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Practical Aspects Regarding the Role of Administrative Law in the Modernization of Public Administration

Practical Aspects Regarding the Role of Administrative Law in the Modernization of Public Administration

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Publications

Her most important publications are the following books: *The authority of European law. Exploring primacy of EU law and effect of EEA law from European and Icelandic perspectives*, together (co-author Ólafur Ísberg Hannesson), Law Institute, University of Iceland, 2012; *EC and EEA law: A comparative study of the effectiveness of European Law*, Europa Law Publishing, Holland, September 2009; *The solution of cross-border consumer claims: the Achilles' heel of the European Union*, edited by the City of Madrid and the Bar Association of Lawyers of Madrid, Spain, January 2002; *Protection of Consumers in the European Union. Towards a Common Procedural Consumer law*, published by the legal publisher Marcial-Pons, Madrid, Spain, 1998. A full updated list of her most recent publications can be consulted here https://ugla.hi.is/pub/hi/simaskra/ritaskra en/3e6a07bcd2b7.pdf

Prizes

Madrid Regional Government. Comunidad Autonoma de Madrid. Consejería de Economia y Empleo. *Research Prize on Consumer law, 1997.*

"Efecto útil del efecto directo del Derecho Comunitario". *Primer Premio Antonio Maura de artículos jurídicos, Ilustre Colegio de Abogados de Madrid, 1998.*

"The solution of cross-border consumer claims: the Achilles' heel of the European Union". *Research prize awarded by the City of Madrid and the Bar of Lawyers of Madrid, 2001.*

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Prizes

Awarded "Prize of the International Nuclear Law Association" in 2009 for his study on options and limits of potential harmonisation of nuclear liability within the European Union. Further, he was awarded a prize of the Union of Corporate Lawyers of the Czech Republic for his achievements in the field of administrative law.

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Publications
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Prizes
"Anibal Teodorescu" Prize awarded by the Union of Jurists of Romania in 2014 for the work „Cartea de contracte administrative – modele, comentarii, explicații" („The Book of administrative contracts - models, comments, explanations"), C.H. Beck Publishing House, Bucharest, 2013.

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Contributions to the 2nd International Conference
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Preface

Editors
Professor ***M. Elvira Méndez-Pinedo****, University of Iceland*
Associate professor ***Jakub Handrlica****, Charles University in Prague, Czech Republic*
Associate professor ***Cătălin-Silviu Săraru****, Bucharest University of Economic Studies, Romania*

This volume contains the scientific papers presented at the 2nd International Conference "Contemporary Challenges in Administrative Law from an Interdisciplinary Perspective" that was held on 17 May 2019 at Bucharest University of Economic Studies, Romania. The conference is organized by the Society of Juridical and Administrative Sciences together with the Department of Law at Bucharest University of Economic Studies. More information about the conference can be found on the official website: www.alpaconference.ro.

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

- *Practical aspects regarding the role of administrative law in the modernization of public administration at European and international level.* The papers in this chapter refer to: the European level of research and development funding policy; a perspective on conservation of underwater cultural heritage with reference to international conventions and administrative laws by the State; European and international institutional connection of the National Council for Combating Discrimination; the proportionality principle used as standard by the European Court of Human Rights when assessing the excess of power; considerations on the functions of the European Council; the lawful State in the context of the normative and institutional requirements of European Union; the Schengen area in the context of the free movement of persons in the European Union; why do we have to take examples from others?
- *Practical aspects regarding the role of administrative law in the modernization of public administration at national level.* This chapter includes papers on: the identity and legitimacy of the PhD in administrative sciences; the institution of public servants in Romania, according to current legislation; considerations on certain legal issues regarding the establishment of the National Council for the Development of Human Resources in Public Administration; the obligation to notify the judicial bodies in relation to commission of certain acts stipulated by the criminal law in connection with the exercise of state authority; aspects on the practical

utility of the transfer in the field of the employees and the public servant; administrative democratization: the participation of citizens in the Portuguese administrative system; practical problems regarding the suspension of the execution of administrative acts - a special look at the acts adopted at local government level as "internal acts" and/or the reorganization of some public institutions; movable cultural heritage -Wisdom of the Earth by Constantin Brancusi: public domain and recovery of possession; theoretical and practical aspects regarding the modification of the public servants' employment relationship; processing of personal data - a fair balance between the right to information and the right to privacy; theoretical and practical aspects on liability in administrative law; the collective negotiation and collective agreements – legal task or opportunity, in the management of the legal service relationships of the police officers; living assistance for people with disabilities; legal regime of requests for voluntary intervention in public procurement trials; practical aspects regarding the motivation of administrative acts in antitehese with the motivation of judging decisions in accordance with the New Code of Civil Procedure; trans-institutional teams - a possible solution for effective use of human resources in public administration in accessing European funds; the legal regime of competition in Germany

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

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PRACTICAL ASPECTS REGARDING THE ROLE OF ADMINISTRATIVE LAW IN THE MODERNIZATION OF PUBLIC ADMINISTRATION AT EUROPEAN AND INTERNATIONAL LEVEL

The European level of research and development funding policy

PhD. student **Oana Iuliana RUJOIU**[1]

Abstract

The study presents some indicators that characterize the Romanian public funding policy in comparison with other European countries. An alarming lack of project-based funding accompanies the lack of Romanian public R&D resources. The data indicate that the most industrialized European countries tend instead to strengthen and differentiate the mixture of policy instruments, to reach leadership positions in particularly promising fields for prospective developments; Romania does not follow this trend, making it more challenging to extract the benefits of this strategy. The orientation towards a performance-based distribution of institutional financing is the most significant change in Romania's scientific policy. However, the allocation of public funds for R&D had a massive contribution to the decline of this sector. The organization of the Romanian research system maintains a strongly hierarchical mold based on ministerial actors, and there are no autonomous bodies able to elaborate policy instruments suitable for supporting sectors, structures, territories and activities. That's why the public intervention is necessary mediating between the various governmental interests and the demand for funding coming from the research community, the scientific organizations, and corporates.

Keywords: *the public funding policy, research, development, projects*

JEL Classification: H83

1. Introduction

The scientific and technological debate in Romania has become progressively more critical and controversial. Public opinion has become more demanding in requesting information on how public resources are used, and companies are subjected to fiercer international competition that often finds the key to competitiveness precisely in research and innovation. The debate is still dominated by observations on individual phenomena and less attention is paid to the overall picture in which those in charge for providing and investigating new knowledge work in the universities, public research institutions and businesses.

Through this research, I'm presenting analyzes, data and problems relating to the country's research and innovation system. The National Scientific Research Council (CNCS) has never stopped producing analyzes and data, but with this report, it is proposed to offer a systematic and, above all, periodic contribu-

[1] Oana Iuliana Rujoiu - Doctoral School of Law, Bucharest University of Economics Studies, Romania, rujoiuoana@yahoo.com

tion. The research intends to bring attention back to the facts, favoring quantitative analyzes and in-depth case studies, provided by comprehensive research and innovation systems. The CNCS is not the only organization that produces data; but is also helped by various organizations - public and private - that contribute to the analysis of the scientific and technological system.

The research it had paid particular attention to international players: observing Romania's performance together with those of its major partners, but also competitors for providing a better frame of the country's position and the challenges it faces in the next period. These comparisons were possible thanks to the periodic data gathering activity of various institutions, whose sources are mentioned in the references section.

Regarding contribution for the future, the research is intended to promote debates and raise questions on these issues, with the hope that the discussion and also the strategic choices regarding science and technology take place based on more in-depth documentation.

2. Methodology

The composite indicator has been applied to 14 European Union countries, except Spain due to the lack of some data on local funding, and distinguishes between:

- allocated loans based on an ex-ante evaluation process, by collecting data regarding project's granted loans and the public institutional investments also based on a competitive tender.

- allocated loans based on an ex-post evaluation process, based on performance evaluation, where the value of the institutional financing is calculated based on performance criteria.

The result was obtained by the below formulas:

- Ex-ante orientation to performance = (project-based funding) + (ex-ante institutional funding);

- Ex-post performance orientation = (allocation methods) * (allocation criteria).

The obtained results were scored by the following: allocation rates 0-0.5-1; allocation criteria 0-1[2].

The research is taking into consideration data between from 2013 to 2018, thus covering a time span that is immediately following the financial crisis. Data for Spain covers only two years and is therefore not used in the analysis.

[2] Forschungsgemeinschaft, Deutsche (2015), *Funding Atlas 2015: Key Indicators for Publicly Funded Research in Germany*, New Jersey: Wiley and Sons.

3. Data on project-based funding, institutional funding, and performance orientation

The need to pursue objectives linked to the national research strategy, to support high-quality primary research, to promote collaboration between industry and the public sector, are examples of the political goals that they have determined (starting with 1990) a change in the ways in which federal funding was disbursed, bringing out a growing share of the funding distributed through competitive national or local research programs. Often these donations were the fruit of a collaboration between research agencies, which design a shared research program on which different national teams work in partnership[3].

The granted advantage to the funding instruments on a project compared to the institutional type of financing is the ability to select the best projects, actors or groups through competitive tenders, and to direct them towards scientific activities goals of particular relevance for the national government or local community. And to support cross-sectoral and international collaboration activities, as well as interdisciplinary research activities on emerging sectors susceptible to particularly significant scientific and social relapses[4].

Project-based funding must take into account, the disadvantages of this instrument, which due to its nature is limited in time, and strongly oriented to predetermined objectives. On the contrary, institutional financing is characterized by being long-term oriented, and organizations have greater options on the use unconventional activities or strategic objectives within institutions.

Figure 1 presents data on project-based public funding during 2008 and 2018, which indicate the importance of this mode of allocation in the considered countries and how it evolves over the years. United Kingdom' project-based funding share is 50% of the total national public R&D appropriations, the highest among the examined countries, which shows a growth trend up to 2018. Norway follows the UK with a share of around 40%, and Germany reaches 38% of the total of 2018. The allocation of Romania is just over 10% of the total in 2013 and is further reduced until 2018.

Figure 2 it shows, the performance of the indicator over the years for the funding agency; the most noticeable fall is the MRI funded project (2012), due to the lack of funding for the Applied Research Fund and, due to a sharp reduction in allocations for basic research.

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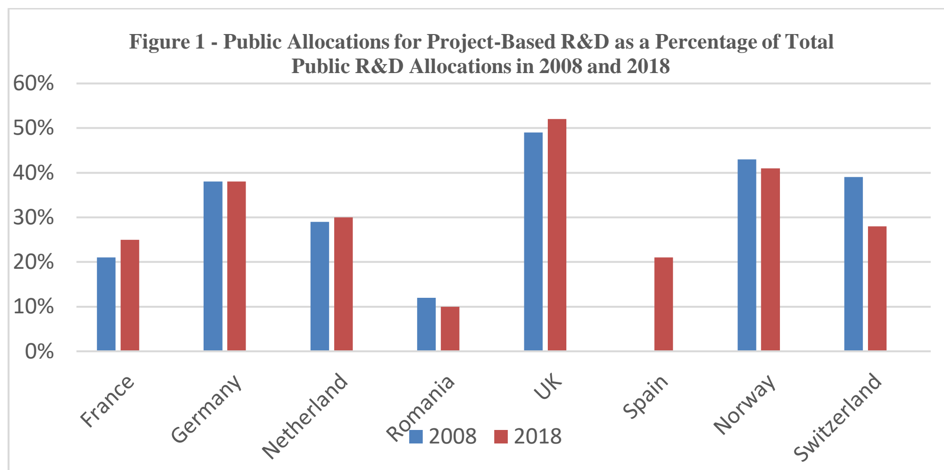
[3] Smith, B., Kevin, Larimer, Christopher (2009), *The Public Policy Theory Primer*, Abingdon: Routledge. Smith, 2009, p. 17.

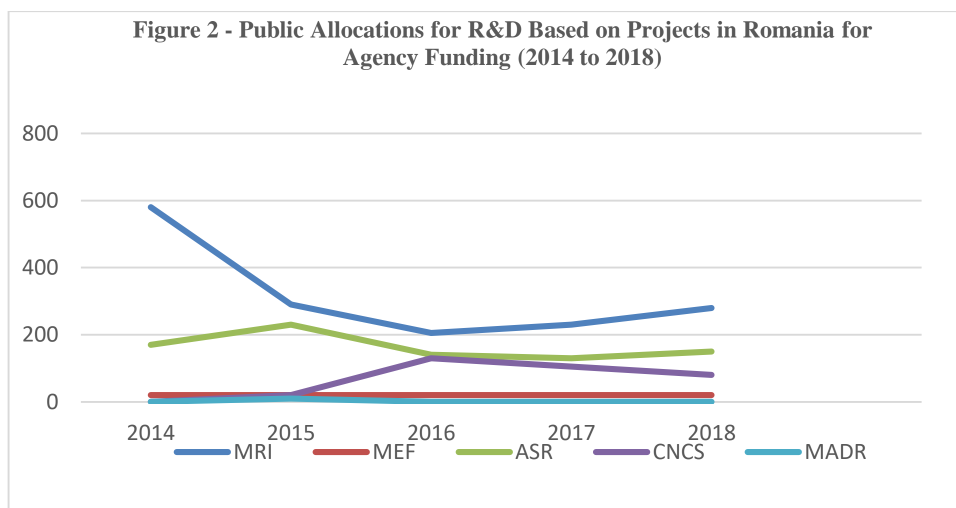
[4] Smith, C., Peter (2006), *Formula Funding of Public Services*, Abingdon: Routledge, p. 35.



Source: Public Research Funding (PREF) - rio.jrc.ec.europa.eu (2019)

The increase recorded between 2012 and 2014 fails to recover the 2009 volume. The fall in public funding is also recorded by the Romanian Space Agency (ASR) and the National Scientific Research Council (CNCS), while the allocation of the Ministry of the Economy and Finance (MEF) and that of Research in Agriculture (MADR) remain substantially stable even if with extremely reduced volumes compared to those of the other considered subjects.

However, it must be specified that the appropriations by the project described in the picture mentioned above do not include resources on a project that may be made available by other ministries. When these are too small to report Romania's research and innovation to be detected through, quantitative and qualitative elements on the allocation of financial resources are combined.

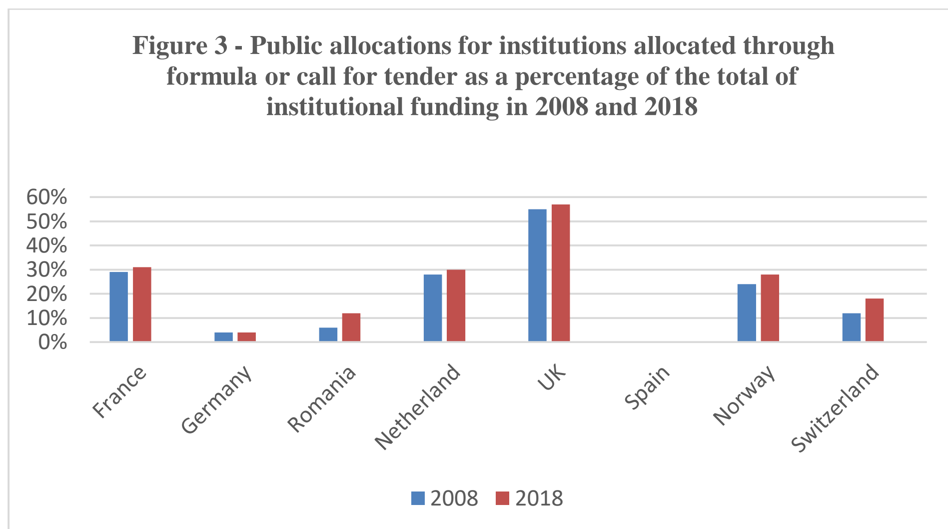


Source: Public Research Funding (PREF) - rio.jrc.ec.europa.eu (2019)

From researchers' perspective (or research organizations), this fact represents a significant constraint, since the scarcity of the institutional fund doesn't correspond to opportunities linked to national programs, and this also weakens the ability to procure a number of federal resources that adequately supports international competition and the possibility of assuming leadership roles in highly innovative sectors. In fact, the availability of resources for long-term R&D, such as those linked to the institutional fund, allows the launch of new research lines that anticipate future needs and prepare the necessary skills to be able to sustain international competition, compensating for any risks deriving from frontier activities, supporting the costs of constructing advanced proposals and promoting strategies oriented on results.

Figure 3 shows the data on institutional funds allocated through competitive methods (formula or called proposals), showing different levels between the various countries in terms of distributed resources, and therefore the relevance of the traditional type of funding.

The United Kingdom has a very high share (55%) of institutional financing allocated with competitive modes, which grows further over the years. At the other extreme, we find Germany, where instead the distribution of the institutional fund remains based on historical methods. Romania shows a very substantial growth of the formula-based share of the funding from 2013 to 2018, which is mainly due to the use of the results of the ARACÎS assessment for the allocation of resources of the Ordinary Financing Fund of the Universities (OFFU). If the data is calculated only concerning the OFFU, the percentage of the funding by formula rises to over 20%.



Source: Public Research Funding (PREF) - rio.jrc.ec.europa.eu (2019)

Table 1 instead uses the composite indicator of political orientation towards a performance-based allocation, comparing the ex-ante orientation and the ex-post orientation. For comparing Romania's trend with that of other European countries, I considered only two years (2009 and 2014) because I didn't found other available data. The use of the combination of funding rates and criteria shows a framework in which the ex-post orientation emerges also in countries, such as Germany, which do not apply a formula but have negotiating mechanisms.

Regularly, there is a tendency to strengthen the competitiveness of the systems through the increase in the importance of the allocation guided by the ex-ante evaluation (Netherlands, Germany, United Kingdom, and France heads into this direction). In other words, countries favor the movement towards a competitive allocation by increasing the share of project-based funding, which is likely to direct research towards issues of particular political relevance or innovation, rather than pushing the accelerator on the competitive positioning of the basic financing of public structures, whose effects in terms of overall system performance are still controversial.

Table 1 - Comparison between allocation' rates of public R&D based on performance driven by ex-ante or ex-post evaluation of the total public allocation in 2012 and 2018

Year	2012	2013	2014	2015	2016	2017	2018
Romania (ex-post evaluation)		3%				6%	
Romania (ex-ante evaluation)		12%				11%	
France				6%			8%
France (ex-ante evaluation)				21%			25%
Netherland (ex-post evaluation)		20%				21%	
Netherland (ex-ante evaluation)		29%				31%	
Switzerland (ex-post evaluation)	12%					14%	
Switzerland (ex-ante evaluation)	30%					29%	
Germany (ex-post evaluation)		5%				5%	
Germany (ex-ante evaluation)		32%				37%	
Norway (ex-post evaluation)		16%				15%	
Norway (ex-ante evaluation)		42%				41%	
UK (ex-post evaluation)		18%			17%		
UK (ex-ante evaluation)		57%			61%		

Source: Public Research Funding (PREF) - rio.jrc.ec.europa.eu (2019)

The trend does not record significant changes in the overall orientation of countries (Figure 4): although the allocation volumes for performance-based R&D are very different, the trend is stable, indicating that substantial changes in

this type of distribution are rare, and in any case linked to structural reforms of the national funding system. In this respect, Romania and France are the countries that show the lowest levels of resource distribution based on results, and a tendency to increase it.

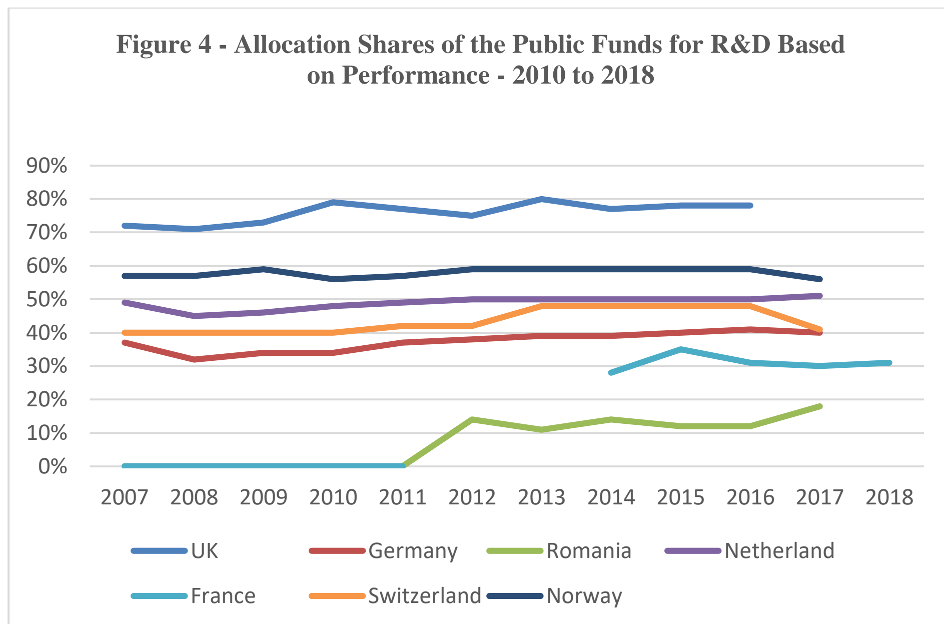


Figure 4 - Allocation Shares of the Public Funds for R&D Based on Performance - 2010 to 2018

Source: Public Research Funding (PREF) - rio.jrc.ec.europa.eu (2019)

The choices made by the two countries are very different: as already mentioned, Romania sees an evident prevalence of the ex-post orientation, while in France there is a marked tendency towards an ex-ante direction, which will probably be confirmed over the years. This is following the recent approval of the "Investments for the Future" program which provides for a somewhat consistent amount of resources for R&D based on the project.

4. The organizational structure of public funding for R&D

One of the constituent elements of a national public research funding system is given by the community of the actors to whom the resource allocation function is assigned, generally referred to as "funding bodies." These bodies can be very different from each other, and each one can manage a portfolio of instruments of different sizes and with different numbers. Moreover, the relations that bind the organisms to the central or local government are different, and therefore the relative degree of autonomy in the exercise of the financing function, can go from merely managerial aspects, to a real decision-making role.

This type of analysis presents numerous problems in accessing data, due to indicators that measure the importance of the various instruments and the characteristics of each co-financed organization. One of the problems is that there is no general register of public and private research institutes in the various European countries.

Using the work done within the Public Research Funding (PREF) study as above mentioned project, I tried to deepen the knowledge of the funding instruments managed by the various agencies and the structures of these actors: number, size, differentiation in the mission given to them, organizational characteristics and power relations with the state (independence, autonomy, control).

The analysis highlights the different configurations of the national systems in terms of the characteristics of the agencies, the volumes and the funding types that these actors manage.

A first distinction is between resources distributed through real research funding agencies or public research organizations. Large institutions whose budget is destined for both internal scientific activity and research funding based on specific programs, whose resources are allocated through calls for proposals, in which both domestic research facilities and external structures can participate.

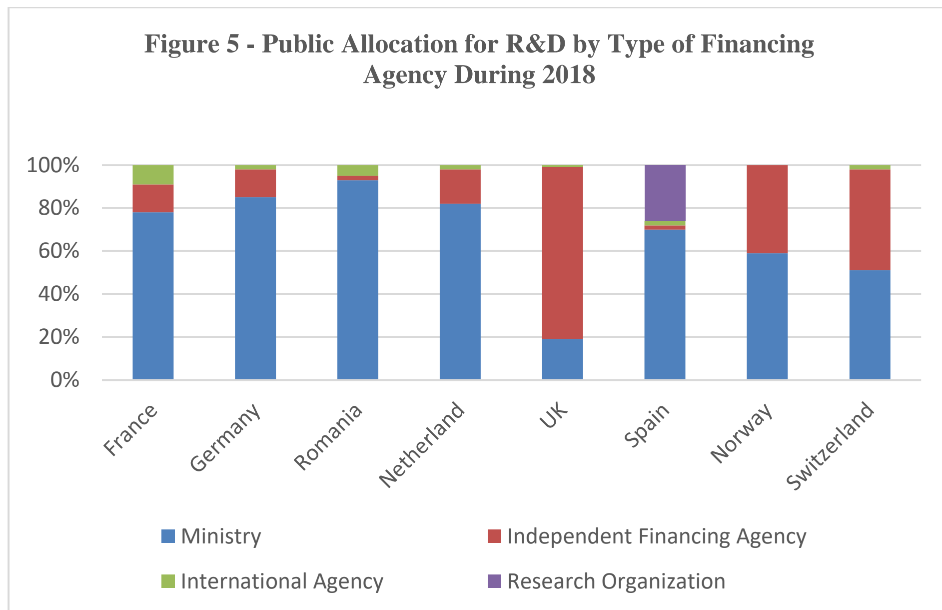
The distribution percentage of public appropriations for R&D by type of funding body reveals that the four continental European countries characterized by the presence of numerous essential research institutions (Romania, Spain, France, Germany) have an R&D financing activity that covers from 15% to 20% of the total public appropriations.

Figure 5 focuses attention on R&D funding through research agencies, distinguished based on a typology that identifies four types of organizations. The figure considers the entire amount of the national public R&D allocation, without distinguishing between the institutional and project-based fund.

Ministries and regions are the political decision-makers who do not limit themselves to set the number of transferred resources and the lines of strategic development of the sector, but also maintain the tasks of allocating financial resources and the design of allocation tools. The independent agencies are instead the organizations that have a separate decision-making space due to a precise delegation conferred them by the government, whose breadth naturally varies concerning the different political-administrative traditions of the countries. This group includes the Research Councils, the Innovation Agencies (aimed at the financing of precompetitive R&D), the sectoral Agencies (i.e., agencies for agricultural research, space research, etc.).

A key feature to distinguish independent agencies from ministries and regions is to observe whether the government retains the final decision on the disbursement of funds, or whether that decision is also delegated. In the first case, we won't have an independent agency; in the second one, the autonomy ensured it has a significant role.

The performers main mission is to carry out research and development activities, but some funding functions are also delegated to the international agencies.



Source: Public Research Funding (PREF) - rio.jrc.ec.europa.eu (2019)

The most interesting element is the importance of the ministries and regions, which in Romania is the highest among all the considered countries. About 95% of the total funds are managed by the ministries, of which the MRI funds represent over 60%; the others are appropriations of various ministerial structures, among which the MEF, the Ministry of Health and the Ministry of Agricultural and Forestry Policies.

This characteristic becomes macroscopic if we consider only the financing based on project proposals: that have more space for interaction, networking, and operational flexibility, as well as the ability to monitor the national situation and the best practices existing at international level in the various scientific sectors.

The second aspect is the relevance of the independent funding agencies, very high in the United Kingdom, where the Research Councils play a central role in the management of public R&D allocations in the various disciplinary macro-sectors. Regarding this, it is worth noting the position of small countries with a high investment intensity in R&D, because even in this case there are independent agencies that convey a substantial amount of public funds, while in France the position of the National Research Agency (NAR) the research in the public sector is consolidated. International agencies emerge in many countries, but with more limited roles in terms of volume of funding than the total.

