Current Issues in Business Law

Editors:

Kristine Strada-Rozenberga

Activity

Kristine Strada-Rozenberga, Dr.iur., is Professor at the Faculty of Law of the University of Latvia, teaching Criminal Procedure Law, Evidence Law, and Law of Administrative Ofencces. With the decision by the Latvian Council of Science has been appointed as an expert in the branch of science – juridical science. Former Dean of the Faculty of Law, University of Latvia. Head of the Department of Criminal Sciences. Sworn advocate. The author of more than 80 scientific publications, including a monograph. Has participated in the implementation of more than 15 research projects, also international. Has reported on topical issues in criminal procedure law at more than 40 conferences and seminars, of which 20 have been international scientific conferences. Participant in European Criminal Law Academic Network, latvian contact point (since 2007), Member of Expert Group on EU Criminal Policy (2012-2016), Legal Science Institute of the Faculty of Law, University of Latvia – head of the scientific councel (since 2018), New Journal of European Criminal Law - editorial board member (since 2013).

Publications

Kristine Strada-Rozenberga is author of numerous books and articles, including *Victims and their Criminal Procedure Statuss un Law Enforcement Practicies in Latvia* in „Journal of the University of Latvia. Law", Riga, University of Latvia, 2014; *Juridiskā persona un nevainīguma prezumpcija kriminālprocesā (Legal entity and presumption of innocence in criminal proceedings)*, 2016; *Piespiedu ietekmēšanas līdzekļu juridiskajām personām piemērošanas process un tā aktuālās problēmas Latvijas kriminālprocesā (The process of application of coercive measures to legal entities and its current problems in Latvia's criminal proceedings)* in: „Efficiency of law in postmodern society: collection of articles of the 73rd scientific conference of the University of Latvia", 2015; *Mantisko jautājumu pierādīšana un tās aktualitātes kriminālprocesā (Proof of Material Issues and Its Current Issues in Criminal Proceedings)* in „Foreign Investments: When Rights Interact: A collection of articles from the 74th Scientific Conference of the University of Latvia", 2016.

Maria do Rosário Anjos

Activity

Maria do Rosário Anjos is Professor in public law (Administrative Law; Tax Law and European Law); Coordinator of the Master's Degree in Legal Studies, in IP-MAIA; Professor in law in Faculty of Law – O'Porto Lusófona University; President of the Technical and Cientific Council of IPMAIA – Polytéchnique Institute of Maia; Investigator in Capital, Labor, Tax and Trade at Portucalense Institute for Legal Research - IJP. She participated in research projects in the field of Legal Science in Portugal and abroad; Member of the Committee in Action Cost "Stops&Search"; Investigator in Group de Investigación en Derecho Publico Global, Faculty of Law – University of A Coruña, Spain. PhD in Special Public Law – Faculty of Law – A Coruña University - Spain, 2011; Master in Public Administration – Minho University – 1998; Law Degree in Portuguese Catolic University – O'Porto, 1989; Lawyer – Portuguese BAR Association member since 1991; Trainer of the internship center of the Portuguese Bar Association, since 2011; Arbitrator in Administrative and Tax Law, in CAAD – "Centro de Arbitragem Administrativa", since 2011; Member of the Portuguese Tax Association and the International Tax Association.

Publications

Maria do Rosário Anjos is the author of several chapters of books and scientific articles with peer review, namely: (2018) *Students in higher education as consumers of services provided by the University. New Trends and Issues Proceedings on Humanities and Social Sciences*; (2018) *The travel consumer*. New Trends and Issues Proceedings on Humanities and Social Sciences. [Online]. 5(2), pp 136-141; (2018) *Arbitragem Administrativa e Tributária: a solução adotada em Portugal*, Aceite para apresentação oral e publicação no Livro de Atas do II Conditrans – Congreso de Derecho Transnacional – Universidade de Salamanca – Spain; (2017) *Arbitration in foreign investment: A meeting point between investor interest and social progress*; (2017) *Justiça administrativa e tributária: o recurso à arbitragem administrativa e tributária* in O Estado da Justiça (pp. 121-143). Edições Universitárias Lusófonas; (2016) *Serviços de Interesse Económico Geral, Concorrência e Garantias dos Cidadãos Usuários - Um estudo à luz do Direito Comunitário*. Publismai; (2016) *Il contratto di engineering e la risoluzione delle controversie: l'arbitrato* in Studi sul c.d. contratto di engineering by Andrea Caprara - Mauro Tescaro, (pp 437-452); *Collana del Dipartimento di Scienze Giuridiche dell' Università di Verona*, Edizioni Scientifiche Italiane; (2016) *Abuso de Confiança Fiscal; Crime Corporativo, Crime Empresarial, Crime Fiscal; Fraude Fiscal* in Dicionário Crime, Justiça e Sociedade, Edições Sílabo, (p.8-10; 115-116; 122-124; 124-125; 225-227).

Kristine Strada-Rozenberga (ed.)
Maria do Rosário Anjos (ed.)

Current Issues in Business Law

Contributions to the 8th International Conference
Perspectives of Business Law in the Third Millennium,
November 16, 2018, Bucharest

ADJURIS
International Academic Publisher

Bucharest 2018

ADJURIS – International Academic Publisher
This is a Publishing House specializing in the publication of academic books, founded by the *Society of Juridical and Administrative Sciences (Societatea de Stiinte Juridice si Administrative)*, Bucharest.
We publish in English or French treaties, monographs, courses, theses, papers submitted to international conferences and essays. They are chosen according to the contribution which they can bring to the European and international doctrinal debate concerning the questions of Social Sciences.
ADJURIS – International Academic Publisher is included among publishers recognized by **Clarivate Analytics (Thomson Reuters)**.

ISBN 978-606-94312-5-2 (E-Book)

Editing format .pdf Acrobat Reader
Bucharest 2018

www.adjuris.ro
office@adjuris.ro

Preface

Editors

Professor ***Kristine Strada-Rozenberga***

Faculty of Law, University of Latvia

Professor ***Maria do Rosário Anjos***

Faculty of Law, Lusófona University of Porto

This volume contains the scientific papers presented at the Eighth International Conference „Perspectives of Business Law in the Third Millennium" that was held on 16 November 2018 at Bucharest University of Economic Studies, Romania. The conference is organized each year by the Department of Law at Bucharest University of Economic Studies together with the Society of Juridical and Administrative Sciences. More information about the conference can be found on the official website: www.businesslawconference.ro.

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

- *National and International Business Law.* The papers in this chapter refer to the relationship between environmental protection and economic growth from the perspective of sustainable development, complex legal institutions with relevant effects on professional activity, features of non-executive directors' fiduciary duties, the content and organization of statutory and extrastutory conventions, the powers and the duties of the fiduciary, trader's accounting books as proof in the civil litigation in Republic of Bulgaria, legal significance of commercial books under Bulgarian law, free movement of capital and payments in the European Union, the result of successive regulations, implementation of the Agreement-Based EU Single Market System and its implications if applied in ASEAN, in international business disputes concept of claiming and awarding damages for breach of contract, the value of privacy - what does the personal data mean to the data subject and businesses, abuse of a dominant position.
- *Business and Corporate Criminal Law.* This chapter includes papers on: about the material object of offenses in the field of arms and munitions in the criminal law of Romania and the Republic of Moldova, commer-

cial companies in the criminal trial, corruption - aggravated cause of violation of the legal order, special or extended confiscation during the criminal trial in Romania.

- *Labor Law in Business Context.* The papers in this chapter refer to performance and collective dismissals – an evaluation of the legal practice on the subject matter, teleworking, the role of the International Labour Organization (ILO) in protecting workers' rights, issues on discrimination in matters of remuneration, good faith in exercising the work reports by the contract personnel in the public sector.

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

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

Table of Contents

NATIONAL AND INTERNATIONAL

BUSINESS LAW

The Relationship Between Environmental Protection and Economic Growth from the Perspective of Sustainable Development

Professor **Lucreția DOGARU**[1]

Abstract

The use of the natural resources of the environment for the purpose of economic development, ignoring the maintenance of ecological equilibrium and triggering irreversible negative environmental phenomena, has generated, at the level of theory and also at the level of environmental policies, disputes, concerns and initiatives. Outlining the idea of economic development in close connection with that of sustainable development of the environment was aimed at identifying solutions and setting objectives to solve the complex problems that concern the quality of life and the environment. Starting from the concept of sustainable development of the economy, we try to prove that the exploitation of resources and the quality of the environment implies a gradual process imposed by the existing realities, but also by the objectives of the strategies or policies of environmental protection at national and external level. In this paper we will show that the new orientation of the economy, namely towards a sustainable development, requires the realization of a process of economic growth that must take place in the conditions of ensuring the social welfare of the population, but which must be correlated with ensuring the preservation of the environment and of its natural resources. The basic idea that must be retained is that the environmental protection is not only necessary but is also extremely important, such as is, as well, the economic growth, as it must be seen as a way of supporting human development which, from a sustainable standpoint, has at the center of its priorities, the human being. The present study attempts to demonstrate that the solving of economic problems involves taking into account ecological problems that can generate negative consequences for the quality of human life and of the environment, so that any economic decisions must be made in accordance with the ecological aspects.

Keywords: *economic development; environmental protection; sustainable development; economic decision-making, environmental policies.*

JEL Classification: K22, K23, K32

1. Preliminary considerations

A very topical and important issue is the connection between the natural and the economic environment, connection that has been gradually grounded, but which has become a strong one, on the grounds that it is absolutely necessary and useful to make an efficient connection between the ecological and economic policies.

[1] Lucreția Dogaru - University of Medicine, Pharmacy, Science and Technology, Tîrgu-Mureș, Romania, dogaru_lucretia@yahoo.com.

Achieving any type of long-term development implies interdependence between the environment and the decision-making system, requiring both a re-distribution of conventional economic presumptions and a planned ecological and socio-economic integration with a view to ensuring a balance.

Of course, such a problem generated a lot of controversy at the doctrinal level[2], in the sense that a diminution in economic growth would not result in a significant reduction in pollution, although reality demonstrates that the economic growth process inevitably involves an increase in consumption energy and raw materials and, implicitly, increased pollutant emissions into the environment. However, the reality has shown that the two types of activities can't be separated, the relationship between economic growth and environmental pollution resulting, in the long-term, in the transformation of environmental policy into a reparation policy. Certainly, there are other approaches whereby strong economic growth may condition an improvement in the environmental situation on the grounds that it can provide the necessary and sufficient funds to do so.[3] However, it is obvious that the environmental benefits are not at an appropriate size and often the amounts granted from the fiscal revenues related to economic growth, do not increase the environmental protection actions and this is a problem that seems to be left to the future generations. We will also recall in this context the approach that the entire process of economic growth is incompatible with environmental protection, which represents a real barrier to economic growth that provides social welfare. From this perspective, we can however, appreciate that the two processes are evolving at the same rhythm, having positive effects on each other, in the sense that the complex environmental actions[4] could lead to an increase in the level of global welfare. That is why, in our opinion, a good policy of economic growth must also take into account the qualitative dimension of the process, which must include the requirements of respecting the quality of the environment.

At the theoretical level, there are also theories according to which the economic globalization is the main cause of unsustainable development, on the grounds that the globalized economies subordinate environmental concerns to

---

[2] There are specialists who considered that there was no significant connection between the two phenomena; to be seen, Bran Florina, *Componenta ecologică a deciziilor de dezvoltare economică*, ASE Publishing House, Bucharest, 2002, pp. 102; to address the issue of economic development in consensus with environmental policy, see, Mitroi M., *Ecodezvoltarea - imperativ al mileniului trei*, Tribuna Economică Review, no. 21 in 2000, pp. 21 and the following; Daniela Vîrjan, *Regândirea activităţii economice pe principii de eco-eficienţă*, in „Revista de economie teoretică şi aplicată", Vol. XVIII, NO. 7(560), 2011, pp. 135-146.

[3] The HWWA Economic Research Institute in Hamburg promoted the thesis that an economic policy in which economic growth is correlated with pollution reduction results in an ecological crisis.

[4] Şchiopu Dan, *Ecologie şi protecţia mediului*, Didactical and Pedagogical Publishing House, Bucharest 1997, pp.108.

economic demands.[5] On the one hand, the economic growth and poverty reduction, generally lead to a public demand for better environmental quality, and additional accumulated wealth can be redirected to green investments and increased environmental protection. On the other hand, an increase in economic activity leads to an increase in the global consumption of energy resources, and implicitly to the generation of more waste and higher pollution levels which takes the most diverse forms.[6]

Sustainability or sustainable development is an important objective which must be taken into consideration in setting up the line of action at the entire level of European Union processes[7], establishing requirements regarding the information about the medium and long-term objectives which are pursued in the economic field that have an impact on the environment.

Now, the European Union requires for all Member States to promote a sustainable economic growth, in full compliance with the quality of the environment, with its protection and development in the spirit of the concept of sustainable development. We underline, for example, that the Lisbon Strategy adopted in 2000, with its subsequent revisions,[8] has set the key objectives of transforming Europe by 2020, into the smarter, most competitive and dynamic economy in the world, also focused on the crucial importance for environmental protection, sustainable development and competitiveness. At the same time, the European Union's Strategy for Sustainable Development, adopted by the European Council in Gothenburg in 2001[9], marked an essential moment, namely, the need and importance to continue economic growth in a balanced way, ensuring social security and the sustainable environmental protection.

However, beyond the adoption of European Union legislative instruments, that are not only necessary but also efficient and effective achievement of sustainable and durable peace, it is required to adopt economic instruments that allow for an environmentally consistent production and that contribute to the improvement of the environment and to the efficiency of the action instruments on a horizontal level. In this respect, it is absolutely essential

---

[5] Newell Peter, *Globalization and the environment: Capitalism, Ecology and Power,* 1st Edition, Publisher Polity Press, Cambridge, 2012, pp. 5-9; Kajcsa Andrea, *The Influence of Compliance with Environmental Requirements on Commercial Competition*, in „Curentul Juridic" Review, no. 1/2011.

[6] Details, Lucreţia Dogaru, Kajcsa Andrea, *Interrationships between globalization and environmental Protection,* Revue D'Etudes Européennes, Editeur Prodifmultimedia Paris, No. 5/2011, Paris, 2011, pp.113/120; Kassai Cristina, *The globalization process and its impact on the environment,* Vol. 4, GIDN, Arhipelag XXI Press, 2017, pp. 415-420.

[7] Regarding the role of the Community policy, see, Dacian Cosmin Dragoş, Raluca Velişu, *Introducere în politica de mediu a Uniunii Europene,* Accent Publishing House, Cluj-Napoca, 2004, pp. 40-45; Mircea Duţu, *Politici publice de mediu,* Universul Juridic Publishing House, Bucharest, 2012, pp. 195-140.

[8] Adopted by the Extraordinary Council of Europe in Lisbon on 23-24 March 2000, it was revised and updated by the European Council in Brussels on 22-23 March 2005 and then in January 2009.

[9] Completed in 2002 by the European Council in Barcelona and revised in 2006.

to have the procedure of assessment of the impact of economic activities on the environment, planning, public information and public education into a direction that emphasize the idea of a weighted environmental resources uses.

In the context of trying to define the concept of sustainable development,[10] we recall the classic definition according to which sustainable development means meeting the needs of present generations without compromising the ability of future generations to meet their own needs. Above all, it is important to underline that sustainable development is neither science nor discipline, but it is that development that creates sustainable structures over time and can ensure economic and environmental development. The concept of sustainable development has made society recognize and take into account the benefits of the environment, the role and importance of environmental factors as well as the multiple and complex functions and services it provides. The defining of the sustainable development concept must be linked with two basic concepts, namely: the ability of conservation or disposal of planet Earth, and sustainable programming which must to be associated with economic, technological and social development programs, taking into account the objectives compatible with the ecological succession, so as to ensure that current needs without compromising the future of generations.

A good sustainable development programming must be circumscribed within the protective capacity and based on respect for sustainable-yield principles[11], which means that, while a person can affect renewable natural resources, it is necessary to take measures for the regeneration of and compliance with the principle of compensatory intervention, that is, the one who uses or deprives us of a non-regenerative factor must ensure balance through a compensation form.

The concept of sustainable development of the economy, the exploitation of resources and the quality of the environment, involves a step-by-step process imposed by the realities but also by the objectives of national and foreign environmental strategies or policies.

All studies show that, a sustainable economic growth and an adequate standard of living are determined by the development of the competitiveness[12] of the national economy of states in the context of the current global challenges.[13] At present, the protection of the environment, which can generate great benefits, is not only an integral part of the economic and social development strategy of

[10] Mircea Duțu, Andrei Duțu, *Dreptul mediului*, Edition 4, C.H. Beck Publishing House, Bucharest, 2015, pp. 112-114; Anca Ileana Dusca, *Dreptul mediului,* Edition II, Universul Juridic Publishing House, Bucharest, 2014, pp. 16-18.

[11] Lucreția Dogaru, *Quelques Principles du Droit de l' environment,* „Judicial Current" Journal, No. 1(72), Tirgu-Mures, 2018, pp. 108-116.

[12] World Economic Forum for 2005, made a study regarding the level of the competitiveness of the European Member States.

[13]Such us, for example, those aimed the globalization of the economy, the opening of international markets, rapid technological change, etc.

the European Union Member States, but also a self-standing strategy corresponding with the national strategy.

Corroborated with the sustainable development principle, the underlying objectives of an environmental protection strategy or economic and social development policies are mainly those aimed at controlling the pollution phenomenon, adapting environmental quality standards to the required level by the European Union in accordance with the global standards, the framing of the economic evolution of the states in the criteria of sustainable development and, last but not least, the restoration of the environment affected by polluting activities.

2. Economic implications of sustainable development. The ecological aspect of the economic decision

In order to achieve a sustainable economic process, able to respect the sustainable development principle, a lot of economic indicators are required. Of course, the basic indicator of any economic development is the gross domestic product, which reflects the sum of the market value of goods and services intended for final consumption, produced in the economy of a country or region within one year. This macroeconomic indicator must be associated both with the prosperity of the society as well as with the environmental damage as a result of economic activity with a negative impact on the natural environment, damages to which the economic value can be established and which must be valued and deducted from the gross domestic product.

On the other hand, the attribution of a correct economic value to the natural resources of the environment is extremely important, and this implies the necessity of reflecting their total value in their price, price that is related to the cost of extracting or producing any kind of resource. The market mechanism is the one that ensures that these costs are reflected in the prices, although the complex extraction and production process imposes other environmental costs (due to the pollution of environmental factors, erosion). The price of resources can also cause other problems in the sense that if they are exploited sustainably, their stocks will remain constant over time, and if they are not properly exploited, the stocks will diminish to the detriment of future generations; this future profit, lost due to inappropriate management, is called the user-cost and must be included in the price of the natural resource being extracted. Therefore, it is necessary that the correct price of a natural resource to reflect the extraction or production costs to which it is added the environmental costs and the user costs.

As the production of goods and services involves environmental services, the price of goods and services produced is incorrect. Just in this respect, the "polluter pays" environmental principle intervenes, according to which the polluter is obliged to pay the cost of environmental damage that is caused by the production of goods or the provision of services. This obligation the polluter is

held to involves an adequate repair of damages resulting from environmentally hazardous activities, just by imposing a charge on the asset containing the pollution.[14] But the reality that has been confirmed is that a part of the cost of producing goods passes directly to the consumer in the form of a higher price, this being the one that bears the pollution consequences and not the polluter, starting from the reason that he is the one who asks the producer what exactly he wants, and thus becomes a subsidiary polluter.

The implementation of sustainable development also aims at changing the way of assessing investments, measuring the effects of projects on the environment and the integration of the natural environment into the economic assessment value. Thus the costs must include all the environmental damage and the benefits must include all the environmental gains resulting from the implementation and carrying-out of the project.

The economic orientation towards a sustainable development requires a process of economic growth carried out under the conditions of ensuring a high degree of well-being related to the preservation and protection of the environment and its natural resources. That is why any economist concerned by the ecological aspects of the economic decision will follow the achievement of the proposed objectives both by including the means of solving the problems related to the economic and social development as well as through the rational management of natural resources and environmental factors.[15] Currently, the economic science has synthesized a set of procedures, tools and methodologies able to transform the adoption of an economic decision into a well-founded process, deprived of subjective influences and deviations from the requirements of economic and environmental legislation.[16]

Considered until recently just a simple instrument of economic growth, the natural environment and its natural resources are required to be rigorously protected, because the neglect of environment degradation and environmental damage costs through economic activities generates an impact on its quality, life and human health. Or all of these involve additional costs for the economic activity that is finally supported by the whole society that sees itself seriously threatened by the aggravation of ecological dangers.

Taking into consideration the importance of the economic development in relation to the environmental protection, the decision makers need to identify ways of solving all the problems simultaneously so as to achieve integrated

---

[14] Regarding to the role of this principle, see, Patricia Birnie, Alan Boyle, Catherine Redgwell, *International Law and the Environment*, third edition, Oxford University Press, 2009, pp. 318-325; Claude Fluet, *Assurance de Responsabilité, Assurance de choses et dommages environnmentaux: Une analyse économique de la Directive 2004/35/CE,* „Révue d'Economie Politique", Vol. 126, No. 2/2016, Editeur Dalloz, Paris, pp. 193-211; Mircea Duţu, *cited above,* 2012, pp. 41-48.

[15] With reference to the decisional impact, see, Bădescu Adriana, Dobre Ioan, *Modelarea deciziilor economico-financiare*, Conphys Publishing House, Bucharest, 2001, pp.17.

[16] For details, see, Bran Paul, *Finanţele întreprinderii*, Economic Publishing House, Bucharest, 2001, pp.325.

economic growth in environmental strategies through the use of non-polluting performance technologies.[17] Along with these methods, one of the most important and effective is considered to be the preventive method or the pollution prevention, on the ground that it is less costly to prevent the environmental factors degradation than to support the costs of repairing them.[18] At present, the protection and sustainable management policy has come to be based on a preventive approach. We recall in this context that environmental prevention involves the prevention against negative effects on the environment through a set of preventive measures: preventive action is an *a priori* action, which is preferred to *a posteriori* measure, such as repairs, restorations or repressions as a consequence of environmental damage. It is absolutely necessary for the decision-making process to include both economic decisions and ecological decisions based on a good knowledge of the problems to be solved, on a good documentation and processing of information, as well as on the creation of the final decision. It is a reality that the lack of information on the assessment of natural resources and natural capital generates decisions that are adopted under uncertainty.[19]

We appreciate that in the adoption process of an ecological and economic decision at a macroeconomic level, the following elements must represent the start point: reviewing the environmental legislation and the existence of economic and administrative measures; eliminating subsidies for polluting activities; promoting actions in priority areas for the reduction of pollution; restructuring of those types of sectors that use polluting technologies, etc. On the other hand, at the microeconomic level, namely in the management team, the environmental economist must act to protect the environment and at the same time must provide the environmental information needed for the other members of the management team so that they are able to take the right decisions.[20] Of course that all economic, environmental and social information will be analyzed taking into account the financial implications that accompanies an economic decision. At the same time, in order for an economic decision to be integrated into a process of sustainable development, the decision makers must adhere to a set of principles regarding the

[17]Relative to the implications of decision makers, see Cândea Melinda, Bran Florina, *Spaţiul geografic românesc. Organizare, amenajare, dezvoltare*, Economic Publishing House, Bucharest, 2001, pp. 68.

[18] For details, Michel Prieur, *Droit International et comparé de l'environnement. Les principes généraux du droit International de l'environnement,* AUF, Agence Universitaire de Francophonie, Université de Limonges, 2015, pp. 22-55.

[19] See, Brown Lester**,** *Eco-economia. Crearea unei economii pentru planeta noastră*, Technical Publishing House, Bucharest 2001, pp.48.

[20] For details, Rojanschi Vladimir, Bran Florina, Diaconu Gheorghe, Iosif Gh. Nicolae, Toderoiu Filon, *Economia şi protecţia mediului*, Tribuna Economică Publishing House, Bucharest, 1997, pp.128.

respect of values and must advocate for full knowledge of the environmental implications of any type of economic decision.

In contrast to the economists, the environmentalists believe that the process of economic growth leads to a rapid exhaustion of natural capital, so that for sustainable development a stable correlation between the ecology and the economy must be ensured, also become aware the importance of the environment, and at the same time to admit the dependence of the economy on the natural environment economy.

We believe that the adjusting of all activities through ecological economic decisions justifies the ecological and economic balance, that state of normality between the natural and the economic factors. This balance is achieved precisely through the self-regulation of the environment, its awareness justifying that economic performance that takes place in the conditions of limited and often non-regenerative resources.

3. Conclusions

Between the natural environment and the economy, a relationship of mutual conditioning gradually emerged, and nowadays it is necessary to harmonize the ecological and economic policies in order to achieve a sustainable development. The new orientation of the economy towards sustainable development requires a process of economic growth carried out under conditions able to ensure the social welfare of the population but this has to be correlated with the preservation and protection of the environment and its natural resources.

Solving the economic problems also involves taking into account all ecological issues that have a negative impact against human beings and the environment in which this lives, so any economic decision cannot exclude the ecological side of that particular decision.

Of course, environmental protection is very important and necessary, but the same is true about economic growth, as it must be seen as a means for sustained human development, which, from a sustained point of view, must put the human being at the center of its priorities.

An essential role rests on the decision-makers that need to achieve integrated economic growth in environmental strategies through the usage of non-polluting technologies, and the implementation of a decision-making process that must include both economic and environmental decisions. Also, the ecologists who believe that the economic growth process leads to a depletion of natural capital of the planet, support the sustainable development able of ensuring a stable relationship between ecology and economy, to realize the role and the importance of the natural environment, but also the dependence of the economy on the natural environment economy. In order to avoid the inconsistencies between economists and ecologists, it is necessary to adopt an ecological economy, which implies compliance with the ecological principles, environmental factors, and at the same

time, the adoption of policies and strategies able to combine economic development with the preservation and protection of the natural environment.

The regulation of economic activities through ecological-economic decisions justifies the ecological-economic balance, the normality between the natural and the economic factors. However, the transition towards a green economy requires a long-term process that is based on enhancing environmental consciousness and on a set of fiscal and legislative instruments.

Bibliography

1. Anca Dachin, Cornel Tarhoaca, Zizi Goschin, Catalin Huidumac, Cosmin Marinescu, Cosmin Rogojanu, *Evaluări ale dezvoltării durabile în România*, ASE Publishing House, Bucharest, 2005;
2. Bãdescu, A., Dobre, I., *Modelarea deciziilor economico-financiare*, Conphys Publishing House, Bucharest, 2001;
3. Birnie, P., Boyle, A., Redgwell, C., *International Law and the Environment*, Third Edition, Oxford University Press, 2009;
4. Bran F., *Componenta ecologică a deciziilor de dezvoltare economică*, ASE Publishing House, Bucharest, 2002;
5. Bran, P., *Finanţele întreprinderii*, Economica Publishing House, Bucureşti, 2001;
6. Brown, L., *Eco-economia. Crearea unei economii pentru planeta noastră*, Technical publishing House, Bucharest, 2001;
7. Cândea, M., Bran, F., *Spaţiul geografic românesc. Organizare, amenajare, dezvoltare*, Economică Publishing House, Bucharest, 2001;
8. Dan, M.,*Dezvoltarea Durabilă,* Ecological University Publishing House,Bucharest, 2004;
9. Dachin, A., Tarhoaca, C., Goschin, Z., Huidumac, C., Marinescu, C., Rogojanu, C., *Evaluări ale dezvoltării durabile în România*, ASE Publishing House, Bucharest, 2005;
10. Dogaru, L., Kajcsa, A., *Interrationships between globalization and environmental Protection,* Revue D'Etudes Européennes, Editeur Prodifmultimedia Paris, No. 5/2011, Paris, 2011;
11. Lucreţia Dogaru, *Quelques Principles du Droit de l' environment*, The Judicial Current Journal, No. 1(72), Tirgu-Mures, 2018, pp. 108-116;
12. Dragoş, D., C., Velişu, D.,*Introducere în politica de mediu a Uniunii Europene*, Accent Publishing House, Cluj-Napoca, 2004;
13. Dusca, A., I., *Dreptul mediului*, Ediţia a II-a, Universul Juridic Publishing House, Bucharest, 2014;
14. Duţu, M., *Politici publice de mediu*, Universul juridic Publishing House, Bucharest, 2012;
15. Duţu, M., Duţu, A., *Dreptul mediului*, Ediţia 4, C.H. Beck Publishing House, Bucharest, 2015;
16. Fluet, C., *Assurance de Responsabilité, Assurance de choses et dommages environnmentaux:Une analyse économique de la Directive 2004/35/CE,* Révue d'Economie Politique, Vol. 126, No. 2/2016, Editeur Dalloz, Paris;

17. Kajcsa Andrea, *The Influence of Compliance with Environmental Requirements on Commercial Competition*, Curentul Juridic Review, no. 1/2011;
18. Kassai, C., *The globalization process and its impact on the environment*, Vol. 4, GIDN, Arhipelag XXI Press, 2017;
19. Lovins, A., *The Economic Renewal Guide: A Collaborative Process of Sustainable Development*, Rocky Mountain Institute, 2001;
20. Mitroi, M**.,** *Ecodezvoltarea - imperativ al mileniului trei*, Review Tribuna Economică, Bucharest, nr. 21/2000;
21. Prieur, M., *Droit International et comparé de l'environnement. Les principes généraux du droit International de l'environnement*, AUF, Agence Universitaire de Francophonie, Université de Limonges, 2015;
22. Rojanschi, V., Bran, F., Diaconu, Gh., Iosif, Gh., N., Toderoiu, F**.**, *Economia şi protecţia mediului*, Tribuna Economică Publishing House, Bucharest, 1997;
23. Şchiopu, D., *Ecologie şi protecţia mediului*, Didactică şi Pedagogică Publishing House, Bucharest, 1997;
24. Vîrjan, D., *Regândirea activităţii economice pe principii de eco-eficienţă*, Theoretical and Applied Economics Review, Bucharest, Vol. XVIII, No. 7(560), 2011.

Complex Legal Institutions with Relevant Effects on the Professional Activity

Associate professor **Valeria GHEORGHIU**[1]

Abstract

The Romanian contemporary society imposed a profound transformation of many traditional legal institutions. From this perspective, one cannot overlook the profound change brought by the current Civil Code in contractual matters, namely the unification of the legal regime for civil contracts and commercial contracts. In the context of the assimilation of European values, the adoption of the monist system of regulation on the contractual domain by the Civil Law was imposed by the fundamental transformations of the entire economic life in Romania and of all the relations having a patrimonial character from the Romanian society. In this study we will stop on the legal regime applicable to contracts that are particularly interested in banking activity: current account contract, current banking contract and other bank contracts. The contractual freedom allowed to legal subjects to conclude current account contracts is exploited by banking institutions, both at the end and during their execution. The lack of legal protection for clients in general and for professionals in particular generates bargaining imbalance and additional contractual power for banking institutions. The impact of legislative amendments to former business, business, financial and banking activities on the realities of everyday life, beyond all doubt, is overwhelming and visible, with decisive macro-social effects.

Keywords: *professional, contract, current account, current bank account, client, bank.*

JEL Classification: K12, K22

1. Introductive considerations

The present study aims to identify the legal regime applicable to the current professional account of professionals, as well as to determine the legal nature of this type of professional contract which, in recent banking practice, risks becoming a mere "legal situation"[2].

As a consequence, regarding the importance of the bank account, we welcome the knowledge and understanding of the applicable rules of this complex juridical institution.

---

[1] Valeria Gheorghiu - „Alexandru Ioan Cuza" Police Academy of Bucharest, Romania, valeria.gheorghiu@yahoo.com.

[2] For a detailed study, see Adriana Almasan, *Contul curent al profesioniștilor: contract sau situație juridică*, in „Revista Română de Drept al Afacerilor" no. 8/2015, p. 105-116.

Preceding the professional setting up, the professional will proceed for opening of a capital account, where the associate founding members will put their subscribed social capital, according to the statutory clauses in the constitutive act. Subsequent, after regaining the juridical personality and also obtaining the distinct law subject, for the purpose of carrying out the economic activity declared at constitution, the professional will open a current bank account through he will manage his financial operations of payments and receipts[3].

This current bank account contract also has a professional character, in our opinion, with specific valences in terms of the effects resulting from its conclusion (the parties as professionals).

2. The legal nature of the current bank account contract of professionals. Is your current bank account binding or adherent? Does the current bank account have the mandatory character or adhesion character?

From the entitling of the title IX „Different special contracts" and the chapter XV „The current bank account and other bank contracts" we detach the contract nature of the current bank account, which couldn`t be born whiteout the will of both contract sides.

The traditional doctrine affirms about the current bank account that „he has a adhesion character and by the virtue of negotiation power that bank holds in bargaining with any of its clients, the client is invariably invariable, to whom the bank prepares the terms that are equally valued"[4].

The recent doctrine has other opinions by exposing[5] „that the institutions of the current bank account would have an mandatory character sustained by Law no. 70/2015 that present only the characteristic that strengthens and extend the rules regarding the payment operations and banking receipts transfers. We observe that behind the prosaic and shy current account hide a plethora of unquestioned and complex importance operations".

We rally with the second opinion for the next arguments:

- the provisions of Law no. 70/2015 for strengthening the financial discipline on the operations of receipts and payments in cash, the imperative character and not the device, whereas article 1(1) expressly laid down: "the operations of receipts and payments made by legal persons, persons authorized, individual companies, family enterprises, free professionals, natural persons who carry out their activities in an independent manner, the association and other entities with

[3] In present the juridical regime of payments and receipts operations is established by Law no. 70/2015 for the strengthening of financial discipline regarding the cash receipts and payments operations and modification and completion of Government Emergency Ordinance no. 193/2002 on the introduction of modern payment systems.

[4] F1. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), in *Noul Cod civil. Comentariu pe articole*, second edition, C.H. Beck Publishing House, Bucharest, 2014, p. 2300-2301.

[5] Adriana Almasan, *op. cit*., p. 105-116.

or without legal personality from / to any of these categories persons will be made only by cashless payment instruments, defined according to the law"; the exceptions are strictly and strictly provided for in art. 3-4 of the same normative act; art. 11 paragraph (1) is a prohibitive rule which provides: "It is forbidden for the persons provided in art. 1 paragraph (2) to release to persons referred to in art. 1 paragraph (1) and art. 8 cash in excess of the ceiling set in art. 3 paragraph (1) letter c) per person and transaction, except for the operations provided for in art. 5"; the sanctioning system provided by art. 12 establishes the incidental offense regime in the matter.

- the contract concluded with the Bank, has a standardized form, which are applicable to the provisions of Article 1201 of the Civil Code -"if by law does not provide otherwise, the parties shall be held by the extrinsic clauses of the contract refers". However, these external clauses are not negotiated by the parties and, therefore, do not represent their expression to the will of the most of the times, the bank will move these clauses in the standardized part of the contract. Also, in practice, the standardisation is carried to the extreme by the parties with superior power of negotiation[6]. Thus, very few remain essential elements in the contract itself, being transferred to the most important and the most onerous clauses in extrinsic stipulations of the contract[7].

- the occupational (professional), being a party to the contract concluded with the current bank account banking institution benefits from a power unequal, in respect of the negotiation, whereas it sees "forced" to accept expressly certain standard clause, as they are defined in paragraph 2 of article 1202 of the Civil Code[8]. However, these standard clause with the subsidiarity, the negotiated clauses should be subordinated to the will, and the interests of the negotiated by

[6] In accordance with article 1201 of the Civil Code, the external clauses forming part of the contract. However, they have very diverse forms, from the Annex (hereinafter called the "banking practice and Conditions General Terms"), until the whole pages of contractual terms published on the web-site of the governor of the bank of times notifications in the form of a brochure, or other printed format which can be found at the headquarters of the bank.

[7] Limitation of Liability is at the top of the list clause which imposes compliance with the formalities for discharge referred to in article 1203 of the Civil Code, the headquarters of the raw for unusual clauses, which would preclude the possibility of transferring in a safeguard clause providing for the external aspect. However, when an external clause takes the form of a notice, change the nature of the legal person, whereas it has unilaterally.

[8] "There are standard clauses stipulated in advance by one of the parties to be used in a general way and repeatedly and which are included in the contract following negotiation between the parties. (...)" - Article 1202 Civil Code. Further, article 1203 Civil Code provides that "the standard clauses which provide for the benefit of which it proposes to limitation of liability, the right to withdraw from the contract unilaterally, to suspend the execution of the obligations or to provide to the detriment of the other party lapse of rights or the benefit of the time limit, the limitation of the right to oppose the exceptions, restrictions on freedom to contract with other persons, the tacit renewal of the contract, the applicable law, any arbitration clause or to derogate from the rules relating to the competent courts do not produce effects only if they are acceptable, subject to express, in writing, and on the other side".

the parties, taking into account the position of equality in front of the civil law. In other words, the parties to benefit in an equitable manner, a power equal the special negotiating body. On the other hand, "easily observed that this provision does not result from the control of the Party against which operates this type of clauses, but I only of the conflict with other clauses or communication to the party[9]".

- the main characteristic of the current bank account presupposes the possibility of occupational (power), to accept the conditions on which the bank imposed or the exercise of the option not to conclude the contract[10]. We see, therefore, that the legislator shall place at the disposal of the party "protected" the possibility to enter consciously in a report on the contract that it cannot control or, at least, influence. "As soon as there is a security in order to achieve this purpose, there is no other specific protection for a contract of accession[11]".

- although it has a competitive nature, the current bank account shall not be subject to specific rules in the field of competition rules applicable to trade, the only being those of the Civil Code.

So, the current bank account of occupational, remains in our opinion a contract "forced", because of the lack of negotiation power on the part of the professional's.

3. The legal regime applicable to the current bank account. Professional's rights

The current bank account is regulated in art. 2184-2190 of Chapter XV, Title IX, Book 5, Civil Code, but without the benefit of a legal definition. The legislator will be confined solely to the exposure of the effects of the contract, the right to dispose of the balance of the creditor, in situations of indivisibility over the balance of the account, to the denunciation of the unilateral and at the period of limitation of the rights arising from the contract. The nature of the device of rules of forming the headquarters of the matter, and Humility The legislator to regulate the current bank account are alike, difficult negotiation position of the

[9] Adriana Almasan, *op. cit.*, p. 108.

[10] Occupational is not forced to conclude the contract, whereas it may find a better alternative to another bidder, or it may simply waive the good or service which is the subject of the contract. Article 1175 Civil Code - "The contract is of accession when its essential clauses are imposed or are drawn up by one of the parties, or as a result of its instructions, the other party does not have to accept them as such.' simple definition does not help in establishing a legal regime derogator the ordinary law, in this case the contract negotiated, but the Civil Code does not make any reference to this category of legal and enable the establishment of special rules of the contract of adhesion only through the interpretation of texts article 1202 Civil Code, which are speaking about the standard clauses which are used in the usual way professionals, namely bank, the party to the contract of current account with the negotiating power.

[11] Adriana Almasan, *op. cit.*, p. 109.

professional's not benefit from a legal equality "fair", in relation to the superior negotiating power of the banking institution.

In the doctrine[12] , the current bank account was defined as a deposit paid the money, without a time and which can be dismantled anytime, over which overlaps, as a rule, a mandate received the bank account of the holder to carry out the various payments and operations in the account, in the name and on behalf of the supplier. The current bank account holder has the right to dispose of the balance of the creditor[13] of the account, in accordance with Article 2184 of the Civil Code, through the withdrawals, by means of transfers or through the issuance of debt payment or by the formation of security. But, on the amounts of money, occupational will only have a right to claim, whereas the owner of money deposited is the bank, because the sums of money they lose individuality after their submission in the current account[14] .

The current bank account does not eliminate the chargeability of the credit balance and will not stop the bank to be pumped automatically amounts in the Account Holder's account, the debts of the bank, or to seizure the amounts in the lender's balance, according to the law.

Under the old rules, current account showed that the bank was a species of the contract of current account, but after the adoption of the Civil Code[15] this support may not be received, as two separate legal institutions, with its own regulations and with the specific legal effects.

So, the current bank account not to be confused with the institution of the contract of current account regulated in Article 2171 of the Civil Code - 2183. According to the monistic conception introduced by the current Civil Code, the current account in the contract, the Parties called "curentisti" shall bear in mind the reciprocal claims arising out of the rebates for the sums of money under settlement[16] and unavailable[17] , until the closing of the account, amounts which may be subject to compensation to the fulfillment of the duration of the contract. In other words, the current bank account lacks reciprocity remission of money. The rights of occupational surging conclusion of the current bank account are regu-

[12] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *op. cit.*, p. 2300.
[13] It representing available from the current account. Occupational, as proprietor of the current bank account will be able to issue checks, bills of exchange, promissory notes on 5 hectares in the bank account. The creditors of the occupational and personal - Account Holder, will be able to legally popri by way of insurance or enforceable title, the amounts of money in the balance of the creditor.
[14] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *op. cit.*, p. 2301.
[15] By Law no. 287/2009, republished on the basis of the Law no. 71/2011, giving the items a new numbering, which entered into force on 01 October 2011, which has been repealed the old code commercial (which provide the bank account as a species of the current account) and other normative acts.
[16] The holder thereof may not dispose of them.
[17] Third parties can not seize them.

lated by the Civil Code as follows: the right to dispose of the balance of the creditor[18], the right to withdraw from the contract unilaterally[19], the right mutual compensation the balances[20], the right to exercise the civil action for the recovery of the creditor account within a particular limitation period of 5 years[21] .

His abysmal rules and lack of legal protection for professionals gives the banks a contractual power extreme upper and exploitation of legislative vacuum. Practically, occupational is forced to conclude a contract rather administrative, if we were to take into consideration the onerous conditions offered by the banking units and who are missing from the real negotiation power on the customer-professional[22].

Which are subject to the conclusion of contracts under the conditions specified above are thus trapped on the customer-professional, because they contain a number of clauses excessively onerous or flagrant violation of the provisions of minimum standards for the protection professionals at your fingertips.

The doctrine of the comparatively recent[23] identified some of the legal pitfalls that can fall professionals: "the most dangerous of provisions is that according to which the bank is not obliged to open account or may refuse the opening without justification. How such a provision may have legal value, even if it is the nature of the contract, pursuant to article 1356 of the Civil Code, it appears that this allows the discretionary refusal. But the discretionary refusal of the bank, in correlation with the obligation which it has a commercial company even the

---

[18] Article 2184 Civil Code - "In case the bank deposit, the credit or any other banking operation is carried out by the current account, the Account Holder can have at any time of the balance of the creditor of the account, with respect to the period of notice, if it has been agreed by the parties".

[19] Article 2188 Civil Code - "where the contract of the current bank account is concluded for an indefinite duration, any party may withdraw from the contract of current account, with respect to a period of notice of 15 days, unless the contract or the customary practice does not result in a different period, under the sanction of damages".

[20] Article 2185 Civil Code - "If there are several legal relationships or multiple accounts between the credit institution and the customer, even in different currencies, the active and passive balances offset each other, unless the parties have agreed otherwise".

[21] Article 2.190 Civil Code - "(1) The right to action in the refund credit balance results at the close of the current account shall prescribe within a period of five years from the date of closure of the current account. (2) In the event that the current account has been closed on the initiative of the credit institution, the limitation period shall be calculated from the date on which the holder or, as the case may be, each joint holders of the account has been notified in this respect by registered post with acknowledgment of receipt to the last domicile or seat shall be brought to the attention of the credit institution".

[22] For example, the professional will fill out a request to open the current bank account, subject to the "approval" of the bank, and then the professional client acquaints him with the "General Business Terms", which he does not sign. From the banking practice used, we note that the contract does not actually end with the consent of the parties, flagrantly breaching the principle of consensualism, and the banking unit, approving the request of the professional client, behaves more like a public authority to which the other subjects of law. As such, the bank avoids to contractually treat the contractual obligations of a contract and, in practice, can not be held responsible for its effects, and is sheltered from possible contractual liability.

[23] Adriana Almasan, *op. cit.*, p. 110.

setting-up of them, to open a bank account, generates a wrongful situation for the one who is addressed to the bank with a view to opening a current account professional. So the bank shall on this path to the shelter for any liability for that prevented the accomplishment of a legal obligation for the one who has requested the opening. Another trap clause in current bank account contracts provides for prohibiting compensation without the bank's agreement between client accounts, but allows debiting accounts by the unconditional bank. The clauses concerning compensation are clauses of an unusual nature, according to art. 1203 Civil Code, therefore, they can not be the subject of a simple notice, but must be assumed by the express and written customer[24]. But the rigors imposed by article 1203 of the Civil Code does not Gives a real protection for the customer bank that, through this, loses control on the account. Another example of the clause found in contracts for the current account banking implies that the agreement from the bank withdrawal of large amounts by the customer. This provision, in the context of the minimum conditions to be satisfied by the contract of current account, is a clause of zero, in accordance with article 2184 of the Civil Code which ensure that the disposal of the client on the amounts from the account. No doubt, there is a fundamental difference between the opinion that the customer must give the bank, about which makes speech and legal text here meant, and the approval of which must give the bank, endorsement diminishes right provision of the customer".

Therefore, we note that the bank's obligations that should be correlated to the rights conferred on the professional client, based on the established contractual relationship, escape the legislator, are not regulated, as they would justify and meet the usual practical needs.

4. Conclusions

The conclusion and implementation of contracts for the current bank account of banks and professionals get rid of legal protection, whereas the devices of the Civil Code and legislative insufficient, you positioned the several times on the customer-professional in the subordination toward the banking unit, located on the side of the force.

The customer-professional is on the position not to be able to negotiate the terms of the contract, but to accept them, as set out in the practical disadvantages mentioned in the study, we appreciate that prejudice the interests of the professional's (taking as an example: stipulating the clause whereby the bank shall not be obliged to open a bank account or may refuse the opening without any justification, availing of the provisions of article 1356 of the Civil Code). The position of the discretionary powers of the bank, practically by the authority, in

[24] Adriana Almasan, *Discuții cu referire la clauzele neuzuale, standard și externe în procesul încheierii contractelor, în reglementarea Codului civil*, "Dreptul" no. 9/2014, 134 et seq.

accordance with each client-professional, and abundance of external clauses (sometimes restricted to consultation by the customer), generates major difficulties during the execution of the contract.

At the same time, the current bank account gets rid of the specific legislation of consumer protection, owing to their professional of the contract and the quality of the topics which are design professionals (in article 3 paragraph 2 of the Civil Code).

In order to reshape the contractual relations between the bank and the professional client, the legal nature of the current bank account could be regulated by the legal recognition of the binding nature of the contract.

We believe that it is necessary to enact mandatory rules of professional client protection that would lead to the elimination of excessively onerous clauses and would rebalance the contractual relations governed by the principle of freedom of contract and the position of legal equality before civil law.

In support of the *de lege ferenda* proposal, we also predict the provisions of art. 1170 The Civil Code, which comes and strengthens the notion of good faith, expressly stipulates that the parties must act in good faith, both in the negotiation and conclusion of the contract, and throughout its execution, and they can not remove or limit this obligation. In addition, Art. 1183 The Civil Code further regulates good faith in negotiations: "The principle of good faith applies also in the negotiation phase of the contract, the party engaging in negotiation being bound by the requirements of good faith, the parties being unable to agree to the limitation or exclusion of this obligation".

It remains to be seen to what extent the legislator's intervention will decide on the balancing of contractual relations and, implicitly, the economic life of professional clients in relation to the banks where they decide to open their current bank accounts. Or, on the contrary, its passivity will deepen the state of crisis and will remain a factor of relativizing contractual obligations.

Bibliography

1. Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *Noul Cod civil. Comentariu pe articole*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2014.
2. Adriana Almășan, *Contul curent al profesioniștilor: contract sau situație juridică*, „Revista Română de Drept al Afacerilor" no. 8/2015.
3. Adriana Almășan, *Discuții cu referire la clauzele neuzuale, standard și externe în procesul încheierii contractelor, în reglementarea Codului civil*, "Dreptul" no. 9/2014.
4. The Romanian Civil Code adopted by Law no. 287/2009, republished by Law no. 71/2011 giving the articles a new numbering.

6. Law no. 70/2015 for the strengthening of the financial discipline regarding the operations of cashing and cash payments and for the modification and completion of Government Emergency Ordinance no. 193/2002 on the introduction of modern payment systems.

Features of Non-Executive Directors' Fiduciary Duties

PhD. student **Adina PONTA**[1]

Abstract

Among the influences of the 2007 financial crisis on corporate governance, the developing role of non-executive directors and their expanding duties require particular attention. By nature of their function, non-executive directors mitigate risks determined by information shortcomings between shareholders and managing directors, on the assumption of effective exercise of their duty of oversight. However, this subsidiary duty is not within the essence of non-executives' role, the same perspective being reflected in statutory rules of several European countries. This paper will examine the particularities of non-executive directors' fiduciary duties, incorporated from common law doctrine, by providing a comparative overview of EU member state approaches. The paper will pursue the evolution of the non-executive function in continental law and examine recent European studies, which extend the scope of non-executive directors' duty of care. The objective is to demonstrate that fundamental differences between national regulations are determined by different understandings of the function of non-executive directors, for example, subsets of their fiduciary duties are divided in Romanian corporate governance between different managing bodies of the company.

Keywords*: duty of care, duty of loyalty, duty of oversight, non-executive director, executive director, supervisory board.*

JEL Classification: K22

1. Introduction

Modern corporate governance is characterized by numerous efforts to strike a balance between those who hold the capital and those who have the controlling and decisional power in a company. The best approach to resolve the continuing tension caused by the conflict of interest between these two groups proved to be by regulation and correct enforcement of directors' fiduciary duties. Modern lawmakers understood that effectiveness of fiduciary duties depends on their definition as general and open terms, allowing courts to complement parties' will in circumstances not covered by the law. At the same time, shareholders and associates have learned that the applicable law to fiduciary duties should be understood as a response to circumstances that justify the expectations from an individual who works in the interest of another person.

[1] Adina Ponta - Faculty of Law, Babeș-Bolyai University, Cluj-Napoca, Romania, ponta.adina@gmail.com.

Changes in the business market have prompted the need to formulate homogeneous responses to corporate directors' conduct[2] in the relationship with their principal. The agency problem[3], identified by common law literature, essentially represents the imbalance between granting trustees discretionary rights and the disadvantageous effects of this trust on the principal's wealth. In modern financial markets, it is impossible to provide precise prior instructions and to anticipate all issues a director might encounter in fulfilling his function, therefore flexibility of fiduciary duties proved to be decisive for the success of the fiduciary governance strategy.

In common law doctrine and case law, directors owe to the company what the Delaware Supreme Court[4] called the "triad of fiduciary duties": duty of care, duty of loyalty and good faith[5]. Recognized almost uniformly by doctrine and case law as the standard of conduct review utilized by shareholders and courts, these fiduciary duties express the moral duties every agent should display in the fulfilment of his functions.

Although the Business judgement rule[6] comes into play with reference to all these three duties, it is closely associated with the duty of care. In essence, the duty of care requires directors to act with the same degree of diligence and prudence that an ordinary cautious and diligent person would utilize in similar circumstances[7]. The doctrine of the 1980s assimilates the duty of care to a moral

---

[2] In order to avoid confusion and to emphasize the homogeneity of directors' duty of care and duty of loyalty, the term "director" used in this paper is meant to be extended to members of the board of joint stock companies which adopted the two-tier board system.

[3] For an overview of the issue of representation, agency problem and "incomplete contracting" in contemporary corporate governance, see Sitkoff, R.H.: *The Economic Structure of Fiduciary Law*, Boston University Law Review, vol. 91, 2001, p. 1041.

[4] Delaware courts are internationally recognized as the most prominent forum for corporate governance disputes. Their efficiency, predictable judgements, trust gained by the business market and continuous exposure to business law litigation is unique in the world. Delaware Court of Chancery is an equity court and a benchmark of professionalism, which determined considerable forum shopping.

[5] *Common law* doctrine and jurisprudence partially renounced the triad of fiduciary duties, and the current trend is to include good faith within the scope of the duty of loyalty. However, we share the view that good faith rationalizes and explains the variety of specific established duties that do not fall within the scope of the duty of care and the duty of loyalty, such as the duty not to consciously determine the company to violate the law. We consider that although good faith is undoubtedly a component of the duty of loyalty and duty of care, jurisprudence has shown that limiting it to a simple component of another duty would diminish its power as a tool for guiding fiduciary conduct. For a comprehensive discussion of the independent character of good faith as a fiduciary duty, see Ponta, A. *Good faith in corporate law – an independent fiduciary duty or an element of the duty of loyalty?*, Juridical Tribune – Tribuna Juridica vol. 6, issue 2, Bucharest, 2016.

[6] The paper at hand does not aim at illustrating the conditions and judicial application of the Business judgement rule. For a comparative approach of the Business judgement rule in the EU member states, see Catană, R. N, Ponta, A., *The Business Judgement Rule and its reception in European Countries,* The Macrotheme Review 4(7), Austin, Texas, 2015.

[7] The goal of the paper at hand is to identify the features of non-executive directors' fiduciary duties. For a broad view of the scope and elements of the duty of care, see Ponta, A., *The Evolution and*

duty attached to the directorial position, namely watchfulness to business decisions and adoption of rational measures, and defines this duty as the sum of four distinct subsidiary obligations[8]. The first component includes the duty to monitor the business as a whole in a reasonable manner and to take appropriate measures for continuous information and collection of relevant data. The second component is the duty to make inquiries, to investigate and proactively "ask questions", namely the duty to follow up information that may indicate irregularities in the progress of business activities. The last two components relate to the use of obtained information and to the duty to use a proper decision-making process for the adoption of reasonable business decisions.

Following the 2008 financial crisis, the risks stemming from the imbalances between those holding capital and those in control of a company have become imminent. Thus, the role of non-executive directors has increased, especially regarding lawmakers' and shareholders' approach to their duties, remuneration and access to information[9], in order to ensure that their monitoring function is carried out effectively and they avoid advancing personal interests.

The purpose of this paper is to analyze the peculiarities and the application of non-executive directors' fiduciary duties. The first part will present the content and objectives of non-executive directors' function in light of characteristics of the duty of care and duty of loyalty. The analysis of the duty of care will follow the four elements identified by traditional doctrine, as we consider them especially relevant for examining non-executive directors' duties. We will then demonstrate that the fundamental differences between regulations of non-executive directors' duties among EU member states are determined by the major differences of the understanding and the scope of the non-executive function in different jurisdictions. Finally, we will evaluate the regulatory approaches chosen by EU member states and the relationship between non-executive directors' activity and corporate governance effectiveness in European countries.

2. The scope of non-executive directors' fiduciary duties

Executive directors are members of the board of directors of a company, who also bear management responsibilities, as opposed to non-executive directors who are members of the board without responsibilities to manage day-to-day operations. The term used for executive directors' positions already reveals the

Complexity of Directors' Duty of Care, „Perspectives of Business Law" Journal vol. 4, issue 1, 2015.

[8] Eisenberg, M.: *The Duty of Care of Corporate Directors and officers*, U. of Pittsburgh Law Review 51, 1989, p. 945.

[9] Economist Intelligence Unit Special Report no. 244 - *Non-executive directors. Where's all the fun gone*? 2004, https://www.economist.com/special-report/2004/03/18/wheres-all-the-fun-gone, accessed on 18.10.2018.

scope of their function, which encompasses duties employed for carrying out current affairs, in accordance with directions and strategies established by the board of directors or by shareholders. In the UK, the general rule is that executive directors are not remunerated for their role on the board of directors, an issue which is criticized by the Corporate Governance Code, because in order to encourage them to properly fulfill their fiduciary duties, their remuneration should reflect the performance achieved in their respective position.

Non-executive directors' duties are mainly positive duties, executives are expected to contribute to the endeavors of the board of directors and to ensure achievement of the main objectives. In view of the impartial influence which they are able to exercise by translating experience, their appointment is in the best interest of shareholders and executive directors.

Non-executive directors generally have the same legal duties as executive directors, the same management responsibilities and fiduciary duties. Thus, they are subject to the same liability regime, although it is obvious that in most jurisdictions the scope of their role does not imply the same level of attention rendered to the managed company. Although the content of non-executive directors' responsibilities differs from that of executive directors, the standard of care assesses their devotion, a standard which remains the same regardless of the position held on the board.

The differences between fiduciary duties of executive and non-executive directors are based on the different nature of the two functions. The history of non-executive directors' position shows that the duty to protect and develop the company is the essence of their function. By applying the *ultra vires* principle, companies are bound to developing their business within the scope of their core business activity. Protecting the company by minimizing competition caused by its representatives who might take advantage of opportunities the company cannot engage, has proven to be disadvantageous for both the company and its agents. Consequently, in the dynamics of contemporary business markets, corporate governance developed effective methods to award business opportunities. Shareholders appoint managers with diversified skills, executive directors focus on current business affairs, while non-executive directors cover executive directors' knowledge gaps, such as by prospecting new markets or moving production units[10].

The position of non-executive directors evolved from a pure supervisory function to support of the strategic development of the company. The UK Government recommended companies to appoint non-executive directors with extensive knowledge and valuable experience and found that companies on the European market did not largely understand the nature and essence of non-executive

[10] Gibbs, D.: *Non-executive Directors' self-interest: Fiduciary duties and Corporate Governance*, Univ. of East Anglia 2014, p. 72-77.

directors' role and the evolution of their office from mere monitoring to the positive duty to determine the strategy and policies of the company[11].

Corporate governance in *common law* breaks down non-executive directors' main responsibilities in four broad categories[12]: the duty to build and implement the company's strategy, the duty to determine and measure the performance of the company and of the executive, control and minimization of risks and the duty to coordinate and communicate.

First, non-executive directors are the main creators of the long-term and short-term strategy of the company. Development and advancement of business strategy proposals are business decisions where the duty of care is most evident. At the same time, the Business judgement rule should function as an incentive for non-executive directors, because they have not only the possibility but also the duty to challenge executive directors' decisions and acts in order to ensure that these are in line with the business strategy and with higher interests of the company. In addition, non-executive directors' diligence and prudence can be translated into efforts to maintain collaborative and trustworthy relationships with other board members, to achieve an atmosphere of consensus and the promotion of the values defended by the company.

Secondly, as we have mentioned, evaluation and analysis of executive directors' performance is conducted on the basis of pre-established objectives and goals. Non-executive directors' primary duty is to monitor the performance of the company, to identify gaps and propose improvement and correction solutions. In pursuit of this goal, non-executive directors shall always have an overview over the big picture of the company and ensure that fiduciary duties owed to shareholders are clear and highly considered in any business decision. As we will describe in the second part of the paper, these subsidiary duties are not inherent to the non-executive function in Romanian corporate law.

Thirdly, non-executive directors are required to ensure accuracy of financial information and to establish robust and reliable control systems, both in terms of financial controls and risk mitigation structures. They are responsible for building and implementing coherent and effective financial control and risk assessment mechanisms. Non-executive directors' authority is reflected in their guidance and initiatives, through influences which orientate the board of directors towards stable and fair internal mechanisms.

---

[11] *The Walker review*, a report drafted by London banks at the British Prime Ministers' request, which includes recommendations regarding modernization of corporate governance. Walker, D.: *A review of corporate governance in UK banks and other financial industry entities*, July 2009. http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/walker_review_consultation_160709.pdf, accessed on 21.10.2018.

[12] This is the classical structure of non-executive directors' fiduciary duties in British case law, being adapted and developed by most professional organizations in their reports and recommendations, for e.g. *Institute of Business Law Teachers, Deloitte UK, The professional body for non-executive directors and board members in the UK (NEDonBoard), Royal Institute of Directors*, etc.

Last but not least, non-executive directors shall have extraordinary communication and coordination skills to be able to carry out their mediation and oversight functions. In most European jurisdictions, they have decisive roles for executive directors' appointment, revoking and remuneration, therefore they should inform themselves about candidates' traits, experience and qualifications in order to be able to render relevant recommendations.

