006, and the large with 23.95 percent in 2005 and 21.10 percent in 2006. At the level of this region, the value of turnover has had a weighted countdown to the number of enterprises in this way: large enterprises have achieved the highest value of turnover of 36.57 percent, the middle of 35.93 percent, the small ones by 16.71 percent and micro-enterprises of 10.79 percent in 2005 and in 2006, the medium-sized enterprises of 35.96 percent, the large of 31.67 percent, the small ones by 20.13 percent and micro-enterprises of 1.07 percent (Table 5).

Related to the staff of the building enterprises both to the Region 2 South-East and the national, the most share have had the medium-sized enterprises, about 35 percent, followed then by the large enterprises with 28.20 percent at the regional and at the national with 26.77 percent. In micro-enterprises there are working the smallest share of employees in construction, 13.99 percent at the regional level and 18.40 percent in the national (Figure 9).

4. Conclusions

The conclusion that dropping of the analysis is that in the building sector over 60 percent of turnover of the sector is generated by medium and

large enterprises and more than 58 percent of the employees number are serving in the latter, both the nationally and in the Region 2 South-East.

Both the nationally and in the Region 2 South-East, in the analyzed period 2000-2006, the building sector obviously has had an ascending trend, the fact mainly supported by the large infrastructure projects and the non-reimbursable financing for the benefited this sector. In the future, however, the building sector will know a continuous rise, maybe not as remarkable as it was until now, especially in urban areas, as a result of structural funds, of the development of the mortgage loan and of the government support.

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Tables and figures:

Table 1. The building sector share in national GDP

	2000	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**
Buildings (the million lei)	3.928,7	6.233,4	8.788,9	11.483,1	14.648,7	18.468,4	25.607,1
GDP (the million lei)	80.377,3	116.768,7	151.475,1	197.564,8	246.468,8	288.176,1	344.535,5
Building sector share in GDP (%)	**4,05**	**5,34**	**5,80**	**5,81**	**5,94**	**6,41**	**7,43**

Source: Statistical Yearbook of Romania, The National Institute of Statistics, 2006 and 2007;

Table 2. The net investments performed, by the financing source

Millions lei

	2000	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**
Own sources	9.680,3	15.376,3	20.703,7	24.503,6	30.947,6	41.211,4	52.471,5
Domestic credits	440,8	723,5	2.200,5	3.279,1	4.669,6	4.756,7	6.171,7
Foreign loans	1.496,4	1.724,5	1.307,8	2.971,6	3.885,3	3.299,9	3.095,0
The state budget and local budgets	425,1	1.716,3	1.859,4	2.454,5	2.288,2	2.249,3	5.351,3
Foreign Capital	37,6	103,4	86,6	150,6	213,9	337,1	852,5
Other sources	418,5	775,5	1.015,5	2.291,8	2.865,3	2.711,6	4.949,0
Total	**12.498,7**	**20.419,5**	**27.173,5**	**35.651,2**	**44.869,9**	**54.566,0**	**72.891,0**

Source: Statistical Yearbook of Romania, The National Institute of Statistics, 2006 and 2007;

Table 3. The turnover and the gross profit to the building sector, national, after size, the 2005-2006

Millions lei

	Turnover		**The gross result**	
	2005	**2006**	**2005**	**2006**
0-49 employees	11.699	17.043	1.210	2.250
50-99 employees	3.991	5.946	78	509
100-249 employees	6.850	10.278	510	627
250-500 employees	3.629	4.967	237	340
500 employees and over	5.678	6.820	181	248
Total	**31.847**	**45.054**	**2.216**	**3.974**

Source: Statistical Yearbook of Romania, The National Institute of Statistics, 2006 and 2007

Table 4. The active enterprises in construction at the national level in 2000-2006

	2000	2001	2002	2003	2004	2005	2006
Building enterprises (number)	12.021	14.299	16.567	20.628	25.389	30.372	36.115
Total enterprises (number)	308.064	311.260	315.105	349.061	394.519	433.030	461.812
The share of building enterprises in total enterprises (%)	**3,90**	**4,59**	**5,26**	**5,91**	**6,44**	**7,01**	**7,82**

Source: Statistical Yearbook of Romania, The National Institute of Statistics, 2006 and 2007;

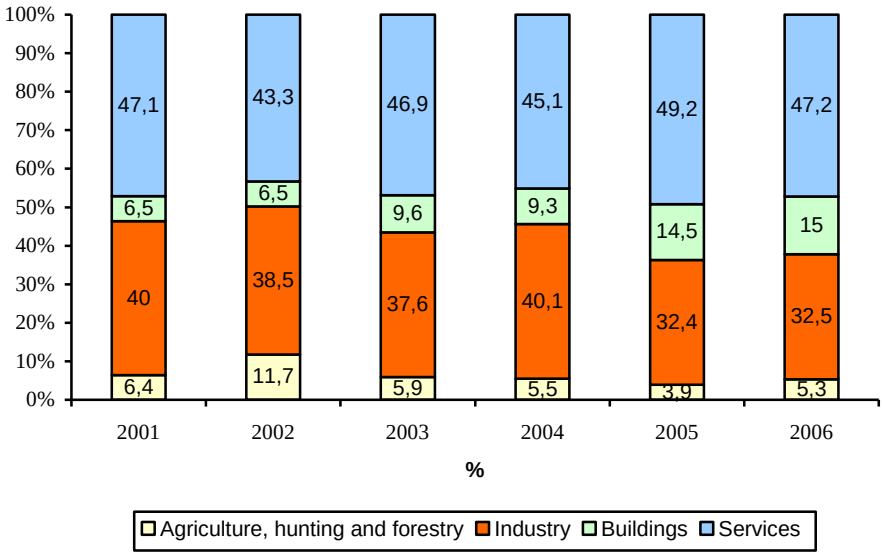
Table 5. The turnover for the building sector, in the Region 2 South-East and the national level, by size in the 2005-2006