5. Conclusions

The research presented some elements that characterize the public funding policy in Romania by comparing it with other Western European countries. The years of the economic and financial crisis have seen a general reduction in public investment, only Germany being an obvious exception, which has instead adopted a countercyclical behavior, increasing public resources for R&D. The general tendency to reduce resources has generated stronger effects in countries such as Romania, which are already under-sized in terms of R&D expenditure, particularly affecting public organizations and the research institutions.

The literature above mentioned has amply highlighted the risks that occur when the public sector excessively reduces its role, both in terms of the social relevance of the addressed issues, and in terms of the ability to produce results, and the ability to generate unforeseen and unpredictable new knowledge to generate innovation.

In Romania, the low level of public resources allocated to R&D is accompanied by an alarming shortage of project-based instruments and funding, which make it possible to direct researchers' activities towards sectors, and objectives of relevant national interest or linked to the significant social challenges on which today converges a large part of the global scientific effort. The data indicate that the most industrialized European countries tend to strengthen and differentiate the policy mix of tools that drive project financing, to increase the orientation of research agendas and reach leadership positions in particularly promising fields for possible future developments; Romania does not follow this trend, making it more challenging to have the relative benefits.

The orientation towards the distribution of institutional financing based on the ex-post performance evaluation is the most mutated change in our country's scientific policy, as regards the allocation of public funds for R&D; this change, however, intervenes on an in a sharp reduction of the total amount of public resources.

Therefore, the absence of expansive interventions of institutional financing could produce specific effects in terms of equitable distribution of resources and global sustainability of scientific activities developed in the public sphere. Romanian researchers do their job well despite the lack of available resources, and therefore the absence of a public funding policy is what prevents Romania from jumping from an excellent individual performance to an outstanding level of systemic type, capable of making the country attractive internationally.

Finally, the presumed link between an institutional loan based on performance and the improvement of the quality of the results must be carefully considered, since the presented data show that different allocation models of the institutional fund, do not prevent the possibility of producing excellent performance. The organization of the Romanian research system maintains a strongly

hierarchical mold based on ministerial actors, and there are no self-governing bodies able to devise policy tools suitable for supporting sectors, structures, territories and activities for which the public intervention is needed from time to time.

The absence of this type of actors, which exist and play an increasingly central role in the main Western European countries, deprives Romania of strategic and prospective operational capacity in the elaboration and management of scientific policy, which is in line with the most general needs of economic and social development. Therefore, a simple increase in public resources for R&D is a necessary and indispensable condition, but not sufficient; other interventions related to the design of policies and the organizational system structure are essential for Romania to be able to play a non-marginal role in the global scientific competition.

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A perspective on conservation of underwater cultural heritage with reference to international conventions and administrative laws by the State

Ph.D. **Harsh PATHAK**[1]

„There's probably more history now preserved underwater than in all the museums of the world combined. And there's no law governing that history. It's finders keepers."
Robert Ballard, Ocean Researcher

Abstract

That sheer quantity of submerged human history has led monuments and wrecks to be considered in terms of "cultural heritage" rather than mere submerged objects. And it has become a subject of conservation through convention and proper legislation by the state as cultural heritage. It implies something worth preserving and warranted an active state legislative and administrative action for its conservation. This paper is based on importance of underwater cultural heritage (UCH) and UNESCO convention, as guiding principle for the state to frame appropriate legislation, regulations and administrative actions to conserve underwater cultural heritage.

Keywords: *underwater, maritime, heritage, UNESCO, conservation, convention, preservation.*

JEL Classification: K23, K32, K33

1. Introduction

Heritage is the identity of every respective state, and they are putting considerable efforts to preserve and protect their centuries old rich heritage.[2] Human history owes much of its development to settlement in coastal areas and ocean commerce. However, residing and traversing the seas brings peril in proportion to the benefits: scholars estimate that more than three million shipwrecks currently lie on the ocean floors and various cities are submerged.[3] Now, they are considered as heritage worth exploration, preservation and promotion for historical, archeological, scientific research and tourism. That sheer quantity of submerged human history has led monuments and wrecks to be considered in terms

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[2] https://www.livelaw.in/legal-aspects-heritage-india/, consulted on 1.05.2019.
[3] http://portal.unesco.org/culture/en/ev.php-URL_ID=34114&URL_DO=DO_TOPIC&URL_SECTION=201.html>, consulted on 1.05.2019.

of “cultural heritage” rather than mere submerged objects. And it has become a subject of conservation through convention and proper legislation by the state as cultural heritage implies something worth preserving and warranted an active state legislative and administrative action for its conservation.

The ocean floor had identifiable formations such as the “continental shelf” near the continents' landmass. Here it is generally thought of as that part of the continent that is underwater. Perhaps it could be better thought of as that part that corresponds to the area of the mainland between the beach and the point where the continent falls off into the abyss.

Other terms include the “seabed, seafloor, sea floor, or ocean floor” which is the bottom of the ocean. If this area were to be dry it would include many of the same features found on land, such as mountain ranges and flat plains. The definition applying to underwater cultural heritage, drew broadly from preceding international and domestic attempts to define the concept. “underwater cultural Heritages” as “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years.” It goes on to elaborate, including examples such as (a) sites, structures, and human remains, (b) vessels or aircraft and their cargo, and (c) prehistoric objects. Importantly, objects designated as cultural heritage are included “together with their archaeological and natural context.”

2. Major events leading legislative and administrative action

That earthquakes between 320 and 1303 AD on the coast of Pharos in Egypt shook the city of Alexandria, which was home to Pharos Lighthouse. Due to earthquake the large monument may have fallen into the sea, leaving massive blocks of stone awaiting the exploration mission led by archaeologist Jean-Yves Empereur in 1994.[4] While many components of the old lighthouse are on display at the Kom el-Dikka museum in Alexandria, archaeologists suggest that around 500 pieces remain on the sea floor. Today, the Alexandria Lighthouse is among one of the seven wonders of the ancient world.

In July 1545, the British Fleet known as the Mary Rose sunk to the bottom of the Portsmouth Harbour, in the United Kingdom. While its failures still remain a mystery, is estimated that at least 500 men were trapped in the ship, and only 35 of these escaped to safety. In 1982, sixty million people watched as the vessel was lifted out of its resting place, with its 19,000 discovered objects still intact. Due to the preservation of this monument of underwater cultural heritage in the Mary Rose Museum, the public can continue to enjoy the vessel and all of her artifacts.[5]

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[4] "Pharos Lighthouse of Alexandria". Retrieved 13 March 2016.

[5] Attenborough, G., *The Mary Rose Museum (Portsmouth)*, „The Journal of Transport History”,

Similarly , Off the coast of Sweden in 1628, the pride of the Swedish Navy, the Vasa sunk deep beneath the frigid waters of the Baltic Sea. Under the orders of King Gustavus II Adolphus, the immense vessel was built to support Swedish military campaigns during the Thirty Years' War, yet was toppled by swift winds at sea. The Vasa remained peacefully underwater until a team of archaeologists raised the wreck in 1961.[6] Fortunately, the wreck and all of its belongings were salvaged, despite its lengthily time spent on the ocean floor. Today, the Swedish Vasa museum in Stockholm is an emblem of cultural heritage, dedicated to educating public citizens worldwide.

In 1985, a team of scientists discovered the RMS Titanic in the northern waters of the Atlantic Ocean off the coast of Newfoundland, Canada 1,800 artifacts were found in the wreck site, deeming the discovery a very important contribution to the field of Underwater Cultural Heritage . The Titanic has raised significant questions surrounding the remaining passengers, the value of the wreck and the items lost therein, as well as the impact of the accident.[7] The discovery of the ship, and other sunken wrecks, may have also raised questions about the legal framework of the UNESCO Convention on the Protection of Underwater Cultural Heritage.

3. International laws addressing to conservation of underwater cultural heritage

3.1. Jurisdictional maritime zones: customary international law and UNCLOS I-III

The practice of coastal States exercising jurisdictional rights and authority over activities in their coastal waters dates back to at least the seventeenth century, when a three nm territorial sea was recognized as the limit of a coastal State's control. This recognition has been attributed by some to the range of cannon in the seventeenth century, and is commonly known as the "Cannon Shot Rule."[8] Seaward of the territorial seas were the high seas, in which all vessels had the freedom of the seas, including the freedom of navigation and exploitation. A customs zone or belt of water adjacent to the territorial sea later developed in which states recognized the coastal States' right to enforce certain customs and trafficking laws for violations committed with the territory. Centuries later,

34(2), 2013, p. 198.

[6] Adams, A., *Sweden's vasa museum, an overwhelming sight:* Final edition, 1995, The Record.

[7] Dromgoole, S., *Underwater cultural heritage and international law*. Cambridge: Cambridge University Press, 2013, p. 4.

[8] See History of the Maritime Zones Under International Law from the Cannon Shot Rule to Unclos, Nat'l Oceanic & Atmospheric Admin., Off. of Coast Survey, http://www.nauticalcharts.noaa.gov/staff/law_of_sea.html, consulted on 1.05.2019.

United States proclamation concerning the continental shelf and asserted jurisdiction and control over the natural resources of the continental shelf, recognizing the shelf as a natural prolongation of U.S. territorial lands. Shortly thereafter, as the need for a comprehensive legal framework became more apparent, the United Nations held its first Conference on the Law of the Sea (UNCLOS I) in 1956, which resulted in four conventions: the 1958 Convention on the Territorial Sea and Contiguous Zone, the 1958 Convention on the Continental Shelf, the 1958 Convention on the High Seas, and the 1958 Convention on Fishing and Conservation of Living Resources of the High Seas. The United Nations held a second conference regarding the Laws of the Sea in 1960 (UNCLOS II), but this conference did not result in any convention or agreement. Another UN conference was called in 1973 to address certain unresolved issues (UNCLOS III). This conference was concluded in Montego Bay, Jamaica in 1982, and resulted in the LOSC.29 The LOSC came into force in 1994 upon receiving the necessary number of signatories.[98]

3.2. 1982 Law of the Sea Convention

The LOSC sets forth a comprehensive legal framework for the use and protection of the sea, the seabed and subsoil, and the marine environment, including both natural and cultural heritage resources. Through a wide range of provisions, the LOSC establishes clear guidelines with respect to states' navigational rights, maritime zones and boundaries, and economic jurisdiction, while also providing member states a mechanism for international cooperation and dispute resolution. At UNCLOS III it was agreed that there would be a new 200-nm EEZ, that the territorial sea may extend twelve miles beyond the baseline and internal waters, and that the contiguous zone may extend twenty-four nm from the same baseline. It was also agreed that the continental shelf may extend out to 200 nm even if it is part of an abyssal plain. Moreover, the conference developed rules for recognizing the portion of the continental shelf that naturally extends beyond the 200 nm EEZ, and a new regime for the Area that is the seabed beyond the continental shelf under the high seas. In addition to providing a balance of jurisdiction between coastal States and flag States over uses of the sea in these various zones.

Articles 149 and 303 provide some framework for the legal protection of UCH found at sea.

"… All objects of an archeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, with particular regard being paid to the preferential rights of the State or country of

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[9] United Nations Convention on the Law of the Sea of 10 December 1982, U.N. Div. For Ocean Affairs & The Law of the Sea, http://www.un.org/Depts/los/convention_agreements/ convention_ overview_convention.htm, consulted on 1.05.2019.

origin, or the State of cultural origin, or the State of historical and archaeological origin."

While it is not always clear which nations have preferential rights, it is clear that they would include the flag States of the sunken ship and nation from where the ship is coming from. Article 303(1) sets forth a duty to protect objects of an archaeological and historical nature found at sea, and a duty to cooperate to ensure that protection. While Article 149 applies just in the Area under the high seas beyond national jurisdiction, Article 303 is under Part XVI (General Provisions) and applies in all of the maritime zones. As most, if not all, of the LOSC is now recognized as customary international law, it may be argued that the duty to cooperate to protect UCH is also recognized as an established part of international law.

While the LOSC does not recognize a coastal State's authority and jurisdiction to unilaterally enforce its UCH laws against a foreign-flagged vessel on the OCS beyond the twenty- four-nm contiguous zone, nations may enter into agreements, such as the 2001 UNESCO Convention, 39 to provide their consent to enforcement of UCH laws against their flagged vessels and nationals. In addition, there appears to be consensus that any salvage or recovery of UCH should be conducted in compliance with international scientific standards.

3.3. Other international laws addressing the conservation of underwater cultural heritage

Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), Washington 1935. The most important purpose of the Roerich Pact is the legal recognition that the defence of cultural objects is more important than the use or destruction of that culture for military purposes, and the protection of culture always has precedence over any military necessity.

UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention), The Hague 1954. This is the first international treaty with a world-wide vocation focusing exclusively on the protection of cultural heritage in the event of armed conflict. It covers immovable and movable cultural heritage, including monuments of architecture, art or history, archaeological sites, works of art, manuscripts, books and other objects of artistic, historical or archaeological interest, as well as scientific collections of all kinds regardless of their origin or ownership.

UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris 1970. This is the first Treaty with an international instrument dedicated to the fight against illicit trafficking of cultural property.

UNIDROIT Convention on Stolen or Illegally exported cultural objects, Rome 1995. To take international cooperation, UNIDROIT was asked by

UNESCO to develop the Convention on Stolen or Illegally Exported Cultural Objects (1995), as a complementary instrument to the 1970 Convention. States commit to a uniform treatment for restitution of stolen or illegally exported cultural objects and allow restitution claims to be processed directly through national courts. Moreover, the UNIDROIT Convention covers all stolen cultural objects, not just inventoried and declared ones and stipulates that all cultural property must be returned.

Rome Statute of the International Criminal Court, Rome 1998. The Rome Statute established four core international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. Those crimes "shall not be subject to any statute of limitations". The Rome Statute explicitly protects cultural heritage under art 8, deeming its destruction to be a war crime.

UNESCO Convention on the Protection of the Underwater Cultural Heritage, Paris 2001. The convention is intended to protect "all traces of human existence having a cultural, historical or archaeological character" which have been under water for over 100 years. This extends to the protection of shipwrecks, sunken cities, prehistoric art work, treasures that may be looted, sacrificial and burial sites, and old ports that cover the oceans' floors.

UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Paris 2003. Referring to existing international human rights instruments, in particular to the Universal Declaration on Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966, and the International Covenant on Civil and Political Rights of 1966 the Convention considers the deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage.

4. Dedicated international endeavour for conservation of underwater cultural heritage

That the aforesaid concept and facts qua maritime laws and heritage conservation lead to International Committee on the Underwater Cultural Heritage (ICUCH) which was founded in 1991 by ICOMOS Australia to promote international cooperation in the protection and management of underwater cultural heritage and to advise the International Council on Monuments and Sites (ICOMOS) on issues related to underwater cultural heritage around the world. The committee is composed of international experts in underwater cultural heritage, representing the five geographical regions as defined by UNESCO (Africa, the Arab States, Asia and the Pacific, Europe and North America, and Latin America and the Caribbean).

The first mandate of ICUCH was to develop a charter to guide the management and protection of underwater cultural resources. The completed document became known as the International Charter on the Protection and Management of Underwater Cultural Heritage and was adopted by ICOMOS in 1996.

The status of this document was confirmed in 2001 when it was incorporated as the Annex to the UNESCO “International Convention for the Protection of Underwater Cultural Heritage”. It has thus become the standard guide to the ethics and practices of underwater cultural heritage management throughout the world. The UNESCO Convention on the Protection of the Underwater Cultural Heritage, adopted in 2001, is intended to enable States to better protect their submerged cultural heritage.

5. The UNESCO Convention on Protection of Underwater Cultural Heritage

The Convention on the Protection of the Underwater Cultural Heritage , treaty that was adopted on 2 November 2001 by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO).[10]

The convention is intended to protect "all traces of human existence having a cultural, historical or archaeological character" which have been under water for over 100 years. This extends to the protection of shipwrecks, sunken cities, prehistoric art work, treasures that may be looted, sacrificial and burial sites, and old ports that cover the oceans' floors. The preservation of underwater cultural heritage is significant as it allows for the retelling of numerous historical events. As part of its duty to conduct scientific research and provide continuous education on the importance of underwater cultural heritage, UNESCO strives to maintain these sites for the enjoyment of current and future generations. The convention may provide a customary framework to help raise awareness and seek to combat the illegal looting and pirating occurring in waters worldwide. As an international body, member states of the convention agree to work towards the preservation of sunken cultural property within their jurisdiction and the high seas.

5.1. Fundamentals and basic principles of 2001 conventions

The Convention sets out basic principles for the protection of underwater cultural heritage; provides a detailed State cooperation system, widely recognised practical rules for the treatment and research of underwater cultural heritage. The Convention consists of ‘official text’ and ‘Annex’, which sets out the rules and procedure for activities pertain to underwater cultural heritage.

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[10] Convention on the Protection of the Underwater Cultural Heritage 2001, UNESCO, http:/portal.unesco.org/en/ev.phpURL_ID=13520&URL_DO=DO_TOPIC&URL_SECTION=201.html, consulted on 1.05.2019.

5.2. The official text of the Convention

This sets out the obligations of the states parties in regards to the protection of underwater cultural heritage, defined in Article 1 as: "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years”. UNESCO "2001 Convention on the Protection of the Underwater Cultural Heritage", 2 November 2001. Official Text of Convention is briefly explained as under;

Articles 1–4 define the Convention and its objectives, as well as its relation to the United Nations Convention on the Law of the Sea (UNCLOS) and the law of salvage.

Articles 5–12 define varying levels of obligations and procedures within the four maritime zones (Territorial Sea, Contiguous Zone, Exclusive Economic Zone, the Area) defined by UNCLOS.

Articles 13–21 define further obligations, such as seizing illicitly recovered underwater cultural heritage, cooperating with other state parties, and providing training in underwater archaeology.

Articles 22–35 clarify a number of points relevant to the functional aspects of the Convention, such as the creation of statutory bodies, the settlement of disputes between states parties, and modes of ratification.

5.3. Annex of the Convention and main principles

In addition to the official text of the convention, an annex of 36 rules governs the practical aspects of activities directed at underwater cultural heritage. State parties are required to ensure that these rules are applied within their territorial sea and contiguous zone, and also that they are adhered to by all nationals and flag vessels. Main principles are as under.

i. Obligation to Preserve Underwater Cultural Heritage. States Parties should preserve underwater cultural heritage and take action accordingly. This does not mean that ratifying States would necessarily have to undertake archaeological excavations; they only have to take measures according to their capabilities. The Convention encourages scientific research and public access.

ii. In Situ Preservation as first option. The in situ preservation of underwater cultural heritage (i.e. in its original location on the seafloor) should be considered as the first option before allowing or engaging in any further activities. The recovery of objects may, however, be authorized for the purpose of making a significant contribution to the protection or knowledge of underwater cultural heritage.

iii. No Commercial Exploitation. The 2001 Convention stipulates that underwater cultural heritage should not be commercially exploited for trade or speculation, and that it should not be irretrievably dispersed. This regulation is in conformity with the moral principles that already apply to cultural heritage on land. It is not to be understood as preventing archaeological research or tourist access.

iv. Training and Information Sharing. States Parties shall cooperate and exchange information, promote training in underwater archaeology and promote public awareness regarding the value and importance of Underwater Cultural Heritage. The rules also cover aspects such as project design, conservation, documentation, and reporting.[11]

6. Constitution of India and conservation perspective

India is one of the countries possessing rich cultural and natural heritage. In this regard, the preservation of historical structures has to have an objective of safeguarding national cultural identity various policies and laws are framed for preservation, protection and proper management of the cultural heritage at the state and central level in India. It is pertinent to note that many of us are not aware of the legislation and legal framework States are obliged under Article 49 of the Indian Constitution to protect monuments and places and objects of national importance. It shall be the obligation of the State to protect every monument or place or object of artistic or historic interests, declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be. But the state is failing to abide by the provision. On the other, we as the responsible citizen of the nation unable to attach any sense of belongingness toward our cultural heritage. It is the duty of every citizen of India under Article 51A(f) of Indian Constitution[11] to value and preserve the rich heritage of our composite culture. It is essential to be aware of the international conventions and the national and with the respective state laws significant to the security and protection and conservation of the art and the cultural heritage of a nation.

7. Marine archaeology in India

UNESCO adopted convention concerning the Protection of the World Cultural and National Heritage on November 16, 1972. It is also called World Heritage Convention. India is also party to the convention. The beginning of underwater archaeology in India can be traced back to 1981. Off-shore explorations in the country have generated a lot of popularity to this discipline. Establishment

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[11] http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/, consulted on 1.05.2019.

of the UAW in 2001 marked a major step towards the development of the subject.[12]

The Underwater Archaeology Wing (UAW) of the Archaeological Survey of India (ASI) plans to explore underwater archaeological sites along the strategic locations of the coast. [13]

The UAW has in its credit—exploration of Elephanta island, Mahabalipuram in Bay of Bengal, Arikamedu, Pondicherry and excavation of a shipwreck named 'Princess Royal' in lakshadweep. Marine archaeology, also known as maritime, nautical or underwater archaeology deals with the 'scientific study of the material remains of man and his past activities on the sea'.

Marine archaeology has made tremendous progress in India. Over the years National Institute of Oceanography, Goa in collaboration with other Government agencies has undertaken the exploration and excavation of submerged ports and shipwrecks at Dwarka, Bet Dwarka, Somnath, Vijaydurg Goa and Lakshadweep on the west coast and Poompuhar and Mahabalipuram on the east coast of India. Further, onshore explorations have also been carried out at various places both the coasts of India for locating ports, trade centres and structures related to maritime activities. These findings from various sites of India confirm the rich submerged cultural heritage, conservation of which is prime necessity now. A modest beginning has been made in this direction and more thrust is required before the submerged heritage is destroyed owing to intense activity along the coast, resulting from globalisation and rapid industrialisation.

8. Critical areas

The 2001 Convention neither regulates the ownership of wrecks nor does it change existing maritime zones. Abstaining from signing the 2001 UN Convention, the United States has stipulated that the term "all traces of human existence" is too broad, legally and as a mechanism tool for the protection of underwater cultural heritage for the preservation of future generations. The United Kingdom also holds this concern. The UNESCO Convention has also been criticised by some States for seemingly eroding the sovereign immunity principle and for being incompatible with UNCLOS provisions, despite evidence to the contrary. Same way Spain and Columbia also get into conflict due to non-binding nature of the convention on non-signatory Columbia.[1413]

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[12] https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf, consulted on 1.05.2019.

[13] https://www.dailypioneer.com/2014/india/asis-underwater-wing-to-explore-sites-along-gujarat-coast.htm, consulted on 1.05.2019.

[14] Roberts, Hayley (2018), *The British Ratification of the Underwater Heritage Convention: Problems and Prospects*, „International & Comparative Law Quarterly", Volume 67, Issue 4, October 2018, pp. 833-865.

9. Conclusion

The protection of underwater cultural heritage and regulation of underwater activities aimed towards the cultural heritage should be one of the main concern of the global community. Framing of "Convention on the Protection of the Underwater Cultural Heritage" by UNESCO in 2001 displays the global concern about the protection and management of underwater cultural heritage. The convention is guiding format for the concerned states to frame appropriate administrative regulations and framework to conserve the underwater cultural heritage. The convention deliberates upon preservation, preference to in-situ preservation, no commercial exploitation of heritage, and international cooperation for training and research. The rules also cover determining aspects, such as project design, conservation, documentation, and reporting. There are some challenges related to ownership of the shipwrecks in High Seas as main area of concern for the UN member states. The 2001 Convention neither regulates the ownership of wrecks or submerged monuments or objects nor does it change existing maritime zones. Therefore, every state's commitment to conserve underwater cultural heritage by adoption of international convention will be a great contribution to global community in conserving cultural wealth. Undoubtedly, sea is a big museum, worth a systematic preservation by the mankind to conserve its Underwater Cultural Heritage.

"*It is a quiet and peaceful place –*
and a fitting place for the remains of
this greatest of sea tragedies to rest."[15]
Robert Ballard, Discoverer of the Titanic Wreck

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European and international institutional connection of the National Council for Combating Discrimination

Professor **Cristian JURA**[1]

Abstract

The primary purpose of this research study is to introduce and examine the European and international network of the National Council for Combating Discrimination, one of the national institutions in a permanent connection with most of the international organizations, namely United Nations, Council of Europe, OSCE, European Union and others. The National Council for Combating Discrimination (CNCD) was established in August 2002, following the adoption of the Government Ordinance no. 137/2000 and Government Decision no. 1194/2001 regarding the organization and operation of CNCD. These documents are in fact the transposition into the national legislation of certain European directives. At European level, there are institutions similar to CNCD in all the Member States of the EU, yet CNCD is singular thanks to the fact that it can ascertain discrimination on 14 different criteria and can impose sanctions. No other institution of this nature covers such a large scope. CNCD is an autonomous state authority, under Parliament control, which carries out its activity in the field of prevention, combating and sanctioning of all the discrimination forms. The main method to compile this study is the content analysis, simple or comparative, dealt with in a manner specific to research in the sector of socio-human sciences, law and history, respectively. Several statistical aspects will be underlined where they are a natural completion to the quality analysis. An essential role is played by personal experience of almost 20 years in the public international law. This research study will help with a better understanding of the role and place that CNCD occupies in the society and a model of international connection of a national institution.

Keywords*: National Council for Combating Discrimination, Council of Europe, ECRI, discrimination, European Convention for Human Rights, European Union.*

JEL Classification*:* K23, K33, K38

1. What is the National Council for Combating Discrimination from an institutional perspective?

The National Council for Combating Discrimination[2], hereinafter CNCD, is the state authority in the sector of discrimination, autonomous, with legal capacity, found under Parliamentary Control and at the same time a guarantor of enforcement and implementation of the principle of non-discrimination, in

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[2] For further information on CNCD, see: http://www.cncd.org.ro/, consulted on. 1.05.2019.

compliance with the internal legislation in use and with the international documents which Romania is part of.

CNCD was established as a result of the transposition into the national legislation of the Council Directive 2000/43/EC regarding the implementation of principle of equal treatment between persons, with no discrimination on grounds of racial or ethnical origin and of the Council Directive 200/78/EC establishing a general framework in favor of the equal treatment in terms of employment and occupation.

This authority is not part of the organization system of the court instances that, in compliance with the constitutional stipulations being mentioned, are the High Court of Cassation and Justice, appeal courts, courts and courthouses.

The specificity of the scope of the National Council for Combating Discrimination leads to the conclusion that this body is the only one entitled to provide a specialist solution to the requests being filed and comply with the behaviors deemed discriminatory from the legislator perspective. The circumstance that Art. 27 of the Government Decision (G.D.) no. 137/2000, republished, leaves the person who considers being discriminated with the option to choose between the complaint filed with the National Council for Combating Discrimination and the application addressed to the court according to the common law with the purpose of granting compensation and restoring of the previous situation prior to discrimination or the cancelation of the discrimination-generated situation, as per the common law, which means that the complaint filed with the National Council for Combating Discrimination is not a mandatory procedure.

The internal procedure to solve the petitions and complaints adopted through an Order of the President of the National Council for Combating Discrimination in implementing the Council Directive 2000/43/EC regarding the implementation of principle of equal treatment between persons, with no discrimination on grounds of racial or ethnical origin and the Council Directive 200/78/EC establishing a general framework in favor of the equal treatment in terms of employment and occupation, is finding solutions in an expeditious and little costly manner to all the complaints being received.