In order to fulfill their role effectively and fairly, non-executive directors may hold meetings even without executive directors' participation. We consider that they should also be allowed to request external advice whenever they feel this is required for fulfilment of their duties, but without challenging executive directors' skills and qualification and creating tensions within the board.

The exhibited features are within the nature of non-executive directors' function in its classical content borrowed from common law doctrine. As we shall see below, they are not inherent to non-executive directors' role in all EU member states, sometimes being attributed to the board of directors, sometimes to the supervisory board. We will discuss in detail non-executive directors' fiduciary duties in common law and we will then incorporate them into continental law corporate governance systems. The paper will end with exposing the distribution of the presented fiduciary duties we in Romanian law, both in the one-tier and in the two-tire management system.

2.1. Non-executive directors' duty of care

The unique nature of modern corporate governance is determined by the unprecedented and incomparable discretion and decision range granted to the board of directors. Executives have robust mechanisms to exercise their authority, compared to similar functions in the democratic society: politicians are bound to the discipline of their party and judges are restricted by judicial precedents and procedural rules[13]. Directors have the opportunity to choose their team, their strategies and action plans and to receive external consultation in situations requiring specialist knowledge.

The role of the board is to propose and, in some jurisdictions, even to appoint executive directors. This is an expression of the essence of their function and describes their goal to protect shareholders' interests through appropriate interventions and proposals. Non-executive directors' duty of care translates, first of all, to their *duty of oversight*, i.e. monitoring the company and the executive, a duty which is thoroughly developed and analyzed by common law jurisprudence. The use of this general term is justified, first, by several parallel activities required to be met in order to fulfill the elements of the duty of care. Secondly, a strict definition of the duty of oversight cannot be applied in the variety of industries

[13] Morck, R.: *Behavioral Finance in Corporate Governance – Independent Directors and Non-executive Chairs*, Discussion Paper 2037, Harvard Institute of Economic Research, 2004, p. 9-10.

present in the era of globalization and technology. Non-executive directors' duty of care involves not only guiding the company, but also executives and senior officers through prudent and efficient control mechanisms. The efficiency of supervising senior executives and business development is measured by constructive monitoring, risk assessment and risk management and by evaluating executive performance based on pre-established goals and objectives.

The duty to monitor the growth of the business as a whole is always accompanied by the duty to track and process information identified by means of continuous surveillance. The duty to monitor is not limited to direct observation of the conduct of business operations, but also involves efforts to analyze and improve the methods to inform the board about future requirements[14]. Thus, non-executive directors have the duty to periodically control the opportunity and efficiency of their information systems, which represents a continuous and inherent part of management function, through constant checking of their efficiency and by self-initiative to always stay informed[15].

Given the nature of their role, non-executive directors' duty of oversight does not translate into absolute knowledge about all aspects and details of the company's activities, an exercise which would be impractical and expensive. The degree of self-information must be reasonable and depends on the circumstances of each particular situation, as a director's business judgement is determined in each case. They do not have to prove the same detailed knowledge of the company's business which is expected from executive directors, but their diligence is expressed by taking opportune measures to identify the necessary data about the company and current operations.

An illustrative example is that of the manager of a reinsurance company[16] who was not aware of money misappropriation committed by the vice-president and general manager, because she was not actively involved in performing her tasks, she came rarely to the corporation seat and did not make any effort to familiarize herself with the insurance market legislation or with corporate practices. The court ruled that "directorial management does not require a detailed inspection of day-to-day activities, but rather general monitoring of corporate affairs and policies", they are not required to study audit courses, but to "become familiar

[14] See footnote 7 for details of the duty of oversight and to situate this term into the broad scope of the duty of care.

[15] In one of the cases of reference for British corporate governance, *Re Barings plc, 1 BCLC 433, 1999,* the court ascertained non-executive directors' poor conduct by applying the objective standard of a reasonable and average agent. In the statement of reasons, the court held that directors always bear the duty to be informed about the affairs of the company and to work with members of the board to oversee the business. The lack of an adequate monitoring system represents a violation of the standard. Even if directors choose to delegate certain tasks, they remain responsible for the performed functions.

[16] *Francis vs. United Jersey Bank,* 87 N.J. 15, 432 A.2d 814 (N.J. 1981).

with fundamentals of the business in which the corporation is engaged". Additionally, the court ruled that the detection of embezzlement did not require special expertise, but a regular lecture of the balance sheets.

Regarding the exercise of this duty, total delegation of the duty to monitor and supervise is not permitted, as this is a core responsibility of corporate management. An informed decision taken in compliance with the general oversight duty will not trigger a director's liability even in the case of unsatisfactory results, if the decision considers the strategical priorities of the company. For example, after analyzing relevant information and weighing risks, the board of directors decides not to install an IT security program, as this would be too costly. Similar, the board of directors considers that delegating supervision of certain processes would be very efficient. The examples are numerous, but their common denominator is that, if a decision taken after deliberation meets the conditions of the Business judgement rule, the board members will not be liable for its failure, even if the decision itself was not the most appropriate.

Non-executive directors should be those setting the standards of the company and ensuring that executive directors and officers, as well as employees understand their duties towards the company and shareholders and strive to meet them. The board of directors as a collective body is responsible for advancing the company's success by steering business closings. However, non-executive directors are those who are actively involved in the board's decision-making processes and concerned about building business strategies. As board members, they shall contribute to the strategic goals of the company in a forward-looking manner. This initiative implies, among other things, insuring sufficient human, financial and material resources to achieve the corporate goals.

Non-executive directors shall support the CEO and executive directors to create and maintain a corporate culture of commitment and accountability which should be embraced by executive directors and management. This means they should strive to understand the corporate culture, values and directors' conduct in order to be prepared to formulate the right questions.

The mechanisms used are the expressions of the duty of care. First, non-executive directors are required to formulate clear and realistic business strategies and communicate executive directors the reasonable expectations they have from them and from the corporate performance. Secondly, they shall build and put in place internal mechanisms for assessing and correcting personal and team performance, and for measuring and mitigating risks. Their economic and financial experience plays an important role in verifying the fulfilment of fiscal duties and establishing the necessary control and internal audit mechanisms.

One of the commitments that non-executive directors are required to take upon themselves, is allocation of sufficient time to effectively fulfill their responsibilities within the company. In addition, they are required to allocate sufficient time to meet the expectations of their role, as set out in the management contract. Non-executive directors shall inform the board of other significant commitments

they might have and which require significant time, both before being appointed, as well as during the exercise of the mandate. The UK Corporate Governance Code[17] recommends that non-executive directors seek the agreement of the Chairman of the board before accepting additional commitments that may affect the time they should devote to their role. Last but not least, non-executive directors will need to invest time in their professional development and update their knowledge in order to be able to guide executive leadership accordingly.

We highlighted that non-executive directors' duty of care also translates into their role of advising and guiding the chairman of the board and executive directors. The role of a non-executive director is expressed by objective and constructive criticism, which facilitates executive directors' decisions[18]. For this reason, non-executive directors' personal qualities, expertise and professional experience ultimately determine the manner in which they fulfill their fiduciary duties. The success of the non-executive function can be observed and measured by long-term effects, such as the company's reputation and strategic direction. The appointment of non-executive directors is often used as a marketing strategy, as their recognized name often contributes to the company's growth. The symbolic value of non-executive directors' philanthropic activities and past business success in the same industry creates a positive exposure of the company to the market and represents a long-term strategy for involvement in Corporate Social Responsibility projects and other charitable programs that are consistent with the values promoted by the company. In view of these expressions of the duty of care, non-executive directors' liability will obviously be the same for the success or decline of the company, in accordance with statutory and corporate requirements.

Non-executive directors' diligence and prudence of is often an expression of the communication skills of these individuals, who shall tactfully and confidentially handle delicate decisions. At the same time, they will take the necessary steps to ensure that the guidance given and the trust relationship built with executive directors does not turn into potential conflicts of interest and power imbalances within the boards of directors.

Non-executive directors shall be good diplomats and have superior emotional intelligence. In order to fulfill their duty of care and work with executives in a valuable manner, they shall well assess human traits, situations and relationships, and adapt their strategies accordingly. A dominant attitude that does not inspire executive directors' trust and friendship, but rather fear of being sanctioned or revoked, will destroy the essence of the non-executive directorial function and consequently, the fulfillment of the supervisory role.

---

[17] The UK Corporate Governance Code 2016, section B.3.1, https://www.frc.org.uk/getattachment/ca7e94c4-b9a9-49e2-a824-ad76a322873c/UK-Corporate-Governance-Code-April-2016.pdf, accessed on 22.10.2018.

[18] A description by the (Royal) Institute of Directors, UK in a presentation given in March 2018 https://www.iod.com/training/open-courses/role-of-the-non-executive-director, accessed on 22.10.2018.

British legal literature calls non-executive directors the "critical friend" of the CEO and of executive directors, because half of the time they ask uncomfortable questions about the pursuit of business in shareholders' interest and in the other half they play the role of genuine team members, supporting the board of directors to achieve the maximum growth potential and the preset goals[19]. In view of the experience and knowledge that is essential for the appointment of non-executive directors, they often play the role of mentors for executive directors through accurate observations regarding internal details or external factors that may adversely affect the course of the business.

Non-executive directors are required not only to bring a vision to the board, but also to develop business prospects, expand production lines or the company's core activity. They bring value through professional, independent and objective advice and contributions, which is emphasized by their external character and becomes essential for shareholders' protection. We have highlighted the importance of appointing individuals with impeccable and high caliber reputation in this unique position, as their duties include monitoring executive directors' compliance with fiduciary duties. Non-executive directors may be requested to participate in advisory committees within the board of directors[20]. Participation in a committee should be established by utilizing their skills and competencies for the benefit of the company.

In the above-mentioned examples, we observe that overlapping elements and effects of the duty of care and duty of loyalty is predominant for non-executive directors. For example, they enhance corporate management by using their contacts who can benefit the company, given that their reputation is one of the appointment criteria. Thus, they are required to make the necessary efforts to create and maintain external contacts and utilize pre-existing relationships which are able to contribute to the mission and vision of the company. At the same time, these relationships will undoubtedly expose them to situations of conflict of interest, business opportunities and business proposals, when they will have to demonstrate loyalty to the managed company and to the represented shareholders.

The duty to disclose relevant information to the company includes all simultaneous commitments and non-executive directorship positions in other

---

[19] Hazell, R., Cogbill, A., Owen, D. Webber, H..: *The Role of Non-Executives on Whitehall Boards*, The Constitution Unit, School of Public Policy, University College London, January 2018, https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/178_-_Critical_Friends__The_Role_of_Non_Executives_on_Whitehall_Boards, accessed on 22.10.2018

[20] This participation is also provided by Romanian law and includes the same functions as those presented for common law and some continental law jurisdictions, see art. 140 ind. 2 of the Law no. 31/1990. The advisory committee shall be composed of at least two members of the board of directors and at least one of them shall be an independent non-executive director. The scope of the advisory committees is specialized in matters such as auditing, remuneration of directors, of auditors and senior staff, nomination of candidates for different management positions, etc. Moreover, the audit and remuneration committee shall only include non-executive directors.

companies[21]. Non-executive directors shall comply with the duty of loyalty by keeping professional secrets and fulfilling their parallel responsibilities in a responsible and balanced manner.

2.2. Non-executive directors' duty of loyalty

In 2018, the Financial Times suggested that the ideal non-executive director is someone who is quiet, knowledgeable and competent[22]. The same values were articulated by Spencer Stuart, namely that a non-executive director shall possess the virtue of modesty and shouldn't be dogmatic[23].

The role of non-executive directors is not a mere continuation or extension of the experience they gained as executive directors. These positions are usually filled by individuals who have previously been senior executives in companies within the same industry, as this complex role requires great investment in their own knowledge and skills, as well as the ability to translate competencies into a position aimed at providing observation and correction. Appointing external persons is generally a guarantee of their independence and impartiality and provides in the same time the opportunity to integrate external views and opinions. The main advantage of appointing external directors is the likelihood to avoid conflict of interest situations and to receive objective assessments of the company performance. On the other hand, due to the fact that they are less involved in the company's current affairs and problems, non-executives have far less information on which they root their corporate decisions, even though they are subject to the same liability rules.

The independent value of non-executive directors is highlighted by the UK Corporate Governance Code[24], which recommends that they shouldn't be chosen from former employees or individuals who used to engage in business relationships with the company they intend to join. British doctrine encourages executives to offer their services as non-executive directors to partner companies, where they can contribute through experience, knowledge and new perspective.
In the UK, the board of directors will justify the decision to appoint a non-executive director on his conduct, taking into consideration if he has previously been employed by the company or if he engaged in direct business relationships with

[21] Romanian law attaches similar duties to independent non-executive directors, art. 138 ind. 2 of the Law no.31/1990, mainly including the conditions for the appointment of these individuals and prohibitions aimed at avoiding conflicts of interest and guaranteeing non-executive directors independence.
[22] https://www.ft.com/content/87bed6b0-14bb-11e8-9e9c-25c814761640, accessed on 20.10.2018.
[23] Spencer Stuart is one of the world's leading executive search and recruitment consulting firms and addresses a broad range of practice groups in the public and private sector. See *Cornerstone of the Board: Lessons on creating or rebuilding a board, Spencer Stuart*, April 2010, https://www.spencerstuart.com//media/pdf%20files/research%20and%20insight%20pdfs/cornerstone-of-the-board_23apr2010.pdf, accessed on 20.10.2018.
[24] For the UK Corporate Governance Code, see footnote 17.

it or as a representative of another company for the past three years, if he is acquainted with consultants, directors or employees of the company, and if he has business relationships with other executives through other companies. In general, individuals who have been members of a board of directors for at least nine years and who are known to have a reputation of independence and experience in the industry are favored. The faithful transposition of this principle into Romanian business law[25] was synchronized with pre-existing business law rules and currently, independent non-executive directors are appointed by shareholders. The candidate must, among other things, not be a director or employee of the company or of a controlled company, he shouldn't have occupied such a position in the last 5 years and he cannot be a significant shareholder of the company. Additionally, the candidate cannot be the financial auditor or associate employee of the current financial auditor of the company or its controlled company or have occupied such an office in the last 3 years.

A non-executive director is a member of the board, but does not engage in current affairs and day-to-day management of the company, but solely in the creation of long-term strategies, corporate policies and planning exercises. Therefore, the duty of loyalty is inherent to the non-executive directors' function, because they are the primary contributors to defending the interests of shareholders, while executive directors' duty of loyalty of is regarded by the majority doctrine as being primarily owed to the company[26].

Non-executive directors have a duty to determine the direction and performance of the company, due to the detached nature of their function, which enables them to obtain a more objective perspective than the internal perception of executive directors, who are directly involved in everyday business and who are more exposed to the conflicts of interest between those who hold the capital and those who have the power of control and decision. The duty to evaluate and analyze the functioning and productivity of the company and of ongoing projects is the core of the non-executive function, therefore they shall ensure that shareholders' and other stakeholders' interest prevail over the requirements and interests of the board of directors.

The principal expression of non-executive directors' duty of loyalty[27] is monitoring and supervision of executive directors in a completely impartial and independent manner from influences of shareholders, other board members or third parties. Unlike the duty of loyalty expected from executive directors, non-executive directors' duties are not focused on maximizing shareholder wealth, but

---

[25] The applicable Romanian law rule is art. 138 par. 2 of Law no.31/1990.

[26] Gold, A.: *The new concept of loyalty in Corporate Law*, University of California Law Review no. 43, 2009, p. 462.

[27] For the historical evolution, traditional elements and jurisprudential application of the duty of loyalty in its classic meaning, see Ponta, A.: *O scurtă istorie a bunei-credințe în guvernanța corporativă – Formarea și decăderea (obligației fiduciare a) bunei-credințe,* „Revista Română de Drept al Afacerilor" no. 5/2017, Wolters Kluwer, Bucharest.

are equally divided between promoting the interests of the company, of shareholders, partners, and customers, and last but not least, employees.

The fiduciary duties provided for in the UK Companies Act 2006 are complemented by the UK Corporate Governance Code. The transparent and consensual nature of corporate decisions is a prerequisite for a collegial management body in the UK. This feature is highlighted in various legal provisions and justifies the imperative requirement of the composition of the board of directors with both executive and non-executive directors, as this mechanism ensures that decision-making processes are not dominated by a group of directors. It is recommended that at least half of the members of the board of large enterprises are independent non-executive directors, and small companies shall include at least two. The tendency in the EU member states is to grant supervisory responsibilities to non-executive directors, which corresponds to an increase of their remuneration packages. The market reflects the importance granted by large corporations to these positions, for example HSBC's board of directors has 14 non-executive directors, and Barclays has 10.

3. Non-executive directors' fiduciary duties in the EU member states

Given the particular role of non-executive directors in companies' boards and the importance of their proper compliance with fiduciary duties, the requirement to appoint qualified individuals in these positions increased significantly across EU member states.

Corporate governance among EU jurisdictions reflects that courts generally impose a higher standard of diligence and prudence for top executives, who work almost exclusively for the managed company, against the standard applied to non-executive directors. The difference is based on the different nature of their roles on the board, therefore most states have opted for clear regulation of non-executive directors' duties.

Typically, legal provisions governing the standards of review take into consideration non-executive directors' professional experience and expertise, their familiarity with the managed company and their experience in the respective industry. In some jurisdictions, case law has set a standard of diligence and prudence which depends on the occupied position and on the remuneration, such as in the United Kingdom and Ireland, where this standard has been explicitly adopted by law.

The United Kingdom sets out the most predictable duties for non-executive directors, which are the very the same primary duties of executive directors, provided by the UK Companies Act 2006. Contrary to the tendency of continental European countries which allow companies to choose between the one-tier board and two-tier board system, most British companies are managed by a unitary board of directors (monistic structure), therefore all directors are subject to the

same rules[28]. Although statutory rules provide for different diligence and prudence standards of review based on the position a director occupies in a company, as well as on his experience and expertise, their main legal duties are identical[29].

Most states determine non-executive directors' standards of review in line with evaluation criteria of their position, such as the assigned functional responsibilities, the role of the position within the board of directors and division of tasks in the management bodies.

Greece sets different standards for executive and non-executive directors by analogy to the performance of an average prudent agent "depending on the assigned tasks"[30]. Other countries, such as Bulgaria, Denmark, Malta or Sweden, apply the same standard of care, regardless of whether it applies to executive or non-executive board members[31].

Austrian courts take into account the company type and the specific tasks of the occupied position[32], and Danish law sets a higher standard if non-executive directors have a professional qualification in the field of business of the managed company[33]. German[34] and Dutch jurisprudence recommend different expectations from board members, contingent on their functional responsibilities and professional experience in the field of activity of the managed company. In most cases, this approach leads to higher expectations and a higher standard of conduct[35].

Portugal combines the systems displayed in Germanic countries, the standard is variable and depends upon the concretely performed functions and the governance structure. Italy imposes the standard based on the general principles of civil law, namely that of knowledge, competence and experience that can reasonably be expected from a director fulfilling the same role[36].

---

[28] Witney, S: *Corporate opportunities law and the non-executive director*, Journal of Corporate Studies, vol. 16 no. 1, London, 2016, p. 146.

[29] Section 174(2) UK Companies Act codifies relevant case law prior to its adoption in 2006.

[30] art. 22a (2) of the Greek Company Law no. 2190/20.

[31] Gerner-Beuerle, C., Schuster, E.P.: *Study on Directors' Duties and Liability, prepared for the European Commission*, Department of Law, London School of Economics, London 2013, p. 112-115.

[32] By Decision RS0116167/2002, the Austrian Supreme Court held that "business law rules establish an objective-normative standard, therefore management board members cannot benefit from the statutory rule if they lack appropriate skills and competencies. The duty of care will be evaluated considering the company's core business activity, the size of the company, its market position and similar circumstances. The higher standard of review of the duty of care is just slightly different from the practical application of the standard provided by art. 1299 Civil Code, general part" [*art. 1299 Civil Code, general part regulates the agency*].

[33] Christensen, J.S: *Kapitalselskaer*, Thomson Reuters Professional 2009.

[34] Raiser, T., Veil, R.: *Recht der Kapitalgesellschaften*, 5th edition, C.H. Beck, München 2010, p. 249.

[35] By Decision II ZR 234/09, 2 September 2011, the German Supreme Court confirms that directors who have specialized expertise shall fulfill the duty of care with proper application of their knowledge. For the Netherlands, see case *Staleman/Van de Ven*, Supreme Court, HR 10-01-1997, ECLI:NL:HR:1997:ZC2243.

[36] See art. 2392(1) Portuguese Civil Code.

In spite of the harmonization and similarities observed in the duty of care and duty of loyalty among EU member states, we notice significant differences in the determination of the standard of care applied to non-executive directors, which may lead to divergent solutions in court practice.

A challenge of judicial practice in most member states is establishing a coherent and fair mechanism for assessing factors that contribute to the determination and interpretation of the applicable standard of care. Balanced application of the standard of care to non-executive directors is all the more difficult if they occupy a key position within the company, such as chairman of the board of directors or of the audit committee, which in some states are composed of the members of the boards of directors. The relevant elements for courts in cases of application of standards to senior executives cannot be transposed in all situations. In most countries, non-executive directors' conduct is less strictly scrutinized than executive directors in comparable positions, with the standard of care being lowered by statutory regulation or by case-law. However, the qualification and professional experience raises again the standard of review, the same qualifications that initially determined the assignment of a certain individual for a position. Following the financial crisis, the doctrine foresaw that EU member states' judges would no longer differentiate between reviewing the performance of the executives involved in decision-making processes and the supervisory responsibilities of non-executive directors, but the evolution of judicial practice is quite unpredictable.

Regarding the monitoring and supervising duty among EU member states, there is no convergence towards non-executive directors' liability procedures. In general, expectations are high from individuals who bring knowledge and expertise in the field, such as members of the audit committee. However, differences in the nature and scope of the duty of oversight are predominant. Certain jurisdictions allow directors to fundament their decisions on information provided by other board members or high ranked officers with management functions, unless there are other signs of prejudicing the company. Other states highlight the increased duty of audit committee members in financial and fiscal matters, but do not attach importance to the board's overall duties to build and implement functional and stable control systems.

Irish courts emphasize the monitoring and oversight role of non-executive directors, sometimes observing that accomplishment of their responsibilities depends on the information they receive from executive directors, therefore their liability will be limited to internally received, requested or reasonably investigated information.

In Spain, non-executive directors are not liable for executive directors' acts except for cases of *in eligendo, in vigilando* sau *in instruendo* fault. They are liable towards the company solely in situations when they were themselves negligent in carrying out the tasks assigned to them as non-executive directors, such as displaying lack of the duty of oversight. Even if non-executive directors' duty

to monitor is implied and understood by lawmakers and doctrine, in practice, it is not enforced and sanctioned as a true component of the duty of loyalty. If the breach of the duty is the result of a board decision, members will be jointly liable, excepting those who voted against the decision and who have taken measures to prevent more serious consequences.

Romania is one of the few European jurisdictions that does not assign the monitoring and supervision duty to non-executive directors, joining Belgium, Bulgaria and France in this approach. Thus, the standard of care does not differ between non-executive and executive directors. Some of the supervisory and monitoring functions are performed by the audit committee, its members being evaluated according to a higher standard of review.

Bulgaria and Croatia provide for identical rights and duties of board members, regardless of the distribution of tasks, i.e. familiarization with the operations performed by the company and appropriate information about current activities and decisions.

A stricter option is expressed by Czech Republic by providing for non-executive directors' liability in situations where they should have observed mistakes or deficiencies in transactions that prejudice the company. Similarly, Finland verifies *ex post* whether non-executive directors had reasons to doubt the true nature of transactions on the basis of the available information.

Most EU member states opted for express statutory rules on non-executive directors' duty to monitor or supervise management. The practice of German companies is that of lower expectations from non-executive directors who are not members of the audit committee if they do not have specialized knowledge of accounting and auditing to identify irregularities. Similarly, in Greece, Spain, The Netherlands and Hungary, non-fulfillment of the duty of oversight represents a violation of the duty of care, while Portugal exclusively regulates non-executives' duty to monitor the CEO. Irish jurisprudence recognizes the duty to monitor, and similar to German practice, the use of specialized financial knowledge is mandatory, otherwise the courts will verify the measures taken by non-executive managers to gain information and retrain themselves.

Other countries, such as Slovenia, Austria, Romania and Poland, only provide for the supervisory board's duty to monitor the performance of the board of directors in the case of the one-tier management system.

As mentioned in the previous chapter, one of the commitments that non-executive directors are obliged to take is allocation of sufficient time to effectively fulfill their responsibilities within the company. Therefore, numerous member states chose to explicitly include this duty in the applicable legislation or in Corporate Governance Codes[37], and others have chosen to limit the number of non-executive directors' positions that a person may occupy at a certain point in time.

[37] Estonia, Finland, Italy, Latvia, Lithuania, Luxemburg, Malta Slovenia, Spain and the UK.

The European Commission Recommendation on the role of non-executive directors and members of the supervisory board of listed companies on a public market, published in February 2005[38], emphasizes the independent nature of the non-executive position. The Commission urged member states to set up internal committees of independent directors to determine directors' remuneration, a mechanism that proved to reduce conflicts of interest among members of the board in two-tier systems. Member states treat non-executive directors' remuneration differently, some countries opted for performance-based rewards, which depend on non-executive directors' participation in internal committees[39]. The Spanish law provides that basic remuneration shall be equal for all directors unless otherwise provided in the articles of association. The Danish Corporate Governance Code recommends avoiding rewarding managers with options to buy shares, but allows rewards in the form of market priced shares.

I have pointed out that the non-executive directors' roles evolved through new duties conferred to them by Corporate Governance Codes, first in common law jurisdictions and then in continental law, culminating with new perspectives and strengthened positions in the aftermath of the 2007 financial crisis. Even though Romanian law does not entail non-executive directors with the duty to monitor and supervise executive directors, a feature considered traditional in common law jurisdictions, art. 144 ind. 2 par. 2 of Law no. 31/1990 provides that "directors[40] shall be liable to the company for damages caused by the acts performed *by directors or by staff*, when the damage would not have occurred, had they properly exercised the supervision imposed by their function", which confirms the British theory set out above, i.e. prohibition of total delegation of the duty of oversight.

The duty to supervise and set out the strategic policies of the company falls upon the board of directors as collegiate body and cannot be delegated to directors, in accordance with art. 142 para. 2 of Law no.31/1990. In the same way, the lawmaker's intention was to align national legislation with the Recommendations of the European Commission, therefore para. b of the same article includes among the core responsibilities of the board of directors, the establishment of internal planning and financial control systems. We acknowledge that negligence is revealed in practice by absence of internal mechanisms meant to prevent commission of detrimental acts for company. This approach has similar content to that of other member states, but Romanian law aims at increasing the

[38] https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=celex:32005H0162, accessed on 24.10. 2018.

[39] Ferrarini, G., Moloney, N., Ungureanu, M. C.: *Understanding Directors' Pay in Europe: A Comparative and Empirical Analysis*, European Corporate Governance Institute, Law Working Paper no. 126/2009, p. 46-48.

[40] The first Romanian term refers to non-executive directors, while the second only includes executive directors. Therefore, the duty of oversight of non-executive directors cannot be excluded, even if it is no expressly regulated by law, but does not include performance measuring duties.

accountability of the board of directors as a collegiate body and not of non-executive directors. Further, art. 142 para. 2 (d) of the law expressly requires the board of directors to supervise directors' activity, which corresponds to non-executive directors' duty to set out direction and guidance, as explained in the first part of the paper.

In two-tier boards, the supervisory board performs a true supervisory and monitoring function of the company's board and business, thus having the same duties detailed by British doctrine and case law for non-executive directors. We note that in one-tier boards, non-executive directors' duties overlap with those provided for in most EU member states, apart from the duty of oversight. In the two-tier board system, however, the performance of these functions is absorbed by the supervisory board. According to art. 153 ind. 4, the supervisory board verifies regular reports submitted by the board about their management activity, performance and development plans, as well as facts that could significantly influence the company's situation. The law expressly mentions the methods of properly exercising the control functions and these rules mirror the duty to monitor the executive of the company found in all EU member states.

Similar to the one-tier board system, where the board of directors may set up consultative committees to carry out investigations and make recommendations, the supervisory board may also set up consultative committees consisting of at least two members of the board, of which at least one should be an independent director. In the case of joint stock companies whose annual financial statements are subject to a statutory financial audit duty, the establishment of an audit committee is mandatory according to art. 160 par. 2 Companies Law.

4. Conclusion

In essence, the main function of corporate management is to satisfy the organic and structural integrity of a company. The organic integrity represents functional and operative management, which ensures constant and efficient internal information systems, adapted to the particularities of the company, a system which delivers financial data on which accurate decisions can be made.

Non-executive directors' monitoring role of is essential in situations at risk of conflicts of interest, such as proposing or even appointment of executive directors, depending on the rights provided for them by national regulations. In jurisdictions where shareholders do not have the possibility to closely supervise the board, non-executive directors will improve information imbalances. Therefore, independence of non-executive directors' office is essential to the operation of management, to avoid conflicts of interest and to protect minority shareholders.

Although business law is fairly harmonized, at least in terms of corporate institutions and management body structures, the role of non-executive directors

varies significantly among EU countries. We have shown that fundamental differences between legal regulations of the non-executive office among member states are determined by major differences in the meaning and content of non-executive directors' fiduciary duties in various states and by the different nature of the two functions. In most countries, non-executive directors' duties are mainly positive obligations, such as building the company's strategy, determining performance, mitigating risks and coordinating board members' endeavors. Therefore, non-executive directors' position has evolved from a pure supervisory function to a strategic development role.

As detailed, most EU member states expressly regularized non-executive directors' duty to monitor or supervise management, but the establishment of a coherent mechanism for interpreting the applicable standard of care remains a challenge for the judiciary. Most states determine applicable standards for non-executive directors based on their assigned functional responsibilities and specialist knowledge.

Romania is among the few European jurisdictions that do not include monitoring and supervision of executive directors among non-executive directors' duties. Even though the legal formulation doesn't exclude this function, it cannot be interpreted as including the duty to measure executive's performance. The duty of oversight and the duty to establish the company's strategic policies, internal planning and financial control systems falls upon the board of directors as a collegiate board, which absorbs most classic attributions inherent to the non-executive office in common law systems. In two-tier board companies, supervisory boards perform a true supervisory and monitoring function of the company's management and business, thus having the very same duties exposed by common law jurisprudence for non-executive directors.

Bibliography

I. Books

1. Christensen, J.S: *Kapitalselskaer*, Thomson Reuters Professional, Aarhus 2009.
2. Raiser, T., Veil, R.: *Recht der Kapitalgesellschaften*, 5th edition, C.H. Beck, München 2010.
3. Schiau, I.: *Drept commercial*, Hamangiu, Bucharest, 2009.
4. Todică, C.: *Răspunderea juridică civilă a administratorului societății comerciale*, Ed. Universitară, Bucharest, 2012.

II. Articles

1. Catană, R. N, Ponta, A., *The Business Judgement Rule and its reception in European Countries*, The Macrotheme Review 4(7), Austin, Texas, 2015.
2. Eisenberg, M: *The Duty of Care of Corporate Directors and officers*, Pittsburgh Law Review 51/1989.

3. Ferrarini, G., Moloney, N., Ungureanu, M. C.: *Understanding Directors' Pay in Europe: A Comparative and Empirical Analysis,* European Corporate Governance Institute (ECGI) Law Working Paper no. 126/2009.
4. Gibbs, David: *Non-executive Directors' self-interest: Fiduciary duties and Corporate Governance*, University of East Anglia, 2014
5. Gold, A: *The new concept of loyalty in Corporate Law,* University of California Law Review 43/2009.
6. Hazell, R., Cogbill, A., Owen, D. Webber, H., Chebib, L.: *The Role of Non-Executives on Whitehall Boards,* The Constitution Unit, School of Public Policy, University College London, 2018.
7. Morck, R.: B*ehavioral Finance in Corporate Governance – Independent Directors and Non-executive Chairs,* Discussion Paper 2037, Harvard Institute of Economical Research, 2004.
8. Ponta, A.: *Good faith in corporate law – an independent fiduciary duty or an element of the duty of loyalty?*, Juridical Tribune – Tribuna Juridica, vol. 6, issue 2, Bucharest, 2016.
9. Ponta, A: *O scurtă istorie a bunei-credințe în guvernanța corporativă – Formarea și decăderea (obligației fiduciare a) bunei-credințe*, Revista Română de Drept al Afacerilor no. 5/2017, Wolters Kluwer, Bucharest, 2017.
10. Ponta, A., *The Evolution and Complexity of Directors' Duty of Care*, „Perspectives of Business Law" Journal, no. 4/2015.
11. Sitkoff, R.H.: *The Economic Structure of Fiduciary Law*, Boston Univ. Law Review, vol. 91, 2001.
12. Witney, S.: *Corporate opportunities law and the non-executive director*, Journal of corporate studies vol. 16, no. 1, London, 2016

Content and Organization of the Extrastatutory Conventions

PhD. student **Andreea PURCEA – REZEANU**[1]

Abstract

The theme "The content and organization of extrastatutory conventions" is a rare topic both in Romanian legislation and in doctrine and jurisprudence. This theme is a subject proposed to clarify and bring novelties into the sphere of commercial law. The main objectives are to provide a clear, well-defined framework for the organization and content of these atypical contracts (extra-statutory conventions). Due to the complexity of the field, the research will be outlined on the compatibility of these conventions if they have the capacity to anchor the corporate market, effervescence and transparency. The work involves the rich and complex presentation of the theoretical and unidentified aspects in the literature, analyzing the practicalities of the Community law. The legal research will aim at gathering the principles, issues of the stages, methods, techniques and tools of investigation and scientific knowledge of legal phenomena, playing an important role in the final outcome of the project. The actual research will consist of documenting, debating and proposing solutions to problems and gaps in both doctrine and legislation and jurisprudence. These conventions are the civilized way of confronting the freedom of contracting associates, the particular or fractional interests of the associates in society, finding the appropriate instrument for extrastatutory conventions.

Keywords: *extrastatutory conventions, organization, content, blocking syndicates, vote unions.*

JEL Classification: K12, K22, K33

1. Introduction

The theme "the content and organization of extrastatutory conventions" is a contribution to the study of relations between associates and is a rare topic in Romanian doctrine and jurisprudence. This theme is a subject proposed to clarify and bring novelties into the sphere of commercial law.

As we can see, in every field, there are room for interpretation and loopholes, both in the law on commercial law and in the other situations involving the community in which we live together.

This theme is a "partial" of a whole that aims to present the richness and complexity of the field of commercial law and societies.

In Romanian legislation this principle is new, not defined or debated in legislation, doctrine or jurisprudence. It is a concept that provides rapidity to associates within companies.

[1] Andreea Purcea – Rezeanu – Faculty of Law, University of Craiova, Romania, purcea_andreea@yahoo.ro

The main objectives are to provide a clear, well-defined legal framework with regard to the organization and content of these atypical contracts (extrastatutory-conventions).

Due to the complexity of the field, the research will be outlined on the compatibility of these conventions if they have the capacity to anchor the corporate market, effervescence and transparency.

The work involves the rich and complex presentation of the theoretical and unidentified aspects in the literature, analyzing the practicalities of the Community law.

The legal research will aim at gathering the principles, issues of the stages, methods, techniques and tools of investigation and scientific knowledge of legal phenomena, playing an important role in the final outcome of the project.

The actual research will consist of documenting, debating and proposing solutions to problems and gaps in both doctrine and legislation and jurisprudence.

These conventions are the civilized way of confronting the freedom of contracting associates, the particular or fractional interests of the associates in society, finding the appropriate instrument for extrastatutory conventions.

Students of commercial law deal with decades of conventions in various circumstances.

In general, the issues that have been dealt with - and continue to be dealt with - by doctrine and jurisprudence in relation to this particular convention typology, relate to their validity, compatibility with some basic elements of company law, duration and publicity.

But recently, some special conventions have been raised, these being the extrastatutory conventions.

The theme chosen is to present the richness, complexity, problem and everything that this challenge poses to society. This work is up-to-date, is extremely little debated and will try to approach an original and complex presentation that includes both problems and solutions.

2. Extrastatutory conventions

Shareholders who are members of a company are called upon to act as a shareholder to achieve common goals or to agree on issues that are not defined in the constitutive act or statute.

Davide Proverbio: "From their undeniable classification as' contracts', the same unquestionable submission to the principles applicable to any other contract [...] [2]".

Otherwise, shareholders may define certain rules of conduct, restrictions, legal rights of operation of the company and relations between partners.

[2] Davide Proverbio, *Societa e Mercati finanziari I patti parasociali; Disciplina, prassi e modelli contrattuali*; IPSOA, Gruppo Wolters Kluwer, Milano, 2010, p.1.

For example, if no shareholder is strong enough to get the majority of votes at the meeting, he or she may conclude an agreement with other shareholders to take control of the company with them.

We will define extrastatutory conventions as agreements between shareholders, the formal formation of the association or the life of the company in order to regulate between them (or between some of them) one or more profiles of the essential aspects of rights and duties within a complex set of relationships stemming from being a member of membership.

In most cases, they are presented in detail and presented the actual contracts in which the rights and obligations of the members of the Convention are established, as well as, of course, the penalties resulting from the non-observance of the provisions.

The most recent shareholders' conventions are the voting syndicate and the blocking syndicate. With the voting syndicate, the participating members are obliged to agree with each other, before each meeting, the content of the vote or are obliged to release the power of attorney for one of those who will express the will of all.

As for the blocking syndicate in which the members participate, they undertake to sell them under certain conditions.

To complement, other conventions well known in practice are also required:

- consultation conventions which do not involve a commitment to vote in a certain sense only stipulate that the participants consult each other before the meeting;
- management conventions which provide for the exercise of direct influence over the directors of the company.

3. Failure to observe extrastatutory conventions

Extrastatutory conventions work as any contract that obliges only the parties that have concluded it.

This means that the sale of shares is effective against third-party buyers, as well as the vote expressed in the framework of the meeting. However, those who break the agreement may be required to compensate for the prejudice caused to the other members.

4. Duration and shape

The form of these conventions is both verbal and written, even if the advertising obligations imply, in particular, the use of written recognition of the relevant conventions.

The Italian Civil Code provides in clear terms; art. Bis-2341; "*In any form they would have stipulated*[3]".

Agreements which do not include a duration, without prejudice to the right to withdraw with six months' notice to each contractor, are permitted.

5. Special rules

Since conventions can have a considerable influence on the company's management, the law establishes certain rules regarding their duration and their knowledge. These:

- may not last for more than 5 years and are intended for that duration even if the parties have provided for a longer period;
- if the company is listed, the maximum duration is the year;
- if the agreement provides for no term, each contractor shall be entitled to withdraw with a three-month notice.

6. Communication of conventions

In venture capital companies, the extraordinary shareholders' conventions must be:

- communicate to the company;
- declared at the opening of each ensemble so that everyone knows about it.

In the absence of a communication or a statement, the holders of shares referred to in the Convention may not exercise the right to vote. If it exercises it, resolutions of the shareholders adopted with the final vote may be appealed before the court.

---

[3] Dispositivo dell'art. 2341 bis Codice civile: „I patti in qualunque forma stipulati, che al fine di stabilizzare gli assetti proprietari o il governo della società: a) hanno per oggetto l'esercizio del diritto di voto nelle società per azioni o nelle società che le controllano; b) pongono limiti al trasferimento delle relative azioni o delle partecipazioni in società che le controllano; c) hanno per oggetto o per effetto l'esercizio anche congiunto di un'influenza dominante su tali società, non possono avere durata superiore a cinque anni e si intendono stipulati per questa durata anche se le parti hanno previsto un termine maggiore; i pattisonorinnovabiliallascadenza. Qualora il patto non preveda un termine di durata, ciascun contraente ha diritto di recedere con un preavviso di centottanta giorni. Le disposizioni di questo articolo non si applicano ai patti strumentali ad accordi di collaborazione nella produzione o nello scambio di beni o servizi e relativi a società interamente possedute dai partecipanti all'accordo", this document is available online at: https://www.brocardi .it/codice-civile/libro-quinto/titolo-v/capo-v/sezione-iii-bis/art2341bis.html?utm_source=internal &utm_medium=link&utm_campaign=articolo&utm_content=nav_art_prec_top, consulted on. 1.11.2018. For the comment of this article, see Torino R., *Societal Contracts*, Milano, 2000, p. 114; Ventoruzzo M., Balzarim P., Carcano G., *La societa per azioni oggi. Tradizione, attualita is prospective. Atti del Convegno internazionale di studi*, Milano - Dottt Publishing House. A. Giufree Editor - 2007, Venezia, 2007, p. 131.

The declaration on the existence of conventions must be recorded in the minutes of the meeting; the latter, in turn, will be filed with the Competent Trade Register.

Also, in this case, mandatory information refers to the content of extra-statutory conventions and is functional for pursuing general interests related to the good performance of the company's management.

It should be emphasized that the rule refers only to public limited liability companies that use the venture capital market while, even through specific operators, closed companies are expressly excluded from the advertising obligations described above. The reason for this exclusion can certainly be seen in the fact that they are usually limited companies and a management body composed of several subjects, directly chosen by shareholders; in other words, because the risks of instability in the company's power structures are not met, it was not considered essential to regulate the discipline of advertising the conventions.

7. Rules for the application of listed companies

Strict and strict publication obligations are imposed as follows:

- the preventive notification to CONSOB[4];
- publishing by extracts in the daily press;
- the submission of the said text in the agreements with the competent company register.

In the event of non-compliance with one of these obligations, the nullity of the conventions is provided for.

The seriousness of this provision appears to be justified by the recognition of best interests to examine the content of the extrastate conventions on alleged confidentiality requirements.

Following the nullity, the non-execution of the voting right in respect of the actions for which the aforementioned transparency obligations have not been met is provided for.

8. Types of extra statutory conventions

The law lists only the most widespread conventions (voting, blocking and consultation unions); this list is not, however, exhaustive for all typologies present in practice. Analyzing in detail the different types of shareholders' conventions, starting from those subject to the legal provision.

Voting unions. This is undoubtedly the most common type in practice. They have the object and purpose of regulating and disciplining the members of the convention with the right to vote during the meeting (at the Shareholders'

[4] Comissione Nazionale per la societa e la borsa, Autorita italiana per la vigilanza dei mercati finanziari, this document is available online at: http://www.consob.it, consulted on. 1.11.2018.

Meeting). In this aspect, they may provide for a simple obligation to consult members before voting or may choose to vote in a manner compatible with what was decided in a separate place by the majority of the members of the convention.

They are often the instrument of exercising a dominant influence in the assembly by those members who, individually, would not have enough "weight" to achieve this result.

The modalities of voting in the assembly can be decided unanimously or by the majority of union members. These may be valid provided that they comply with the mandatory rules, which are absolutely mandatory.

For example, a voting convention would not be valid, which means that it does not internalize to deliberate on the action of liability against administrators.

"*With regard to the admissibility of the trade unions, fears about the effect of emptying the functions of the assembly must be understood to be overcome today, moreover, being able to retain the verification of legality must concern the individual provisions of each individual pact*[5]" explains Davide Proverbio.

Such conventions may regulate both the relations between the shareholders of the company in which the exercise of the voting is regulated and between the shareholders of the parent company in order to pre-organize the exercise of the voting in the subsidiary.

Blocking syndicates. Extrastatutory conventions include blocking syndicates. These are conventions that place the limits of the movement of shares and are functional for the need to maintain the consistency and stability of the shareholder structure over time.

In order to be valid, they must be limited in time so as not to constitute an unjustified restriction on the free movement of capital.

Also, Davide Proverbio brings important additions: *"Blocking trade unions are designed to protect the so-called intuitus personae that characterize society structures on a narrow basis, giving the possibility to those who are already associated to analyze whether potential third parties wishing to be associated have a standing analogy with that of the outgoing associates.* [6]"

The category of blocking syndicates includes a variety of assumptions that can also be combined.

To name just a few, it may range from simply prohibiting the sale for a certain period of time to conventions by acquiring new shares in their syndication or allowing the purchase of shares only within specific quantitative limits, preemption, co-selling and mixed contracts preferably with approval conventions.

[5] Davide Proverbio, *op. cit.*, p. 63.
[6] *Idem*, p. 91.

9. Conclusions

As I mentioned earlier, the article is just a "partial" of a whole. This article is a general overview of the results of the in-depth research of this fascinating subject: "Extrastatutory Conventions".

The results of the research have been seen since the beginning of this article, because it brings novelty to our legislative sphere, helping associations in societies to facilitate their work and attributions.

It is a special, complex theme that requires a thorough in-depth study and will be of benefit to both law students and professionals.

Bibliography

1. Davide Proverbio, *Societa e Mercati finanziari I patti parasociali; Disciplina, prassi e modelli contrattuali*; IPSOA, Gruppo Wolters Kluwer, Milano, 2010;
2. Torino R., *Societal Contracts*, Milano, 2000.
3. Ventoruzzo M., Balzarim P., Carcano G., *La societa per azioni oggi. Tradizione, attualita is prospective. Atti del Convegno internazionale di studi*, Milano - Dottt Publishing House. A. Giufree Editor - 2007, Venezia, 2007.
4. The Constitution of Romania republished in the Official Gazette no. 767 of 31 October 2003.
5. Company Law no. 31/1990 republished in the Official Gazette no.1066 of November 2004.
6. Law no. 134/2010 on the new Civil Procedure Code, republished on the basis of art. XIV of Law no.138/2014 for the modification and completion of related normative acts, published in the Official Gazette of Romania.
7. Law no. 297/2004 regarding the capital market, published in the Official Gazette, Part I no. 571 of June 29, 2004, as amended.

The Powers and Duties of the Fiduciary

PhD. student **Günay DUAGI**[1]

Abstract

Fiducia is undoubtedly one of the most innovative institutions introduced by the New Civil Code and the fiduciary is on its turn the main actor in this institution. An analysis of the fiduciary's powers and duties is essential to perceive correctly the mechanism of the fiduciary relations. The most important power held by the fiduciary is given by the ownership of the fiduciary property. This right is absolute under the law, but it is nevertheless circumscribed to the obligations held by the fiduciary under the fiduciary contract. In addition, among the rights of the fiduciary, we also mention the administration and decision power in relation to the fiduciary assets in favour of the beneficiary. Also, the right to remuneration should not be ignored, especially in view of the fiduciary's professional position. As regards the obligations of the fiduciary, the most important is the one mentioned in the very definition of fiducia, namely the obligation to manage the fiduciary assets for and in favour of the beneficiary. The fiduciary also is held accountable and must inform both third parties and the parties to the fiduciary contract about the position in which he operates. Both the powers and duties of the fiduciary are "intertwined" to form the "fabric" within which it operates.

Keywords: *fiducia, fiduciary's powers, fiduciary's duties, fiduciary, fiduciary agreement, Romanian Civil Code.*

JEL Classification*:* K12, K15, K22

1. Introduction

"*Fiducia*" is defined in art. 773 of the Civil Code[2], as "the legal operation by which one or more settlors transfer real rights, claims, guarantees or other property rights or a set of such rights, present or future, to one or more fiduciaries which exercise them with a defined purpose, for the benefit of one or more beneficiaries. These rights form an autonomous patrimonial mass, distinct from the other rights and obligations in the assets of the fiduciaries".

Given the importance of the fiduciary in the fiduciary agreement context, it is natural to look at the role, powers and correlative obligations of the fiduciary. The fiduciary holds the most active "part" in *fiducia*, and for this reason the law has attached a number of requirements. Thus, only certain persons may hold the fiduciary status. According to art. 776 of the Civil Code only "credit institutions,

[1] Günay Duagi - Doctoral School of Law, Bucharest University of Economic Studies, Romania, gunayduagi@yahoo.com.

[2] Civil Code of July 17, 2009 (Law no. 287/2009 on the Civil Code published in the Official Gazette of Romania no. 511 of 24 July 2009).

investment and investment management companies, financial investment services companies, legally established insurance and reinsurance companies" may hold the fiduciary position together with "notaries and lawyers, regardless of the form of exercise of the profession".

This limitation shows the legislator's concern to protect the beneficiary of *fiducia* by narrowing the area of entities that can hold the position of fiduciary, allowing only some categories of professionals, strictly regulated and supervised, to hold this quality. Thus, a trustworthy figure has been formed in the image of the fiduciary in view of the fact that these categories operate and carry out their work in the service of consumers.

We consider that the misunderstanding or the lack of knowledge of *fiducia* is due to the lack of relevant practice in Romania, but also to the apparent complexity of this institution, in the light of the Civil Code regulation. And if *fiducia* seems to be complex, then the role of the fiduciary encompassing its powers and obligations is essential in deciphering this institution. Hence the importance of the analysis of the fiduciary's powers and obligations.

In this paper we will try to answer the following questions in order to get deeper into the philosophy of the fiduciary's role: Why is the fiduciary the most important actor in the trust contract? How is the fiduciary's power limited against potential abuses? What are the most important powers and obligations of the fiduciary? How can the fiduciary answer in the fiduciary agreement?

2. The role of the fiduciary in the fiduciary agreement

According to the provisions of the Civil Code, the main role of the fiduciary is to exercise real rights, receivables rights, guarantees or other patrimonial rights or a set of such rights, present or future, for a determined purpose, for the benefit of one or more beneficiaries. In other words, the role of the fiduciary is to manage for the benefit of the beneficiary the fiduciary patrimony that is transmitted to him for this purpose.

Therefore, we note that although the fiduciary has the most important role in the economy of the fiduciary agreement, he exercises this role and the powers conferred to him (including property rights over transferred assets) not for himself but in order to meet the needs and interests of the beneficiary. As one Romanian author shows "the legislator puts the fiduciary on the highest chair in the fiduciary hall"[3]. In exchange of these services, the fiduciary is adequately remunerated. Thus, nothing prevents the fiduciary from being remunerated according to the degree of success he has had in administering or multiplying/increasing

[3] Sergiu Golub, *Fiducia*. *Efectele contractului de fiducie*, "Revista Română de Drept al Afacerilor", no. 4/2017, p. 77.

the fiduciary assets (success fee). When the fiduciary is also a beneficiary, it incorporates these two qualities, benefiting both from the remuneration (if any) and the benefits of fiduciary.

As some Romanian authors observe[4], there are some contradictory provisions in the Civil Code regarding the powers of the fiduciary. Thus, it is stated that the fiduciary is the sole and genuine owner of the property, while another article states that the same fiduciary manages the assets for the beneficiary. However, we believe that the legislator has attempted to highlight the relationship the fiduciary has with third parties compared to his relationship with the settlor and the beneficiary, although the fiduciary cannot be "less proprietary" to the latter.

The primary role granted by the legislator to the fiduciary depends and must also be measured by the type of the fiduciary relations. Thus, we mention two broad categories with regard to the purpose of fiduciary: fiduciary-guaranty and fiduciary-management. The role of the fiduciary in each of the two major categories is different.

In case of fiduciary-guaranty, the role of the fiduciary is to protect and preserve the assets in the interest of the beneficiary (which may be a bank) for eventual surrender in the event of non-compliance with the contractual obligations towards this creditor. However, at all times when the fiduciary manages the asset, its products should be returned to the settlor unless otherwise provided in the contract. Thus, the role of the fiduciary is to hand over to him the products of the asset. As it can be seen, the complexity of the fiduciary's role goes beyond the simple bookkeeping or written evidence.

In case of fiduciary-management, the role of the fiduciary is even more complex since it is not only necessary to ensure that the asset is kept in good condition in order to be transmitted to the beneficiary-creditor in the event of a breach of the contractual obligation by the settlor (passive role for conservation purposes), but it must manage and even place the asset in production in favour of the beneficiary (active, management role).

Thus, in case of fiduciary-management, the fiduciary should have sufficient knowledge and skills in order to be able to carry out the mandate for which he is remunerated. Among the activities that should be carried out by the fiduciary-manager we mention: payment of utilities, payment of taxes and duties, payment of services necessary for the management of the assets, concluding the contracts for the use of the patrimonial mass, negotiating the necessary contracts, receiving the related incomes, informing the beneficiary, transfer of the income to the beneficiary (withholding the fee and related costs, etc.).

In addition, the fiduciary's role is also circumscribed to his role as owner of the asset. Thus, the fiduciary becomes from date of the conclusion of the fiduciary agreement, the holder of the rights stemming from the fiduciary property.

[4] Sergiu Golub, *Fiducia. Analiza definitiei legale. Diferenta specifica*, "Revista Română de Drept al Afacerilor" no. 12/2016, p. 38.

Thus, he will appear as the owner in the public registers, before the tax authorities, the Electronic Archive of Real Securities (Electronic Archive), the Land Book, etc. In this role, the fiduciary will pay the taxes and other duties related to the holding and use of fiduciary property and will be held responsible for any failure to comply with the statutory provisions on the fiduciary mass.

3. The powers of the fiduciary

As we anticipated above, the fiduciary enjoys the most important and extensive powers in the fiduciary agreement.

The analysis of the fiduciary's powers cannot be complete without mentioning that the lawmaker has given them these powers not to serve a selfish purpose, but to use them in favour of the beneficiary.

A second notable aspect is that the powers of the fiduciary are provided in the fiduciary agreement. Thus, although the Civil Code provides some powers of the fiduciary, the parties to the fiduciary contract are free, and it is even advisable for the fiduciary contract to be drafted as thoroughly as possible regarding the fiduciary's powers. According to art. 779 of the Civil Code ("The content of the fiduciary contract"), the parties are free to provide what is the "extent of the fiduciary's management and disposal power". Thus, the fiduciary agreement provides for the margin of discretion granted to the fiduciary in the performance of his duties.

Finally, a third preliminary aspect worth mentioning is that when we analyse the powers of the fiduciary it is very important to consider the limits of these powers. In fact, we can say that the analysis of the fiduciary's powers, without considering the boundaries of this power, would also be incorrect and even deceptive, as the fiduciary's powers are not unlimited, as we will show below. It is also worth noting that reservation of certain powers by the settlor or beneficiary, or the limitation of the fiduciary's power, are not contrary to a fiduciary relation, as is also shown in international doctrine[5].

We will begin the detailed analysis of the fiduciary's powers by referring to the provision in art. 784 of the Civil Code ("Powers and remuneration of the fiduciary"), according to which "in relations with third parties, the fiduciary is deemed to have full powers over fiduciary property, acting as a genuine and sole holder of the rights in question, unless it turns out that others were aware of limiting these powers". From this provision, arise several ideas necessary to form the full picture of the fiduciary's powers.

From the above article, become apparent a dichotomy between the fiduciary's powers towards third parties and the powers of the fiduciary towards the other parties of the fiduciary agreement.

---

[5] James Douglas, *Trusts and their equivalents in civil law systems: Why did the French introduce the fiducie into the Civil Code in 2007? What might its effects be?* "QUT Law Review" Volume 13, no. 1/2013, p. 22.

First of all, it is recognized that the fiduciary is and must behave as a true owner of the fiduciary assets in relations with third parties. However, the question arises: Are the powers of the fiduciary different from third parties compared to parties of the fiduciary agreement?

The provision in the Civil Code seems to indicate a positive answer to the question above. However, we are of a different opinion considering the reasons mentioned below.

Firstly, both the parties to the fiduciary agreement and third parties know or ought to know that the fiduciary holds that quality and hence it is the owner of the fiduciary asset. In this respect, we remind the fact that *fiducia* is registered with the Electronic Archive, and the fiduciary has the obligation to inform third parties about his role. Also, if the fiduciary assets include real estate, *fiducia* is also registered with the Land Book.

Secondly, even if the fiduciary's powers vis-à-vis third parties are different from those of the parties to the fiduciary contract, the possibility for the parties to take action against the fiduciary is strictly limited to the liability of the fiduciary provided for in the Civil Code, possibly supplemented by the agreed contractual liability by parties. However, since the fiduciary is the owner of the asset, he cannot be stopped to carry out the transactions he deems necessary, even if they may seem abusive.

Therefore, as the Civil Code also expressly states, the fiduciary has full powers and behaves as a true owner in relation to third parties.

But what happens to the fiduciary's powers in relation to the parties of the fiduciary contract (the settlor and the beneficiary)?

As shown above, some powers are common to the ones relating to third parties. In addition, however, there are a number of powers that complement the initial ones and which actually make the object of this analysis.

Compared to the settlor and beneficiary, the fiduciary has the power provided by law and contract. In particular, he is entitled to use his statutory and contractual rights to carry out his mandate or even against abusive requirements from the settlor or the beneficiary.

In order to understand the powers of the fiduciary, we need to classify fiduciary into its two major types: fiduciary-guaranty and fiduciary-management. In case of fiduciary-guaranty, the fiduciary's powers should include mainly legal acts of conservation. In case of fiduciary-management, we consider that the type of legal acts that can be performed by the fiduciary is much larger, including both acts of preservation, replacement, selling and even acquisition.

Since the only secondary regulation with more details about fiduciary status is the Lawyer's Statute, we consider it relevant to provide the powers of a fiduciary lawyer. This analysis can be extrapolated in terms of these powers to any other type of fiduciary.

Thus, in art. 93 of the Lawyer's Statute, among the powers of the fiduciary are mentioned the receipt in the name and on behalf of the client of financial

funds and goods resulting from the enforcement of executory titles after the completion of a dispute, mediation, inheritance procedure or liquidation of a patrimony; placing and redeeming, in the name and on behalf of the client, financial funds and assets entrusted; managing, in the name and on behalf of the client, the funds or securities in which they were placed.

Although they are placed under the Lawyer's Statute at another article (art. 95), we believe that the following activities are part of the fiduciary's powers. Thus, the fiduciary lawyer may, among other things, carry out consultancy activities, preserving the substance and the value of financial funds and the assets entrusted to them, operations to place funds in movable or immovable assets, securities and other financial instruments, under the law, and the capitalization of placements made by contracting material transactions and performing legal operations to increase the value and liquidity of placements, related activities, such as filling in tax returns and payment of these and other client's debts related to the management of such properties, the collection of products and the collection of income or other investment results, the mediation of financial transactions, etc., any cash transactions relating to payments, receipts, bank deposits, compensation, repayments imposed by the nature of these activities.

For each of these rights, however, there are correlative obligations that we will set forth in the next chapter.

The fiduciary also has the right to a remuneration. This right is provided for in law, but in practice this remuneration is subject to negotiation and depends both on the purpose of the fiduciary (guarantee, management) and on the actual services provided by the fiduciary, but also on its reputation.

It is noteworthy that the fiduciary's powers are not homogeneous in all European countries where *fiducia* has been introduced, and this is confirmed by some extensive studies by European authors[6]. However, we believe that in Civil law systems, perhaps more than in the Anglo-Saxon law systems where the trust operates, the minimum powers are present.

A separate discussion can be made about the delegation of fiduciary powers. Although at first glance this possibility seems unfeasible given the special qualification that the fiduciary must have and the trust that he should inspire, the fiduciary contract being an *intuitu personae* contract, yet we do not exclude this possibility especially for the activities under a fiduciary contract flexible to such a delegation. Thus, some authors have shown that in fact the criterion to be considered is the beneficiary's best interest, and depending on it, it will be necessary to decide whether or not the powers of the fiduciary can be "outsourced"[7] or not.

---

[6] Corrado Malberti, *Fiduciary Arrangements in Civil Law Countries: Framing the* Trustee's Role and Duties, "European Review of Private Law", Volume 24, Issue 6, p. 1053.

[7] John Robert Felix Lehane, *Delegation of Trustees' Powers and Current Developments in Investment Funds Management*, "Bond Law Review", Volume 7, Issue 1, Bond University, 1995, p. 39.

4. The duties of the fiduciary

The duties of the fiduciary must always be seen in relation to the correlative rights of the beneficiary or the settlor.

The most important obligation of the fiduciary is represented by the administration of the fiduciary assets. Thus, it is also necessary in this case to distinguish between the two most important types of fiduciary relations.

In case of fiduciary-guarantee, the primary duty of the fiduciary is to ensure that the asset is preserved. Another duty of the fiduciary is to hand over the fiduciary asset to the beneficiary-creditor in the event of default by the debtor or to surrender the asset back to the settlor in good condition after termination of the contract it guarantees.