Millions lei

	The turnover in the Region 2 South-east		The turnover on total building sector	
	2005	2006	2005	2006
0-9 employees	353	516	4.889	6.580
10-49 employees	547	849	7.619	11.752
50-249 employees	1.176	1.517	11.602	17.069
250 employees and over	1.197	1.336	7.593	9.469
Total	**3.273**	**4.218**	**31.703**	**44.870**

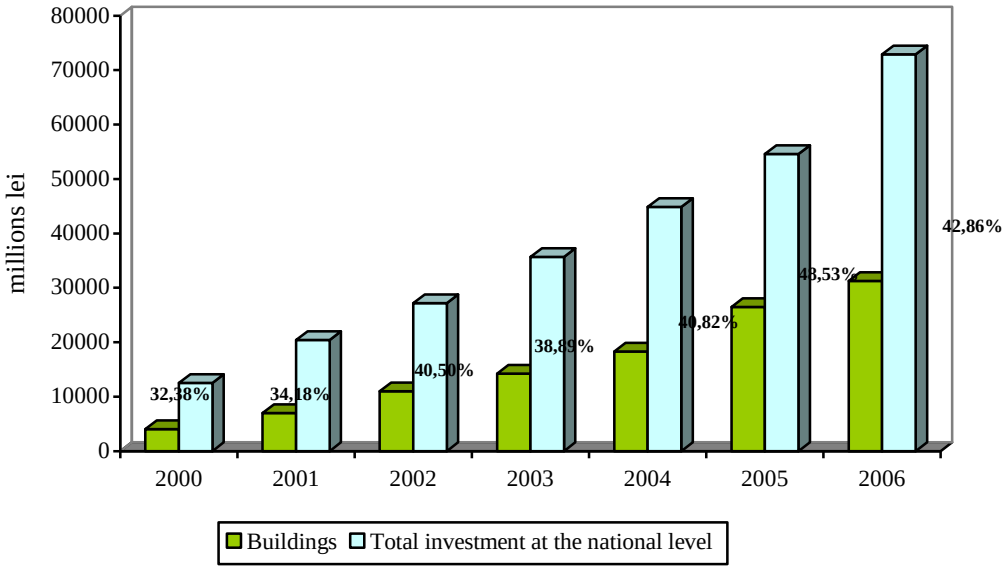
Source: Statistical Yearbook of Romania, The National Institute of Statistics, 2006 and 2007;

Figure 1. The net investment on the main activities of the national economy



Source: Statistical Yearbook of Romania, The National Institute of Statistics, 2006 and 2007;

Figure 2. The share of the net investment in construction in the total investments

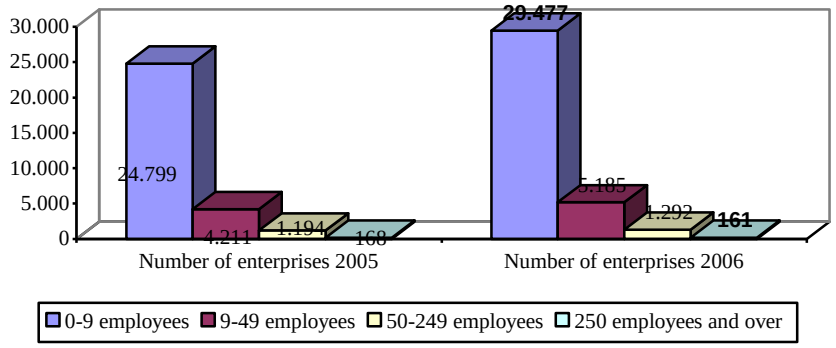


Source: Statistical Yearbook of Romania, The National Institute of Statistics, 2006 and 2007;

Figure 3. The share of average number of employees in the building sector in total employees at the national level

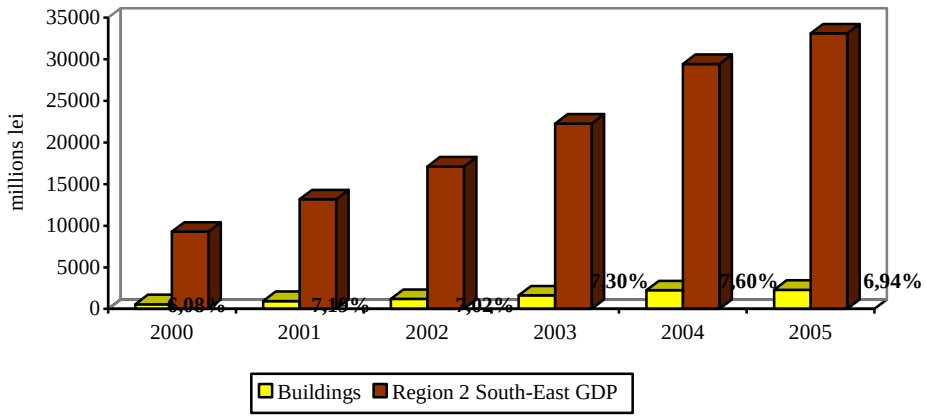
Source: Statistical Yearbook of Romania, The National Institute of Statistics, 2006 and 2007;

Figure 4. The building active enterprises, at the national level, after size in the period 2005-2006



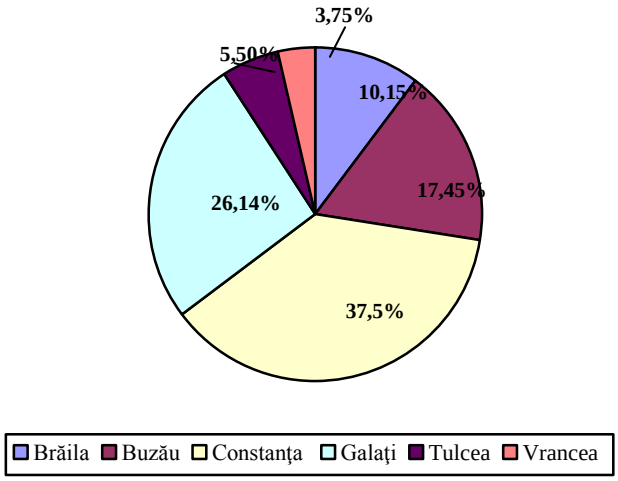
Source: Statistical Yearbook of Romania, The National Institute of Statistics, 2006 and 2007;