The scope of the National Council for Combating Discrimination is circumscribed by law to a strict and precise domain, in which a clear and predictable mechanism to solve the related contentious situations is being set in motion.

All the characteristics of the internal procedure to solve the petitions and complaints are able to include it into the warranties provided by the special jurisdictions, thus a quick, fair and specialist solution of a certain category of disputes, namely the ones tangent to the sector of discrimination in all its components regulated by the legislator.

The determination of the legal nature of the National Council for Combating Discrimination necessarily requests conducting an exhaustive analysis of the legal norms regulating the organization and operation of such authority.

From a legal perspective, the National Council for Combating Discrimination was established pursuant to Government Decision no. 137/2000 published in the Official Gazette of Romania, Part I, no. 431 on 2 September 2000 and ratified with amendments and additions through Act no. 48/2002, published in the Official Gazette of Romania, Part I, no. 69 on 31 January 2002. At a subsequent date, the normative document was amended and completed through a series of normative documents, such as:

- Act no. 324/2006 for the amendment and completion of the Government Ordinance no. 137/2000 on preventing and sanctioning of all forms of discrimination, published in the Official Gazette of Romania, Part I, no. 626 on 20 July 2006, with a new numbering to the texts;
- Government Ordinance no. 77/2003 for the amendment and completion of the Government Ordinance no. 137/2000 on preventing and sanctioning of all forms of discrimination, published in the Official Gazette of Romania, Part I, no. 619 on 30 August 2003, ratified with amendments and additions through Act no. 27/2004, published in the Official Gazette of Romania, Part I, no. 216, on 11 March 2004;
- Act no. 324/2006 for the amendment and completion of the Government Ordinance no. 137/2000 on preventing and sanctioning of all forms of discrimination, published in the Official Gazette of Romania, Part I, no. 626 on 20 July 2006.

In 2007, the Government Ordinance no. 137/2000 on preventing and sanctioning of all forms of discrimination, published in the Official Gazette of Romania, Part I, no. 99 on 08 February 2007.

The institutional perspective requires conducting a research activity on how the National Council for Combating Discrimination is organized and operates, as regulated by the legislator.

The Council for Combating Discrimination is the state authority in the sector of discrimination, autonomous, with legal capacity, found under Parliamentary Control and at the same time a guarantor of enforcement and implementation of the principle of non-discrimination, in compliance with the internal legislation in use and with the international documents which Romania is part of (Art 16 in G.D. no. 137/2000).

While carrying out its duties, the Council conducts its activity independently, without being confined or influenced by other institutions or public authorities.

The Council is responsible for implementing and control of the stipulations in the G.D. no. 137/2000 in its scope, as well as the harmonization of the provisions within the normative or administrative documents contravening the principle of non-discrimination.

In 2008, the most important clarification of the legal nature of the National Council for Combating Discrimination was provided by the Constitutional Court of Romania.

Following an invocation of an exception of unconstitutionality in the stipulations of Art. 16-25 in the G.D. no. 137/2000, republished, through the Decision of the Constitutional Court of Romania no. 1096 on 15 October 2008, published in the Official Gazette no. 795 on 27 November 2008, the Constitutional Court has ruled about the legal nature of CNCD in terms of compliance with the constitutional provisions. The Constitutional Court has decided, among others, the following, „The National Council for Combating Discrimination is **an administrative body with jurisdictional duties,** which has the independence required to fulfill the jurisdictional-administrative act and complies with the constitutional provisions in Art 124 on enforcement of justice and Art 126, par 5, to forbid establishment of extraordinary instances. The Council exerts its duties independently, free of any influence from any institutions or public authorities, in compliance with the stipulations in Art 1, par 4 in the Fundamental law, which consecrates the principle of powers separation and balance within the constitutional democracy."

2. Connection of CNCD to the institutions of the European Union

The European Union has had a rather tardy reaction in terms of rights protection for people belonging to national minorities; when it did, it was not directly but through the promotion of the principle of equality and its complementary, of non-discrimination.

The most important Directives[3] through which the European Union protects certain rights of the people belonging to the national minorities by promoting the equal opportunities, are as follows :

- Council Directive 2000/43/EC on 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,
- Council Directive 2000/78/EC on 27 November 2000 establishing a general framework for equal treatment un employment and occupation.

Art 1 in Directive 2000/43/EC states the purpose of the directive:

„The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect the principle of equal treatment in the Member States." and in Art 1 in Directive 2000/78/EC, which states the purpose of the directive:

„The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect the principle of equal treatment in the Member States."

[3]For an ampler analysis on the two directives, see the European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European non-discrimination law*, Luxembourg, 2011, p. 71.

It is worth mentioning that the European Union does not deal with the issue of rights of the persons belonging to the national minorities in a special manner, but it addresses together with other groups that are subjected to discrimination, such as racial origin, affiliation to a religious group, beliefs, disability, age, sexual orientation or gender. Both directives provide very clear definitions of the direct, indirect discrimination and perceive harassment as a form of discrimination.

These two directives promote concepts such as reversing the burden of proof, victimization, dissemination of information, social dialogue, communication with the non-governmental organizations, national bodies specialized in combating discrimination, legislative harmonization and sanctions.

2.1. The European Network of Equality Bodies in the European Union (EQUINET)

The National Council for Combating Discrimination is a member of the European Network of Equality Bodies in the EU (EQUINET)[4]. EQUINET comprises institutions similar to CNCD, with the purpose of facilitating the exchange of information among the equality bodies concerning the uniform implementation of the European non-discrimination law.

EQUINET is an international non-profit organization to connect 45 bodies in 22 European states, with the purpose to combat discrimination. In order to facilitate the exchange of information and expertise, the EQUINET members have implemented an electronic system of knowledge administration, in order to create a relevant source for the legislation and policies in use by this sector, as well as to develop a set of instruments and procedures to allow the orientation of the dialogue to the priorities of the organization members.

Another aspect of the EQUINET activities points to the implementation of a network-type approach, which stimulates the contacts among participants, at all levels of dialogue, via a direct interaction or electronic communication. The contacts are made both during the Annual General Meeting, working groups and also through an implementation of a regular training schedule, with the support from the organization secretariat.

2.2. Connection with the European Union Agency for Fundamental Rights

European Union established the Fundamental Rights Agency (FRA)[5] with the goal to provide the EU institutions and Member States with specialist knowledge and independent assistance, based on the evidence in the sector of

[4]Details on EQUINET: http://www.equineteurope.org/, consulted on. 1.05.2019.
[5] FRA website: https://fra.europa.eu/ro, consulted on. 1.05.2019.

fundamental rights. FRA is an independent, self-financed body of the European Union.

The main purpose of FRA is to monitor the human rights in the Member States of the European Union. FRA gathers data about the compliance with the human rights, conducts surveys and examine those data, based on which FRA formulates recommendations in regards to the implementation and respect of the human rights within the European Union.

2.3. High Level Group on Non-Discrimination, Equality and Diversity – European Commission

Within the Group[6], Romania is spoken for by a representative from the National Council for Combating Discrimination. This working group assists with the implementation of the current legislation at the European Union level.

2.4. The group of governmental experts regarding the non-discrimination at the European Commission level

Romania is represented within the Group by governmental experts regarding the non-discrimination at the European Union level, through the National Council for Combating Discrimination. At the request of the European Commission, CNCD communicates information concerning the national situation of the public policies regarding the interdiction of discrimination, based on the sexual orientation criterion, as well as of the public policies for labor regarding the interdiction of discrimination, based on racial or ethnical origin.

2.5. Court of Justice of the European Union

The Court of Justice of the European Union[7] in Luxembourg hosted the hearing meeting of the closing arguments in case C – 673/16 Coman a.o. The case was sent to CJUE by the Constitutional Court of Romania by addressing 4 preliminary questions regarding the implementation of Articles 2, 3 and 7 in the Directive 2004/38/EC corroborated with Articles 7, 9, 21 and 45 in the Charter of Fundamental Rights of European Union, regarding the indirect rejection by the Romanian General Inspectorate for Immigration, in the response to a request for information about the possibility of granting a temporary residence permit to one of the applicants, who is an American citizen married to a same-sex Romanian citizen in a ceremony that took place in Belgium.

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[6]Further details on this group: http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3328, consulted on. 1.05.2019.

[7]https://curia.europa.eu/jcms/jcms/j_6/en/, consulted on. 1.05.2019.

During this hearing metting, CNCD participated as an expert national institution, *amicus curie*. The meeting was held in the Reunited Chambers of the Court and covered the closing arguments of the parties and of the states that wished to intervene in the case herein.

3. Connection of CNCD to the institutions of the Council of Europe

3.1. European Commission against Racism and Intolerance (ECRI)

The National Council for Combating Discrimination represents Romania within the European Commission against Racism and Intolerance ECRI[8].

ECRI is a commission established through a decision made at the highest political level[9]. ECRI is a mechanism set up during the first Summit of the Heads of States and Governments of the Member States in the Council of Europe. The decision of establishing ECRI is stipulated in the Declaration of Vienna adopted at the Summit on 9 October 1993. The second Summit, held in Strasbourg on 10-11 October 1997, has resolved to consolidate the ECRI actions.

The purpose of ECRI is to combat racism, xenophobia, antisemitism and intolerance at the European level from the perspective of protecting the human rights. The ECRI actions cover all the measures required to combat violence, discrimination and prejudice towards persons or groups of persons on grounds of race, color, language, religion, nationality or ethnical origin.

During its approach, ECRI examines the situation of each member State in the Council of Europe and draws conclusions, analyzes, makes suggestions and propositions as how the racism and intolerance issues need to be identified and solved.

The ECRI reports are first send in the form of a project to the Member States that are subject of the report, for a confidential process of dialogue with the national authorities.

For the second stage, the reports are combined with the monitoring of the ECRI propositions, information update and a thorough analysis of the issues in the respective countries.

The publishing of the ECRI reports is an important step in the development of an active dialogue between ECRI and the authorities in the Member States, so as to identify the solutions to the racism and intolerance issues. The contribution of the institutions, authorities and organizations operating in this sector is deemed useful and possible.

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[8]https://www.coe.int/en/web/european-commission-against-racism-and-intolerance, consulted on. 1.05.2019.

[9]Cristian Jura, *Drepturile omului. Drepturile minorităților naționale*, C.H. Beck Publishing House, Bucharest, 2006, p. 152.

The major activities ECRI is focused on are combating racism, xenophobia, antisemitism and intolerance. Another one is to address recommendations to the governs of the Member States in the Council of Europe.

The most recent ECRI undertakings is the dissemination and collection of examples of good practices on the following topics - bodies specialized in combating racism and intolerance; good practices to combat racism and intolerance in mass-media; practical examples in combating racism and intolerance towards Roma/Gypsies.

One of the issues the world is nowadays facing is the amplitude gained by the dissemination of racist information on the Internet. ECRI will continue to take relevant measures, nationally and internationally, as well as initiate an anti-racism website.

ECRI has been actively involved in preparing the World Conference Against Racism, Racial Discrimination, Xenophobia and Intolerance, organized by the United Nations in Durban, South Africa. Similarly, ECRI has specifically brought its contribution to the organization of the European Conference Against Racism. ECRI will continue to be effective in its efforts to implement the recommendations of the World Conference Against Racism.

The relations with the civil society refers to the dissemination of the antiracist messages in international, national and local areas. The actions aim to raise the awareness of the public of the racism - and intolerance - related issues. ECRI pays a great deal of attention to having different society sectors involved in an intercultural dialogue.

The purpose of ECRI is to organize informative sessions in the Member States along with publishing its reports, cooperation with national partners, thematic and joint action meetings with the NGOs operating in this field, use of mass-media to make ECRI actions known along with civil society, informative activities to target governmental, parliamentary and political audience.

ECRI Secretariat is part of the Directorate General for Human Rights of the Council of Europe.

The list of the 9 general policy recommendations from ECRI is shown below:

- General Policy Recommendation no. 1, Combating racism, xenophobia, antisemitism and intolerance, adopted on 4 October 1996;
- General Policy Recommendation no. 2, Equality bodies to combat racism, xenophobia, antisemitism and intolerance at national level, adopted on 13 June 1997;
- General Policy Recommendation no. 3, Combating racism and intolerance against Roma/Gypsies, adopted on 6 March 1998;
- General Policy Recommendation no. 4, National surveys on the experience and perception of discrimination and racism from the point of view of potential victims, adopted on 6 March 1998;

- General Policy Recommendation no. 5, Combating intolerance and discrimination against Muslims, adopted on 16 March 2000;
- General Policy Recommendation no. 6, Combating the dissemination of racist, xenophobic and antisemitic material via the Internet, adopted on 15 December 2000;
- General Policy Recommendation no. 7, National legislation to combat racism and racial discrimination, adopted on 13 December 2002;
- General Policy Recommendation no. 8, Combating racism while fighting terrorism, adopted on 17 March 2004;
- General Policy Recommendation no. 9, The fight against antisemitism, adopted on 20 September 2004;
- General Policy Recommendation no. 10, Combating racism and racial discrimination in and through school education, adopted on 15 December 2006;
- General Policy Recommendation no. 11, Combating racism and racial discrimination in policing, adopted on 29 June 2007;
- General Policy Recommendation no. 12, Combating racism and racial discrimination in the field of sport, adopted on 19 December 2008;
- General Policy Recommendation no. 13, Combating anti-Gypsism and discrimination against Roma, adopted on 24 June 2011;
- General Policy Recommendation no. 14, Combating racism and racial discrimination in employment, adopted on 22 June 2012;
- General Policy Recommendation no. 15, Combating Hate Speech, adopted on 8 December 2015;
- General Policy Recommendation no. 16, Safeguarding irregularly present migrants from discrimination, adopted on 16 March 2016.

3.2. Framework convention for the protection of minorities[10]

By means of the Department of External Affairs, CNCD compiles regular reports based on the Framework convention for the protection of minorities[11].

The framework convention for the protection of minorities represent the first mandatory multilateral legal instrument to protect the persons belonging to the national minorities. The purpose of the Framework convention is to specify the juridical principles the States undertake to abide by in order to ensure protection for the persons in national minorities.

In adopting this instrument, the Council of Europe has responded to the request in the Declaration of Vienna to convert, to the largest extent possible, the political commitments adopted by the Conference for Security and Cooperation in Europe into juridical obligations.

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[10]Cristian Jura, *op. cit.*, 2006, p. 148.

[11]https://www.coe.int/en/web/minorities, consulted on. 1.05.2019.

Two mentions should be worth making in this context, i.e. there is no definition of national minority in the Framework convention and the implementation of this convention does not imply the recognition of certain collective rights.

Besides the Preamble, the Framework convention features an operative body divided into five titles – Title I includes provisions that generally stipulate certain fundamental principles that can help to elucidate the other substantive directives in the Framework convention; Title II lists a catalog of specific principles; Title III consists of stipulations concerning the monitoring of implementation of Framework convention, Title IV includes various provisions regarding the interpretation and implementation of the Framework convention while Title V ends with final clauses.

The essence of this Framework convention is that the entire juridical content relies on the implementation of the principles of equality and non-discrimination between the persons in minorities and the majority. To promote these principles, special measures can be adopted, in consideration to the specific conditions of the respective persons that need to be appropriate – i.e. in compliance with the principle of proportionality in order to avoid violating the rights of other persons, as well as their discrimination.

The main elements that need to be taken into account are related to the development of culture, religion, language, traditions and cultural heritage. Other rights and freedoms that have to be guaranteed are the freedom of peaceful assembly, freedom of association, freedom of expression, freedom of thinking, consciousness and religion, freedom to receive and impart information and ideas in the minority language, right to use the minority language in private and public life, whether in written or oral forms, etc. The mutual respect, understanding and cooperation need to be a foundation for the relations between persons in a national minority and the majority, in accordance with the text of the Framework convention.

3.3. Charter for minority and regional languages

Whereby the Department of External Affairs, CNCD presents periodical reports based on the Charter for minority and regional languages[12].

Besides the Preamble, the European Charter for minority and regional languages has five parts[13].

Part I includes general dispositions that clarify the concepts, such as the minority or regional languages, the area where a regional or a minority language

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[12]Cristian Jura, *op. cit.*, 2006, p. 149.

[13]https://www.coe.int/en/web/european-charter-regional-or-minority-languages, consulted on. 1.05.2019.

is used, non-territorial languages, the practical manner of implementing the assumed commitments, the relation between the protection regime enforced by the Charter and other more favorable protection regimes, etc.

Parts II and III lay out the objectives and principles in accordance with par 1 in Art 2 and the measures to favor the use of the minority or regional languages in the public life that are about to be adopted in line with the assumed commitments in par 2 of Art 2, mainly in education, justice, administrative authorities and public services, means of communication, cultural activities and facilities, economic and social life and within cross-border exchanges.

Part IV comprises the means to monitor the implementation of the Charter provisions, thus setting up a system of periodical reports that the States are required to present to the General Secretary of the Council of Europe. The last part refers to certain final dispositions associated with ratification, accession and the reservations to be formulated about the Charter.

3.4. In its activity, CNCD constantly reports to the jurisprudence of the European Court of Human Rights[14]

Protocol no.12 is thereby fundamental for the protection of the rights for the persons in the national minorities, since it stipulates the general forbiddance of discrimination. Even though it does not make a direct reference to the persons belonging to national minorities, the categories listed implicitly protect such persons. The principles underlying this Protocol are the principle of non-discrimination and the correlative principle of equality. The means to protect these rights is relatively similar with the procedure campaigned for by the Directives of the European Union.

The essence of the Protocol lies in Art. 1 „General forbiddance of discrimination', which rules in par 1 that the exercise of any right stipulated by law needs to be ensured with no discrimination mainly based on gender, race, color, language, religion, political or other opinion, national or social origin, belonging to a national minority, property, birth or other status", while the par 2 limits the scope of this protocol to the public authorities – „No one shall be discriminated against by any public authority on any of the grounds enunciated in par 1."

Protocol no. 12 entered into force on 1 April 2005.

4. Connection of CNCD to the United Nations institutions

Act no. 612 on 13 November 2002 formulates a statement on recognition by Romania of the competence of the Committee on the Elimination of Racial Discrimination, in accordance with Art. 14 of the International Convention on the

[14]https://www.echr.coe.int/Pages/home.aspx?p=home, consulted on. 1.05.2019.

Elimination of All Forms of Racial Discrimination, adopted by the General Assembly of the United Nations in New York on 21 December 1965.

The International Convention on the Elimination of All Forms of Racial Discrimination[15] was adopted by the General Assembly of the United Nations on 21 December 1965. Romania acceded to this Convention by means of Decree no. 345/1970.

This Convention establishes a system of jurisdictional regarding the receipt and examination of the complaints (notices) coming from persons under the Romanian jurisdiction, claiming to be victims of having any of the rights listed in the International Convention on the elimination of all forms of racial discrimination violated by Romania, with two levels, namely national and international.

In 2002, Romania formulated a statement regarding the recognition of the competence of the Committee on the Elimination of Racial Discrimination[16] to receive and examine complaints (notices) from persons under the Romanian jurisdiction, claiming to be victims of having any of the rights listed in the International Convention on the elimination of all forms of racial discrimination violated by Romania.

Under par 3 in the single article of Act 612/2002, it is stipulated that the competent body to receive and examine complaints (notices) on the territory of Romania, pursuant to Art 14, par 2 in the International Convention on the Elimination of All Forms of Racial Discrimination is the National Council for Combating Discrimination.

In other words, the competence to examine complaints (notices) on the territory of Romania belongs to the National Council for Combating Discrimination, while the international counterpart is the Committee on the Elimination of Racial Discrimination.

On the other hand, CNCD has a constant participation at the sessions of United Nations Committee for Human Rights during which Romania presents periodical reports to the International Pact on the civil and political rights (ICCPR)[17].

5. Conclusions

The National Council for Combating Discrimination is one of the best connected national institutions to the European or international bodies. CNCD was established in August 2002, following the transposition into the national legislation of certain European directives, namely Directive 2000/43/EC regarding the implementation of principle of equal treatment between persons, with no discrimination on grounds of racial or ethnical origin and of the Council Directive

[15]https://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx, consulted on. 1.05.2019.
[16]Cristian Jura, *op. cit.*, 2006, p. 117.
[17]https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx, consulted on. 1.05.2019.

200/78/EC establishing a general framework in favor of the equal treatment in terms of employment and occupation.

Starting with 2002, since its beginning, the activity of CNCD has surged in importance, both nationally and internationally. Internally, CNCD has mainly focused on providing a solution to the notices being received. Worldwide, the activity of the Council has been diversified and has consisted in regular reporting during international conventions, appointing individuals in international structures and participation to the sessions of the Court of Justice of the European Union.

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The proportionality principle used as standard by the European Court of Human Rights when assessing the excess of power[1]

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Abstract
The study herein aims at examining the implementation of the proportionality principle in the European Court of Human Rights case law, as a means of controlling the activity of the national authorities, namely limiting the excess of discretionary power. The main motivation for such an approach consists in providing the guidelines in the decision-making process of restricting certain fundamental rights and freedoms, so that the provided substantiation to form the belief that all relevant factors have been taken into account and that the measures implemented in those cases are transparent, non-discriminatory and accountable. Thus, in drawing up this study, we have taken into account the relevance that the principle of proportionality should have in the activity of the public authorities, including that of the public administration. The exercise of their powers shall be always done in accordance with the principle of legality, but also within the limits of the discretionary power accepted so as not to prejudice the fundamental rights and freedoms of individuals and not to compromise the public interest by excess power or even abuse of power. The importance of the principle of proportionality is also revealed by the Constitutional Court of Romania, which has built its own case-law in this respect on the jurisprudential elements developed by the ECHR. This is the reason for which, in this study, we shall also mention the case-law issues of the Romanian Constitutional Court, not just those of ECHR.

Keywords: *principle of proportionality, public interest, freedom of expression, the right to peaceful assembly and association, limitation of the property right.*

JEL Clasiffication: K10, K33, K38

1. Introduction

Proportionality is an inherent notion of the idea of justice and it can be found in the whole legal system[4] and, we may add, in any legal system enshrined

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[1] This study is the result of research funded under the project entitled "Legality - Opportunity, the relationship between them in the administrative act and the identification of risk factors to ensure good administration" (UniTBv - Grants for interdisciplinary teams, Competition 2018).
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[4] Lamprini Xenou, *Les principes généraux du droit de l'Union Européenne et la jurisprudence administrative française*, Bruylant Edition, 2017, p. 347.

in a state or an international organization, even at a regional level, such as the European Union or Council of Europe, where elements specific to democracy and rule of law are recognized, established or even guaranteed by normative acts.

Regarded as a fundamental legal concept, proportionality is also considered to be one of the „old principles applicable to the law according to which the legal measures taken must be appropriate to the social situations to which they apply, involving several dimensions: reasonableness, fairness, legitimacy, equity”[5].

Precisely because „it can be analysed from several perspectives, its practical applications are different and produce different legal consequences”[6], that proportionality, in its various aspects, is considered to be „a principle inherent in the judicial function of the state itself”[7]. In this context it is appreciated that „the principle of proportionality expresses the adequacy for the legal measures to be appropriate to the facts to which they are addressed, establishing a relationship - appreciated by the entire community as - fair and legitimate between the adopted legal measure and the social reality”[8].

Proportionality is often analysed in relation to human rights and fundamental freedoms, specifically in cases of limitation of their exercise when even the constitutional regulations require that any such measure of restraint to be taken only if necessary, in a democratic society and proportionate to the legal situation that caused it[9].

Moreover, we can talk about three types of cases where are questionable and therefore analysed aspects relating to proportionality, as namely: cases involving public authorities' decisions by exercising their discretionary power, cases regarding rights and freedoms, respectively sanctions and their application[10].

Whenever a court will have to rule on proportionality as regards measures taken by a public authority, usually one in the field of public administration, the courts are cautious[11]. In such cases, the decision on taking a particular measure,

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[5] Ștefan Deaconu, *Drept constituțional*, C. H. Beck Publishing House, Bucharest, 2017, pp. 190-191.

[6] Ioan Muraru, Elena Simina Tănăsescu, (coord.), *Constituția României, Comentariu pe articole*, C. H. Beck Publishing House, Bucharest, 2008, p. 541.

[7] *Ibidem.*

[8] *Ibidem.*

[9] Such an example is given by the provisions of Art. 53 of the Romanian Constitution, republished, where it is stipulated that the exercise of certain rights or freedoms may be restricted only by law and only if necessary, in certain situations expressly listed in the constitutional provisions, the restriction may be ordered only if necessary in a democratic society, the measure thus taken must be proportionate to the situation which determined it, be applied in a non-discriminatory manner and without prejudice to the existence of the right or the freedom.

[10] Paul P. Craig, *Proportionality, Rationality and Review* (2010 New Zeeland Law Review). Articles by Maurer Faculty. 2455, p. 269, accessed at: http://www.repository.law.indiana.edu/facpub/2455, (12.11.2018).

[11] Paul P. Craig, *op. cit.*, p. 269.

its content and its size, will belong to the public authority, in the exercise of its discretionary power, but in compliance with the limits imposed by the principle of legality. Consequently, the courts will not overturn such public authorities' decisions simply because they believe that another decision would be better, thus not being able to substitute the administration[12]. Basically, in such cases the court will decide only in those situations where the violation of the proportionality limits is more than obvious.

Moreover, courts will have to decide in such cases where the breach is not just overcoming the limits of proportionality discretion, discretionary power of the administration, but even damage personal rights and freedoms.

Besides, by their jurisprudence, the different and various national and international courts have built up mechanisms to thoroughly analyse the necessity and the adequacy of any measures taken by the administration, the public authorities, and by which the principle of proportionality may be affected, especially with regard to fundamental rights and freedoms.

„Proportional reasoning involves comparing interests so that the limitation of the exercise of a fundamental right or freedom does not go beyond what is strictly necessary to satisfy a public interest or to defend the rights of others".[13] Thus, when analysing the principle of proportionality as regards the restriction of the exercise of certain rights, especially when it comes to restrictive measures, the assessment is made by reference to the legitimate purpose in question[14], a legitimate aim[15] which must be clearly expressed by legal provisions in force.

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[12] *Ibidem.*

[13] Marius Andreescu, Andra Puran, *Drept constituţional. Teoria generală şi instituţii constituţionale*, C. H. Beck Publishing House, Bucharest, 2016, p. 258.

[14] See Marius Andreescu, Andra Puran, *op. cit.,* p. 258. For example, the Constitutional Court of Romania, by Decision no. 21/2000 regarding the exception of unconstitutionality of the provisions of art. 91 (1) to 91 (5) of the Code of Criminal Procedure, published in the Official Gazette of Romania, Part I, no. 159 of 17.04.2000, stressed that this condition of proportionality is clearly met, considering the importance of the values defended against crimes, values provided by the primary legislation (in this case the values stipulated in Article 1 of the Criminal Code in force at that time, according to which "the Criminal Law protects, against the offenses, Romania, the sovereignty, independence, unity and indivisibility of the state, the person, its rights and liberties, the property, as well as the entire order of law" to the degree of restriction of some rights exercise for potential offenders and the fact that the very existence of the right or freedom is not achieved results from certain provisions of the Code of Criminal Procedure in force at that time (the provisions of paragraph 2 of Article 911 of the Code of Criminal Procedure, sn), according to which the interception and recording of the conversations is only temporary, being allowed only for up to 30 days, with the possibility of a possible extension for duly justified reasons.