In case of fiduciary-management, the principal obligation of the fiduciary is much more complex. Thus, besides the passive obligation to ensure that the good of the trust is preserved in good conditions, the fiduciary must also have an active role. Thus, the fiduciary is bound to comply with contractual obligations which may vary from case to case depending on the type of fiduciary asset and the type of fiduciary-management. If the fiduciary management is concluded for the purpose of managing the goods for profit, then the fiduciary has to carry out all the necessary activities in this respect. Thus, he must find clients for the introduction of the asset into production (if any), renting (if it is a real estate), collecting the rent or the price, paying the related taxes, completing the necessary documents and submitting these documents to the tax authorities (NSAPDP[8], NBR[9], FSA[10], NTRO[11], NOPCML[12], CPA[13], etc.) to make other necessary formalities in relation to the authorities.

In addition to the relationship with the authorities as mentioned above, the fiduciary's obligation in case of a fiduciary-guarantee is all the more striking in relation to potential clients. Thus, the fiduciary must ensure the optimal relationship with third parties that can guarantee the introduction of the fiduciary asset in the civil circuit (e.g. potential tenants). During this relationship, in the practical example chosen (renting an asset), the fiduciary must identify tenants, negotiate the price and terms of the contract, sign the lease contract (taking into account to maximize the price and the term), collect the rent, checking constantly the status of the building, and at the end to make the reception of the asset from the tenant.

[8] The National Supervisory Authority for Personal Data Processing.
[9] The National Bank of Romania.
[10] The Financial Supervision Authority.
[11] The National Trade Registry Office.
[12] The National Office for Prevention and Combat of Money Laundering.
[13] The Consumer Protection Authority.

We will further detail the obligations of the fiduciary in relation to the settlor and the beneficiary. From the practice (Electronic Archive records of *fiducia*) we can see that the settlor and the beneficiary are often the same person and the fiduciary is usually a lawyer.

Thus, the obligations of the fiduciary are those indicated below. According to art. 780 of the Civil Code, it is the duty of the fiduciary to register the fiduciary with the fiscal authority. That article expressly provides that "under penalty of absolute nullity, the fiduciary contract and its amendments must be registered at the request of the fiduciary within one month from the date of their conclusion to the competent tax authority to administer the amounts owed by the fiduciary to the general budget consolidated state".

Also, a fiduciary's other duty is to record the fiduciary on the Land Book when the fiduciary mass includes real estate rights. In this respect it is expressly stipulated that "when the fiduciary property mass includes real immovable rights, they are registered, under the conditions stipulated by law, under the same sanction, to the specialized department of the local public administration authority competent for the administration of the amounts owed to the local budgets of the units administrative-territorial districts in which the building is located, the Land Book provisions remaining applicable". In the same sense are the provisions of art. 781 of the Civil Code stipulating that "the registration of the real estate rights, including the real estate collateral, which is the subject of the fiduciary contract, shall also be made in the Land Book for each right".

Another obligation of the fiduciary to the settlor is to specify, or in certain conditions, not to specify, its fiduciary status. Thus, the parties to the fiduciary contract may expressly stipulate that the fiduciary may or is prohibited from indicating the quality in which he acts (Article 782 of the Civil Code): "when the fiduciary acts on behalf of the fiduciary property, he may make express mention in this meaning, unless this is forbidden by the fiduciary contract".

This obligation is related to another obligation arising from the fiduciary status, namely the loyalty obligation. Thus, we believe that a fiduciary should respect this loyalty obligation, and not enter, for example, in business relationships that would lead to some conflicts of interest. Loyalty is an attribute that must be attached to the fiduciary because in its turn the constituent confers confidence to the fiduciary. Some foreign authors even resemble this duty of loyalty to the fiduciary with that of an employee or even the one existing within a family through the relationship of trust or social dependence that is created, even more important than the obligation of good faith[14].

The fiduciary's obligation may be further extended to a duty of care towards the settlor and the beneficiary. It goes without saying that this duty of care is much more complex than that of good faith or even of loyalty. Although this

[14] Martin Gelter, Geneviève Helleringer, *Fiduciary Principles in European Civil Law Systems*, "ECGI Working Paper Series in Law", no. 392/2018, March 2018, p. 10.

obligation is mentioned in some of the European countries where fiduciary was implemented, in Romania, however, it remains the realm of the contract, if the parties agree, or possibly an "unwritten law" of fiduciary relations[15].

Therefore, the parties may agree that the fiduciary is obliged to indicate the quality in which he acts, according to art. 782 of the Civil Code: "In all cases where the settlor or the beneficiary so requests in accordance with the fiduciary contract, the fiduciary will have to specify the quality in which he acts. Otherwise, if the act is damaging to the constitution, the act will be deemed to have been concluded by the fiduciary in his own name".

Going along the same line, however, it is not clear why the legislator introduced the obligation mentioned in art. 782 par. 2 of the Civil Code "also, when the fiduciary property mass includes rights whose disclosure is subject to advertising, the fiduciary may require the name of the fiduciary and the quality in which he acts". Thus, we are considering two scenarios. The first scenario is the one in which the transfer of ownership must be registered with the Electronic Archive and/or the Land Registry, in which case this obligation is a legal one. The second scenario refers to the case where these rights should not be registered with the Electronic Archive or the Land Registry, in which case, however, this transaction is subject to such registration under art. 781. Indeed, there is a difference between the effect of fiduciary registration for the purpose of opposability vis-à-vis third parties and registration for the purpose of transmitting the right of ownership (constitutive of rights). However, in practice, in any situation the fiduciary should be registered with the Electronic Archive, and third parties will be able to access this public information. In addition, as stated in art. 782 par. 2 of the Civil Code it appears that the legislator gives the fiduciary the opportunity to mention his name and the quality in which he acts and is not required to do so. So we are talking about a permissive, rather than imperative, commanding obligation that requires this behaviour, but it only allows subjects of law to have a certain conduct.

Therefore, *de lege ferenda,* I propose that this provision be modified in order to impose the fiduciary to indicate his quality in all cases.

The most "visible" obligation (the only one expressly provided in art. 783 of the Civil Code) that the fiduciary has to the settlor is the accountability obligation. Thus, the Civil Code provides as follows: "The fiduciary contract must include the conditions under which the fiduciary gives the constituent responsibility for the fulfilment of his obligations. The fiduciary also has to report, at intervals specified in the trust agreement, to the beneficiary and to the representative of the settlor at their request".

[15] James Koessler, *Is There Room for the Trust in a Civil Law System? The French and Italian Perspectives,* University of Warwick, March 2012, article available at the web address: https://ssrn.com/abstract=2132074, p. 16, (last visited on 28.10.2018).

This obligation involves a very wide range of activities. Thus, we can divide this obligation into two broad categories: information obligations and patrimonial liability obligations.

While we believe that the legislator has considered the first type of obligation, which we will focus on, we must not ignore the fact that the obligations by which the fiduciary responds materially are perhaps more important in the fiduciary system.

Thus, in the fiduciary contract, the parties have to mention the reporting duty of the fiduciary. In accordance with the above-mentioned provisions, this obligation to provide information is two-fold: periodic information and on-demand information. Periodic information should include information about the status of the assets, revenue generated, taxes paid, customer/tenant relationship, fiduciary activities during the relevant period, unforeseen events (such as litigation) and settlement.

It is obvious that the report that the fiduciary must provide is a form of control of the fiduciary's powers. Thus, it is in fact controlled in order not to exceed the fiduciary mandate but also to allow the settlor to take action if it observes "deviations" from the object of the contract. However, this control must be balanced in order not to hinder the fulfilment of this mandate itself. As an author shows, this form of control must be carefully exercised in order not to violate the powers of the fiduciary[16].

As we have seen above, the Lawyer's Statute has the most detailed enumeration of the powers and obligations of a fiduciary lawyer. Thus, among the obligations of a fiduciary lawyer (in art. 94), are mentioned the limit and duration of the mandate entrusted, expressly stipulated in the specially concluded legal assistance contract. Also, according to the same article, it is noted that when "the mandate involves empowerment to dispose of funds, assets or values or to dispose of the client's goods, the lawyer may proceed to perform such operations only if this is expressly stipulated in mandate or, in the absence of such a clause, only after being specifically authorized in writing by the client". Among other things, the fiduciary lawyer is obliged to act in good faith, professionalism and the diligence of a good owner, without deviating from the rules specific to his professional activity; to manage the business entrusted in the sole interest of the client; not to influence the client, either directly or indirectly, in order to obtain its own benefits outside the lawyer's fees (conflict of interest); to promptly and promptly inform the client about the execution of the fiduciary mandate and the results obtained.

Moreover, art. 96 of the Lawyer's Statute provides that "the lawyer shall open an account with a reputable bank (fiduciary account) for the purpose of depositing fiduciary funds for each client for whom he carries out fiduciary activities". It is also relevant that a set of rules are imposed on the use of the amounts

[16] Richard Nolan, *Controlling fiduciary power*, "Cambridge Law Journal", July 2009, p. 293.

from the trust account. Thus, it is stipulated in art. 98 of the Lawyer's Statute that "the lawyer may withdraw or authorize the withdrawal of trust funds from the trust account, and instruct the payment of such funds only in the following situations: a) for making investments or expenses under the conditions and limits of the fiduciary mandate; b) at the express instruction of the client, but with the possibility to withhold the counter-value of the approved fees for fiduciary activities; c) based on a court decision; d) on the basis of the legal assistance contract, for the collection of the fees related to the fiduciary activities carried out; e) when an enforcement proceeding concerning the assets or funds being managed is in progress".

Additionally, a number of obligations are foreseen such as the registration of all fiduciary transactions, no later than three working days after they are made, as well as the retention of records of fiduciary activities for a period of at least ten years.

The information provided on request should include information requested by the settlor or beneficiary. However, we consider that these requests should be relevant and not be abusive. These requests should indicate (preferably in writing) what the issue is and, in principle, they cannot request complete information (which is done periodically on the basis of the contract). In this respect, it would be advisable to include in the contract aspects related to the rights and obligations of the settlor/beneficiary regarding the request for information upon request (including cases where the fiduciary has the right not to divulge this information or postpone its disclosure - when sensitive, confidential, privileged information may lead to violation of legal provisions in the capital market, for example).

As regards the duties of the fiduciary towards the beneficiary, these are stipulated in art. 783 of the Civil Code. In practice, however, the vast majority of cases registered with the Electronic Archive, the constituent and beneficiary are one and the same person. Consequently, the obligations I have indicated above to the settlor will also be considered to be fulfilled vis-à-vis the beneficiary.

Another duty of the fiduciary arising from the separation of the fiduciary patrimonial mass is that which consists in the clear delimitation of the assets that constitute the fiduciary's patrimonial mass and those of its own patrimonial mass. Thus, the fiduciary has the obligation to keep these goods separate so as not to risk their disposition or to replace uncommon goods, for example.

Finally, it is important to note that an important duty of the fiduciary is also to transfer the asset to the beneficiary upon termination of the contract, or in the absence of the beneficiary, to the settlor. Thus, as some Romanian authors show, this is the "specific effect of the termination of the fiduciary agreement"[17].

[17] Daniel Moreanu, *Fiducia și Trust-ul*, Ed. C.H. Beck, Bucharest, 2017, p. 274.

5. Conclusions

The fiduciary's powers and duties are the foundation on which the fiduciary institution is built. Given the importance of the fiduciary's role in this contract, the analysis of these issues is essential. Unfortunately, the Civil Code does not contain sufficient provisions governing the powers and duties of the fiduciary, with only a set of guidelines to that effect (especially with regard to its obligations). However, this role should be met by the secondary legislation to be adopted (currently there are only a series of regulations issued by the FSA - Regulation no. 1/2015[18] and NUBR[19] – Lawyer's Statute) or by the tax regulations in force (e.g. the Code Fiscal).

De lege ferenda, we recommend modifying or even removing unclear provisions in the Civil Code governing fiduciary as outlined above. In addition, we look forward to the adoption of secondary regulations on *fiducia* by other authorities (for example, the NBR).

As far as the rights of the fiduciary are concerned, it is easy to see that the most important right is that the fiduciary becomes the owner of the fiduciary assets and has all the related rights (if the fiduciary contract does not restrict this right - for example, the right of disposal). It is important to note that the fiduciary's powers are closely related to the type of fiduciary agreement (fiduciary-guaranty and fiduciary-management), of which we enumerate the one to manage and enter into contractual relations for the management of the asset and its preservation.

As far as its obligations are concerned, we mention that they can be of two kinds (legal obligations and contractual obligations). Of the legal ones, we mention those related to the registration of fiduciary evidence to the tax authorities and for the purpose of opposability, as well as those related to the report to the settlor and the beneficiary. We mention here that we agree with the Romanian authors who have stated that the obligation to register with the tax administration of the fiduciary contract is an "excessive requirement in our law"[20].

As regards to the questions outlined at the beginning of the study, we hereby provide the answers that emerged from this analysis. As we already discussed above the importance of the role of the fiduciary and his most important obligations, we will further mention the answers to the other questions raised. Thus, limiting the powers of the fiduciary against possible abuses is done both by

[18] Regulation no. 1/2015 regarding the performance of certain activities by the financial investment services companies and the application of certain provisions of the capital market legislation in the case of the fiduciary contract, the Official Gazette of Romania, Part I, no. 142 of 25 February 2015.
[19] The National Union of Bars on Romania.
[20] Camelia Florentina Stoica, Silvia Lucia Cristea, *Legea aplicabilă fiduciei, ca element de extraneitate*, Journal "Educație și creativitate pentru o societate bazată pe cunoaștere", November, 2011, p. 4.

provision of reports and by means of the obligation to compensate the beneficiary in the case of non-performance of activities (with other assets than the ones that form the fiduciary mass), since "fiduciary is a division of patrimony"[21] for the fiduciary. Furthermore, besides these "legal remedies", the parties can, and is even recommended, to include in the contract other "contractual remedies" against the abuses of the fiduciaries, including damages clauses. Also, simply restricting the capacity to hold a fiduciary status only to some types of regulated, supervised and authorized entities is yet a measure against the possible abuse of the fiduciary.

Regarding the concrete way in which the fiduciary can be held responsible, we believe that it is the active role of the settlor or the beneficiary to track the fulfilment of obligations (through current reports and on-demand reports on point-to-point issues) to decide whether or not to take measures. As the case may be, the fiduciary may be changed and held accountable. Given the quality of the fiduciary (credit institutions, insurance company, investment firms, etc.), it is very unlikely that it may become insolvent.

As an author has observed, in advanced economies there has been a tendency to give the fiduciaries stronger powers in view of the fact that they have both the necessary knowledge and the trust of the settlor/beneficiary as well as of the public[22]. We believe that this is the way that should be followed by fiduciary institution in Romania.

Lastly, we mention that the practice in Romania, although at inception stage as regards the institution of *fiducia*, is already showing signs of being aware of the importance of *fiducia* and its benefits, which still has an unravelled potential, as some French authors state[23]. Thus, the information made available in Electronic Archive where these transactions are recorded, already contain cases where the powers and duties of the fiduciaries are extremely diverse and innovative, and the assets on which they have been set are very diverse.

Bibliography

1. Bouteille Magali, *La fiducie. Un potentiel inexploité*, without details of publications, article available at the web address: http://cnriut09.univlille1.fr/ articles/Articles/Full text/75a.pdf (last visited on 28.10.2018).
2. Camelia Florentina Stoica, Silvia Lucia Cristea, *Legea aplicabilă fiduciei, cu element de extranitate*, Journal "Educație și creativitate pentru o societate bazată pe cunoaștere", November, 2011.

[21] Flavius Antonius Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei (coord.), *Noul Cod Civil. Comentariu pe articole. Art. 1-2664,* Ed. C.H. Beck, Bucharest, 2012, p. 822.
[22] Gilbert Stephenson, *Expanding Powers of Trustees*, "Fordham Law Review", Volume 26, Issue 1, 1957, p. 50.
[23] Bouteille Magali, *La fiducie. Un potentiel inexploité*, without details of publications, p. 20, article available at the web address: http://cnriut09.univlille1.fr/articles/Articles/Fulltext/75a.pdf (last visited on 28.10.2018).

3. Corrado Malberti, *Fiduciary Arrangements in Civil Law Countries: Framing the Trustee's Role and Duties,* "European Review of Private Law", Volume 24, Issue 6.
4. Daniel Moreanu, *Fiducia și Trust-ul*, Ed. C.H. Beck, Bucharest, 2017.
5. Flavius Antonius Baias; Eugen Chelaru; Rodica Constantinovici; Ioan Macovei (coord.), *Noul Cod Civil. Comentariu pe articole. Art. 1-2664*, Ed. C.H. Beck, Bucharest, 2012.
6. Gilbert Stephenson, *Expanding Powers of Trustees*, "Fordham Law Review", Volume 26, Issue 1, New York, 1957.
7. James Douglas, *Trusts and their equivalents in civil law systems: Why did the French introduce the fiducie into the Civil Code in 2007? What might its effects be?* "QUT Law Review" Volume 13, no. 1, 2013.
8. James Koessler, *Is There Room for the Trust in a Civil Law System? The French and Italian Perspectives*, University of Warwick, March 2012, article available at the web address: https://ssrn.com/abstract=2132074, (last visited on 28.10.2018).
9. John Robert Felix Lehane, *Delegation of Trustees' Powers and Current Developments in Investment Funds Management*, "Bond Law Review", Volume 7, Issue 1, Bond University, 1995.
10. Martin Gelter, Geneviève Helleringer, *Fiduciary Principles in European Civil Law Systems*, "ECGI Working Paper Series in Law", No. 392/2018, March 2018, Bruxelles, 2018.
11. Richard Nolan, *Controlling fiduciary power*, "Cambridge Law Journal", July 2009.
12. Sergiu Golub, *Fiducia. Analiza definitiei legale. Diferenta specifica*, "Revista Română de Drept al Afacerilor" no. 12/2016.
13. Sergiu Golub, *Fiducia. Efectele contractului de fiducie*, "Revista Română de Drept al Afacerilor", no. 4/2017.

Accounting Records as Evidence in Civil Litigation in the Republic of Bulgaria

Assistant professor **Atanas IVANOV**[1]

Abstract

Accounting record is a document, and the document is evidence which is necessary to prove real past facts. Considering the difference between the moment of adjudgement and the moment of realization of the facts relevant for the dispute, it is necessary to establish these facts through their sources – namely, through evidence. The document is taken as an item on which a statement of specific facts is materialized through written or electronic signs. Legal meaning gives reference of the document – it is not the document itself which is assessed, but whether the document can be used as evidence in a specific case. That is why, it does not make any difference whether the statement is legally relevant or not, and what does not make any difference with the legally relevant statement is its type.

Keywords: *accounting records, document, proof, evidence, presumption, proving, civil proceedings, legal procedures.*

JEL Classification: K41

1. Introduction

The concept of proof is epistemological, as the law serves as an objective support of the concept. In order to settle any legal dispute, it is necessary to prove real past facts. From the point of view of the cognitive activity, they are proofs for the existence or non-existence of a legal relation. The legally relevant and proof relevant facts are evidence due to the fact that, from the point of view of 'the legal relation presented for judicial review, they are proofs for its existence or non-existence'. Since the submission of the claim, the hearing, and the adjudgment happens at a moment which is different from the moment of the realization of the legally relevant and the proof relevant facts, the establishment of these facts is done through the sources of information connected to these facts. These sources of information connected to the facts subject of proving are called evidence. The evidence itself is knowledge of specific facts, as they themselves do not have any value in the proceedings. Their meaning and purpose is to prove the truthfulness of the statements for facts presented by the parties, which statements are connected to the fair adjudgment. Evidence includes objective reasons for the conformity of the factual statements with the reality.

[1] Atanas Ivanov - assistant professor of Civil Proceedings at the Faculty of Law and History of "Neofit Rilski" South-West University, Blagoevgrad, Bulgaria; Judge at Blagoevgrad District Court, nasko_nbu@abv.bg.

There are numerous and various issues connected to the document as evidence under the Code of Civil Procedure (CCP). They are analysed in the Bulgarian legal doctrine[2] and there are lots of such adjudgments in the case law. According to the regulations of Art. 178, par. 1 of the CCP, the probative value of the document is regulated by the law which was valid at the time and place where the document was executed. The written document executed abroad has the probative value of the applicable foreign law. Under the regulations of Art. 180 of the CCP, any private documents signed by the persons who executed them are a proof that the statements they contain are made by these persons. This is the so called 'formal probative value' of both the signed private and formal documents. The private evidencing document is also used with a material probative value, i.e., it has the meaning of evidence for the external fact the verification statement refers to, only if it certifies such facts which are unfavourable for its executor. Consequently, it is only then that it has a probative value against him/her, otherwise, as a rule, its executor does not have a verification competence. Otherwise, the document is not used as such a probative value, and under Art. 180 of the Code of Civil Procedure, it is only a proof that the statement was made by the person specified as its author. The regulations of Art. 182 of the Code of Civil Procedure and Art. 55 of the Commercial Act find only one exception regarding the regular accounting records kept by the trader, which records can be used as a proof in his/her favour. They are not used with any obligatory probative value, and the latter is assessed in the court considering all the proofs for the case. These issues are the subject of our analysis, without any pretentions for comprehensiveness.

2. Concept of a trade book and proof

According to the regulation from Art. 53, par. 1 of the Commercial Act, each trader[3] is obliged to bookkeep where he/she is to record the movement of the property of his/her enterprise. This regulation obliges the trader to keep general ledgers, as, under par. 3 of Art. 53 of the Commercial Act, the trader is obliged to summarize the results of his/her business on the basis of the entries in his/her accounting records and the inventory by preparing an annual financial statement, and, if necessary, respective accounting reports. General ledgers and

[2] Kornezov, L. *Civil litigation. Volume one. Claims procedure*. S.: Sofia, 2009; Stalev, Zh., Mingova, A., Stamboliev, O., Popova, V. and Ivanova, R. *Bulgarian Civil Procedure Law*. Ninth reviewed and amended edition. First under the current CCP. S.: 2012; Ivanov, A. *Current Issues for Evidence in Civil Litigations*. Sofia, Nova Zvezda, 2015; Ivanov, A., *Legal consequence of irregular request for evidence as procedural action in civil litigation in Bulgaria*, "Journal of Law and Criminal Justice", New York, USA, june 2015, Vol. 3, no. 1, pp. 147-149, ISSN: 2374-2674 (Print), 2374-2682 (Online).

[3] For the Legal Meaning of the Trader, see Ilieva, R. *Commercial Law. General conditions. Types of traders*, Sofia, Nova Zvezda, 2018, p. 15.

the entries in them can be used as evidence[4] in commercial litigations for establishing receivables under commercial litigations – an argument from Art. 55, par. 1 of the Commercial Act. The regulation under par. 2 of Art. 55 of the Commercial Act, further develops the conclusion by enacting that the general ledgers kept in violation of the requirements of the Commercial Act and the Accounting Act cannot serve as evidence in favour of those who are obliged to keep them.

The conclusion that comes from all the above-mentioned statements is that general ledgers are private documents. Private documents are used with formal probative value and with material probative value, but only when verifying facts which are not favourable for their author.

3. Proof of force

The probative value is a result of the assessment of the document under the personal perception of the evidence connected to civil litigation. The task of the assessment is to establish the validity of the document and the connection of its contents with the parties' factual statements under the case.

The probative value[5] of the evidence is actually *the proving influence of the evidence – which means the extent to which the information any evidence has is reliable and the extent to which it binds the court.* It all depends both on *the reliability* of the evidence – *this is the compliance between the reality and the information the evidence provides, and on the eligibility of the evidence.*

From all the above-mentioned statements and led by the moto '*Scriptum pro scribente nihil probat (sed contra scribentem)*' – nothing proves what one writes (except against him/her), it follows that the entries in the accounting records are to be legally irrelevant in connection to the trader who would like to rely on them. The regulations under Art. 182 of the CCP and Art. 55 of the Commercial Act establish one exception to this rule regarding the regular accounting records of the trader which can serve as evidence in his/her favour. They are not used with any obligatory probative value, and the latter assessed by the court in accordance with the evidence connected to the case. Therefore, the accounting records which are regularly kept do not possess probative value, equal to the material probative value of an official evidencing document, since they are derivative, i.e. they are prepared on the basis of primary accounting documents. This is exactly why, both art. 182 of the Code of Civil Procedure and art. 55 of the Commercial law require them to be in order, i.e. each entry in them to be duly certified. The regular keeping of the general ledgers is not presumed but it has to be verified through a forensic accounting report. That is why, whenever such an investigation is ordered for the case, which aims to perform an inspection of the account of the trader, if it is not requested, the court should officially also ask the expert witness

[4] As well as Ilieva, R., *op. cit.*, p. 19.
[5] See Ivanov, A. *Actual Issues of Evidence in Civil Litigation*, S., Nova Zvezda, 2015, 75-76.

whether the accounting records have been regularly kept by the party during the period, which the inspection is performed for. Of course, under art. 145, par. 1 Code of Civil Procedure, in this case as well, the court should, above all, examine if the regularity of the accounting records is a subject of a dispute between the parties or not. If it is not, the court is to acknowledge this fact for irrefutable with the report under art. 146, par. 1, item 3 of the Code of Civil Procedure, and in this way the performance of an unnecessary proving is avoided, i.e. in the case it is not necessary to order an investigation (Interpretative decision no. 39-2/5 March 1954, of the General Meeting of the Civil Panels of the Supreme Court of Cassation).

General ledgers may serve as evidence in favour of the trader only regarding the trade deals. It is enough only for the deal to be a trade one, but not the parties to the deal. If the deal is a trade one, the entries in the general ledgers have probative value both against traders and against non-traders, under argument from art. 55, par. 2 of the Commercial Law. However, it should be noted that even if general ledgers have been kept in violation of the law, they can serve as evidence, with the difference that on a trader who has not kept them can refer to them. This conclusion follows a contrario from art. 55, par. 2 of the Commercial Law, according to which, general ledgers cannot serve as evidence in favour of these trades who are obliged to keep them, if they have been kept in violation of the law.

Next, general ledgers can serve as evidence to the partners of a trading company in between themselves, too – each partner can refer to these ledgers in case of a dispute[6] with the other partners.

The probative value of the general ledgers is valid only if they are kept regularly – an argument from art. 55, par. 1 of the Commercial Law. Therefore, the law presumes the truthfulness of the entries in the accounting records, when they are kept regularly, but no presumption is established that the ledgers are kept regularly. They shall be in order when they completely meet the legal requirements, set in the Commercial Law and the Accountancy Act. This requirement, however, is not absolute, since one partial material irregularity cannot invalidate completely the general ledgers – e.g. one addendum. The following text is the condition here – the addendum, for example, not to be the subject of the dispute of the case.

For the opportunity to occur for the probative value of the general ledgers to be acknowledged, the prerequisite for ledger keeping regularity should be present. In this case, the court can accept them as evidence for the case. The legislator has provided a free evaluation to the court whether and to what extent to accept the general ledgers as evidence in the case – the presence of regularity does not oblige the court to accept the evidence in the case, and the court has the right to judge the probative value of the entry. This is why the probative value of the

[6] See. Petrov, V., *Acceptance of Inheritance*. C.: Ciella, 2014, p. 54.

general ledgers, and, more specifically, of the accounting records is not presumed but has to be determined in an irrefutable way. The regular and proper keeping of the accounting and the general ledgers is proved through a forensic and economic investigation by the party which refers to their probative value. Even if the accounting and the general ledgers have been kept in violation of the law, they can serve as evidence, with the condition that only the party-trader which has not kept them can refer to them, under argument a contrario from art. 55, par. 2 of the Commercial Law, according to which, general ledgers cannot serve as evidence in favour of those traders who are obliged to keep them if they have been kept in violation of the Commercial Law and the Accountancy Act. Since no accounting records are stored in violation of art. 53 and art. 55 of the Commercial Law in the accounting of a trader, if a dispute occurs, they cannot draw rights from their own unlawful behaviour.

In conclusion, the entries in the accounting records (general ledgers) are private evidencing documents, whose probative value is not equal to material probative value of official evidencing documents, regardless of the provisions of art. 182 of the Code of Civil Procedure, respectively art. 55 of the Commercial Law. Within the meaning of the law they have a possible (in case of a consent of the parties) probative value. As derivative, based on the probative value of primary accounting documents, this probative value is not presumed and if it is contested, it is subject to proving, initially – to an assessment, with view to all evidence for the case (argument from art. 182, par. 1 of the Code of Civil Procedure). All business operations which lead to changes in the property and financial status of the enterprise under the Accountancy Act are registered in the accounting records, as the accounting is performed on the basis of documental justifiability of the business operations and facts, under the requirements of the active legislature for documents execution. This is the exact reason why regularly kept accounting records – in compliance with the requirements of the Accountancy Act and based on regular primary documents – are used with evidential value under art. 182 of the Code of Civil Procedure. This evidential value, however, refers only to legal facts, related to the respective booked business operations and facts and to a dispute with parties which are claimed to have legal relationship with the enterprise.

Bibliography

1. Kornezov, L. *Civil litigation. Volume one. Claims procedure*. S.: Sofi-r, 2009.
2. Stalev, Zh., Mingova, A., Stamboliev, O., Popova, V. and Ivanova, R. *Bulgarian Civil Procedure Law*, ninth reviewed and amended edition. First under the current CCP. S.: 2012.
3. Ivanov, A. *Current Issues for Evidence in Civil Litigations*, Sofia, Nova Zvezda, 2015.
4. Ivanov, A., *Legal consequence of irregular request for evidence as procedural action in civil litigation in Bulgaria*, "Journal of Law and Criminal Justice", New York, USA, june 2015, Vol. 3, no. 1, pp. 147-149.

5. Ilieva, R. *Commercial Law. General conditions. Types of traders*, Sofia, Nova Zvezda, 2018.
6. Ivanov, A. *Actual Issues of Evidence in Civil Litigation*, S., Nova Zvezda, 2015.
7. Petrov, V., *Acceptance of Inheritance*. C.: Ciella, 2014.

Legal Significance of Commercial Books under the Bulgarian Law

Associate professor **Raya ILIEVA**[1]

Abstract

The article aims to analyse the legal importance of the commercial books a trader is required to keep in their business. At the same time, the study questions the role of these ledgers, the functions they perform, and their probative force in disputes between traders.

Keywords: *commercial books, legal significance, bookkeeping, traders, Commercial law.*

JEL Classification: K12, K22.

1. Introduction

The necessity of keeping general ledgers, where accounting entries to be made occurred in the ancient times, when exchanging relations between people appeared.

Historical data shows that with the first accounting entries, in the so-called special books[2] (*codices accepti et expensi*), traders registered the number of head of cattle they had in their herd, the size of land they owned, etc. Even at that time traders realized the need to use general ledgers, since they gave them clarity regarding their obligations and receivables from and to third parties, as well as information for their own property.

Subsequently, with the development of the economic, commercial and cultural life, the increasing volume and complexity of the business operations, made the country to obligate the traders to keep special books, called general ledgers[3]. General ledgers are kept in the field of trade and serve to establish activity of the trader and his/her property status. From a legal perspective, they have important evidential significance since they represent evidence between traders for the establishment of commercial deals.

---

[1] Raya Ilieva - South-Western University "Neofit Rilski", Blagoevgrad, Bulgaria, raiailieva@abv.bg.

[2] Bulatov, M., *Theory of the Bugalter School*. M., Экзамен (Exam), 2005, p. 9.

[3] In 1498, the Roman Emperor Maximillian I confirms 'book keeping' by traders. He signs a decree, under which 'the reliable and hard-working clerks who bookkeep are now called bookkeepers'. Until the appearance of double-entry bookkeeping in countries such as Italy, Germany, etc., the everyday registration of economic facts in the general ledgers is wide-spread. They have the features of daybooks which performed the functions of primary documents and registers for bookkeeping entries.

2. Obligation to water accounting

The obligation of the trader to keep general ledgers is underlying even in the first Bulgarian Commercial Act from 1897. In the current Commercial Act, which has not been amended or changed in this part, the obligation for keeping of general ledgers is displayed in art. 53 par.1 of the Commercial Act, where the following is written: *"each trader is obliged to keep accounting, where he/she is to register the movement of the property of his/her enterprise, which is registered in a chronological order"*.

From this provision it becomes evident that each trader has the administrative legal obligation to keep books. This obligation occurs with the constitution of the trader and affects both all traders and enterprises, regardless of their legal form, including sole proprietors. Since the Commercial Act does not state which traders are to keep books, the clarification is made in art. 2 of the Accountancy Act. According to it, all traders within the meaning of the Commercial Act are to be understood as an "enterprise", including the branches of foreign traders; local legal entities which are not traders; budget enterprises; consortiums within the meaning of the Commercial Act, the companies under the Obligations and Contracts Act, joint ventures and other unions, based on contractual relations, under which the parties have rights on the net assets; insurance funds under art. 8 from the Social Insurance Code; commercial representations; foreign legal entities, which conduct commercial activity in the Republic of Bulgaria, through a place of business, with the exception of the cases when the commercial activity is performed by a foreign entity from a country – member of the European Union or from another country – party to the Agreement on the European Economic Area, only under the conditions for free provision of services.

Chapter VII of the Commercial Act arranges only the general conditions of the trader to keep accounting. In this connection, art. 53 lists three obligations of the trader.

The first one is developed in the provision of art. 53, par. 1 of the Commercial Act, according to which "Each trader is obliged to keep books, where he/she is to register the movement of the property of his/her enterprise. This movement is to be registered in a chronological order". The obligation to keep books refers to the entire activity of the trader, including of the branches. In accordance with art. 19 of the Commercial Act, the branch keeps general ledgers as individual trader without making a separate balance. The branches of legal entities, which are not traders within the meaning of the Commercial Act, and the branches of foreign entities make a balance as well.

3. Basics of commercial accounting

In the Republic of Bulgaria, the Commercial Act does not order the system for keeping accountancy, but refers to the Accountancy Act. Accounting represents an information system for documental, constant and interconnected registration, in a monetary indicator, of the economic facts, events and processes within the enterprise, by application of specific methods. This means that the movement of the actual property status of the trader is registered in the general ledgers. This movement is registered in a descriptive form, as all operations connected to the financial assets, property and material valuables of the trader are registered. Each trade operation, however, has to be registered in the general ledgers and it has to be turned in a property article. A registration of the commercial operations in the property of the trader is achieved through its entry[4]. Each operation is registered in the assets and liabilities of the property. The assets represent the overall value expression of the rights of the trader, while the liabilities represent his/her obligations. The assets and liabilities as a value expression of the rights and obligations represent the legal notion for property. Bookkeeping does not create rights but reflects the movement of the commercial activity. Bookkeeping itself is connected to performance of accounting entries with which three types of accounting documents are formed:

1) primary: documents, carriers of information for an economic activity registered for the first time (invoice);

2) secondary: carriers of summarized information, received from the primary ones (register of the revenue and expenditure).

3) registries, carriers of chronologically systematized information for the economic operations from the primary and secondary sources.

General ledgers vary with view to the form of the bookkeeping. The law foresees two ways of bookkeeping: single-entry and double-entry. The difference is in the way of accounting.

- With single-entry bookkeeping, the economic operations are stated in chronological order, without a connection between them. This is the way books for revenue and expenditure, inventory book and auxiliary ledgers are kept.

- Double-entry bookkeeping is kept on the basis of the accounting calculations. The meaning is that with it, the keeping is performed by making a connection between the economic operations – the records that are kept, are not only chronological, but they have systematic characteristics (synthetic and analytical keeping).

[4] Svrakov, A. Milev, C and others, *Documentation in Accounting*, „Yearbook IS", Vol. 64, 1992, pp. 142-144.

Fundamentally, general ledgers are not public, since the entries in them enter the scope of trade secret; however, the beginning is not brought to an end due to the fact that the interests of the state impose control over them[5].

4. Legal significance of trade books

The legal meaning of general ledgers is expressed in several directions. On one hand, general ledgers and the entries in them can be used as evidence in commercial cases between traders, for confirmation of receivables from trade deals (art. 55, par. 1 of the Commercial Act)[6]. In order to be used as evidence, however, they should provisionally meet several conditions: first, the general ledgers have to be kept regularly, in accordance with the Accountancy Act[7], and second, the receipt has to originate from the trade deal, concluded between traders. The regularity of the books is not presumed, but has to be proven[8].

On the other hand, they give information to the trader about the financial results of his/her own activity. This is valid, especially for the partners and shareholders of trade companies, who, through the information of general ledgers can inform themselves about the condition of the company, the status of the shares and stocks they own, and the potential profit they bring, i.e. the profits and losses of this activity can be established through them.

Additionally, general ledgers give information to all partners and creditors of the trader about the financial flows of his/her activity, about the equity, etc. Through them, the state exercises control, related mostly to taxation.

Bookkeeping principles are to be reviewed as initial formulations (rules), which have to be kept, so that the bookkeeping can perform its public functions. Their application provides comparability, identity and understandability of the information registered in the accounting reports of separate enterprises, industries, in national and international scale.

According to the requirements of the Accountancy Act, the bookkeeping documents are executed in Bulgarian, with Arabic figures and in leva. The bookkeeping documents, which are received by the company in a foreign language, need to be accompanied by a translation in Bulgarian for the obligatory requirements for the operations registered in them. The entries in the financial accounts are performed on the basis of the primary and secondary bookkeeping entries.

---

[5] Gerdzhikov, O., *Commentary on the Commercial Law*, Book One, Art.11-112, Sophie P, 2000, p. 176.

[6] Ivanov, A., *Current Issues of Demonstration in Civil Litigation*, Sofia, New Star, 2015, p. 98.

[7] In force since 01.01.2016, last supplemented. SG. No. 22 of March 13, 2018.

[8] Ivanov, A., *Legal consequence of irregular request for evidence as procedural action in civil litigation in Bulgaria*, "Journal of Law and Criminal Justice", New York, USA, June 2015, Vol. 3, no. 1, pp. 147-149, ISSN: 2374-2674 (Print), 2374-2682 (Online).

The second obligation of the trader is set in art. 53, par. 2 of the Commercial Act, in accordance to which, the trader is obliged to perform an inventory within the terms, determined by the Accountancy Act, to establish the availability and the evaluation of the elements of the assets and liabilities of the property of his/her enterprise. The terms for performance of an inventory are:

1. for fixed assets and intangible assets – at least once every two years;
2. material reserves – at least once a year;
3. books in the library – once every five years;
4. for all other assets and liabilities – once a year, in connection to the execution of an annual financial statement.

Inventory is a kind of documentation, it is a continuation of the documentation, related to economic events, having subjective or objective characteristics, passing disastrously, incidentally, i.e. such processes, which cause changes in the assets and liabilities and cannot be established under the general order. Such characteristics are found in the natural changes in the quantity and quality of some material reserves, as a result of evaporation, weathering, etc.

- destruction of material reserves – with disasters, failures, thefts;
- unintentional errors in the reporting process as a result of events with irregular characteristics, an unequal representation occurs between the informational presentation of the separate elements of the property of the enterprise, provided by compiling, accounting, and their factual real condition. These discrepancies can be registered and corrected only by applying the method of inventory. Within the meaning of the active legislation, inventory represents a method for a periodical check through the application of different approaches of the quantitative and value parameters of the assets and liabilities as of a specific moment time and date and their comparison with the data in the accounting. The ultimate goal, which is sought, is to achieve a complete conformity between the data of the accounting and the factual status of the assets and liabilities.

The last obligation of the trader is set in art. 53, par. 3 of the Commercial Act, namely, “The trader is obliged to summarize the results of his/her trade activity on the basis of the entries in the accounting records and of the inventory, by performing an annual financial statement, and if necessary, the respective accounting references, too. The annual financial statement has to be verified by a registered auditor in the cases foreseen by the law”. This is not a one-time obligation, but it is performed each year.

In connection to this obligation, the Commercial Act states that traders prepare an annual financial statement as of 31 December each year, but this obligation is further developed in art. 34, par.1 of the Accountancy Act, which states which standards the trader should follow and what requirements the annual financial statement of the enterprise of the trader should meet before it can be published.

After the performance of the annual accounting balance, the trader compiles an annual financial statement of the activity, which offers summarized information for the up-to-date accounting, in accordance with the accounting policy of the enterprise through the passed accounting year. The annual financial statements are performed on the basis of the international bookkeeping standards and are the concluding stage of the bookkeeping kept through the year. When the annual financial statement is being prepared, it should be noted that even though they are independent from each other, the data of the report at the beginning of the current reporting period has to correspond to the data of the end of the previous reporting period.

5. Requirements for keeping books in accordance with the Accounting Act

According to the Accountancy Act, the proposed annual financial statement has to cover several important conditions, namely: to be understandable and useful, to allow for past, future and current events to be assessed, to be cleared from errors and the information from different years has to be comparable. The elements, which are to constitute the annual financial statement include accounting balance, report of the financial flows, report of the revenue and expenditure, report of the capital and appendix. For the submission of the annual financial statement of trade companies several documents are to be prepared, namely: certificate of the company, report, balance, minutes of the general assembly, sole act of the owner and a Power of Attorney, certified by a notary public, in case the documents are submitted by an accountant, representing the company.

The periods and cases, which the enterprises are obliged to publish their annual statements in, are stated in the provision of art. 38 of the Accountancy Act. According to the Commercial Act, the general assembly of the partners (shareholders) of all trade companies is obliged to accept their annual financial statement by 30 June of the following calendar year – through application for registration and presentation for publishing in the Commercial Register. This acceptance and approval of the annual financial statement by the superior managerial body of the trade company is not considered an act of approval for publishing of the financial statement. As date for confirmation and publishing and approval of its publishing shall be accepted the earlier date, on which the individuals who are in charge of this management have undertaken their responsibility for the respective financial statement and have declared its entirely and completeness[9].

The annual financial statements and the activity report are published in the form and with the text, based on which the registered auditor has stated his/her expert's opinion. The text of the auditor's report is subject to publishing, too.

[9] Dosev, H., *Events after the end of the reporting period and preparation of the annual financial statement according to the applicable accounting standards*, „Accounting", issue 3/2014, p. 3.

When the financial statement is initially declared for publishing in the term of par. 1 and a publishing rejection has been ordered under art. 22, par. 5 of the Commercial Register Act and within 14 days from its entering into force, a second application has been submitted, it is considered that the financial statement has been submitted within the term.

These requirements are not applied for:

1. budget enterprises and sole traders which are not subject to obligatory independent financial audit; and

2. enterprises which have not conducted activity during the reporting period; this circumstance is declared with a declaration which is published in the Commercial Register by 31 March of the following year; no fees are due for the publishing of the declaration under art. 12, par. 1, item 1 of the Commercial Register Act and under the Register of the Non-profit Legal Entities.

By 31 July of the current year, the Registry Agency presents electronically to the National Revenue Agency, a list of the enterprises, which have not published their financial statements for the previous year on time. By 30 September of the current year, the National Revenue Agency undertakes the necessary measures for the performance of inspections and detection of violations. Administrative penal sanctions are foreseen for those who have not published their annual financial statements. In this way, the lack of a sanctioning provision in the Commercial Act for failure to comply with the requirement for keeping general ledgers is compensated.

6. Conclusion

From all written above, a conclusion can be made, that general ledgers are not without legal significance, as the biggest one is manifested in their evidential character. It is expressed in the fact that probative force of accounting records is not equal to the material probative force of an official evidencing document[10]. According to the norms of the Code of Civil Procedure, the court is to accept the keeping of general ledgers on a general basis, as written evidence. Bulgarian courts are unanimous that the probative force of general ledgers and the entries in them is derivative.

Bibliography

1. Bulatov, M., *Theory of the Bugalter School*. M., Экзамен (Exam), 2005.
2. Dosev, H., *Events after the end of the reporting period and preparation of the annual financial statement according to the applicable accounting standards*, „Accounting", issue 3/2014.
3. Gerdzhikov, O., *Commentary on the Commercial Law*, Book One, Art.11-112, Sophie P, 2000.

[10] Ivanov, A., *op. cit. (Current Issues of Demonstration in Civil Litigation)*, p. 38.

4. Ivanov, A., *Current Issues of Demonstration in Civil Litigation*, Sofia, New Star, 2015.
5. Ivanov, A., *Legal consequence of irregular request for evidence as procedural action in civil litigation in Bulgaria*, "Journal of Law and Criminal Justice", New York, USA, June 2015, Vol. 3, no. 1.
6. Svrakov, A. Milev, C and others, *Documentation in Accounting*, „Yearbook IS", Vol. 64, 1992.

Free movement of capital and payments in the European Union, the result of successive regulations

Lecturer **Adriana MOŢATU**[1]

Abstract

The first part of the paper presents the distinction between the concepts of "capital movement" and the circulation of payments. The principle of free movement of capital and payments does not require the adoption of additional regulations at national level and is therefore directly applicable in the member countries. The second part of the paper deals with the legislative framework of the two freedoms in its evolution, according to the Treaties of the European Union and the directives in field.

Keywords: *capital, payments, free movement, liberalization, tax measures, directive.*

JEL Classification: K22, K33

1. The concepts of "capital movement" and "payments"[2]

The free movement of capital and payments is governed by: Art. 63-66 TFEU (Capital and payments), art. 75 and art. 215 TFEU (as regards sanctions), the CJEU directives and case-law on capital and payments.

a) The movement of capital is not defined in the Treaty, it only regulates the obligation to remove restrictions on the freedom of movement.

The Court of Justice of the EU has defined capital movements "through those financial transactions that essentially reflect the placement or investment of money, not the remuneration for a benefit"[3].

"Circulation of Capital" is an operation of an autonomous nature, i.e. direct investment, share issuance, credit, private financing, etc. A purchase of immovable property in a Member State by a non-resident, irrespective of its reasons,

---

[1] Adriana Moţatu – Department of Law, Bucharest University of Economic Studies, Romania, lucian_motatu@yahoo.com.

[2] See Ioana-Nely Militaru, *European Union Law, Chronology. Streams. Principles. Institutions. The internal market of the European Union. Fundamental Liberties*, 3rd edition, revised and added, Universul Juridic Publishing House, Bucharest, 2017; Ioana Nely Militaru, *Development Issues on the EU Internal Market*, Octav Onicescu National Seminar organized by the Romanian Society of Statistics, „Romanian Statistics Magazine", Supplement no. 1/2014.

[3] See N. Diaconu, *European Union Law. Treated*, ed. revision II, Lumina Lex Publishing House, Bucharest, 2011, p. 401.

is an investment in immovable property that falls within the category of capital movements between Member States[4].

In practice, the payment of insurance premiums for material damage or civil liability insurance was assessed as a current payment whereas the payment of life insurance premiums was qualified as capital movement.

In this context Council Directive 88/361/EEC for the application of Article 67 of the Treaty[5] (TCEE) includes "The Nomenclature of Capital Movement Areas referred to in Art. 1 of the Directive". Areas of capital movements are classified in the nomenclature according to the economic nature of the assets and liabilities to which they refer, expressed either in national currency or in foreign currency[6].

b) "Payments" means those money transfers which constitute[7]:

- a counterpart in a transaction, namely the exchange of goods and services;
- a remuneration for a given benefit, namely wages for the work carried out by the beneficiary of the right of establishment in a Member State, as a person who has gone to that State under that right;
- the distribution of the profit or the payment of interest to the creditor or the beneficiary;
- capital transfers as a result of their free movement.

Circulation of payments implies a transfer of values (ancillary) that is performed as a result of a principal operation. The EU Court of Justice has stated that "the physical transfer of banknotes can not be regarded as a capital move when it is the result of a payment obligation resulting from a transaction in the movement of goods and services"[8]. Payments, not capital movements, transfers in connection with tourism or travel for trade, education or medical treatment are considered, even if they are carried out by means of the physical transfer of banknotes.

Directives that have led to the free movement of capital[9]. The first directive, which was adopted in 1960 (11 May)[10] - before the creation of the Single Market[11] and which was amended in 1962[12] - unleashed direct investment,

---

[4] See Oc. Manolache, *Treaty of Community Law*, the 5th edition, C.H. Beck, Bucharest, 2006, p. 289; Silvia Cristea, *International Issues of Recovery of Tax Claims between the Member States of the EU*, Rev. Tax Court no.10/2007, pp.14.

[5] Article 67 TEC has been abrogated through the ECT.

[6] See, to that effect, Annex I to Council Directive 88/361/EEC of 24 June 1988.

[7] See N. Diaconu, *op. cit.*, p. 401; O. Manolache, *op. cit.*, p. 294.

[8] C-358/1995 of 23 February 1995; See N. Diaconu, op. cit., p. 401; O. Manolache, *op. cit.*, p. 294.

[9] See N. Diaconu, *op. cit.*, p. 401; Ioana Nely Militaru, *Directive - the main legislative instrument for the implementation of EU law*, „Magazine of Commercial Law" no. 7/8/2010, pp. 22-29.

[10] JOCE, L 43, 12 April 1960.

[11] Ioana Nely Militaru, *Development Issues on the EU Internal Market*, Octav Onicescu National Seminar organized by the Romanian Society of Statistics, „Romanian Journal of Statistics", Supplement no. 1/2014.

[12] JOCE, L 49, 22 January 1963.

short-term or medium-term loans for commercial transactions and the purchase of traded securities on the scholarship.

In 1972, Directive 72/156/EEC was adopted, regulating the international capital flow and neutralizing unwanted effects on domestic liquidity. In order to complete the single market, more precisely with the launch of the single market, a series of directives were adopted which only "called into question" the progress of the period 1960-1962. The following directives were adopted:

- in the years 1985 and 1986[13]; are two directives that have extended the unconditional liberalization of long-term loans for commercial transactions and the purchase of non-market securities;

- in 1988, Directive no. Council Directive 88/361/EEC[14] (of 24 June) removing, with effect from 1 July 1990, all remaining restrictions on the movement of capital between residents of Member States. This directive has proposed the completion of the single market (until 1993), the transition from the European Monetary System to the economic and monetary union and the introduction of the euro.

By Directive no. 88/361/EEC completely liberalized the movement of capital[15], which involved the suppression of all transfer authorizations, even those granted automatically.

The directive also provided for a safeguard clause by which Member States had protective measures when short-term capital movements of exceptional magnitude caused serious disturbances in the conduct of monetary policy[16].

The Directive allowed certain countries to maintain temporary restrictions, especially in the case of short-term capital movements, but only for a certain period of time.

2. Legislative framework for free movement of capital and payments

2.1. The Treaties of the European Union

The Maastricht Treaty (TMs) introduced the free movement of capital as a freedom enshrined in the Treaty, and the TFEU introduces a general ban in Art. 63 - with regard to any restrictions on the movement of capital and payments

[13] Following a Commission Communication of 1986 (COM (86) 292 final of 23 May 1986).

[14] JOCE, L 178, 8 July 1985, the Single European Act determined the adoption of the said Directives. This was the repeal of the Directive of 11 May 1960 and the Directive no. 72/156/EEC.

[15] With this directive, liberalization was extended to monetary or quasi-monetary transactions that could have the greatest impact on national monetary policies, such as loans, foreign currency deposits and securities transactions; see D. Kolassa, *Technical Sheets on the European Union, Free Movement of Capital*, December 2016, http://www.europarl.europa.eu/ftu/pdf/ro/FTU_3.1.6.pdf and http://www.europarl.europa.eu/aboutparliament/ro/displayFtu.html?ftuId=FTU_3.1.6.html, consulted on 1.10.2018. For details, see also O. Manolache, *op. cit.*, pp. 290-291.

[16] However, no State has resorted to such a safeguard clause.

between Member States and between Member States and third countries - a ban that goes beyond simply eliminating unequal treatment by nationality[17].

Art. 65 par. (1) TFEU allows differential tax treatment of foreign and non-resident investment. Thus, the general prohibition provided in art. 63 TFEU does not remove the right of Member States to apply the relevant provisions of tax legislation which distinguish between taxpayers who are not in the same situation as regards their place of residence or the place where their capital has been invested; (...)

Even in relations with third countries, the principle of free movement of capital prevails over reciprocity and the maintenance by the Member States of a bargaining leverage in relation to third countries[18].

2.2. Exceptions and justified restrictions

The exceptions provided by the Treaty refer only to capital movements concerning third countries, namely the prohibition of restrictions on the free movement of capital and payments under Art. 63 TFEU "is without prejudice to the application in respect of third countries of the restrictions in force on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries in third countries where they involve direct investment, including real estate investments, the establishment, provision of financial services or the admission of securities to capital markets" (Article 64 TFEU). For Bulgaria, Estonia and Hungary, the restrictions in force under the national laws of 31 December 1999 are maintained.

The Council and the European Parliament may adopt legislative measures relating to the movement of capital between Member States and third countries involving the direct investment, the provision of financial services or the admission of securities to capital markets [according to Art. 64 par. (2) TFEU].[19]

The Council, after consulting the Parliament and acting unanimously, may adopt[20] measures constituting a regression, a step backwards in Union law as regards the liberalization of capital movements between Member States and third countries [according to art. 64 par. (3) TFEU].

Article 66 TFEU refers to emergency measures that may be adopted in relation to third countries but which are limited to a period of six months, namely: the Council (...) may adopt, in relation to third countries, safeguard measures for a third country for up to six months if such measures are strictly necessary.

---

[17] C-367/98 Commission v Portugal, paragraph 44.
[18] C-101/05, Skatteverket v. A, cited by D. Kolassa, *op. cit.*, p. 10.
[19] COM (2010) 0344; P7_TA (2011) 0206.
[20] Only the Council in accordance with a special legislative procedure.

The only justifiable restrictions that Member States may decide to apply to capital movements in general, including within the Union[21], are laid down in Art. 65 TFEU. Therefore, Member States are entitled:

a) to take all necessary measures to combat the violation of their laws and regulations, in particular in the field of taxation or prudential supervision of financial institutions;

b) to establish procedures for declaring capital movements for administrative and statistical purposes;

c) to take measures justified on grounds of public policy or public security.

Article 75 TFEU complements the abovementioned restrictions, from art. 65 TFEU, with a restriction which may be imposed not by the Member States but by the European Parliament and the Council, which by means of regulations[22] define the framework of administrative measures on capital movements and payments, that is, they have the right to apply financial sanctions to natural or legal persons, groups or non-State entities, such as the freezing of funds, financial assets or economic benefits owned or held by them.

TFEU provides in Art. 215 and the possibility of applying sanctions:

- one or more third countries, by interrupting or restricting, in whole or in part, economic and financial relations;
- against natural or legal persons, groups or non-State entities, in the form of restrictive measures, on the basis of decisions taken in the framework of the Common Foreign and Security Policy.

2.3. Payments

According to art. 63 par. (2) TFEU, "any restrictions on payments between Member States and between Member States and third countries shall be prohibited". Any restriction, however, on the circulation of payments is prohibited, even with the first Community regulation, by art. 106 TCEE, the 'unrestricted circulation of payments' was made only if the other freedoms were insured. According to art. 106 TCEE:

1. "Each Member State undertakes to authorize payments in respect of the exchange of goods, services and capital, as well as capital and wage transfers, in the currency of the Member State in which the creditor or the beneficial owner is established, to the extent that which the movement of goods, services, capital and persons is liberalized between Member States in the application of this Treaty. Member States are willing to proceed with the liberalization of their payments beyond what is provided for in the previous paragraph, insofar as their

[21] See D. Kolassa, *op. cit.*, p. 10.
[22] Adopted in ordinary legislative procedure.

economic situation in general and their balance of payments situation in particular so allow.

2. To the extent that the trade in goods and services and the movement of capital are restricted by restrictions on related payments, the provisions of the chapters on the abolition of quantitative restrictions, liberalization services and free movement of capital".

Liberalization of payments is therefore achieved insofar as the movement of goods, services, persons and capital is liberalized, which means that the evolution of the first freedom is conditioned by the evolution of the others.

Moreover, the liberalization of payments remains at the disposal of States, insofar as their economic situation in general and their balance of payments situation in particular allow them. "

According to the same art. (3) Member States shall not impose new restrictions on transfers of invisible transactions (listed in Annex III to this Treaty). The phasing out of existing restrictions shall be carried out in accordance with the provisions of Articles 63 to 65 "(...).

Consequently, the restrictions on the freedom of movement of payments have been phased out, "according to a general program for the elimination of restrictions"[23], for now, art. 63 TFEU to specifically state "prohibition of any restrictions".

If, principally, the free movement of capital is closely linked to freedom of establishment - although the right of establishment is not always accompanied by a capital transfer, the latter being able, for example, to apply for credit in that country[24] - free movement of payments is necessary to complete the free movement of goods, workers, services and capital[25].

2.4. Legislative framework for "free movement of payments"

Union legislative acts on the costs of national and cross-border payments within the euro area[26] have the following succession:

- Council Regulation (EC) 2560/2001 of 19 December 2001 harmonized the costs of national and cross-border payments within the euro area;

- Council Regulation (EC) Regulation (EC) no. 2560/2001 was repealed and replaced by Regulation (EC) no. 924/2009 of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community;

---

[23] *Idem*.
[24] See O. Manolache, *op. cit.*, p. 288.
[25] See P. Mathijsen, *Compendium of European Law*, ed. 7th edition, Club Europa Publishing House, Bucharest 2002, p. 266.
[26] D. Kolassa, December 2016, *op. cit*.

- Regulation (EU) no. 260/2012 of the European Parliament and of the Council of 14 March 2012 laying down the technical and trade requirements for direct credit transfer and direct debit transactions in euro.

The new legal framework for payments includes[27]:

- Payment Service Directive 2007/64/EC is the legal basis for creating a single EU payment market by 2010.

The Directive contains rules applicable to all payment services in the EU; it aims to:

- that cross-border payments become as simple, efficient and secure as "national" payments made within a Member State;

- Promote efficiency and reduce payment costs through greater competition by opening up new payment markets.

- provide the necessary legal framework for a European banking sector initiative, called the "Single Euro Payments Area" (SEPA).

- Regulation (EU) Regulation (EC) no. 260/2012 of the European Parliament and of the Council of 14 March 2012 laying down the technical and trade requirements for direct credit operations and direct debit transactions in euros and amending Regulation (EC) 924/2009, adopted in 2012, is the result of the Commission's December 2010 proposal.

3. Conclusions

The Commission's efforts to encourage the liberalization of capital movements were supported by the European Parliament, which considered that liberalization should be more advanced within the Union than between the Union and the rest of the countries to ensure that European economies prioritize European investment.

The European Parliament also specified that the liberalization of capital movements should be supported by full liberalization of financial services and harmonization of tax legislation to create a unified European financial market, which is why the Commission, under the political pressure exerted by the European Parliament, has initiated legislation on the harmonization of national and cross-border payments (Parliament's resolution of 17 June 1988).

Parliament has supported the creation of an efficient, integrated and secure market for securities clearing and settlement in the European Union and has organized a workshop on issues related to securities legislation. In its non-legislative resolution of 7 July 2005 on clearing and settlement in the European Union, Parliament has supported the creation of an efficient market[28]. Parliament is also open to other legislative initiatives in the field of clearing and settlement for discussion under the ordinary legislative procedure.

---

[27] *Idem*.

[28] 2004/2185 (INI).

Bibliography

1. D. Kolassa, *Technical Sheets on the European Union, Free Movement of Capital*, December 2016, http://www.europarl.europa.eu/ftu/pdf/en/FTU_3.1.6. pdf and http://www.europarl.europa.eu/aboutparliament/ro/displayFtu.html?ft uId =FTU_3.1.6.html, consulted on 1.10.2018.
2. Ioana Nely Militaru, *Development Issues on the EU Internal Market*, Octav Onicescu National Seminar organized by the Romanian Society of Statistics, Romanian Journal of Statistics - Supplement no. 1/2014.
3. Silvia Cristea, *International Recognition of Tax Receivables between Member States of the EU*, Rev.Fiscal no. 10/2007, pp. 14.
4. O. Manolache, *Treaty of Community Law*, the 5th edition, C.H. Beck, Bucharest, 2006.
5. Mathijen P., *Compendium of European Law*, 7th edition, Club Europa Publishing House, Bucharest 2002.
6. N. Diaconu, *European Union Law. Treated*, ed. revision II, Lumina Lex Publishing House, Bucharest, 2011.
7. Ioana Nely Militaru, *Directive - the main legislative instrument for the implementation of EU law*, „Magazine of Commercial Law", no. 7/8/2010, pp. 22-29.
8. Ioana-Nely Militaru, *European Union Law, Chronology. Streams. Principles. Institutions. The internal market of the European Union. Fundamental Liberties*, 3rd edition, revised and added, Universul Juridic Publishing House, Bucharest, 2017.