Figure 5. The share of the building sector in the Region 2 South-East GDP



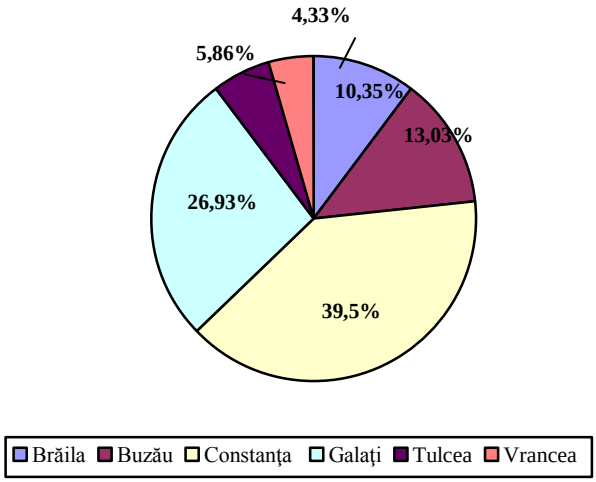
Source: Statistical Yearbook of Romania, The National Institute of Statistics, 2006 and 2007;

Figure 6. The share of the average number of employees in building sector in the Region 2 South-East, the counties in 2005



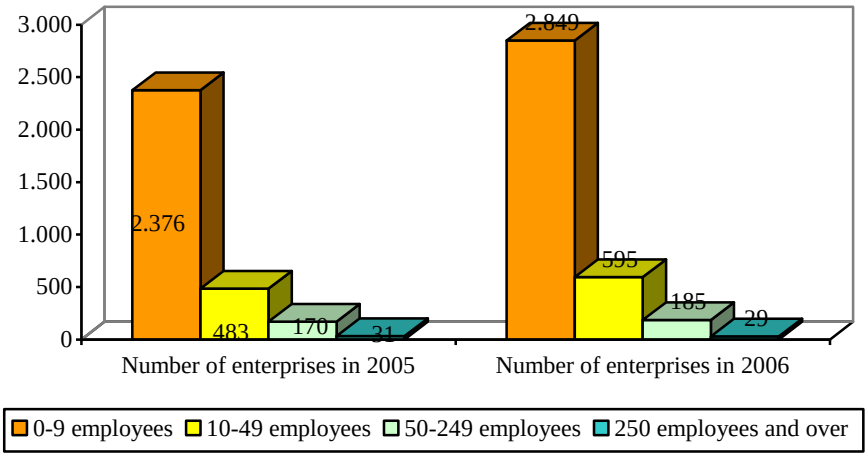
Source: Statistical Yearbook of Romania, The National Institute of Statistics, 2006;

Figure 7. The share of the average number of employees in building sector in the Region 2 South-East, the counties in 2006



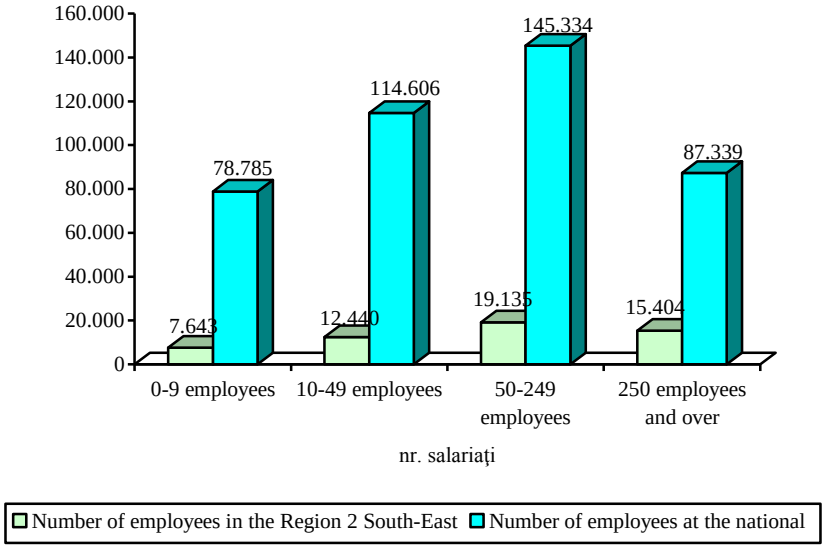
Source: Statistical Yearbook of Romania, The National Institute of Statistics, 2007;

Figure 8. The enterprises active in buildings, in the Region 2 South-East, by size in the period 2005-2006



Source: Statistical Yearbook of Romania, The National Institute of Statistics, 2006 and 2007;

Figure 9. The staff of building enterprises, in the Region 2 South-east, by size in 2006



Source: Statistical Yearbook of Romania, The National Institute of Statistics, 2006 and 2007

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Florin TUDOR

THE EXTERNAL TRANSIT OF COMMUNITY FREIGHT THROUGH A FREE ECONOMICAL AREA. CASE STUDY: GALATI FREE AREA

Abstract

As long as the custom legislation does not foresee regulation in the field, the member states decide the competence of various custom offices situated on their territory and must take into consideration, as much as possible, of the nature of freight and custom regimen under which will be placed.

The fact that an exporter sells the goods under the "ex-works" condition and the foreign buyer becomes responsible for the transport, does not give to the buyer or to the transport company, the right to decide upon the place if carrying out the custom formalities (for export).