[15] Moreover, the Constitutional Court of Romania, through its case law has established that "in order to achieve the proportionality test, the Court must first determine the aim of the legislature in the disputed measure and whether it is legitimate, since the proportionality test can relate only to a legitimate aim ". See in this regard, for example, pt. 20 Decision no. 270/2014 [/ R] regarding the exception of unconstitutionality of art. 114 par. (6) of the Government Ordinance no. 92/2003 regarding the Fiscal Procedure Code in drafting these provisions before amendment by Law no. 126/2011 approving Government Emergency Ordinance no. 88/2010 amending and supplementing

However, in such an analysis of the Constitutional Court it will be investigated that the measures taken by the public authorities restricting the exercise of fundamental rights or freedoms are legal (ordered by law or by normative acts with the same legal force as the law), legitimate, fair, necessary in a democratic society, proportionate to the situation that has caused them, and without affecting the substance of the right[16].

Faced with cases in which the principle of proportionality had to be analysed, the Constitutional Court of Romania has built a proportionality test[17] whose elements are: the adequacy of the measure - any measures taken should be appropriate which means that any such measure is capable of objectively lead to that purpose; the necessity - which supposes that the measure taken is indispensable for the fulfilment of the purpose, and the proportionality - by which it is necessary to establish the existence of a fair balance between the actual interests in order to be appropriate for the purpose pursued.

However, the doctrine notes that „the case-law of the Constitutional Court of Romania is neither generous nor edifying in the application and interpretation of the principle of proportionality in ensuring fundamental rights and freedoms"[18], and the observance of this principle by the competent authorities is established in the jurisprudence of our constitutional court, including by reference to the jurisprudence of the European Court of Human Rights[19].

2. Systematization of the principle of proportionality in ECHR cases aimed at ensuring the fair balance between the individual fundamental rights and the public interest

The principle of proportionality[20] is one of the defining standards that contribute to the protection of fundamental rights, ensuring the fair balance between individual rights and the public interest.

However, it was noted[21] that reading the text of the European Convention

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Government Ordinance no. 92/2003 regarding the Fiscal Procedure Code and the provisions of art. 114 par. (1) and (4) of the same order, decision published in the Official Gazette. of Romania, Part I, no. 554 of 28/07/2014.

[16] Marius Andreescu, Andra Puran, *op. cit.*, p.258.

[17] See, for example, point 30 of the Decision no. 462/2014 [A] on the objection of unconstitutionality of the provisions of art. 13 par. (2) second sentence, art. 83 par. (3) and Art. 486 par. (3) of the Code of Civil Procedure, published in the Official Gazette of Romania, Part I, no. 775 of 24.10.2014.

[18] Marius Andreescu, Andra Puran, *op. cit.*, p. 263.

[19] *Ibidem*, p. 259.

[20] Sofia Ranchordás, Boudewijn de Waard, *Proportionality crossing borders. Why it is still difficult to recognise sparrows and cannons*, in *The judge and the proportionate use of discretion: A comparative study,* Ronledge Research EU Law, edited by Sofia Ranchordás, Boudewijn de Waardeds, 2016, p. 10.

[21] Catherine Haguenau-Moizard, Yoan Sanchez, *The principle of proportionality in European law*, in *The judge and the proportionate use of discretion: A comparative study,* Ronledge Research EU

on Human Rights and its additional Protocols, we find few specifications relating to the proportionality test. Thus, it was found[22] that the Convention does not use terms such as: proportional, fair balance, disproportionate. Nonetheless, the doctrine stressed that[23] we must not understand that the idea of proportionality had not been envisaged when the Convention was drafted, some articles are written in such a way that the idea of proportionality is evident.

To illustrate the above, we show that this is the case the rules establishing the principle of protection of a right or a freedom and then introducing possible derogations from the rule, such as Article 10, which protects the right to freedom of expression and provides in paragraph 2 restrictions that can be applied when necessary[24], or Article 11 governing freedom of assembly and association[25]. Similarly, in Article 1 of the First Protocol to the ECHR[26] protecting property rights, the ECHR uses the proportionality test to ensure that the decision to expropriate was taken after balancing the public interest and respect for fundamental rights[27].

Therefore, we intend further to reveal under what conditions may be imposed a restriction of the rights exemplified above, without intending to exhaust this issue but placing emphasis of course on the principle of proportionality.

Law, edited by Sofia Ranchordás, Boudewijn de Waardeds, 2016, p. 142.

[22] *Ibidem.*

[23] *Ibidem.*

[24] According to Article 10 of the European Convention on Human Rights: 1. Everyone has the right to freedom of speech. This right includes freedom of opinion and the freedom to receive or communicate information or ideas without the interference of public authorities and without taking into account the frontiers. This Article does not prevent States from subjecting broadcasting, cinematographic or television companies to a licensing regime. 2. The exercise of these freedoms of duties and responsibilities may be subject to formalities, conditions, restrictions or penalties prescribed by law which, in a democratic society, constitute measures necessary for national security, territorial integrity or public security, the defense of order and the prevention of criminal offenses, the protection of health, morals, reputation or the rights of others, to prevent the disclosure of confidential information or to guarantee the authority and impartiality of the judiciary.

[25]Article 11 of the Convention has the following normative content: 1. Everyone has the right to freedom of peaceful assembly and freedom of association, including forming trade unions and joining trade unions to defend his interests. 2.The exercise of these rights can not be subject to any restrictions other than those provided for by law in a democratic society, constitute measures necessary for national security, public security, the defense of order and the prevention of crimes, the protection of health, morals or rights and the freedoms of others. This Article does not prohibit legal restrictions being imposed on the exercise of these rights by members of the armed forces, the police or the state administration.

[26] Art. 1 of the First Protocol to the European Convention on Human Rights: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and under the conditions provided by law and by the general principles of international law. The preceding provisions shall not affect the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

[27] Catherine Haguenau-Moizard, Yoan Sanchez, *The principle of proportionality in European law*, in *The judge and the proportionate use of discretion: A comparative study,* Sofia Ranchordás, Boudewijn de Waard eds., 2016, p. 145.

With regard to the reasons justifying restrictions of the freedom of expression, we note, in relation to paragraph 2 of Article 10, that the limitation must be provided by law, pursue a legitimate aim, such as that provided by the Convention - national security, the territorial integrity or public security, the defense of order and the prevention of crimes, the protection of health, morals, the reputation or the rights of others, the prevention of disclosure of confidential information, the guarantee of the authority and impartiality of the judiciary, respectively the necessary measure in a democratic society achieving the legitimate aim pursued.

Regarding the condition for the restriction to be prescribed by law, the doctrine[28] notes that the rule underlying the restriction of the right must be identifiable, precise, predictable and accessible.

Related to the condition that the restriction is necessary in a democratic society, referring to the case-law of the Court, it was stated[29] that it is an imperative social need, the position of the Court being thus favorable to prioritizing this freedom over other purposes and interests that the state would want to protect them through its decisions. As an example of the criteria used by the European Court of Human Rights to assess the need to make a decision in a democratic society, the doctrine[30] provided the following: the importance of the interest of expression, the context and the way of communicating opinions and information, the margin of appreciation of the states.

A special mention that ought to be done during this analysis is the one that envisages the possibility for civil servants to rely on the freedom guaranteed by Article 10 of the Convention, since it is legitimate for a state to submit to these categories of persons, due to their status, a reserve requirement[31].

In this respect, the Court[32] stated that civil servants have the right to freedom of expression, while pointing out that, if generally employees owe their employer a duty of loyalty, reserve and discretion, this is especially applicable to civil servants in respect of which the obligation to be loyal and reserve assumes special significance.

In the analysis performed in the above-mentioned case, the Court held that „a public official may, during his or her service, find information of an internal nature, including secret information, the disclosure or publication of which corresponds to a strong public interest. Therefore, the Court considers that reporting by a civil servant or a public sector employee of an unlawful conduct or a crime

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[28] Bianca Selejan-Guțan, *Protecția europeană a drepturilor omului*, 4th edition, C.H. Beck Publishing House, Bucharest, 2011, accessed at: www.legalis.ro (16.09.2018).

[29] Bianca Selejan-Guțan, *op. cit.*. The cited author rely on on an earlier cause of the Court's case in the development of this conditional restraint of the right - the cause of Handyside v. The United Kingdom (1976).

[30] Bianca Selejan-Guțan, *op. cit*.

[31] Corneliu Bârsan, *Convenția europeană a drepturilor omului. Comentariu pe articole*, second edition, C.H. Beck Publishing House, Bucharest, 2010, accessed at www.legalis.ro (16.09.2018).

[32] ECHR Judgment from12.02.2008 in Guja c. Moldovei case (application nr.14277/04), par. 72.

at the workplace should, under certain circumstances, be protected. This could be required when the employee or civil servant concerned is the only person or part of a small category of people who knows what is happening at work and is thus best placed to act in the public interest by alerting the employer or the general public". In the Court's view, by virtue of the duty of discretion, the disclosure of certain facts should be done, first of all, to the superior or a competent authority to investigate what has been raised and to consider whether there are other effective means to remedy the unlawfulness.

As regards the proportionality of the interference in the freedom of expression of a civil servant, the Court takes into account factors such as:

- the public interest that the information disclosed involves, and the fact that, as regards the restriction of debates on matters of public interest, the margin provided by art. 10 par. 2 is restricted[33]. Therefore, „in a democratic system, government actions or omissions must be subject to scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest the public may have in certain information may sometimes be so powerful as to overcome even a legitimate obligation to preserve confidentiality"[34];

- the authenticity of the information disclosed, any person who chooses to disclose information must carefully check, to the extent that circumstances allow, that it is accurate and reliable[35];

- assessing the damage, if any, suffered by the public authority as a result of the disclosure of the case and assessing whether such damage prevails over the public's interest in disclosure of the information[36];

- the reason for which the disclosure was made, pointing out that „an action motivated by a personal accusation or personal antagonism or expecting a personal advantage, including a pecuniary gain, would not justify a particularly high level of protection"[37];

- analysis of the penalty imposed on the officer making the disclosure and its consequences[38].

Applying this test of proportionality in the case mentioned, but given the „importance of the right to freedom of expression on matters of general interest, the right of civil servants and other employees to report illegal conduct and offenses at their place of work, the obligations and responsibilities of the employees towards their employers and the right of employers to manage their staff and weighed up the other different interests involved in this case, the Court concludes that interference with the applicant's right to freedom of expression, in particular

[33] ECHR Judgment from12.02.2008 in Guja c. Moldovei case (application nr.14277/04), par. 74.
[34] *Ibidem*.
[35] ECHR Judgment from12.02.2008 in Guja c. Moldovei case (application nr.14277/04), par. 75.
[36] ECHR Judgment from12.02.2008 in Guja c. Moldovei case (application nr.14277/04), par. 76.
[37] ECHR Judgment from12.02.2008 in Guja c. Moldovei case (application nr.14277/04), par. 77.
[38] ECHR Judgment from12.02.2008 in Guja c. Moldovei case (application nr.14277/04), par. 78.

his right to communicate information, was not „necessary in a democratic society”[39].

Other examples of interference with the right to free communication of information concern the refusal to grant a broadcasting and television company the business license[40]. Remaining in the area of journalism, the main medium of communication, dissemination of information and ideas, we shall indicate those established by the Court in the Case Cumpănă and Mazăre v. Romania, judgment considered to be[41] a reference to the condition of proportionality in relation to the nature and amount of punishments imposed on journalists.

In this case, the Court found that the interference was prescribed by law and pursued a legitimate aim in relation to the protection of the rights of another, namely the reputation of the lady, a city hall official who had been exposed by journalists. As regards the condition of necessity in a democratic society, the Court recalled that the Contracting States enjoy a certain margin of discretion to establish the existence of such a need but subject to European control, the Court must „determine whether the arguments put forward by the national authorities to justify the interference are 'pertinent and sufficient' and if the measure in question was 'proportionate to the legitimate aims pursued' [...]. In this context, the Court must satisfy itself that the national authorities, on the basis of a reasonable appraisal of the relevant facts, have enforced rules in accordance with the principles established in Art. 10 [...]”[42].

The Court further stated that it is necessary to check „whether the domestic authorities maintained a fair balance between, on the one hand, the protection of freedom of expression enshrined in art. 10 and, on the other hand, the right to reputation of the persons concerned, which is also protected by Art. 8 of the Convention as an element of privacy”[43]. In this regard, it noted that the article incriminated concerns a topic of general interest for the local community - the management of public funds by certain local elected officials and civil servants, which was also the subject of a report drawn up by the Court of Auditors. However, the Court pointed out that the reference in the article to specified persons, indicating their names and functions, implied for the applicants „the obligation to provide a sufficient factual basis”[44], especially since it was about serious charges such as to render the criminal liability of the official.

Considering these aspects, the Human Rights Court has ruled that the journalists’ punishment was necessary in a democratic society, and that we cannot

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[39] ECHR Judgment from12.02.2008 in Guja c. Moldovei case (application nr.14277/04), par. 97.
[40] Corneliu Bârsan, *op. cit.*
[41] *Ibidem.*
[42] ECHR Judgment from 17.12.2004 Cumpănă și Mazăre c. României case (application nr.33348/96) published in the Official Gazette of Romania nr.501/14 iunie 2005, par. 90.
[43] ECHR Judgment from 17.12.2004 Cumpănă și Mazăre c. României case, par. 91.
[44] ECHR Judgment from 17.12.2004 Cumpănă și Mazăre c. României case, par. 101.

speak, in this case, about an unjustified limitation on the part of the authorities of freedom of expression through the press.

Quite different, however, was the Court's conclusion as to the nature and gravity of the penalties applied in the case, which were considered to be "elements to be taken into account in assessing the proportionality of a restriction on the right to freedom of expression guaranteed by Art. 10"[45]. Thus, the Court held that the obligation of journalists to pay damages for the moral prejudice caused to the public servant, namely the imposition of a seven-month prison sentence with execution, accompanied by the prohibition of civil rights and the practice of the profession of journalist for a year are such as to discourage the participation of the press in the debate on matters of legitimate general interest, the sanctions being therefore disproportionate, by their nature and gravity, to the legitimate aim pursued by the applicants' conviction for insult and slander.

Turning our attention now to another conditional right, we shall consider the applicability of Article 11 of the Convention which guarantees the freedom of peaceful assembly and freedom of association with others, providing in paragraph 2, as we saw in the preceding, the potential restriction of this right, with respect to the same standard of proportionality.

Therefore, as the Court[46] had the occasion to rule „the right to freedom of assembly, one of the foundations of a democratic society, is subject to exceptions which must be strictly interpreted and the need to impose such restrictions must be convincingly established. When considering whether the restrictions on the rights and freedoms guaranteed by the Convention may be considered „necessary in a democratic society", the Contracting States have a certain margin of appreciation but not an unlimited one. However, it is for the European Court to give a final judgment on the compatibility of the restriction in question with the Convention, and this is done by assessing the circumstances of a particular case [...]".

The Court further stated that when „it exercises its power of control, its task is not to replace the opinion of the relevant national courts with its own point of view, but rather to review, in relation to art. 11 the decisions rendered by them. This does not mean that it has to confine itself to determining whether the State exercised its discretionary power reasonably, carefully and in good faith; The Court must analyse the alleged interference in the light of the case as a whole and to assess, after determining that it pursued a 'legitimate aim', if it answered a 'pressing social need' and, in particular, whether it is proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are „relevant and sufficient" [...]. Thus, the Court has to be convinced the national authorities have applied standards in line with the principles set out

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[45] ECHR Judgment from 17.12.2004 Cumpănă și Mazăre c. României case, par. 111.

[46] ECHR Judgment from 5.01.2016 in Frumkin v. Russia case (application nr.74568/12), final at 06.06.2016, par. 93.

in Art. 11 and, furthermore, that they have based their decisions on an acceptable assessment of the relevant facts"[47].

Relative to the freedom of peaceful assembly, it has been indicated[48] that restrictions may take the form of prior authorization or conditional authorization requirements. It is important to note that the Strasbourg Court's view is that public authorities must „demonstrate a certain degree of tolerance to peaceful assemblies, even against unlawful ones, so that the freedom of assembly guaranteed in Art. 11 of the Convention shall not be emptied of content. The limits of tolerance that an unlawful assembly must have depend on specific circumstances, including the duration and magnitude of the public order disorder caused by it, and whether the participants in the unlawful assembly have sufficient opportunity to express their views […][49].

Usually, Article 11 of the Convention does not grant protection to violent demonstrators, the Court stressing that „when demonstrators engage in acts of violence, interference with the exercise of the right to freedom of assembly is, in principle, justified for the maintenance of public order and prevention of disorder offenses and protection of rights and freedoms of others"[50]. Even under these conditions, it is specified[51] that „a person does not cease to enjoy the right to freedom of peaceful assembly because of sporadic violence or other offenses committed by others during a demonstration, if the person keeps his intentions and behavior peaceful [...]. Even if there is a real risk that a public demonstration will result in a disorder of order due to events that can not be controlled by the persons organizing it, such a demonstration is not excluded by itself from the scope of Art. 11 § 1 of the Convention, but any restriction on such gatherings must be in accordance with Art. 11 § 2".

The above-mentioned Court's considerations are relevant in tense situations where prudent management by the authorities and respect for proportionality is an extremely difficult task, given the multitude of unpredictable problems that may arise - for example in demonstrations that become violent and in which operational choices must be made so that defending the public order and protect the rights and freedoms of citizens. It is acknowledged that[52] these difficulties are

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[47] ECHR Judgment from 5.01.2016 in Frumkin v. Russia case (application nr.74568/12), final at 06.06.2016, par. 94.
[48] Bianca Selejan-Guțan, *op. cit.*
[49] ECHR Judgment from 5.01.2016 in Frumkin v. Russia case (application nr.74568/12), final at 06.06.2016, par. 97.
[50] ECHR Judgment from 5.01.2016 in Frumkin v. Russia case (application nr.74568/12), final at 06.06.2016, par. 98.
[51] ECHR Judgment from 5.01.2016 in Frumkin v. Russia case (application nr.74568/12), final at 06.06.2016, par. 99.
[52] The European Convention on Human Rights and policing. A Handbook for police officers and other enforcement officials (Jim Murdoch, Ralph Roche), Council of Europe Publishing, p.104-105, accessed at: https://www.echr.coe.int/Documents/Handbook_European_Convention_ Police_ ENG.pdf, (02.09.2018).

intensified by the fact that, in principle, the police, the gendarmerie is not required to act offensive in these events, but rather have to intervene so that the peaceful nature of the assembly is protected.

Obviously, the Court recognizes the authorities' right to assess the security risks and the disturbance of the peace and public order, as well as their competence to prescribe measures accordingly, but observing the specific conditions related to the legal provision of the measure ordered, thereby pursuing a legitimate aim and necessity in a democratic society[53].

Regarding the need for the measure to be prescribed by law, it is considered[54] that this condition allows a person to be able, with a reasonable degree of certainty, to foresee for any limitation of his or her right, thus being an essential guarantee against the arbitrary action of the authorities.

Then, with regard to the pursuit of a legitimate aim, there is, of course, a link between the actions/measures of the authorities and the aim pursued[55]. Last but not least, because in our example of the turbulent manifestations, the action of the authorities, to be necessary in a democratic society, it is imperative that it corresponds to a stringent social need, be proportionate to the aim to be achieved and a sufficient motivation is given, relevant to the action of the authorities[56].

Based on the Court's vision on the proportionality assessment, three relevant issues are indicated[57]:

- the degree of interference by the authorities;
- if the authorities had less intrusive means available;
- the procedural safeguards available.

These guidelines may prove useful in steering the decision-making process, in those circumstances when we have shown that the authorities have a margin of discretion, ensuring that the measures adopted are responsible, transparent and non-discriminatory.

To summarise, it should be noted that in order for the action of the authorities in such conflicting situations to be proportionate, it is necessary to approach the following elements of analysis[58]:

- it has been achieved the motivation of the actions undertaken;

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[53] The European Convention on Human Rights and policing. A Handbook for police officers and other enforcement officials (Jim Murdoch, Ralph Roche), Council of Europe Publishing, p.104-105, accessed at: https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf, (02.09.2018), pp. 100, 104.

[54] The European Convention on Human Rights and policing. A Handbook for police officers and other enforcement officials (Jim Murdoch, Ralph Roche), Council of Europe Publishing, p.104-105, accessed at: https://www.echr.coe.int/Documents/Handbook_European_Convention_ Police_ENG.pdf, (02.09.2018), p. 101.

[55] *Ibidem*.

[56] *Ibidem*, p. 102.

[57] *Ibidem*.

[58] *Ibidem*, pp. 102-103.

- it has been analysed whether there were less intrusive means available to the authorities to achieve the legitimate aim pursued;
- reference is made to the relevant regulatory framework and to the manner in which the legal provisions have been respected by the measure;
- the necessity of the action taken is justified and the foreseeable consequences deriving from it are examined;
- the impact of the action is indicated;
- it is well founded that the action pursues a legitimate aim and is non-discriminatory;
- it is indicated that the decision was taken after considering all relevant information.

In concluding our approach, we also wish to illustrate how the principle of proportionality in terms of limiting the ownership applies, of course, in accordance with the practice of the European Court of Human Rights.

The doctrine[59], based on the ECHR jurisprudence valorisation, reiterates the necessity to apply a fair balance test, expression of the general principle of proportionality, which means achieving a fair balance between the demands of the general interest of the community and the protection of the fundamental rights of the individual.

Thus, from the reading of Article 1 of Protocol No. 1 to the ECHR, there are three conditions where it is considered[60] that deprivation of a property is not a violation of the property rights, namely:

- the deprivation shall be prescribed by law;
- the deprivation shall be imposed by a cause of public utility;
- the deprivation shall be in compliance with the general principles of international law.

In addition, by way of jurisprudence, there was also detained[61] the condition of the rightful indemnity of the rightsholder, which can be considered[62] as an expression of the principle of proportionality applied to the interference in the property right, the lack of such compensation constitutes an excessive breach of the property right, breaking the balance to be achieved between the protection of the property right and the achievement of general imperatives, such as the public utility[63].

The doctrin[64], however, notes that the case-law of the Court acknowledged that it is not guaranteed, in all cases, the right to a full compensation for the loss suffered, legitimate objectives such as the implementation of economic reforms

[59] Bianca Selejan-Guțan, *op. cit.*
[60] Corneliu Bârsan, *op. cit.*
[61] *Ibidem.*
[62] Bianca Selejan-Guțan, *op. cit.*
[63] Corneliu Bârsan, *op. cit.*
[64] *Ibidem.*

or social justice can lead to a compensation below the market value of the property.

3. Conclusions

From the preceding lines, trying to systematize the application of the principle of proportionality in the ECHR's case law, the conclusion[65] that we are going to reach is that the mission is not an easy one, because while the examination of individual cases can reveal, at first glance, a common structure of analysis, there are a number of exceptions. Therefore, it is noted[66] that in most cases the Court carries out a two-stage examination. First, it ensures that the measures in question pursue a legitimate aim, and secondly ensures that the measures are adequate/proportionate to achieve this legitimate aim. But in many other cases, the Court's reasoning goes through more than two stages. First, the Court verifies whether there was an interference with a right protected by the Convention and whether the interference is prescribed by law. Second, the Court examines whether the interference pursues a legitimate aim. Third, it is assessed whether the measure is necessary in a democratic society.

Reported to the case law of the Court, it is considered[67] that a measure is considered necessary if the State concerned has no other options for attaining the legitimate aim pursued, thus creating less interference in the exercise of the fundamental right affected by the measure adopted. The Court shall also ensure that the measure is not disproportionate in that the disadvantages are counterbalanced by the advantages obtained by adopting that measure, the benefits being assessed in relation to the general interest of the adoption of the measure, and the disadvantages in relation to the damage caused to the individual.

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[65] Catherine Haguenau-Moizard, Yoan Sanchez, *The principle of proportionality in European law*, in *The judge and the proportionate use of discretion: A comparative study,* Sofia Ranchordás, Boudewijn de Waard eds., 2016, p. 142.
[66] Catherine Haguenau-Moizard, Yoan Sanchez, *op. cit.* 2016, p. 145.
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Considerations on the functions of the European Council

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Abstract

The work focuses mainly on the functions of the European Council, after a brief review of its regulations in the treaties, its composition and organization, as well as on the functioning of the European Council. It also addresses the European Council's connection with the EU Council, mainly in order to underline the importance of the EU Council for Romania in the current period, when our country holds the presidency of the EU Council, for six months, starting with January 1st 2019, but also in order to avoid any confusion between the European Council and the EU Council.

Keywords: *European Council, EU Council, legislative functions, organic attributes, EU strategic interests, draw back of a Member State, COREPER (Committee of Permanent Representatives).*

JEL Classification: K23, K33

1. European Council – history

1.1. Regulation of the European Council institution prior to the Treaty of Lisbon

The European Council, composed of Heads of State and Heads of Government, must not be confused with the Council (of the European Union), which consists of one representative from each Member State, at ministerial level, empowered (authorized) to appoint the government of that Member State (Article 16 TUE), or with the Council of Europe, established in 1949, which circumscribed to the social-cultural field.

The European Council acquired an official status by the Maastricht Treaty. Its role is to give impetus to the development of the Union and to define its general guidelines.

The European Council does not participate in the formal decision-making process set by the Community Treaties. It only pronounces on a political point of view and, the task of applying the Community Policies is upon the Community Institutions, particularly on the Council of the European Union.

Thus, TMs, in art. 13 par. (1) and (2), specifies the role of the European Council, while in para. (3), it specifies how the European Council itself should

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work together with the EU Council in the implementation of Community policies, as follows:

- defines the general principles and guidelines of the Common Foreign and Security Policy, including for issues that have implications in the field of defense;

- sets out common strategies to be implemented at Union level in areas where Member States have important common interests. Common strategies shall specify their objectives and duration, as well as the means to be provided by the Union and the Member States.

"The Amsterdam Treaty confirmed the status of the European Council as the main source of impetus for the integration of Europe. The European Council has the highest political status. Thus, according to art. 99 par. (3), the European Council, on the basis of the EU Council's report, adopts conclusions of general orientation on the economic policies of the Member States and the Communities. On the basis of these conclusions, the EU Council, acting by a qualified majority, shall adopt a recommendation that sets out the general guidelines."[2]

Therefore, from this perspective, the European Council is not an institution of the Communities or of the Union, but the doctrine is that "it exists and acts rather as a super-Council in its mentioned composition."[3]

By the Treaty of Nice, according to art. 4 par. (3) TMs, the European Council must submit to the Parliament a report on each of the meetings and an annual report on the progress made by the Union (a provision also taken over by the Treaty of Lisbon).