Implementation of the Agreement-Based EU Single Market System and Its Implications if Applied in ASEAN

Student **Banyu Biru ADILEGOWO**[1]
Student **Zippo Surya PUTRA**[2]

Abstract

Asean Economic Community is a community built in 2008 by Asean States Members. One of the purpose is to accelerate the regional economy development. As implemented in European Union, System on Single Market was built by International Agreement signed by states in EU. Nevertheless, EU has European Court Justice to solve any dispute that could be arise from the agreement, but unfortunately Asean has no any court to solve any legal settlement dispute toward the agreement. Here, we apply a library and normative research due to our paper. We acknowledge that Asean Economic Community is not a replica from European Economic Community. Moreover, we insist that it's crucial to carefully control the application of Single Market System of Asean Economic Community. Vacuity of legal dispute settlement in Asean could be a big question about how Asean would solve any dispute in the future from the application of the Single Market System.

Keywords: *Asean, European Union, Single Market, Treaty, Legal Dispute Settlement, Economic Intergration*

JEL Classification: K22, K33

1. Introduction

1.1. Background of study

Economic globalization was a competition that bring opportunities and advantages. However, it can only be received if the right strategy was adopted. Today's economic conditions show that interconnectedness and interdependency between countries was very crucial, especially due to economic acceleration and globalization. Interdependence between countries at the next level has encouraged the economic integration both on a global scale and on a regional scale.

In relation to economic inter-regional and regional-scale economic integration, in 1967 the countries of the Southeast Asian geographic region formed a regional organization called ASEAN. The organization has begun to strengthen economic cooperation since 1980s, and in the early 1990s economic

[1] Banyu Biru Adilegowo - student from Faculty of Law, Universitas Islam Indonesia in Indonesia. Currently enrolling on International Law, banyubirual@gmail.com.
[2] Zippo Surya Putra - student from Faculty of Law, Universitas Islam Indonesia in Indonesia. Currently enrolling on International Law, zippo.surya@gmail.com.

cooperation was increased to ASEAN economic integration was by forming an ASEAN Free Trade Area (hereinafter referred to as AFTA) which was signed in 1992 and formed in 2003.[3] The next step of the economic cooperation was enhanced again by creating a concept of the ASEAN Economic Community (AEC) formed in 2008 by the establishment of the ASEAN Charter[4].

A number of meetings have been held by leaders of ASEAN countries to accelerate the regional economy development. One of the important results of the agreement was the Acceleration of the AEC establishment and implementation. The end of 2015 was a milestone of the AEC start in the dynamics of the global economy. As a form of regional economic liberalization AEC has some characteristics including; (1) single market and single production base, (2) highly competitive economic zones, (3) areas with equitable economic development, and (4) areas that were fully integrated with the global economy.[5] In other words, as a single market and a single production base, it will result in the free flow of goods, skilled labor to free investment in ASEAN member countries, including VISA-free, Customs-free and free to work across AEC member countries. This can be an opportunity and challenge for member countries that were mostly developing countries in the world.

In general, the basic concept of economic integration was to reduce or eliminate all trade barriers between member countries in a particular region to be able to increase the flow of goods and services freely into and out of the borders of each member, so the trading volume was higher.[6] Economic integration in the ASEAN region were built based on a concept of providing economic benefits for member and non-member countries, to eliminate any restrictions of economic growth.

The opening of free trade area in the ASEAN region was predicted to be able to encourage positive results for the economic development of Southeast Asia. Firstly, it will increase the state revenues through exports and imports. Secondly, it opened up new opportunities for industrialization in the Southeast Asian region which was weakening due to the monetary crisis occurred in 1990s. Third,

---

[3] Koesratanti. *Pembentukan Masyarakat Ekonomi ASEAN (Asean Economic Community/AEC) 2015 : Integrasi Ekonomi Berdasarkan Komitmen Tanpa Sanksi*, Jurnal Law Review, Vol. XIII, No. 2, Fakultas Hukum Pelitas Harapan. 2013. p. 9 seet https://www.researchgate.net/ publication /279915791_Pembentukan_Masyarakat_Ekonomi_ASEAN_ASEAN_Economic_CommmunityAEC_2015_Integrasi_Ekonomi_Berdasar_Komitmen_Tanpa_Sanksi. (accessed Sep 16 2018).

[4] Declaration of the AEC formation was carried out in 2003 at the IX Summit with the issuance of the Bali Concord II Declaration, and this was then stated in the ASEAN Charter, for the content of ASEAN Charter see http://www.asean.org/archive/publications/ASEAN-Charter.pdf (accessed Sep 16 2018).

[5] ASEAN Economic Community Blueprint, https://asean.org/asean-economic-community/ (Accessed Sep 16 2018).

[6] Ridwan, *Dampak Intergrasi Ekonomi terhadap Investasi Kawasan ASEAN :Analisis Model Gravitasi*, Jurnal Organisasi dan Manajemen, Volume 5, Nomor 2, 2009. p. 56.

expanding professional employment for new young generations in member countries and providing career opportunities in various regions of Southeast Asia.

This transformation has driven a new era in building economic, social, political and cultural life of the ASEAN community. All communities were encouraged to further expand relations and cooperation among nations in an international integration with the assumption that free market competition will encourage ASEAN countries to produce a maximum efficiency and ultimately improve the welfare of the people. Thus, the ASEAN community was expected to have interaction and transaction widely in various strategic fields.[7] If the mechanism in regional economic integration performed well in each country, then all involved parties will be benefited though the profit will not be evenly distributed.[8]

With regard to economic integration, in fact many countries in the world have implemented economic integration policies, for example were European countries that have first formed the European Economic Community in the 1950s, hereinafter referred to as the European Union. European Union participating countries not only integrated their economic sectors but also made political integration on member countries. This integration has made Europe became one of the highest income regions because of its economic integration with the single market concept.

In spite of its new establishment compared to the European economic community, ASEAN Economic Community conception was classified as good for economic acceleration, but it has various weaknesses and shortcomings compared to the European Economic Community (EU). In the future AEC was expected to be equal with the European Economic Community, but various significant aspects became a differentiating gap between the Asean Economic Community and the European Economic Community, including the dispute resolution and decision making system on a conflict on agreements in the scope of ASEAN. From cultural differences to currency matters was a challenge for ASEAN in achieving competitive ASEAN economic community in the dynamics of the global economy.

The AEC member countries must indirectly implement the policies stated in the ASEAN Charter, but in reality interpretation of the policy implementation was surrendered to member countries. This was because ASEAN has its own policy for agreement and decision-making systems based on the ASEAN Way conception. The mechanism of conflict cooperation and settlement in the Southeast Asia region based on the principle of non intervency diplomacy, mutual respect,

---

[7] Atep AbdulRofiq. *Menakar Pengaruh Masyarakat Ekonomi ASEAN 2015 Terhadap Pembangunan Indonesia*, Jurnal Hukum Universitas Islam Jakarta Fakultas Syariah dan Hukum. 2014. p. 23, see https://www.academia.edu/9997959 (accessed Sep 16 2018).

[8] Boy Samsul Bakhri. *Masyarakat Ekonomi Asean (Mea) dan Tinjauan Dari Perspektif Ekonomi Syariah*, Jurnal Ekonomi KIAT, Universitas Riau. 2014, see http://jurnalkiatuir.com/index.php/kiat/article/view/22/22 (accessed Sep 17 2018).

consensus, dialogue and consultation, as well as prohibition on using armed violence was referred to as the ASEAN Way.[9] Prioritizing national regulation and implementation rather than creating supranational authority was also one of the concepts adopted by the ASEAN Way so that the agreement compliance was up to the member countries.

The absence of forced power in the agreements implementation in the ASEAN region can be a weakness and also an advantages of legal sector that will impact on the implementation of the agreements. This was very different from the European community that has a court to enforce agreements implementation. ASEAN was not like the European Union (EU) which has a court (ie the European Court of Justice/ECJ) which prosecute any member countries that do not execute the contents of the agreed agreement and ensure the implementation of community law for the achievement of EU objectives. In addition, the EU has a clearer decision-making hierarchy mechanism than ASEAN that use diplomacy for decision making because it was based on the ASEAN way as an ideology of the Asian region. Nevertheless, the court system owned by Europa Union can lead to disadvantages for its members. By the European court system, the countries sovereignty system was gradually weakening as time progresses.

By considering the description above, the author intended to conduct a study of the policies carried out by AEC participating countries in order to achieve regional economic integration and the extent of the AEC forwardness to meet a single market and single production base so that it can be equal with similar organizations such as the European Union that a single Market concept earlier. In addition, this paper will also make a policy comparison between the AEC and the EU by the perspective of International Business Law on the weaknesses and strength of AEC towards EU.

1.2. Problem formulation

Based on the background explained, some formulations of the problems discussed in this paper:

1. How were implementation of the agreement-based EU single market system and its implications if implemented in ASEAN?

1.3. Objective of the Study

The study was aimed to reveal the implementation of the agreement-based EU Single Market system and its implications if implemented in ASEAN. With this point, the research objective were as follows :

[9] Sefriani. *ASEAN WAY dalam Prespektif Hukum Internasional*, Jurnal Yustitia UNS, Vol. 3, No.1, 2014. p. 90.

1. To discuss the implementation of EU and ASEAN Single Market Systems;
2. To deepen the analysis of EU and ASEAN Single Market policies;
3. To compare EU and ASEAN single market implementation.

1.4. Research method

In this section research of method is to explain what kind of methodology that been used to examine the paper. The method is by doing an research on normative law which also using a secondary data which composed by a primary and secondary sources of law. Primary sources of law in this research is Treaty on European Union, Asean Charter 2008, Treaty of Rome, Treaty of Schengen, and Treaty of Maastricht. Secondary sources of law in this research is all the teachings of publicists of International Law regarding Asean Economic Community, European Union, and Asean Way. All of the materials was gathered by a library research. All of the materials was gathered, and analyze in qualitative by using a several mechanism. Some of the mechanism is statute approach, historical approach, conceptual approach, and comparative approach. The results of this study will be presented in analytical descriptive form.

2. Theoretical framework

2.1. Economic integration

The increasingly close trade relations between countries can lead to higher interdependence among the involving countries. When two or more countries want to further strengthen their trade or economic relations, an economic integration was performed. These reasons can be said to be underlying reasons of free trade agreement in a regional area. When trade relations between regions was continued to rise from year to year and there was an expectation to further strengthen the relationship, an agreement was made then to further integrate the two economies by reducing the existing trade barriers.

Salvatore explained that concept of economic integration was a commercial policy that discriminatively reduces or even removes trade barriers that will only apply to countries that agree to each other, and do not apply to countries outside of the agreement.[10]

Pelkman defined economic integration as an integration marked by the elimination of economic economic frontiers between two or more economies or countries. These economic barriers include all restrictions that result in relatively low mobility of goods, services, production factors, and the flow of communication.

[10] Dominick Salvatore. *International Economics,* New Jersey: Prentice Hall- Gale, 1997, p. 54.

When economic integration was executed, there will be discriminatory treatment between member and non-member countries of integration in the implementation of trade, so that it will result in creation and diversion impact on member countries. Krugman introduced an assumption that naturally trade regions were formed based on a geographical approach providing efficiency and improving welfare of its members.

Salvatore described economic integration in several forms:

- Preferential Trade Arrangements were formed by countries that agree to reduce trade barriers between them and differentiate them from non member countries.
- Free trade area where both tariffs and non tariffs trade barriers among member countries were completely eliminated, but each member country was still entitled to determine for themselves whether the trade barriers elimination applied to non member countries.
- The Customs Union obliged all member countries not only to eliminate all forms of trade barriers between them, but also to harmonize their trade policies with other non-member countries.
- Common Market was a form of integration where the free flow of trade was not only applied to goods but also other production factors such as labor and capital.

2.2. ASEAN Economic Community

The establishment of free trade areas achieved through the AFTA mechanism was a success because tariffs in the region have been successfully reduced gradually to zero. ASEAN then expected to further enhance the economic cooperation. The flow of foreign investment into the ASEAN region was mostly from many multinational companies operating in the region requiring suppliers that have to be available in the region as well, so that production cost efficiency occurred. The ASEAN market which was already open and integrated with global markets along with the availability of production goods supplied by suppliers from ASEAN countries will greatly help ASEAN member countries to attract more foreign investors into the region. So, the *Cebu Declaration* on January 13, 2007 (12th ASEAN Summit) was declared to accelerate the formation of the AEC in 2015 to strengthen ASEAN's competitiveness in facing global competition, especially from China and India.[11]

A number of considerations underlying this decision were: (i) the potential for production costs reduction in ASEAN by 10-20 percent for consumer goods as a result of economic integration; (ii) improving the capacity of the region by implementing international standards and practices, intellectual property

[11] Koesratanti, *op. cit. (Pembentukan Masyarakat Ekonomi ASEAN…),* p. 9.

rights, and increasing competitiveness. With economic integration, it was expected that regional infrastructure can be further developed along with the integration of transportation, telecommunications and energy.[12]

To strengthen the step of accelerating economic integration, ASEAN transformed economic cooperation by creating a legal framework that became a basis of ASEAN countries' commitment through the signing of the ASEAN Charter at the 13th ASEAN Summit, 20 November 2007. Furthermore, in 2008 The AEC Blue Print began to be implemented and the ASEAN Charter was in effect on December 16, 2008. The blueprint which was direction of the AEC's guidelines and strategic schedule of the time and stages of each pillar achievement was also agreed.[13]

As a form of regional economic liberalization AEC has the main characteristics including; (1) single market and single production base, (2) highly competitive economic region, (3) region with equitable economic development, and (4) regions that were fully integrated with the global economy.[14]

In order to monitor the progress of the AEC implementation, the ASEAN Baseline Report (ABR) was formed playing role as a score card through three categories: process indicators output indicators and outcome indicators which then become country-level and regional level index. The country-level index was used for comparisons between countries in achieving ASEAN goals. Meanwhile, the regional level index was used to assess the overall performance of the region in each ASEAN Community objectives.[15]

2.3. European Economic Community

The single market was a product of the European Union which was formed through the Rome Agreement on March 25, 1987. The beginning of a single market in the European Union was the formation of the European Coal and Steel Community (ECSC) on May 9, 1950. European Coal and Steel Community (ECSC) was then signed by France, West Germany, Italy, Belgium, the Netherlands and Luxemburg on April 18, 1951 which became known as the Paris agreement in 1952. This agreement was the beginning of the formation of the European Union.[16]

In 1955, the six countries held a Messina Conference. At that time, Italy proposed to establish a tax-free European market. Starting from that, the European Economic Community was formed on March 25, 1957 through the Rome

---

[12] Arifin Samsul. *Masyarakat Ekonomi ASEAN 2015, Memperkuat. Sinergi ASEAN Ditengah Kompetisi Global*, Jakarta: PT. Elex Media. Komputindo. 2008, p. 35.

[13] Bustami. *Menuju ASEAN Economy Community 2015*. Jakarta: Departemen Perdagangan RI. 2013, p. 9.

[14] ASEAN Economic Community Blueprint, *op. cit.*

[15] Arifin Samsul, *Masyarakat Ekonomi Asean 2015, loc. cit.*, p. 38.

[16] Ileana Tache. *Examining the recent upgrading of the European Single Market*, University of Braşov Series V: Economic Sciences, Vol. 9 (58) No. 1 , 2016, p. 98.

Agreement and entered into force in 1958. The main objective of the Rome Agreement was to eliminate all trade barriers between European countries. This certainly includes such goods, services, workers, and capital. The need for economic liberation was increasingly needed when in the early 1970s the United States postponed dollar adjustments. This resulted in instability in world finance due to the oil crisis in 1973 and 1979. The number of members in the EC increased by joining Denmark, Britain and Ireland in 1973, Greece in 1981, and Portugal and Spain on January 1, 1986. This was certainly to be of its own advantage, with the least difference between these 12 countries. On July 1, 1968, taxes on industrial goods were written off. This runs 18 month earlier than the targeted schedule. Countries such as the Netherlands, Belgium, France, Luxembourg and Germany signed the Schengen Agreement on June 14, 1985 in which it was agreed that it would guarantee the freedom of human movement, both national and other citizens. Then in 1986, the EC planned to form a Single Market signed in The Single European Act (SEA) on February 28, 1986 and ratified by all EC members on March 21, 1987 and implemented on July 1, 1987. SEA changed several previous agreements to complement the International market Europe and form a borderless area that was expected to run on December 31, 1992. From the above negotiations the Treaty on European Union (TEU) was signed in Maastricht which transformed European Communities (EC) into a European Union (EU) and the existence of a European Single Market system in pillars of Economics.

Single Market was one of the biggest achievements in the European Union and was very useful in the era of globalization. The Single Market itself was defined by EU as a territory without any restrictions that limit the movement of goods and services. In addition, Single Market was also a tool to shape and maintain the economy of the European Union countries to remain more stable. By legalizing people, goods, and money to freely go in and out was a business opportunity to be able to develop without having to be limited by existing barriers.[17]

The Single Market in Europe itself was composed of International Agreements. This serves to bind all countries in the EU so that the system of the Single Market itself can run well and be carried out by all countries within the EU. These agreements include:

A. Rome Agreement. The Rome Agreement was one of the earliest systems of the Single Market. This was due to the Rome Agreement that the European Economic Community (EEC) was formed. The purpose of the establishment of the European Economic Community as stated in Article 2 of the Rome Agreement is: "*The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of*

[17]Carl Emmerson Paul Johnson, Ian Mitchell. *The EU Single Market: The Value of Membership versus Access to the UK*, The Institute for Fiscal Studies, 2016, p. 10.

Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it."

By having the above objectives, Article 3 states how these objectives will be achieved. The contents of Article 3 include :

A. The elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;

B. The establishment of a common customs tariff and of a common commercial policy towards third countries;

C. The abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital[18]; etc.

This agreement was an initial step for EEC to achieve freedom of trade, or the first step in making the system from the EU Single Market itself.

A. Schengen Agreement

The Schengen Agreement was one of the important agreements in the application of EEC. The purpose of this agreement was to facilitate the movement of goods, services and people throughout Europe. From the data we have quoted, the results of this agreement provide an additional effectiveness in trade in the EU environment of 2.81%. Here, the number of trades about services was more strongly affected by goods. This was due to the freedom of the EU community to enter and exit countries that have applied the Schengen agreement.

This agreement eliminates all procedures for checking on the borders of each EU country, except in the event of emergency matters. But this also may only be within certain time limits. This agreement itself was signed in 1985 in the City of Schengen in Luxembourg by Belgium, the Netherlands, Luxembourg, France and Germany. In 1990, this agreement was applied to the above 5 countries plus Spain and Portugal. The area affected by this agreement continues to grow with time. To this day, this agreement has been implemented by 26 countries. However, several EU members such as Bulgaria, Croatia, Cyprus, Ireland, Romania did not participate in this agreement. In fact, countries outside the EU such as Iceland, Norway, and also Switzerland have become participants in this agreement.[19]

[18] *Ibid*, p. 38.

[19] Gabriel Felbermayr, Jasmin Gröschl, Thomas Steinwachs. *The Trade Effect of Border Controls: Evidence from the European Schengen Agreement* . IFO Institute, ERIA-DP-2016-36, 2017, p. 2.

B. Maastricht Treaty

The Maastricht Agreement was a step in which the formation of the euro takes place, and creates the structure of the European Union pillar. This agreement establishes three pillars of the European Union, namely the European Community (EC), Foreign and Joint Security Policy (CFSP), and Justice and Domestic Affairs. The first pillar was where EU supranational institutions, namely the Commission, the European Parliament and the European Court of Justice, have significant power and influence. The other two pillars were intergovernmental with decisions made by committees consisting of politicians and officials of member states. These three pillars were an extension of the previous policy structure. The pillar of the European Community was a continuation of the European Economic Community with the word "Economy" abolished to represent a broader policy base according to the Maastricht Treaty..

Here we can observe that in the process of forming a Single Market system in the European Union, countries in Europe must go through a long process to form a good system. In international law, a country can bind itself to other countries by making agreements. This was what underlies how the Single Market was formed, so that it can be implemented until now which continues to have a positive impact on economic development in the European Union.

3. Discussion

3.1. Implementation of the agreement-based EU Single Market system and its implications if implemented in ASEAN

Economic interpendency and economic integration on a regional scale can be said as one of the efforts to achieve community welfare. Many regions in the world have implemented the concept of economic Intergration, European countries have adopted the concept of Economic integration in 1952 by forming the European Economic Community. Then in 1992 an agreement was made to implement a single market in the European region marked by the Maastrich Agreement.

In addition to Europe, Southeast Asian countries that were united in ASEAN began to designate the concept of economic integration, to strengthen the pace of economic integration, ASEAN transformed economic cooperation by making a legal framework to be basis for ASEAN countries' commitment through the signing of the ASEAN Charter at the 13th ASEAN Summit, 20 November 2007.

In spite of its relatively new establishment, the concept of ASEAN Economic Integration has been based on the ASEAN BluePrint containing several reasons and characteristics. As a form of regional economic liberalization AEC

has the main characteristics such as; (1) single market and single production base, (2) highly competitive economic zones, (3) region with equitable economic development, and (4) fully integrated regions with the global economy.[20]

This transformation was driving a new era of ASEAN countries to make changes and progress in the economic sector. All communities were encouraged in an international integration to further expand relations and cooperation between world nations, with the assumption that free market competition will encourage ASEAN countries to produce a maximum efficiency and finally improve the welfare of the community.

However, there was a separate challenge for ASEAN in achieving an integrated ASEAN economic community to achieve the Single market concept. Members of ASEAN countries, which were mostly developing countries, were one of the challenges in implementing the single market concept.

The next challenge was related to the implementation of policies. In terms of policies implemented after an agreement occured between ASEAN countries, ASEAN did not have the ability to impose the agreement to be implemented fully in member countries. This was because ASEAN has its own policy for agreement and decision-making systems which was based on the conception of ASEAN Way, the mechanism of conflict cooperation and settlement in the Southeast Asia region based on the principle of non intervency diplomacy, mutual respect, consensus, dialogue and consultation, as well as the prohibition on the use of armed violence referred to as the ASEAN Way,[21] prioritizing national regulation and implementation rather than the creation of supranational authorities so that the agreement compliance was authorized to member countries.

Considering this circumstance, the settlement of a dispute occured in the ASEAN environment was more about resolving diplomacy between countries, although ASEAN seems to avoid the existence of a legal settlement, this proved that ASEAN gave more emphasis on the concept of peaceful settlement of disputes. However, this can also be a problem in the future, the unclear dispute resolution system in the ASEAN environment can have a negative impact on the business environment in the ASEAN region. The absence of a clear mechanism can have an impact on the investment of ASEAN entrepreneurs when they want to invest in other ASEAN countries. There was a fear that multinational business between countries will not work if resolution was not achieved in a dispute.

As a Comparison, Single Market in Europe itself came into force in 1992, which began with the signing of the Maastricht agreement. In spite of the fact that this agreement has been repeatedly amended, but this agreement was a historic milestone for the EU in the application of the Single Market system in the European Union.

---

[20] ASEAN Economic Community Blueprint, *op. cit.*

[21] Sefriani, *op. cit.* (*ASEAN WAY Dalam Prespektive Hukum Internasional)*, p. 90.

Single Market system itself was not formed in a short time. There were processes that must be followed to form an Economic system such as the Single Market. This process began through agreements formed and signed by EU pioneer countries. The agreement itself in International Law was a way to bind the state into a legal obligation that must be obeyed and implemented. So that here, countries that commit themselves to an agreement were obliged to implement the contents of the agreement and were prepared to accept sanctions if they violate one of the contents of the agreement.

Beginning with the Rome Treaty signed by several countries in 1952, which then continued to the Amsterdam Agreement, the Schengen Agreement, the Maastricht Treaty, the Lisbon Treaty and the Nice Agreement had established a system in which economic activities can perform well and beneficial for the parties. An example was an increase in the movement of goods on the EU border by 4.1% after the Schengen Agreement was signed. The number of trade in goods increased by 69.4% and trade of services amounted to 39.8% for countries joining the EU after 1995.[22]

From the data that I have provided above, the effect of the agreement signed by the EU parties has a very big impact on the creation of positive business environment that result in many impacts on EU countries. In addition, countries in the EU do not need to worry about violation of one of the agreements contents. This was because the EU has the European Court of Justice, where the Court has the authority to interpret the Law in the EU and ensure that all countries in the EU implemented the laws binding the EU countries.

The implication of ASEAN intention to adopt the EU's Single Market system itself was still far from expectations. ASEAN only has a dispute resolution mechanism for economic problems that have not been used to address the issue of the Agreement, and this was not a major mechanism for dispute resolution. The ASEAN Charter itself does not provide a significantly improved settlement system when compared to the protocol signed in 2004.[23]

This condition has led the ASEAN countries to be reluctant to make agreements supporting the Single Market system sustainability. This was certainly a problem that must be resolved immediately because the agreement was a very important thing in the formation of the Single Market system itself. Without a binding agreement between countries in ASEAN, the adoption of the Single Market system itself was a waste.

---

[22] Gabriel Felbermayr, Jasmin Gröschl, Thomas Steinwachs, *op. cit. (The Trade Effect of Border Controls: Evidence from the European Schengen Agreement)*, p. 4.

[23] Laura Alisson. *The EU, ASEAN and Interregionalism Regionalism Support and Norm Diffusion between the EU and ASEAN*, The European Union in International Affairs series. 2016, p. 98.

4. Conclusion

Economic interpendency and economic integration on a regional scale can be said as one of the efforts to achieve community welfare. Economic interpendency and economic integration on a regional scale can be said as one of the efforts to achieve community welfare. A lot of region in this world already applied an economic integration concept, including EU. Since the integrations applied, they succesfullys made a single market concept which already give a lot impact toward the state on the region. After 1995, the number for trade of goods was increased for 69.4% and the trade of service on 39.8% for states in EU region. The increasing economic development of Europe has been influenced by the agreement agreed upon by the EU countries. This is inseparable from the existence of the European Court of Justice and a clear dispute resolution mechanism that is used to resolve disputes occurring in the participating countries that are not compliant and violate the agreements that have been made.

In addition to Europe, Southeast Asian countries that were united in ASEAN began to designate the concept of economic integration, to strengthen the pace of economic integration, ASEAN transformed economic cooperation by making a legal framework to be basis for ASEAN countries' commitment through the signing of the ASEAN Charter at the 13th ASEAN Summit, 20 November 2007. Although they already done an economic integration on Asean Region, a several problem was still exist. One of the problem is there is no dispute legal settlement regarding a violation on the treaty that is already been agreed. ASEAN did not have the ability to impose the agreement to be implemented fully in member countries. This was because ASEAN has its own policy for agreement and decision-making systems which was based on the conception of ASEAN Way, the mechanism of conflict cooperation and settlement in the Southeast Asia region based on the principle of non intervency diplomacy, mutual respect, consensus, dialogue and consultation, as well as the prohibition on the use of armed violence referred to as the ASEAN Way, prioritizing national regulation and implementation rather than the creation of supranational authorities so that the agreement compliance was authorized to member countries. This is what can be a barrier to the growth of a massive business environment in the ASEAN Region.

The implication of ASEAN intention to adopt the EU's Single Market system itself was still far from expectations. ASEAN only has a dispute resolution mechanism for economic problems that have not been used to address the issue of the Agreement, and this was not a major mechanism for dispute resolution. The ASEAN Charter itself does not provide a significantly improved settlement system when compared to the protocol signed in 2004.

This condition has led the ASEAN countries to be reluctant to make agreements supporting the Single Market system sustainability. This was certainly a problem that must be resolved immediately because the agreement

was a very important thing in the formation of the Single Market system itself. Without a binding agreement between countries in ASEAN, the adoption of the Single Market system itself was a waste.

Bibliography

1. Alisson, Laura. 2016. *The EU, ASEAN and Interregionalism Regionalism Support and Norm Diffusion between the EU and ASEAN*, The European Union in International Affairs series.
2. AbdulRofiq, Atep. 2014. *Menakar Pengaruh Masyarakat Ekonomi ASEAN 2015 Terhadap Pembangunan Indonesia*, Jurnal Hukum Universitas Islam Jakarta Fakultas Syariah dan Hukum, see https://www.academia.edu/9997959.
3. Bakhri, Boy Samsul. 2014. *Masyarakat Ekonomi Asean (Mea) dan Tinjauan Dari Perspektif Ekonomi Syariah*, Jurnal Ekonomi KIAT, Universitas Riau. see http://jurnalkiatuir.com/index.php/kiat/article/view/22/22.
4. Bustami. 2013. *Menuju ASEAN Economy Community 2015*. Jakarta: Departement Perdagangan RI.
5. Gabriel Felbermayr, Jasmin Gröschl, Thomas Steinwachs. 2017. *The Trade Effect of Border Controls: Evidence from the European Schengen Agreement* . IFO Institute, ERIA-DP-2016-36.
6. Paul Johnson, Carl Emmerson, Ian Mitchell.2016. *The EU Single Market: The Value of Membership versus Access to the UK*, The Institute for Fiscal Studies.
7. Ridwan.2009.*Dampak Intergrasi Ekonomi terhadap Investasi Kawasan ASEAN :Analisis Model Gravitasi*, Jurnal Organisasi dan Manajemen, Volume 5, No. 2.
8. Sefriani.2014.*ASEAN WAY dalam Prespektif Hukum Internasional*, Jurnal Yustitia UNS, Vol. 3, No.1.
9. Salvatore, Dominick.1997.*International Economics*, New Jersey: Prentice Hall-Gale.
10. Samsul, Arifin.2008.*Masyarakat Ekonomi ASEAN 2015, Memperkuat. Sinergi ASEAN Ditengah Kompetisi Global*, Jakarta: PT. Elex Media. Komputindo.
11. Tache, Ileana.2016. *Examining the recent upgrading of the European Single Market*, University of Braşov Series V: Economic Sciences, Vol. 9 (58), No. 1.
12. ASEAN Economic Community Blueprint, https://asean.org/asean-economic-community/.

In international business disputes concept of claiming and awarding damages for breach of contract

PhD. **Harsh PATHAK**[1]

Abstract

The purpose of introducing this topic through this paper is to give an overview regarding the world's trade and the complexities involved in international trade dispute resolution. The paper elaborates upon the damages which a party shall seek from the other party due to breach of business contract. This paper is aimed to help academicians and professional in understanding the different types of damages pertain to international business disputes. How to effectively identity and calculate the damages which can be applicable to a given dispute, so that the claim for damages can be duly substantiated to get them as award. The damages are claimed and awarded in several ways mainly such as "compensatory damages", "punitive damages", "liquidated damages", "exemplary damages" and "statutory damages" and several other methods. This paper also elaborates upon other methods of dispute redressal in the form of, "Specific Performance" (where the party causing injury or breach is asked to complete his promise) and "Rescission of contract" (where the parties to the contract can back-out from the contractual obligation with mutual consent and without causing injury to either party) and lastly in the form of "Quantum Meriut" (where the party to contract has done some work under an agreement and the other party disputed the agreement, or some event occurs which makes the further execution of the agreement impossible, then in such a case the party who has already performed the work, shall claim payment for the work already performed).Further , this write-up deal's with the interest component that shall be levied upon such damages at the time of redressal of the damages claimed.

Keywords: *international business disputes, claiming, damages, breach of contract.*

JEL Classification: K12, K22, K33

1. Introductory considerations

International Trade: the world has changed and developed drastically over the last few decades due to the evolving international trade, the world's trade has grown remarkably over the few centuries. According to the World Trade Organization, the value of the international trade was estimated to be approximately more than USD 24 Trillion according to UNCTAD[2] and according to the WTO

[1] Harsh Pathak - MBA, LL.B., PH.D., Advocate, Supreme Court of India, New Delhi, India, dr.harshpathak@gmail.com.

[2] UNCTAD, Key Statistics and Trends in International Trade (2015), https://unctad.org/en/PublicationsLibrary/ditctab2015d1_en.pdf, consulted on 1.10.2018.

the world trading merchandising economy is estimated to more than 34,770 Billion till 2017[3].

That for understanding the relation between "loss" and "damages", the Hon'ble Supreme Court in its landmark judgment "*Trojan & Co. v. RMNN Nagappa Chettiar"* observed that: "In the absence of any special circumstances the measure of damages cannot be the amount of the loss ultimately sustained by the injured party. It can only be the difference between the price which he paid and the price which he would have received if he had resold them in the market forthwith after the purchase provided of course that there was a fair market then. In other words, the mode of dealing with damages in such a case is to see what it would have cost him to get out of the situation, i.e. how much worse off was his estate owing to the bargain in which he entered into."[4]

International trade relations between the nations, organizations and entities in situations of any inconsistency by any party to the contract give birth to international trade disputes. These trade disputes on International level and in grave situations could also become International or global disputes. Hence to overcome such disputed and maintain balance in the international trade "Damages" are awarded for any dispute between the parties to a contract or any party involved in such deal in case of any loss or injury suffered. Hence the aim of granting damages is to compensate the injured or claimant for the loss suffered.

2. Concept of claiming and awarding damages for breach of contract

Concept of Damages: Damages are of several types and could be awarded in several ways to recover the loss or injury sustained by any party to the contract depending upon the gravity of the injury or loss suffered. Therefore, for better understanding of dispute resolution mechanism lets us discuss the meaning of damages, according to "Merriam-Webster" and "Oxford" dictionary the term damages, refer *"to a sum awarded or money claimed in compensation for a loss, breach or an injury"*. As per the "Wex-Legal" dictionary Damages implies "*a remedy in the form of monetary compensation to the harmed party as per the Law of Tort".* Therefore "Damages" are the sum that is awarded or imposed by law for any breach or violation of any right or duty. For claiming damages there is no set criteria, that what should be the degree of the damage, hence compensation can be claimed for loss or injury suffered through an act done intentionally, or by negligence of either party, or by statutory obligation, or through courts award, etc. is based on the facts and circumstances of each case.

The fundamental principle behind award of damages is not to punish but to compensate the aggrieved party for the loss or injury suffered and to put him into his original financial position in which he would have been if there had been

[3]World Trade Organization, World Trade Statistical Review (2018), https://www.wto.org/english/res_e/statis_e/wts2018_e/wts2018_e.pdf, consulted on 1.10.2018.
[4] Trojan & Co. v. RMNN Nagappa Chettiar [1953] SCR 789.

no loss or injury or Breach of contract. Damages are in the form of monetary compensation to the aggrieved party.

In India, the laws and rules in relation to damages were established and are based upon the judgment of "*Hadley V. Baxendale*"[5]. "In this case H's mill was stopped due to the breakdown of a shaft. He delivered the shaft to B, a common carrier, to be taken to a manufacturer to copy it and make a new one. H had not made it known to B that delay would result in a loss of profits. By some neglect on the part of B, the delivery of the shaft was delayed in transit beyond a reasonable time. Findings it was held that, thus where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally i.e., according to the usual course of things, from such breach of contract itself."

There are certain types of Damages which we observe in the cases of commercial disputes, some of the ways for damage redressal are:

a) "Compensatory damages" are awarded in situation of loss or injury to make the injured person to compensate his losses and make his whole again in position they would have been had the contract been performed.

b) "Punitive damages" are the damages that are awarded in excess of general damages to penalize the wrongdoer for causing loss to the injured party. These are not awarded to compensate the injured, but are type of precautionary and exemplary damages where the motive behind awarding such exemplary damages is to punish and deter others from acting in the same manner and cause loss or injury to any person.

c) "Liquidated damages" are damages which are pre-decided by the parties to contract to be paid to the injured party in case of breach of contract. However there is a condition under disputed resolution in liquidated damages, that parties to the contract shall not be entitled to damages exceeding the amount that has been pre-defined under the agreement. On the other-hand "Unliquidated damages" are awarded by the courts in situation of a breach of contract between the parties to a contract, the court assess the loss or injury incurred by the injured party and award the damages.

d) "Nominal damages" are awarded in situations where an injured party approached the court for any breach, but there is no actual injury or loss to the injured party or there has been a violation of his/her legal right. Therefore, the injured party fails to prove such loss/ injury hence, in such situations the court can award nominal damages to compensate them.

e) "Treble damages" are allowed by certain nations and statues (like USA), where in situations of will-full loss or injury caused by the wrongdoer, the court may award triple the amount of damages assessed by the plaintiff. Treble damages can also be termed as aggravated form of punitive damages.

[5] Hadley v. Baxendale, The Court of Exchequer (England), (1854) 9 Exch. 341, 156 E.R. 145).

f) "Statutory damages" are awards for damages stipulated in a statute, it is the amount that is awarded as per the statute for any injury or loss to the plaintiff rather than calculating or assessing the damages or injury sustained by the plaintiff. Statutory damages are a way of faster redressal of damages sustained.

g) "Restutionary damages" are awards that are based upon the profit or gain made by defendant rather than the assessment of loss or injury sustained by the plaintiff. Hence in Restitutionary damages the award is not based upon the loss of plaintiff, but simply based upon the profit made by the defendant.

h) The damages for "loss of profit" are awarded in situation where it is stipulated at the time of entering into the contract by the parties, that any breach or delay of the aforementioned contract would cause loss to the plaintiff and hence the defendant has the duty to reimburse the plaintiff with the losses occurred due to delay or breach, but not for any loss for breach of contract that could had been procured. Therefore it was held in the case of *Sapphire International Petroleums Ltd. v. National Iranian Oil Co.*, that there shall be two contention that shall be considered to award "Loss of profit"[6] :

1. Does a loss of opportunity give the right to compensation? "It is not necessary to prove the exact damage in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behavior of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage. In the arbitrator's judgment, the plaintiff had satisfied the legal requirement of proof by showing a sufficient probability of the success of the prospecting undertaken if they had completed the process. The plaintiff could therefore claim compensation for 'loss of profit'."

2. Amount for the loss of profit: "The amount of the compensation could not be established precisely because the extent and existence of the damage were not certain. It was therefore the arbitrator's task to decide on an amount '*exaequo et bono*' by considering all the circumstances."

i) "Demurrage" is a form of liquidated damages, which are pre-decided between the parties to a contract and mentioned as a penalty under the condition of the contract. Hence demurrage is said to be the charges normally charged by the owner of a vessel to the charterer or the organization hiring the vessel for transportation, it is charged in cases where the charterer causes delay in loading, unloading or causing any unnecessary delay to the vessel exceeding the allotted time granted for such operations.

In certain cases, 'specific performance' is awarded by the adjudication authority, especially in case of a breach of contract or any other dispute, the parties in dispute may not consider the award of damages as an adequate remedy similarly in certain situations the aggrieved parties may not be interested in grant of monetary award or compensation. Hence in such cases, the court may direct or

[6] *Sapphire International Petroleums Ltd. v. National Iranian Oil Co.*, 35 I.L.R. 136 (1967); 13 Int'l & Comp. LQ 1011 (1964).

command the party at fault to fulfill his promise as per the terms of the contract between the parties. The courts may grant specific performance in cases where monetary compensation is not enough as the injured party may not be able to get the exact same or substitute in the market.

Rescission of contract by mutual consent by the parties. In some cases, parties rescind the contract at will. It means setting aside the contract. Thus when a party to a contract disables himself or refuses from performing their duties or promise. The mutual obligations and promise may put to an end to the contract. Hence in such a case the parties are discharged from all contractual obligations and this leads to no claim or award of damages against the parties.

The phrase "Quantum meruit" means "as much as is merited" or as per dictionary.com "as much as he deserved". It is a general principle of law, that unless a party completes his promise in its entirety, he shall not be liable for its rewards from the other party. Hence to this rule, be as it may, there are some exemptions based on quantum meruit. Quatum meruit comes into the picture at the point when a man has done some work under an agreement and the other party disputed the agreement, or some event occurs which makes the further execution of the agreement impossible, then in such a case the party who has already performed the work, shall claim award/payment for the work already performed or done. Hence the right of claiming the payment for the work already done, before the agreement got disputed or the performance of such became impossible is called "quantum meruit".

In claiming damage reasonable mitigation of losses during breach is an important factor. It is notable that a party claiming damages on breach of a contract should have performed or was willing to perform the requisite part of the contract. Thus, prior to a claim of damages, the duty to mitigate losses is indispensable. As noted by Lord Aldine, L.C., "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps."[7] For example, if a seller defaults in delivering goods and, the purchaser purchases goods from another buyer at an exorbitant price, without trying to look for substitutes at a reasonably close price, such a purchaser would be entitled to damages that are calculated by considering the difference between the agreed price in the original contract and the normal market price.

While considering the mitigation the extent to which reasonable steps shall be taken by the plaintiff shall be judged based on the facts and circumstances of the given case. Nevertheless, it must be ensured that the plaintiff acts reasonably not only in his own interest but also in the interest of the defendant and lower

[7] British Westinghouse Electric and Manufacturing Company v. Under- ground Electric Railways (1912) A.C. 673, 689.

the damages by acting reasonably in the matter, failing which he shall not be entitled to damages for losses which could have been reasonably avoided.[8] This duty to take reasonable steps to mitigate the loss is accompanied by the duty to refrain from resorting to unnecessary means that would aggravate the loss. Courts have often stated that such duties to mitigation would arise on breach of a contract.[9] Additionally, parties should ensure that they perform their obligations in a bona fide manner to avoid any breach or subsequent losses, since the day contract is entered into.

In calculation of Damages, the most essential aspect of calculation of damages is to ascertain the loss or injury caused to the plaintiff or the aggrieved party, hence, before taking any action or initiating any proceeding, it is believed to be the duty of the aggrieved party to calculate the losses incurred by them. The most eminent aspect of calculation of damages and damage retrieval is that, the amount of damages should not exceed the loss likely to be suffered or the loss suffered by any entity. Hence, the calculation of damages is dependent on certain condition:

a) Where, a party or entity makes a contract with another party or entity, to supply him certain good at a certain price and the supplier to full-fill the order procures such good. Now if the purchaser refrains to take delivery of the procurement. Hence in this situation, the seller can sue to purchaser for the amount of loss incurred by him and for damages. Therefore, the supplier is entitled to get damages to the extent of the difference between the cost of procurement and the supply price.

b) Where, the supplier fails to provide the goods to the purchaser on a stipulated time and the purchaser has to procure such goods from some other supplier at some excessive price. Then in such situation the purchaser can later recover the losses and damages from the supplier, which shall be such difference in the price at which the purchaser has procured the goods and the original contract price decided between the parties.

c) The calculation of damages is largely dependent on the loss or injury suffered by the victim or the claimant and the very motive behind the award of damage is to bring back the injured in the same pecuniary position that he had been if the contract had been fulfilled or before the breach of the said contract. Hence in cases the calculation and award of damages, one such process of calculation of damages is that where the motive is that the claimant shall be awarded based on, the expenses incurred in the contracts performance and the loss of profit to the party due to the breach. Thereby the compensation shall be based upon the "loss suffered" (*damnum emergens*) ie., the expenses or amount incurred and the loss of profits (*lucrum cessans*) expected to be received. Hence the most common

[8] M. Lachia Setty & Sons Ltd v. Coffee Board Bangalore AIR 1981 SC 162.
[9] Burn & Co. Ltd v. Thakur Sahib Shree Lakhdirjee AIR 1924 Cal 427.

method of calculation is (a) Calculate the amount spent by the claimant in performing the contract;(b) Calculate any profit the claimant expected to receive; and(c) Add the two together[10].

d) In international trade disputes the damages for the loss or injury suffered are mostly awarded by "Tribunals". Hence tribunals are mostly required to decide the profit that could have been made, if there would have not been a breach of contract by either party.

e) The tribunals also have a grave duty in calculating and awarding damages in matters of capital investments, where they have to keep in view the inflation that shall be there in that specific industry in the next few years and also consider the increasing rate of interest and all the other risks involved in relation to that industry.

f) Lastly the motive behind calculation and award of damages is to put the claimant/ injured party in the same pecuniary position, they would have been had the contract been performed, but in certain cases the contracts or statutes or tribunal may award specific performance instead of awarding pecuniary damages. The similar was held in the case of *Ram Karan v. Govind Lal*[11]: "an agreement for sale of agricultural land was made & buyer had paid full sale consideration to the seller, but the seller refuses to execute sale deed as per the agreement. The buyer brought an action for the specific performance of contract and it was held by the court that the compensation of money would not afford adequate relief and seller was directed to execute sale deed in favor of buyer".

Interest on Damages, in commercial lingua franca Interest *"represents the profit that the creditor might have made if he had made use of the money which he would have earned, if the breach wouldn't have been there."*[12]Here interests on damages, denote compensation paid to the plaintiff for being deprived of the damages till the judgment is made by the court or any other authority in his favor. Thus, a court or that other authority may grant interests to the plaintiff from the date of filing of the suit till the date of realization of the amount of damages.[13]The interest on damages to be awarded in the above-said and contractual cases majorly depends upon contractual and statutory provisions, terms of the agreement made between the parties, etc. It is pertinent to note that in cases of arbitration for resolving disputed between the parties, when the terms of arbitration agreement prohibit payment of interest upon damages awarded, the arbitrator cannot award interest pendent-lite.

Interest that are granted for the damages shall be calculate as per the statutory provisions or as per the terms mentioned in the contact made by the parties.

---

[10] Michael Pryles, *Lost Profit and Capital Investment*, Damages in the international arbitration paper, (Oct.05.2018), https://www.arbitration-icca.org/media/4/43096502954185/media012223892171920 damages_in_the_international_arbitration_paper.pdf, consulted on 1.10.2018.

[11] AIR 1999 Raj 167, 1999 (1) WLC 120.

[12] *Dr. Shamlal Narula v. Commissioner of Income-Tax* AIR 1964 SC 1878.

[13] Kishan Lal Kalra v. NDMC AIR 2001 Del 402.

In India as per Section 34 of the Civil Procedural Code, 1908[14] provides the interest rates to be charged in such cases. Hence as per the provisions of the act, *"the rate for such interest shall not exceed 6% and has to be charged from the date of suit to the date of decree. However, where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed 6%, per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalized banks in relation to commercial transactions."*

3. Conclusions

Concluding remarks, anything could be concluded only when the focus is not being shifted from the genesis of topic under discussion. Similarly, in present topic, from the above discussed material we can express that damages awarded through any form are the most essential and beneficial method of dispute resolving mechanism in international business and trade. Hence it is found and noted that damages are more advantageous and beneficial method of dispute resolution technique than all other available remedies dealing with the breach of contract and international business disputes as it can be clubbed and granted with other disputed resolution techniques such as, injunction, specific performance, rescission, etc.

Going further in the article we were able to observe that the concept of claiming damages is best fit in modern international business scenario for solving international business disputes. We can comment the aforesaid, as, during any trade disputes, dispute resolution mechanism in the form of damages help in faster redressal of such disputes and helps in preventing lengthy litigation and hence limiting and reducing the burden upon the victim/ claimant to proof the actual injury or loss suffered. We can conclude this by an example "dispute resolution technique in the form of liquidated damages, where the quantum of damages is pre-defined between the parties to the contract. Therefore, Liquidated damages are type of security and assurance to the parties in the contract, that in case of any dispute between the parties, they have insurance in the form of damages." Also in certain cases it has also been observed that where the quantum of damages is pre-defined in the contract or the contract may exclude the right to claim damages

[14] C.P.C.§34(1908) (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six per cent, per annum as the Court deems reasonable on such principal sum from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit. (2) Where such a decree is silent with respect to the payment of further interest on such principal sum from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefore shall not lie.

in case of any breach or loss or injury. The parties in those cases shall be asked return payments already made, but there shall be no award or grant of damages or compensation.[15] Lastly the most important aspect in resolution of trade disputed is the role played by the judiciary, which has now has also started playing an eminent role in awarding damages and has adopted a balance with cautious and liberal attitude in awarding damages. The courts have now started awarding arbitral and treble damages to the injured, sometimes the awards ranging in crores[16], which has vastly helped the aggrieved party to cover their losses and have also helped in reducing the trade disputed and breaches. Therefore, in modern international business scenario the concept of claiming damages for resolving the international business disputes has come out as a very effective factor in dispute resolution mechanism in cases of loss or injury to any party under contractual obligation.

Bibliography

1. Michael Pryles, Lost Profit and Capital Investment, Damages in the international arbitration paper, (Oct.05.2018), https://www.arbitration-icca.org/media/4/43096502954185/media012223892171920damages_in_the_international_arbitration_paper.pdf, consulted on 1.10.2018.
2. UNCTAD, Key Statistics and Trends in International Trade (2015), https://unctad.org/en/PublicationsLibrary/ditctab2015d1_en.pdf, consulted on 1.10.2018.
3. World Trade Organization, World Trade Statistical Review (2018), https://www.wto.org/english/res_e/statis_e/wts2018_e/wts2018_e.pdf, consulted on 1.10.2018.
4. Judgement *Trojan & Co. v. RMNN Nagappa Chettiar* [1953] SCR 789.
5. Judgement *Hadley v. Baxendale*, The Court of Exchequer (England), (1854) 9 Exch. 341, 156 E.R. 145).
6. Judgement *Sapphire International Petroleums Ltd. v. National Iranian Oil Co.*, 35 I.L.R. 136 (1967); 13 Int'l & Comp. LQ 1011 (1964).
7. Judgement *British Westinghouse Electric and Manufacturing Company v. Under- ground Electric Railways* (1912) A.C. 673, 689.
8. Judgement *M. Lachia Setty & Sons Ltd v. Coffee Board Bangalore AIR* 1981 SC 162.
9. Judgement *Burn & Co. Ltd v. Thakur Sahib Shree Lakhdirjee AIR* 1924 Cal 427.
10. Judgement *Dr. Shamlal Narula v. Commissioner of Income-Tax* AIR 1964 SC 1878.
11. Judgement *Syed Israr Masood v. State of Madhya Pradesh* (1981) 4 SCC 289.

[15] Syed Israr Masood v. State of Madhya Pradesh (1981) 4 SCC 289.
[16] Microsoft Corporation v. Deepak Raval MIPR 2007 (1) 72.

The Value of Privacy: What Does the Personal Data Mean to the Data Subject and Businesses?

PhD. student **Andreea ȘERBAN**[1]

Abstract

In a world where technology is progressing at a very fast pace, it is up to the legislator to come up with creative legal instruments that can answer to the newest and most challenging issue that arose and can arise in practice. In the past decades, privacy has become an important resource for the growing businesses or for the ones already renowned in the market that look for a way of expanding their activity. Knowledge is power, data is money – this phrase is representing the core of the present and upcoming companies that wish to develop or distribute their products. The personal information of natural persons is being targeted and used for determining the future and the direction of the market and interest in products and services. Through the present study we shall look at how privacy has been perceived over time, reflected in relevant jurisprudence and legal acts and how it is now understood by both the data subject and the controller. We will study a case that captures the observed practices of obtaining the consent of the data subject for data processing in return for access to certain services, also answering to the following question: is there a value-for-money relationship between the personal data and the benefits received in exchange of processing of information? This paper will cover the issues of monetized privacy and protection of personal data used in trade and commercial businesses, as well as the impact of the European legislation on such activities.

Keywords: *privacy, general data protection regulation, personal data, data as commodity, profiling.*

JEL Classification: K22, K24

1. Short considerations regarding privacy

Privacy has always been a debated issue that had to be dealt with by adapting to the new conditions of development. In the present technological era, it is no wonder that the discussions have been brought to a new level as people began to understand the meaning and the cost of their privacy. Nowadays, personal data is used in most activities, one of the purposes of data processing being the profit that benefits the controller. Several questions have been raised lately and within the present paper, we are looking to bringing some light to these concerns. A highly debated question would be how is the personal data actually used? Which is the purpose of commercializing such information? Who benefits from

[1] Andreea Șerban - Faculty of Law, `Alexandru Ioan Cuza` University of Iasi, Romania, andreeaserban20@yahoo.com.

this activity of processing data? What is actually privacy in the context of commerce? And the last, but not the least, is the data subject gaining anything in exchange of their data?

Before determining the relevance of user privacy to businesses, it is of great importance defining the overly used concept of privacy. This notion has come into discussion quite often in the past century. The Universal Declaration of Human Rights states in article 12 that *no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, not to attacks upon his honour and reputation Everyone has the right to the protection of the law against such interference or attacks*[2]. The statement has been reiterated in article 17 of the International Covenant on Civil and Political Rights[3]. The European Convention on Human Rights has its own perspective on privacy, recognizing it in the article 8 – right to respect for private and family life – *everyone has the right to respect for his private and family life, his home and his correspondence*[4]. Later, the Charter of Fundamental Rights of the European Union refers to privacy from two perspective: one as the respect for private and family life, as stated in article 7 – *everyone has the right to respect for his or her private and family life, home and communications* – and the protection of personal data, as stated in article 8 – *(1) everyone has the right to the protection of personal data concerning him or her [...]*[5]. Early 20th century judicial cases refer to privacy as a legal right *and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasingly the profits and gains of the advertiser, is an invasion of this right*[6]. Over the time, in the European area a certain interest in personal privacy and data protection has increased, this being observed in renowned cases such as *Google Spain*[7]*, Lindqvist*[8] *or Schrems*[9].

There is no generally accepted definition of the term *privacy*. A first acknowledgement of this notion has been made in the late nineteenth century,

---

[2] The Universal Declaration of Human Rights, United Nations General Assembly resolution 217 A, 10th of December 1948, retrieved from http://www.un.org/en/universal-declaration-human-rights/index.html, accessed at 29 October 2018.

[3] The international Covenant on Civil and Political Rights, United Nations General Assembly resolution 22000A (XXI) of 16th of December 1966, entry into force 23rd of March 1976, retrieved from https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx, accessed at 29th of October 2018, article 17(1): *no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, not to unlawful attacks on his honour and reputation.*

[4] European Convention on Human Rights, Council of Europe, 4 November 1950, Rome, retrieved from https://www.echr.coe.int/Documents/Convention_RON.pdf, accessed at 29 October 2018.

[5] Charter of Fundamental Rights of the European Union, 2012/C 326/02, published in the Official Journal of the European Union C 326/391 of the 26 October 2012.

[6] Supreme Court of Georgia, United States of America, decision from the 3rd of March 1905 available at la http://faculty.uml.edu/sgallagher/pavesich_v.htm, accessed at 29 October 2018.

[7] Judgement of 14 May 2014, *Google Spain*, C-131/12, EU:C:2014:317.

[8] Judgement of 6 November 2003, *Lindqvist*, C-101/01, EU:C:2003:596.

[9] Judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650.

being named *the right to let alone*[10]. Another perspective defined the concept as *withholding or concealment of information*, noting that this concept is not only elusive, but difficult to attempt to even come close to a proper definition that would cover every aspect of it[11]. Nowadays, at the growing peak of the technological progress and history, *privacy* refers to the control that is given to a natural person over their private and personal information. In the light of this definition, we note that the interpretation of it can be either too broad or too narrow. The concept may refer to any of the following: *(i)* limited access to the self, *(ii)* the right to be let alone, *(iii)* intimacy, *(iv)* secrecy, *(v)* personhood or *(vi)* control of the personal information[12].

The new European legislation, the Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data[13] also known as the General Data Protection Regulation, narrows the interpretation of privacy, defining it through a series of new rights that the data subject – the natural person whose personal data is being processed – can oppose to the data controller – the legal or the natural personal that determines the uses and the means of data processing. These rights refer mainly to the access to information – article 15, rectification – article 16, erasure of data – article 17, restriction of processing – article 18, data portability – article 20, the right to object – article 21, as well as the rights to address the competent authorities and courts in case of disputes – articles 77-80.

The questions being raised in the light of the new legislation are how the data subjects really perceive the concept of privacy and how does data processing affect them? What is the real value of privacy?

2. Privacy-service online exchange

Personal data, according to article 4 point (1) of the General Data Protection Regulation, refers to *any information relating to an identified or identifiable*

[10] Samuel D. Warren, Louis D. Brandeis, *The Right to Privacy*, in Harvard Law Review, vol. 4 no. 5, 1890, p. 195, retrieved from https://goo.gl/ZQKrvc, accessed at 30 October 2018.

[11] Richard A. Posner, *The Right to Privacy*, in Georgia Law Review, vol. 12, no. 3, 1978, p. 393, retrieved from https://goo.gl/AZqD5Q, accessed at 30 October 2018.

[12] Adrienn Lukács, *What is Privacy? The History and Definition of Privacy*, in Tavaszi Szél 2016 = Spring Wind 2016. Tanulmánykötet. I. kötet: Agrártudomány, állam- és jogtudomány, földés fizikatudomány, hadés rendészettudomány. Doktoranduszok Országos Szövetsége, 2016, Budapesta, ISBN 978-615-5586-09-5, p. 258, retrieved from http://publicatio.bibl.u-szeged.hu/10794/7/3188699.pdf, accessed at 30 October 2018.

[13] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Official Journal of the European Union L 119/1, 4 May 2016, applied starting the 25 May 2018.

natural person. This definition covers a wide range of information[14], being, therefore, too vague for a clear determination of to what exactly may refer. The concept of personal data is so generous that it is recommendable to avoid a static and inflexible interpretation, given the fact that the information and their civil circuit is constantly changing and adapting[15]. Numerous cases referred to certain data as being personal, such as: the name of the data subject, the phone number, their work or health condition[16], birth date, ethnicity, religion and so on[17].

Nowadays, a very large part of the commercial activity uses the Internet as a primary method of communication, advertising and marketing. Given its unlimited potential and numerous advantages, it is no wonder that the Internet has taken over a very important market and has developed it in such ways twenty years ago would have been incomprehensible to the human mind and imagination. This was one of the main reasons for which the European Union chose to adapt its legislation, leaving behind the outdated Directive 95/46 of the European Parliament and of the Council with regard to the processing of personal data[18] and adapt the aforementioned General Data Protection Regulation.

The new legislation has had a great impact on all activities. One of the most visible consequences of implementing the European act can be seen mainly online on the most diverse platforms and websites, even from the very first access. This effect refers to the consent of the data subject to offer his information in exchange of the services of the provider. In this case, the data subject is the Internet user that has the intention of accessing and using the information or content provided on the website for different purposes – *e.g.* for shopping, weather information, educational or cultural information and so on. A website is an online resource identified through a www address, has purpose of offering certain content – pictures, texts and so on - of interest to different kinds of users.

Having into consideration the definition of controller according to the General Data Protection Regulation in article 4 point 7, the legal or natural persons that own and operate the website act as controllers are the ones that determine the purposes and means of processing of personal data belonging to the data subjects that use their services. According to article 6 of the General Data Protection Regulation, the processing - any activity or operation that are being performed on personal data (*e.g.* collection, alteration, usage, transmission, erasure

---

[14] Carmen Tamara Ungureanu, *Protecția datelor cu caracter personal în contractele internaționale*, in „Analele Științifice ale Universității „Alexandru Ioan Cuza" Iași, Științe Juridice", vol. LXIII, no. 2, 2017, p. 138.

[15] Andreea Șerban, *Reglementarea dreptului de a fi uitat,* in „Analele Științifice ale Universității „Alexandru Ioan Cuza" Iași, Științe Juridice", vol. LXIII, no. 2, p. 330.

[16] Judgement of 6 November 2003, *Lindqvist,* C-101/01, EU:C:2003:596.

[17] Judgement of 17 July 2014, *Minister voor Immigratie,* C-141/12 and C-372/12, pt. 38.

[18] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281, 23 November 1995.

and so on[19]) - is lawful only if certain conditions provided by this article are met. We shall have into consideration only the first situation that has been envisioned by the European legislator, that being the lawful processing of personal data based on the consent given by the natural person for such actions.