The custom authorities must have a firm attitude in applying the rules concerning the competence, established in the community custom Code. However, due to the fact that some cases need flexibility, an export custom declaration presented to a custom is not necessarily to be refused. The custom authority has the obligation to analyze the transaction and to decide depending on the exporter's commercial interest (non) community.

The free areas and free repositories are parts of the custom territory of the Community or enclosures situated on its territory, separated from the rest of the custom territory, for which there is such a disposition which regulates specific domains, benefits from the measures mainly concerning the export of freight, based on placing the freight in a free area or in a free repository.

The transition of freight exported of community origin through a free area, until taking the freight out from the community custom territory, raises some question marks concerning the legality of such operation. We have proposed to analyze all these aspects, having as starting point the Galati Free Area, placed in the near vicinity of the external border to European Union.

1. Export of community commodity performed by an extra-community purchaser

The export regime allows the community commodity to get out of the customs territory of Community. The export supposes the application of exit formalities, including of the trading policy commodity, and, as the case may be, of the export rights. The customs free for export is granted under the conditions that the relevant commodity to get out from the customs territory of Community in the same state as when the export statement was accepted.

The community commodity loose this status, when there are got out from the customs territory of Community, except for the community commodity, which circulate from one point to another of the customs territory of the Community, transiting the territory of a third country,

without any modification of their customs status, in accordance with the procedure of committee.

The customs statement of export, accompanied by any necessary document in view of a correct application of the export rights and of the provisions that regulate the export of relevant commodity, it is deposed:

- at the authorized customs office for the surveillance of place where it is the headquarters of exporter or
- at the authorized customs office for the surveillance of place where the commodity are packed or charged for the export transport or
- at the authorized customs office for the place where it is established the sub-contractor or at any authorized customs office, in exceptional circumstances

Unless the community legislator provided regulations in domain, the member states may establish the competence of different customs offices, located on their territory and have to take into account, as much as possible, the nature of commodity and the customs regime under which these are to be placed.

The customs authority comes the difficult charge to analyze the transaction and to decide depending also by the trading interest of exporter (extra) community. The customs authorities must have a firm attitude in the application of principles regarding the competence, established in the community customs Code. However, because in certain circumstances, in it appropriate to manifest flexibility, an export customs statement, presented at a customs office without competences, does not have to necessarily be refused.

The problems may occur in the case that an exporter sells the good in the "ex-works" condition (franco-fabric) to an extra-community purchaser, who becomes responsible for export and transport. This type of transaction does not give the purchaser or the transport company that represent him, the right to decide on the place of fulfillment of the customs formalities (of export).

The customs authorities must have firm attitude in the application of rules regarding the competence, established in the community customs Code. Normally, especially in the case of water transport, the customs formalities of export must be performed at the authorized customs office, with the surveillance of place where the commodity is packed or loaded for the export transport.

Therefore, we believe that the role of the community seller does not have to limit only to the properly delivery of commodity, but he has to depose the reasonable diligence to facilitate the extra-community purchaser

the procurement of all the necessary authorizations for export, indicating him, also, the customs office of export.

Although, in certain cases, it is appropriate to manifest flexibility, a customs statement of export, presented at a customs office without competences, does not necessary has to be refused. The customs authorities comes the charge to analyze the transaction and to decide on the trading interest of the (extra) community exporter.

This decision of the customs authority would allow the extra-community purchaser to be able to perform the export at the customs office, which would disadvantage him from the economical, or even territory point of view.

2. Re-entering of exported commodity in the community space

Once a commodity definitively got out by export from the European Community, it may return in the European space, according to art. 844 align. (2) of the Regulation of appliance of the community customs Code, under the following circumstances:

(a) the commodity that return in the customs territory of Community, as consequence of a damage occurred before the delivery to the addressed, either to the commodity itself, or at the way of transport, in which these have been transported;

(b) the commodity, initially exported for the purpose of consumption or sale within a fair or of another similar manifestation, which have not been therefore consumed or sold;

(c) the commodity that could not have been delivered to the addressee due to his natural or legal incapacity to honor the agreement by which the export has been performed;

(d) the commodity that, due to natural, politic or social events, could not have been delivered to the addressee or which did arrive to him after the obligatory date of delivery provided in the agreement in which the export has been performed.

In case that a commodity reenters in the community space, in other situations than those provided by the community legislator, it can even put the problem if the export has not been made for the purpose to obtain certain restitutions or other amounts to export.

Even in these circumstances, which we do not consider limitative, the customs authority may take the decision to allow the re-entering of exported commodity in the European space, on a temporary period, under

customs surveillance, in the case that the owner of exported commodity requires such an operation.

3. Transit of exported community commodity in Zona Libera Galati

The free customs area represents the most complex form of the suspend customs regions.

The location of area in Galati is restricted to a land surface, limited by natural or artificial borders, and located in the proximity or inside a transport way (maritime or fluvial port, railway), by which a large volume of export and import commodity is transited.

The legal status of area is precisely regulated by laws and different normative acts, which allow the access of commodity in liberalized customs regime and without restrictions of quantity, under the circumstance that they not be prohibited.

The working object of the area is constituted by the commodity that may be introduced within it, either especially the re-export, or for the purpose of a manufacturing by which to result other commodity for export.

According to art. 166 of the community customs Code, the free Areas and free antre-storages take part to the customs territory of Community or are located on that territory and separated by the rest, in which:

(a) the non-community commodity are considered, in the application of import rights and the measures of trading policy regarding the import, as not being situated on the customs territory of Community, as there are neither put in free traffic, nor placed under other customs regime, nor used or consumed in other circumstances than those provided in the customs regulations;

(b) the community commodity for which there is such a clause in accordance with the community legislation that regulates specific domains, benefit by the measures connected usually by the export of commodity, based on their placement in a free area or a free antre-storage.