Acts of the European Council. Decisions of the European Council were adopted by it, even before a proposal had been made by the Commission or before the European Parliament had been consulted, which led to some of its rulings being discretionary[4]. Its decisions were not adopted in accordance with the procedure laid down in the Community Treaties (before the Treaty of Lisbon), as they did not constitute acts of a (community) institution. Consequently, the legal effects of a Community act did not fall within the jurisdiction of the Court of Justice and were not the subject of a preliminary reference for interpretation or examination of validity, 234 TEC (Article 267 TFEU) and Art. 156 Euratom[5].

However, in the European Council, since its first reunions and until recently (prior to the Lisbon Treaty), important decisions have been taken on: the

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[2] See Ioana Nely Militaru, *European Union Law. Chronology. Sources. Principles. Institutions. Internal Market of the European Union. Fundamental Liberties*, Universul Juridic Publishing House, Bucharest, 2017, p. 221 and following.

[3] See O. Manolache, *Treaty of Community Law*, 5th edition, C.H. Beck Publishing House, Bucharest, 2006, p. 192.

[4] *Ibidem*, p. 192.

[5] See B. Ştefănescu, *Prejudicial Referral to the Court of Justice of the European Communities*, Community Law Review no. 1/2003, Rosetti Publishing House, Bucharest, 2003, pp. 88 90; I. N. Militaru, *Prejudicial Referral to the European Court of Justice*, Lumina Lex Publishing House, Bucharest, 2005, p. 101 et seq.

introduction of direct elections, the expansion of the Communities, budget matters, agreements on new budgets and their correction, giving extra help to the four Community countries considered less developed (Spain, Greece, Portugal and Ireland), the Economic and Monetary Union, the reform of the Common Agricultural Policy, etc.

1.2. European Council under the Treaty of Lisbon

According to the Treaty of Lisbon, the European Council has European Union status (Article 15 TEU, Article 235 236 TFEU)[6], provides the Union with the impetus needed for self-development, and defines its general political orientations and priorities.

2. The composition and organization of the European Council

2.1. General aspects

The European Council is composed of the Heads of State and Government of the Member States as well as its President and the President of the Commission.

As a result, Member States are represented in the European Council by Heads of State and Government, who themselves are democratically held accountable either to national parliaments or to their citizens [Art. 10 par. (2) TEU].

The President of the European Council[7] shall be elected by qualified majority by the European Council for a term of two and a half years. His mandate may be renewed once.

The European Council has the right to end the term of office of its President in case of impediment or serious misconduct, in accordance with the procedure by which it was elected.

The President of the European Council is forbidden to exercise a national mandate.

The President of the European Council may, if international developments so require, convene an extraordinary meeting to define political strategies of the Union in relation to this evolution [Art. 26 par. (1) TEU].

The European Council and its President shall be assisted by a General Secretariat under the authority of a Secretary-General.

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[6] See the Rules of Procedure of the European Council (JO L 315, December 2, 2009, p. 52 and JO L 325, 11.12.2009, p. 36). The Rules of Procedure of the European Council were adopted by European Council Decision 2009/882/EU of December 1, 2009.

[7] Since the 1st of December 2009, the office of President of the European Council has been carried out by Belgian Prime Minister Herman van Rompuy.

3. The functioning of the European Council

3.1. European Council meetings

The European Council meets twice per semester at the invitation of its President [Art. 15 par. (3) TEU].

European Council meetings are not public[8].

At least one year before the beginning of the semester, and in close co-operation with the Member State holding the Presidency during that semester, it shall make public the expected dates for the European Council meetings to be held during that semester[9].

The European Council may also meet in an extraordinary meeting when the situation is called for, at the invitation of its President [Art. 15 par. (3) TEU].

Meetings of the European Council take place in Brussels and, in exceptional circumstances, the President of the European Council may, with the agreement of the General Affairs Council and the Committee of Permanent Representatives, unanimously decide that a meeting of the Council should take place elsewhere[10].

Each ordinary meeting of the European Council shall be held for a maximum of two days, unless the European Council or the General Affairs Council decides otherwise, at the initiative of the President of the European Council[11].

The High Representative of the Union for Foreign Affairs and Security Policy participates at the works of the European Council [Art. 15 par. (2) TEU].

"The member of the European Council representing the Member State holding the Presidency of the Council shall submit to the European Council, after consulting with its President, the work of the Council. The European Council may also be invited to be heard by the President of the European Parliament; the exchange of views between the representatives of the two institutions shall take place at the beginning of the meeting of the European Council, unless this institution unanimously decides otherwise."[12]

As regards the quorum required for the adoption of decisions by vote, the presence of two-thirds of the members of the European Council is required, without the President of the European Council and of the Commission.

According to art. 15 par. (4) TEU, the European Council shall act by consensus, unless the Treaties provide otherwise. In the case of a vote, each member of the European Council may be delegated by a single member [Art. 235 par.

[8] See Art. 4 par. (3) of the Rules of Procedure of the European Council.
[9] See Art. 1 par. (1) of the Rules of Procedure of the European Council.
[10] *Idem*; see art. 1 of the Rules of Procedure of the European Council.
[11] *Ibidem*, art. 4.
[12] Ioana Nely Militaru, *op. cit.*, 2017, pp. 224 et seq.

(1) TFEU]. Also, if the European Council takes a vote, its President and the President of the Commission shall not vote.

3.2. The European Council decides, for different situations, by a qualified majority and by a simple majority

a) It shall act by a qualified majority when:

• adopts a decision establishing the list of Council formations other than General Affairs and Foreign Affairs [according to art. 16 par. (6) TEU];

• adopts a decision on the presidency of the Council formations, with the exception of Foreign Affairs [according to art. 16 (9) TEU].

Starting with the 1st of November 2014, the qualified majority is defined differently, according to art. 16 par. (4) TEU and Art. 238 par. (2) TFEU, as follows:

1. according to art. 16 par. (4) TEU, the qualified majority shall be equal to at least 55% of the members of the European Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union [Art. 16 par. (4) TEU]. The blocking minority must have at least four members of the European Council, otherwise it is considered that a qualified majority is met;

2. according to art. 238 TFEU paragraph (2), by way of derogation from Art. 16 TEU - new and subject to the provisions laid down in the Protocol on transitional provisions, a qualified majority shall be equal to at least 72% of the members of the European Council representing the participating Member States, comprising at least 65% of the population of the Union.

b) The European Council decides by simple majority in procedural matters, as well as in the adoption of the Rules of Procedure [art. 235 par. (3) TFEU], or in the ordinary revision of the Treaties [Art. 48 par. (2) and (3) TEU].

4. The functions of the European Council

The functions of the European Council are, mainly, provided in Art. 15 TEU, which states that it provides the Union with the impetus needed to develop it and defines its general policy guidelines and priorities. The European Council does not exercise legislative functions.

In addition to the functions mentioned in art. 15 TEU, the European Council fulfills some of the attributions considered to be organic[13], which are exclusively related to the organization of Union institutions of the Union, while others are related to their functioning.

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[13] See A. Popescu, I. Diaconu, *European and Euro-Atlantic Organization*s, Universul Juridic Publishing House, Bucharest, 2009 p. 228.

1. **The European Council**, acting unanimously, at the initiative of the EP and with its approval adopts a decision establishing the composition of the EP [Art. 14 par. (2) last thesis TEU].

The European Council, acting by qualified majority, proposes to the EP a candidate for the office of President of the Commission. Given that the candidate does not meet the majority laid down in the Treaty[1413], the European Council proposes a new candidate [Art. 17 par. (7) TEU].

The European Council appoints the Commission on the basis of a vote of consent by the EP [(Art. 17 par. (8) TEU].

The European Council, acting by qualified majority, with the agreement of the President of the Commission, shall appoint the High Representative of the Union for Foreign Affairs and Security Policy. The European Council may terminate his mandate in accordance with the same procedure [Art. 18 par. (1) TEU].

2. The European Council has decision-making powers. Thus, in the framework of the Union's external action and based on its principles and objectives (as set out in Article 21 TEU):

The European Council identifies the Union's strategic interests and objectives and takes decisions regarding them [Art. 22 par. (1) TEU]. The decisions of the European Council in the external action concern:

- Common Foreign and Security Policy - CFSP, as well as other areas of the Union's external action;
- the Union's relations with a country or region or can address a particular issue. The Council shall act unanimously at the recommendation of the Council (Article 22 TEU).

The European Council identifies the strategic interests of the Union, establishes the objectives and defines the broad guidelines of the CFSP, including regarding matters of defense [Art. 26 par. (1) TEU]. The European Council takes the necessary decisions in this field.

The Common Foreign and Security Policy - CFSP is defined and implemented by the European Council and the Council, acting unanimously, unless the Treaties provide otherwise. CFSP is implemented by the High Representative of the Union for Foreign Affairs and Security Policy and the Member States [Art. 24 (1) TEU]. And within the competence to define and implement of the CFSP, the European Council and the Council have the competence to make decisions, excluding the adoption of legislative acts (Art. 31 par. (1) TEU].

The European Council and the Council provide the legal framework for Member States to agree on any matter of general interest in the CFSP field, in order to define a common approach (Article 32 TEU).

The European Council decides unanimously on the gradual defining within the CFSP of a common defense policy of the Union [Art. 42 para. (2) TEU].

[14] With reference to TEU, Art. 7 par. (7).

3. The European Council has competence in the procedure of revision of the treaties. In the procedure of ordinary revision of the Treaties, the European Council may adopt (...) by simple majority a decision favorable to the examination of proposed amendments, in which case the president of that institution shall convene a Convention composed of representatives of national parliaments, heads of state or government of the Member States of the EP and of the Commission (Article 48 TEU).

The European Council can also decide by a simple majority (...) not to convene the Convention if the extent of the amendments does not justify it.

Under the simplified treaty revision procedure, according to Art. 48 par. (6), the European Council:

- may adopt a decision to amend, integrally or partially, the provisions of Part Three of the TFEU;
- decide unanimously (...) in the event of institutional modifications in the monetary field;
- may adopt decisions authorizing the Council, either to act by a qualified majority in a specific area where it usually decides by unanimity, either for the adoption of legislative acts in accordance with the ordinary legislative procedure where the provisions of the TFEU provide that those legislative acts shall be adopted in accordance with the special legislative procedure.

4. The European Council has competence in the withdrawal action of a Member State of the Union. The European Council receives notifications of intent from Member States that decide to withdraw themselves from the Union, and may decide unanimously, in agreement with the Member State, to extend the two-year period following the entry into force of the withdrawal agreement (Art. 50 TEU).

The European Council receives notifications from the Council in cases where a member of the Council declares that a draft legislative act, necessary to establish the free circulation of workers, does not meet the conditions imposed by the Treaty (with reference to TFEU and Article 48 respectively). The European Council is entitled:

a. to resubmit the draft to the Council, in which case the suspension of the ordinary procedure ceases;

b. not act in any way or asks the Commission to submit a new proposal [Art. 48 letter a) and b)].

5. The European Council has decision-making and examination competence under Title V - Area of Freedom, Security and Justice (TFEU).

With regard to "Judicial cooperation in criminal matters", the European Council may, at the same time or afterwards, adopt a decision extending the powers of the European Public Prosecutor to include the fight against serious cross-border crime and to amend the TFEU accordingly [art. 86 par. (2)] as regards authors and co-authors of serious crimes affecting several Member States [Art. 86 par. (4) TFEU].

With regard to "Police Cooperation", the European Council examines the draft measures concerning the operative cooperation between the relevant authorities, a group of at least nine Member States on which the Council failed to achieve unanimity [Art. 87 par. (3) TFEU].

In the framework of the "Economic Policy", the European Council discusses the conclusions on the broad guidelines of the economic policies of the Member States and of the Union, which depart from the draft report drawn up by the Council [art. 121 par. (2) TFEU].

With regard to "Monetary Policy", the Council (...) decides which Member States are subject to a derogation only after discussing the criteria to be met by the Member States within the European Council [Art. 140 par. (2) TFEU].

Under the employment policy, the European Council receives an annual report on this policy, including on the implementation of the employment guidelines drawn up by the Council and the Commission [Art. 148 par. (5) TFEU].

Where a Member State is the subject of a terrorist attack or is the victim of a natural or man-made disaster, the other Member States shall provide assistance at the request of its political authorities on the basis of a solidarity clause. In this context, in order to allow the Union and the Member States to act effectively, the European Council periodically evaluates the threats the Union is facing (Article 222 TFEU).

5. The connection between the European Council and the EU Council

5.1. The Council or the EU Council. Regulation of the institution

The Brussels Merger Treaty[15] established a Council of European Communities, called the Council, which has replaced the Special Council of Ministers of the ECSC, EEC and Euratom. According to art. 2 of the Treaty of Brussels, this single Council "exerts the powers and competences conferred under the terms of each of the three Community treaties", and, with regard to composition, "each government delegates one of its members".

Through TMs, the name of the Council is changed into the Council of the European Union, and the composition is defined in new terms, in art. 203 TEC[16]: The Council is made up of one representative per ministerial level of each Member State empowered to appoint the government of that Member State.

By the Treaty of Lisbon, the Council of the Union is referred to as the "Council" and is regulated by Art. 16 TEU and Art. 237-243 TFUE.

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[15] Done at Brussels April 8, 1965, entered into force on July 1 1967.

[16] It is regarding art. 146 TEU [resulting from Art. 2 par. (1) of the Executive Merger Treaty], which became Art. 203 by the Treaty of Amsterdam.

In terms almost identical to those in the TEU, the Council is composed of one ministerial level representative of each member state, empowered to appoint the government of the Member State it represents and to exercise the right to vote [Art. 16 par. (2) TEU].

The Council of the Union is the body representing the Member States through their governments, which are democratically accountable either to national parliaments or to their citizens [Art. 10 par. (2) TEU]. Each Member State should set the way of representation in the Council, in accordance with Art. 16 par. (2) TEU (Annex I to the Council's Rules of Procedure[17]).

The seat of the Council is in Brussels, and in April, June and October, Council meetings are held in Luxembourg[18]. In exceptional circumstances and for duly substantial reasons, the Council or the Committee of Permanent Representatives of the Governments of the Member States - Coreper - may, acting unanimously, decide that a meeting of the Council should take place elsewhere[19].

5.2. Composition and organization of the Council

The representative in the Council must be empowered to appoint the government of the Member State, so not only the holders of ministerial portfolios, although only they implement the national policy of a state in a given area.

Therefore, governments can empower other higher-ranking officials other than ministers, that may attend Council meetings, for example, deputies, state secretaries, representatives of federal (lands) or regional entities[20]. It excludes the Council meeting "at the level of Heads of State and Government" of the Member States, unless the ECT itself explicitly provided for this (former Article 121 and Article 122 TEC); first Council decision "reunited at State and Government level" was taken on May 3, 1998 to decide on the list of countries fulfilling the necessary conditions for the adoption of the single currency on January 1,1999[21].

Even if the Foreign Ministers are regarded as the main representatives of the Member States in the Council, it is allowed by habit, depending on the importance of certain areas or issues on the agenda, the attendance in these meetings of other ministers (of agriculture, transport, economy and finance, industry (referred to as Specialized or Sectorial Councils), either with the Foreign Ministers

[17] The current Council's Rules of Procedure approved by Council Decision 2009/937/EU of December 1, 2009. It was amended by Council Decision no. 795 of December 14, 2010, with effect from January 1, 2011 (2010/795/EU).
[18] See Art. 1 par. (3) of the Council's Rules of Procedure; see also the unique article of the Protocol on the Establishment of the Offices of Certain Institutions, Bodies, Agencies and Services of the European Union.
[19] See Art. 1 par. (3) of the Council's Rules of Procedure.
[20] See O. Manolache, *op. cit*., p. 111 (and the works cited there).
[21] OJ No. L 139/30 of May 11, 1998; see G. Isaac, M. Blanquet, *Droit communautaire général*, 8th edition, Dalloz Publishing House, Paris, 2001, p. 51.

or, most often, by themselves[22]. As the meeting of "so many sectorial Councils" has led to the development of self-policies lacking unity and coherence, the Foreign Ministers met in the formation of the General Affairs Council to become the coordinator of these sectorial formations[23].

The Treaty of Lisbon enshrines the above practice and expressly states: "The Council meets in different configurations", the list being adopted by a qualified majority by the European Council in accordance with Art. 236 TFEU [Art. 16 par. (6) TFEU]. The European Council therefore adopts:

a. a decision establishing the list of Council formations other than General Affairs and Foreign Affairs, according to art. 16 par. (6) TEU;

b. a decision on the presidency of the Council formations, with the exception of the Foreign Affairs, according to art. 16 par. (9) TUE.

The list of formations is set by the Council. According to the last list, the Council can be convened[24] in ten formations[25]:

- General Affairs and Foreign Affairs (these are established by Article 16 (6) TEU);
- Economic and Financial Affairs, also called Economic and Monetary Affairs - ECOFIN (including the Budget)[26];
- Justice and Internal Affairs (including civil protection);
- Employment, Social Policy, Health, Consumers;
- Competitiveness (Internal Market, Industry and Research, including Tourism);
- Transport, Telecommunications and Energy;
- Agriculture and Fisheries;
- Environment;
- Education, Youth and Culture, including Audiovisual domain.

The eight specialized formations are adopted, as shown, by the European Council with a qualified majority (Article 236 TFEU).

The Presidency of the Council, with the exception of the Foreign Affairs Group, is assured for a period of 18 months by pre-established groups of 3 Member States. These groups are formed based on an equal rotation of the Member

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[22] See G. Isaac, M. Blanquet, *op. cit*., p. 51.
[23] *Idem*.
[24] At the European Council in Helsinki on December 10, 1999, the number of Council configurations has been reduced in order to improve the coordination and consistency of the work. The Council Conclusions (2000/C174/01) of April 10, 2000 merged some formations of this institution. The new formations were laid down in the Rules of Procedure of 2002 (Annex I) and later in the 2004 Rules of Procedure (Annex I) and then in 2006 (Annex I); the current Rules of Procedure, in force since 2009, as amended by Council Decision 2010/795/EU, contain the necessary changes to the implementation of the Lisbon Treaty.
[25] According to Annex I to Council Decision 2009/937/EU of December 1, 2009 adopting the Council's Rules of Procedure, as amended by Council Decision 2010/795/EU.
[26] It consists of the Ministers of Economy and Finance; ECOFIN involves meetings of finance and economy ministers from countries that have adopted the single euro currency.

States, taking into account their diversity and the geographical balance of the Union[27].

Each member of a group ensures, for a six-month period, the rotating presidency of all Council configurations, with the exception of the Foreign Affairs party[28].

As a result, the Presidency of Council configurations, with the exception of the Foreign Affairs Council, is ensured by the representatives of the Member States in the Council following an equal rotation system, under the conditions established in accordance with Article 236 TFEU [Art. 16 par. (9) TEU][29].

The other members of the group of states support the presidency in fulfilling all its responsibilities, on the basis of a joint program[30].

As a rule, the Council presidency changes on January 1 and July 1 of each year.

The default group of the 3 Member States holding the presidency of the Council for the 18-month period has the following tasks:

- draws up a program of Council activities for the period in question[31];
- draws up, after appropriate consultations, for each Council formation, draft agendas for the meetings of the Council scheduled for the following semester, indicatively presenting the legislative work and operational decisions envisaged[32].

Also, the President of the Council, taking the 18-month program into consideration:

- convenes the meetings of the Council (Article 237 TFEU);
- draws up the provisional daily agenda for each meeting, which it shall transmit, at least 14 days before the meeting, to the Council, the Commission, the national parliaments and the Member States[33];
- signs the acts adopted by the Council with the participation of Parliament and the acts adopted by the Council and the European Parliament through ordinary procedure [art. 297 par. (1) TFEU][34];
- has the initiative of voting in the Council, being obliged to initiate a voting procedure at the initiative of a member of the Council or of the Commission[35];

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[27] See Art. 1 par. (4) of the Council's Rules of Procedure.
[28] *Idem.*
[29] The current order for the exercise of the Presidency of the Council was established by Council Decision 2007/5/EC, EURATOM, laying down the procedure for the exercise of the Presidency of the Council, published in OJ L, January 4, 2007, p.11.
[30] See Art. 1 par. (5) of the Council's Rules of Procedure.
[31] For details, see the Council's Rules of Procedure, art. 2 par. (6).
[32] See Art. 2 par. (7) of the Council's Rules of Procedure.
[33] See Art. 3 par. (2) of the Council's Rules of Procedure.
[34] With the same purpose, Art. 15 of the Council's Rules of Procedure.
[35] See Art. 11 of the Council's Rules of Procedure.

- represents the Council before the EP and its commissions[36]; also in the case of the Foreign Affairs Council, the President of this formation represents the Council before the EP and its committees[37].

Under the CFSP, the High Representative of the Union for Foreign Affairs and Security Policy, who chairs the Foreign Affairs Council, together with the Council, ensures that the principles of loyalty and mutual solidarity are respected, as Member States work together to strengthen them in their relations. [Art. 24 par. (3) TEU].

5.3. Coreper

Within the Council there is a Committee consisting of the permanent representatives of the Governments of the Member States, referred to as the abbreviated Coreper[38], which, according to Art. 240 par. (1) TFEU is responsible with:

- preparing the work of the Council;
- the execution of the mandates entrusted to it, particularly ones entrusted by the above mentioned Council.

Coreper is also entitled to "censor, amend and approve unanimously any proposal or initiative made by a majority in the Commission and that shall become a Community act"[39].

According to art. 19 of the Rules of Procedure of the Council[40], in all cases, Coreper shall ensure the consistency of the Union's policies and actions and shall ensure that the following principles and rules are respected:

- the principles of legality, subsidiarity, proportionality and justification of acts;
- the rules for determining the competences of Union institutions, bodies, offices and agencies;
- budgetary provisions;
- rules on procedure, transparency and quality of drafting (acts, n.a.).

Coreper shall first examine all items on the agenda of a Council meeting, unless Coreper decides otherwise.

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[36] The Council may be represented before the EP or its committees and a Member State of the group of States pre-established by three Member States (Article 26 of the Council's Rules of Procedure).

[37] See Art. 26 of the Council's Rules of Procedure.

[38] It was established by the Treaty of Brussels of April 8, 1965, establishing a Single Council and a Single Commission of the European Communities, also called the Executive Merger Treaty; came into force in 1967.

[39] The Coreper mechanism is designed to paralyze even those areas of decision that the Treaties of Rome (TCE and TEuratom) have maintained in the attributions of the "supranational" Commission. See B. Ștefãnescu, *op. cit.*, p. 26.

[40] The provisions of art. 19 of the Rules of Procedure on Coreper are without prejudice to the role of the Economic and Financial Committee provided for in Art. 134 TFEU and the existing Council Decisions on that committee (OJ L 358, 13.12.1998, p. 109 and OJ L 5/9th of January 1999, p. 71).

Coreper also ensures that the files are adequately submitted to the Council and, if it considers it necessary, presents guidelines, options or suggestions for solutions.

Coreper may establish or approve the establishment of committees or working groups in order to carry out certain preparatory work or studies defined in advance.

Among these committees, the Treaties regulate the work of:

- The Economic and Financial Committee, in the context of monetary policy, to promote the coordination of Member States' policies to the extent necessary for the functioning of the internal market [Art. 134 par. (1) TFEU][41];

- The Political and Security Committee in the field of the CFSP, empowered to pursue the international situation in the areas of the CFSP (Article 38 TEU);

- The Standing Committee on the "Area of Freedom Security and Justice", which will ensure the promotion and strengthening of operational cooperation in the field of internal security within the Union (Article 71 TFEU);

- The Committee on Employment, in the area specifically mentioned by the Committee, to promote coordination between Member States on employment and labor market policies; the Committee is consultative in nature (Article 150 TFEU);

- The Social Protection Committee, with a view to promoting social protection cooperation between the Member States and the Commission; the Committee is consultative in nature (Article 160 TFEU).

The Coreper Presidency is assured, depending on the items on the agenda, by the Deputy Permanent Representative of the Member State holding the Presidency of the General Affairs Council.

The Presidency of the Political and Security Committee is assured by a representative of the High Representative of the Union.

The Presidency of the other preparatory bodies and the formations of the Council, with the exception of the Foreign Affairs Party, shall be assisted by a delegate of the Member State holding the presidency of the respective formation.

Coreper may adopt procedural decisions in the cases provided for in the Council's Rules of Procedure [(Art. 240 par. (1) and art. 19 par. (7)].

The Council is supported by a General Secretariat, headed by a Secretary-General appointed by the Council.

The way the European Council cooperates with the EU Council in / and for the implementation of the Community policy is as follows:

[41] The Statute of the Committee was adopted by the Council on March 18, 1958. Initially, it was called the Monetary Committee and was established by art. 109, inserted by the TEU, and it replaced at the beginning of the third phase of the Monetary Union, the Economic and Financial Committee.

- the necessary decisions for defining and implementing the common foreign and security policy are taken by the EU Council on the basis of the general guidelines established by the European Council;
- the EU Council recommends common strategies to the European Council and implements them, in particular by adopting joint actions and common positions;
- the EU Council ensures the unity, consistency and effectiveness of the Union.

6. Conclusions

The European Council, composed of heads of state and government, should not be confused with the Council (of the European Union) consisting of one representative from each Member State, at ministerial level, empowered to appoint the government of that Member State (Article 16 TEU) the Council of Europe, set up in 1949, circumscribed the social - cultural domain.

According to the Treaty of Lisbon, the European Council has the status of an EU institution. (Article 15 TEU). It provides the Union with the impetus needed to develop it, defines its general political orientations and priorities.

The Council of Europe does not exercise legislative powers.
In addition to the functions mentioned in art. 15 TEU, the European Council fulfills some of its organic responsibilities, which are exclusively related to the organization of the Union's institutions, while other tasks are related to the functioning of these institutions.

The European Council adopts a decision setting the composition of EP (Article 14, paragraph 2, last THESIS, EU.).

The European Council proposes to EP a candidate for the position of chairman of the commission (Article 17 paragraph 7 TEU).

The European Council appoints the Commission on the basis of a vote of consent from EP [Article 17 (8) TEU].

It also appoints the High Representative of the Union for Foreign Affairs and Security Policy [Article 18 (1) TEU].

In addition to these functions regarding the functioning of the EU, the European Council also has a decision-making power in the field of CFSP (Common Foreign and Security Policy), as well as in the other fields of the Union's external action or in the EU's relations with a country or region.

Lastly, the European Council has competence in the revision of the Treaties.

The European Council also has competence in the withdrawal action of a Member State of the Union (Brexit).

The European Council, in the exercise of this competence, shall receive notification of intent from the Member States which decide to withdraw from the

Union and may decide unanimously, in agreement with the Member State, to extend the 2-year period following the entry into force of the withdrawal agreement of the Member State (Article 50 TEU).

The European Council has decision-making and examination powers within the Area of Freedom, Security and Justice (TFEU - Title V).

So the European Council, whose functions we have analyzed, is not to be confused with the Council or the EU Council, which is composed of a ministerial representative of each Member State empowered to appoint the government of the Member State it represents and to exercise the right [Article 16 (2) TEU].

The EU is the representative body of the Member States through their governments, which are democratically accountable either to national parliaments or to their citizens [Article 10 (2) TEU].