Having into consideration the provisions of article 7 of the General Data Protection Regulation, the consent, must meet certain criteria: the request from the controller regarding the approval of the data subject for using their data has to be *presented in a manner which is clearly distinguishable from other matters, in an intelligible and easily accessible form, using clear and plain language.* Also, the data subject or user has to be informed of the purpose and nature of the data processing prior to giving their consent. A simple click to an *I agree* button[20] will no longer be sufficient to be considered a proper consent as provided by the General Data Protection Regulation.

After the aforementioned Regulation has been adopted at the European Union, many controllers have changed their privacy policies on their websites in order to comply with the new provisions. Having a clear-out extraterritorial effect, the General Data Protection Regulation has to be complied with even by the controllers established outside the European Union territory if they process the personal data of European citizens or if the processing takes place in the Union or not as long as the controller or processor is established in the Union, according to article 3. For sure, the Regulation has influenced the perspective on personal data usage and protection all over the world, being a topic highly debated mainly in the context of trade and political activities between EU and non-EU states.

Let's take, for example, the hypothetic case of a website that provides weather information, putting into this context all the repetitive practices we observed regarding the consent of the user and the processing of personal data in exchange for its services. The user that accesses the website is greeted with a pop-up picture – an image that blocks the access to the Internet page – that informs them of the collection and distribution of their device data in order to tailor the advertising messages and keep updates for free. The first question we had was whether or not the data subject must agree with sharing their data in order to benefit from the offered services, in this case receiving news regarding the weather forecast. In search for the answer, we looked at article 7 paragraph 4 of the General Data Protection Regulation. It clearly states that *when assessing whether consent is freely given, utmost account shall be taken of whether, inter*

[19] For the detailed definition of processing, see article 4 point 2 of the General Data Protection Regulation*: 'processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.*

[20] For details regarding online contract, refer to Carmen Tamara Ungureanu, *Implicațiile internetului în viața juridică,* in „Analele Științifice ale Universității „Alexandru Ioan Cuza" Iași, Științe Juridice", vol. LXIII, no. 2, 2017, p. 3-6.

alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract. The recital 43 of the same act states that the *consent is presumed not to be freely given […] if the performance of a contract, including the provision of a service, is dependent on the consent despite such consent not being necessary for such performance*. First of all, the example website provides services in the form of weather information. Secondly, the General Data Protection Regulation seeks to ensure that the processing of personal data based on requested consent cannot become directly or indirectly the counter-performance of a contract or service[21]. Therefore, in our case, the controller should offer their services to the data subject regardless of the receipt of consent or lack of it.

Another aspect we want to refer to is the term *device data* and another question is being issued: what kind of data is being requested exactly? The device data refers to location information of the used technological product such as a personal computer, laptop, phone or tablet. There are different types of such data. First of all, looking the detailed privacy policy of Google, we learned of a classification already used in practice of implicit and explicit location information that clarified the perspective of big companies on what are these[22]. The implicit location information that does not share the exact place where the device is located, yet it might show the interest of the data subject in and at the respective place. The explicit location information refers to data such as the IP address of the device that can determine the geographic location of the user, their country or city of residence, their language and, in certain cases, also GPS signals that can estimate or give the precise location. Looking back to the provisions of the General Data Protection Regulation, we observe the definition in article 4 point 4 of *profiling* as *any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural personal, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interest, reliability, behaviour, location or movements.* We ask ourselves if by agreeing with sharing the device data, the user consents to sharing all the aforementioned information with the controller. In practice, the consent is requested to serve as the legal basis for data processing for a specific purpose that the data subject is informed about, yet, the consent is not asked for each type of data. Usually, the information regarding which type of data is necessary and processed can be found in the privacy policies of each website, if it exists. In our case scenario, the correlation between the type of provided service and the requested data

[21] Article 29 Working Party, *Guidelines on Consent under Regulation 2016/679,* adopted on 28th of November 2017, revised on 10th of April 2018, p. 8, retrieved from http://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=623051, accessed at 2 November 2018.

[22] For details, refer to the terms and conditions of Google, retrieved from https://policies.google.com/technologies/location-data, accessed at 3 November 2018.

can be observed: the location information offers an accurate service to the data subject by giving him only the weather information that applies to the area where they are located.

Another practice, and probably the one that underlines the need of businesses for personal data, is offering the services either for free or in exchange of a certain amount of money. How free is free allowance? The answer lays in the abovementioned profiling. Most part of the Internet economy relies on online advertisements and the present practices refer to targeted advertising based on the collection of large amounts of personally identifiable information of users[23]. In order to offer the services apparently for free, the websites give to advertisers spaces to present their products, these online spaces being created with the intention to attract users to become clients to the third parties. Profiling comes in discussion as web service providers collect personal data of their users such as interests, location and so on, more than often outside the scope of application – search engines that collect information and disseminate it[24].

Profiling has proven to be a heated topic as it was learned that the online activity of Internet users provided not only information about their interests and daily personal life, but also it was used as a basis for swaying the thinking with regard to certain topics[25]. It has been observed that the data subjects have become more aware of privacy breaches, showing in interest in their own privacy and the value of the personal data they share[26]. An example of profiling can be represented by most simplistic manner for the data subject to observe whether they have been the subject of this activity by keeping an eye on the follow-up of their online searches that would later be considered by the advertisers as an interest of the person by producing his searches through ads.

The online presence has proven to be profitable: the developing market based on advertising uses strategies such as 'pay-per-click' also named 'cost-per-click' that bring profit to business when the user or data subject click and access

[23] Juan Pablo Carrascal, Christopher Riederer, Vijay Erramilli, Mauro Cherubini, Rodrigo de Oliveira, *Your Browsing Behaviour for a Big Mac: Economics of Personal Information Online*, in WWW 2013 Proceedings, Rio de Jaineiro, Brazil, p. 189, retrieved from http://www2013.w3c.br/papers/proceedings.htm, accessed at 3 November 2018.

[24] *Idem*.

[25] For example, see the case referring to Cambridge Analytica at https://cambridgeanalytica.org, accessed at 3 November 2018.

[26] For example, Maximillian Schrems filed a complaint after the Edward Snowden – National Security Agency situation in the United States of Americe in 2013. For details, refer to Fanny Coudert, *Schrems vs. Data Protection Commissioner: a Slap on the Wrist for the Commission and New Powers for Data Protection Authorities*, from 15 October 2015, retrieved from http://europeanlawblog.eu, accessed at 5 November 2018 and Majed Alkhammash, *Information security for national security: The Snowden and NSA case study*, Munich, GRIN Verlag, 2014, retrieved from https://www.grin.com/document/308419, accessed at 5 November 2018.

the linked Internet page from an advertisement[27]. Personal data is perceived nowadays a commodity in the exchange for the provided services. Internet platform are enabled by the data gathering to use the personal information and target the potential clients with relevant advertisers for them[28].

In the used example of the weather information service website, the difference between opting for free content from opting for paid service would refer only to the existence of advertisements from third parties on the online page. For the free content, the data subject would have to 'pay' with their personal data, being therefore susceptible of profiling. For the paid service, the data subject apparently retains the right to decide which personal information can be processed by the controller; no ads will be present on the page during the user's online activity on the website. Yet, even if the user obtains the services for a cost, would that mean the personal data such as location wouldn't be processed and used for advertisements on other Internet pages? One way or another, the price of personal data is still paid.

The economics of the online activity has been summed up by the phrase 'if you are not the consumer, then you are the product', as it seems that the service providers put a value on each user's personal information[29].

3. The cost-benefit analysis and the value of personal data and privacy

This participation of the user or data subjects in the process of using their data for marketing or advertising purposes is both active and passive. On one hand, the data subject may give their personal data on purpose, on the other hand, the personal information will be collected through the mere accessing of the website, without agreeing to transfer the data to the controller and the processor. What happens when the user knowingly consents to the processing of data? A certain cost-benefit analysis can be observed in this situation. For data subjects to perform such an analysis, they have to know the value of the personal information that they are trading. The cost represents the loss of privacy and the personal data, the benefit is, most of the time, understood as the service that is provided in exchange[30].

The natural person can enjoy a specific service for which the consent has been given in order to have their personal data processed. Another relevant example has been given in the legal doctrine: the company that offers email services

---

[27] For details, refer to *Overture and Google: Internet pay-per-click (PPC) advertising auctions*, London Business School, March 2003, retrieved from http://faculty.london.edu/mottaviani/PPCA.pdf, accessed at 5 November 2018.

[28] Vassilis Charitsis V., *Prosuming (the) Self*, in Ephemera Journal, 16 no. 3, p. 49, retrieved from http://www.ephemerajournal.org/contribution/prosuming-self, accessed at 5 November 2018.

[29] Juan Pablo Carrascal, Christopher Riederer, Vijay Erramilli, Mauro Cherubini, Rodrigo de Oliveira, *op. cit.*, p 189.

[30] *Idem*.

to a user can process the collected personal data by analysing it, for profiling and so on; in exchange of benefiting from this service for free, the user would have to entertain multiple 'click' actions, yet with or without this effort, the service would remain the same one and only. Therefore, the question is raised whether the email service truly 'costs' of if the 'cost' is worth the fee offered for the effortless access. Does the fee cover the real cost in personal data that this service asks for in exchange of being used? Given the fact the processing of personal data can take place in unlimited and perpetual forms, the fee shouldn't be equal or less than the value of a single processing activity[31].

Studies regarding the value of privacy through the perspective of individuals have shown that a truly high valuation of privacy is seldom found, the results stating that most users are inclined to sell their known personal data for commercial use, even asking up to 15 EUR for their contact information and approximately 19 EUR for the data from their personal Facebook accounts; it is notable that a small number of subjects asked for irrelevant amounts of money while a similar number of data subjects refused to sell their information. Also, there is a tendency for refusing the sale of personal data if it concerns contact details, yet, if the data is being asked anonymously, there is willingness in selling the information[32]. This also shows that control and choice represent core values of privacy[33] that are being respected by the individuals.

4. Conclusions

The new General Data Protection Regulation has enforced a certain level of control over the personal data, control that can apparently be handled and decided upon by the data subject. One of the greatest impacts this legislation had so far was bringing into the data subject's attention the importance of their personal data and privacy and the ignoring attitude towards their private life they had shown so far. Yet, given the fact that the working mechanism of the Internet offers unlimited opportunities for using the information referring to a data subject and that it is quite difficult to keep track of data movement through the World Wide Web, we cannot but wonder what is the extend of the data subject's power and control over their personal information?

Because of the fear of being sanctioned according to the new provisions, a significant number of controllers with businesses exceeding the European ter-

[31] Maria Bottis, George Bouchagiar, *Personal Data v. Big Data: Challenges of Commodification of Personal Data*, in Open Journal of Philosophy, no. 8, 2018, p. 209, retrieved from https://file.scirp.org/Html/5-1650907_84445.htm, accessed at 5 November 2018.

[32] Volker Benndorf, Hans-Theo Normann, *The Willingness to Sell Personal Data*, in The Scandinavian Journal of Economics, 120, no. 4, 2017, p. 16-17.

[33] Sarah Ludington, *Reining in the Data Traders: a Tort for the Misuse of Personal Information*, in „Maryland Law Review", 66, no. 1, 2007, p. 147, retrieved from http://digitalcommons.law. umaryland.edu/mlr/vol66/iss1/5, accessed at 6 November 2018.

ritory have altered their privacy policy, yet, the users of their services and products do not hesitate to share their personal data, even if what they get instead is the illusion of not being charged at all. When they offer their personal information, the individuals sell themselves and become this way a commodity in the ongoing trade activities of the legal persons around world.

The data protection rules are not only about the controller's activity. The control and the protection of the personal data should be determining a raise of responsibility into the data subject as, after all, their data are being processed. We can observe a paradox being developed that refers to the decision of each individual over their personal data, by determining which information are public or private and assuming the risk of being processed by controllers if shared. With the growing freedom on the Internet and accepting the online activity as being a significant part of the natural persons' life, we are bound to observe the increasing inconsistency between the attitudes towards the private life and those regarding the public environment.

Bibliography

1. Volker Benndorf, Hans-Theo Normann, *The Willingness to Sell Personal Data*, in The Scandinavian Journal of Economics", 120, no. 4, 2017.
2. Maria Bottis, George Bouchagiar, *Personal Data v. Big Data: Challenges of Commodification of Personal Data*, in Open Journal of Philosophy, no. 8, 2018.
3. Juan Pablo Carrascal, Christopher Riederer, Vijay Erramilli, Mauro Cherubini, Rodrigo de Oliveira, *Your Browsing Behavior for a Big Mac: Economics of Personal Information Online*, in WWW 2013 Proceedings, Rio de Jaineiro, Brazil.
4. Vassilis Charitsis V., *Prosuming (the) Self*, in Ephemera Journal, 16 no. 3.
5. Sarah Ludington, *Reining in the Data Traders: a Tort for the Misuse of Personal Information*, in Maryland Law Review, 66, no. 1, 2007.
6. Adrienn Lukács, *What is Privacy? The History and Definition of Privacy*, in Tavaszi Szél 2016 = Spring Wind 2016. Tanulmánykötet. I. kötet: Agrártudomány, államés jogtudomány, földés fizikatudomány, hadés rendészettudomány. Doktoranduszok Országos Szövetsége, 2016, Budapesta, ISBN 978-615-5586-09-5.
7. Richard A. Posner, *The Right to Privacy*, in Georgia Law Review", vol. 12, no. 3, 1978.
8. Andreea Șerban, *Reglementarea dreptului de a fi uitat,* in „Analele Științifice ale Universității „Alexandru Ioan Cuza" Iași, Științe Juridice", vol. LXIII, no. 2.
9. Carmen Tamara Ungureanu, *Implicațiile internetului in viața juridică,* in „Analele Științifice ale Universității „Alexandru Ioan Cuza" Iași, Științe Juridice", vol. LXIII, no. 2, 2017.
10. Carmen Tamara Ungureanu, *Protecția datelor cu caracter personal in contractele internaționale*, in „Analele Științifice ale Universității „Alexandru Ioan Cuza" Iași, Științe Juridice", vol. LXIII, no. 2, 2017.
11. Samuel D. Warren, Louis D. Brandeis, *The Right to Privacy*, in Harvard Law Review, 4 no. 5, 1890.

Abuse of a Dominant Position

Lecturer **Ovidiu Horia MAICAN**[1]

Abstract

Several elements can be considered that lead to configuring the specificity of abuse of a dominant position in a competitive context. The Court of Justice has defined the dominant position referred to in art. 82 (ex 86) EC as a "position of economic power in which there is an undertaking which enables it to hinder effective competition in order to be maintained in a relevant market in order to give it the power to behave independently of its competitors, its customers and, ultimately, consumers".

Keywords: *dominant position, abuse, competition, relevant market.*

JEL Classification**:** K22, K33

1. Introduction

Another threat to ensuring free and fair competition is the negative effect of the concentration of economic power.

Competition and inter-state trade within the European Union (interior) may be adversely affected not only by "cartels" (agreements between undertakings, decisions by associations of undertakings and concerted practices) but also by "dominant positions" located in quasi-monopoly positions[2].

That is why it was intended to control the strong economic position of those able to dominate the market, while pursuing the benefits of such a position.

2. Definition

Article 82 (ex 86) EC (today article 102 TFEU) considers incompatible with the Common Market any action by one or more undertakings constituting an abuse of a dominant position in the common market or in a substantial part thereof, to the extent that it may affect trade between Member States[3].

Such abuse is materialized in[4]:

- the imposition, directly or indirectly, of unfair sale or purchase prices or other unfair trading conditions;

---

[1] Ovidiu Horia Maican – Department of Law, Bucharest University of Economic Studies, Romania, ovidium716@gmail.com.

[2] Cosmovici, M., Munteanu, R., *Înţelegerile între întreprinderi*, Ed. Academiei Române, Bucharest, 2001, p. 12.

[3] Manolache, O., *Drept comunitar*, Ed. All Beck, Bucharest, 2003, p. 333.

[4] Druesne G., *Droit materiel et politiques de la Commmunaute europeene*, Ed PUF, Paris, 1991, p. 194.

- the restriction of production, sales outlets or technical developments to the detriment of their beneficiaries;

- applying different conditions to equivalent transactions with other trading partners, placing them in a competitive disadvantage position;

- determining the conclusion of contracts by making it subject to the acceptance by the other parties of additional obligations which by their nature or according to commercial usage are not related to the subject of such contracts.

As a preliminary consideration, it must be noted that abuse of a dominant position has become more common at Community level, leading to the reaction of the Community institutions.

Abuse of dominant position is an anticompetitive and unilateral activity, differing from the situations regulated by art. 81 (ex 85) EC (today article 101 TFEU), which are bilateral or multilateral activities[5].

Article 82 (ex 86) EC (today article 102 TFEU) applies equally in the private sector and the public sector (where these structures act in their commercial capacity) and in all economic sectors, even in the agricultural sector. There are also exceptions to the application, namely coal and steel, as well as defense.

According to the practice of the Court of Justice, Art. 81 (ex 85) EC (today article 101 TFEU) and 82 (ex 86) EC (today article 102 TFEU) have as their object the achievement of the same purpose at different levels, ie the maintenance of competition in the common market. Thus, the restriction of competition, prohibited if it results from the behavior provided by art. 81 (ex 85) EC is not permissible in that the conduct is the result of the influence of a dominant position and results in the merger of the undertakings concerned.

First of all, it should be noted that, if one or more undertakings hold a dominant position in the Community market, it does not automatically entail the attribution of abusive practices. Sometimes, the dominant position is the result of a profitable activity equally for businesses and for the beneficiaries, which has been carried out over the years by the supply of high-quality products and services, according to the consumers' requirements[6].

All practice Court records and at that when it is found that an undertaking holds a dominant position does not in itself constitute a charge, meaning that regardless of the reasons dominant position, the undertaking concerned has a special responsibility not to allow that its behavior is affected by real undistorted competition. In the Court's case-law, the mere creation of a dominant position by granting an exclusive right within the meaning of Art. 86 (ex 90) EC, paragraph 1 is not incompatible with art. 82 (ex 86) EC (today article 102 TFEU).

A Member State conflicts with the rules of Articles 81 (ex 85) (today article 101 TFEU) EC and 82 (ex 86) EC (today article 102 TFEU) only if, by

[5] *Idem*, p. 186.
[6] Manolache, O., *op. cit.*, 2003, p. 334.

exercising only an exclusive right, that undertaking can not avoid abusing the dominant position.

In a specific case, it was shown that Art. 5, 86 (today article 102 TFEU) and 90 (today article 107 TFEU) of the Treaty does not prevent national legislation from reserving the retail sale of tobacco products manufactured to distributors which have been authorized by the State. That is so, inasmuch as the exclusive rights undertaking issuing the operating licenses for retailers does not abuse (in particular to the detriment of consumers) the dominant position they enjoy on the market for the distribution of the goods in question.

In the same vein, it has also been pointed out that a dominant undertaking has the right to defend and gain market share, provided that the undertaking retains the limits of normal competitive conduct and legitimate competition. However, art. 82 (EC) ex 86 (EC) (today article 102 TFEU) prohibits a dominant undertaking only from the conduct intended to eliminate a competitor, thus reinforcing its position by resorting to means other than competition.

The provisions of art. 82 (ex 86) EC (today article 102 TFEU) have direct applicability, confirmed by the provisions of Art. 1 of the Regulation no. 17/62, which prohibits the abuse of a dominant position and no prior decision is necessary for that purpose.

The Court's practice also states that the prohibitions in Art. 82 (ex 86) EC, referred to in art. 86 (ex 90) EC (today article 107 TFEU) grants rights to stakeholders that need to be safeguarded by national courts. National courts may receive damages or actions to obtain decisions imposing a fine (penalty).

Article 82 (ex 86) EC (today article 102 TFEU) prohibits in all cases the abuse of a dominant position, even if such abuse is encouraged by any national regulation.

The Court ruled that "in order to assess compatibility with article 86 combined with Article 3 (f) of the Treaty (now Article 3 (g) and paragraph 2 of Article 5 of the same Treaty, the introduction of or maintaining in force a national measure whereby the prices determined by the manufacturer or the importer must be accepted when the goods are sold to a consumer, it must be determined whether, taking into account the obstacles which may arise from the nature of the tax arrangements to which the goods are subject, without any consideration of any abuse of a dominant position which these understandings might encourage, that introduction or maintenance is also favorable to the inter-state trade".

The Court of Justice has also held that the person who holds a dominant position on the commodities market exploits this position when, in order to reserve the respective raw materials for its own derivative products, it does not want to deliver it to a customer derivative in order to eliminate any competition from the customer.

The dominant position is not self-condemning. What is to be condemned is the abuse of a dominant position.

There can be no exemption and no notification obligation does not constrain businesses, but there may be a negative clearance claim. We find notions similar to those prevailing in national law[7].

3. Forms (variants) of abuse of a dominant position

The enumeration of types of abuse is found in article 82 (ex 86) EC (today article 102 TFEU), similar to article 81 (ex 85) EC (today article 102 TFEU), and it has an enumerating nature.

a) Abuses consisting in "directly or indirectly imposing unfair or unreasonable purchase or selling prices". This practice concerns both the imposition of low prices (lower than costs) in order to eliminate the weaker competition. The term "price" also includes elements related to quantity, premium, rebate depending on cash payment etc. The abuse may consist (the General Motors case) in "perceiving an exaggerated price in comparison with the economic value of the benefit offered, such a measure having the effect of stopping parallel imports". A price is therefore considered exaggerated if there is no reasonable relation between it and the economic value of the service offered and if the dominant person "has used means to obtain advantages and transactions that would not have been obtained in the case of a practical and effective competition". A case of abuse is also that of an undertaking which requires an airline to apply very high or very low rates, as well as imposing a single price on a particular line.

b) Abuses consisting of "limiting the production of bumps or technical development to the prejudice of consumers"[8]. It is the refusal to sell and the attempts to keep customers through exclusive supply commitments combined or not with discounts, for fidelity. In Suiker Union, the Court considered that it abused its dominant position vis-à-vis a refinery and forced "negotiators to channel their exports to designated recipients or destinations and impose these restrictions on their customers", thus limiting the outlets and the buyers of the negotiators. In Hoffman-La Roche, the Court noted the illegality of an exclusive supply clause introduced at the buyer's request, since such commitments are not based on 'economic benefits justifying this advantage but tend to remove buyers or diminish the choice of on sources of supply and to stop other producers from entering the market".

'Unfair selling prices' covered by Article 82 (ex 86) EC (today article 102 TFEU) may be 'abusively low prices' (Court of Justice, Akzo Chemie judgment of 3 July 1991). There are abuses of dominant position in a market different from that of effects and there are massive and prolonged price cuts. The Court confirmed its case-law in the Tetra Pak case of 14 November 1996[9].

---

[7] Weatherill, S. W, Beaumont, P, *EU Law*, Ed. Penguin Books, 1999, p. 847.
[8] *Idem*, p. 844.
[9] Druesne, G., *op. cit*., p. 191.

The Court of Justice stated in its judgment in Hoffmann-La Roche of 13 February 1979 that the concept of abusive exploitation is an objective notion which refers to the conduct of an undertaking in a dominant position which is likely to influence the structure of a market or the degree of competition (which is already low) and which has the effect of preventing (by using means other than those governing a normal competition of products or services on the basis of economic operators) the maintenance of the level of competition still existing on the market or the development of that competition.

It follows that article 82 (ex 86) EC (today article 102 TFEU) prohibits a dominant undertaking from eliminating a competitor and thus reinforcing its position by resorting to methods other than those which show fair competition. In this perspective, price competition can not, however, be regarded as legitimate. Prices below the average of variable costs (i.e. those that vary by product quantity) by which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in practicing such prices if the purpose is not to eliminate competitors for power, then to reveal its prices, taking advantage of its monopoly situation, since each sale entails a loss, to knows the total fixed costs (ie those that remain to be determined, whatever the quantities of products) and at least part of the variable costs of the produced unit. In fact, prices below the average cost, including fixed and variable costs, but above average variable costs, should be considered abusive if they are fixed in a plan with the purpose of eliminating a competitor. These prices may in fact remove firms from the market, which may be as effective as the dominant undertaking but which, because of their lower financial capacity, are unable to resist the competition they are making".

c) Abuses consisting of "applying to the trading partners the unequal conditions for equivalent supplies, thus putting a disadvantage in competition"[10]. It is the imposition of discriminatory conditions, ie the application of discriminatory prices that affect more than one customer for the same services. In 1971, the Commission condemned the German company GEMA for requiring importers of tape recorders and magnetoscopes a higher royalty than that owed by the German manufacturers, without admitting the justification that the cost of control was much more important in the first case than in the case second.

d) Abuses consisting of "subordinating the conclusion of additional service contracts which by their nature or commercial usage are not related to such contracts". Abuse of a dominant position here lies in subordinating the conclusion of the contract to the acceptance by customers of other products and services that are not related to the purpose of this contract. It is therefore a matter of preventing an undertaking from expanding by using the advantages it gives to controlling a specific product, forcing the customer to buy another product manufactured by it but in competition with the products offered by other manufacturers.

[10] *Idem*, p. 191.

Situations of abuse can be distinguished into two categories, anticompetitive abuses and exploitative abuses.

Anticompetitive misconduct (which affects current or potential competitors) materializes in blocking measures to remove new competitors on the dominant undertaking's market, as well as in distorting current competitors (incorrectly low prices, refusal to trade with a competitor).

Abusive exploits consist in the imposition of excessive prices, the sale of a commodity subject to the purchase of goods less demanded on the market (sometimes at a lower price), the imposition of different prices in different geographical areas (where price differences can not be motivated by cost differences), etc.

Also an abuse of a dominant position can be considered the English clause.

Under the English clause, buyers are required by a contractual clause to inform the seller of the most favorable offers submitted to them by competitors.

Thus, it will be very easy for the seller to identify his rival and obtain valuable information to shape his market strategy.

If an undertaking in a dominant position requires buyers or obtains by contract their agreement to notify tenders to competitors, it is a worsening of the abuse of a dominant position (buyers have a clear commercial interest not to disclose the offers of competition and are free to -and obtains supply from competitors of that enterprise if it does not adjust its prices to those favorable offers).

In the case of undertakings which enjoy exclusive rights from a Member State (thus having a dominant position), it was considered that these companies are abusing dominant positions (contrary to article 82, ex 86 EC) (today article 102 TFEU) if they require the payment of unsolicited services, billing disproportionate prices, refusing to use modern technology, or granting discounts to some users, while offsetting these cuts by increasing the prices invoiced to other users.

In practice, it has been shown that there is an abuse of a dominant position where an undertaking imposes on purchasers the obligation to obtain raw materials to supply those machines only from it or from the supplier it designates.

Where an undertaking in a dominant position directly or indirectly forces its customers by means of an exclusive supply obligation, it is an abuse, as customers are deprived of the choice of source of supply and other traders is denied access to the market. It is irrelevant that such a sale is in line with commercial usage, since commercial acceptance accepted in a normal situation in a competitive market can not be accepted in a market where competition is already limited[11].

On the other hand, it was shown that although it is acceptable for an undertaking in a dominant position to sell sometimes at a loss, this is unacceptable in the case of eliminating sales.

[11] Manolache, O., *op. cit.*, p. 342.

Although Community competition law permits an undertaking in a dominant position to take reasonable steps to protect its commercial interests, it is not permissible for acts of genuine purpose to strengthen and abuse the dominant position. Article 82 (ex 86) EC (today article 102 TFEU) specifically prohibits an undertaking in a dominant position from eliminating a competitor through the exercise of price competition, which does not fall within the scope of competition based on quality.

In a classic approach, art. 82 (ex 86) EC (today article 102 TFEU) only applied to practices having an effect on market conditions that would be prejudicial to the beneficiaries or trading partners, that is, only in terms of market behavior, and not to the behavior that changed the structure of competition on the market.

4. Conclusions

The concept of abuse can also be interpreted through the creation of a common market and the introduction of an undistorted competition system. Restriction of competition permitted by the Treaty due to the need to harmonize its objectives is limited, under certain conditions, to the requirements contained in these legal regulations, and overcoming these limits involves the risk of incompatibility between the mitigation of competition and the objectives of the Common Market.

Consequently, the prohibition of abuse must ensure that the dominant undertaking does not have to distort the dominant position in order to obtain advantages that can not be achieved through effective and workable competition.

Bibliography

1. Cosmovici, M. Munteanu, R., *Înţelegerile între întreprinderi* Ed. Academiei Române, Bucharest, 2001.
2. Druesne G., Droit materiel et politiques de la Commmunaute europeene, Ed PUF, Paris, 1991.
3. Manolache, O., *Drept comunitar*, Ed. All Beck, Bucharest, 2003.
4. Weatherill, S. W, Beaumont, P, *EU Law*, Ed. Penguin Books, 1999.

BUSINESS AND CORPORATE CRIMINAL LAW

About the Material Object of Offenses in the Field of Arms and Munitions in the Criminal Law of Romania and the Republic of Moldova

Associate professor **Aurel Octavian PASAT**[1]

Abstract

This scientific article aims to formulate de lege lata findings and de lege ferenda recommendations obtained through the comparative analysis of criminal and extrapenal legislation in Romania and the Republic of Moldova, as well as through the synthesis of international regulations in the field, to clarify the legal nature of the object material of offenses in the field of weapons and ammunition regime. The normative basis of this study is made up of the criminal and extrapenal legislation of Romania and the Republic of Moldova, as well as the international normative basis at European level. Following the study, several legislative shortcomings were identified that are being removed for improving internal legislation as well as for better cooperation in preventing and combating illicit trafficking in arms and munitions. Methods of research have been chosen systemic method, comparative method, analysis and synthesis. The author analyzed the criminal and extrapenal rules in comparative plan (Romania, Republic of Moldova), identified some gaps in the legal technique and demonstrated the necessity of reviewing some legislative concepts that will ultimately contribute to the reconceptualization of the criminal law in force.

Keywords: *firearm; ammunition; material object; criminal offence; criminal law; illicit trafficking in weapons and ammunition.*

JEL Classification: K14, K33

1. The introductory section

The Critical Approach to Criminal and Extra-Penal Rules in the Field of Compliance with the Legal Regime of Weapons and Ammunition in Comparative Law (Romania and the Republic of Moldova), made by establishing *de lege lata* and formulating of the proposals *de lege ferenda*, regarding the clarification of the notions of weapons and ammunition in the text law, is the question of the research undertaken in this study.

The research focuses mainly on the in-depth study not only of some provisions of the Special Part of the New Criminal Code of Romania[2] and, implicitly,

[1] Aurel Octavian Pasat - State University „Bogdan Petriceicu Hașdeu", Republic of Moldova; Customs Inspector, Border Customs Office Galați-Giurgiulești, octavian_passat@yahoo.com.

[2] Law no. 187/2012 for the enforcement of the Law no. 286/2009 on the Criminal Code. Originally published in the Official Gazette no. 757 of 12.11.2012.

of the Special Part of the Criminal Code of the Republic of Moldova[3] but, to an equal extent, attention is paid to the questionable issues of extra-penal legislation on arms and ammunition in both states.

In order to provide a common vector in research, only one objective sign was selected for debate - *the material object of the offenses that affect social relations in the field of respecting the regime of firearms, ammunition, mechanisms and devices*, which are the material object of the offenses provided in art. 342 and 343 of the new Romanian Criminal Code, and, implicitly, art. 290 and 291 of the Criminal Code of the Republic of Moldova. Thus, research into other categories of weapons exceeds the boundaries of the scientific study we undertake and will not be carried out within our endeavors.

In order to ensure an advanced degree of scientific research, we will also refer to the extra-penal rules regarding their firearms, ammunition, mechanisms and devices both from Romanian and Moldovan legislation, the objective being one: identification of weaknesses of the existing legislative norms and the formulation of recommendations to remove some theoretical and practical differences in the future.

From the doctrinal point of view, we find the presence of the necessary scientific studies in the field both in Romania and in the Republic of Moldova, but we observe the lack of thorough comparative law studies.

2. Situation in contemporary doctrine and legislation (European Union, Romania, Republic of Moldova)

According to the Communication from the Commission to the Council and the European Parliament, Brussels, 21.10.2013, COM (2013) 716 final "*EU firearms and internal security: protecting citizens and combating illegal trafficking*" in the first decade of the 21st century, the 28 EU Member States have registered over 10.000 victims of murder and murder without premeditation, killed with firearms, and each year over 4 000 suicide bombs are recorded. It is noted that, despite existing EU legislation, firearms, explosives and explosives precursors are still too easily accessible. Access to illegal channels has been complicated by the availability of weapons on the Internet. A comprehensive approach is needed to support the suppression of trafficking and the illegal use of firearms and explosives while at the same time defending the legal trade in firearms and the legitimate use of chemicals.

According to this document, an average of 0.24 homicides and 0.9 suicide firearms per 100,000 inhabitants are reported annually in the EU. The presence,

[3] Criminal Code of the Republic of Moldova, no. 985 of 18.04.2002. Republished in the Official Gazette of the Republic of Moldova, 2009, no. 72-74.

especially in deprived urban areas, of strong firearms and which are often illegally held may create a feeling of insecurity among citizens[4].

In the first part we shall mention that from the legislative range that we have selected for research, the *Arms Trade Treaty* (New York, Romania)[5] will be exempted within the limits of the determination of the material object of civilian weapons and ammunition in Romania and the Republic of Moldova, 2 April 2013) is not our object of research because, from the point of view of the quality of the weapons that fall within its scope, this international act applies to special categories of conventional weapons (battle tanks, armored combat vehicles, artillery systems large-scale combat aircraft, attack helicopters, warships, missiles and rocket launchers, small arms and light weapons), which surpasses our research object - the criminal and extra-penal regime of civilian weapons and ammunition in Romania and the Republic of Moldova. However, the definition of international trade within the meaning of this Treaty, which includes 1) export, seems to us to be useful; 2) import; 3) transit; 4) transshipment and 5) brokerage, referred to under this "*transfer*" act. From the content of this international document we can deduce the definition of "*arms transfer*" that can be accepted at the doctrinal level and provides a terminological clarity. Thus, arms transfers include - export, import, transit, transshipment or brokering.

Therefore, according to the Ministry of Internal Affairs Ministry's informative note *on the activity of surveillance of arms trafficking during the 12 months of 2017*, during the 12-month period of 2017, there were recorded 135 crimes committed with the application or use firearms including: with weapons in evidence - 53 and with illegally held weapons - 82. During the 12-month of 2017, 135 offenses were committed with the application or use of firearms, including: with weapons in evidence - 53 and with illegally held arms - 82[6]. 87,056 cartridges of different caliber, 160 grenades, mines, projectiles and explosives were erected. As a result of the detected violations, during the current year, 377 weapons permits were canceled[7].

In another context, based on the purpose of our study, in Chapter III of the New Romanian Penal Code (Non-Observance of the Weapons, Ammunition, Nuclear and Extraneous Goods), it is of interest to investigate the material objects of the offenses referred to in Article 342 (Failure weapons and ammunition regime) - lethal weapons, ammunition, mechanisms, devices (paragraph (1) art.342 New Penal Code); - non-lethal weapons of the category subject to authorization

[4]http://ec.europa.eu/transparency/regdoc/rep/1/2013/RO/1-2013-716-RO-F1-1.Pdf, consulted on 10.10.2018.

[5]Law of the Republic of Moldova no.105 of 28.05.2015 for the ratification of the Arms Trade Treaty, published in Official Gazette, 2015, no.161-165.

[6] Informative Note of the Ministry of Internal Affairs of the Republic of Moldova on the activity of supervision of the movement of arms during the 12 months of 2017, http://politia.md/sites/ default/files/nota_informative_pe_perioada_ anului_2017_a_ssca_a _dal_a_dgsp-1.pdf, consulted on 10.10.2018.

[7] *Idem*.

(paragraph (2) art.342 New Penal Code); - weapons and ammunition (paragraph (3) art.342 New Penal Code); the weapons referred to in paragraph (1) and paragraph (2) Article 342 New Criminal Code (paragraph 4) Article 342 New Criminal Code); - prohibited weapons or ammunition, their mechanisms or devices (paragraph (5) art.342 New Penal Code); lethal weapon (paragraph (1) Article 343 of the New Criminal Code); prohibited weapon (paragraph (1) art.343 New Criminal Code); non-lethal weapon of the category subject to authorization (paragraph (2) art.343 New Penal Code). As noted by the author, I. Rusu, the new criminal law refers to the material object of the "lethal guns" crime, while in the previous law are meant "firearms"[8].

Moreover, considering with special attention the entities that can form material objects of these crimes, we conclude that their enumeration in the Romanian criminal law text is sufficiently meticulous in comparison with the criminal law of the Republic of Moldova. Thus, according to the provisions of art. 290 the Penal Code of the Republic of Moldova (CP RM), as a material object, recognizes a firearm, except for a plain-headed gun, ammunition, without any specification of the weapon. It is worth mentioning that, in our opinion, the criminal law of the Republic of Moldova in the field of investigation is to be subject to considerable revision, with the special responsibility for criminal liability for different types of firearms, as was done in Romanian criminal law, the incriminating regime on arms lethal and non-lethal weapons.

At the same time, we note that the criminal law of the Republic of Moldova suffers from a rudiment that no longer resists legal and social reality, the criminal law becomes rigid and unclear. Thus, the discussions will focus on the issue of decriminalized manipulations with a gun with a straight pipe (Art.290 CP RM). The Hedgehog Hunting Gun, although falling within the category of firearms, the illegal handling of such weapons is exempt from criminal liability under Art.290 CP RM[9]. However, as the author A. Serbinov rightly notes, in the description of the material object of the offense provided by art.290 CP RM, the legislator uses a negative sign[10]. This follows explicitly from the expression "*with the exception of the straight pipe hunting gun*" used in the provision of the rule of criminality. On the other hand, the hunting gun with a straight pipe, although classified as firearms under the extra-penal legislation of the Republic of Moldova, illegal manipulations with such weapons are exempted from criminal liability on the basis of Art.290 CP RM. And for the simple reason that the lawmaker decided that the wearing, preservation, acquisition, manufacture, repair or sale of the hunting gun with a straight pipe as well as its obstruction does not reach the injurious degree

[8]Rusu Ion, *Conţinutul constitutiv al infracţiunii de falsificare sau modificare. Ştergerea sau modificarea marcajelor de pe armele letale. Legea penală mai favorabilă*, „Acta Universitatis George Bacovia. Juridica", 2015, Vol.4, Issue 1, p. 141-150.
[9]A.Serbinov, *Obiectul material al infracțiunilor prevăzute la art.290 și 291 CP RM* (*Partea II),* „Revista Națională de Drept", 2016, no. 10, p.50.
[10] *Idem,* p.51.

of a crime and therefore can not fall under the law criminal proceedings[11]. It is attributable that, for example, hidden stealing of a smooth-hitting gun can lead to criminal liability under art. 186 CP RM (theft). He rightly interprets the law of the Republic of Moldova by A.Serbinov, pointing out that the norm of art.290 CP RM is special in relation to one of the norms of art.186 CP RM only in the case of the stealing of a firearm, not in the situation of the fire hunting with a smooth pipe[12].

In another context, Romanian criminal scholars I.Lesenciuc, I.Musca, G.Dănilă, C.Suciu, D.Pintilie, in his paper in 2016, point out that in recent years there has been a significant increase in the incidents in which they are involving hunting weapons, the deviations from the law being various: not presenting the hunters for the renewal of the gun permit; the use of ammunition prohibited by law; useless weaponry; attempted poaching and poaching; hunting accidents resulting in injury, or, worse, the death of some hunters[13].

Moreover, we note that Romanian legislation does not create such a differentiation of material objects in these categories of crimes. In support of the Romanian State's criminal policy, we consider that any manipulation of a firearm intended to produce traumatic effects under the law should be subject to a severe sanctioning regime. As a consequence, in our opinion, the creation of a discriminatory sanctioning regime for firearms, depending on its constructive characteristics, as in Art. 290 of the Criminal Code of the Republic of Moldova, is not a well-grounded legislative step, noting in particular that an atypical weapon made of a firearm with a continuous pipe is a material object of the offenses provided by art. 290 of the Criminal Code of the Republic of Moldova.

In order to confirm our scientific position, we referred to investigating the causes of such legislative decisions. As a result of analyzing the causes of criminal liability for such a weapon category, we found that this legislative decision in post-Soviet space was determined by the idea that manipulations with this specific weapon category were usually carried out by hunters were engaged in hunting to feed their families, especially referring to some ethnic groups in the distant areas of Russia, and therefore did not represent a greater degree of prejudice. However, even the Russian authors in their last-minute scientific papers say that they are obsolete, inconsistent with the contemporary social and legal realities,

[11] *Idem*, p.50-51.
[12] *Ibidem*.
[13]I.Lesenciuc, I. Muscă, G. Dănilă, C. Suciu, D. Pintilie. *Identificarea armelor de vânătoare lise în funcție de caracteristicile impactului dintre cuiul percutor și capsa de inițiere*, „Bucovina Forestieră", 2016, no.16(1), (p.87-94), p. 87.

generating unequal judicial practice, for giving up such a legislative provision (S.A. Nevskii, N.I. Pikurov[14], D.M.Kokin[15]).

Also, the proof of the advanced danger of jet-gun weapons is also encountered by Romanian criminals. Thus, in the opinion of the Romanian authors I.Lesenciuc, I.Musca, G.Dănilă, C.Suciu, D.Pintilie, two major causes determine the hunting accidents: 1) the negligent handling of the firearms, and 2) the non-observance of the all rules on the practice and organization of hunters. According to the authors, the weapons used for hunting can be classified into two main categories: rifled weapons and squirrel arms, which can be identified by different constructional features or inner and outer ballistics. Thus, it is shown that the number of accidents does not depend on age, they are equally caused both by lynx and carbines, they occur in all types of hunters (large game, small game)[16]. In the opinion of the author A. Serbinov, in the light of the criminal law in force in the Republic of Moldova, even though the hunting gun with a straight pipe can not be a material object of the offense provided in art.290 of CP RM, the violation of the rules of its possession, port and transport falls under the law of contravention (paragraph (1) art.361 Countervention Code of the Republic of Moldova) [17].

In this context, the author's opinion, A. Serbinov, is relevant, according to which the device designed or adapted to reduce the noise caused by the firing of fire has to be classified as a piece for the firearm but not a firearm itself.

Operating with the notion of "weapon" in the content of art. 290 and 291 of CP RM, the legislator had in mind the special device, but not any other special means of fighting. Illicit manipulation with the material entities designated as special devices, within the meaning of the Law of the Republic of Moldova no.130 of 2012, can not give rise to criminal liability under art. 290 or 291 CP RM. The author A.Serbinov points out that as a material object of the offenses provided in art. 290 and 291 of CP RM can evolve not only the ammunition of firearms, but also other types of weapons, including those ammunition that have no connection with weapons. The ammunition of the hunting gun with a straight pipe can be regarded as a material object of the offense provided in art. 290 CP RM.

---

[14] Nevsky S.A., Pikurov N.I., *Уголовно-правовая оценка незаконного оборота огнестрельного гражданского оружия.* В: Московский журнал «Российское правосудие», (Criminal law assessment of the illicit trafficking of civilian firearms. Q: Moscow magazine "Russian Justice"), 2011, no. 8 (64), p.73-77.

[15] Kokin D.M., *Некорыстный оборот оружия: уголовно-правовая и криминологическая характеристика:* Автореферат диссертации на соискание ученой степени кандидата юридических наук (Disinterested weapons: criminal law and criminological characteristics: dissertation author's abstract for the degree of candidate of legal sciences), St. Petersburg: St. Petersburg University of the Ministry of Internal Affairs of the Russian Federation), 2015, (24 c), p.13.

[16] I. Lesenciuc, I. Muscă, G. Dănilă, C. Suciu, D. Pintilie. *Identificarea armelor de vânătoare lise în funcție de caracteristicile impactului dintre cuiul percutor și capsa de inițiere*. „Bucovina Forestieră", 2016, no.16(1), (p.87-94), p.89.

[17] A.Serbinov, *op.cit.*, p. 51.

In this context, it is necessary to establish a balance between the notions of "weapon" and "armament". We observe that the Moldovan extra-penal law uses the notions of weapons and weapons as identical. For example, according to the Law of the Republic of Moldova on conventional weapons and ammunition, special means and military devices owned by the National Army and foreign military forces legally on the territory of the Republic of Moldova, no.147 of 14.07.2017[18], conventional arms - an object or device, designed or adapted, by which a lead, a bullet or other projectile or a gaseous, liquid or other harmful substance can be discharged by explosive, gaseous or atmospheric pressure, or by means of two other propelling agents. We cannot agree with the Moldovan legislator because they cannot be the same. In this respect, we are in solidarity with the author A. Serbinov who considers that the notion of "arms" is generic for all types of weapons, military equipment and military equipment. Weapon is the genre, while the weapon - the species. In addition to weapons, weapons include the technical means of fighting.

In a different way, unlike the criminal law of the Republic of Moldova, we observe that the Romanian Criminal Code (the New Criminal Code of Romania) operates with several special terms in matters that influence the juridical-criminal detention of the deed, compared to the general terminology used by the Moldovan legislator. Thus, they are highlighted:

- *lethal weapons and ammunition* - weapons and ammunition, the use of which may cause the death or serious injury of persons (the factual sign) and which are provided in category B of the Annex to Romanian Law no. 295/2004 on the regime of arms and ammunition;

- *the mechanisms*, devices of the lethal weapons;

- *non-lethal weapons of the kind subject to authorization* - weapons and ammunition intended for a commercial purpose or for leisure or self-defense, made in such a way that, by their use, they do not cause the death of persons; are assimilated to this category and old weapons;

- *prohibited weapons and ammunition* - the weapons and ammunition provided in category A of the Annex to the Romanian Law no. 295/2004 on the regime of arms and ammunition, whose purchase, possession, port and use are forbidden to natural and legal persons, except public institutions have competences in the field of defense, public order and national security, subordinated or coordinated units established by normative acts, as well as national companies and commercial companies constituted by normative acts in order to produce such weapons and ammunition;

- ammunition, mechanisms or devices;

- mechanisms or devices of prohibited weapons.

In accordance with the provisions of Article 3 (Terminology) of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts

[18] Official Gazette of the Republic of Moldova, 2017, no. 277-288.

and Components and Ammunition, Additional to the United Nations Convention against Transnational Organized Crime adopted in New York on November 15, 2000, of 31.05.2001[19],

- *firearm* designation means any portable gun with a propelling lead, bullet or projectile on the basis of the action of an explosive, or designed to perform such an action or which can be easily transformed for that purpose, except for weapons of old fire or their replies. Old firearms and their replicas are defined in accordance with national law. However, old firearms will in no case include firearms manufactured after 1899;

- the expression of *parts and components* is any replacement component or component specifically made for a firearm and indispensable for its operation, in particular the pipe, sleeve housing or sleeve, cylinder head or bolt, movable sleeve or closure, as well as any other a device designed or adapted for attenuating the noise caused by the detonation of a firearm;

- the term of *ammunition* represents the totality of the cartridges or their components, including the cartridge chamber, the initiation strips, the shotgun, the bullets or the projectiles used in a firearm, provided that these components themselves are subject to authorization in that State Party.

In support of this Protocol, the Council of Europe Directive 91/477/EEC of 18 June 1991, CELEX/31991L0477[20], which accepted the definition and the classification of weapons by the deduction method in Annex I, but maintains the interdependence of the notions in the text , using both positive poster signs ("as defined", weapons other than firearms as defined by national laws) and negative ("any object falling into one of the following categories, more at least those which correspond to the definition but were excluded for the reasons mentioned in Section III ").

First of all, the Directive deals with the notion of "*arms*" in two respects: 1) any firearm as defined in Section II of this Annex - using the reference to a rule within this normative act; as well as 2) other weapons than firearms, as defined in the domestic legislation - using the blank "blank" method to other normative acts in domestic law. We note that the Directive aims to ensure uniformity and consistency with the domestic law of any member state of this regional document.

---

[19]*Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, Supplementary to the United Nations Convention against Transnational Organized Crime, adopted in New York on 15 November 2000, 31 May 2001. In: Official Gazette of Romania, March 2, 2004.* General Assembly resolution 55/255 of 31 May 2001 *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*. United Nations Convention Against Transnational Organized Crime and The Protocols Thereto United Nations, New York, 2004. p. 69-82.

[20] Directive no. 477/1991 of the Council of the European Community of 18 June 1991 on the control of the acquisition and possession of weapons. In: Official Journal of the European Union, L series, no. 256 of 13.09.1991, CELEX/31991L0477, p. 51-58.

It should be specified that the Directive does not apply in the following cases:

I. *trade transfers of arms and munitions of war*;

II. *acquiring or possessing weapons and ammunition by*: the armed forces, the police or the public services; collectors and bodies of a cultural and historical nature in relation to arms and recognized as such by the countries of the European Union in which they are established.

This document is without prejudice to the application of national provisions on arms, hunting or sport shooting.

For the purposes of this Directive, "firearms" within the meaning of this Directive are: any object falling within one of the following categories, but excluding those which correspond to the definition but which have been excluded for the reasons set out in Section III, include:

- *Category A - Forbidden Firearms:* 1) explosive-effect military instruments and launchers; 2) automatic firearms; 3) camouflaged firearms in the form of another object; 4) ammunition with perforating, explosive or incendiary projectiles, as well as projectiles for these ammunition; 5) ammunition for guns and revolvers with expansive projectiles, as well as those projectiles, except for target shooting or hunting weapons, for ordinary persons to use these weapons.

- *Category B - Firearms subject to authorization:* 1) semi-automatic or repetitive short firearms; 2) short-range firearms with central firing fire; 3) fire-blasting short firearms with an annular percussion of a total length of less than 28 cm; 4) semiautomatic long-range weapons whose chargers and chambers contain more than three cartridges; 5) semiautomatic long-range weapons whose chargers and chambers contain more than three cartridges whose charger is immiscible or guns for which transformation is not guaranteed by a current machine in arms the charger or chamber of which may contain more than three cartridges; 6) repeatable long beating and semi-automatic with a smooth pipe whose pipe does not exceed 60 cm; 7) semiautomatic civil firearms, which have the appearance of an automatic firearm.

- *Category C - Firearms subject to declaration*: 1) repeatable long firearms other than those referred to in Category B, point 6; 2) long-fire firearms with fire-firing spiral pipe; 3) semiautomatic long firearms other than those in category B, points 4 to 7; 4) fire-blasting short firearms with an annular percussion of a total length equal to or greater than 28 cm.

- *Category D - Other firearms*: long-fire firearms with fire-firing through a smooth pipe; the essential parts of these firearms: the closing mechanisms, the chamber and the firearm pipe which, as separate objects, are included in the category in which the firearms to which they belong or to which they are assigned are classified.

According to the provisions of Section III, the definitions of firearms are not included in the definition of firearms, but which: (a) were considered to be definitively unfit for use by the application of technical procedures guaranteed by

an official body or recognized by such a body; (b) are designed for alarm, signaling, protection, abatement, harpoon or industrial or technical fishing, provided that they can not be used for that purpose; (c) are considered to be antique weapons or their replicas, to the extent that they have not been included in the previous category and are subject to national laws.

From the above, we observe that the European Community has established the cataloging of firearms according to its legal regime, which in turn is determined by the danger of the weapon.

The legal regime of arms and ammunition in Romania is governed by Law no. 295/2004 *on the regime of arms and ammunition*[21], as subsequently amended and supplemented by Law no. 319 of 11 December 2015 and Law no. 22 of 21 March 2017, as well as by the Government Decision no. 11/2018 *approving the Methodological Norms for the application of the Law no. 295/2004 on the regime of arms and ammunition*[22].

The new regulations on the regime of arms and ammunition were adopted in the context of harmonizing the national legislative framework with the international regulations in this field. Implementation of the *acquis communautaire* on this line has as its central objective the implementation of the provisions of Council Directive no. 477/1991 *on controlling the acquisition and possession of weapons*, as subsequently amended and supplemented by Directive no. 2008/51/EC and Directive no. 2017/853/EU.

In Romania, the competent authority exercising control over the possession, port and use of weapons, pieces and ammunition, as well as arms and munitions operations, is the General Police Inspectorate. Individuals wishing to own or, as the case may be, to wear and use lethal and/or non-lethal weapons and/or non-lethal weapons and/or munitions subject to authorization must first undergo a theoretical and practical training course in weapons and ammunition organized by a legal person authorized to do so.

Regarding the application of the provisions of the Directive under Romanian judicial practice, there has been a case of non-compliance with the non-lethal weapon regime described in the case law of the Constanta Court of Appeal: "*In the period 02.11.2014-05.11.2014, the defendant [...] held on the territory of Romania the KWC non-lever pistol model GSR SIGARMS cal. 4,5 mm BB, included in category C point 23, Chapter III of the Annex to Law no. 295/2004, without having obtained the prior authorization for the purchase provided for in Article 57, paragraph 1, letter a) of Law no. 295/2004, illegally introducing it into the country through PTF Arad-Nadlac on 02.11.2014*". From all the testimonial evidence, the contradiction between the defendant's statement before the court is duly taken into account in that "*frontier workers have not directed him in any sense to declare the weapon, while witnesses [...] and [...]] talk about the fact*

[21] Republished in the Official Gazette no. 425 of 10 June 2014.
[22] Published in the Official Gazette no. 83 of 29 January 2018.

that the defendant knew from the instructions of the border workers that it is necessary to declare the weapon at the police unit, remembers the defendant's insincere in supporting the error regarding the possession of the weapon on the territory of Romania, all the more so since the statement on March 2, 2015, the defendant speaks of the intentional act of taking the weapon from Spain with a view to its registration/declaration on the territory of Romania, for personal purposes, identified in part by the witness ... and in the original statement only mentioned the error found to have taken the pistol "in luggage" with the appropriate action promptly presenting to the police, omitting the significant episode of interaction with frontier workers, an element that could not be omitted in the context of a statement/testimony formulated in good faith and in accordance with the objective reality". The first instance held the defense of the defendant in the sense that "he was unaware of the incumbent legal provisions for the authorization of the possession and possession of weapons subject to authorization on the territory of Romania, but this reasoning is not a cause of impropriety, the lack of knowledge of the law being imputable to the defendant [...] Romanian citizen", but still retains a minimal impact on social relations protected by the rule of incrimination which leads to the imposition of a sanction with a fine for this offense of non-observance of the arms and ammunition regime.

Article 3 of the above Directive states that "*Member States may adopt more stringent measures within their own legislation than those laid down in this Directive*". Comparing the legal provisions in the field covered by the Council of Europe Directive no. 91/477/EEC of 18 June 1991 and by the domestic law of the Romanian State, in this case the Court held that the Romanian legislation provides for stricter regulations regarding the authorization of obtaining or possession of weapons. In this regard, referring to the conclusions of the forensic finding report no.121657 of 11.11.2014 that the pistol introduced on Romania's territory on 02.11.2014 is a CO2-based weapon fitted with a CO2 cylinder under pressure, the Court found that this pistol falls within the category of weapons referred to in point III Category C point 23 of Annex 1 to Law 299/2004, as amended and supplemented by Law no. 117/15.06.2011, respectively Authorized Weapons: "*point 22 Short or long arms (compressed air) that use the expansion force of compressed air or pressurized gases in a container for discharging the metal projectile a projectile speed greater than 220 m/s*". Therefore, the provisions of Article 113 paragraph 4 of Law no. 295/2004 republished, as amended and supplemented by the Law no.117/15.06.2011, by which it was transposed, are included in the introduction of such a weapon on the territory of Romania in the Romanian legislation Council of Europe Directive 91/477/EEC of 18 June 1991 on the control of the acquisition and possession of weapons: "*The introduction by non-EU law of non-lethal weapons of the category subject to authorization on the territory of Romania is prohibited, the holder proves that he/she is going to participate in an affiliated sporting competition at the national sports federations or, as the case may be, proves that he is going to participate in a*

cultural, artistic or historical event and presents the invitation of a collectors' association, legally constituted, or of a museum institution in Romania". In view of the above considerations, the Court finds that the defendant [...] did not follow the procedure laid down in Article 113 paragraph 4 of Law no. 295/2004 republished for the introduction into the country on 02.11.2014 of the KWC brand pistol, GSR SIGARMIS model, 4.5 mm BB size, with the series [...], pistol legally acquired on the territory of Spain, non-lethal weapon framed according to Romanian legislation in the category of the weapons referred to in point III Category C point 23 of Annex 1 of the Law no. 295/2004, as amended and supplemented by the Law no. 117/15.06.2011, respectively Arms subject to authorization. In this respect, the defendant [...] did not prove that he is going to take part in an affiliated sporting competition at the national sports federations, nor did he prove that he is going to attend a cultural event, artistic or historical, with the invitation of a legally constituted association of collectors, or of a museum institution in Romania.

From the evidence in question, the Court finds that there is a strong doubt as to the intention of the defendant [...] of fraudulent introduction of that gun on the territory of Romania, there is no evidence in this case that the defendant [...] intently took that gun from his home in Spain to come with him to Romania. The Court notes that the court of first instance did not take account of: - the other means of proof that it accidentally took the bag in which the pistol was placed instead of an identical bag with a laptop; - the conduct of the defendant who addressed as soon as possible to the police in Austria, the Arad PTF, the Ovidius Police and the Constanta Arms and Ammunition Service, to explain the circumstances of the introduction into Romania of the compressed-air pistol legally acquired on the territory of Spain, - the photographic sheets with the two bags and which are found to be identical and the box in which the pistol is located is sufficiently small to allow it to enter such a bag and when the bag is closed it is possible to be confused with a bag containing a laptop and the corresponding charger, - that the category 4 card holder license acquired by the defendant [...] of the Spanish authorities for that gun is valid only in the Parla region, so it is wholly irrelevant that the defendant took that gun to obtain a possession permit on the territory of Romania as long as the possession of the respective gun was limited only to a region in Spain. All these latter aspects are able to give the court reasonable doubt that the defendant [...] acted intentionally (directly or indirectly) to put that gun on 02.11.2014 on the territory of Romania, so that according to the provisions of art. 103 paragraph 2 of the second sentence of the Code of Criminal Procedure with reference to Article 4 of the Criminal Procedure Code and Article 23 paragraph 11 of the Romanian Constitution in this case cannot pronounce a judgment to convict the defendant for the offenses for which he was sent to the court, ordering the acquittal of the defendant ... for both offenses on the basis of

Article 16, paragraph 1, letter b) Code of Criminal Procedure: "*the act was not committed with the guilt prescribed by law*"[23].

In another context, the regime of arms and ammunition in the Republic of Moldova is regulated by the Law no. 130 of 08.06.*2012 on the regime of weapons and ammunition for civilian use*[24]. For a better assimilation of the correlation between the terminological definitions used in the legislative texts, we compared the definitions used in the text of extra-penal legislation in the field of firearms and civilized mountains (Romania, Republic of Moldova) and we found that notions as weapon of fire, piece, essential composition, ammunition are almost identical, and the notion of weapon is different from a linguistic point of view, but not a semantic. Thus, according to Law no. 295/2004 *on the regime of weapons and ammunition*, any object or device the operation of which determines the disposal of one or more projectiles, explosive substances, ignited or light, incendiary mixtures or the spreading of harmful, irritating or neutralizing gases, in so far as it appears in one of the categories set out in the Annex. At the same time, the weapon in the sense of the Law *on the Arms and Civil Weapons Regime*, no. 130 of 08.06.2012, the weapon is an object or device, designed or adapted, by which a lead, a bullet or another gas projectile or substance, liquid or otherwise, may be discharged by explosive, gaseous or atmospheric pressure or by other propelling agents, insofar as it is in one of the categories listed in Annex 1.

Based on the literary comparison of legislative texts, we note that only the notion of weapon differs slightly from a linguistic point of view, while other notions are identical.