In accordance with art. 169 and the following, of the community customs Code, both the community commodity and those which are non-community may be placed in free areas, if these are designed for the area. Despite all these, the customs authorities may require that the commodity that present a risk or could damage other commodity or which, by other reasons, need special conditions, or placed in especially endowed precincts, to cover them.

In the case that, for a commodity exported from the Community, with the destination Moldavian Republic, water transported, it is reasonably required the customs regime of external transit, we believe that the customs authority may decide the discharge and conditioned transition through Zona Libera Galati of the commodity.

3. Proposed customs procedures

In accordance with art. 176 align. (1) of the community customs Code, all the persons that develop an activity that implies either the storage, processing or transformation, or the sale or purchase of commodity in an area or a free antre-storage, must take the operative evidence of commodity, in a form approved by the customs authorities. The commodity are registered in the operative evidence, immediately when these are brought to the headquarters of the relevant person. The operative evidence must give the possibility to the customs authorities to identify the commodity and register their movements.

When the commodity is transported in a free area, the documents regarding the operation are kept to the disposition of customs authorities. The storage of commodity on short term, in such transportations is considered to take an integrant part of the operation.

Specifically, in accordance with art. 22 of the Order of Vice-president of the National Agency of Fiscal Administration no. 7394 of 20 of July 2007, the development of an activity in a free area or in a free antre-storage is conditioned by the prior approval by the customs authority of control of the operative evidence of commodity.

When the operator uses for holding the operative evidence of a common informatics system, administered by the administration of free area, previously approved by the customs authority, he has to specify this aspect in the request.

The operative evidence is presented at the request of control customs authority. Also, the documents regarding the operative evidence is maintained together with it, and it is presented at any request of the control customs authority.

The approval of the operative evidence is issued in writing by the control customs authority of the free area.

In the appliance of art. 803 align. (2) of the Regulation of Commission (CEE) no. 2.454/93 of establishment of appliance decisions of the Regulation of Commission (CEE) no. 2.913/92 for institution of the community customs Code, by granting of the necessary warranties for the

application of provisions regarding the free areas or the free antre-storages, it understands that the solicitors:

a) do not have rest budgetary obligations representing interests, fees, contributions, including the individual contributions of employees and any other budgetary incomes, except for those installment and/ or re-installment to payment, as well as of those suspended under the lawful conditions;

b) do not register debts to the customs authority;

c) they are not in state of insolvency, are not in a reorganization or legal liquidation state and do not figure in the special evidence and/ or in the list of inactive contributors;

d) they hold an operative evidence, which allows the identification and pursuance of the flow of commodity, considered as sufficient by the control customs authority.

By the approval decision, there are established the obligations that come to the operator in organization of the operative evidence. Among these, one will regard also to the statement of an address of the operator, where it will be held the evidence and the responsible person for holding of this evidence.

Once accepted this procedure, normally, the customs authority certifies the possibility of introduction in Zona Libera Galati of the commodity that make the object of the previously described transaction.

In accordance with art. 46 of the community customs Code and art. 69 align (1) of the Customs Code of Romania, the commodity are unloaded or transported from the way of transport, only by the allowance of customs authority in the places appointed or approved by him. The customs authority, which has the obligation to take into account the objective conditions of transportation, will grant the allowance of transportation, also imposing a certain term of finalization of the operation.

On our opinion, the customs authority must take into account the effective getting out of commodity from the Community, therefore it has to be taken into account the maximum term of 90 days, decided by law.

In which regards the necessary documents presented to the customs authorities in the free area, in accordance with art. 60 of the Customs Code of Romania, the commodity introduced on the customs territory of Romania make the object of a summary statement, except for those loaded in the ways of transport, which pass, without stopping, through the territory waters or through the customs space.

The summary statement is deposed before the commodity be introduced on the Romanian customs territory.

In certain cases, and depending on certain types of transport of commodity, by the way of transport or by the economic agent, or in accordance with the international agreements, which provide specific decisions in the security domain, by the customs regulations, there are established the following:
a) the limit term, until which it is deposed the summary statement, before the commodity being introduced on the Romanian customs territory;
b) the derogation modalities from the limit term, provided at letter a) and by its modification;
c) conditions in which it may renounce to the summary statement, or in which it may be adapted.

Exceptionally, in accordance with art. 170 of the community customs Code, corroborated with the provisions of art. 57 align. (1) of the Order 7394/2007, the commodity that enter in the free area do not have to be presented to the customs authority, nor they necessitate the deposal of a customs statement.

The commodity are presented to the customs authorities and are subject to the customs formalities, recommended only in case that:

(a) it has been put under a customs regime, which is concluded when entering in a free area; yet, when the relevant customs regime allows the exemption by the obligation to present the commodity in the customs, such presentation is not required;

(b) it has been placed in a free area, based on a granting decision of reimbursement or remission of the rights of import.

Concluding, on our opinion, the commodity may enter in the free area based on the transport and trading documents, which accompanied the international transport, conditioned by the following items:

- prior approval by the customs authority, of the operative evidence and
- granting of the customs permission for transportation (unloading/ loading) together with the arrival of ship in Galati port, when the customs authority will also grant a term for termination of the required transportation operations.

In accordance with art. 39 of the Order 7394/2008, the common storage and handling operations, defined at art. 109 align. (1) from the Regulation of Council (CEE) no. 2.913/92 of institution of the community customs Code, performed by the operators in free areas, are excepted from the warranty of customs rights of import, in accordance with art. 166 letter a), of the same regulation.

In which regards the getting out of goods from the territory of free area and from the customs of Romania, in accordance with art. 38 align. (1) of community customs Code, the commodity introduced on the customs territory of Community are transported with no delay by the person who bring them in the Community, on the specified route by the customs authorities and in accordance with their instruction, in the case that these exist in a free area, when the commodity are introduced in that free area, directly on a maritime route.