Presidency of the EU Council (with the exception of Foreign Affairs) is ensured over a period of 18 months by pre-established groups of 3 Member States, groups formed on the basis of an equal rotation of Member States, taking into account their diversity and the geographical balance of the Union [Article 1 (4) of the EU Council's Rules of Procedure].

Presently, the EU Council Presidency is exercised by Romania until July 1, 2019.

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The lawful State in the context of the normative and institutional requirements of European Union

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Abstract

The doctrine of the lawful state comes from the German theory and jurisprudence, but is now a requirement and a reality of the constitutional democracy in contemporary society. Presently, the lawful state is no longer merely a doctrine but a fundamental principle of democracy consecrated in the Constitution and international political and legal documents. In essence, the concept of the lawful state is based on the supremacy of law in general and of Constitution in particular. Essential for the contemporary realities of the lawful state are the following fundamental elements: the moderation of the exercise of state power in relation to the law, the consecration, guaranteeing and observance of the constitutional rights of man especially by the state powers and, last but not least, the independence and impartiality of justice. In this study we analyze the most important elements and features of the lawful state with reference to the contemporary realities in Romania in the context of the requirements expressed in the political and legal instruments of European Union. An important aspect of the analysis is the separation, balance and cooperation of the state powers, in relation to the constitutional provisions. The excess of power of the public authorities, the excessive politicking and failure to respect the independence of justice are aspects of contemporary social and state reality that contravene to the requirements of the lawful state. Are analyzed the most significant aspects of the Constitutional Court jurisprudence and the jurisprudence of administrative courts in regard to the guaranteeing of the lawful state attribute in Romania, as well as, regarding the power excess.

Keywords: *conditions of the lawful state; separation and balance of the powers; the supremacy of law; guaranteeing of the fundamental rights; contemporary realities and aspects of the constitutional and administrative jurisprudence.*

JEL Classification: K10, K33

1. Brief considerations on the notion of the rule of law

The notion of state attributes means its defining dimensions as they result from constitutional provisions, as an expression of the political will and determined by the political regime and at the same time values of principle of constitutional order.

The rule of law, pluralism, democracy, civil society are unquestionable universal values of contemporary political thinking and practice and are found to be expressed in the Constitution of Romania as well as in international documents. The state attributes configure its quality as constitutional law subject and define the

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power, but also the complex reports between the state and citizens and the other constitutional law subjects. The attributes of the Romanian state regulated by the provisions of art. 1 para. 3 of the Romanian Constitution: 1. rule of law; 2. social state; 3. pluralist state; 4. democratic state.

The rule of law is one of the most discussed concepts of constitutional law and is unquestionably related to the transition from the state law to the rule of law. In the literature, contradictory opinions were sometimes affirmed, according to which the rule of law corresponds to an anthropological necessity or is a myth, a postulate and an axiom, and on the other hand, the rule of law is a pleonasm, a legal nonsense.

The concept of the rule of law is a constitutional reality whose foundation is found in the mechanisms of the exercise of state power, in the relations between power and liberty of every individual of society and in the application of the principle of legality to the entire state activity, but also in the behaviour of each member of society.

The rule of law has formed and spread over three major models: **1.** The *English model of* "Rule of Law" is characterized by the limitation of the monarch's power and, on the other hand, by preserving the power of the parliament, which in terms of constitutional law means:a) the restriction of the powers of the monarch and their recognition of a power constituted by the norms of positive law, b) the necessity to found acts of the executive directly or indirectly on the authority of the Parliament, c) the obligation of all subjects of law to submit to the law of jurisdiction. **2.** The *German concept* emphasizes the need to ensure the legality of the administration and its judicial control; **3.** The *French concept* considers the rule of law as a legal state, which proclaims and defends the principle of legality.

In the expression rule of law there are two aspects of the legal, seemingly contradictory but still complementary: normativism and ideology. In the normative plane, the rule of law appears as a structural principle of the Constitution along with other essential attributes of the state, materializing the fundamental values on which the existence of society and state are based.

From the normative point of view, the requirements of the rule of law are manifested in a double sense: a) the formal meaning expresses the requirement that the state and its organs observe the laws, strictly subordinate to the juridical rules regarding the composition of the state bodies, their attributions and their functions, and b) the material meaning - the requirement that the state bodies, exercising their functions, comply with the legal guarantees concerning the exercise of citizens' fundamental rights and freedoms.

In the field of ideology, the rule of law confers a logical system of ideas by which people represent their society, the state, in all its manifestations, and which confer the legitimacy of the state.

The term "rule of law" is not a simple logical concept but it expresses a fundamental constitutional necessity according to which: a) the state is indispensable for the law in order to create for it its norms and to ensure the finality and

effectiveness of the legal norms; b) the law is indispensable for the state to express power by establishing a general and binding behaviour.

In essence, the rule of law expresses a condition of power, a movement to rationalize it, but also a new conception of law, its role and functions. Professor Tudor Draganu, in his paper[2], proposes an interesting and comprehensive definition of this concept of constitutional law: "The rule of law is considered to be that state which was organized on the basis of the principle of separation of powers of the state, the application of which justice acquires real independence and pursues through its legislation the promotion of the rights and freedoms inherent in human nature, ensures the strict observance of its regulations by all its organs in all their activity."

The definition defines the main elements of the rule of law - the separation of powers as a reality of the state activity, in the application of which justice acquires real independence and pursues through its legislation the promotion of rights and freedoms inherent in human nature, ensures the strict observance of its regulations by all its organs, in their entire activity.

This definition renders the basic features of the rule of law – separation of powers, as reality of the state activity, the application of the principle of legality in the activity of all the state bodies, the observance and the guarantee of fundamental human rights. Also, from the same definition result the basic features of the rule of law, respectively: a) the freedoms of the human being require guarantees of security and justice through the primacy of law and in particular the Constitution; b) the moderation of the execution of the power requires the organization and adaptation of the functions of the erratic organisms and a hierarchical normative system.

2. Conditions of the rule of law

In the final document of the Copenhagen Summit in 1990 was stated that *the rule of law* does not simply mean a formal legality, and in the Charter of Paris from 1990 *the rule of law* is prefigured not only in terms of human rights but also of democracy, as the only governing system.

From the corroboration of the principles written in international documents, as well as in relation to the constitutional law doctrine, we consider as conditions or characters of the rule of law the following: 1. the accreditation of a new concept concerning the state, especially under the following aspects: the voluntary or consensual nature of the state, the delimitation of the state from the civil society, the responsibility of the state and the authorities that make it, and the moderation of constraint as a means of intervention of the state in society by appropriate

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[2] T. Drăganu, *Introducere în teoria și practica statului de drept*, Ed. Dacia, Cluj-Napoca, 1993, p. 37.

and reasonable forms; 2. capitalization of the rations and mechanisms of the principle of separation of powers in the state; 3. the establishment and deepening of an authentic and real democracy; 4. institutionalization and guaranteeing of the rights and freedoms of man and citizen; 5. the establishment of a coherent and hierarchical legal order and of an area of law.

The systematic functionality and consistency of the rule of law must be ensured by a number of regulatory systems, namely: a) political control by Parliament as one of its essential functions through various institutional means b) administrative control that is carried out in the system public authorities, either on their own initiative or at the initiative of citizens; c) judicial review of the legality of administrative acts entrusted to either the courts of common law or the specialized courts; d) control of the constitutionality of laws; e) control of the observance of fundamental rights and freedoms through the bodies of the authority and the judiciary; f) the conciliation and control procedure, which is carried out through the institution of the "ombudsman" or the People's Advocate; g) free access to justice and organizing the court activity in several degrees of jurisdiction.

The consecration of the rule of law in the Constitution of Romania is achieved not only by art. 1 para. 3 of the 1st thesis, but also by many other constitutional provisions expressing the content of this principle of organization and exercise of power in a democratic society. In this respect we reiterate the provisions of art. 16 para. 2, which provide that no one is above the law and those of art. 15 para. 2 proclaiming the principle of the unretroactivity of the law, principles essential to the entire construction of the rule of law. The content of the rule of law is expressed in particular in the constitutional provisions regarding the separation and balance of state powers as well as those regarding the organization, functioning and attributions of the state institutions. The provisions refer to the fundamental rights, freedoms and duties of the citizens, to the mechanism of the separations of powers, pluralism, free access to justice, independence of courts, and the organization and functioning of parliamentary, administrative and judicial control. They can be considered as a constitutional normative expression of the content and requirements of the rule of law.

The rule of law is not a state whose essence is exhausted by constitutional regulations and other normative acts at a given moment. The rule of law is not exclusively an institution of constitutional law but must become a reality found at the level of the conduct of each subject of law, whether it is a state organ or a simple citizen. This means and implies a complex evolutionary process in which all the structures of society participate, and at the same time a process of perfection on the ideological and moral level in order to improve the activity of the organs of state and to effectively establish the principle of legality, to form a civic behaviour in the spirit of observance the law and the fundamental values of democratism.

The Constitution of Romania establishes, in its normative content, the main guarantees of the rule of law:

a) the constitutional regime, that is, the establishment in the Constitution

of the fundamental principles of organization and activity of the three powers. Establishing the legal regime applied to the revision of the Constitution;

b) the direct or indirect popular legitimacy of state and public authorities;

c) ensuring the supremacy of the Constitution through political or judicial control, as well as ensuring the rule of law, over other normative acts;

d) the exercise of fundamental rights and freedoms may be restricted only temporarily, only in cases expressly determined in proportion to the circumstance justifying the restriction and without suppressing the very right or fundamental freedom;

e) independence and impartiality of justice.

Therefore, art. 21 para. 2 of the Constitution of Romania stipulates that no law may impede the free access of a person to justice for the protection of legitimate rights, freedoms and interests [3]

3. Application of the principle of proportionality in terms of state organization of power

From the complexity of the issue of the rule of law, we further on refer to the implicit application of the principle of proportionality in the constitutional provisions on the state organization of power.

This principle is explicitly expressed in the Constitution of Romania only in the provisions of art. 53, but it is implicitly found in other constitutional regulations as it has been emphasized in the specialized literature. The constitutional principle of proportionality is a synthesis of other principles of law and expresses the ideas of fairness, and the correctness of the state's dispositions to the intended purpose. We consider it a criterion in relation to which the powers of the state are organized in a state of law because by its application a dynamic and functional balance is realized in the institutional diversity of the state system. We also underline the fact that this principle confers legitimacy and not only the legality of state decisions and is a criterion already used in case-law which establishes the demarcation between the exercise of power within the limits of the Constitution and laws and on the other hand the excess of power in the activity of the organs of the state in situations where state decisions have the appearance of legality but are also not legitimate because they are not appropriate to the intended purpose defined by constitutional or secondary legislation. We believe that the constitutional principle of proportionality can be considered a requirement of the rule of law.

Further on, briefly analyze the application of the principle of proportionality to the state organization of power in our country, as it results explicitly or implicitly from the constitutional provisions applicable.

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[3] M. Andreescu, A.Puran, *Drept constituţional. Teoria generală a statului* , 3rd ed., Ed. Ch Beck, Bucharest, 2018 , pp. 65-75.

The principle of the separation of powers in the state, considered to be a foundation of democracy, is at the same time a reflection on the moderation and rationalization of state power. "Balancing these powers by judiciously distributing the powers and equipping each of them with effective means of control over the others, thus defeating the inherent tendency of the human power to grasp the whole power and to abuse it is the condition of social harmony and the guarantee of human freedom". In its classical form, as it is known by the decisive contribution of Montesquieu, the principle of separation of powers in the state affirms that in any society there are three distinct powers: legislative, executive and judicial power. These three powers must be exercised by separate organisms independent of each other. The purpose of this division is that power should not focus on a single state organ, which would naturally tend to abuse the prerogatives entrusted to it. "In order that power not be abused, it is necessary that by the arrangement of things power stops power" - says Montesquieu. At the same time, the division of state power is necessary to respect individual rights and freedoms, so that one power opposes the other and creates itself instead of a single force, a balance of force.

In order to achieve these goals, the organs of the state must be independent of one another in the sense that no one can exercise the function entrusted to the other. Consequently, it is not possible for an organ of the state to be subordinated to another, if it exercises a separate power.

The doctrine states that: "The theory of separation of powers is in fact an ideological justification of a very concrete political purpose: weakening the power of the governors as a whole, limiting one another". It is considered that the separation of powers has two well-defined aspects: a) separation of parliament from the government; b) separation of jurisdictions against the governors, which allows them to be controlled by independent judges[4]. The theory and principle of the separation of powers in its classical form were criticized in doctrine. "Montesquieu's error", wrote Carré de Malberg, "is certainly to have thought it possible to regulate the game of the public powers by their mechanical separation and, in a certain way, mathematical, as if the problems of the state organization were susceptible to be solved by procedures of such rigor and precision"[5].

In the doctrine, other inaccuracies and limitations were noted as well, among which we recall: from the terminology used, it is not clear whether a "state body" or a "function" is to be understood by power; power is unique and indivisible and belongs to a single titular - the people. That is why we cannot speak of the division of powers, but, possibly, the distribution of the functions involved in the exercise of power; the separation of powers, conceived in the form of opposition between them, is likely to block the functioning of state authorities. It is not possible for the sovereign exercise of the completeness of each of the static

[4] I. Muraru, E.-S. Tănăsescu, *Drept constituţional şi instituţii politice*, vol. II, Ed. All Beck, Bucharest, 2003, p. 186.
[5] Carré de Malberg, *Contribution á la théorie géneral de l'Etat*, vol. II, Tenin, Paris, 1922, p. 35.

functions to be assigned to a separate authority or group of authorities. None of the state organs perform a function in integrity, and consequently the steady organs cannot be rigidly and functionally separated; in most constitutional systems, as a result of the existence of political parties, the real problem is not the separation of powers, but the relationship between the majority and the minority or, in other words, between the governors and the opposition. There is no antagonistic relationship between parliament and government. A government that has a parliamentary majority will work in close association with the parliament, which is considered a modern state of their efficiency; the legislative function is not equal to the executive function. Execution of the law is by definition subject to legalization. If the two functions are in hierarchical relations, then the organs that perform those functions are in the same ratios.

It should also be underlined that, in doctrine, there is more and more talk of a decline of legislative power in favour of the executive; the separation of powers does not solve the issue of guaranteeing fundamental human rights. Constitutional justice is the main guarantor of respect for fundamental rights, but it does not find its place in the classic scheme of separation of powers in the state, as develop in their papers.[6]

In the case of the theory of separation of powers in state it was said that "the myth" far exceeds the reality. In fact, it is the dogmatic confidence to impose on a concrete reality a pre-established theoretical and abstract framework[7]. The criticisms formulated and the modernization tendencies cannot result in the abandonment of this principle. "The great force of the theory of separation of powers in the state - said Professor Ioan Muraru - lies in its fantastic social, political and moral resonance"[8]. It should not be forgotten that the principle is enshrined, explicitly or implicitly, in the constitutions of the democratic states. From the perspective of our research theme, it is important to consider the autonomy of the state authorities and the relations between them in order to prevent separatism and rigidity.

The myth of absolute separation of powers is in fact, Carré de Malberg says, irreconcilable, "with the principle of unity of the state and its powers"[9] . The will of the state, he continues, being necessarily a single one, must be maintained between the authorities that held a certain cohesion, without which the state would risk being harassed, divided and destroyed by the opposite pressures to which it would be subjected. It is thus impossible to conceive that the powers in the state are equal. "That is why, in any state, even in those whose Constitution is said to be based on Montesquieu's theory and pursues a certain equalization of

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[6] Ch. Eisenmann, *L'espirit des lois et la separation des pouvoirs*, „Cahiers de philosophie politique", Ed. Ousia, no. 2-3, 1984, p. 198; D. Rousseau, *Droit du contentiux constitutionnel*, Paris, 1990, p. 365; p. 256-265; I. Muraru, E.S. Tănăsescu, *op. cit.*, vol. II, p. 9-11.

[7] O. Duhamel, I. Meny, *Dictionnaire constitutionnel*, PUF, Paris, 1992, p. 972-975.

[8] I. Muraru, E.-S. Tănăsescu, *op. cit.*, vol. II, p. 11.

[9] Carré de Malberg, *op. cit.*, vol. II, p. 23.

powers, invariably will find a supreme organ that will dominate all the others and thus achieve the unity of the state"[10]. As the author states, it is not so much about separation, but rather about the "gradation of powers". There would then be a single power that would first manifest through acts of initial will - the legislative power - and would be exercised at a lower level through law enforcement acts - the executive power.

It follows that the powers of the state are unequal, but this cannot have the significance of subordination, nor can allow for excess power. "State means also force, hence the risk of escaping from the control of the holder, of considering himself being the owner of the power"[11]. At the same time, a coherent functioning of the organs of the state is not possible, nor can it be conceived, unless there are some relations between them.

It was said that, given the existence of political parties and their access to power, "the real problem is not that of the relations between the institutionalized powers but of the relations between the majority and the minority, between the government and the opposition, especially when the government comes from a parliamentary majority, comfortable and homogeneous and leaning on it"[12].

In a wider sense, it must be stressed that democracy generates a majority that leads, imposing its will and values to minorities, but they also have the opportunity to express themselves and their rights have to be respected. Achieving the democratic and functional balance between the majority and the minorities is the solution to avoid what the doctrine is called the "tyranny of the majority". Undivided power is always an excessive and dangerous power.[13] Thus, the tyranny of the majority, relevant from a constitutional point of view, is defined according to the rights of the minority, especially if the right to opposition is complied with or not. The main problem in this context is that the minority or the minorities have the right to oppose, have the right to opposition.

The relationship between the majority and the minority involves the analysis of the very complex interaction between those that govern and the ones that are governed. Interaction consists of a multilevel process in which majorities and minorities are materialized in different ways and at different levels. The rule that allows the functioning of such a complex system of democracy is the application of the principle of majority in decision-making. However, Hamilton observed very well: "Give all the power to many, and they will oppress the few. Give all the power of the few, and they will oppress the many"[14]. Therefore, the problem is to avoid giving all or most of the power to all, by distributing it, alternately

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[10] Carré de Malberg, *op. cit.*, vol. II, p. 52.

[11] I. Muraru, S.E. Tănăsescu, *op. cit.*, vol. I, p. 19.

[12] I. Deleanu, *Drept constituţional şi instituţii politice* , Ed. Europa Nova, Bucharest, 1996., vol. I, p. 95.

[13] G. Sartori, *Teoria democraţiei reinterpretată*, Ed. Polirom, Bucharest, 1999, p. 137.

[14] J. Elliot, *Debates on the Adoption of the Federal Constitution*, Philadelphia, Lippincott, 1941, p. 203.

and/or at the same time to the majority and minority.

Therefore, in order to avoid dogmatism, in order to respond to these problems of social, political and state realities, it is necessary to reconsider the theory of the separation of powers in the state from the point of view of the principle of proportionality. The fundamental idea has already been stated: the moderation of power and the balance in the exercise of power that actually reflects, to a certain extent, the balance of social forces[15]. When discussing the content and meanings of the separation of powers, it is less about separation, but especially about the balance of powers[16] . Balancing the powers in the state by judiciously distributing the powers and equipping each with effective means of control over the others, thus stabilizing the tendency to capture the whole power and to abuse it, is essentially the application of the principle of proportionality to the organization of state power. This is the condition of social harmony and the guarantee of human freedom even though, until now, an explicit reference to the principle of proportionality has not been made in the specialized literature, it results from the context of supporting some authors: "So, weight and counterweights in the power tiles so that none of them dominates the others. It would not be so much a separation of powers, but especially about their relative autonomy and their mutual dependence: the balance of powers"[17].

Rethinking the separation of powers in terms of the constitutional principle of proportionality can be answered, in our opinion, to all the problems listed above.

The principle of the separation of powers in the state was not explicitly enshrined in the Constitution of Romania before its revision in 2003, but from the analysis of the constitutional texts, the doctrine ascertained that the balance of state powers as a principle was found in the content of the norms of the Constitution. Through the Review Law, the Romanian derived constituent expressly enshrined this principle, referring not only to the separation of powers but also to the balance between them: "The State is organized according to the principle of separation and balance of powers - legislative, executive and judicial - within constitutional democracy" [Art. 1 para. 4].

The necessary balance between state authorities is the expression of the principle of proportionality applied in the matter of organizing the institutional system of power in Romania. State authorities are neither equal nor independent in the absolute sense. The balance that a proportionality relationship implies is based on differences but also on interrelations that allow the functioning of the institutional system so as to avoid excessive concentration of power or exercise of the same, as well as the excess of power, especially by violating human rights

[15] C.Grewe, H.R. Fabri, *Droit constitutionnels europeans*, PUF, Paris, 1995, p. 361.
[16] I. Deleanu, *op. cit.*, vol. I, p. 80.
[17] *Ibidem*.

and fundamental freedoms. The finality of the proportionality ratio between public authorities is "the establishment of balanced correlations between the governors and the ones that are governed, complying with the public freedoms"[18].

We will refer to some of the constitutional regulations concerning the Romanian state institutional system, which reflects the principle of proportionality:

A. Elements of *difference* between state authorities, meaning the autonomy of each category of organs and their position within the system:

Public authorities are governed distinctly by the rules contained in Title III of the Constitution. These are the "three classic powers" in the traditional order: legislative, executive and judicial power.

The Constitution confers a certain degree of prerogative to Parliament in relation to the other state authorities: "Parliament is the supreme representative body of the Romanian people and the sole legislator authority of the country" (art. 61 para. 1);

Besides the classic scheme of the separation of powers in the state, the Constitutional Court achieved constitutional power (art. 142 and subsequent of the Fundamental Law), which is the guarantor of the supremacy of the Constitution, the only constitutional jurisdictional authority of Romania, independent of the any other public authority [art. 1 para. (3) of the Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished]. The People's Advocate is also independent of any other public authority. He is appointed by the Parliament in the joint session of the Chambers [art. 65 para. (2) letter i)]. Ex officio or at the request of persons injured in their rights or freedoms, the People's Advocate may refer the matter to the public authorities in order to take measures to eliminate acts or facts that affect subjective rights or legitimate protected legal interests (art. 58 and subsequent). It has the power to notify the Constitutional Court, in the situations provided by art. 146 letters a) and d);

The bicameral structure of Parliament is an expression of the balance involved in the principle of proportionality. Thus, Chambers are equal but are functionally differentiated in the exercise of their legislative powers. The distinction between the Chamber referred first (of reflection) and the Decision Chamber, made by art. 75, expresses the "quasi-perfect" bicameralism, which is a proportionality ratio. We agree with the opinion expressed in the literature, according to which "the system of parliamentary bicameralism in Romania must be preserved, but it must be transformed into a differentiated bicameralism. Thus, to the law of democratization and efficiency can be ensured, and to the legislative organ a representativeness and responsibility increment"[19] .

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[18] I. Muraru, M. Constantinescu, *Rolul Curţii Constituţionale în asigurarea echilibrului puterilor în stat*, „Dreptul" no. 9/1996, p. 17.

[19] I. Muraru, A. Muraru, *Scurtă pledoarie pentru un bicameralism parlamentar diferenţiat*, în „Revista de drept public" no. 1/2005, p. 8.

The difference between the length of the term of office of some state authorities contributes to a proportionate ratio between the powers of the state, is the expression of the balance and not of the formal equality, in order to ensure the good functioning of the Romanian institutional system. Thus, the duration of Parliament's mandate is 4 years (art. 63), of the President of Romania is 5 years (art. 83), of the members of the Superior Council of Magistracy is 6 years (art. 133), the mandate of the judges at the Constitutional Court is 9 years, and the president of this institution is elected for a period of 3 years (art. 142), the judges of the courts appointed by the President of Romania have practically an indefinite mandate in time because they are irremovable under the law (art. 125). The People's Advocate mandate is 5 years (art. 58).

B. The specialty literature highlighted the particularities of the relations between the state authorities, which in our opinion materialize the principle of proportionality, because the relational balance also implies the difference. In this respect, it was stated that: "The election of the President of Romania by the people, an essential feature of the presidential republics, combines in our country with the pre-eminence of the Parliament, as a result, mainly, of the parliamentary origin of the government, thus defining a semi-presidential political regime"[20]

The set of interrelations between the different categories of organs of the state is the form of achieving the balance and mutual control of the powers. These relations, which form the "identity card of the state power system"[21] , presuppose the autonomy of the state authorities and the differences between them. The complex structure of the state power system is a concretisation of the principle of proportionality, in other words, it strikes a balance between the powers of the state, which are based on autonomy, differentiation and interrelations. The more the constitutional regulations in the field manage to materialize the requirements of the principle of proportionality, the more exists the guarantee of avoiding some forms of concentration of the state powers, the tyranny of the majority or minorities and obviously the excess of power.

The concern of the Romanian constituent legislator to achieve a functional balance between the powers of the state, between these and society, is obvious, if we refer to the provisions of art. 80, according to which: "The President exercises the function of mediation between the powers of the state as well as between state and society", but also to the provisions of art. 146 letter e) according to which our constitutional court has the competence to resolve constitutional legal conflicts between public authorities. We also need to remember the role of mediator and balance factor for the powers of the state, but also for the society that justice has. In this respect, the provisions of art. 124 of the Constitution con-

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[20] M. Constantinescu, *Echilibrul puterilor în regimul constituţional din România*, în „Dreptul" no. 3/1993, p. 3.
[21] I. Deleanu, *op. cit*., vol. II, p. 201.

secrate the general "uniqueness, impartiality and equality" of justice, which represents important guarantees for the achievement of the functions of the judicial power in society.

Of course, the system of state power is an open, dynamic one, implying not only the multiplication of its constituent elements or their reorganization, but also of the functions that correspond them and of the interrelationships between the elements of the system. Within the internal system, the social-political system, and externally the system of the international community of states represent the "environment" with which the state authorities interact. Therefore, the balance, as a particular aspect of the principle of proportionality, between the powers of the state must be understood in its dynamics, including in the continuous process of interpreting and applying the constitutional provisions in the matter.

Proportionality, as a principle of constitutional law, has a concrete dimension. The existence of a proportionate, balanced relationship between the state authorities, between them and society, is verified in practice through the functioning of the political and social system, the avoidance of crises, or, when they occur, through the capacity of the state authorities to manage these, complying in any situation with the principles of the rule of law. Essential for the fulfilment of the requirements of separation and balance between the powers of the state, but also for stability, in its social and political system dynamics, from the perspective of pluralism in society, there is the existence of a proportionate balance between the majority and the minorities between the government and the opposition.[22]

4. Aspects of the constitutional court case-law on garanteeing and complying with the requirements of the rule of law

At the end of this analysis we shall refer to some decisions of the Constitutional Court which we consider relevant to the rule of law.

The Constitutional Court identifies the fundamental feature of the rule of law, namely the supremacy of the Constitution and the obligation to observe the law[23].

At the same time, it has been stated in the case-law of the constitutional court that the rule of law, ensuring the supremacy of the Constitution, also realizes "the correlation of all laws and all normative acts with it"[24].

The requirements of the rule of law concern the major purposes of state activity, namely the supremacy of law, which implies the subordination of the

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[22] I. Deleanu, *op. cit.*, vol. I, p. 95.