According to the Romanian Law no. 295/2004 *on the regime of arms and ammunition*, the classification of weapons is carried out:

- *in terms of destination*: military weapons - weapons for military use; defense and security weapons; self-defense arms; firearms; hunting weapons; Utility weapons; weapons and recreational devices; replicas of airsoft type weapons; paintball devices; stun guns; industrial weapons; arms with tranquillizers; panoply weapons; collecting weapons; old weapons;

- *in constructive terms*: compressed air or pressure guns; short firearms; long firearms; automatic firearms; semiautomatic firearms; repeated firearms; one-shot firearms; white weapons with blade.

At the same time, according to the provisions of the Law of the Republic of Moldova *on the regime of weapons and ammunition for civilian use*, no. 130 of 08.06.2012, the weapons are defined and classified according to several criteria:

---

[23] Failure to comply with the arms and munitions regime. Plausible payment because the act was not committed with the guilt of the law. In: Constanta Court of Appeal. The criminal section for juvenile and family criminal cases. Jurisprudence Bulletin. Quarter I, 2017, pp. 26-38. http://portal.just.ro/36/Documents/DECIZII_RELEVANTE/AN_2017/TRIMESTRUL_I/Decizii%20relevante%20penal%20trim.I-2017.pdf, consulted on 10.10.2018.

[24] Official Gazette of the Republic of Moldova, 2012 no. 222-227.

1. *Depending on the categories of weapons and ammunition*: prohibited weapons and ammunition; weapon and lethal ammunition; non-lethal weapon and ammunition;

2. *According to its destination*: military weapons; civilian weapons;

3. *From the point of view of destination*: defense and security weapon; self-defense weapon; throwing gun; stun gun; collecting weapon; props; panoply weapon; signaling weapon; shooting gun (sporting); hunting weapon; weapon deactivated; industrial weapons; gun with tranquillizers; unusable weapon; weapon; old weapon; electro shock device; spray with tear gas or irritant;

4. *From the building point of view*: compressed air or compressed air (pneumatic) weapon; gas weapon; rifled pipe gun; gun with flat barrel; automatic firearm; one-shot firearm; repeat firearm; long firearm; short firearm; semi-automatic firearm.

Unlike the Romanian and Moldovan Laws, the Law no. 74/2014 on the Weapons Regime, approved by the Decision of the Assembly of the Republic of Albania (adopted on 10.07.2014)[25] is partially aligned with the Council of Europe Directive 91/477/EEC of 18 June 1991, CELEX number/31991L0477[26], since it does not provide the classification of weapons and mountains, but merely reviews the terms used in the text of the law.

Analyzing the provisions of the Albanian law we have synthesized that it operates with two definitions that do not meet in the extra-penal law of Romania and the Republic of Moldova, in particular "*weapon imitation*" and "*special weapon equipment*":

1. "***Weapon Imitation***" - an object whose exterior appearance is very similar and imitates a weapon, but which cannot be used as a firearm, nor does it occur with a fire-retarding mechanism, nor can it be adapted for such use;

2. "***Special firearm equipment***" means any mechanism which is produced or intended for the improvement of the firearm's base design, the use of which improves the performance and quality of the use of the firearm, except for the optician.

In our opinion, the introduction into the extra-penal legislation of the term "*weapon imitation*" would help to clarify the circle of material objects that would be recruiting weapons and which would not ensure the clear delineation of law and law enforcement.

In turn, the introduction into the extra-penal legislation of Romania and the Republic of Moldova of the term "*special equipment for firearms*" would allow the extension of the list of objects which may constitute the material object of criminal offenses.

---

[25]http://www.seesac.org/f/docs/Albania-1/1.ALB_RUM_Law-on-Weapons-2014.pdf, consulted on 10.10.2018.

[26] Directive No 477/1991 of the Council of the European Community of 18 June 1991 on the control of the acquisition and possession of weapons. In: Official Journal of the European Union, L series, no. 256 of 13.09.1991, CELEX/31991L0477, p.51-58.

3. Conclusions and *de lege ferenda* proposals

A. *The Arms Trade Treaty* (New York, April 2, 2013) is not our object of research because this international act applies to special categories of conventional weapons that cannot be attributed to civilian use, but we find it useful to define the "*arms transfer*" act, including - export, import, transit, transshipment or brokering.

B. The Romanian Criminal Law provides for a different sanctioning regime for the different types of firearms, as well as for their mountains, their mechanisms and devices, as well as the entities that can form the material objects of the crimes stipulated in art. 290 CP RM, with the exception of the jet gun, the ammunition, without any specification of weapons and ammunition as such, and there is no indication of a weapon mechanism or device. In our opinion, the criminal law of the Republic of Moldova in the field of investigation is to be subject to a considerable revision, with the criminal responsibility for different types of firearms being specified, as was done in the Romanian criminal law, the incriminating regime regarding the lethal arms and non-lethal weapons.

C. The criminal law of the Republic of Moldova suffers from a rudiment that no longer resists the juridical and social reality, the penal law becoming rigid and unclear - manipulations decriminalized with a gun with a straight pipe (art. 290 CP RM). At the same time, we have shown that in recent years, there has been a significant increase in incidents involving hunting weapons, with deviations from the law being varied: not presenting hunters for renewing a gun permit; the use of ammunition prohibited by law; useless weaponry; attempted poaching and poaching; hunting accidents resulting in injury, or, worse, the death of some hunters. In addition, the Romanian legislation does not create such a differentiation of material objects for these categories of crimes. In support of the Romanian State's criminal policy, we consider that any manipulation of a firearm intended to produce traumatic effects under the law should be subject to a severe sanctioning regime. As a consequence, the creation of a discriminatory sanctioning regime for firearms, depending on its constructive features, is not a coherent and well-grounded legislative step, noting in particular that an atypical weapon made of a single-stranded firearm constitutes material object of the offenses provided by art. 290 of the Criminal Code of the Republic of Moldova.

D. We note that Moldovan extra-penal law uses the notions of weapons and weapons as identical. But we are in solidarity with the author A. Serbinov who considers that the notion of "*armament*" is generic for all types of weapons, military equipment and military equipment. Weapon is the kind, while the barrage - the species. In addition to weapons, weapons include the technical means of fighting.

E. Analyzing the provisions of the Albanian law we have synthesized that it operates with two definitions that do not meet in the extra-penal law of Romania

and the Republic of Moldova, in particular "*weapon imitation*" and "*special equipment for firearms*": The introduction into extra-penal law of the term "*weapon imitation*" would help to clarify the circle of material objects that would be recaptured weapons and which would not ensure a clear delineation at law and law enforcement. Also, the introduction in extra-penal law of the vigor of Romania and the Republic of Moldova of the term "*special equipment for firearms*" would allow the extension of the list of objects which may constitute the material object of the criminal offenses.

Bibliography

1. Rusu Ion. *Conţinutul constitutiv al infracţiunii de falsificare sau modificare. Ştergerea sau modificarea marcajelor de pe armele letale. Legea penală mai favorabilă*, „Acta Universitatis George Bacovia. Juridica", 2015, Vol.4, Issue 1, p. 141-150.
2. A. Serbinov, *Obiectul material al infracțiunilor prevăzute la art.290 și 291 CP RM* (*Part II),* „Revista Națională de Drept", 2016, no.10, p.50-58.
3. I. Lesenciuc, I. Muscă, G. Dănilă, C. Suciu, D. Pintilie. Identificarea armelor de vânătoare lise în funcție de caracteristicile impactului dintre cuiul percutor și capsa de inițiere, „Bucovina Forestieră", 2016, no.16(1), p.87-94.
4. Kokin D.M., *Некорыстный оборот оружия: уголовно-правовая и криминологическая характеристика:* Автореферат диссертации на соискание ученой степени кандидата юридических наук. – Санкт- (Disinterested weapons: criminal law and criminological characteristics: dissertation author's abstract for the degree of candidate of legal sciences) St. Petersburg: St. Petersburg University of the Ministry of Internal Affairs of the Russian Federation, 2015.
5. Nevsky S.A., Pikurov N.I., *Уголовно-правовая оценка незаконного оборота огнестрельного гражданского оружия* (Criminal law assessment of the illicit trafficking of civilian firearms), Q: Moscow magazine "Russian Justice", 2011, no. 8 (64), p.73-77.
6. The Criminal Code of the Republic of Moldova, Law no. 985 of 18.04.2002. Republished in: Official Gazette of the Republic of Moldova, 2009, no.72-74.
7. Directive no. 477/1991 of 18 June 1991 of the Council of the European Community on the control of the acquisition and possession of weapons. In: Official Journal of the European Union, L series, no. 256 of 13.09.1991, CELEX/31991L0477.
8. Government Decision no. 11/2018 approving the Methodological Norms for the application of the Law no. 295/2004 on the regime of arms and ammunition. Published in the Official Gazette no. 83 of 29 January 2018.
9. The Law of the Republic of Moldova for ratification of the Arms Trade Treaty, no.105 of 28.05.2015. In: Official Gazette, 2015, no.161-165.
10. Law of the Republic of Moldova on the regime of weapons and ammunition for civilian use, no.130 of 08.06.2012. In: Official Gazette of the Republic of Moldova, 2012, no.222-227.

11. The Law of the Republic of Moldova on the Conventional Weapons and Ammunition Regime, Special Means and Military Devices Armed by the National Army and the Foreign Military Forces Lawful to the Republic of Moldova, no.147 of 14.07.2017. In: Official Monitor of the Republic of Moldova, 2017, no.277-288.
12. Romanian Law on the Arms and Ammunition Regime, no. 295/2004. Republished in the Official Gazette no.425 of 10 June 2014.
13. The New Criminal Code of Romania. Law no. 187/2012 for the enforcement of the Law no. 286/2009 on the Criminal Code. Originally published in the Official Gazette no. 757 of 12.11.2012.

Commercial Companies in the Criminal Trial

Lecturer **Ramona Mihaela COMAN**[1]

Abstract

The accused or the civilly liable party? What is the position of a commercial company in a criminal trial? If in the case of certain offenses, the answer is quite clear, in the case of crimes like tax evasion or money laundering, the practice is not unitary. The article analyzes the cases in which the criminal liability of a company can be engaged, as well as the effect generated by the role that the prosecutor sets for the company - as criminally or civilly liable party - in the case of criminal offenses such as tax evasion.

Keywords: *commercial companies, criminal trial, accused, civilly liable party.*

JEL Classification: K14, K22

1. Brief history of the criminal liability of the legal person

Criminal traditionalism had great difficulty in accepting the idea that *societas delinquere potest*. The theory of the legal entity's fiction considers the legal entity as the creation of law, and therefore, according to this theory, a legal person cannot be an active subject of a crime. Moreover, the principle of personal liability, as well as the fact that the offense is committed with guilt, which denotes a psychic attitude specific to human beings, has long determined the criminal branch to exempt commercial companies from liability. However, the criminal law system has slowly adapted to the reality of the legal person, embracing the theory of reality, which considers the legal person a concrete reality. Thus, the idea commonly shared is that a legal person can become a criminal, and therefore subject to criminal liability.

The criminal liability of the moral person had been enshrined in the canon law by the 18th century, being abolished after the French Revolution in almost all states. However, since the 19th century, they have resumed discussions on the responsibility of the moral person, although most doctrine considered that in modern law such liability cannot be accepted.[2]

In 1929, the Romanian Criminal Law Association discussed the question of the liability of legal persons at the Second International Congress on Criminal Law, 6-12 October 1929 held in Bucharest. On this occasion, it recommended introducing "effective social protection measures against the moral persons" into

---

[1] Ramona Mihaela Coman - Faculty of Economics and Law, University of Medicine, Pharmacy, Sciences and Technology of Targu Mures, Romania, moldovan_ramona@yahoo.com.

[2] George Antoniu s.a., *Explicații preliminare ale noului cod penal,* volume II, Universul Juridic Printing Press, Bucharest 2011, p. 371.

domestic law for crimes committed in their interests or with the means provided by them.[3]

Professor Vintilă Dongoroz considered this idea as a common denominator of the two theses, of fiction and of reality, because it allowed on the one hand a form of criminal liability of the legal person, but on the other hand it avoided punishing it. If punishment is based on the idea of guilt, the safeguard measures, even though they are sanctions of criminal law, do not require the attribution of guilt. Thus, the Romanian Criminal Code of 1936 provided for three security measures that could be applied to moral persons: shutting down the establishment, dissolution and suspension.[4]

However, the 1968 Penal Code excluded any form of criminal liability of moral persons, and no security measures were stipulated. The Committee of Ministers of the Council of Europe, through Recommendations 12 and 18, stipulated the need for legal person liability ever since the 1980s. [5] The need for the legal person to be held accountable was primarily due to the need for effective repression of economic crimes. The criminal liability of the legal person has been introduced in many European countries, for example in Italy, as early as 2001, by Legislative Decree 231.

By Law no. 27 of January 16, 2002, published in the Official Gazette of Romania, Part I, no. 65 of 30 January 2002, the Romanian Parliament ratified the Criminal Law Convention on Corruption, adopted in Strasbourg on 27 January 1999. Article 18 of the Convention states that each party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for offenses of active corruption, influence peddling and capital laundering established under this Convention, if they are committed on their account by a natural person acting either individually or as a member of a body of the legal person where he/she performs managerial duties.

Until 2004, in Romania, legal persons could only be held liable civilly or contraventionally. In 2004, the publication of a New Criminal Code (which has never come into force - Law No. 301 of 2004[6]) was an attempt to introduce criminal liability for the legal person. However, the liability of the legal person was limited to the offense of counterfeiting of coins or other values, provided by Law no. 299 of 2004, a law that was in force for 2 years.

In 2006, by Law no. 278 of July 4, 2006, the 1969 Penal Code was amended, introducing for the first time the criminal liability of the legal person in the Romanian legislation. The criminal liability of the legal person, as regulated in our current legislation, by the New Penal Code that entered into force on February 1, 2014, approaches the general way of the so-called general clause, in

[3] *Ibidem*, p. 372.
[4] Art. 71 of 1936 Romanian Criminal Code.
[5] George Antoniu and others, *op,cit.,* p. 374.
[6] Offical Gazette no. 575 of 29 June 2004.

the sense that a legal person can commit both as an author, instigator or accomplice any crime, whatever its nature.[7]

2. Commercial company as a civilly liable party

Liability for another's deed, governed by civil law, is applicable to the criminal proceeding when a crime has caused damage and remedy for damage is required both from the accused and the civilly liable party. The commercial company may thus be considered as a party, or may request its consideration as a party, under the vicarious liability of the principal for the agent's deed.

The procedural position of company will thus be as subject of procedural passive capacity in the civil action exercised within the criminal lawsuit, and between the company and the accused there is procedural solidarity. In its defense, it can use the entire trial evidence.[8]

In order for a commercial company to be held civilly liable as a principal in a criminal lawsuit, the conditions that come out of the interpretation of art. 1373 of the Civil Code must be met- more precisely, the relationship between the principal and the agent should have its source in a law or a contract, the company should direct, supervise and control the agent, and the agent should perform certain functions or tasks in his or her interest. It was stated in the doctrine[9] that this liability should not be extended unjustifiably to those situations in which the agent exceeds the limits of his position, takes advantage of it or commits abuse of office, or if he/she acts for his/her own interest without connection with the interests of the principal or if he/she acts against the interests of the principal.

3. The accused or the civilly liable party?

The question that is rightly asked is what must be the procedural capacity of a commercial company in a criminal lawsuit? If for some crimes the answer is simple and the judicial practice is unitary, in the case of other crimes we can see situations in which the company is considered as a civilly responsible party, and the same situations in which it is the accused.

Thus, for example, in the case of road accidents committed by a driver employed by a company, or accidents at work, the issue of trial capacity does not arise - the company will be civilly liable, as the conditions of the criminal liability of the legal person are not met.

---

[7] Ilie Pascu, Vasile Dobrinoiu and others, *Noul cod penal comentat, partea generală*, 2nd edition, Universul Juridic Printing Press, Bucharest, 2014, p. 687.

[8] Vintilă Dongoroz and others, E*xplicații teoretice ale coduluid e procedură penală român, partea generală,* Vol. I, Editura Academiei Republicii Socialiste România, Bucharest 1875, p. 91.

[9] Ioan Neagu, Mircea Damaschin, *Tratat de procedură penală partea generală, în lumina noului cod de procedură penală,* Universul Juridic Printing Press, Bucharest, 2014, p. 201.

In the case of tax evasion and money laundering, however, we can notice a non-unitary practice. Sometimes only the administrator of the company is investigated for committing offenses, the company being a civilly liable party; sometimes we can notice the criminal liability of the company along with the criminal liability of the administrator. What is the correct position, or on what basis should its capacity be determined?

Analyzing the conditions of criminal liability of the legal person, we can notice that the offense must be committed in the performance of the object of activity or in the interest or on behalf of the legal person. By the phrase in *the performance of the object of activity* we understand the situation in which the offense is carried out on the occasion of the implementation in practice of the activities which, according to the law, the articles and memorandum of association, the legal person can carry out.

An offense is committed *in the interest* of the legal person when this benefits from the proceeds of the offense. Finally, the offense is committed *in the name* of the legal entity if the natural person acts as an agent or official representative.

The three assumptions do not present cumulative but distinct, alternative situations and this leads to the idea that the criminal liability of the legal person could also be engaged also when a crime is committed on behalf of company, yet contrary to its interests. [10]

An essential condition of criminal liability is that the act be committed with the guilt required by law. In the case of a legal person, the guilt relates to its bodies and organization. If the act is not committed by its bodies, but by an agent or by a representative, the guilt is established in relation to the attitude of the bodies. This stems from the way in which the decisions of the governing bodies or the existing practices, adopted or accepted/tolerated have been adopted. The liability of the legal person is excluded when the offense is unexpectedly committed by an agent of a legal person or if the criminal act does not fit into a practice that is tolerated or accepted by the legal person. The liability of the legal person is also excluded when it has created a well-established supervisory and control system that would reasonably have been able to prevent the commission of offenses. [11]

This case of non-punishment is expressly regulated in the Italian law, which at art. 6 of the Decree Law no. 231/2001 on Criminal Liability of Legal Entities establishes that companies are exempted from criminal responsibility if internal adequate models of organization and control are proved to be in place to prevent the commission of offenses through the proper establishment of an internal supervising body.

[1010] Ilie Pascu, Vasile Dobrinoiu a.o., op. cit., p. 689.
[11] *Ibidem*, p. 690.

But when we talk about a company with a sole shareholder and administrator who is committing a tax evasion, both the conditions of the principal's liability for the deed of the agent, that is, those for the introduction of the society as a civilly liable party, but also those related to a crime committed on behalf of (and perhaps even in the interest of) the company, which would entail criminal liability for it.

In such situations, we believe that the criminal liability of the commercial company would be fairly engaged, this being a broader liability and including civil liability.

4. The effect of the company's trial capacity in the case of payment of the damage to the tax evasion offense

In the case of the tax evasion offense, the legislator provided in Article 10 of the Law no. 241/2005 a cause for the reduction of the penalty limits by half, if the damage is fully paid up to the first term of the trial. The question was asked whether this cause of non-punishment/reduction of penalty limits has a real or personal character.

The High Court of Cassation and Justice, the Criminal Division, having been notified in relation to a preliminary ruling on the legal issue[12], determined that the provisions of Article 10 paragraph 1 of Law no. 241/2005, in the form in force until 1 February 2014 , regulates a cause of non-punishment / reduction of punishment limits with a personal character. It was considered that the legislator, in the generic assessment of the social danger of the act, considered that the full recovery of the damage caused by committing a tax evasion, up to the time established by the legislator, is *a circumstance subsequent to committing the offense* that influences this social danger and has as a result the attenuation of the sanctioning regime, in relation to the perpetrator's conduct after committing the deed.

As such, it is appreciated that the full coverage of the damage up to the procedural moment established by the legislator *does not refer to the act of tax evasion, but concerns the conduct of the perpetrator after the act of committing the act*, outlining the psychic attitude of active repentance manifested by the perpetrator up to that moment in the proceedings, conduct in relation to which the perpetrator's danger can be assessed.

At the same time, the Constitutional Court clarified the issue of the effects of covering the damages on the participants, on the occasion of analyzing the exceptions of unconstitutionality of the provisions of art. 10 par. (1) of the Law no. 241/2005. Thus, on several occasions, the Constitutional Court has determined that the effect of the reduction of the penalty limits applies to *the authors*

[12] "if Article 10 paragraph 1 of the Law no. 241/2005, in the form in force until February 1, 2014, regulates a cause of non-punishment/reduction of penalty limits of a real or personal character."

of the tax evasion offense that covered the damages under the conditions regulated by art. 10 par. (1) of the Law no. 241/2005 and the fact that *only the guilty person or the accused who fully covers the incurred damages during the criminal investigation or during the lawsuit until the first term of trial benefits from the reduction of punishment limits as provided by the law, has no significance to the restriction of the free access to justice* [13].

At the same time, the High Court of Cassation and Justice, the Criminal Section, considered as correct the interpretation given by Brasov County Court in the recitals of the Criminal Sentence no. 120 of March 24, 2011, upheld by Brasov Court of Appeal through Criminal Decision no. 95/A of September 15, 2011, in the sense that the provisions of art. 10 par. (1), the final consideration of Law no. 241/2005 are benefitted only by the accused who have paid the entire damages, within the term stipulated by the legislator, the court stating in the reasoning of the decision the personal circumstance character of the conduct of the accused in the entire remedy of the damages caused by the offense of tax evasion.

Judicial practice has established that it is necessary to ascertain the contribution of the accused in the full remedy of the criminal injury and not the attitude and contribution of the civil party in the debts' recovery. In other words, not every way of recovering the damages leads to the incidence of the non-punishment cause, but only the active, strictly personal attitude of the accused, to eliminate the consequences of the offense committed.

The doctrine[14] directly points out that if the civilly liable party pays the damages caused by the offense of tax evasion, the accused can no longer benefit from the cause of reduction of the punishment provided by art. 10 of the tax evasion law, in relation to the personal nature of the performance assumed by the law.[15]

Therefore, if the manager of a company commits the offense of tax evasion in the interest or on behalf of the company, even if the benefit (unlawfully obtained amounts) remains in the company's account, but this company is introduced as a civilly liable party civilly, not as the accused, the accused administrator should fully bear the damages recovery from his / her own income, in order

[13] Decision no. 638 of 28 June 2007, published in the Official Gazette of Romania, Part I, no. 581 of 23 August 2007, Decision of the Constitutional Court no. 60 of 15 January 2009, published in the Official Gazette of Romania, Part I, no. 112 of 25 February 2009, Decision of the Constitutional Court no. 272 of 16 March 2010, published in the Official Gazette of Romania, Part I, no. 254 of 20 April 2010, Decision of the Constitutional Court no. 647 of 19 June 2012, published in the Official Gazette of Romania, Part I, no. 494 of 18 July 2012.

[14] Mihail Udroiu, *Procedură penală- partea generală*, 3rd edition, Ed. C.H. Beck, Bucharest 2016, p. 97.

[15] On the contrary, see Decision no. 3204/R/21 October 2013 of The High Court of Cassation and Justice. In this case, Suceava Court of Appeal, where it was applied art. 10 of the Law no. 241/2005 regarding the accused, although the damages had been covered by the civilly responsible party. The appeal of the prosecutor's office criticizing the application of art. 10 could not be examined on the merits by the High Court on the grounds that the case of cassation was wrongly invoked.

to benefit from the cause of reducing the penalty limits. On the other hand, if the company is the accused party, paying joint damages, both the accused person and the accused company bringing their contribution to the payment, the cause of the reduction would be applicable.

It is obvious that it would be necessary, for the proper evolution of the criminal trial, but also for guaranteeing equality before the law (of natural and legal persons) that, at least in the situation in which the company had to gain from the evasion, to introduce the company not as a civilly liable party, but as the accused. Otherwise, the accused natural person would be treated differently and disadvantageously, in relation to the situation of the legal person in whose interest the offense was committed.

We consider that in order to unify the judicial practice, it would be necessary to refer the matter to the High Court of Cassation and Justice in order to establish in concrete terms the priority of engaging the criminal liability of the legal person, compared to its simple civil liability, when all conditions required by law are met.

Bibliography

1. George Antoniu s.a., *Explicații preliminare ale noului cod penal,* Volume II, Universul Juridic Printing Press, Bucharest 2011.
2. Ilie Pascu, Vasile Dobrinoiu and others.- *Noul cod penal comentat, partea generală*, 2nd edition, Universul Juridic Printing Press, Bucharest, 2014.
3. Ioan Neagu, Mircea Damaschin, *Tratat de procedură penală partea generală, în lumina noului cod de procedură penală,* Universul Juridic Printing Press, Bucharest, 2014.
4. Mihail Udroiu, *Procedură penală - partea generală*, 3rd edition, Ed. C.H. Beck, Bucharest 2016.
5. Vintilă Dongoroz and others, E*xplicații teoretice ale codului de procedură penală român, partea generală,* vol. I, Editura Academiei Republicii Socialiste România, Bucharest 1975.

Corruption – Aggravated Cause of Violations of the Rule of Law

Lecturer **Andrada NOUR**[1]

Abstract

The theme of this paper is to identify and analyze the causes and the effects of the corruption, antisocial behaviors that can be identified as having both national and supranational dimension. Although the study of this phenomenon is a concern manifested long both domestically and internationally, we believe that, from the point of view of its implications, is a theme that not only it can never be exhausted, but it presents a real use, especially in the context of a comprehensive process of prevention and combat of the antisocial manifestations, in order to maintain stability and the rule of law. In carrying out this work we used methods of research devoted to documentation, method: comparative method, analytical method, logical method, setting out the allegations on my opinions expressed in doctrine. Comments and personal opinions of entire scientific approach will, which would prove to be incomplete in their absence. I could not conclude this study without expressing some opinions regarding possible solutions that could be envisaged to stop or at least to minimize the risks.

Keywords: *corruption, organized crime, law, economics, public administration, political power*

JEL Classification: K14

1. Preliminary issues

This scientific approach, entitled "Corruption - aggravated cause of violation of the rule of law" is a highly topical and opportunity theme, the work being based on a thorough scientific research that gives it a theoretical and practical special importance. The objective of this paper is to analyze the phenomenon of corruption in the light of the factors giving rise to corruption activities, to analyze the forms in which corruption manifests itself and the need to prevent and eradicate or, at least, to fight against its will. We also wanted to examine in which way the means of counteracting the corupţional phenomenon, existing on national, european and international level work in order to operate the exercise of Justice, in order to remove the negative effects of these anti-social and illegal manifestations of and in order to ensure the stability of the rule of law.

This paper captures the innovations introduced by national and international regulations. We deemed it necessary to highlight the progress of regulations in this area but also existing problems, gaps at the level of these new regulations, obstacles faced by the legislator in order to make national legislation to become efficient in issues of criminalisation of the corruption, in the context

[1] Andrada Nour - Hyperion University of Bucharest, Romania, andrada_nour@yahoo.com.

of achieving economic progress and in the context of the necessity of protecting the rule of law. Within this framework, we considered that, through research undertaken we can contribute to the enrichment of the legal doctrine, to optimize knowledge process in this area and, of course, to use in practice the ideas expressed here.

Personal contribution can be found in each of the four sections of the paper and it is reflected by the way of analysing the concepts used, through appreciation of the doctrinal opinions brought to the attention, through expressing personal and the formulation of conclusions.

On the structure of the scientific approach taken, specify that it comprises 4 sections, preceded by a brief summary and an introduction and followed by conclusions and bibliographic references.

This scientific approach had in mind five dimensions: historical method, comparative, descriptive, analytical and logical perspective.

The descriptive method and analytical method regard the spatial-temporal evolution of existing legal instruments at both the international level and at european level on the ground of the fight against corruption acts and facts, the presentation of the rules existing in the national legislation concerning the criminalization of such facts, as the legislature has failed or has not failed to transpose into national law the international provisions, the presenting and the analysing the causes, forms and consequences of the corruption.

The logical perspective considering the normative legal framework research of existing regulations in the field of the fight against corruption, pointing out the logical nature of the work of drafting the law and its application. By applying the rules of formal logic to reach conclusions and personal opinions as they were formulated, we used logic reasoning.

Historical perspective is in close connection with the logical, analytical and comparative perspective. It is based on research into the historical and social and political conditions in the national, european, and international levels, which led to the emergence and the amplification of the corupţional phenomenon.

2. The notion of corruption. Generating corruption factors

With the collapse of the Communist regime, there were disbanded and the legal and administrative, political and economical structures, specific for the bureaucratic and totalitarian old nomenclature. The years after the revolution were marked by fundamental reforms in all areas, for the democratization of civil society, for the transition to a market economy and for the rule of law accomplishment.

The extensive and difficult transition process, marked by contradictions and conflicts faced, on the one hand, with the existence of legal and social norms which were perpetuated, although they were outdated or obsolete because of the

bureaucratic mentality and on the other hand, with structures and institutions which remained inoperative and ineffective as a "memory" of the old regime.

During this transient process, the normal inter-human and inter-institutional relations and has been affected by the so poor and incomplete legislation characteristic of this period, and also by a diminished social control. The whole context has favored the emergence of powerful manifestations of antisocial character, especially among certain social groups thirsting for power and the desire to enrichment, events materialized in acts of fraud, smuggling, corruption etc.

We must point out that corruption have known expression not only in post revolutionary years, but also under communism they were most often hushed up, denied or minimized in order to create the illusion of perfection regarding that system.

Corruption were "labeled" as a subjective manifestation of expression of a foreign behavior of the socialist essence, and individuals involved in such acts were considered "greedy", "immoral", "vicious", "venal" etc., forgeting aboutt the dysfunctions manifested in political and institutional over centralized system, unable to achieve normal adequacy goals and legitimate means for most individuals.[2]

Given that corruption knows the old throughout history, we must say that with the fall of communism, it took a special scale in all sectors, whether we talk about the political, administrative, financial and banking, commercial or economic. We emphasize also that this boost of coruption could be possible both because of the political and institutional dysfunction taken during before revolution and subsequently maintained and because of the specific transition period transformations to a market economy. No less true is that post-revolution, there have been new forms of corruption, resulting in the gradual deterioration of public property, illegal transfers of capital and goods, theft organized, fraudulent bankruptcy, abuse and negligence, false documents accounting and financial fraud, out of the land of significant economic value and goods belonging to the national cultural heritage.[3]

Basically, in the last 30 years, corruption was established as a phenomenon organized, quasi-generalized, managing to show up at the highest level in all sectors as a real octopus whose tentacles have invaded the political, administrative, legislative and judiciary alike.

In a society affected by globalization, the consequences of corruption and political instability will manifest not only internally, but it can have a variety of unpredictable ramifications including expanded internationally.

Among the harmful effects of corruption there are the insufficient allocation of financial resources at national level, the inefficient central or local

---

[2] Dan Banciu, Sorin M. Rădulescu, *Corupţia şi crima organizată în România*, Ed. Continent XXI, Bucharest, 1994, p. 39.
[3] Dan Banciu, *Sociologie juridică*, Ed. Hyperion, Bucharest, 1995, p. 146.

administrative system, stagnation or even decrease economical growth, decay political system, reducing or even lack of foreign investment, decreased social protection of employees, lack of competition loyal, impaired justice in terms of the principle of equity, increased organized crime. According to the General Anticorruption Department (2011), organized crime and corruption are closely interdependent, meaning that whenever recorded increases valences organized crime, in public order events are increasing and corrupt.

Corruption is an extremely complex phenomenon, it is very difficult if not impossible to define clearly and inclusiveness. In a general sense, corruption is an abuse of power for the purpose of private interest[4]. According to the definition that is found in the dictionary of the Romanian Language, corruption is "state of deviation from morality, of honor, of duty". We could say that this process aims to obtain personal benefits or benefits by improper exercise of public power abusively and illegally or legally only in appearance. Corruption takes the form of immorality and illegal influence, abuse and coercion in the exercise of public power. However, the definition of this phenomenon, we subscribe to the opinion that corruption "includes the network of individuals, groups and organizations linked by relationships of complicity, mutual concealment and cover in order to satisfy moral and material, public or private interests ".[5]

When we talk about the factors generating corruption, we must consider, on the one hand, a number of general factors, such as shortness living standards of citizens by high costs and damage the national economy, rigidity fiscal policy, legislation incomplete and inadequate to the current social realities etc., and, on the other hand, a number of specific factors, political, administrative, legal, social, cultural etc. It became notorious that bureaucracy system involves almost all cases, the reward "in particular" any civil servant for every citizen's calls even when the latter is legally entitled to address those problems. Also, insufficient salary, due to the high cost of living generally determines their corruptibility and some social tolerance of reaching illegal ways to solve problems.[6]

Besides all these factors, tolerance of decisin factors regarding the phenomenon of corruption, inefficient penalty system, lack credibility and, consequently, lack of the authority of the state institutions, inefficient mechanisms of social control, crisis and instability of the legal system contributes to strengthening and generalization of corruption to the highest level. The main reasons for the existence of the corruption phenomen are the moral degradation of society, bureaucracy, poor quality of public service delivery, inefficient

---

[4] Johann Graf Lambsdorff, *The Institutional Economics of Corruption and Reform: Theory, Evidence and Policy*, Cambridge University Press, Cambridge, 2007, p. 16.
[5] Dan Banciu, Sorin M. Rădulescu, *op. cit. (Corupţia şi crima organizată în România)*, p. 20-21.
[6] Theodor Mrejeru, *Infracţiunile de corupţie. Aspecte teoretice şi practice*, Ed. AllBeck, Bucharest, 2000, p. 1.

mechanisms of control of the judiciary, opacity that characterizes the decision-making process, low remuneration of civil servants.

3. Forms of corruption

Corruptive phenomenon is considered as a disease, a cancer that devours civil society, rule of law undermined its foundations.The economic process is diverted from its purpose and huge funds are at stake for satisfying personal interests. Corruptive phenomena come to infiltrate all sectors, to the highest level, destroying the welfare of society as a whole.

Economic corruption is materialized through a series of illegal activities, which take the form of crime and unlawful administration, fraud, unfair competition, forgery and bank accounts, whose authors are enterprises (autonomous or commercial companies) or individuals , offenses committed in order to obtain obtain financial benefits. Most often, authors willing to compromise and favoritism, holding management positions or are vested with control.

Nationally, economically, the negative effects of corruption are reflected in the slowdown in reform, through increases in prices negatively, by degradation of living standards of society. Studies have shown that among the many effects of corruption include the economic costs that reach huge amounts.

We believe that when the state is concerned to provide protection excessive to the public sector through legislation and by applying excessive fiscal and economic measures in this regard, and also creates the opportunity of corruption amplification.

Consequently, in order to reduce corruption, there are necessary economic measures aimed at speeding up the reform and privatization, halting economic decline, subsidizing the private sector, ensuring monetary stability and exchange rate, stopping inflation.[7]

So much has been said about eradicating corruption and economical growth that these two notions have become somewhat stereotyped character expressions. However, we can see a very obvious fact, that in poor countries it was recorded the highest level of corruption. So being the critical situation, we can not ask whether poverty is the main determinant of corruption or the corruption is that who leads to poverty.

Of course, it is generally true that high economic growth involves lowering corrupt. How, otherwise, we can not say that the absence of corruption requires economic growth. It would be utopian to believe that a country without corruption and without corrupt means a prosperous, as the fight against corruption is only one element of all those who contribute to the economic growth of a

[7] Dan Banciu, *op. cit. (Sociologie juridică)*, p. 161.

state. It is true that the most significant way in which corruption affects economic growth (in excess of 50%) is political instability.

Professional corruption (administrative) is materialized by committing immoral acts and deeds, illegal and contrary to the rules of professional ethics by public officials or by other persons in connection with the performance of their duties. Thus, civil servants perform their job duties conditionally and preferential or not they perform or perform them incorrectly, aim to satisfy their own interests or obtaining advantages, usually financial, but at the same time, harming the general interest of society.

Antisocial manifestations of corruption acts in this sector may be aimed at acquiring and using public resources for private use or conclude business transactions by the circumvention of the legislation in force. Also, in practice there were met numerous cases where public functions were taken on various criteria, less on the basis on competitiveness and professionalism. Needless to remind the situations where some employees have either been kept in certain positions without being suitable for the position in terms of training or were even promoted without merits.

Political corruption. In Max Weber's view, "the official professional" (government) is an essential element of social order, representing "the pillar of the modern state and modern economy"[8].

Officials professional, in other words, the occupants of important public functions, are the exponent of an administration created to meet the general interest of society, reason what for the conduct is governed by rational rules and impersonal legal norms. In this sense, at least in theory, he has moral and legal duty to ensure the maintenance the delimitation of the personal interests (private) from the public interest (public) in order not to prejudice the social order.

However, it began to sink the corruption and among the highest officials of the state, public officials, governors or members of the ruling party. At this level too, the professional conduct is dictated by civil and personal interests, while disregarding the general interest of the civil society that lead, favoritism, bias or bribes are just forms of expression of the effects of corruption.

There are appeared characters and have formed groups of "interests" and "pressure" which have important economic resources and capital and using them as means of corruption of those in power in order to increase their own benefits and strengthening position held.

Bribery, traffic and buying influence, fraud and extortion are just some of the ways corruption materializes in the political area, public office came to be used exclusively to satisfy private interests. Abuse of power as a form of expression of political corruption, manifested either by circumventing the law,

[8] Max Weber, *Etica protestantă şi spiritul capitalismului*, Translation, Ed. Humanitas, Bucharest, 1993, p. 7.

either by breaking it directly in order to reinforce social position and maximize capital.

It is known and the practice found that the phenomenon of corruption have valences that achieve the highest level in the case of the top politicians or in the case of the people who hold in their hands the leadership of the state, primarily because of the importance of the functions vested in them.

Worldwide Governance Indicators, which assesses the degree of corruption, measuring the extent to which public authority is exercised for the benefit of private gain, including petty and grand forms of corruption, as well as "capture" of the state by elites and private interests.[9]

In our opinion, given that all legislation and existing controls are inadequate diminishing corruption of the political class leading, it is impetuous necessary to prohibit the financing of election campaigns, involving members of the political class in business, and appointment to public positions, so the central administration and the local administration level, no longer to be made politically.

Unfortunately, however, very often, amid a lack of interest marked on eradicating or at least to reduce the phenomena, it become active subjects of corruption crimes including those who required a finding of such acts and punish the those who are guilty of committing them.

We subscribe to the view expressed in the doctrine that "the phenomenon of corruption is not just a lump, a foreign body can be incised and removed anytime, anyway, but a true bond that is articulated and includes a whole system."[10]

4. The need to prevent and combat corruption

We believe that the manifestations of antisocial nature that characterize corruption phenomenon, considering the extremely high degree of social danger, should be carefully controlled and monitored in order to punish and prosecute people who commit them. Consequently, it is necessary to develop adequate legislation, but without it becoming excessive, establishment of institutions in order to improve the fight against corruption and sociological measures with educational character.

In the context of the current political system and democracy early established in Romania, a legislative framework overcrowded probably would only increase social conflicts caused by poverty, high unemployment rate, inflation process, antisocial behaviors such fraud or corruption. Behold, we did

[9] Sorin-Daniel Manole, Raluca Erdnic, *Evaluarea impactului corupţiei asupra economiei României*, the document is available online at www.strategiimanageriale.ro, accessed on 10.11.2018.
[10] Dan Banciu, Sorin M. Rădulescu, *op. cit. (Corupţia şi crima organizată în România)*, p. 79.

mention that legislation to stop or, at least, reducing the corruption phenomen must not be excessive, but effective weighted.

At first glance, we would be tempted to believe that the law, by virtue of its mandatory provisions and legal force at its disposal, should cover and solve all situations arising in practice and with their help the state to subject all members of society. Nothing more wrong, because this would achieve a real "inflation" of laws, resulting in a restrictive social control went to extremes that will reach restricting democratic individual rights and freedoms and also the amplification of penalties system outside of the normal range. On the other hand, practical experience during the communist regime also proved that legislative inflation failed to intervene effectively in the fight against corruption, bribery, trading in influence, abuse of power are not foreign at all to that time. It is also known that "the most intense degree of corruption is achieved in authoritarian regimes where ambitions and rivalries find no outlet and where there is no institutional brake for people who hold power"[11].

On the one hand, laws are intended to regulate relations and social relations, and on the other hand, they also serve to criminalize antisocial actions that may occur in violation of legal norms. This reality explain why, in a country where crime and illegality are ubiquitous, legislative inflation would only contribute to improving the methods of action of criminals and to increase the likelihood of committing crimes, of course, depending on the "degree the laws enjoy general support of the population, the ease with which they can be violated by someone without that he can be identified, as well as damages resulting from their violation"[12]. Seeking to emphasize the negative effects of legislative inflation, A. Toffler cites UK parliamentary statements: "We solved all legal matters. We adopted seven laws against inflation. We removed repeatedly injustice. Each issue was resolved repeatedly by law. But problems remain. Only one law does not work"[13].

Undoubtedly, in the context of the realities existing in the country, determined also by the integration into the European Union, we need to create a legislative framework that will contribute to improving the political and institutional systems in order to reduce as much as possible the risk of antisocial behaviors that could endanger the rule of law, order and social stability, but this does not mean that legislative inflation is saving solution. To prevent and fight against corruption it is required, for example, the adopting effective rules and weighted.

Although nationwide found that many of the measures taken to reduce corruption phenomen have been implemented incorrectly, however, in recent years, Romania has expressed an increased concern about preventing and fighting

---

[11] Alvin Toffler, *Înainte de Watergate. Probleme ale corupţiei în societatea americană*, Ed. Politica, Bucharest, 1989, p. 9.
[12] Samuel P. Huntington, *Political order in chancing societies*, London, 1968, p. 62.
[13] Alvin Toffler, *Al treilea val*, Ed. Politica, Bucharest, 1983, p. 532.

corruption, being created for this reason, specialized bodies, including the National Anticorruption Directorate and the General Anticorruption Directorate. We must emphasize that the National Anticorruption Directorate activity, reflected in the 4738 investigation of high level corruption cases, was regarded positively by the European Commission. In 2,000 of the total cases were involved politicians and directors of public institutions or private companies. In six years, most cases were completed, resulting in the 1496 final conviction decision.

It was also tightened sanctions system and it was conducted cooperation with other states and international organizations.

Thus, on 27.01.1999, the Permanent Representative of Romania to the Council of Europe signed with representatives of other Member States, Criminal Law Convention on Corruption, adopted on 11.04.1998, in the framework of the 103rd Session Council of Europe Committee of Ministers. The provisions of this document complement those of the European Union Convention in May 1997 and those of and the OECD Convention of December 1997[14].

However, internally, in terms of legislation, significant importance it has the adoption of the Law no.78/2000 on preventing, detecting and sanctioning corruption published in the Official Gazette, part I, no. 65 of 30.01.2002.

We believe that in order to prevent and combat corruption, it is important to adopt a series of sociological measures in educational plan. These measures are intended to contribute in changing the mentality and the tolerance of petty corruption (which later leads to amplification them) perceived by the public opinion as proof of accomplishment and gratitude to the official who meets act according to its attributions.[15] Sociological approaches are taken in order to establish the causes that generate the corruption phenomenon, the conditions favorable for increasing such events, those intensity and frequency.

We believe that this scourge that it is corruption it is almost impossible to eradicate, even assuming that it could be identified all the causes that generate it, because man by nature, tends to be concerned with the own interest, and the man is the one who is governing or developing business. In our opinion, to decrease the coruption phenomen it is impetuous to fight corruption as well as helping political power to manifest all members of society in this respect.

5. Combating corruption at national, European and international

The fight against corruption has become a major concern both in the countries of the world and the international organizations and regional bodies, because of the strong negative impact it has corruptive phenomena in social, economic and political. European Union, United Nations, Organization for

[14] Theodor Mrejeru, *Infracţiunile de corupţie-aspecte teoretice şi practice,* Ed. AllBeck, Bucharest, 2000, p. 5.
[15] *Ibidem*.

Economic Cooperation and Development and Transparency International supported efforts to combat corruption at world level. In addition to national strategies based on economic development, there are required proper governance, respecting the law in force and to exercise corruption control both in the public and private sectors.

In recent years, at international level, to prevent and combat corruption, regarded as an abuse of public office to obtain the benefits of a personal nature, 170 states have recognized the existing reality: "Corruption is no longer just a problem local, but a transnational phenomenon that affects all societies and economies". Thus, the assumption that fighting corruption is the responsibility of all world countries, these countries have agreed to sign the United Nations Convention Against Corruption (UNCAC), which provides on the one hand, the promotion and strengthening of preventive measures and combating the corruption phenomenon more efficiently and effectively, and, on the other hand, promote, facilitate and support cooperation and providing international technical assistance to prevent and combat terrorism, including the recovery of the proceeds of corrupt activities and their return to the state of provenance.

Under the Convention, State Parties shall implement provisions in national law, such as those relating to bribery of domestic public officials, bribery of foreign public officials active, laundering proceeds of crime and obstruction of justice. It is important to note that the Convention is criminalizing a much larger numer of acts, it is increased the definition of the concept of public official and, although not mandatory, is provided for the first time, implementing into the national legislations of the corruption fom the private sector.

We note that, unfortunately, the major deficiency of this document is that the rules on transparency of party funding were not provided as required.

Also, to facilitate asset recovery of the proceeds is to recover assets derived from corruption activities using direct civil action, even when there are difficulties such immunity othe officials or moving in other jurisdictions.

Comparing the Convention with the existing contents such other international documents on issues to fight corruption, such as the Inter-American Convention against Corruption (1996), the Convention on Bribery of Foreign Public Officials in Business Transactions Transnational (1999) or the African Union Convention Against Corruption (2003) find that UNCAC treats preventing and combating corruption in the most comprehensive manner.[16]

In the last 10 years, attempts internationally to punish multinationals that have committed acts of bribery of public officials in order to obtain illegal benefits and recover property acquired in such circumstances. Often these problems were resolved amicably without criminal liability of persons responsible for such antisocial behaviors, which seriously damaged the interests

[16] Ophelie Brunelle-Quraishi, *Assessing the Revelancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis*, „Notre Dame Journal of International & Comparative Law", 2012, Vol.2, Issue 1, p. 101 et seq.

of society, especially in cases where bribery is committed in the context of projects involving infrastructure.

We believe that in such situations, both the company and bribed public officials should be answerable for acts committed. Only that, in practice, by signing the UNCAC, which facilitates full cooperation in the matter of investigation and adjudication of transnational corruption, it was difficult to achieve because of the characteristics of multijurisdictional cases.

We believe that Romanian legislature should create both appropriate legal framework and tools of international cooperation to recover amounts lost by committing huge corruption activities and to reinvest capital back into the public system.

Found that although the European plan Member States should cooperate to counter corruption phenomenon, yet there is no document to give a definition of corruption and to ensure the legal incrimination. Developed by the EU Framework Decision on combating corruption in the private sector since 2003, governing bribery and bribery in the conduct commercial transactions and its application has shown positive results. How sphere of corrupt behavior manifested in the public sector is much wider than that manifested in the private sector, it makes it much more difficult to combat.

In the European Union, the Stockholm Program in 2009, was established as a strategic objective at this level, freezing any assets obtained through corruption and organized crime activities. Also, internal strategy of the European Union ruled in 2011 the need to review EU legal framework on confiscation and recovery of assets.

A year later, in 2012, was submitted by the European Commission proposal for a Directive on the freezing and confiscation of assets acquired through such activities as criminal, thus confiscation becomes possible even when the offenders who left the country would not could be located.

However, there were established National Offices for Asset Recovery, following a decision by the European Commission which called for Member States and their operation was launched a platform to enhance cooperation and coordination at European level.

In Romania, it arose Office for Crime Prevention and Cooperation with the Office Assets Recovery in Member States under the auspices of the Ministry of Justice, the national office for the recovery, as defined in Decision 2007/845/JAI[17] of 6 December 2007 concerning cooperation recovery offices of the Member States in the field of tracing and identification of proceeds of crime or other property related offenses.[18] The office is sworn to deal with freezing, seizure and confiscation of proceeds of crime of corruption, based on the decisions of national courts. Although institutional progress in this area is

[17] Published in the Official Journal of the European Union, L series, no. 332 of 18 December 2007.
[18] Article 1 of the Government Decision no. 32/2011 published in the Official Gazette of Romania, Part I, no. 51 of 20 January 2011.

notable, however, a result of the monitoring reports that public institutions are reserved for the transmission of information regarding the enforcement of judgments[19].

Romania made remarkable efforts to achieve economic progress, which is why the fight against corruption has become a constant sustained in the context of current realities, that the bribery in the public sector, traffic and buying influence, money laundering, conflicts of interest, financing arrangements illegal political parties, politicization of administration and justice, which emerges as a major risk to the rule of law, we are not foreign, quite the contrary.

Improving legislation and its correct application implementation are paramount to combat corruption. To ensure high efficiency legislation in this area, our country ratified the United Nations Convention against Corruption and the Council of Europe conventions on criminal matters and civil matters relating to corruption and transposed into national law decisions EU framework and the text of the current Criminal Code has succeeded cover some of the gaps. Current Penal Code penalizes, among other things, bribery, trading in influence, buying influence, as crimes whose active subject is civil servant. These criminality set out in the Criminal Code are supplemented by the mandatory provisions contained in other laws such as the Law no.78/2000 on preventing, discovering and sanctioning of corruption, Law no. 161/2003 on certain measures to ensure transparency in exercising public dignities, public functions and the business environment, preventing and sanctioning corruption, Law no. 176/2010 regarding the integrity in exercising public functions and dignities etc.

6. Conclusions

In our opinion, in order to ensure economic progress and effective governance is necessary to ensure a clean business environment where corruption is not can expand their tentacles.

In this regard, we believe that reducing bureaucracy, increasing the quality of public service delivery, establishing effective control mechanisms, transparency in decision making, increase the remuneration of civil servants, creating a sanctioning system effectively would be likely to contribute to reducing the frequency of acts of demonstration corruption in the public sector.

We also expressed the view that in order to reduce the incidence of acts and corruption in the political class, it is necessary to prohibit the financing of election campaigns, depoliticizing public functions and also not involving members of the political class in business. Need to develop an effective legal system that would provide a control to fight corruption and that those who are guilty of committing such acts as may be sanctioned.

[19] UNCAC Implementation Self-Asessment Report, România, the document is available online at www.uncaccoalition.org/images/PDF/executive-summary-romania.pdf, accessed on 22.07.2015.

We believe that the Romanian legislature should create both appropriate legal framework and tools of international cooperation to recover amounts lost by committing huge corruption activities and to reinvest capital back into the public system.

Bibliography

1. Dan Banciu, Sorin M. Rădulescu, *Corupţia şi crima organizată în România*, Ed. Continent XXI, Bucharest, 1994.
2. Dan Banciu, *Sociologie juridică*, Ed. Hyperion, Bucharest, 1995.
3. Ophelie Brunelle-Quraishi, *Assessing the Revelancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis*, „Notre Dame Journal of International & Comparative Law", 2012, Vol.2, Issue 1, p. 101-166.
4. Samuel P. Huntington, *Political order in chancing societies*, London, 1968.
5. Johann Graf Lambsdorff, *The Institutional Economics of Corruption and Reform: Theory, Evidence and Policy*, Cambridge University Press, Cambridge, 2007.
6. Sorin-Daniel Manole, Raluca Erdnic, *Evaluarea impactului corupţiei asupra economiei României*, the document is available online at www.strategiimanageriale.ro, accessed on 10.11.2018.
7. Theodor Mrejeru, *Infracţiunile de corupţie. Aspecte teoretice şi practice*, Ed. AllBeck, Bucharest, 2000.
8. Alvin Toffler, *Înainte de Watergate. Probleme ale corupţiei în societatea americană*, Ed. Politica, Bucharest, 1989.
9. Alvin Toffler, *Al treilea val*, Ed. Politica, Bucharest, 1983.
10. Max Weber, *Etica protestantă şi spiritul capitalismului*, traducere, Ed. Humanitas, Bucharest, 1993.

Special or Extended Confiscation During the Criminal Trial in Romania

associate professor **Daniela Cristina VALEA**[1]

Abstract

In the field of the Romanian Criminal trial, especially regarding the serious defences, judiciary body may order asset freezing, in order to avoid concealment, destruction, disposal or dissipation of the assets that may be subject to special or extended confiscation or that may serve to secure the penalty by fine enforcement or to pay court fees or to compensate damages caused by the committed offense. A general legal frame has provide by art. 112 and 112[1] Criminal Code, art. 249-253 Criminal Procedure Code. For a clear outline of the special or extended confiscation, including the fact that such aspects may prejudice the rights of the defendant or could interesting entire criminal trail, must take into consideration the provisions and guarantees provided by the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), and also the Romanian Constitutional Court's jurisprudence or the High Court of Review and Justice decisions regarding the motion of appeal in the interest of the law.

Keywords: *special confiscation; extended confiscation; asset freezing; trial; rights of defendant*

JEL Clasification: K14, K42

1. General considerations on the role and nature of special confiscation and enhanced confiscation measures

In Romania, in criminal proceedings, the judicial bodies, according to the competence established by the law, may have a series of instruments to fight the criminal phenomenon, some of which have an economic component. Both criminal law bodies (sacs) and criminal law (procedural measures, such as insurers) can be considered. Between criminal law sanctions, the measure of special confiscation and extended confiscation as well as procedural measures such as precautionary measures can have a strong economic and financial impact.

Thus, firstly, the current Criminal Code, by art. 112 and 112[1] provides a special instrument for the fight against crime (generally not only the economic one), namely the special confiscation and the extended confiscation. Included in the category of safety measures, it clearly preserves the sanctioning nature of the institution of criminal law sanction, but, as stated in the doctrine, it is

[1] Daniela Cristina Valea - Faculty of Economics and Law, Department of Law and Public Administration, University of Medicine, Pharmacy, Sciences and Tehnology of Tirgu Mures; Lawyer, Mures Bar Association, Romania, vdaniela2002@yahoo.com.

characterized mainly by the preventive character, the coercive being a subsidiary one[2].

Secondly, the current Romanian Criminal Procedure Code (articles 249-254) regulates a series of procedural measures of a real, provisional[3] and insurable nature, in order to "avoid the concealment, destruction, alienation or evasion of the prosecution goods which may be the subject of special confiscation or extended confiscation or which may serve to guarantee the execution of the punishment of the fine or of legal expenses or the repair of the damage caused by the crime" (Article 249 paragraph 1 of the Criminal Code), respectively the unavailability of goods mobile or immovable property by imposing a seizure[4] on them (Article 249 (2) Criminal Procedure Code) or mortgage notes[5].

Starting from the basic legal provisions, a distinction must be made between the scope of the property which may be the subject of special confiscation and the extended confiscation and the scope of the assets which may be covered by an assurance measure because they may serve to guarantee the execution of the penalty or of the fine repairing the damage caused by the offense.

Special confiscation and extensive confiscation are safety measures, so criminal law sanctions have a major preventive character. However, the application of such a measure is not conditional on the existence of criminal liability, but only on the existence of a materialized danger not in the social danger of the offense incriminated by the criminal law, but in the particular danger which characterizes certain categories of goods (some dangerous through themselves, other dangerous by destination or by origin). In order to emphasize the priority of the precautionary nature of such a measure, an example of judicial practice, a court decision which held that the application for restitution of a confiscated property motivated by the decriminalization of the deed but formulated after the execution of the principal sentence was considered inadmissible[6].

The regulation and use of such methods is justified by the need either to eliminate such goods or to restrict or even prohibit access to them.

---

[2] Alexandru Boroi in George Antoniu (coord.), *Explicațiile teoretice și practice ale noului Cod penal*, vol. II, Universul Juridic, Bucharest, 2011, pp. 281-283.

[3] Decision of the Constitutional Court no. 629 of 8 October 2015, published in the Official Gazette no. 868 of November 20, 2015.

[4] The seizure regulated by the Criminal Procedure Code is similar to the seizure insured under the Code of Civil Procedure - Alexandru Boroi, Gina Negruț, *Drept procesual penal*, Ed. Hamangiu, Bucharest, 2017, p. 375. In the opinion of the authors, this similarity also explains the legislature's inconsistency regarding the use of the term "seizure", when of the "seizure insurer" (for example, in Article 252^2 paragraph 2 of the Criminal Procedure Code, article 253 paragraph 2 letter b) Criminal Procedure Code).

[5] For details on the legal nature and procedure of the precautionary measures see Daniela Cristina Valea, *Some consideration regarding legal limitations about asset freezing during the criminal trial in Romania*, „Curentul Juridic", no. 4/2017, pp. 166-174.

[6] Bucharest Court of Appeal, criminal decision no. 292/2001, in Alexandru Boroi in George Antoniu (coord.), *op.cit.*, p. 312.

Specifically, in terms of legal nature, special confiscation and extended confiscation are real measures of forced (and free)[7] passage of property in the (private[8]) property of the state from the perpetrator or even from other persons under the law.

2. Special confiscation (article 112 of the Criminal Code)

According to art. 112 Criminal Code, the following categories of goods may be subject to special confiscation:

"a) the goods produced by committing the deed provided by the criminal law;

b) the goods that have been used, in any way, or intended to be used for the commission of an act provided for by the criminal law, if they are the offender, or if it is the purpose of their use for another person;

c) the goods used, immediately after the act was committed, in order to ensure the escape of the perpetrator or the preservation of the benefit or the obtained product, if they are of the perpetrator or if, for another person, it has the purpose of their use;

d) the goods which have been given to cause the commission of a criminal act or to reward the perpetrator;

e) the goods acquired by committing the offense provided for by the criminal law, unless they are returned to the injured party and insofar as they do not serve to compensate it;

f) the goods the possession of which is prohibited by criminal law".

So according to art. 112^1 Criminal Code subject to extensive confiscation and other goods than those referred to in art. 112 Criminal Code (including sums of money) if the person is convicted of committing one of the offenses expressly provided, if the deed is likely to procure material benefit, and the penalty prescribed by law is 4 years' imprisonment or more.

With respect to the first category of goods which may be covered by the special confiscation measure provided by art. 112 letter a) Criminal Code, it must be stated that it can be either goods produced by committing an act provided for by the criminal law (for example, counterfeit goods actually produced (false inscriptions, false pictures, false money) or transformed (by changing the composition, for example, medicines)) or goods produced by committing a criminal act but which only meets the characteristics of the objective generic character of the offense (as in the case of the acts provided for by the criminal law but in connection with which the justifying or non-punishable causes covered by art. 18-31 Criminal Code)[9].

---

[7] Alexandru Boroi in George Antoniu (coord.), *op.cit.*, p. 303.

[8] The competence of capitalizing the goods entered in this way in the private property of the state belongs to the National Authority for Fiscal Administration.

[9] Alexandru Boroi in George Antoniu (coord.), *op.cit*, p. 304.

A second category of goods that may be subject to the special confiscation measure consists of goods that have been used in any way or intended to be used for the commission of an act provided for by the criminal law if they are the offender or if belonging to another person , it has known the purpose of their use (article 112 (1) letter b) of the Criminal Code).

First of all, in order to be confiscated, the goods must have been used or intended to be used to commit an act of criminal law in a concrete manner and, more importantly, to be the means of committing the deed. For example, the electronic device used for the production of pornographic materials may be targeted by the measure of confiscation, but not the building in which the equipment was used and used. Although the text of the law, by its formulation, that the property can be confiscated virtually irrespective of its use, would allow for an exaggerated widening of the scope of the goods concerned by such a measure, it is essential, however, that the good be the concrete means in itself committing the criminal offense. In this respect, it is stated punctual with regard to the drug trafficking offense, the supreme court which held that in order to be able to confiscate the means of transport it must have actually been used to achieve the objective side of one of the ways of the offense or, if it is intended to be intended for express use, has been manufactured, prepared or adapted in order to achieve the objective aspect of the deed[10].

Secondly, another condition must be met, namely that the property belongs to the perpetrator or, even if it belongs to another person, the latter has known the purpose of using the good. If the person to whom the good belongs, other than the perpetrator, knew the purpose in which the good was used or used, it is the question of retaining a form of criminal participation. We suppose that, if only drugs were hidden between goods legally transported with a means of transport unchanged in any way for that purpose, whose driver or owner was unaware of this, special confiscation would not he could also target the means of transport (also considering the provisions of the first sentence of article 112, paragraph 2, Criminal Code on the disproportionality of value).