Any person who assumes the responsibility for the transport of commodity, after it has been introduced on the customs territory of Community, among others, as consequence of transportation, becomes liable for the observance of liability provided at the previous alignment.

In such circumstances, we appreciate that the unloaded commodity have to be got out of the country as soon as possible.

The operation being atypical – because the rule at the getting out from the free area of community commodity is represented by the export or re-export (art. 117 of the community customs Code and art. 57 align. 1 of the Order 7394/2007) – we believe that the specific solution adapted to the specific circumstance, for the vehicle transport, is represented by the getting out of commodity from the free are, with the TIR carnet, the slat taking the place of transit, until the effective getting out of commodity from the European Union.

Each and every way of transport will be accompanied by a transport document of type CMR, in accordance with the auto international transport Convention for commodity.

Also, we recommend that for each and every transport, to be concluded a trading document, by which to result effectively the loaded quantity and the value of commodity. It must be taken into account, here, the fact that the value of commodity per measure unit, will not bear modifications in the free area.

For the development of operations proposed, we recommend you to take into account certain information at the conclusion of the following:

- The external invoice has to be unique. It accompanies the transport from the point of departure until the final place of destination. According to the legislation in force, in Zona libera Galati, the commodity will not be re-invoiced.
- The cargo-manifest (transport document) issued at the departure point has to contain obligatory mentions regarding the final destination (The Moldavian Republic), the intermediary destination (Zona libera Galati).

- The Bill of Lading will contain specific mentions, similar to those of the transport document.

4. Conclusions

In the circumstance of an occasional transaction/ deliveries, or when it is invoked justifying the non-knowledge of Community legislation, may be accepted the statement. On the other hand, where these irregularities repeat and the operator or the agent cannot offer a pertinent reason for the non-observance of indications given by the customs office, an export customs statement, presented at one of the customs offices provided at art. 791(1) RVC can be refused.

Despite all these, for the purpose of training of operators, there have to be taken measures with temporary character for the observance of rules. These may be:

- Also of another customs office in respect of art. 161(5) CVC, as for example that where the goods are loaded/ unloaded;
- A more strict surveillance (in accordance with art. 791(1) RVC, of the second paragraph)

The purpose of establishment of such measures is to establish the solicitor that it is in his interest to fulfill the export formalities or to request its fulfillment at a customs office of which area of competence has its headquarters.

On the other hand, we consider that the customs authority has the role to evaluate each and every operation and not to refuse immediately the deposal of customs statement of export at another customs office than the competent one, if the request of operation is justified in the respect of Working procedure of the Customs Code Committee.

Not the last, without stressing the considerents and advantages of development region, we believe that Zona Libera Galati may constitute an important economic node between the West and East, especially for the community commodity exported and transported by water and transposed in railways or road ways of transport, to the destinations of the ex economical space in the east on small parts and not on large lots of commodity.

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THEORETICAL ASPECTS CONCERNING THE IMPLICATION OF THE PUBLIC-PRIVATE PARTNERSHIP IN THE SECTOR OF SOCIAL SERVICES

Abstract

The private sector makes its presence felt by closing partnerships with the public sector, and in this manner, contributing greatly to solving different community issues. The public-private partnership has known lately a surprising expansion in providing many forms of public services, including social services. This progress brought a series of benefits to the private and public institutions as well as to the entire system of social assistance. Based on the principle of voluntary cooperation, the public-private partnership represents the conviction of public and private actors that they will benefit from this kind of approach much more than if they act alone.

This work offers some theoretical details on the importance of such cooperation in the field of social services, and on the concrete effects that have resulted and can result, as a consequence of this collaboration.

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The term of private public partnership is more and more used when it comes to public services, utilities provision and development of public infrastructure. During the last decades, private public partnership has become a basic tool in public policy. Each country, depending on the existing context, seeks, by using this type of partnership, to obtain multiple

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benefits by focusing on specific priorities: community development, combating social exclusion, involvement of civil society in order to satisfy public needs and others.

In the broadest sense this term means "any form of voluntary cooperation between public and private actors."[1] Synthetically, the concept of private public partnership defines any form of collaboration between the public and private sectors. The way in which these partnerships manifest themselves legally varies from one legal system to another. Thus, in legal systems based on French law, we meet, as a manifestation of private public partnership, particularly the concession contract or the public works contract. It is hard to give a generally accepted definition of the private public partnership. Private public partnership has been used for the first time in Britain and the U.S., and then it spread to other states as examples from the first two have proven its practical results.

The concept of private public partnership is perceived differently in the specific literature, depending on the perspective from which it is viewed. Thus, in the American and the Anglo-Saxon perspective, the PPP is an arrangement between the public and the private sectors, in which are performed services of public interest, which were supplied until that moment by the local public administration. The main features of such a partnership are the sharing of investment, risks, responsibilities and benefits between the two partners.

In French doctrine, there is a large emphasis on the contract itself, this form of collaboration between the public and private knowing greater rigidity.

Public-private partnership is a way of introducing private management in public services, via a long-term contract between an operator and a public authority. The basic, public-private partnership provides the public service in part or in whole, depending on the private funds attracted and calls upon the know-how of the private sector.[2]

More recently, in Romania there is a growing interest for cooperation between the public and private social policy. Increasing the availability and capacity of the private sector to take a number of responsibilities of the public sector in the social field has resulted in the multiplication of efforts to accelerate achievement of the planned objectives

[1] PPPUE Working Paper Series Volume II: Joint Venture Public-Private Partnerships for Urban Environmental Services, NY 2000, http://www.undp.org/pppue

[2] "Guidelines for Public Private Partnerships for Infrastructure Development" United Nations Economic Commission for Europe, www.unece.org

and projects by reducing overall costs and improving quality of social services.