[23] Decision no. 232 of July 5th 2001, published in the Official Gazette no. 727 of November 15th 2001; Decision no. 53 of January 25th 2011, published in in the Official Gazette no. 90 of February 3rd 2011.

[24] Decision no. 22 of January 27th 2004, published in the Official Gazette no. 233 of March 17th 2004.

state to the law. In this respect, the law provides the means by which the political options or decisions can be censored and performs the abolition of any abusive and discretionary tendencies of the state structures. Further on, the rule of law ensures the supremacy of the Constitution, the existence of the regime of separation of the public powers and establishes guarantees, including of a judicial nature, that ensure the observance of citizens' rights and freedoms, primarily by limiting the state authority, which represent the framing of the public authorities' activities within the limits of the law.

The case-law of the Constitutional Court expresses the main requirements of the rule of law in relation to the goals of the state activity. Thus, by case-law is achieved a very eloquent synthesis of the doctrine on the notion and features of the rule of law. It is significant in this respect the Decision no. 17 of January 21st 2015[25], by which the Constitutional Court gives an explanation concerning the state of law, enshrined in art. 1 para. (3) thesis I of the Constitution: "The requirements of the rule of law concern the major purposes of its activity, prefigured in what is commonly called the reign of law, a phrase involving the subordination of the state to the law, the guarantee of the means to allow the law to censor political choices and, in this context, to weigh the potential abusive, discretionary tendencies of the static structures. The rule of law ensures the supremacy of the Constitution, the correlation of laws and all normative acts with it, the existence of the regime of separation of the public powers that must act within the limits of the law, namely within the limits of a law expressing the general will. The rule of law enshrines a series of safeguards, including jurisdictional, to ensure that citizens' rights and freedoms are complied with by the state's self-restraint, namely the involvement of public authorities in the coordinates of law".[26]

The principle of stability and security of legal relations is not explicitly enshrined in the Constitution of Romania, but, like other constitutional principles, it is involved in the constitutional normative provisions, respectively art. 1 para. (3), which enshrines the rule of law. In this way, our constitutional court accepts the deduction, by way of interpretation, of the principles of law implied by the express rules of the fundamental Law. In this respect, by means of the Decision no. 404 of April 10th 2008[27], the Constitutional Court stated that: "The principle of stability and security of legal relations, although not explicitly enshrined in the Romanian Constitution, is deduced both from the provisions of art. 1 para. (3), according to which Romania is a state of law, democratic and social, and from the preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights in its

[25] Decision no. 17 of January 21st 2015, published in the Official Gazette no. 79 of January 30th 2015.
[26] Decision no. 70 of April 18th 2000, published in the Official Gazette no. 334 of July 19th 2000.
[27] Decision no. 404 of April 10th 2008, published in the Official Gazette no. 347 of May 6th 2008.

case-law"[28]. Furthermore, our constitutional court has considered that the principle of security of civil legal relationships is a fundamental dimension of the rule of law[29]

Constitutional Court decides constantly for clarity and predictability of law, which are requirements of the rule of law. Thus, "the existence of contradictory legislative solutions and the annulment of legal provisions through other provisions contained in the same normative act lead to the violation of the principle of security of legal relations, due to the lack of clarity and predictability of the norm, principles which constitute a fundamental dimension of the rule of law, as it is expressly enshrined in the provisions of art. 1 para. (3) of the fundamental Law"[30].

Concerning the rule of law, the Constitutional Court has shown that justice and social democracy are supreme values. In this context, the militarized authorities, in this case the Romanian Gendarmerie, exercise, under the law, specific powers regarding the defense of public order and tranquillity, of citizens' fundamental rights and freedoms, of public and private property, of prevention and detection of crimes, and other violations of applicable laws, and the protection of state institutions and the fight against acts of terrorism. Consequently, the Constitutional Court ruled: "By the possibility of militarized authorities to find contraventions committed by civilians, art. 1 para. (3) of the Constitution is not affected in any way, regarding the Romanian state, as a rule of law, democratic and social"[31].

Human dignity, together with the freedoms and rights of citizens, the free development of human personality, justice and political pluralism, are supreme values of the rule of law [art. 1 para. (3)]. In the light of these constitutional regulations, it has been stated in the Constitutional Court's case-law that the state is forbidden to adopt legislative solutions that can be interpreted as being disrespectful of religious or philosophical beliefs of parents, which is why organizing school activity must achieve a fair balance between the process of education and teaching religion, and on the other hand with respect for the rights of parents, to ensure education in accordance with their own religious beliefs. Activities and behaviours specific to a certain attitude of belief or philosophical, religious or non-religious beliefs must not be subject to sanctions that the state requires for such behaviour, regardless of the person's motivation for faith. "As part of the constitutional system of values, freedom of religious conscience is attributed to

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[28] Decision no. 685 of November 25th 2014, published in the Official Gazette no. 68 of January 27th 2015.
[29] Decision no. 570 of May 29th 2012, published in the Official Gazette no. 404 of June 18th 2012; Decision no. 615 of June 12th 2012, published in the Official Gazette no. 454 of July 6th 2012.
[30] Decision no. 26 of January 18th 2012, published in the Official Gazette no. 116 of February 15th 2012.
[31] Decision no. 1330 of December 4th 2008, published in the Official Gazette no. 873 of December 23rd 2008.

the imperative of tolerance, especially to human dignity, guaranteed by art. 1 para. (3) of the fundamental Law, which dominates the entire value system as a supreme value"[32].

It is also interesting to note that our constitutional court considers human dignity as the supreme value of the entire system of values constitutionally consecrated, value that is found in the content of all human rights and fundamental freedoms. At the same time, it is an important aspect that requires the state authorities in their entire activity to first consider respecting the human dignity.

It should be noted that in its case-law the Constitutional Court also identifies the content components of human dignity, as a moral value but at the same time constitutional, specific to the rule of law: "Human dignity, in constitutional terms, presupposes two inherent dimensions, namely the relations between people, which refers to the right and obligation of the people to be respected and, in a correlative way, to respect the fundamental rights and freedoms of their peers, as well as the relation of man to the environment, including the animal world".[33]

5. Conclusions

Antonie Iorgovan said that an essential problem of the rule of law is to answer the question: "where discretionary power ends and where the abuse of law begins, where the legal behaviour of the administration ends, materialized in its right of appreciation and where the violation of a subjective right or legitimate interest of the citizen begins?"[34] Therefore, the application and observance of the principle of legality in the activity of state authorities is a complex issue because the exercise of state functions presupposes the discretionary power with which the organs of the state are invested, or in other words the authorities' "right of appreciation" regarding the moment of adoption and the content of the measures imposed. What is important to emphasize is that discretionary power cannot be opposed to the principle of legality, as a dimension of the rule of law.

The excess of power can be manifested in these circumstances by at least three aspects: a) the appraisal of a factual situation as an exceptional case, although it does not have this significance (lack of objective and reasonable motivation); b) the measures ordered by the competent authorities of the State, by virtue of discretion, to go beyond what is necessary to protect the publicly threatened public interest; c) if these measures unduly and unjustifiably restrict the exercise of fundamental rights and freedoms constitutionally recognized.

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[32] Decision no. 669 of November 12th 2014, published in the Official Gazette no. 59 of January 23rd 2015.

[33] Decision no. 1 of January 11th 2012, published in the Official Gazette no. 53 of January 23rd 2012; Decision no. 80 of February 16th 2014, published in Official Gazette no. 246 of February 7th 2014.

[34] Dana Apostol Tofan, *Puterea discreţionară şi excesul de putere al autorităţilor publice*, Ed. All Beck, Bucharest, 1999, p. 37.

The key issue for the practitioner and the theorist is to identify criteria by which to establish the limits of the discretionary power of the state authorities and to differentiate it from the excess of power that must be sanctioned. Of course, there is also the question of using these criteria in court practice or constitutional litigation.

Concerning these aspects, the opinion of the specialized literature was that the purpose of the law will be the legal limit of the right of appreciation (of opportunity). For discretionary power does not mean a freedom beyond the law, but one permitted by law. Of course, "the purpose of the law" is a condition of legality or, as the case may be, the constitutionality of the legal acts of the organs of the state, and can therefore be considered a criterion for delimiting discretionary power from excess of power.

As can be seen from the case law of some international and domestic courts in relation to our research theme, the purpose of the law cannot be the only criterion to delimit discretionary power (synonymous with the margin of appreciation, term used by the ECHR) of the State may be an excess of power not only in the case where the measures adopted do not pursue a legitimate aim but also in the case that the measures ordered are not appropriate to the purpose of the law and are not necessary in relation to the factual situation and the legitimate aim pursued.

The adequacy of the measures ordered by the state authorities to the legitimate aims pursued is a particular aspect of the principle of proportionality. Significant is the opinion expressed by Antonie Iorgovan, who considers that the limits of discretionary power are set by: "positive written rules, general principles of law, principle of equality, principle of nonretroactivity of administrative acts, right to defense and principle of contradictory, principle of proportionality" Therefore, the principle of proportionality is an essential criterion that allows the discretionary power to delimit excess of power in the work of state authorities. And by this is an essential principle of the rule of law.

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The Schengen area in the context of the free movement of persons in the European Union

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Abstract

The free movement of persons in the European Union is certainly one of the most concrete achievements of the European integration process. The establishment of the Schengen area in 1995 led to the abolition of controls at the internal borders of the European Union. Currently, the Schengen area comprises most of the EU states except Ireland and the United Kingdom, which have opted to stay outside, as well as Bulgaria, Croatia, Cyprus and Romania, which are bound to join Schengen. However, EU citizens benefit from free movement when traveling within the EU, whether or not the country is part of the Schengen area. If they enter the territory of an EU Member State that is not part of the Schengen area, EU citizens are in principle subject to a minimum identity check based on travel documents, respectively passports or identity cards).

Keywords: *free movement of persons, European Union, Schengen area, borders, European Parliament, Council, regulation.*

JEL Classification: K33

1. Introductory considerations

The legal basis of "Schenghen Area" is:

- the Schengen Agreement on the gradual abolition of checks at the common borders of 14 June 1985;
- Convention implementing the Schengen Agreement on the gradual abolition of checks at their common borders, signed on 19 June 1990 and which entered into force on 26 March 1995.

The free movement of persons in the EU is based on the following provisions: Art. 3 par. (2) TEU, Art. 21 TFEU (Titles IV and V, Part III of the TFEU), Art. 45 The Charter of Fundamental Rights of the EU.

The legal basis for this freedom begins with one of the Union's objectives[2], which in its content is a guarantee given to its citizens in the area of freedom, security and justice without internal frontiers, in conjunction with appropriate measures on external border control, with the right to asylum , immigration,

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[2] See Dragoş Marian Rădulescu, *European Union, From Traditions to Fundamental Rights. Asserting the fundamental human right to a healthy environment*, Pro Universitaria Publishing House, Bucharest, 2012, p. 64 et seq.; Iulia Boghirnea, *The General Theory of Law*, Sitech Publishing House, Craiova, 2013, pp. 28 et seq.; Stoica Camelia Florentina, *European Union Law, Fundamental Freedoms*, University Publishing House, Bucharest, 2009, pp. 24 et seq.

as well as the prevention of crime and combating this phenomenon (under art. 3 par. (2) TEU].

In the order of presentation, the following provision, art. 21 TFEU[3], refers to **"any EU citizen who has the right to move and reside freely within the territory of the Member States"** as a result of the introduction of the concept of EU citizenship by the Maastricht Treaty. This freedom of movement therefore benefits every citizen of a Member State, subject to the limitations and conditions laid down in the Treaties and the provisions adopted for their application (Article 21 TFEU).

The concept of free movement of people has changed over time[4].

The first provisions in the field, which also meant the original meaning of the concept, were included in the TCEE (1957), referring to the free movement of workers and the freedom of establishment, understood as rights of employees or service providers. Currently, these provisions are contained in Titles IV and V, Part III of the TFEU, as follows:

- Title IV contains regulations on "Workers (Chapter 1), "Right of establishment" (Chapter 2) and "Services" (Chapter 3);

- Title V, entitled "Area of freedom, security and justice", starts with the Union's guarantee of the absence of controls at internal borders, while developing a common policy on asylum, immigration and external border control - a guarantee based on solidarity between Member States, which is fair to third-country nationals (Art. 67 paragraph (2)].

Article 45 of the Charter of Fundamental Rights of the EU only reinforces the provisions of Art. 21 TFEU, ie "any citizen of the Union has the right to move and reside freely within the territory of the Member States". This freedom may be accorded, in accordance with the Treaties (TFEU, TEU), and to third-country nationals legally residing in the territory of a Member State.

The provisions of the Treaties on this matter are "complemented" by a series of directives, which will be presented as far as the reference to the notions to which they refer.

2. Schengen area

2.1. Legal basis

Together with the provisions of the TFEU, the free movement of persons is also based on:

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[3] The former art. 18 TCE (eg Article 8A).

[4] Cristina Samboan, *O directiva controversata-Directiva Bolkestein,* „Revista de Statistica", supplement May 2007; Elise Nicoleta Valcu, *Introducere în dreptul comunitar material,* Ed. Sitech, Craiova, 2010, p. 75.

- the Schengen Agreement on the gradual abolition of checks at the common borders of 14 June 1985[5];

- Convention implementing the Schengen Agreement on the gradual abolition of checks at their common borders, signed on 19 June 1990, which entered into force on 26 March 1995.

Initially, the Convention - only signed by Belgium, France, Germany, Luxembourg and the Netherlands[6] - was based on intergovernmental cooperation in the field of Justice and Home Affairs (JHA), after which a protocol to the Treaty of Amsterdam[7] secured the transfer of the "Schengen" in the treaties. Thus, the Treaty of Amsterdam established the so-called "Area of Freedom, Security and Justice"[8]. In this context, the Schengen Treaty has been integrated into Community acts. Great Britain and Ireland have not joined this treaty. Member States also agreed on closer cooperation on visa, asylum and immigration.

"Schengen Area" is based on Art. 67 and art. 77 TFEU (Treaty of Lisbon), therefore:

a) The Union constitutes an area of freedom, security and justice, respecting the fundamental rights and the different legal systems and legal traditions of the Member States.

The Union ensures the absence of controls on persons at internal borders and develops a common policy on asylum, immigration and external border control based on solidarity between Member States and which is fair to third country nationals. Stateless persons are assimilated to third-country nationals (Art. 67 paragraph (1) and (2) TFEU)[9];

b) The Union is developing a policy that aims to:

• ensure that there is no control over persons crossing internal borders, regardless of citizenship;

• ensure people control and effective surveillance at the crossing of external borders;

• gradually introduce an integrated border management system (Article 77 TFEU).

2.2. Participating countries

Currently, the Schengen Area comprises 26 states[10], including 22 EU

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[5] The free movement agreement was signed in the Luxembourg city of Schengen.

[6] These states opened their borders between them on March 26, 1995.

[7] The Treaty of Amsterdam was adopted by the Heads of State and Government of the European Union (EU) on 16-17 July 1997 and signed on 2 October 1997. It entered into force on 1 May 1999.

[8] The Treaty of Amsterdam extended the rights of the European Police Office (EUROPOL).

[9] According to art. 68 TFEU: "The European Council defines the strategic guidelines for legislative and operational planning within the area of freedom, security and justice".

[10] They are members of the Schengen area: Austria, Belgium, Czech Republic, Denmark (excluding Greenland and the Faroe Islands) Switzerland, Estonia, Finland, France (excluding Overseas Departments and Territories, Iceland, Latvia, Lithuania, Luxembourg, Malta, Netherlands

Member States and 4 non-EU countries (Norway, Iceland, Switzerland and Liechtenstein).

Ireland and the United Kingdom are not parties to the Convention but have the possibility to accede to the application of certain provisions of the Schengen acquis.

Denmark, although part of the Schengen Agreement, has the option not to participate in any of the new measures in the field of justice and home affairs, but has the obligation to comply with some provisions in the field of the common visa policy.

Romania, Bulgaria and Cyprus are to join, even if there are delays for different reasons. On July 1, 2015, Croatia began the process of joining the Schengen area.

2.3. Objective of the "Schengen Area".

The objective of the Schengen Area is to create a single area without internal border controls[11]. This objective requires a common policy for the management of external borders[12].

To this end, the Union is determined to establish common standards on controls at its external borders and to gradually put in place an integrated system for the management of these borders[13].

Achievements of the objective pursued by the "Schengen Area" can be found in:

1. The Schengen acquis on external borders. The acquis is made up of the rules governing the external borders, based on the original acquis integrated into the EU legal order by the Treaty of Amsterdam[14].

Achievements are as follows[15]:

- the Schengen Information System (SIS), which provides the necessary information management infrastructure to support border controls and security related tasks in judicial and police cooperation;

(excludes Aruba, Curacao, Sint Maarten, Caribbean Netherlands), Norway (Svalbard excluded), Poland, Portugal, Hungary. Of these, Switzerland, Iceland, Norway, Liechtenstein are not members of the European Union, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/schengen_brochure/schengen_brochure_dr3111126_ro.pdf consulted on 1.05.2019.

[11] Elise Nicoleta Valcu, *Introduction to European Union Material Law*, 2nd edition revised and added, Hamangiu Publishing House, Bucharest, 2012, p. 140

[12] See, K. Milt, March 2017, http://www.europarl.europa.eu/aboutparliament/ro/displayFtu.html?ftuId=FTU_5.12.4.html, consulted on 1.05.2019.

[13] *Idem.*

[14] See Council Directive 2002/90/EC and Council Framework Directive 2002/946/JHA.

[15] For details of each achievement, K. Milt, March 2017, http://www.europarl.europa.eu/about parliament/ro/displayFtu.html?ftuId=FTU_5.12.4.html, consulted on 1.05.2019.

- the Visa Information System (VIS), which aims to improve the implementation of the common visa policy, consular cooperation and consultations between the central visa authorities;

- the European Border Police and Coast Guard Agency, which came from the former Frontex Agency with extensive tasks under the Border and Coast Guard (EBCG) Regulation. The main role of the EBCG[16] is to help ensure integrated management of the external borders.

2. Developments in the EU's management of its external borders. Since the establishment of Frontex, practical steps have been taken to improve the integrated management of the external borders, namely: a series of significant technical infrastructure updates; a series of joint border management operations; developing a rapid response capability (initially with the help of the Rapid Border Intervention Teams - RABIT - and, as of 2011, also through the European Border Police Teams).

In spite of all developments, in recent years, the Schengen area has been subject to challenges that could put pressure on the reconsideration of the provisions governing this area, namely:

- the unprecedented flow of refugees and migrants to the EU. Thus, the extremely high number of refugees and migrants, starting in September 2015, has led several Member States to reintroduce temporary controls at the internal borders of the Schengen area (however, temporary border controls have complied with the rules of the Schengen Borders Code);

- terrorist threats; they have shown the difficulty in detecting terrorists entering and moving into the Schengen area. All this has highlighted the extremely complex links between the firm management of the external borders and the free movement within them. New measures have also been imposed, both to increase security controls applied to persons entering the Schengen area and to improve the management of external borders[17].

2.4. Achievements of the "Schengen Area"

The achievements of the "Schengen Area" according to its objectives are[18]:

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[16] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on border and coastal police at European level and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No. (EC) No 863/2007 of the European Parliament and of the Council, Regulation (EC) 2007/2004 and Council Decision 2005/267/EC.

[17] See, Ioana-Nely Militaru, *European Union Law, Timeline. Streams. Principles. Institutions. Internal Market of the European Union. Fundamental Liberties*, 3rd ed., reviewed and added, Universul Juridic Publishing House, Bucharest, 2017, 395 et seq.

[18] See O. Marzocchi, March 2017, *Technical Sheets on the European Union, Free Movement of Persons*, June 2017, http://www.europarl.europa.eu/atyourservice/ro/displayFtu.html?ftuId=FTU_2.1.3.html02/2017, consulted on 1.05.2019.

a. the abolition of internal border controls for all persons; EU citizens have the right to free movement when traveling within the EU, whether or not the country is part of the Schengen area. When entering the territory of an EU Member State that does not belong to the Schengen area, EU citizens are in principle subject only to a minimum identity check based on travel documents (passport or identity card)[19].

b. Adopting measures to strengthen and harmonize controls at the external borders, consisting in the fact that all EU citizens can enter the Schengen area only by presenting their identity card or passport;

c. a common policy on short-stay visas: third-country nationals included in the common list of non-Member States whose citizens require an entry visa (see Annex II to Council Regulation 539/2001) may obtains a single visa, valid for the whole Schengen area. The Visa Information System (VIS) is an information system linking the consulates of third-country Schengen States, competent national authorities and all border crossing points of the Schengen States[20];

d. police and judicial cooperation: police forces help each other in the detection and prevention of crime and have the right to pursue fugitive criminals on the territory of a neighboring Schengen state; there is also a faster mechanism for extradition and mutual recognition of criminal judgments;

e. the establishment and development of the Schengen Information System (SIS).

2.5. Contribution of the European Parliament to supporting the right to free movement of persons in the EU[21]

In its resolution of 16 January 2014 on respect for the fundamental right to free movement in the EU, Parliament calls on the Member States to comply with the Treaty provisions on EU rules governing freedom of movement and to ensure that the principle of equality and the fundamental right to free movement are respected in all Member States, including access to employment, working conditions, remuneration, dismissal and social and fiscal benefits. In the above-

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[19] The EU is currently working on a program for the external borders, called "Intelligent Frontiers". It includes an entry / exit system that will improve border controls and combat irregular migration, while facilitating border crossings for frequent travelers and subject to prior checking. The EU is also working on modifying the visa procedure to create better links with other policy areas, such as tourism, and to further simplify the procedures for frequent travelers. Consideration is also being given to the introduction of a new type of visa, a "circuit visa" which would allow a stay in the territory of two or more Schengen States with a duration of more than 90 days, but not more than one-year possibility of extension for another year). To be seen https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/schengen_brochure/schengen_brochure_dr3111126_ro.pdf, consulted on 1.05.2019.

[20] To be seen https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/schengen_brochure/schengen_brochure_dr3111126_ro.pdf, consulted on 1.05.2019.

[21] See O. Marzocchi, *op. cit.*, March 2017.

mentioned resolution, the European Parliament states that Member States have a responsibility to combat the misuse of social security systems, regardless of whether they are guilty of their own citizens or other EU citizens.

The European Parliament's resolution of 12 April 2016 refers to the pressure exerted on the Schengen area by the 2015 refugee, migrant flows (including the situation in the Mediterranean), stating that a global approach to migration by the EU is needed, recalling that the Schengen area is "one of the greatest achievements of European integration". Against this background, the EP has expressed concern that some Member States have responded to the pressure of migration through "the need to close their internal borders or to introduce temporary border controls, thus calling into question the proper functioning of the Schengen area".

3. Conclusions

We are currently talking about a so-called "Schenghen Crisis," due to the migration of recent years. Although no controls are required at the European border of the Schengen area, including 22 EU Member States and four neighboring countries, several Member States have decided to reintroduce controls due to the migration crisis in recent years. In this respect, Austria reintroduced border controls with Hungary and Slovenia in 2015, and Germany returned to control its borders with Austria in the same year. Also, Denmark, Norway and France have reintroduced border controls with some Schengen countries.

The current European Commissioner for Migration, Citizenship and Home Affairs[22] has submitted a series of requests to Germany and other European countries that have decided to introduce border controls in the Schengen area[23].

He said, among other things, that when Schengen ceases to exist, Europe will die. The current Commissioner also announced that he is unwilling to approve new border controls in the Schengen area, which, in his opinion, should return to normal operation, otherwise the repercussions will be drastic. In this context, he specified that internal policy has clearly played an important role in the decision of these states to resume border checks, often with populist decisions[24].

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Why do we have to take examples from others?

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Abstract

Intellectual capital is an up to date concept. The term intellectual capital (IC) has been used for the first time in 1836 by William Nassau Senior, economist, when he was pointing out that the IC of Great Britan has exceeded by far all the material capital, not only in importance, but also in productivity. The world has evolved since 1836 up until now. Industrial economy has been, step by step, replaced by the knowledge economy. This replacement process started in 1959. It was Peter F. Drucker who drew attention to knowledge economy. IC came from 3 diffrent spheres: economics, management and accounting and became attractive to academics. Therefore, reaserchers could use IC in order to create new toolsthat produced essential change. We refer particulary to The Intellectual Capital of the State of Israel Report that became an instrument to promote Israel. The purpose of this paper is to analyse the role and the importance of intellectual capital in developing communities, with a focus on Romania and how IC could help Romania to develop in the near or distant future. The reasearch emphasises the importance of the IC and of the organisational intelligence for the society's development.

Keywords: *intellectual capital, intellectual capital report, organisational intelligence, development of society.*

JEL Classification: H83, K23

1. Introduction

Intellectual capital is an up to date concept. The term intellectual capital[2] (IC) has been used for the first time in 1836 by William Nassau Sr., economist,

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[2] see approaches to this concept in Bratianu, C., Dima, A.M., Vasilache, S. & Orzea, I., *Nonlinear integrators and intellectual capital dynamics,* Curtea Veche Publishing House, Bucharest, 2011, p. 12 et seq.; Bratianu, C.; Orzea, I., *Intergenerational learning as an entropy driven process*, „Management & Marketing. Challenges for the Knowledge Society", Vol.7, no.4, 2012, pp.603-613; Bratianu, C., Orzea, I., *The entropic intellectual capital model,* „Knowledge Management Research and Practice", 11(2), 2013, pp.133-141; Bratianu, C., *Managementul cunoştinţelor, concepte fundamentale*, University Publishing House, Bucharest, 2015; Bratianu, C., *Intellectual Capital research and practice: 7 myths and one golden rule*, „Management & Marketing. Challenges for the Knowledge Society", Vol. 13, no.2, 2018, pp 859-879; Herciu, L. G., *Capitalul intelectual activ intangibil*, Proceding of the Smart Cities Conference 4th edition, Pro Universitaria Publishing House, Bucharest, 2016, pp. 179-186; Herciu, L. G., *Smart Managers, Smart Companies*, Proceding of the Smart Cities Conference 5th edition, Pro Universitaria Publishing House, Bucharest, 2017, pp 124-129; Bernard Marr (ed.), *Perspectives on Intellectual Capital*", Elsevier Press, Oxford, 2005, p. 5 et seq.; Pasher, E., *The In-and-Out Intellectual Capital of Israel*, The World Conference

when he was pointing out that the IC of Great Britan has exceeded by far all the material capital, not only in importance, but also in productivity.

The world has evolved since 1836 up until now. Industrial economy has been, step by step, replaced by the knowledge economy. This replacement process started in 1959. It was Peter F. Drucker who drew attention to knowledge economy. In this context intellectual capital became the new capital.

IC came from 3 different spheres: economics, management and accounting and soon became attractive to academics. Therefore, reaserchers could use IC and created new tools; with which they achieved important changes in society. We refer particularly to the Intellectual Capital of the State of Israel Report. The report was released in 1997 by the young reasercher Edna Pasher. The Report became a model for the academics and for the State of Israel it a tool to promote itself.