Considering the opinion expressed in the specialty literature, we consider that the special confiscation of the goods provided by art. 112 par. 1 letter b) Criminal Code is not applicable in the case of the commission of the culpable offenses[11].

Article 112 paragraph 1 letter c) Criminal Code introduces a third category of goods that may be targeted by the special confiscation measure, that is, the goods used immediately after the offense, in order to ensure the escape of the perpetrator or the retention of the benefit or the product obtained, if it is the perpetrator or if, known the purpose of their use. Besides the two main conditions

[10] It maintains its validity also in relation to the provisions of the current Penal Code, respectively of Law no. 143/2000, the provisions of the Decision of the High Court of Cassation and Justice (SU) no. XVIII/2005 (RIL), published in the Official Gazette no. 285/29 March 2005.

[11] Alexandru Boroi in George Antoniu (coord.), *op.cit.*, p. 305.

to be fulfilled (to commit an act provided by the criminal law and to belong to the perpetrator or, if another person belongs, to be aware of the purpose of the use), in order to order the special confiscation it is necessary, three other conditions are met: 1. goods in this category must have been previously manufactured, modified or adapted for that purpose; 2. have been expressly used for the purpose indicated by the law; and 3. have been used immediately after the act, the temporal component being relevant to the express provision. Only the fulfillment of all the conditions gives a thorough justification of the confirmation based on art. 112 par. 1 letter c) Criminal Code. Otherwise, either the confiscation is inadequate or it may be available on another legal basis.

A fourth category of goods subject to special confiscation are the goods provided by art. 112 par. 1 letter d) Criminal Code, respectively the goods that were given to determine the commission of a criminal act or to reward the perpetrator. Any asset of patrimonial value, including a sum of money that has been promised or promised to be surrendered and surrendered after the act has been committed to a person, for the purpose of causing it to commit an act of criminal law or to reward it for committing such an act. It is essential, being a prerequisite for the mercy of confiscation, that the good be promised or offered voluntarily, in the absence of any constraint. However, by virtue of the preventive nature of the special confiscation measure and the presumed danger, it has been considered that confiscation is possible and sound even in situations where the act in which the person is instigated remains at the trial stage or enters another legal classification or, the person instigated in this way does not even commit the act or denounce it; or even if the person returns the good received[12].

According to art. 112 par. 1 letter e) Criminal Code special property and assets are also subject to the property acquired through the act of the criminal law provided that they are not returned to the injured party and to the extent that they do not serve to compensate it. In any case where the property acquired by committing a criminal offense (in the case of many crimes that affect the patrimony, but also the blackmail, etc.) has been returned to the injured party or used to compensate him, confiscation no longer is possible by interpreting *per a contrario* the legal text[13].

Another category of goods covered by the extended confiscation measure is that established by art. 112 par. 1 letter f) Criminal Code, ie goods whose possession is forbidden. Included in this category are goods held without the necessary authorization or by unauthorized persons (weapons, drugs, dangerous substances subject to a special regime of detention, etc.).

The state of confiscation is complemented by a number of other provisions. Thus, in the situations provided in art. 112 par. 1 letter b) (goods used

[12] *Idem*, p. 307.

[13] Suceava Court of Appeal - Criminal Section and for Cases with Minors, Criminal Decision no. 831/26.10.2015, pronounced in the file no. 3345/237/2014 – https://www.jurisprudenta.com/jurisprudenta/speta-bpdnmb9/ (viewed on 11.11.2018).

or intended to commit the offense) and lit. c) (to ensure the escape of the perpetrator or to preserve the benefit obtained) Criminal Code, if it is found that the value of the assets subject to confiscation is manifestly disproportionate to the nature and gravity of the deed, it is ordered to confiscate only in part, by monetary equivalent, produced or likely to have occurred and the contribution of the good to it. If the goods were manufactured, altered or adapted for the purpose of committing the offense provided for by the criminal law, it is ordered that they be confiscated in their entirety (article 112 paragraph 2 of the Criminal Code). Also, if the goods provided by art. 112 par. 1 letter b) and letter c) Criminal Code can not be confiscated because they do not belong to the offender and the person to whom they belong did not know the purpose of their use, they will confiscate the equivalent of their money, respecting the proportionality (article 112 paragraph 3 of the Criminal Code) (also called confiscation by equivalent[14]). By way of exception, goods which have been used in any way or intended to be used for the commission of a criminal offense (article 112(4) of the Criminal Code) can not be confiscated.

The Romanian legislature has extensively expanded the area of assets that can be confiscated by establishing that, if the goods subject to confiscation according to par. 1 letter b) - e) and art. 112 Criminal Code are not found, money and goods are confiscated instead of their value (article 112 paragraph 5 of the Criminal Code).

The goods and money obtained from the exploitation of goods subject to confiscation, as well as the goods produced by them, shall be confiscated, except for the goods referred to in art. 112 par. 1 letter b) and letter c) Criminal Code (article 112 paragraph 6 of the Criminal Code), following the preventive-repressive nature of the measure, the elimination of any possibility of obtaining any material benefit on account of a criminal offense.

In terms of shaping the scope of the assets which may form the object of special confiscation, and of the merits of such measures, an important role is played by judicial practice, with specific reference to the jurisprudence of the High Court of Cassation and Justice. Thus, according to a recent decision[15], the supreme court has determined that "*in the interpretation of the provisions of art. 33 of the Law no. 656/2002 on the prevention and sanctioning of money laundering and art. 9 of the Law no. 241/2005 on the prevention and combating of tax evasion in the case of the contest of offenses between the tax evasion and the money laundering offense, it is not necessary to take the safety measure of the special confiscation of the money laundering money laundering and which arise from the commission of the tax evasion and the obligation of the defendants to pay the amounts representing tax liabilities owed to the state as a result of the*

[14] Alexandru Boroi in George Antoniu (coord.), *op.cit.*, p. 311.

[15] Decision no. 23 of September 19, 2017, pronounced by the High Court of Cassation and Justice - The competent body to judge the application for a preliminary ruling, published in the Official Gazette no. 878 of 8 November 2017.

crime of tax evasion". The aforementioned decision is also important in that it imposes an obligation on the competent court to analyze the merits of such measures in relation to the administered evidence. According to the decision, "*it is for the judge of the court of first instance to verify, after the evidence in question, whether the total amount of money obtained was based on legal transactions or not, and, if the amounts were not based on actual transactions, to determine whether they have been subjected to the "whitening" process, because only those sums operate the special confiscation; the retention of the two offenses in the contest does not imply the applicability of the provisions of art. 33 of Law no. 656/2002, republished, as subsequently amended and supplemented*".

3. Enhanced confiscation (article 112^1 of the Criminal Code)

Since, according to the legislator, the measure of special confidentiality has not been considered sufficient, a further instrument for combating crime has been made available to the competent judicial bodies, ie the measure of extensive confiscation (justified on official and legislative level by the need to intensify the fight against crime organized crime and corruption[16]). Thus, according to art. 112^1 Criminal Code, other goods than those referred to in art. 112 Criminal Code (including money), if the person is convicted of committing one of the offenses expressly provided, if the deed is likely to procure material benefit, and the penalty provided by law is imprisonment of 4 years or more.

Thus, the extent of the extended confiscation implies the fulfillment of special conditions in relation to the special confiscation measure: 1. other goods than those mentioned expressly in art. 112 Criminal Code (and although the following provisions of article 112^1 of the Criminal Code come to outline a number of rules and limits for the application of the extended confiscation measure, the scope of the goods that may be affected by such a measure becomes very broad; 2. there must be a criminal conviction (we definitely appreciate, even if article 112^1 paragraph 1 of the Criminal Code does not expressly expressly refer to the provisions of article 15 of Directive 214/42/EU of the European Parliament and of the Council of April 3, 2014[17]), even one in default; 3. the conviction must be applied only to one or other of the offenses referred to expressly in that legal text; 4. the deed for which the person has been convicted to be susceptible to provide material help (analyzed and determined in concrete terms[18]); 5. the punishment prescribed by the law for the deed for which the prison is 4 years or more. In addition, in order for the measure of extended confiscation to be ordered, two other conditions must be fulfilled cumulatively (article 112^1 paragraph 2 of the Criminal Code):

---

[16] Flaviu Ciopec, *Confiscarea extinsă: între dece şi cât de mult?*, Ed. C.H. Beck, Bucharest, 2015, p. 60.
[17] Published in the Official Journal of the European Union L 127/39 of 29 April 2014.
[18] Flaviu Ciopec, *op.cit.*, p. 126.

a) the value of the property acquired by the convicted person within a period of 5 years before (not exceeding the moment when the Law no. 63/2012 entered into force, and the offenses for which the criminal investigation is carried out have been committed after the entry into force of the Law no 63/2012)[19] and, where appropriate, after the time when the offense was committed, until the date of the court's statement of case, clearly exceeds the revenue lawfully obtained by it;

b) the court is convinced that the respective goods come from criminal activities of the nature provided in par. 1 of art. 112^1 Criminal Code (ie that the legitimacy of acquiring the good can not be demonstrated[20]).

Also the list of offenses is quite consistent with the following: a) drug and precursor trafficking offenses; b) offenses related to the trafficking and exploitation of vulnerable persons; c) offenses related to the state border of Romania; d) money laundering offense; e) offenses against the legislation on preventing and combating pornography; f) offenses from the legislation on combating terrorism; g) establishing an organized criminal group; h) offenses against the patrimony; i) non-observance of the regime of arms, munitions, nuclear materials and explosives; j) forgery of coins, stamps or other values; k) disclosure of economic secrecy, unfair competition, non-compliance with provisions on import or export operations, misappropriation of funds, offenses concerning the import and export regime and the introduction and removal from the country of waste and residues; l) gambling offenses; m) offenses of corruption, offenses assimilated to them, as well as offenses against the financial interests of the European Union; n) tax evasion offenses; o) customs regime offenses; p) frauds committed through computer systems and electronic payment instruments; q) trafficking in organs, tissues or cells of human origin.

In order to rely on such a measure and in order for it to be founded, it is also necessary to take into account the value of the assets transferred by the convicted person or by a third party to a family member or to a legal person over whom the convicted person holds the control (art. 112^1 paragraph 3 of the Criminal Code). When determining the difference between the legal income and the value of the acquisition goods, the value of the goods at the date of their acquisition and the expenses incurred by the sentenced person and the members of his/her family (article 112^1 paragraph 5 of the Criminal Code).

4. Procedural aspects

From the procedural point of view, the taking of special confiscation or extended confiscation measures in a criminal proceeding is done according to the

[19] Decision of the Constitutional Court no. 356 of June 25, 2014, published in the Official Gazette no. 691 of September 22, 2014; Decision of the Constitutional Court no. 11 of January 15, 2015, published in the Official Gazette no. 102 of 9 February 2015.
[20] Flaviu Ciopec, *op.cit.*, p.120.

procedural provisions provided by the Criminal Procedure Code, on the specificity of each procedural phase.

If the order has been ordered or waived (confirmed by the preliminary chamber judge), the prosecutor may also request the taking of the special confiscation measure[21]. The application for a preliminary ruling from the court to which the court has jurisdiction to hear the case at first instance. The request shall be dealt with in a public hearing[22] by quoting persons whose rights or legitimate interests may be affected and the prosecutor being informed. By regulating the possibility for any interested person to belong to such a procedure, provided that we believe that legitimate rights or interests have been or may be affected by the confiscation measure whose acquittal is required, consistency is guaranteed to the rights and freed persons in criminal proceedings[23].

The Preliminary Chamber Judge has the following solutions (pronounced at the end):

- reject the proposal and order, as the case may be, the restitution of the work or the abolition of the precautionary measure taken for confiscation;

- accepts the proposal and orders the confiscation of the goods or, as the case may be, the dissolution of the document.

Against the conclusion, a challenge may be made within 3 days of the communication of the reasoned conclusion by the prosecutor or the persons whose rights or legitimate interests may be affected. The appeal may be dismissed (as late, inadmissible or unfounded) or admissible (in which case the court will terminate the conviction and re-examine the motion).

The provisions of art. 549^1 Criminal Procedure Code establish the special procedural framework for the settlement of the objection formulated against the conclusion of the preliminary chamber judge who has pronounced on the proposal for confiscation, the provisions of art. 425^1 Criminal Procedure Code having only a complete, general role[24].

At the trial stage, the court has, under the conditions stipulated by law, the measure of special confiscation through the court decision, under the conditions of art. 404 par. 4 Criminal Procedure Code.

Regarding the procedure to be followed in the case of taking the extended confiscation measure, subject to the condition of a final conviction, such a measure can be ordered only by a competent court by ruling on the criminal case brought to the court (art. 396 paragraph 2 in relation to article 404 paragraph 4 of the Criminal Procedure Code).

---

[21] Or the dissolution of a document - the procedure being jointly regulated by art. 549^1 Criminal Procedure Code.

[22] Modified aspect following the intervention of the Constitutional Court of Romania, by Decision no. 166 of 17 March 2015, published in the Official Gazette no. 264 of 21 April 2015, previously the text of which provided the council chamber.

[23] Nicolae Volonciu (coord.), *Codul de procedură penală comentat*, 3rd revised and added edition, Hamangiu, Bucharest, 2017, p. 1514.

[24] Nicolae Volonciu (coord.), *op.cit.*, p. 1520.

With regard to the implementation of the provisions on special or extended confiscation, the provisions of art. 574 Criminal Procedure Code.

5. Conclusions

Finally, some coordinates of the nature and regime of the security measures of special confiscation and extensive confiscation can be outlined.

The special confiscation is a penalty of criminal law and not of civil compensation[25], and those found guilty and of material or moral damages caused by committing a crime shall be held under the criminal liability and civil law and to cover the respective prejudice, possibly by imposing overpayments. relevant in this respect is also the Decision of the High Court of Cassation and Justice - the annex for the deprivation of certain issues of law in criminal matters no. 11 of April 22, 2015, which establishes that, in the case of the smuggling offense provided for by Law no. 86/2006 on the Customs Code of Romania, it is necessary to take the measure of security of the special confiscation of the goods or goods illegally introduced into the customs territory of Romania, while imposing the obligation of the defendants to pay the amounts representing the customs debt only if they have passed the first customs office located in the customs territory of the Community without having been presented to customs and transported to that customs office on the ground that a civil action is also admissible in the recovery of the damage (for the full recovery of the taxes due for the import of goods, , as the case may be, including excise duties and value added tax, but only from the moment of occurrence or the occurrence of the chargeable event of the debt).

The measure of special confiscation operates *in rem*[26] and not *in personam*, and the person to whom it confiscates is irrelevant, whether it is the owner or the person only holds them in one form or another. Thus, as it results from the legal text, it is forbidden to be surrendered to the competent authorities, both goods belonging to the perpetrator or goods belonging to other persons, as long as one or other of the categories of goods referred to in art. 112 and 112^1 of the Criminal Code, respectively the nature or purpose of the use of those assets.

Although the general rule is that of confiscation in full of the good and in kind, a series of exceptions based on the principle of portability, as well as the discretion of the judiciary (prosecutor or court) to apply the confiscation measure.

Regarding the extent of the extended confiscation, we appreciate that the current regulation (even considered as a special law in relation to the regulation of the special confiscation measure) has reversed the role of such a sanction, the predominantly repressive one, to the detriment of the preventive one (equated in

[25] Alexandru Boroi in George Antoniu (coord.), *op.cit.*, p. 312.
[26] *Idem*, p. 303.

doctrine recently with a violation of a fundamental principle of criminal law, the minimum of interventions[27]).

The safe measure of confiscation is immediately enforceable, irrevocable (unless a final criminal judgment executed is abolished through an extraordinary appeal[28]), restrictive of rights (property).

In addition, we consider that the requirements of constitutionality and conven- tivity should also be respected in the matter of special security measures and extended confiscation (as in the case of insurers). Although internal regulations do not impose conditions on the existence of reasonable suspicion of a crime, the judicial bodies are obliged to respect the necessity and proportionality[29] of the measure with the aim pursued. Proportionality is based on a fair balance between the general interests of society and the interests of the person whose goods were unavailable and appreciated according to several criteria: the complexity of the criminal activity and the structural organization of the offenders[30], the degree of social danger.

Bibliography

1. Alexandru Boroi in George Antoniu (coord.), *Explicațiile teoretice și practice ale noului Cod penal*, vol. II, Ed. Universul Juridic, Bucharest, 2011.
2. Alexandru Boroi, Gina Negruț, *Drept procesual penal*, Hamangiu, Bucharest, 2017.
3. Daniela Cristina Valea, *Some consideration regarding legal limitations about asset freezing during the criminal trial in Romania*, „Curentul Juridic", no. 4/2017, pp. 166-174.
4. Flaviu Ciopec, *Confiscarea extinsă: între dece și cât de mult?*, Ed. C.H. Beck, Bucharest, 2015.
5. Mihail Udroiu, *Procedura penală. Partea generală*, Ed. C.H. Beck, Bucharest, 2016.
6. Nicolae Volonciu (coord.), *Codul de procedură penală comentat*, 3rd revised and added edition, Hamangiu, Bucharest, 2017.
7. Ramona Mihaela Coman, *Efectele jurisprudenței Curții de la Strasbourg asupra procesului penal român*, Ed. Universul Juridic, Bucharest, 2017.
8. Directive 214/42/EU of the European Parliament and of the Council of 3 April 2014, published in the Official Journal of the European Union L 127/39 of 29 April 2014.
9. Decision of the Constitutional Court no. 356 of June 25, 2014, published in the Official Gazette no. 691 of September 22, 2014.

[27] Flaviu Ciopec, *op.cit.*, p. 60.
[28] Nicolae Volonciu (coord.), *op.cit.*, p. 1576.
[29] Ramona Mihaela Coman, *Efectele jurisprudenței Curții de la Strasbourg asupra procesului penal român*, Ed. Universul Juridic, Bucharest, 2017, p. 55.
[30] Mihail Udroiu, *Procedura penală. Partea generală*, Ed. C.H. Beck, Bucharest, 2016, pp. 765-766.

10. Decision of the Constitutional Court no. 629 of 8 October 2015, published in the Official Gazette no. 868 of November 20, 2015.
11. Decision of the Constitutional Court of Romania no. 166 of 17 March 2015, published in the Official Gazette no. 264 of 21 April 2015.
12. Decision of the Constitutional Court no. 11 of January 15, 2015, published in the Official Gazette no. 102 of 9 February 2015.
13. Decision no. 23 of September 19, 2017, pronounced by the High Court of Cassation and Justice - The competent body to judge the application for a preliminary ruling, published in the Official Gazette no. 878 of 8 November 2017.
14. Decision of the High Court of Cassation and Justice - the annex for the deprivation of certain matters of law in criminal matters no. 11 of April 22, 2015, published in the Official Gazette no. 381 of 2 June 2015.
15. Decision of the High Court of Cassation and Justice (US) no. XVIII/2005 (RIL), published in the Official Gazette no. 285/29 March 2005.

LABOR LAW IN BUSINESS CONTEXT

Performance and Collective Dismissals – an Evaluation of the Legal Practice on the Subject Matter

PhD. student **Ioana Cristina CRISTESCU**[1]

Abstract

The concept of performance, in principle, implies a subjective assessment of the quality of work and the extent to which the "winning behaviors" are manifested by use of knowledge, skills and abilities by the employee in the process of work. In this context, it seems surprising to find within the amendment in 2011 of the collective dismissal procedure stipulated by the Labor Code some stages and concepts linked to performance within the work frame of the dismissal regulated by art. 65 et seq of the Labor Code. Although, essentially, is a type of objective dismissal based on the removal of the employee's working place for one or more reasons unrelated to his or her person, the redundancy may be influenced during the collective dismissal process by subjective elements associated to performance concept. Such subjective elements are present both at the stage the assessment of goals achievement and at the stage of applying the criteria for prioritizing the dismissals by application of performance criteria or traditional social criteria. The hybrid nature of the selection criteria within the collective dismissal procedure is also highlighted by the recent legal practice, which begins to reveal the increase of the consciousness of legal science over that of human resources management and leads to the development of a new, complex and interesting judicial practice. This article aims to initiate a broader study of the interference of these two domains, surprising the impact of performance in targeted redundancies regulated by labor law.

Keywords: *labor law, collective dismissal, employee selection process, performance criteria.*

JEL Classification: K31

Recent judicial practice, show that the courts are concerned of both the formal conditions of legal acts issued in collective redundancies and the substantiative conditions as well.

1. Formal requirements of legal acts. References to performance goals and selection criteria

Thus, with reference to the content of notification of employees' representatives and labor authorities on relevant information for the collective redundancy process, the Court[2] analyzes the concrete references to the employees' selection criteria. The court notes that "the notification contains a reference to the

[1] Ioana Cristina Cristescu - Law Doctoral School, Bucharest University of Economic Studies, Romania, ioanacostea2001@yahoo.com.

[2] Decision no. 2010/2016 of 11.10.2016 of the Pitesti Court of Appeal, Section I Civil.

selection on the basis of an Evaluation Regulation, without specifying that it is a special regulation"; it is considered necessary to highlight whether the assessment in the collective redundancy process was carried out *pro causa* and not as a normal (anual) evaluation process whose results are taken into account for the classification of employees affected by the restructuring.

When analyzing the content of the notification and the dismissal decision, the court states that these legal acts should "contain express references to the selection criteria upon dismissal". The court also notes that the plurality of "criteria" used by the legislator shows that a single selection criterion could not be used to select employees when they were dismissed.

However, we note that the reference to criteria is found in the text of art. 69 par. (2) letter (d) of the Labor Code in scope of transparent information and negotiation between the social partners upon proposals for selection criteria, as their social dialogue should aim to reach an agreement on this issue also. The legislator creates a framework for dialogue within the collective redundancy process, but does not oblige to achieve a result.

2. Substantiative conditions. Negotiating and effectively applying the assessment of employee goals and/or selection criteria

We are wondering whether, it is sufficient to perform the assessment of the performance goals according to para. (3) of art. 69 of Labor Code as the only stage for employees' selection. From a formal perspective and, in relation to the content requirements of the dismissal decision according to art. 76 letter c) of the Labor Code, that the parties could agree to expressly mention in the content of the notification that the performance of the employee is considered as selection criterion (according to letter d) of para. (2) of art. 69 of the Labor Code. Thus, in fact, it would be possible to establish as a single criterion, consisting in the manifestation of professional competence, that can be assessed under two components generally recognized by human resources management:

WHAT does the employee (performance goals) - the objectives describe something WHAT must be achieved during a period of time, "the point to be pursued"[3], whether it is "measurable plan targets (from the perspective of economic profitability, sales volume, cost reduction, scrap reduction), whether it refers to tasks/works/projects (with defined results to be achieved within a certain time frame)".

HOW does the employee (the manifestation of winning behaviors) prove that performance "is interconnected with the quality of services offered to customers[4]", the basis of these results being considered the skills of interracting and

[3] See Armstrong M., *Human Resources Management, Practice Manual*, CODECS (2003), p. 431.
[4] *Idem*, p. 431; Dobrin C.A, Popescu G., Popescu V.A., Popescu C.R. (Study 2012), *The concept of performance in business organizations - case study on the employee performance in Romanian business organizations.* Bucharest - Proceedings of the 6th international management conference

communication. “Performance appraisal is not only about the measurement of job performance but also about motivation, communication and overall relations within the organisation”[5].

As for the diversity/heterogeneity of criteria that may be agreed by the parties, the Romanian legislator does not make any clarifications, leaving it to the social partners to agree upon criteria for the selection of employees in scope of dismissal according to the organizational culture. Thus, some organizations opt for strengthening the performance criterion by performing soft-skills assessments in addition to performance goals evaluation, others choose to apply social criteria.

On the one hand, the court[6] notes that the parties can not stop the employee selection at the stage of performance goals evaluation, as per art. 69 para. (3) of the Labor Code. On the other hand, it is noted "establishing a single criterion, that of the professional competence evaluation, would indicate that no further selection criteria would be needed, as if it were impossible those rated to achieve equal results".

With regard to the formal conditions of the notifications addressed to employees' representatives and labor authorities, the same court highlights that the selection criteria must be clearly and explicitly determined by the parties in the notifications and the dismissal decisions, and may not arise from the imperative nature of the text of art. 69 para. (3) of Labor Code. In the absence of a precise indication in these legal acts (notification and decision), the existence of a single criterion – goal performance can not be invoked for the first time in front of court only.

Although the mandatory nature of the obligation to inform/consultat on selection criteria is not questionable, as a result of the very wording of the provision regulating employer's obligation to initiate dialogue with employees' representatives, it should be noted, however, that this is a duty of care rather than a duty to achieve a given result in the social dialogue process by "information and consultation of the parties, with a view to reaching agreement" on the applicable criteria.

This does not automatically transpose into parties reaching agreement on multiple selection criteria. However, even if the parties do not agree upon multiple selection criteria and, provided that the social dialogue was undertaken in good faith with a view to reaching an agreement, the employer is not relieved by its obligation to mention concrete information within the content of notifications,

"approaches in organisational management", November 2012, Bucharest, p. 315, http://conferinta.management.ase.ro/archives/2012/pdf/38.pdf, consulted on 1.10.2018.

[5] Katarína Staroňová, Study 2017 on Performance appraisal in the EU member states and European Commission, p. 13, see http://www.eupan.eu/files/repository/20170912115220_EUPAN_Performance_appraisal_in_the_eu_member_states_and_the_ec_FINAL_index.pdf, consulted on 1.10.2018.

[6] Decision no. 2010/2016 of 11.10.2016 of the Pitesti Court of Appeal, Section I Civil.

respectively in the dismissal decision about the actual application of the criterion/criteria for the selection process. A merely a formal clarification of the criterion as per art. 69 para. (3) of Labor Code is considered therefore insufficient.

Therefore, the absence of a criterion/selection criteria formulated in addition to the one already imperatively indicated by the legislatorat art. 69 para. (3) of the Labor Code generates a real legal risk for the redundancies to be challenged in court. Thus the employer is not able to prove to the court neither formally - the regulation of the criteria nor *de facto*, the application of the criteria for the correct reasoning of dismissals. In this context, the selection procedure itself cannot be proved, therefor a risk that the dismissal is declared null and void by non-compliance to discharge the dismissal procedure as per art. 69 *et seq*. of the Labor Code.

The aforementioned court judgment also criticizes and considers subjective the special evaluation procedure negotiated by the social partners in the collective redundancy proceedings, "whereas the law regulates an assessment of the performance goals achievement, thus capitalizing on previous performance evaluation".

The court's opinion may be criticized if the parties of the individual labor relation have not performed an evaluation cycle within the performance evaluation system genraly applicable at employeţs level. However, what happens if this performance system is not in place at that employer's level?

We consider that the absence of the performance system can not in itself be a reason for relieving the employer of the obligation set out in art. 69 para. (3) of the Labor Code, since the law provides for mandatory elements for each performance system (performance goals, performance evaluation criteria, performance evaluation procedure) in both the individual labor agreement content and within the content of the internal regulations; thus is generated a legal framework for the existence of a performance system at the level of any employer. Therefore, the absence of a performance system can only be unlawful from employer's perspective and a proof of his bad faith.

An opinion[7] contrary to the above is found in the legal doctrine, arguing that the obligation provided by art. 69 para. (3) of the Labor Code could be supplemented, with no legal consequences for the performance, by a special employee performance evaluation in scope of the collective redundancy process. We consider that this opinion overlooks the imperative nature of the above-mentioned legal norm and the natural consequence of the violation of a procedural stage of collective redundancies, with the consequences stated in art. 78 of Labor Code.

However, there are objective situations where the evaluation itself has not been achieved, whether it is the short period of time since the employee is hired, or a situation of suspension for a long-term of the individual labor contract

[7] Brînduşa Vartolomeu, *Concedierea colectivă*, Universul Juridic Publishing House, Bucharest, 2015, p. 43.

(eg. the situation of a parental leave or long medical leaves). In such situations, the impossibility of evaluating the performance objectives is objectively justified, which puts the employer in the unwanted situation of not going through the mandatory evaluation stage provided by art. 69 para. (3) of Labor Code.

3. Absence of selection process in case of multiple individual redundancies. Transparency of the process

The court[8] notes that an individual dismissal has taken place under art. 65 of the Labor Code and, as a result of the individual dismissal procedure, where position of same kind were reduced, the numeric criteria mentioned for collective dismissals by art. 68 of the Labor Code were not applicable due to the low number of redundancies. In this context, the employee claims that for the observance of equal treatment and non-discrimination, under art. 5 para. (1) of the Labor Code, it would have been necessary to apply transparent and objective selection criteria to enable the selection of employees to be affected by restructuring, such criteria being thus regulated in the content of the dismissal decision.

It is worth mentioning that the legal norm requiring the selection of employees in the case of redundancies for reasons not related to the employee is regulated within the chapter on collective redundancies. Thus, the employee's defense invokes a stretched logical interpretation of the art. 69 of the Labor Code, in the sense that the individual dismissal would only imply the cancelation of a single job postion. In this context, the issuance of selection criteria would exclude arbitrariness, thus providing an objective character to redundancy. In the same context, it was argued that the lack of objective criteria for ranking employees affected by individual redundancies would even affect the seriousness of the dismissal, which would require for such a measure to be objectively justified and not to consider to be performed in scope of removing of certain employee from the organization. Contrariwise, the employer invoking the imperative character of the art. 69 of Labor Code claims that the applicable criteria for selection of employees and, implicitly, the existence of an objective ranking can not be extrapolated, as the law should be of strict interpretation.

As a result, that court did not accept the argument that the employer must prove why he decided to reduce a particular job postion instead of another job position as a way of proving the seriousness of individual redundancy, thus recognizing "his wide discretionary right to decide upon organization and leadership of its activity". Thus, it is not possible to extend the application of legal workframe expressly stipulated for collective redundancies to multiple individual redundancies. This would create a "hybrid form of redundancy", effectively affecting the objective character of a dismissal that must be decided with no link to the employee himself.

[8] Decision no. 1483 of 22 March 2016 issued by the Bucharest Court of Appeal.

In the context of an individual dismissal as per art. 65 of the Labor Code, the court also considered that a reduce "working place/job position" refers precisely to the position occupied within the organizational functional structure (organigram/functions). For this reason, the court considered the employer does not have to differentiate the employees based on competence, as he has the righyt to determine the organization and it's functioning, as well as their efficiency by selection of those particular positions which are to be reduced.

Thus, the court states that a correct application of the provisions of art. 65 does not imply a professional selection among the employees, since the purpose of redundancy that is not related to employee himself is to allow the company to improve his organization and overcome the economic difficulties that led to the reorganization.

4. The stages of the employee selection process in the collective redundancy proceedings

The court analysis[9] the categories of employees participating in the various selection stages of the collective redundancy proceedings. In this context, the first instance court held that "in line with legal provisions, the normal sequence of the stages deriving from the provisions of Art. 69 para. 2 letter d) and art. 69 para. (3) of the Labor Code is as follows:

1) assessing the achievement of performance goals;

2) the ranking of employees in relation to the envisaged criteria for establishing the order of priority upon dismissal as per the law and/or collective labor agreements".

The social dialogue partners have established a process of employee appraisal by adopting a Staff Selection Regulation in scope of the collective redundancy process. Thus, it was agreed that the first criterion of employees' ranking would be the evaluation of employees on the basis of professional performance, by passing specific assemement methods (including interviewing and testing) and, subsequently, applying social criteria. The above ranking criteria were applied after the prior goal evaluation stage.

4.1. Categories of employees participating in the various selection stages

Against this background, on one hand, the court notes[10] that not all employees are involved in the goal performance evaluation. In the case of collective redundancies, art. 69 para. (3) of the Labor Code required the employer to evaluate the achievement of the performance goals of the employees who occupied

[9] Decision no. 3129 of 09.06.2016 pronounced by the Bucharest Court of Appeal.
[10] *Idem.*

positions that were subject to removal, but not to all employees. "Since performance goals are targets that imply the achievement of notable qualitative and quantitative results, the undertaking of special projects that are useful, but which give a level of motivation to the employee and are capable of inducing a certain level of efficiency in the organization".

In this context, it should be noted that the performance goals are not regulated by the Romanian legislator as subject for negotiation of the parties, so that, from a legal perspective, they are set unilaterally by the employer and thus not subject to negotiation[11].

The procedure for performance goals evaluation is in general unilaterally set by the employer via internal regulation (as a result of consultations with employee representatives), and its applicability is a general one to all organizational structures and job positions. Evaluating performance goals implies the development of extensive evaluation cycles (expressed in months/years), therefore such assessment cannot be generally performed *pro causa*.

We appreciate that there are some findings that highlight the distinct nature of the concepts from para. (3) and para. (2) letter d) of art. 69 of Labor Code. Thus, with regard to the criteria ranking the employees mentioned in art. 69 of the Labor Code we note the following aspects:

- the Romanian legislator only imposis to inform and consult the employees' representatives on the criteria necessary to establish the order of priority for the dismissal of employees; this negotiation process is being pursued as a goal ofwith the view to reach an agreement, which explains the fairness of the agreement of the social partners on a specific regulation for employee appraisal and ranking in scope of collective redundancies;

- Labor Code does not contain indications about the nature of the criteria for determining the order of priority for the dismissal of employees, which does not exclude an agreement of the parties in the sense of applying a criterion of professional performance, but also of other criteria that may concern social considerations.

Thus, that court states that the legislator "did not establish as a criterion for determining the order of priority for collective redundancies the criterion of professional performance but gave the employer the possibility of establishing such a criterion which he could apply after the compulsory assessment of the performance goals".

The system of guarantees provided by art. 69 *et seq.* of Labor Code exclusively targets employees affected by the collective redundancy process.

[11] Ion Traian Ştefănescu, Şerban Beligrădeanu, *Principalele aspecte teoretice şi practice rezultate din cuprinsul Legii nr. 40/2011 pentru modificarea şi completarea Legii nr. 53/2003 – Codul muncii,* „Revista Română de Dreptul Muncii", no. 3/2011, p. 9.

Considerring another incidental court decision[12] in this case, it is noted that the provisions of Art. 69 of the Labor Code, sets two obligations for the employer: "an obligation to assess the achievement of performance goals, as a first step in the proper application of the selection criteria (paragraph 3) and "an obligation to fix criteria to be taken into account for determining the order of priority of employees, criteria provided by the law and/or the collective labor contract (paragraph (2) letter d), which is criteria to be communicated to the trade union".

The guarantees given to employees in the process of collective redundancy, respectively the criteria for assessing the professional activity, could be both the general ones provided in the internal regulation and applicable to all employees within the employer's general performance system, as well as some specially agreed by the social partners only for ranking the employees affected by the reorganization process. From this perspective, the employer may rank employee either by a general or a *pro causa* evalyuation procedure, as agreed with the social dialogue partners.

The Court notes that in the current court case "the employer has decided to apply the criterion of professional competence as a principal criterion for the prioritization of dismissal in collective redundancies; the competence is revealed in a three-step selection process: the activity report submitted by each participant, a grid test and an interview". At the same time, the criterion of professional competence was supplemented, in the case of equal scores among employees, with the social criteria stipulated in the collective labor agreement concluded at the company level.

In doing so, the employer has complied with the obligations established under Art. 69 of the Labor Code, the rule of law allowing for the cumulative establishment of the criterion of professional competence and of the social criteria applicable after the evaluation of the achievement of performance goals in the form agreed with the representative union".

4.2. Employees protected by the provisions of art. 60 of the Labor Code are considered by the court as beneficiaries of an exemption from the obligation to participate in the ranking procedure "not included in the selection process because they may not be dismissed and, obviously, employees' whose jobs cannot be subject to reduction or removal"

At first glance, such an assertion would seem correct, but practical considerations force us to reconsider this reasoning. It is true that pregnant workers, those on sick leave or on parental leave can not be dismissed, as they are protected by the prohibition of dismissal established by art. 60 para. (1) of the Labor Code.

At the same time, they are protected during the period of such situation; the process of selection (the selection of the affected employees) is placed at a

[12] Decision no. 58 of January 26, 2016, pronounced by the Bucharest Court of Appeal.

certain moment in time, distinct from the moment of the dismissal (issuance of the dismissal decision). Practical considerations regarding fairness and the good organization of the selection process of employees affected by redundancy require to include all employees in the selection process, and to further observe their legal protection as per art. 60 of Labor Code at the specific moment of issuing, respectively communicating the dismissal decision.

With regard to the sequence for applying the ranking criteria for the implementation of the collective redundancy plan, the court examines the situation of certain job positions which were specifically occupied by employees having special social conditions. The issue under analysis is to determine whether employees with special social conditions should or should not be exempted from the employee selection procedure in the redundancy process. Thus, the Court notes "the number of jobs remaining in the company structure increased on the basis of the results of ordinary consultations. During the additional consultations between the social partners they identified possibilities for reducing the number of vacancies and implicitly the number of redundancies, in order to ensure a social protection measure; the classification of the special social cases (…) actually took place after the completion of the job selection process based on the new organizational chart".

4.3. The imperative nature of the stage of evaluation of performance goals

With reference to the evaluation of the achievement of the performance goals as per art. 69 para. (3) of the Labor Code, Court's analysis is perfoemd to establish if this is itself a selection criterion or a simple step in the collective redundancy proceedings.

The Court notes "the provisions of Art. 69 of the Labor Code does not prohibit the employer from establishing the criterion of professional competence, but only imposes an obligation on him to undergo the procedure for the evaluation of the employees before applying the criteria for determining the order of priority". In other words, Labor Code first establishes an order to perform the employee selection steps in the selection procedure for the collective redundancy process.

Contrary to the assertions that the assessment of performance goals is the only criterion that can be based on employee performance, so that the employer cannot apply any further selection criterion but the social criteria, the court notes that the legislator does not impose on the employer a certain selection method.

Thus, in the case of this employer, the social partners have established, according to art. 69 para. (2) letter d) of the Labor Code to apply the criterion of professional competence for the selection of employees and, only subsequently, social criteria.

Although it was argued that this option generated the eluding of the mandatory criterion set out in para. (3) of art. 69 of the Labor Code, the court identified in the consultation minutes that the evalution of performance goals (as per the annual evaluation proces) was not omitted, as it was considered "as an elimination criterion for enrolling in the selection process", so that only employees who have completed the annual goals performance, have entered the second round of selection.

Subsequently, in the second stage of the selection process, the employer selected as the first selection criterion the professional competence; the prioritization of collective redundancies was based on a "three-step selection process consisting in: activity report (…), grid test and interview". Although this was considere as repetition of the performance assessment and an eluding of the legal requirements, the court notes that the legislator leaves it to the employer and the social partner to determine the means/criteria for the selection of employees, these tests being part of a distinct selection criterion related to professional performance.

Thus, the use of the professional appraisal in restructuring does not change the objective character of the dismissal, and the criterion of competence established according to art. 69 para. (2) letter d) of the Labor Code a not be considered a "subjective intellectual criterion"; so, the termination of the contract of employment under the restructuring procedure is a result of the removal of the job position (of the same kind) which have led to a necessary selection of employees; thus their dismissal was not turned into redundancy for reasons related to the employee.

The court[13] considers organizing a selection based on professional criteria in order to prioritize dismissal as "preferable to collective redundancies because, as a result of periodic evaluations of certain performance standards in practice, most of the employees meet the employer's expectations; selection is the question of comparing the skills and hierarchy of employees by their degree of accomplishment".

5. Conclusions

In the context of collective redundancies, the implications of performance have the following characteristics:

1. A first step is determining the achievement of performance goals. Going through this stage is mandatory, undoubtly from the way paragraph (3) of art. 69 of the Labor Code is regulated. In other words, in the collective redundancy proceedings, the passing of this stage is mandatory, under the sanction of the nullity of the dismissal procedure. Failure to fulfill the obligation to assess the

[13] *Idem.*

achievement of the performance objectives may result in the nullity of the dismissal procedure under art. 78 of the Labor Code.

2. The assessment of the performance goals is imperatively established by para. (3) of art. 69 of the Labor Code. The setting, realization and evaluation of some objectives relates mainly to the achievements of the employee in his current work. The evaluation involves extracting results within a normal evaluation cycle. This does not exclude the carrying out of a *pro causa* evaluation in scope of restructuring, but such an assessment can not itself imply the evaluation of goals performance, but rather an evaluation of professional competence in a formal context in which a hierarchy of employees is made based on skills.

3. In the case of organizing a collective redundancy process, ranking employees implies the formulation and negotiation of selection criteria that the law does not determine and do not qualify in aqualitative and quantitative manner. Legal practice has shown the need for selection is only present in the context of collective redundancies, applying the principle of strict interpretation of a special norm. Thus, the selection procedure set out by art. 69 of the Labor Code and may not be applied by the employer in the case of multiple individual redundancies. In the case of multiple individual redundancies, the employer will determine directly and without applying any ranking criteria which job postion will be removed, with the sole purpose of proving the seriousness of the dismissal provided by art. 65 of the Labor Code. In this context, the organizational prerogative of the employer will prevail, according to the court practice entitled to decide on the way of efficiency of the activity by removing certain job postions and keeping others.

4. In the case of collective redundancies, a second compulsory step for employees ranking is the selection of employees on the basis of selection criteria. While the setting of goals is set by the legislator to the employer's disposal and is not subject to parties' consent as per the Labor Code, the introduction of the professional performance as selection criteria, is the result of a negotiation of the social partners wthin the process of information and consultation for collective redundancies. In this context, the legal practice recognizes that professional evaluation can be a selection criterion among those mentioned in art. 69 par. (2) letter d) of the Labor Code, which can operate within a stable framework of the general performance system applicable at the employer level; at the same time, it can be regulated *pro causa* via pecific regulations applicable to collective redundancy process. In this context, so-called parallelism has emerged from ranking employees based on performance goals versus *ad hoc* evaluation of behaviours based on professional tests, skills assessments, soft skills. What is the true output of these rankings and how does the employer can make the most of them to get the best prepared workforce, remains to be analyzed. To what extent employees' ranking within the procedure specified in art. 69 of the Labor Code can be used in the case of employees' assignment to the newly created job positions in a new organizational structure, is still to be debated.

5. The application of the social criteria for the selection of employees is, anyhow subsequent to applying performance criteria, whether we consider the mandatory/ preliminary stage of performance goals evaluation, or the assessment of the professional competence in scope of ranking the employees affected by collective redundancies. Under no circumstances can the application of the social criteria overpass the performance criterion, as this would elude the 2011 legislator's vision to set if as priority in selecting employees for collective redundancies. This does not exclude finding social solutions, but they must be applied by the social partners in addition to a selection process that is eminently and objective based on goals evaluation and/or professional competence assessment. Thus, in addition to the employees who have already successfully completed the process of ranking to occupy the job postions approved by the orgchart, it is possible to add also employees who meet the social criteria for which it is possible to approve additional job positions in the orgchart, as a measure agreed by the social partners to diminish affected jobs and mitigate the impact of collective redundancies.

Bibliography

1. Armstrong M., *Human Resources Management, Practice Manual*, CODECS (2003).
2. Brînduşa Vartolomeu, *Concedierea colectivă*, Universul Juridic Publishing House, Bucharest, 2015.
3. Dobrin C.A, Popescu G., Popescu V.A., Popescu C.R. (Study 2012), *The concept of performance in business organizations - case study on the employee performance in Romanian business organizations.* Bucharest - Proceedings of the 6th international management conference "approaches in organisational management", November 2012, Bucharest, http://conferinta.management. ase.ro/archives/2012/pdf/38.pdf, consulted on 1.10.2018.
4. Ion Traian Ştefănescu, Şerban Beligrădeanu, *Principalele aspecte teoretice şi practice rezultate din cuprinsul Legii nr. 40/2011 pentru modificarea şi completarea Legii nr. 53/2003 – Codul muncii*, „Revista Română de Dreptul Muncii", no. 3/2011.
5. Katarína Staroňová, Study 2017 on Performance appraisal in the EU member states and European Commission, see http://www.eupan.eu/files/repository/20170912115220_EUPAN_Performance_appraisal_in_the_eu_member_states_and_the_ec_FINAL_index.pdf, consulted on 1.10. 2018.

Teleworking

Lawyer **Raluca ANDERCO**[1]

Abstract

The Law no. 81/2018 of teleworking refers to specific professions such as brokers, sales agents, employees involved in social media activity, analysts, programmers, accountants, financial and tax consultants, translators, etc. Teleworking is the form of work organization in which an activity that may be performed within the workplace organized by the employer is carried out by an employee, from a distance from this location, on a regular and voluntary basis, at least one day per month, using information and communications technology, based on an individual employment contract or an additional act. Prior this Law, the legal possibility an employee could work somewhere else than employer's place, were by working at home, detachment or delegation agreement, or by signing a mobility clause. Teleworking regulation is in line with European legislation, responding to labor market needs and demands, but the application of teleworking legislation will raise problems, especially regarding the activities in the norms of safety and health at work and in terms of highlighting the hours provided by teleworkers and the controls performed by the representatives of the competent authorities.

Keywords: *labor market, teleworking, individual employment contract, European legislation.*

JEL Classification: K24, K31

1. Introductory considerations

On April 26, 2018, in the Official Gazette of Romania was published the Law no. 81/2018 on the regulation of teleworking activity.

The basis for the adoption of the normative act is the European Framework Agreement on Teleworking concluded between the social partners in Brussels in 2002.

As far as this agreement is concerned, Romania was one of the few European countries that did not benefit from teleworking regulation, although since 2002, an agreement has been reached between the parties and the employers.

Thus teleworking is governed by law in Belgium, Czech Republic, Hungary, Luxembourg, by collective bargaining agreements in France, Denmark, Greece, Italy, Spain, Sweden or by other bipartite agreements in Austria, Finland, Germany, Latvia, Poland and the United Kingdom.

[1] Raluca Anderco - Bucharest Bar Association, Romania, raluca.anderco@anderco.ro

In addition to the 2002 European Framework Agreement, Convention no. 177/1996 of the International Labor Organization, regulate work at home as an alternative way to perform work outside the employer's headquarters.

In this context, Romania has adopted the Law of teleworking activity, thus trying to comply with European requirements, but with some gaps and disadvantages.

The law adopted, although not providing a list of activities where teleworking is possible, is addressed to persons who carry out activities and professions whose activity is not strictly linked to the employer's premises, such as: brokers, sales agents, employees involved in the activity social media of companies, analysts, programmers, IT, accountants and financial and tax consultants, translators etc.

2. The teleworking contract

The Law on the regulation of the teleworking activity stipulates the ways of carrying out the activity by the employee in the teleworking regime, applying only to the fields of activity where it is possible to perform the work under such regime.

Thus, according to article 2 letter a) in conjunction with article 3, paragraph 1 of the Law on the regulation of teleworking activity, *teleworking* represents the form of work organization in which an activity that may be performed within the workplace organized by the employer is performed by an employee, from distance from this location, on a regular and voluntary basis, at least one day per month, using information and communication technology, based on an individual employment contract or on the basis of an addendum to it.

Under these circumstances, it appears that *the essence of the teleworking contract is that the activity is done at least one day per month, outside the workplace organized by the employer, using the means of information technology and communication*.

The initial draft law on the regulation of teleworking activities limit the provision of work to the sphere of the employees with a full-time individual labor contract, being exempt from the application of the teleworking scheme to the part-time contracts[2].

It is possible that through the restrictive vision proposed initially in the draft law on telematics regulation in Romania, it was intended that employees would not circumvent the legal rules on the legal regime applicable to overtime in the case of partial-time work contracts.

[2] What was more restrictive in relation to the provisions of the European Framework Agreement on Teleworking in 2002, which defines teleworking as "a form of organization and/or work that could be equally implemented in the employer's premises - on a regular basis, outside of them" (Alexandru Ticlea, *Tratat de dreptul muncii. Legislatie. Doctrina. Jurisprudenta.* Universul Juridic Publishing House, Bucharest, 2016.)

However, conceptually, Law no. 81/2018 on the regulation of teleworking activity shows a number of differences in relation to other legal systems. For example, the Hungarian legal system defines teleworking as being the activity performed on a regular basis in a place other than that of the employer and not belonging to the latter, by computer or other means of information, the product being sent by electronic means. In Lithuania, under an individual teleworking contract, a tele-employee may perform job duties in places other than the employer's premises by using the computer and the internet. By adopting the provisions of the European Framework Agreement in this field, teleworking is defined in Luxembourg as a special form of organizing or executing tasks in the context of an employment contract using information and communication technology to exercise outside the employer's place of employment, and in particular at the place of residence of the employee which she could have provided at the employer's premises[3].

Returning to the internal regulation, however, from the analysis of article 2 of the Law no. 81/2018 regarding the hypothesis in which the work is carried out by the employee outside the unit "on a regular and voluntary basis, using the information and communication technology" it results that it is not excluded the possibility that the activity will be carried out at the headquarters unit. In fact, *the only condition imposed by the law is only a minimal limit in which the activity can be carried out under teleworking, respectively one day per month*.

Prior to the entry into force of Law no. 81/2018, the legal means by which an employee could work elsewhere than the place for which the employer was employed were by means of the work at home, or by posting or delegating, or even by signing a mobility clause.

Deputy and delegation institutions, as opposed to the teleworking contract or even to the home work contract, are legal instruments that are at the disposal of the employer, representing, as stipulated in article 42 of the Labor Code, ways of unilateral change by the employer of the place of employment work, being unilateral legal acts. The essence of these two institutions is that workplace change is done for a determined period of time.

On the one hand, both the teleworking contract and the home work contract, the placement clause is based on an agreement between the employer and the employee and, on the other hand, the two contracts can be concluded both for the determined duration and for the indefinite period.

As a rule, the willingness to agree to the way to do the work either by teleworking or by work at home is done at the conclusion of the employment contract. Naturally, nothing prevents the parties from adding to the work contribution that they have to change the form of work organization.

[3] Raluca Dimitriu, Mihaela Marica, *Telemunca. Avantaje. Dezavantaje. Optimizare cost*, Rentrop & Straton Publishing House, Bucharest, 2018.

In this respect, the legislator expressly stated in article 3 of the Law that the employee's agreement to the provision of teleworking can be given either at the signing of the individual labor contract or at the conclusion of an additional act.

An important aspect of Law no. 81/2018 on the regulation of teleworking activity, which requires some clarification is the *workplace*, which is not one organized by the employer, but is one agreed by the parties in the individual labor contract.

Work is not done at the employer's headquarters or at any of its workplaces, not even in a place indicated by the employer, but is done in a space chosen by the employee, who may or may not be his own home. But the place where the teleworking activity is carried out must be agreed by the parties.

Article 5 paragraph 2 of Law no. 81/2018 on the regulation of teleworking activity establishes that in the labor contract it is necessary to specify precisely which are the "places of the activity agreed by the parties", as well as the "time interval" in which the teleworking activity is carried out and in within which the employer has the right to check the activity of the tele-employed, as well as the way of highlighting the hours worked by the staff.

In practice, there will be problems with the identification of overtime, because the record of the hours worked is difficult.

As far as *the rights of the tele-employees* are concerned, as regulated by Law no. 81/2018, they enjoy all the rights recognized by law, through internal regulations and collective labor agreements applicable to employees who work at the employer's premises, but considering the specific character of these labor contracts, other conditions may be established. We cannot fail to observe the approaches of other states in the field of teleworking, as compared to the internal provisions on teleworking, governed by Law no. 81/2018.

Thus, in Belgium, it is imperative for the employer "to bear the costs associated with teleworking and to equate the number of hours of the telesales by reference to the number of hours of the employees working on the employer's premises"[4].

In Italy, tele-couriers benefit from the same opportunities to develop and promote their professional career and are entitled to specific technical and organizational skills.

In conclusion, it should be emphasized that the field of salary and professional promotion of the *tele-employees* is a subjective and sensitive one, meaning, as already pointed out in the articles on this subject, it is obligatory to specify, in law, equality of treatment in matters of salary between the two spheres of employees.

As far as *the obligations of the employer* in a teleworking contract, article 7 of the same normative act regulates his obligation to comply with the norms

[4] *Idem*, p. 2.

and instructions regarding the health and safety at work of *tele-employees* at the places of teleworking activity.

The location of the teleworking activity can only be used after the employer has expressed his agreement on its use from the point of view of safety and health at work, which implies an assessment of these jobs.

Explaining the employer's agreement in the absence of this assessment stage may expose the employer to high risks in the event of an accident.

On the other hand, the employee may refuse access to the place where the employer, the trade unions and the control authorities have access if it coincides with his or her domicile, which makes any control action a priori.

All these aspects will be complemented by the normative framework in the field, respectively the provisions of the Law no. 319/2006 on safety and health at work.

It is clear from the wording of article 7 letter a) of Law no. 81/2018 that the obligation to provide means of information technology is not exclusive to the employer, so that the parties may agree that the *tele-employee* use its own equipment.

With regard to the latter hypothesis, it must be stressed that the employer may be exposed to the risk of non-compliance with confidentiality obligations.

Regarding *the form provided by the law for the teleworking contract*, we recall that the home work contract is a solemn contract, for which the valid form is required, or at least the clause regarding the provision of the work at home.

Law no. 81/2018 does not prescribe special provisions, derogations from the common law regarding the conclusion of the individual labor contract, in which I consider that the teleworking contract will be subject to the provisions of the common law regulated by article 16 of the Labor Code.

Consequently, the teleworking contract is a consensual contract, for which the mere consent of the will is necessary and sufficient for the valid conclusion of the teleworking contract.

Of course, under article 16 of the Labor Code, the written form of the teleworking contract will be required *ad probationem*, not *ad validitatem*, as long as the law does not undoubtedly result in the contrary, according with article 1242 of the Civil Code.

As regards the content of the teleworking contract, article 5 of Law no. 81/2018 provides that, in addition to the general elements provided by article 17, paragraph 3 of the Labor Code, the teleworking contract will also include certain elements specific to the teleworking contract. These clauses will represent the guarantee that the real will of the parties was to conclude this type of contract, an aspect resulting from the content of article 5 of the Law no. 81/2018, namely, the stipulation that the employee works under teleworking, the period and/or the days in which tele-employee is working on a job organized by the employer.

Also, the law on the regulation of teleworking activity appears as a special law in relation to the Labor Code, as stipulated in the provisions of art. 10, this law completing the general law, represented by the Labor Code.

The law on the regulation of the teleworking activity is a special law and in relation to the special provisions of the Labor Code in the matter of the work contract at home, because if the work is provided at the residence of the tele-employee using the information and communication technology, then the legal report will be one governed by the provisions of the special law regulating teleworking activity.

Thus, we appreciate that the previously exposed problem only subsists if the teleworking activity takes place exclusively at the residence of the tele-employee, because, *per a contrario*, if the parties to the labor law contract have negotiated for at least one day, the tele-employee performs the work outside the domicile, then this activity is inherently incompatible with a legal relationship grafted on the work at home contract, whose essence is the provision of homework.

3. Conclusions

The practical problem that employers will encounter will be that if, on the date of entry into force of Law no. 81/2018, a valid home employment contract is signed in which the employee carries out the activity using information technology and communications, Law no. 81/2018 does not solve this conflict of laws over time, and is not endowed with transitional law.

Naturally, nothing opposes the will of the parties, who can conclude an additional act on the work at home contract, under article 3, paragraph 1, of Law no. 81/2018, which would convince the submission of the labor contract to the provisions of the law, with the addition in the additional act, obligatory, of the information expressly provided by article 5 of Law no. 81/2018.

Last but not least, it is necessary to analyze the intention of the legislator that regulated the legal regime of the individual teleworking contract, distinct from that of the Labor Code, because the teleworking contract is nothing more than a species of the individual labor contract.

For all the reasons that precede, the teleworking policy option adopted by the legislator is in line with European legislation, responding to the needs and demands of the labor market.

However, the application of teleworking legislation will raise practical problems, particularly with regard to the compatibility of teleworking workplace with normative safety and health requirements. Also in practice there will be difficulties in highlighting the hours provided by tele-employee and the checks carried out by the representatives of the competent authorities, especially if the tele-employee option will be his home.

Bibliography

1. Alexandru Ticlea *Tratat de dreptul muncii. Legislatie. Doctrina. Jurisprudenta.* Universul Juridic Publishing House, Bucharest, 2016.
2. Raluca Dimitriu, Mihaela Marica, *Telemunca. Avantaje. Dezavantaje. Optimizare cost*, Rentrop & Straton Publishing House, Bucharest, 2018.
3. Law no. 81/2018 on the regulation of teleworking activity, published in the Official Gazette, Part I no. 296 of April 2, 2018.
4. Law no. 53/2003 on the Labor Code, republished in the Official Gazette, Part I no. 345 of 18 May 2011, as amended.

The Role of the International Labour Organization (ILO) in Protecting Workers' Rights

PhD. student **Ibrahim AL-HAJ-EID**[1]

Abstract

In this article, we study about (ILO), The organization worked on ensuring labor rights and freedom, which ensures them practicing their rights at work in favorable condition, and enables them to benefit from this rights. When other states joining the organization obligate it, according to the constitution, to accept all the commitments written in this constitution. The research is based on analytical materialism and other research methods such as the dialectical, historical, descriptive, predictive and jurisprudence. The international labor organization was able to overcome the conflict of jurisdiction, which often happens between the countries and international organization for protecting human rights, because they derive their legal title in practicing their activities primarily of its constitution, which is characterized by the integrity of its provisions on the eternal law of member states, and this supervisory role does not contradict with the principle of non-interference in the country's internal affairs or the sovereignty of the state, for the state members have willingly accepted joining the organization, and they have full knowledge of the commitments that follows after they join.

Keywords: *labor, International Labour Organization, employers, workers.*

JEL Classification: K31, K33

1. Introduction

The international labor organization has ended monopoly phenomenon of its work representing workers in international organizations through the participation of representative of workers and employers, with government representatives, to participate in making a decision, and develop policies on ILO issues, and taking copies from reports and information given to the organization. On the other hand, government representatives and workers' representatives and employers got equal seats in governing body of the international labor office.

The problem investigated in this study, to provide an understanding of the concept of control over the rights established within the framework of the International Labor Organization and the extent to which the organization contributes to the protection of workers' rights at the global level through the mechanisms available to them and to identify the position of States on the role of the Organization in view of the impact of the Organization's activity on the legislative system of these States.

[1] Ibrahim Al-Haj-Eid – Bucharest University of Economic Studies, Romania, i.bb@hotmail.fr.

Has the ILO succeeded in providing legal means at the international level to protect the rights of workers? What is the legal basis on which the ILO derives its authority to control workers' rights? What are the problems raised by this control?

Because of the lack of previous studies, it was the reason to make this study in this subject, Where I will study the legal basis, that the ILO derives its authority from, to control labor rights, then in the rights and freedom insured to the workers by the ILO.

And then in the International Labor Organization Committees, this research is based on analytical materialism and other research methods such as the dialectical, historical, descriptive, predictive and jurisprudence.

The proposed solutions are:

1. To promote awareness of labor rights among workers by defining all the rights set out in ILO conventions.

2. The obligation of states to open trade unionism, and make it a requirement of membership in the organization.

3. Seriously pressure on multinational companies to comply with the international labor standards created by the organization.

2. The legal basis, that the ILO derives its authority from, to control labor rights

The international labor organization has ended monopoly phenomenon of its work representing workers in international organizations through the participation of representative of workers and employers, with government representatives, to participate in making a decision, and develop policies on ILO issues, and taking copies from reports and information given to the organization. On the other hand, government representatives and workers' representatives and employers got equal seats in governing body of the international labor office.

The terms of creating ILO, which came in a stage known for its huge destruction to the world, which was mentioned in the Conference of Versailles year 1919, in addition to Philadelphia declaration in year 1944, which was attached to it constitution of ILO for year 1946.

This included the organization's area of competence, the expense of its legal authority, having member states bound by their decisions, also the voting system, and establish the basis for membership.