Social services could be defined as representing all measures and actions designed to meet the social needs of individual, family or group, in order to overcome situations of difficulty, reserve autonomy and protection of the individual, prevent marginalization and social exclusion and promote social inclusion. Social services are provided by the local public authorities and by natural or legal persons, public or private, in terms of legal norms.

Private public partnerships in the social field include various forms of cooperation generated by the dynamism of social development, the many particularities, contractual arrangements and the latter should be regarded as a viable option, among other traditional models existing in the provision of social services.

The starting point in developing various forms of private public partnership in the social field is one of the most important principles of social assistance: social partnership as a means of implementation and evaluation of measures of social welfare. Of particular relevance for a successful partnership is its implementation in strict accordance with some principles of social assistance: social solidarity, the universality of entitlement to social assistance, ensuring the accessibility, flexibility of measures of social assistance and bringing them into line with real needs of person or family in need, recognition of independence and personal autonomy, respect for human dignity.

Social assistance is a component of the national system of social protection, in which state and civil society commit to prevent, restrict or remove the temporary or permanent effects of events considered as social risks, which can generate social exclusion or marginalization of persons and families in difficulty[1], which by their own efforts and resources are not able to improve the situation, by helping them to develop their capacities and skills for appropriate social functioning for social integration. Aid is granted usually for a limited period of time until the persons in risk find their economic s, social, psychological resources, in order to lead a normal life, independently.

The objective of social assistance is to prevent an eventual exclusion of people from social life and to reduce poverty. In a broader sense, social assistance means any financial benefit or non-contributing social service, financed from general taxes or special social funds. In a more narrow sense,

[1] Zamfir Cătălin, Zamfir Elena, Pentru o societate centrată pe copil, Ed.Alternative, , Bucharest 1997, p.78

the concept of social assistance does not include all universally defined benefits and social services, defining only the totality of institutions, programs, measures, professionalized activities and services specialized on protecting individuals, groups or communities with special problems, which are temporarily in need.[1]

From this perspective, private public partnerships in the social field will contribute to the functions that satisfies social assistance in the modern society and which concerns:[2]

- identify the segment of population that is the subject of welfare
- diagnosis of socio-human problems that vulnerable individuals or groups at high risk may face
- identify different funding sources to support these programs
- development of services aimed to prevent disadvantaged situations.

Any private public partnership will respond in the most effective way to the need for social welfare of the beneficiary, identifying resources needed for a normal social functioning, outstanding effort by the person concerned and which will include:[3]

a) the need arising from lack of economic resources - a standard of living under the acceptable minimum standards, lack of housing, lack of access to healthcare or education;

b) the need arising from severe limiting of personal capacities to leading a normal life - addiction to alcohol or drugs, problems of integration in family, school, work, community, difficulties in relationship with others.[4]

Social services intervene in two distinct types of situations: in emergencies, which combine, in this case, emergency financial resources with institutional and human specialized resources, and in situations of chronic problems, coupled with scarcity of personal capacity to overcome the difficulties.[5]

By their very nature, as an instrument for individualized assistance, social services are highly focused, ensuring efficient use of social resources

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[1] Zamfir Elena (coordinator), Politici Sociale . România în context European, Ed.Alternative, Bucharest 1995, p.87

[2] Zamfir Cătălin, Zamfir Elena, Pentru o societate centrată pe copil, Ed.Alternative, Bucharest 1997, p.94

[3] Zamfir Elena (coordinator), Politici Sociale . România în context European, Ed.Alternative, Bucharest 1995, p.73

[4] Luana Miruna Pop, Dicționar de politici sociale, Bucharest, 2002

[5] Idem

in supporting certain target groups.[1] From this perspective, social services may be: primary services aiming to prevent or limit situations of vulnerability or difficulty which may lead to marginalization and social exclusion and specialized social services, which refer to some particular issues and are oriented towards recovery and rehabilitation, re-education and social mediation, institutional advice, in centers for information and advice or any other measures and actions aimed at maintaining, restoring or developing individual capacities to overcome a situation of social need.

Support services may be granted to users in their natural life environment, in the middle of the family, at home, at school, at work or in specialized institutions of social assistance, counseling or recovery centers, which represent a protected place, of normal life, to people who can not temporarily or permanently carry out their existence in a natural social environment.[2]

Private public partnership in the social field will lead to:

a) preventing or reducing of dependency and alleviate its social consequences;

b) maintaining a decent life level of the person or family;

c) granting of additional support, temporarily or permanently, through benefits and social services.

Contracting social services instead of producing them by local public administrations is considered a formula for success in applying the principles of private public partnership in the social field and reflects a change in approach of public organizations, from a hierarchical perspective to a competitive, market one, in which the roles of the two parties involved are clearly separated and the property rights explained. As for the development of the application of private public partnership in the social field, we are witnessing an increase of the social contract forms.[3] This is a process in which public institutions in stead of hiring its own staff and infrastructure in order to support the supply of social services identified as necessary, they support these services by contracting, through an auction, a private agent, which will provide the best quality-cost report. In some cases, public institutions may also participate in the auction, but they have to respect the same competitive conditions imposed to private actors.

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[1] Cătălin Zamfir, Elana Zamfir, Pentru o societate centrată pe copil,Bucharest,1997, p.100

[2] Cătălin Zamfir, Elana Zamfir, Pentru o societate centrată pe copil,Bucharest,1997,p.99,

[3] Mihaela Lambru, Ioan Mărgineanu, Parteneriat public privat în furnizarea de servicii sociale,Bucharest, 2004

The contract is performed in several consecutive stages, all of which being equally important, and undermining the importance of one of them can generate different kinds of difficulties in implementing the contract.

Thus, the first stage concerns the evaluation of options for an effective private public partnership. At this stage, local government identifies services that match best to be implemented through private public partnership, and the most suitable private partner. In this regard, a study of opportunity is made that will aim to assess the management of existing services in order to identify areas not covered and to develop new services or to improve existing ones. Through this study, at least the following components should be reached: an inventory of existing standard services in relation to the needs of beneficiaries, estimated costs necessary for maintaining a service. Finally, the study of opportunity must identify the most appropriate services that could be subject to any private public partnership.