These situations made the organization's constitution traits alleviate it from others, since the partnership cannot be accepted without agreeing to the constitution, and because the ILO's constitution is an international treaty that was considered according to article 38 of the statue of international court of justice. Therefore, the eminence and unison of its provinces was according to emanating the international law to the internal law of the states. that means emanating the organizations constitutions from the rules of their member's states, and the unison

of its provinces because the constitution does not allow any form of reservation of its decision.

Agreeing to the ILO's constitution is considered an important condition to join the organization to all the member states of the United Nations, which is according to article1 paragraph 3 from the organizations constitution. As for paragraph 4 from the same article states for the new states to be accepted, they are obligated to be commit themselves to the organizations constitution's provinces and approval by the two-thirds majority of the members. Including two-thirds of the present and voting government delegates[2].

This special trait for the ILO, which is distinguished by its triangular structure, makes the new states required, after obtaining the membership in the government, to apply to the other conditions, including having union representations for its workers, and representing their employers. The composition of the Governing Body of the ILO requires the presence of representatives of Governments, labor representatives and employer's representatives. Whereas when the government provide representation within according to what came in article 7 paragraph 1: The board of directors is formed from sixty-five people, twenty-eight represent the governments, fourteen represents the employers, fourteen represents the workers.

Having the state accept the organization's constitution, and complete it to the ILO that it accepts the commitment from the constitution. The most important being respecting personal rights, duty and freedom in general, and labor rights and freedom in particular, which aims for achieving social justice, which was also mentioned in the constitution at the Philadelphia declaration annexed thereto to the second item from it that said: When the Conference believed that experience had fully proved the validity of the ILO Constitution that there is no way to establish a global and lasting peace unless built on the basis of urgency, it confirms:

All humans, whatever race, belief or gender they are, has the right to work for their physical wellbeing and spiritual offering in conditions that allows them freedom, dignity, economic security and equal opportunities. Providing conditions that allow access to this should be a fundamental objective of every national and international policy.

When any state withdraws, the organization's constitutions states that the withdrawing state is bound to notify the general director of the international labor office, and the withdrawal shall take effect two years after the general director receives the request for withdrawal, with the obligation of having the withdrawing company fulfill all the necessities, including financial necessities, which is according to article 1 paragraph 5 stating: Any member state cannot withdraw

[2] Hamad Saad Al Dakqaq, *International Organizations*, University House of Printing and Publishing, Beirut, Lebanon, 1994, p. 429.

from the ILO without notifying the general director of the international labor office with the intentions of doing so, and the withdrawal tarts two years after the general director receives it, with the condition of having at the time fulfill all the financial necessities of its membership.

When the state member has ratified by international labor convention. Its withdrawal does not affect the continuation of the commitments that comes from the convention, or what's related to it the whole time that was stated in the convention.

Perhaps that is what prompted professor Miele to consider ILO and European collages – before the current European union- of the same kind. In this regard we find him refusing the traditional division for the international organization to:

- Organizations of coordination
- Organizations supranational, which is divided into:
  - Organizations exercising interference in the constitutional scope of member states.
  - Organizations not exercising interference in the constitutional scope of states.

The professor goes on that according to how ILO is making an impact on legal systems, it goes with the European groups from the first time (organizations exercising interference in the constitutional scope of member states)[3].

Therefore, elevating the organization's constitution either from the rest of the organization itself, or even for the legal systems of the countries appointed to it clearly, considering these countries agreed to join the ILO to comply to what is written in the organization's constitution. Making it necessary for them to make their legal system compatible to the constitution, and that is by taking legitimate measures by which works to enforce any of the ILO's conventions ratified by state members. The constitution has stated about this in article 19 paragraph 5 by saying: the member state that got authority approval or the authorities that specialize in this subject has to inform the direct general of the formal ratification of the agreement and take necessary action to implement the provisions of the joint agreement.

The ILO's convention has a characteristic that differentiate it from other work organizations, that made it in line with the saying that the rules of primary law transcend the domestic laws of the state, which is what we see written in Vienna convention in in year 1969 at the treaty law.

The most prominent features of privacy that is specialized by the ILO, is what we see at the declaration of the objectives and purposes of the State, also known as Philadelphia declaration, accompanied by the organization's conven-

[3] Mahmoud Massad Mahmoud, *The role of the International Labor Organization in the creation and application of international labor law*, Dar al-Nahdah al-Arabi, Cairo, Egypt, 1977, p. 105.

tion where the principles written in the declaration applies to all the world societies. That was also written in the fifth item in the declaration by saying: the conference confirms that the principles written in the declaration can be applied to the whole world's society. However, it was necessary to consider how to apply the stage of social and economic development reached by all societies, because applying it gradually to dependent societies and societies that reaches the stage of autonomy, means the whole civilized world.

By considering the ILO's convention a treaty establishing, it has direct effect to the legal and administrative work of the organization, because the ILO is a legislative body in the field of international labor law, by issuing agreements or even recommendations, it is taking their convention into consideration, since it is obligated to respect the conventions texts in order to make others submit into adherence to the convention, and because here it is helping in making international rules that is related to work as human rights. This is done through international conventions and recommendations issued by this organization, also called as international labor work.

3. The rights and freedom insured to the workers by the ILO

Any organization's constitution determines in addition to it making the general framework of the activity of its various agencies, and is not exposed mostly to all the details relating to the organization's activity. The ILO's constitution does not go with this rule. However, Philadelphia declaration supplemented to it insures that lots of rights and freedom are ensured that it could be said that the ILO's convention is for the workers. Therefore, I will show the rights and freedom ensured under the constitution. Included the rights related to working conditions (first section), and presenting to trade union freedoms and the right to trade union representation (second section).

A. The rights related to working conditions. The ILO's area of interest in working conditions was expanded until it included serious illnesses like Immunodeficiency. Philadelphia declaration also included rights that assist in the exercise of the right to work. It also includes mechanisms to remove obstacles to its exercise.

Exercising the rights to work requires the existence of conditions conducive to the exercise of this right, where these conditions were not present, it would not be as easy to exercise the rights of work under lots of obstacles. Therefore, these conditions became rights that help labor rights. It is known that ILO made lots of articles relating to workers, employers and working conditions[4].
It also mentioned other subjects like organizing and operating manpower, and protecting workers from working injuries, occupational diseases, defending the

[4] Ahmed Abu Al Wafa, *International Protection of Human Rights in the United Nations and Specialized International Agencies*, Dar Al Nahdah Al Arabiya, Cairo, Egypt, 2006, p. 268

interest of workers that works outside, organizing work hours by putting a limit to daily and weekly working hours, age pension guarantee, organizing work presentation, providing salary that insures good living conditions, and insuring equal salaries for equal jobs.

It also mentioned that full employment and workers recruitment in works where they can feel comfortable or disbursement of hazardous work allowance, and providing ways to train workers and facilitate transportation, including migration for work and settlement, as a way to achieve the goal, under protective safeguards for all specific workers, and effective recognition of the right to collective bargaining and the cooperation of the administration and workers for continuous improvement of productive efficiency, and the cooperation of workers and employers for preparing and implementing social and economic measures, extend the social measures of social security so as to ensure basic income for all those in need of such protection and provide comprehensive medical care, complete protection for the life and health of the workers in all professions, motherhood and childhood care, providing adequate nutrition, proper housing, recreational and cultural facilities, and ensure equal opportunities in education and vocational training[5].

Poverty is one of the main reasons that prevent the right of work. For that the ILO constitution's opinion was that poverty poses a threat, and accomplishing victory over want does not come without a war that must be waged and pursued with unremitting determination within every nation, which is what the first goal ensures in paragraph (c) and (d) from the goals that were announced at Philadelphia declaration. The organization also access all the national and international policies and measures, particularly in the economic and financial field, and does not accept the policies and measures except what agrees with accomplishing social justice considering it being the main goal for the ILO according to the second article paragraph (h) in Philadelphia declaration. The ILO convention adopted the removal of the obstacles that prevents labor rights and all rights connected to it, like fighting unemployment and backwardness, because the failure of the nation to provide humane working conditions hamper the efforts of other nations wishing to improve working conditions within their countries[6].

The organization also insured that the agreements issued by it and follows the convention's providences to remove all the obstacles that prevents labor rights. The constitution also ensures article 19 paragraph 9 that even the agreements made by it if any of the rights stated in the other is not applied, but what is applied is what is more convenient for their rights. With that the organization worked to remove the obstacles to the work of women in coordination with the States.

---

[5] Article III The Declaration of Philadelphia (10 May 1944) Annex.

[6] Preamble to the Constitution of the International Labor Organization, see https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO, consulted on 8/11/2018.

There are lots of lots of agreements that remove all discriminations either on a sexual basement. Some of them include agreements that removes gender discrimination, and gave women rights equal to men when doing the same job, or it could include racial inequality, where foreigners have the same rights as citizens at work.

Since the ILO was of a labor nature, it seems natural that they would be especially interested in two types of rights: civil and political rights like, freedom of expression, the freedom to participate in trade union, freedom of peaceful assembly, and economic, social and cultural rights like right to work, rights to establish trade union, and the right to join a freely chosen union.

The ILO also gave guarantees about freedom of association. The right of union representation is working to achieve what is consistent with its tripartite composition distinct from other international and even non-international organizations.

First: freedom of association.

The freedom of association has historically been strongly linked with freedom of speech and opinion, freedom of the media, freedom of assembly, the right to universal suffrage. The tripartite nature of the ILO's work brings together governments, employers and trade unions through their representatives to work together to achieve collective justice and raise the standard of living everywhere.

The ILO has mentioned the freedom of association in their preamble, and Philadelphia declaration, which was attached to ILO constitution and stated that supporting freedom of association could be considered one of the goals and basic principles that the organization has.

According to article 3 paragraphs 5 from the constitution that Member States undertake to appoint non-governmental delegates and advisers in agreement with the most representative professional organizations of employers or workers in their countries, depending on the situation, if any of those organizations existed.

The most important thing to notice on the previous article is that the countries are not required to find governmental representatives in their delegations, except it would be underrepresented in the absence of such representatives, since there are some devices in the organization that include representatives of workers only, such as the Committee on Freedom of Association. That makes the member states in order to avoid this situation work hard to find representatives of workers and employers in order to have full representation in all committees, and according to freedom of association is a primal condition to stand up for labor interests, and with it goes other rights and freedom labor. ILO management in year 1949 and 1950 searched this on.

Second: Union Representation.

Practicing freedom association require having union representation that works on protecting and defending labor rights, and having union representation in member state guarantees it full representation in all committees' constituent

for the organization. Although there isn't a true text in ILO constitutions that oblige the states to guarantee having union representative to practice freedom of association, the Declaration of Philadelphia focuses on the aims and purposes of the International Labor Organization, which can highlight the importance of the existence of trade union representation through which workers exercise their right to freedom of association. Where this came in the announcement. To achieve victory in this war against poverty and unemployment requires an age and an irreversible pursuit of determination within each State, and persistent and concerted where representatives of workers and employers work to achieve equality with representatives of governments that are participating with them in free debate and democratic decision to achieve the well-being of society. Therefore, fighting poverty requires consolidation of tripartite formation effort of the ILO to achieve equality.

It was mentioned in Philadelphia declaration the effective recognition of the right to collective bargaining and the cooperation of the administration and workers in order to continuously improve the efficiency of production, as well as the cooperation of workers and employers in the preparation and application of social and economic measures.

B. The guaranteed rights and freedom under agreements of ILO. Labor convention is most distinguishing ILO's activity since its creation, considering it a tool that has proven effective in finding international labor legislation. Where the organization was able to, by huge amount of agreements about 199 agreements till now[7], to address the right to work and the circumstances around it. That also made it exposed to rights and basic principles to practice the right at work, where it can't be imagined practicing labor rights without it's availability.

The rights and basic principles to practice labor rights. The ILO cared to through various agreements to find all the circumstances that ensures rights contributes to practicing labor rights, and works on ensuring the important from them. Perhaps the most important would be:

a) Choosing working hours: lots of agreements have mentioned choosing working hours according to each sector and the worker's privacy per sector, since choosing working hours counts as a primary interest that the organization addressed after its creation, where it was mentioned in the first agreement year 1919, by choosing working hours to be eight hours per day, and forty hours per week in the industrial facilities. Then came the agreement year 1935, where it was approved to work forty hours per week without it leading to a lower standard of living, and facilitate measures that are considered appropriate for the purpose, and the states that ratify this agreement undertake to apply the agreement to all categories of workers, according to the provisions of the agreement that the state ratified it.

[7] ILO Conventions, University of Minnesota Law Library, the document is available online at: http://hrlibrary.umn.edu/arabic/ilo.html, consulted on 8/11/2018.

b) Equality in wages. Equality in wages was mentioned by agreement number 100 year 1951 for equality in worker's salary when the work is equal to the value of the wage. The agreement also specified the concept of wages to include salary and all other compensations that the employer pays to the employee directly or indirectly in cash or in kind for benefiting from the workers' efforts. Paying the wages also comes with improving household living, considering it an important income factor for the family. It also forced the states that ratified the agreement to choose an appropriate way to apply the agreements provisions, because equal remuneration is established by law or regulation issued under a collective agreement between workers, employers and the government. However, disparities in wages between genders are still a widespread phenomenon. The wage gap has seen the new two decades slow, stagnant or renewed.

c) Breaks**.** To secure the psychological and physical comfort of workers in a way that ensures them getting their wages, the agreement in year 1836 obliges to provide workers annual paid vacation. It left it to the states to choose the duration of vacation no less than the minimum that it chooses, which is 6 days per day of the connected service. However, they should not consider sick leaves and public holidays as annual leave or waive them wrongly. That is also to enjoy the right to rest. Article 5 allowed the states to proceed with rules that prevents the worker to merit wages in their annual break, and made the employer obliged to pay the annual leave for the worker when he is detained because of the employer if he does not benefit from the holiday of the year he is dismissed. Article 8 of the Convention called on ratifying States to establish a system of sanctions to ensure the application of the provisions of this Convention.

d) Setting a minimum age for employment. The organization has set a minimum age for employment through many agreements, which have reached many sectors, depending on the working conditions, and the degree of seriousness and the effort required and the corresponding or required age of the worker, and the Convention no. 138 of 1973, where the goal Is to find a general convention to replace the sub-conventions in order to eliminate child labor through a minimum age of employment.

e) Protection of the rights of migrant workers and their families. The aim of the organization is to protect all workers, including migrant workers and members of their families, in view of the apparent increase in immigration due to the need for cheap labor, which is considered a fuel for the economic recovery of rich countries, the problem of unemployment and poverty in their countries of origin and the need for their countries to obtain difficult labor through the export of hands This issue has been of great interest to the Organization, to which the Convention of 1949, no. 97, and its Supplementary Convention no. 143 of 1975 have been devoted. The International Labor Organization, through these Conventions, has called upon States whose provisions apply to the establishment of information

The relevant provisions of legislation and related provisions and agreements concluded by such States shall be made available to the International Labor Office or other Members of the Organization upon request.

It is noted that there is exploitation of the expatriate positions to assign them to the worst works and the lowest wages, which affected their rights, especially those used by multinational companies.

The citizens of the third world who live abroad in general suffer from the new racism in many European countries. These have spread in Germany, France, and recently in Sweden and elsewhere, and to a lesser degree in Britain. It was also added to the United States. It came in the form of to foreigners, especially Arabs and Muslims, and a call to stop immigration and refrain from accepting refugees and deporting workers[8].

Third subject: - Control devices

In essence, the judiciary is the natural guardian of rights and freedoms, including the right of the individual to work. However, the International Labor Organization through its Constitution mentioned that the organs affiliated to it have the role of control in the follow-up implementation of what is issued by the Organization, whether in terms of composition of this device or in terms of its role practiced within the Organization. In addition, the various declarations issued by the Organization have been entrusted to the same bodies to follow up the implementation of what has been called through these declarations, since the Board of Directors within the Organization has a mandate of great importance in terms of executive and supervisory, it sets the agenda of the General Conference and appoints the Director General of the Organization. As well as the necessary instructions to implement the decisions and recommendations of the General Conference and follow the implementation process, but the supervisory role exercised by the committees in the Organization. The International Labor Office also has a supervisory role.

4. International Labor Organization Committees

The most important distinguishing feature of the ILO from other organizations is its tripartite nature, which has had a reflection on the composition and work of the committees within it. These committees are defined by the Constitution of the Organization, whether in terms of composition or in the nature of its work. We find both committees experts and the conference involved in the implementation of conventions and recommendations. There is a third committee in the committee concerned with freedom of association, so we will talk about the committees of experts and the conference on the application of conventions and

[8] Abdul Mohsin Shaaban, *Human Rights Culture*, First Edition, Kawa Association for Kurdish Culture, Beirut, Lebanon, 2001, p. 25.

recommendations (first branch), as well as the Committee on Freedom of Association (SEC).

First Branch: - The Expert Committees and the Conference on the Application of Conventions and Recommendations

The ILO's competence in international labor legislation through the issuance of conventions and recommendations, and in view of the large number of such conventions and recommendations, the committees of experts and the Conference on the application of conventions and recommendations play an important role through:

First: The Committee of Experts chosen to apply Conventions and Recommendations. This Committee was created, which is composed of independent individuals of recognized competence in 1927, and chosen for a three-year term as a personal expert among competent and competent experts in the field of international labor law. The Board of Directors of the International Labor Organization appoints them on the proposal of the Director-General of the International Labor Office. They also take into account the equitable geographical distribution[9].

The Committee of Experts monitors the implementation of the conventions and recommendations. It examines the reports aimed at implementing the agreements and recommendations. This is done through the committee's examination of the reports submitted by the member states concerned with the obligations emanating from the constitution of the organization and the agreements ratified by them, and the extent to which the legislation of these countries is applied, and its internal procedures for this Constitution and those agreements[10].

It also looks at the official newspaper of the member states of the legislative groups issued by it. The committee also examines the reports of the member states concerned about the agreements, which it has not ratified. It also conducts a general study related to these agreements and the cases existing in these different countries. The committee is entitled to inquire from the member states about and if the States concerned have not replied to the questions of the Committee, they shall be entitled to produce a report containing a comprehensive and specific examination of a particular matter from which they have examined, based on the reports of the Member States submitted to them Conventions and Recommendations on these issues.

Therefore, its primary function is to know the extent to which each country's position is consistent with its obligations in accordance with the conventions and in accordance with the Constitution of the Organization, and to make a distinction between the conduct and laws of the State and the provisions of the Convention[11].

---

[9] Ahmed Abu Al-Wafa, *op. cit.*, 2006, p. 282.

[10] Claudio Zengi, *International Protection of Human Rights*, Translated by Fawzi Issa, Lebanon Publishers, Lebanon, 2006, p. 105.

[11] Ahmed Abu Al-Wafa, *op. cit.*, 2006, p. 282.

Second: Conference Committee chosen to apply Conventions and recommendations. In each session, since 1927, the General Conference is composed of representatives of governments, workers and employers. This committee is called the Committee of the Conference. The Committee reviews the reports submitted to it by the Committee of Experts and invites the Member States to participate in their work in order to obtain additional information. The Committee of Experts could have received a number of contradictions in the report of these States, namely that the function of the Conference Committee was to examine the issue of applications and recommendations. It took into account the report of the Committee of Experts on the Application of Conventions and Recommendations for it.

The explanations of these countries may be heard through the measures taken by these countries with a view to removing the contradictions contained in the report of the Committee of Experts. The worker's representatives and the representatives of the employers may present their views regarding their countries' application of the labor agreements. At the end of their work, the committee presents a report containing its conclusions, and noting the difficulties faced by Member States in fulfilling their obligations under the Constitution of the Platform and other conventions to the General Conference, which is being discussed at its plenary session.

Second Branch: - Committee on Freedom of Association. The Special Committee on Freedom of Association was established in 1950 to complement the General Assembly (the committees of experts and the conference concerned with the implementation of conventions and recommendations). This special mechanism is designed to protect the freedom of association. It also includes those countries that have not signed the Convention on Freedom of Association and Protection of Organization, because the principle of freedom of association is enshrined in the Constitution of the International Labor Organization. This new method of examining communications submitted against some States even if they do not sign this Convention (Convention No. 87 of 48), represents the fundamental property of the EO that directly follows its charter of the body (i.e. the ILO Constitution). The Committee is composed of nine members, three member governments, three employers 'organizations, and three workers' organizations. The Committee considers complaints received by a written statement as well as the observations of States thereon. The Committee seeks to adopt its decisions unanimously. Or any representative, citizen or official representative of the employers 'or workers' organization shall be present in the complaint against his or her Government.

The Committee on Freedom of Association may also examine complaints concerning freedom of association, which is not done without the agreement of the concerned government that the complaint was sent against it. The Committee has also established a Committee of Independent Experts to assist it in carrying out its functions, if the nature of the work presented to them requires the presence

of experts who can assist in solving the problems in the work of the committee concerned with freedom of association, the independent experts' committee is appointed by the latter board. After a careful study, the recommendations issued are usually taken into reconsideration by the government, which did not comply with the freedom of association, in respect of legislative amendments or effective applications.

Thus, the Commission created through its long activity a kind of adoption by States of legislation that contributes to the protection of trade union freedom, including what was stipulated in the legislation of countries such as the right to strike, which was not exposed to the International Labor Organization in any of its conventions, except as derived from the right to collective bargaining Which in some cases make the strike a means to fulfill their demands.

The activity of this committee has played a role in achieving recognition by States of the rights related to freedom of association such as trade unionism and public liberties necessary for the exercise of trade union rights. The Committee has also examined a large number of reports, and has examined more than 2000 reports at an ever increasing pace.

5. Conclusions

The conclusions are as follows:

1. Give a more active role of the control devices within the ILO.
2. Urge States to mitigate the impact of economic crises that have a direct impact on workers' rights.
3. The International Labor Organization (ILO) must pressure on the States that occupy other States or disputed territories to comply with the obligations of States to the Conventions of the Organization.
4. The duty of the Organization to protect migrant workers and their families, from all forms of discrimination and racism, by establishing a special convention in this regard.

Bibliography

1. Abdul Mohsin Shaaban, Human Rights Culture, First Edition, Kawa Association for Kurdish Culture, Beirut, Lebanon, 2001.
2. Ahmed Abu Al Wafa, International Protection of Human Rights in the United Nations and Specialized International Agencies, Dar Al Nahdah Al Arabiya, Cairo, Egypt, 2006.
3. Claudio Zengi, International Protection of Human Rights, Translated by Fawzi Issa, Lebanon Publishers, Lebanon, 2006.
4. Hamad Saad Al Dakqaq, International Organizations, University House of Printing and Publishing, Beirut, Lebanon, 1994.

5. Mahmoud Massad Mahmoud, The role of the International Labor Organization in the creation and application of international labor law, Dar al-Nahdah al-Arabi, Cairo, Egypt, 1977.
6. Constitution of the International Labor Organization, https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO, consulted on 8/11/ 2018.
7. International Labor Organization (ILO) Conventions, University of Minnesota Law Library, the document is available online at: http://hrlibrary.umn.edu/ arabic/ilo.html, consulted on 8/11/2018.

Issues on Discrimination in Matters of Remuneration. Case Study

Lecturer **Dragoş Lucian RĂDULESCU**[1]

Abstract

The existence of issues concerning discrimination in the employment legal relationship requires the application of acts or facts which have as their object direct or indirect discriminatory actions. These apparently neutral acts are susceptible of promoting different legal and prejudicial treatments to individuals found in legal situations considered comparable. Practically, procedures that have the ultimate effect of breaching the principle of equal treatment and non-discrimination fall into a state of non-realization of the full use of workers' fundamental rights and freedoms, which has led to the necessity of introducing elements aimed in particular at defining the phenomenon, with an extension to the introduction of justified discrimination requirements. The integration and combating of the discrimination phenomenon in the legal relations of labor under the laws of the Member States of the European Union, the acceptance of the limitations in the judicial practice, the involvement of the doctrine, have determined a constant process of evolution and analysis of the phenomenon, in parallel with the extension of the discrimination criteria application, in order to limit the restriction of the fundamental rights. The article presents issues regarding the special legal norms established to be applied in matters of remuneration with respect to the public institutions, as well as their correspondence with the regulations regarding the protection of fundamental rights and freedoms in the field of legal labor relations.

Keywords: *discrimination, criteria, constitution, salaries, institutions.*

JEL Classification: K31, K33

1. Introduction

As regards the difference in treatment in relation to the concept of discrimination, it is not limited only to the inequality between employees in a comparable situation, being also applicable in the case of identical treatment for workers in different situations, under conditions of excluding issues regarding the positive inequality in order to protect the disadvantaged groups, in the interpretation of the provisions of the international[2] and national legislation in the field[3].

[1] Dragoş Lucian Rădulescu - Petroleum-Gas University of Ploiești, Romania, dragosradulescu@hotmail.com.

[2] Popescu Andrei, *Dreptul internațional și European al muncii,* 2nd ed., C.H.Beck Publishing House, Bucharest, 2008, p. 340-341.

[3] Țiclea A., *Codul muncii*, Universul juridic Publishing House, Bucharest, 2015, p. 21.

We can observe that, in relation to the purpose of the direct[4] or indirect actions of the active subjects, the provisions of the Labor Code as a law in this matter are complementary to those contained in the Government Ordinance (GO) no.137/2000 on the prevention and sanctioning of all forms of discrimination, imposing non-limitative criteria of discrimination, as opposed to the legal situation found in the European directives or the International Labour Organization conventions, which introduces a regime of favor.

However, the extensive legal regime found in the national law is not always corroborated with constitutional provisions and therefore special remuneration norms are introduced inducing new legal situations not reported to the rights already earned by civil servants, partially invalidating the effects of previous normative acts.

Conversely, the introduction of non-limitative criteria of discrimination allows employees to consider as discriminatory different legal situations, both of a normative nature and as a direct or indirect action of the public institution employers, the protection that was sought to be ensured, thus leading to the withdrawal of certain unfounded requests. In this respect, the situation can be found in the case of forms of direct or indirect discrimination, even if, initially, they were not defined at the Community level[5] in Directive 76/207/EEC[6], but afterwards the concepts were identified in Directives 2000/43/EC[7], 2000/78/EC[8] and 2002/73/EC[9].

In this respect, direct discrimination requires differential treatment resulting in the apparition of the prejudicial outcome to the situation of another person in a comparable situation, and the indirect one presumes the existence of a discriminatory criterion substantiating a seemingly neutral action, both of which presuppose the non-granting or restrict of the use of fundamental rights, including actions against individuals being in different situations[10]. This is also the provision of Council Directive 2002/73/EC relating to the application of neutral practices which do not directly indicate a certain criterion of discrimination, both

[4] Ţiclea, A., *Tratat de dreptul muncii*, Universul juridic Publishing House, Bucharest, 2005, p. 22.
[5] Diaconu Nicoleta, *Dreptul Uniunii Europene, Partea specială, Politicile comunitare*, Lumina Lex Publishing House, Bucharest, 2007, p. 266-267.
[6] Directive of the European Council on the implementation of the principle of equal treatment for men and women as regards access to employment, professional training and promotion, and working conditions.
[7] Directive of 29 June 2000 on the implementation of the principle of equal treatment between individuals irrespective of racial or ethnic origin.
[8] Directive of 27 November 2000 establishing a general framework for equal treatment in employment and labour.
[9] Directive of 23 September 2002 amending Directive 76/207/EEC.
[10] Muscalu Loredana Manuela, *Discriminarea în relațiile de muncă*, Hamangiu Publishing House, Bucharest, 2015, p.17.

forms having similar effects, the concept of discrimination being included in the content of Directive 2000/43/EC[11].

These procedures were subsequently transposed into internal regulations, such as the norms contained in the framework law, GO no.137/2000 on the prevention and sanctioning of all forms of discrimination.

2. Legal norms applicabile in matters of remuneration

Non-discrimination effects in the lack of inequality of treatment situations, i.e. the difference, exclusion, restriction or preference of the legal situations of individuals exercising similar attributions, issues previously found in the public institutions[12] through the provisions of the Framework Laws no. 284/2010 and 285/2010 regarding the unitary remuneration of the personnel paid from the funds, as well as of the Government Emergency Ordinance (GEO) no.83/2014 on the remuneration of the personnel paid from public funds, completed by Law no.71/2015, currently abrogated.

Thus, with regard to GEO no.83/2014 on the remuneration of personnel paid from public funds in 2015, the provisions of article 1 paragraph (1) imposed a gross amount of basic salaries[13]/salary allowances at the level previously established, applicable under the conditions when the personnel subjected to the regulation will perform the duties of the post under the same conditions, interpretation also found in the Decision no. 32/19.10.2015 of the Romanian High Court of Cassation and Justice (HCCJ). It is specified in article 1 paragraph (5^1) that the personnel who register a basic salary and the allowances below the level set at the maximum will have the right to a similar level of remuneratio, conditioned by the carrying out of comparable activities as position/grade/stage and class, of course in the same public authority, except in cases where the differentiated salaries represent real professional requirements and proportionate to the occupied positions, in application of the provisions of article 1 paragraph (5^3).

These provisions of GEO no.83/2014 also included the limitation of cases of discrimination in matters of remuneration in the sense of issuing remuneration provisions at the level of the public institution with the setting of maximum salaries for similar positions found within the institution, for similar activities of employees in comparable situations.

In the special statutes previously repealed, such as Law no. 284/2010 on the unitary remuneration of personnel paid of public funds, regarding the introduction of appeals, the provisions of article 30 required the contestant to respect the term of 15 working days from the date when the attacked administrative act

[11] Directive of 29 June 2000 on the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin.
[12] Iorgovan. A., *Tratat de drept administrativ*, All Beck Publishing House, Bucharest, 2005, p. 589.
[13] Ţiclea A., *op.cit.*, p. 332.

was acknowledged, as a way of addressing the injured party to the authorizing body, after which it is possible to follow the administrative litigation.

The same issues were found in the provisions of article 11 of the GEO no.83/2014 on the remuneration of the personnel paid of public funds in 2015, the competence to solve the complaints regarding the basic salaries is of the original authorizing bodies, including the appeal to the administrative contentious instance of the communication on the issued solution.

However, in the case of the appeal to the legal courts with applications based on non-discrimination in matters of remuneration based on the similar provisions of the new Law no.153/2017 on the remuneration of the personnel paid from public funds, respectively article 37 requiring the submission of complaints within 20 calendar days from the date of the communication of the administrative act to the authorizing body, as well as the subsequent access to the administrative contentious courts, their admissibility may be directly related to the provisions of article 7 paragraph (2) of the Law no.554/2004 of administrative litigation, if the victim of discrimination did not opt for the administrative-jurisdictional procedure in the special law.

3. Unconstitutionality of the provisions of the framework law on remuneration matters. Effects of discriminatory legal norms

On the one hand, with regard to the provisions of article 19, paragraps (1) and (2), of Law no.153/2017 concerning the remuneration of personnel paid of public funds, the non-proportionality with the law derives from the process initiated by the head of a public institution to set the basic remuneration for leadership positions, including their own basic remuneration.

On the other hand, with respect to the provisions of article 38, paragraph (3), of Law no.153/2017 concerning the remuneration of personnel paid from public funds, there is a differentiated application with the disrespect of the equality principle, the social importance of labor, the hierarchy or the transparency of the mechanism on setting remunerations in the sense of ensuring salary predictability for personnel employed in the budgetary sector. All these cases of differentiated application contravene the provisions of article 15, paragraph (1), article 16, paragraphs (1) and (2), article 41, paragraph (4), and article 53, paragraphs (1) and (2), of the Romanian Constitution.

In this respect, unconstitutionality is also related with the provisions of article 4, letters c and e, of the Law no. 188/1999 regarding the status of civil servants, namely equal opportunities, as well as the motivation, principle according to which in order to develop the career of civil servants, public authorities or institutions have the obligation to identify and support their professional and individual development initiatives and with the provisions of article 62, paragraphs (2) and (4), of Law no.188/1999 on the status of civil servants, reporting to the Minister of Health Order (MHO) no. 1078 of 27 July 2010 regarding the approval

of the organization and functioning regulation and of the organizational structure of the counties and Bucharest public health directorates, and article 6, paragraphs (1) and (6), regarding the appointment in the public management positions of Executive Director of the County Public Health Directorates by the Minister of Health.

In the same idea, the provisions of article 27, paragraph (2), of the Government Decision (GD) no. 611/2008 for the approval of the norms regarding the organization and development of the civil servants' career prohibit any discrimination between civil servants.

With regard to the provisions of article 5, letter b, of Law no. 188/1999, it stipulates the obligation of the public authorities or institutions to elaborate internal policies and instruments for human resource management and planning, applying to the civil servants the principles of equal opportunities and motivation.

As a result, in relation to the legal nature of the won right, it may be considered unconstitutional that such a right, even it has a salary nature, to be annulled, restricted, or limited, in parallel with the failure to comply with the principle of legality which should have underpinned the issuing of Law no. 153/2017. We are therefore mindful of the universality imposed by the content of articles 15, 16, 41 and 53 of the Constitution, namely access for all citizens to the rights and freedoms enshrined in law, equal rights in the absence of privileges and discrimination before public authorities, social protection of work on equal terms, as well as the permitted exercise to restrict certain rights or liberties, proportionate measures to the decisive situations.

Compared to the rules previously mentioned, on the one hand, article 19, paragraph 1, of Law no. 153/2017 - the framework law on the remuneration of personnel paid from public funds requires that the basic salary for management positions to be set by the head of that institution in relation to the responsibility, complexity and impact of the decisions that the duties of the post contain.

In the paragraph 2, on the other hand, it is stated that in the basic salary for the management positions both at grade I and grade II, the gradation corresponding to the seniority stage is included, at maximum, both being gradations indicated for the purpose of general application for all budgetary public institutions. The law does not, however, provide norms to indicate objective criteria for classification in grade I or grade II, thus the premises of a conflict of interests are created as each manager of a public institution is able to impose, including for him, the more favorable remuneration conditions. For example, if we refer to the content of the MHO no. 1078 of 27 July 2010 regarding the approval of the organization and functioning regulation and the organizational structure of the counties and Bucharest Municipality Public Health Directorates, there are no criteria for differentiating the attributions of the executive directors of these institutions, which implicitly leads to the birth of the possibilities of discrimination in subjectively granting grade I or II for employments' remuneration.

For example, Law no. 153/2017 on the remuneration no longer specifies that, in the field of health, "the criteria for categorizing the healthcare units and subunits, the establishment of the managerial staff's remuneration level for grades, as well as the paid allowances for additional tasks, activities and responsibilities for the basic job position" are to be set by the minister of health order, as was provisioned in the former Laws no. 284/2010 and 285/2010 on the remuneration currently abrogated, the head of the unit being unable to have a legal basis for the application of the respective normative provisions. Thus, formerly, Law no. 285/2010 on the remuneration in 2011 of the personnel paid from public funds required in article 2 the remuneration of the newly recruited personnel[14], the appointed or employed personnel in the same public institution/authority, as well as in case of promoted personnel, to be applied the level of remuneration already paid for similar functions existing in that institution. However, the interpretation of the remuneration provisions for unitary application was the object of the HCCJ Decision no. 32/2015, the non-discrimination assuming the actual payment related to the existing salary level for similar functions in the institution, for the same professional grades and length of work stages.

In the same way, the norms of the Order no. 1078/2010 on the approval of the organization and functioning regulation and the organizational structure of the counties and Bucharest public health departments specify that the personnel of these institutions includes both civil servants and contract auxiliaries who do not exercise any public power prerogatives, or the effects of Law no. 153/2017 on remuneration concern all personnel of these authorities or institutions.

One can see that in terms of discriminatory criteria, Law no. 153/2017 requires that the salaries of personnel paid from public funds within the public health departments will be made for the medical-sanitary personnel according to annex II, chapter I, point 2, and for the civil servants public and administrative staff will be done according to annex VIII, chapters I, II and III. As a result, the remuneration on different criteria of the above-mentioned categories of personnel creates unjustified inequalities among the employees of the same public institution, thus being unconstitutional, disregarding the principles underlying the issuance of the Law no.153/2017. These principles are: non-discrimination aimed to eliminate any forms of discrimination and to institute equal treatment of personnel in the budgetary sector performing the same activity and having the same lengh of work; equality aimed to ensure equal basic salaries for work of equal value; social importance of labor in terms of setting remuneration considering the responsibility, complexity, activity risks and level of studies, as well as hierarchy, vertically and horizontally within the same field, depending on the complexity and importance of the activity being carried out.

[14] Dimitriu, R., *Contractul individual de muncă, prezent şi perspective*, Tribuna Economică Publishing House, Bucharest, 2005, p. 34.

In the same idea, on the one hand, according to the general criteria provided in article 8, paragraph (1), of the Law no.153/2017, the hierarchy of job positions for determining basic salaries, military/civil gradation and employment allowances, both between the fields of activity and within the same field, requires general criteria in relation to knowledge and experience, complexity, creativity and diversity of activities, judgment and impact of decisions, responsibility, coordination and supervision, social dialogue and communication, working conditions, as well as incompatibilities and special regimes, applicable in conformity with article 2, paragraphs (1) and (3), to the personnel of the public authorities and institutions financed entirely from the state budget, as well as to the employees under the individual labor contract and the civil servants.

On the other hand, by the MHO no. 9/06.01.2017 on the application of the provisions of paragraph (1^9) of article 3^1 of the Emergency Ordinance no. 57/2015 regarding the remuneration of the personnel paid of public funds in 2016, it was done the prorogation of some deadlines, as well as some fiscal-budgetary measures, as amended and supplemented by the Law 250/2016 regarding the approval of the GEO no. 20/2016 for the modification and completion of GEO no. 57/2015, and the modification and completion of some normative acts, in order to respect the principles of non-discrimination, of equality, of social importance of labor, of stimulating personnel in the budgetary sector, of vertical and horizontal hierarchization in the same field, of transparency on the remuneration setting mechanism in the same field, in order to ensure the salary predictability for the budgetary sector personnel, respecting the principle of financial sustainability.

4. Effects of the application of the norms contained in Law no. 153/2017

Regarding the effects of the norms contained in Law no. 153/2017, they determined in some cases a process of diminishing salaries of the employees, reported, for example, to the provisions of article 38, paragraphs 3 and 6, provided that the calculation of the salaries determined the exceeding of the amounts set in the grid for the year 2022, with a significant reduction of remuneration for some categories of personnel.

For example, against the provisions of Law no.153/2017 under MHO no. 1078/ 2010[15], article 2, paragraphs (1) and (2), specifies the composition of the leadership of the county public health directorates as well as their quality as secondary authorizing bodies of these public authorities towards the superior authority. Thus, within the meaning of the provisions of article 6, paragraphs (1) and (6), corroborated with article 62, paragraphs (2) and (4), of the republished Law no. 188/1999 on the Statute of civil servants, they are able to appoint and dismiss

[15] MHO of 27 July 2010 on the approval of the organization and functioning regulations and the organizational structure of the counties and Bucharest public health directorates.

the executive directors, but the administrative act of written appointment should contain the corresponding salary rights.

Thus, the situation shows that the ministry should have set objective criteria necessary for the application of the provisions of Law no.153/2017, which would have allowed the legal calculation of basic salaries in the sense of uniform and non-discriminatory application, as, according to the provisions of article 3 paragraph 3 the management of the salary system of the personnel in the public healthcare units is ensured by the main authorizing bodies.

One can see that Law no.153/2017 regarding the remuneration of the personnel paid from public funds, by stipulating the method of establishing the gross basic salary and other allowances granted for the positions in the County Public Health Directorates, violates the provisions of articles 5 and 6 of the Labor Code relating to the principle of equal treatment of all employees and employers, as well as to direct or indirect discrimination against employees in the application of the protected criteria. As a result, we are considering actions that have the purpose or effect of not granting, restricting or abolishing the use and exercise of the rights provided by labor law, the right of employees to respect for dignity and conscience without any discrimination, and the prohibition of any form of discrimination for equal work or of equal value in relation to remuneration conditions.

These legal limitations of employers' action are also found in articles 1 and 2, letter e) and i) of Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discrimination in the sense of respecting the principle of equality between citizens, exclusion of privileges and discrimination, including the right to equal remuneration for equal work or to fair and satisfactory remuneration, requirements transposed by the European directives 2000/43/EC[16] and 2000/78/EC[17].

In this respect one can appreciate that Law no. 153/2017 establishes a method of application interpretable by means of the provisions of article 19, paragrah (1) and (2), "*the basic salary for the managerial positions shall be established by the head of the public institution in relation to the responsibility, complexity and impact of the decisions imposed by the duties corresponding to the performed activity",* under the conditions when each leader chooses to do so without any objective criteria. In addition, Law no.153/2017 no longer specifies that the "*criteria for classifying the units on categories .... for determining the level of salary by grade for the managerial staff, as well as the allowance for carrying out additional tasks, activities and responsibilities to the basic function*" are set by order of the minister of health, as previously provided by Law no. 284/2010 of the unitary remuneration through MHO no. 834/2011 on the approval of the

[16] European Council Directive of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[17] European Council Directive of 27 November 2000 on the establishment of a general framework for equal treatment in employment and occupation.

criteria for the categorization of healthcare units and subunits, the establishment of the level of salaries per grades for the managerial staff, as well as the positions which have a number of classes additional to the basic salary.

In conclusion, the application of the norms of Law no. 153/2017 determined that within the same public institution the basic salary of the executive director position to be reduced to 50% of the former paid salary, in line with the increase in the amount of basic salaries for contracted personnel and the increase in the basic salary, but the decrease in the net salary for civil servants in execution positions, given that the specific tasks, activities and responsibilities in 2018 were the same as those of 2017 before the law was issued.

We can see that these salary diminutions occurred when the tasks, activities and responsibilities were the same as before the new law entered into force, which led to the situation where the salary of the deputy executive director was lower than that obtained by a civil servant, execution personnel in his/her direct subordination.

Moreover, the application of the Law no. 153/2017 with the subsequent amendments leads to the salaries included in the annexes for year 2022 to also include the employer's shares, provided that at the time of the entry into force of the law there is no provision for inclusion in the gross salary of the employer's shares, the 25% percentage originally provided for in article 38, paragraph (3), letter a, concerning remuneration growth and not the employer's share, as mentioned in article 7 paragraph (2) of GEO no. 90/06.12.2017, there being a clear discrimination against employees of the same institution benefiting from the 25% initially indicated as an increase rate in the paid gross basic salary and subsequently specified to be the percentage of the employer's shares included in the gross basic salary, as the main reason for issuing the new remuneration regulation was the elimination of salaries inequalities and inequities existing in the public system.

5. Conclusions

The principle of equal treatment in terms of salary is provided by article 41, paragraph (4), of the Romanian Constitution and in article 1 (2), letter e), of GO no. 137/2000 on the prevention and sanctioning of all forms of discrimination, namely the guarantee of an equal salary for equal work and the right to equitable and satisfactory remuneration.

Provisions concerning non-discrimination in remuneration matters were also identified prior to the entry into force of Law no.153/2017 by the Law no.71/2015 amending and supplementing the GEO no. 83/2014, in parallel with the interpretation given by Decision no. 23/2016 of the High Court of Cassation and Justice.

Thus, article 1 paragraph (5^1) of GEO no.83/2014 stipulates that in the case of the personnel receiving a basic salary amount and allowances lower than those

set at the maximum level in a certain public institution, they will benefit from the same salary level if similar conditions and activities are identified as a position/grade/class and gradation. Practically, article 5 (1^1) of GEO no. 83/2014 interpreted the level of paid remunerations for similar functions as comparable base salary values for activities under the same conditions.

Non-discriminatiory norms on remunerations matter could be identified in national legislation and in the provisions of articles 63 and 159, paragraph 3, of the Labor Code, as well as in articles 1 and 2, letters e) and i), of Ordinance no. 137/2000 regarding the prevention and sanctioning of all forms of discrimination as a guarantee of the application of the principle of equality between citizens, the exclusion of privileges and discrimination, the recognition of the objectives of the European directives 2000/43/EC[18] and 2000/78/EC[19].

Thus, the prohibition of any form of discrimination for equal work or equal value in remuneration, on the means of establishing and awarding salaries in the public sector, calls for the lack of possibilities of different or subjective interpretation of legal provisions, as well as the observance of the constitutionality of the norms of special laws containing disputed aspects regarding the issuance of Law no.153/2017.

We can see that in reality the application of the norms of the Special Law no. 153/2017 determined salary reductions for executive or management positions over previously earned salary rights to occur within the same public institutions, along with an increase in basic salaries for contract personnel, under the conditions when the specific tasks, activities and responsibilities of these officials have not changed as compared with previous ones as a result of the new law, leading to obvious cases of discrimination.

Bibliography

1. Diaconu Nicoleta, *Dreptul Uniunii Europene, Partea specială, Politicile comunitare*, Lumina Lex Publishing House, Bucharest, 2007.
2. Dimitriu, R., *Contractul individual de muncă, prezent şi perspective*, Tribuna Economică Publishing House, Bucharest, 2005.
3. Iorgovan. A., *Tratat de drept administrativ*, All Beck Publishing House, Bucharest, 2005.
4. Muscalu Loredana Manuela, *Discriminarea în relațiile de muncă*, Hamangiu Publishing House, Bucharest, 2015.
5. Popescu Andrei, *Dreptul internațional și European al muncii,* 2nd ed., C.H.Beck Publishing House, Bucharest, 2008.
6. Ţiclea A., *Codul muncii*, Universul juridic Publishing House, Bucharest, 2015.

[18] European Council Directive of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
[19] European Council Directive of 27 November 2000 on the establishment of a general framework for equal treatment in employment and occupation.

7. Ţiclea, A., *Tratat de dreptul muncii*, Universul juridic Publishing House, Bucharest, 2005.

Good Faith in Exercising the Work Reports by the Contract Personnel in the Public Sector

Associate professor **Teodor Narcis GODEANU**[1]
Ionel Florian LIXANDRU[2]

Abstract

The present study aims to analyze how good faith is reflected in the exercise of legal employment or, where appropriate, service relationships, of staff within public authorities and institutions. We have in mind all the categories of such persons, which are mentioned in the legislation and not only by the phrase "budgetary personnel", in which we also include contractual staff, civil servants and dignitaries. In all cases, it is necessary to regain good faith but, in particular, it is revealed to the holders of public functions and dignities. This follows expressly from the wording of Article 54 of the Constitution, which obliges the citizens entrusted with public functions, as well as the military, to fulfill their obligations in faith, in which purpose they take the oath prescribed by law.

Keywords: *good faith, budget personnel, employees, civil servants, dignitaries, oath, service reports, work relations.*

JEL Classification: K23, K31

1. Significance of good faith

The notion of good faith, in Latin *bona fides*, has a dual legal and moral burden, as well. Its meaning is hard to grasp in a definition. The depth of this significance, the multiple valences in the ethical and legal plane, are in principle constraining to concentrate the essence in a generous definition, in terms of the ability to be described, characterized, analyzed, applied, respected.

Good faith is, above all, a state of mind, an attitude. It flows from within each individual and governs its behavior. which behavior must be characterized by the tendency towards good, towards beauty, to justice and dignity.

Secondly, good faith is a principle, a complex rule, not a simple rule. We could say that it is an ensemble of rules, forming, together, the principle of good faith. That obliges the individual to have social and professional relationships characterized by balance, compliance with the rules imposed by the state, through its authorities and the micro-communities in which he/she lives and/or works.

[1] Teodor Narcis Godeanu - Faculty of Juridical, Administrative and Economic Sciences, „Spiru Haret" University, Romania, narcis@godeanu.eu.

[2] Ionel Florian Lixandru - the author is Secretary of State, Ministry of National Education in Romania, lixandru_florin @yahoo.com.

Thirdly, as an enumeration and not as meaning, good faith is a complex duty imposed by law, we could say a synthesis duty, which imposes on a subject of law to fulfill its rights, freedoms, but also the other duties, in a way that reflects the content of good faith, ie responsibility, respect for the law, respect for the rights and freedoms of others and for oneself and others.

We believe that we have succeeded in expressing, in our opinion, the elements which, in our opinion, give an outline to good faith. And it even allows us to define it *as the set of legal and moral requirements which oblige a subject of law to have a private, professional and social behavior in accordance with the prescriptions imposed by the state, by its legitimate representatives, and by people, by unanimous norms accepted, social cohabitation, rooted in customs, established at micro and macro-social level*.

2. Good faith-principle of constitutional rank

The significance of good faith results not only from its complex content, from its roots, which are embedded in the fertile soil of Roman law and in the philosophy of thinking of the great spirits of antiquity, but also in the fact that the present Basic Law of Romania has raised good faith at the constitutional principle.

Thus, the Romanian Constitution[3], revised[4] and republished[5], contains two articles referring in one to "good faith" and the other to "faith" in an approach that includes its "good faith" character. The first is Article 57, which obliges Romanian, foreign and stateless citizens to exercise their constitutional rights and duties in good faith without affecting the rights and freedoms of others.

The aforementioned text is placed in Chapter III, devoted to the fundamental duties, of Title II which regulates fundamental rights, freedoms and duties. From a terminological point of view, we do not see the opinions expressed in the doctrine[6] that the notions of "duty" and "fundamental duty" are preferable in public law, because they have a semantic load more appropriate to this branch of law, unlike "the obligation that is used in private law and is an institution of civil law.

Returning to the place where art. 57 is placed of the Constitution, we understand that, on its basis, good faith is a fundamental duty of individuals in the current constitutional and legal system.

---

[3] The Romanian Constitution was published in the Official Gazette no. 233 of November 21, 1991.
[4] The Romanian Constitution was revised by Law no. 429/2003, published in the Official Journal no. 758 of October 29, 2003.
[5] The Romanian Constitution was republished in the Official Gazette no. 676 of 31 October 2003.
[6] Verginia Vedinaș, *Tratat de drept administrativ*, vol. I, Universul Juridic Publishing House, Bucharest, 2018, p. 468.

From the content of this text it follows that good faith is more than a fundamental duty. As we have anticipated in the pima section of this study, good faith, beyond the nature of duty, it is a principle that governs the way in which all other fundamental rights, freedoms and duties must be exercised.

Such a conclusion stems from the way it is formulated, in the sense that the constitutional text does not devote an independent duty to the formula, let us say, "good faith is obligatory". It establishes a rule that all the legal subjects that exist and operate on the territory of Romania and are entitled to fundamental rights, freedoms and duties must be respected. Therefore, in our opinion, the more appropriate place of the text of art. 57 would be in Chapter I of Title II, which enshrines the principles governing the exercise of all fundamental rights and duties, a proposal we are formulating, *de lege ferenda*.

We therefore appreciate that, in a future and necessary constitutional review, article 57, unchanged, would be advisable to be transferred to Chapter I of Title II of the Constitution.

One last comment we make to this text is that it concerns not only Romanian citizens, but all citizens, all those living in Romania, regardless of whether they are Romanian, foreign or stateless citizens.

The second constitutional text enshrines a relatively similar notion, namely that of faith. This is Article 54 which governs loyalty to the country and which, in paragraph (2) enshrines the rule that citizens entrusted with public functions, as well as military, are responsible for the faithful performance of their duties and, to this end, will take the oath prescribed by law.

We find that the text obliges all persons entrusted with public functions to exercise faithfully their duties, and the pledge of this belief, for this purpose, as expressed by the constitutional text, owes the oath prescribed by law.

It follows from the content of this text that he establishes a principle of exercising any function or public dignity in the Romanian state. Content of the rule contained in Article 54 (2) must be read in conjunction with art. 16 par. (3) of the Constitution, according to which those holding public functions or dignities must be Romanian citizens and have their domicile in Romania, without having to be exclusively Romanian citizens.

In its revised form[7], the text allows, in an implicit manner, that the holders of a public office or dignity have a different citizenship than the Romanian one.

In conclusion, the notions of *good faith*, along with the one *with faith*, have a constitutional determination, and their scope applies directly to categories of public sector employees.

[7] In its original form, Art. 16 par. (3) of the Constitution imposed the exclusive character of Romanian citizenship. It was amended by Law no. 429/2003, eliminating the term "exclusive" that was associated with *Romanian citizenship*.

3. Recovering good faith in the status and professional conduct of staff within public authorities and institutions (budget staff)

3.1. Sphere determination

In order to address this issue, which is the assumed objective of this study, it is necessary to identify the categories of staff working within public authorities and institutions. We will make this determination having as a criterion the legal status applicable to these categories of personnel, and we will identify a first category, which includes the staff subject to a public law status, which includes the holders of public functions and dignities, elected or appointed a second category, which includes staff subject to a legal status of private law, including contract staff. In relation to this second category, it should be noted that they are not subject to an exclusive or pure private law regime, given that certain elements of their legal status are similar to those of civil servants, so that we can speak of a legal status mixed, private law, but also with some elements of public law. In support of this thesis, we invoke the following arguments:

a) the fact that they have to observe specific rules of conduct, similar to civil servants, which are currently included in Law no. 477/2004 *on the Code of Conduct for Contract Staff of Public Authorities and Institutions*[8]. If we analyze the content of this normative act, we find that he is sensitively close, sometimes down to his identity, to that of Law no. 7/2004 *on the Code of Conduct for Civil Servants*[9]. Moreover, in view of the promulgation, publication and entry into force of the Administrative Code, both regulations will be repealed[10] and contained in the content of Part VI of the Code governing *the status of civil servants and contract staff in the budgetary sector*;

b) the contract staff, together with all other categories, officials, officials, managers, budget members, are assimilated to civil servants by the criminal law, and can be actively subject to corruption offenses or assimilated to them, in service or in connection with the service. Article 175 of the current Penal Code[11] confers on the notion of civil servant a very broad meaning, including *the person who, on a permanent or temporary basis, with or without remuneration. a) exercises attributions and responsibilities, established by law, in order to achieve the prerogatives of the legislative, executive and judicial powers. b) performs a public dignity or a public function of any kind; c) exercises, alone or together*

[8] Published in the Official Gazette no. 1105 of 26 November 2004.
[9] Republished in the Official Gazette no. 525 of 2 August 2007.
[10] According to art. 604 par. (2) letters k) and l) of this normative act not yet in force at the date of elaboration of this study.
[11] The current Penal Code was adopted by Law no. 286/2009, published in the Official Gazette no. 510 of 24 July 2009. It was enacted by Law no. 187/2012, published in the Official Gazette no. 757 of 12 November 2012 and entered into force on 1 February 2014.

with other persons, in an autonomous state, another economic operator or a legal person, with full or majority state capital, attributions related to the accomplishment of its object of activity. To these categories is added also the person who performs a public interest service for which he was invested by the public authorities or who is under their control or supervision with regard to the fulfillment of a public service.

We find the generous vision of the legislator, which includes practically any person who carries out an activity of public interest or is under the supervision of a public institution;

c) Finally, a last argument, as succession and not as meaning, is the fact that the Administrative Code is devoted to an independent title, namely Title III of Part VI, to *contract staff in the public administration*. The legal status of these personnel is the regulated one, according to art. 545 of the Administrative Code, of the title, the provisions of which shall be supplemented with those of Law no. 53/2003 on the Labor Code. It is from this very provision that the idea we have advanced is that of a mixed legal status of contract staff in the budgetary sector, which is paid out of public funds.

In addition to these categories already identified, in the public system, we find *persons employed under a management contract* who have the status of managers with rights and obligations established in the management contract with their institution (medical or cultural system).

3.2. Good faith, an indispensable element of the legal status of public sector personnel

In the relatively final part, before concluding, we intend to determine some synthesis ideas that support the existence of good faith as a sine qua non condition of holding and effectively exercising a public or contractual function in a public authority or institution. We have identified, as the first category of staff in the public sector, the holders of public functions and dignities. Along with the soldiers, they make an oath before they begin their mandate for which they were appointed or elected. The content of the oath is that provided by the Constitution or the law. If we look at the content of each oath, we note that it includes elements that, in their entirety, expressly or implicitly configure the idea of good faith. Moreover, the Fundamental Law obliges them, as I have shown, to exercise faithfully the duties of an official or dignitary. Faith is the core of good - belief. It is the kernel, which has as a "wrapper" the actions through which it understands to concretize its activity. As a rule, reference to good-faith is found even in the content of the oath as prescribed by law. Example, art. 32 par. (1) of the Law no. 215/2001 *on the local public administration*[12], which will become Art. 117 of the Administrative Code, when it enters into force, provides for the oath of the local

[12] Republished in the Official Gazette no. 123 of 20 February 2007.

elected representatives, which reads as follows: "*I swear to respect the Constitution and the laws of the country and to do in good faith all that is in the powers and skill for the good of the commune/city/municipality/county people ... So help me God*"[13].

Good faith has to characterize the behavior of public sector personnel, regardless of their status. As a rule, it is expressly prescribed by law. Article 454 of the Administrative Code regulates *conduct in relations with citizens and provides that civil servants are obliged to behave in a relationship based on respect, good faith, fairness, fairness and respect for individuals and legal entities that address the public authority or institution. moral and professional integrity*. Moreover, good faith is one of the principles governing the exercise of the public function, according to the provisions of the Administrative Code, which complements and modifies those of art. 3 of the Law no. 188/1999 *on the Statute of civil servants*[14]. This obligation also rests with the contract staff within the budgetary sector, according to the provisions of art. 557 of the Administrative Code, which in par. 910 states that "*contract staff in the public administration have the same rights and obligations as civil servants, except for the rights and duties expressly regulated for civil servants*".

Among the obligations, it is, as I mentioned, also found to show good faith in the professional relations with third parties, individuals or legal entities.

4. Conclusions

Good faith is one of the legal and moral values that enlivens the personality of an ins, understood both as a private person and as the holder of a function or dignity in a public authority or institution. Moreover, in the latter hypostasis, it is necessary for it to be revealed in professional and social behavior.

The legislator, in general, and the constituent legislator, in particular, confers good faith on profound meanings, the duty and the principle of exercising all rights and duties, or, as we have been allowed to qualify, the duty of synthesis.

Within the structures that make up the public sector, it carries out categories of staff that are meant to serve the public interest, putting it above any personal interest. In such a context, it is necessary to understand the placement of the principle of good faith, based on the exercise of their attributions. The principles, as expressed in the doctrine, *"... feed from the constrictions of legal*

[13] The law recognizes the possibility that the religious formula of condemnation should respect the freedom of religious beliefs.

[14] Republished in the Official Gazette no. 365 of 29 May 2007. Article 3 of this law mentions the principles of legality, impartiality and objectivity; transparency; efficiency and effectiveness; responsibility; orientation towards the citizen; stability in the exercise of public office and hierarchical subordination. For their analysis, see Verginia Vedinas, *Statutul funcționarilor publici (Legea nr. 188/1999), comentarii, legislație, doctrină și jurisprudență,* Universul Juridic Publishing House, Bucharest, 2016, pp. 36-39.

thinking, drawing their sap from Roman pretorian law ..."[15]. We want our study to cause reflection and attitude, which together can lead to an increase in the quality of public and private life in their entirety. Exercising in *good faith* the attributions of those involved in public activity, regardless of their status, brings legality, morality and well-being.

Bibliography

1. Verginia Vedinaș, *Tratat de drept administrativ,* vol. I, Universul Juridic Publishing House, Bucharest, 2018.
2. Verginia Vedinas, *Statutul funcționarilor publici (Legea nr. 188/1999), comentarii, legislație, doctrină și jurisprudență,* Universul Juridic Publishing House, Bucharest, 2016.
3. N. Popa, I. Dogaru, Gh. Dănișor, D.C. Dănișor, *Filozofia dreptului. Marile curente,* All Beck Publishing House, Bucharest, 2002.
4. Romanian Constitution, republished in the Official Gazette no. 676 of 31 October 2003.
5. Romanian Penal Code, adopted by Law no. 286/2009, published in the Official Gazette no. 510 of 24 July 2009. It was enacted by Law no. 187/2012, published in the Official Gazette no. 757 of 12 November 2012 and entered into force on 1 February 2014.

[15] N. Popa, I. Dogaru, Gh. Dănișor, D.C. Dănișor, *Filozofia dreptului. Marile curente,* All Beck Publishing House, Bucharest, 2002, p. 3.