A second step concerns the preparation for providing the service or the project through PPP. This involves preparing for a successful partnership. Activities will include the exact definition of the service to be provided, the selection of preferred methods of choosing a private partner based on assessment criteria, which will be defined and determined, and the recipient of service and establishment of the communication strategy and public involvement.

Stage three will include specific procedures for selecting the partner. During this phase, the local competent authority gives invitations to submitting proposals on the basis of an auction, evaluates the proposals received, and selects the preferred proposal and the most suitable candidate based on competitive tender. Competitive dialogue is the procedure through which any private provider of social services is entitled to subscribe for developing an alternative service.

Stage four will include specific procedures for signing the contract. Once the preferred partner is selected, both parties initiate the procedure of signing the contract for the provision of social services.

The social services contract defines the legal act representing the will of the two parties, concluded between the public welfare, as the contracting authority and a private accredited provider of social services, as a supplier. Thus, on the basis of the contract of service, the local county social service transmits to a private accredited supplier for a period of time and under the law, the right and obligation to manage and develop social services.

At contract expiry the private provider of social services is required to surrender to the contracting authority, free of charge, in full ownership,

free of any task, including investments. By contracting services will be transferred the right and obligation of management of the service aiming at protecting a class of beneficiaries, and the responsibility for the granting of social services from County Councils and Local Councils, to private providers accredited which act on their own risk and responsibility in the interest of the beneficiary, in order to increase service quality.

The contract will necessarily indicate:

- the contract object, which is the provision of social services according to specifications, - the nature of services offered and their costs, the period and the conditions of supply, compliance with quality standards established for each type of service;
- rights and obligations of the parties will include the action of the contracting authority, the public service competent for providing the social assistance services and the provider of the social services, the private authorized body, accredited under the law;
- the beneficiaries of the contract, which are natural persons, beneficiaries of the services covered by the contract;
- the procedure for administration of funds incurred by the supplier of the contracting authority, funds designed for the establishment and administration of the service - which represents the subject of the contract;
- the coordination, management and control of the activities of that service;
- penalties imposed in terms of inadequate quality of the social services.

Contract is signed only if standards are respected, namely the technical regulations and other similar documents provided in the specifications and in the technical proposal. The technical and the financial proposals are the proposal which represented the initial offer for the signing of the contract, as they have been accepted by the contracting authority.

Specifications obligatorily include:

- the purpose of the social service to be contracted;
- the way in which the service contracted by the private provider of social services;
- the goals of the contracted social service;
- physical indicators – the unit of measurement, efficiency indicators, results indicators;
- general activities on the specific of the social service, the administration, development or establishment of the social service contract (indicative)
- staff and staff training;
- reports and progress graphic of ongoing activities.

Social services will be provided in accordance with specific quality standards, regulated by laws. Specific conditions for the provision of social

services may be presented, e.g.: social services supply, with compliance of the agreements on the social activity concluded earlier by the contractor, compliance of the local social assistance strategies, priority to the social services supply to the beneficiaries of the territorial administrative unit in question ; social services supply free or charged.

The fifth step concerns the implementation and monitoring of the contract. After approval of the contract by both parties the implementing of the contract begins. The activities of local public administration includ monitoring performance and ensuring compliance of the private partner with the contract. Thus, the responsibilities are not just to allocate the funds required monthly, but also to check the use of the subvention, to control activities and to provide specialized assistance to associations and foundations.

The monitoring, assessment and control activities have the following main objectives:
- improving quality and increasing the efficiency of social services provided by suppliers; - compliance with quality standards;
- methodological guidance and coordination of activities of the social assistance public service from local and county level, concerning the granting of social services;
- to ensure the social rights of the beneficiary;
- collection of data referring to the situation of the beneficiaries, providers and types of services.

Monitoring, evaluation and control of social services is achieved by carrying out activities aiming at quality service, at satisfaction of the recipient; at quality standards, degree of adaptation of the provided social services to the beneficiary needs, staff performance, required resources, cost of services, and compliance with other regulations related to social services. To achieve an effective activity of control and monitoring, contracting authorities have the right to receive reports from the supplier regarding the supply of social services covered by the contract and to monitor the supply of social services.

Monitoring the process of awarding grants and constant dialogue between the contracting authority and non-governmental organizations, private providers of social services, leads not only to improving the quality of the service, but also to improving the legal policy on the social contract, designed to facilitate the process of request and grant allocation and use of funds received. We mention that monitoring and evaluating performance and results in the field of social work require a high level of expertise, are time and financial resources consuming. These difficulties arise from the fact that many types of social services are difficultly observable and

measurable. We are dealing with complex services for which the state may have a certain level of expertise, but often it is necessary for that expertise to be contracted from the market.

Private public partnership in the supply of social services provides a number of advantages for both the public and the private institutions and for the whole system of social assistance. Thus, long-term private public partnerships in the social field develops a competitive market of social services, where it exists competition between public and private organizations, and between the private entities that provide social services, allowing concentration of effort of the public sector on the development of policies and general management strategies of social services, leaving implementation to the private organizations. It also increases the impact of social services programs supported by the state budget by attracting additional resources. Partnership relations generate improvements of the management of public institutions through the regulatory standards of quality of social services, they allow diversification of social services, leading to increased number of beneficiaries and contribute to higher quality services. However, for organizations and beneficiaries, they enable customers to access public funds, thus ensuring continuity in the supply of social services provided by NGOs, which enhances the credibility of private initiatives for the accumulation of fonds. In recent years have improved steadily the size and quality of public-private partnership[1], but a lot remains to be done to fully exploit the potential of partnership existing in Romania.

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