This paper aims to offer a perspective on how the State of Israel along its 71 years of modernism managed to become, nowadays, one of the most important states in the world. From its IC Report we can find out that Israel was ranked 3rd place in quality of scientific research institutions and 15th place in terms of its Global Competitiveness Indicator, out of 125 countries in the world. Israel is in top 10 most innovative countries. In 2005, Israel was ranked 7th place in Nobel Prize capita, measured per million people, awarded in physics, chemistry, physiology, medicine, and economics. Also at this moment it holds the 5th place on top most innovative countries in the world. And we could carry on with more similar examples.

2. Intellectual capital

Leading figurespersonalities such as Francis Bacon, William Churchill or Alvin Toffler, had the vision of the swift to the new economy, knowledge economy. It took Peter F. Drucker and his book "The Age of Discontinuity Guidelines to Our Changing Society", published in 1969, to draw attention on knowledge economy. In this context, a new capital arrised, the intellectual capital.

The term itself, intellectual capital, it is not new. The economist William Nassau Sr. mentioned for the first time, in 1836, the term intellectual capital (meaning knowledge) as a production factor. Knowledge as a production engine was also mentioned by Marshall, Veblen or Drucker.

It was Th. A. Stewart who popularized the term through a series of articles published in Fortune Magazine in the `90s. The concept has developed from 3 directions: economics, management and accounting. Because it was developed

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on Intellectual Capital Paris, 2006, available at http://www.chair edelimmateriel.u-psud.fr/wpcontent/uploads/2010/08/s7_p2.pdfretrievedMay20 19, consulted on 1.04.2019; Stewart, Th. A., *Intellectual Capital, The New Wealth of Organizations*, Doubldeday Publishing, New York, 1997, p. 10 et seq.; Stewart, Th. A., *The Wealth of Knowledge, Intelectual Capital and the Twenty-First Century Oraganisation,* Nicholas Brealey Publishing, London, 2001.

from 3 different directions the term could not be defined in a singular way. It was defined by many, in many ways. For Stewart IC is “the sum of everything everybody in a company knows that gives it a competitive edge”, is “knowledge of a work force: the training and intuition of a team of chemists who discover a billion-dollar new drug or the know-how of workmen who come up with a thousand different ways to improve the efficiency of a factory. It is the collaboration - the sharing learning- between a company and its customers, which forges a bond between them to bring the customer back again and again”[3].

We can explain IC better using a methaphor. One useful way of looking at companies/organisations/universities/institutions/countries is to see them as trees. The trunk, branches, and leaves, the parts of the tree visible to the observer, are the company/organisation/university/institution/country as it is known to the marketplace and comprises what is expressed by the accounting process. The fruits produced by this tree are the profits and products harvested by investors and consumed by consumers. The hidden value of a company/organisation/ university/institution/country is the root system of that tree. And for that tree to flourish and bear fruits, the tree must be nourished by strong and healthy roots. And just as the quality of a tree`s fruit is dependent upon its root system. If the visible part of the tree is healthy and the environment unchanging, you can pretty much assume the parts of the tree you cannot see – the roots- are healthy too. Only occasionally do you get surprised by an apparently healthy tree that is rotten at the core.

When the climate is in flux, when predators and parasites are everywhere, understanding what takes place underground suddenly becomes more important than what is going on above strong roots may be the only thing that gets a tree through an unexpected drought or freeze[4].

3. Intellectual capital and the State of Israel or the intellectual capital of the State of Israel.

The title of this section sounds intriguing but there is a closed connection between the two ideas. We cannot understand the connection between them without talking about the stages of the IC research. The IC research has 5 stages[5].

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[3] Stewart, Th. A., *Intellectual Capital, The New Wealth of Organizations*, Doubldeday Publishing, New York, 1997, pp. IX-X.

[4] Bounfour, A. and Edwinsson, L., *Intellectual Capital for Communities: Nations, Regions and Cities*, Routlege, New York, 2011, pp. 31-32.

[5] Guthrie, J., Dumay, J., Ricceri, F., Nielsen, C., *The Routledge Companion to Intellectual Capital*, Routledge Publishing House, 2017, p. 19; Dumay, J, *25 Years since Skandia: Critical reflections and projections*, 2019, retrieved at https://www.academic-conferences.org/conferen ces/eciic/eciic-future-and-past/accesed, consulted on 1.04.2019; *Intellectual Capital of the State of Israel - 60 Years of Achievement* available at https://innovationisrael.org.il/sites/default/files, retrieved November 2018; Herciu, L., G., *The Intellectual Capital a Vector of Innovation in the Public Sector*, in Szczepaniak, R., Melo Figueiras, C., S., (editors), *Contemporary Challenges in Administrative*

- Stage 1 (1980 – 1990) Raising IC awarness;
- Stage 2 (1990 – 2000) Creation of guidelines, standards and indices to measure, manage and report IC;
- Stage 3 (2000 – 2004) Crytical and performative analysis of IC practices in action;
- Stage 4 (2004– 2017) Develop and build strong economic, social, and environmental eco-systems
- Stage 5 (2017– present) Develop IC reasearch with no boundaries and as a worthwhile endeavour.

The intellectual capital concept it is dynamic and in full expansion. The 5 five stages are not fully developed, meaning at any moment we can go back to them. Due to the fuzzy nature of IC at any time something new might come up. Even though we are in 2019, we can find at some moment in time reasearches that might have new impact on the first stage, defining IC in a new, surprising and comprising way. Practitioners or academics with their works might have impact on any of the5 stages at any moment in time. For example, in Romania the IC concept it is less known comparing to other countries. Let's suppose a researcher or a teacher from Romanian is working to promote IC and its importance, and then we can consider these actions belong to Stage 1. If the same person or another one creates a new model to evaluate and to report IC, then those actions belong to Stage 2. And we can carry on with more examples.

When referring to the IC of an entity (institution, organization) we have to see its role and mission. For example the role of a university is to produce public value, social value. Universities are considered critical players in the knowledge – based society and are the core of the policy agenda at national an international level. Once we have defined the role of the university we can define the intellectual capital. Stewart considered IC to be "the sum of everything everybody in a company knows that gives it a competitive edge"[6]. Therefore, we may consider that IC of a university is the sum of everything everybody in the university knows that gives it a competitive edge, that produce public value, social value.

In 1997 a young researcher named Edna Pasher released "The Intellectual Capital of the State of Israel" Report. The idea was suggested to Pasher by Leif Edvinsson from Skandia. He developed a theorethical model called the "Skandia Navigator". Based on this model he created "the IC Balanced Sheet", and released it in 1995. It was the first IC report in the world, on Sweden. As Pasher started to elaborate the report, it was the second national IC Balanced Sheet in the world.

Law and Public Administration. Contributions to International Conference `Contemporary Challenges in Administrative Law and Public Administration`, ADJURIS – International Academic Publisher, Bucharest, 2018, p. 200.

[6] Stewart, Th. A., *op. cit.*, 1997, p. IX.

She needed 2 years to complete it. The report was a product of extensive collaboration with leading figures from the academic field, such as professor Baruch Lev, and from the relevant ministries.

The Report was based on a comparison of Israel with other developed countries, and not with developing countries, since developed countries are the ones which must serve to Israel as role models and with which Israel competes within the international markets.

The project had four phases:

Phase 1: Creating a vision of Israel to serve as benchmarking for the study;

Phase2: Identifying the core competencies needed to realise this vision;

Phase3: Identifying the key success factors for each competency;

Phase 4: Identifying the indicators for each key success.

These phases are necessary when elaborating any other IC Report and hey are linked together. There is a causal connection between them. First of all, we are talking about vision and cooperation. Without having vision, direction and objectives to be achieved we cannot talk about creating an IC Report.

After being published, in 1998, the report enjoyed a huge success and became attractive to academics and the public sector.

The State of Israel continued with the IC Report, they released a second one in 2004. A third one was released in 2007, when the State of Israel was celebrating 60 years of modernity. The Report was called "Intellectual Capital of the State of Israel: 60 years of achievements". The report was used as a tool to promote Israel.

Since it its first edition "The Intellectual Capital of the State of Israel Report" enjoyed a huge success and became inspirational for other states. The Report was presented, discussed and referred to in many academic conferences and papers including the global on Knowledge Based Development Forum 2007 – The Universal Forum of Cultural and Knowlegde Monterrey 2007 in association with UNESCO.

4. Intellectual capital and Romania or the intellectual capital of Romania

Before the `90s Romanian economy was centered on the traditional industries. After the 1989 Revolution Romania had to adapt to the market economy. The State had to give up of a part of the entreprises he was having under possession and control. One part became private property being sold, the other part remained under the State`s supervision and administration. The State proved not to be the best manager for those companies. Companies such as National Railways Company – CFR, National Aviatic Transportation Company – TAROM, and we could carry on with the examples, are either in insolvency or in the bankruptcy threshold, whichproves that the State lacks vision and strategy.

After 30 years of postcommunism, Romania still struggles to find its way. It was and it is dominated by political conflicts, scandalsand corruption. The lack of vision and of pragmatism determined the politicians to have divergent interests towards the national interest. States such as Poland, Czech Pepublic, Hungary, managed to acces and used the EU funds to progress. Romania became a member state of the E.U. in 2007. Until today Romania couldn't use the EU funds efficiently. Italy, Spain, Greece, Portugal or Poland used EU funds to develop their road infrastructure.

Recently EU Commision recommended Romania to invest in the infrastructure as we ares on last ranks regarding the road and railway infrastructure chapter.

Investments could boost Romania`s economy as it disposes of a highly qualified human resource that could increase its IC.

5. Let`s take examples from others

We are going to analyse some local and from abroad examples that worth to be taken into consideration as they can be inspiring for Romania. Lessons from past and from present designed to inspire each of us.

Example no 1 – Smart Cities. The Smart Cities Concept has developed in Romania. We have local, regional, or national events related to the Smart Cities Concept, thatare held by academics or business environment.

Cluj, Oradea or Alba-Iulia are considered to be the smartest cities in Romania. They have earned this title because they had vision and objectives and through collaboration with the relevant stakeholders they managed to achieve those objectives. Other cities like Bucharest, the capital, should follow the example of Alba –Iulia, Oradea and transform Bucharest into a smart city.

Yearly, the National University of Political Studies and Public Administration – NUSPA organises „Smart Cities Conference", now being at its 7th edition. The conference is addressed to the academic, public and business sector. Alba-Iulia City being frequently represented at this type of events related to Smart Cities. Alba-Iulia has become a city that developed and continues to develop its IC.

Example no. 2 – National programme „Milk and bread". National programme "Milk and bread" started in 2002[7]. In 2009 it was converted into "Fruits in schools", the purpose was to encourage kids to consume fruits. The programme was financed from EU funds,75%. "Milk and bread" programme is one of the oldest guvernamental programmes and it was initially designed as an instrument to reduce the social inequities among children.

[7] The Romanian Policy Center – CPRE, *Programul laptele și cornul în contextul schemei europene laptele în şcoli*" available at http://www.crpe.ro/programul-laptele-si-cornul-contextul-schemei-europene-laptele-scoli/, retrieved April 2019.

A similar programme was initiated in `70, at the EU level, as a measure to support the dairy industry. In UK such a programme was functioning since 1946. Through "Free Milk Act" children under the age of 18 were received milk for free. "The benefits" of the programme were well known. Because the milk was stored in the sun, children were receiving the milk sour and were forced to drink it as it was. In 1971, when Margaret Thatcher becam the Education Secretary in Edward Heath's government, she stopped the provision of milk in order ro cut public waste. She was called „the milk snatcher" by the people who were screaming "Thatcher, Thatcher, snatcher".

"Milk and bread" programme led to the same results in Romania in the current times as it had in UK. The milk is wasted in Romania as it was wasted in UK. Romanian children are not very interested in consuming it. Therefore, we have today in Romania a public resource waste as it was in England in the `70s. Such programme could bring benefits but they should be developed following the *3E rule*: efficiency, economy, and effectiveness.

Example no. 3 – The Exodus (exodus of the medical doctors, IT specialists and of other qualified human resource). IC includes tangible assets (physical, material) and intangible assets (non material). IC is forbed by the human capital, structural capital and relational capital.

Human capital: the skills and knowledge of our people;

Structural capital: patents, processes, databases, networks;

Relational capital: relationship with customers and suppliers.

At the human capital, Romania looks good, meaning it disposes of a high qualified working force (medical doctors and IT specialists).

In the past years IT sector increased. In order to stimulate the IT sector some fiscal advantages/benefits were offered for the IT specialists. The State of Israel invested in the technological process and created a second Silicon Valley. Romania could follow Israel's example and should invest more in the technological process and create a Third Silicon Valley. Investing in R&D (Research &Development), thorough investments in the prioritary sectors Romania could develop its structural and relational capital, increasing its IC. Increasing IC could step by step turn the negative image Romania has at regional and mondial level into a positive image. Change takes time but it can be done with vision, purpose and direction.

Knowledge is the core of IC. By managing and developing knowledge, increasing the power of learning, understanding, and reasoning we increase our intelligence. Romania should be an intelligent country. We could create a barometer of measuring intelligence to be used at the personal, local, regional, and national level.

Analysing this specialty literature we can extract 10 IC essential capacities/characteristics, those are: openess, initiative, vision, experimentation, learning, IC use, connectivity, cohesion, self-reflection, and leadership. By putting

them in pairs: openess - autism, vision - blindness, leadership - followership, cohesion – disintegration, self reflection – vanity, use of IC – abuse of IC, learning – regression, connectivity – disruption, initiative – lethargy, and experimentation – no risk, we can create a barometer for intelligence – ignorance.

As Edna Pasher once said it is most important to adhere to the concept of taking IC into account and manage it properly. Knowledge management is about increasing IC and increasing IC at personal, local, regional, and national level is the most important thing we can do to ensure long term personal, local, regional, and national prosperity.

IC concept should be promoted and implemented in the public and also the private sector.

6. Conclusions

As we could see in section 2, thorough vision and cooperation the State of Israel had great achievements, becoming a model to follow. Romania should learn from the local and worldwide examples, from winners, should take into consideration and implement solutions that worked/validated by practice (developing an IC Report) and not solutions that already failed ("Milk and bread" programme) Romania should foallow Israel model and build up a vision, objectives, purposes and a direction to follow. Through vision and cooperation Romania can prosper. We should stop from being a state that struggles to for daily survival.

In 2018 Romania has celebrated the Centenary of the Great Union, 100 years since a common vision was transformed into reality. Although the Centenary was marked only in a symbolic way through cultural events (also a special logo for this event was created) the energy of the Great Union should not be abandoned, should be revived, invigorated and used in order to create a new common vision, objective, purpose. Developing IC awareness and using IC as a tool for promoting ourselves we can break through.

As Jesus said 2000 years ago if you give a man a fish, he will eat today, but teach a man to fish and he will eat forever. We need not only the fish but also to learn to fish. We need to increase awareness on IC, to manage IC properly and to create knowledge. This can be done only through vision and cooperation. We are stronger when we are together.

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PRACTICAL ASPECTS REGARDING THE ROLE OF ADMINISTRATIVE LAW IN THE MODERNIZATION OF PUBLIC ADMINISTRATION AT NATIONAL LEVEL

The identity and legitimacy of the PhD in administrative sciences

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Abstract

The research in public administration within the PHD programmes contributes to the satisfying of the need for scientific knowledge in the field. The present study is an approach to the nature of research within the PHD programmes in Administrative Sciences. We synthetize data and information obtained out of the analysis of the activity of the doctoral programmes in Administrative Sciences and we relate it to the criteria that confer the identity and legitimacy of the PHD. We consider three essential elements: major research subjects, research methodologies, and the results disseminated that we relate to the field of study in Administrative Sciences and to the context. We realise a first diagnosis of the stage of the PHD in Administrative Sciences in Romania and the measure that it is relevant to the new economy of knowledge. The conclusion of the study is that the legitimacy of the PHD in Administrative Sciences is mainly ensured by the need to bring the academic studies in accordance to the Bologna system and the criteria imposed in order to follow an academic career. The major subjects of research consider the tendencies of evolution in Administrative Science as a totalizing science.

Keywords*: doctoral studies, PHD, research, scientific result, administrative science.*

JEL Classification: H70, H83

1. The logic and philosophy of the PHD within the society of knowledge

The ministers reunited in Berghen in May 2005 admitted that the relationships between the academic field and other fields can be ensured by making use of an approach based on results. According to the logic of the Bologna process, universities were encouraged to structure their programmes of study in three cycles: bachelor's degree, master's degree, and PhD, ant to make sure that a component of research is included and developed in all the three cycles, and in such a way as to allow the students to gain experience in doing research and to stimulate their interest in research as their possible future career. In 2007, the EUA TRENDS Report revealed the growing tendency in the developing of structural and doctoral programmes[2]. By examining the declarations for research and the

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[2] *** *Doctoral Programmes in Europe's Universities: achievements and challenges*. Report prepared for the European universities and the Ministers of Higher education. European University Association, Brussels, 2007, p. 6-9.

European policies, also from The US and Canada, three common aspects to be expected from the doctoral programmes can be shown:

1. There is a clear international agreement over the fact that the PHD should contribute to knowledge through original research;
2. It is expected that the PHD graduates should have substantial knowledge in their fields of study.
3. There is an increasive agreement that the doctoral studies should involve the development of the transferable abilities and competences[3].

All of the three aspects respond to the essential features of the knowledge society, a stage in the evolution of society that makes out of knowledge: 1. A fundamental resource; 2. The main source of power, prestige, and wellbeing; 3. The main space for the existence and the regeneration of the jobs; 4. The instrument of acting for the new main social actors; 5. The main area for the new social conflicts; 6. The fundament of the types of decision (governance and innovative management); 7. The way of existence of competition (knowledge means innovation); 8. The criterion of the national richness[4].

As well as any type of society is supported by key-actors, capable and interested in making changes and breaking the resistance of other groups, as they doubt them[5], and the purpose of the doctoral studies becomes even bigger. Apart from satisfying the need for academic knowledge and increasing knowledge for those who have jobs in public administration, the doctoral programmes contribute to the education of these key-actors: professors, researchers, inventors in technology, managers, and new governors, all of them seen as carrying the new perspective on society and having a role in ensuring the pass towards the new society and economy of knowledge. A report of The World Bank addresses the issue in a concise manner: "The contribution to the economy based on knowledge requires a new set of human competences. People need higher qualifications and the capacity to obtain a higher intellectual independence… Without increasing the quality of the human capital, the countries will inevitably rest behind and will be marginalized and isolated intellectually and economically"[6].

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[4] Hoffman, O., Glodeanu I., *Societatea/Economia Bazată pe Cunoaştere*, „Revista Română de Sociologie", new series, year XVI, no. 5–6, 2005, p. 427.

[5] Hoffman, O., Glodeanu, I., *op.cit.*, p. 428.

[6] Bernstein, B. *et al*, *op.cit.*, p. 8.

2. Considerations regarding the doctoral research in the field of public administration

On a global scale, the doctoral experience in the field of public administration is very different. The doctoral grades differ when it comes to entrance, the content of the doctoral programmes, their duration, the process of teaching and evaluation[7]. The European doctoral programmes are shorter (between 3 and 4 years) than those in the USA (between 6 and 8 years). The majority of the European doctoral programmes do not require that students should have exams in order to get their grades. There are several important exceptions such as Sweden, where PHD students take two exams, an oral and a written one, at the middle of their doctoral program. Taking into consideration the fact that the countries assumed that they put into practice the Salzburg principles and recommendations, there are plenty of external similarities. But there are also differences of conception and procedure that are related to the cultures and traditions of the respective countries. In this way, we may notice different models of doctoral educations in Europe. In some countries, PHD education presupposes firstly an individual research paper, getting a limited support for this kind of education, in others the PHD means a stage of the permanent education and contains, apart from the final thesis, e series of intensive courses. The first model can be found in Austria, Germany, Franca, and Italy. The second model is dominant in the North countries, in The Netherlands, and in Great Britain. According to the fundamental models that we described, there are two types of PHD: A type: the thesis as a result of substantial research, mainly individual; B type: the thesis as the final result of substantial research based on the courses of the program that not only covers methodological aspects, but also multiple subjects relevant for their content. According to the post-Bologna reforms in the European higher education, the second type becomes more and more relevant[8]. In most European countries, a strong fragmentation in different secondary subjects of the Administrative Sciences. A more thorough and collaborative education can be a measure to surpass this weakness[9]. An important role in preparing the interdisciplinary research in public administration by the European professors and politicians is played by the EGPA. The European Group of Public Administration (EGPA) has been constituted since 1974 as a regional group of the International Institute of Administrative Sciences. It played a modest part in the beginning, but in time it became a serious professional organisation whose objectives include: • to organise and encourage the ex-

[7] Matas, C. Poyatos, *Doctoral Education and Skills Development: An International Perspective*, „Revista de Docencia Universitaria" Vol.10 (2), Mayo-Agosto 2012, p. 168.

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[9] *Idem*, p. 74.

change of information on developments in the theory and practice of public administration; • to foster comparative studies and the development of public administrative theory within a European perspective; to facilitate the application of innovative ideas, methods, and techniques in public administration; and • to include young teachers, researchers, as also civil servants in its activities[10].

Even if the Administrative Science does not belong to the Americans, as its parents are in Europe[11], an increased interest towards the issue of research through doctoral programmes in the field of public administration can be found in the USA. In the 70's, the Ford Foundation supported a series of studies in order to explore the issue of the PHD. The objective was to offer the universities the necessary information in order to adjust the PHD production so that it corresponded to the requests of the "market"[12]. A report of the National Council for Research in the USA officially admitted the PHD in "Public Policies, Public Administration and Public Affairs" as a distinct diploma of research and as a distinct field of study[13].

Before being able to work on their thesis, the students in the USA usually have consistent exams that test their knowledge in the major fields of the domain of Public Administration[14]. Speaking of public administration, it is necessary to make an observation: the expression 'public administration' is susceptible to be understood in at least two different ways: as a science and as an academic subject of study. It is important to note this having in mind that all the academic disciplines can lead to theses, without the pre-eminence of any of them over the others. As a result, any discipline, other than the one we call Public Administration can contribute to the development of public administration as a science. Political science, economy, juridical sciences, and sociology are the disciplines that contribute to the shaping of the character of a synthetic discipline of Public Administration to a large extent. The recent researched show that the science of Public Administration has a distinct identity that accommodates the majority of social sciences, and a lot of researchers no longer see it as a field belonging to Political science. Many American authors consider that the doctoral research is a source

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[10] Reichard C., Schröter, E., *Doctoral Education in European Public Administration: The Contribution of EGPA's PhD Symposium,* in: Edouardo Ongaro, *Public Administration in Europe, The contribution of EGPA*. Palgrave Macmillan, 2019, pp.47-48.

[11] See: Wilson, W., *The Study of Public Administration*, „Political Science Quarterly", Vol. 2, No. 2, Jun., 1887, pp. 197-222. Available at: http://www.iupui.edu/~spea1/V502/Orosz/Units/Sections/u1s5/Woodrow_Wilson_Study_of_Administration_1887_jstor.pdf, consulted on 15.04. 2019.

[12] Rahm, D., Brittain,V., Brown, C., Garofalo, C., Rangarajan, N., Shields, P. and Jung Y.H., *Exploring the Demand for PhDs in Public Affairs and Administration,* „Journal of Public Affairs Education", no.21 (1), 2015, p. 116.

[13] Slagle, D., & Williams, A., *Redefining the boundaries of Public Administration*, „Teaching Public Administration", Vol. 36 (3), 2018, p. 261.

[14] Doing a PhD in Europe vs. the US Available at: https://academicpositions.com/career-advice/phd-in-europe-or-the-us, consulted on 15.04. 2019.

of new information in the field, and they underline the value of a highly qualitative research for practice. On the other hand, the conclusions of other authors show that there is no "invisible hand" to guide the researchers towards those fields that necessitate their efforts the most and the lack of concordance between the academic research and practice in the field of public administration[15]. By analysing the doctoral research in the field of public administration of the last several decades led to a perception full of contempt of the doctoral programmes and the corresponding scientific research – the detractors thought that "the issues of research in the field of the doctoral domain" were to blame[16]. The authors that studied the implications of the PHD for the public administration claimed that it contributed very little to knowing the field better[17].

The methodology of research in public administration remains weak and fragmented. There is considerable incertitude regarding the criteria that the research in public administration should meet and this incertitude is also undertaken by the doctoral students. The data obtained as a result of the doctoral research show that the lack of methodological progress is due to inadequate standards within the doctoral programmes, as well as to the nature of the field as such[18].

Also in China the quality of the PHD in Administrative Sciences is considered unsatisfactory. The conclusion belongs to Yijia Jing who analysed 132 doctoral theses between 2002 and 2006. In order to evaluate them he used a strategy of evaluation, initially elaborated by McCurdy and Cleary that care envisages criteria such as: effectiveness, relevance of the theory, causality, importance, and innovation. The author maintains that the doctoral theses elaborated in China are similar to those elaborated in the USA in 1981. The prevalent consensus in China to build the PA research on contemporary social scientific standards is considered an important element to develop institutional changes in the field.[19]

In Africa doctoral research in public administration is dominated by Stellenbosch University and by the University of Western Cape that are both responsible for the 38,3% of the total of the research production. The most part of research is concentrated in three categories of research subjects, and two of them highly correspond to the needs for knowledge expressed by the Government

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[15] Streib, G., Slotkin, B., & Rivera, M., *Public administration research from a practitioner perspective*, „Public Administration Review", 61(5), 2001, pp. 515–525. doi:10.1111/puar.2001.61.issue-5.
[16] See Slagle, D., & Williams, A., *op.cit.*, p. 262.
[17] Slagle D. R. & Williams A.M., *Changes in public affairs and administration doctoral research, 2000 and 2015,* „Journal of Public Affairs Education", 2018, DOI: 10.1080/15236803.2018.1477370.
[18] McCurdy H. and Cleary, R. E., *Why Can't We Resolve the Research Issue in Public Administration?,* „Public Administration Review" Vol. 44, no. 1, 1984, pp. 49-55.
[19] Jing, Y., *Dissertation Research in Public Administration in China*, „Chinese Public Administration Review", Volume 5, Numbers 1/2, March/June 2008, pp. 27-38.

(PSD, The management of the offer of public services, and HRM, The management of human resources[20].

3. PHDs in administrative sciences in Romania

The development of doctoral programmes in the field of Administrative Science in Romania is relatively recent. According to the national provisions, the right to implement doctoral programmes is given to the doctoral schools. They are administrative and organizational structures appeared within the Organizational Institutions of Higher Education, namely Doctoral Studies (IOSUD). They offer the necessary support for the development of doctoral studies in a certain field or discipline, or even interdisciplinary. IOSUD can be built in one the following ways: A. out of an institution of higher education. B. out of an academic association. C. out of the partnership legally established between an institution of higher education and institutions for research and development. D. out of the legally established partnership between an academic association and institutions of development and research[21].

A statistical exercise of classifying the institutions that organize PHD studies in this field shows that starting with 2001, for a period of time of 15 years, the only institution that could organize PHD studies in the field of Administrative Sciences Romania was the National School of Political and Administrative Studies. In 2015, this „class with only one element" enriches with another doctoral school, the School of Administration and Public Policies within the Institute of Doctoral Studies of the Babeş-Bolyai University, started on the 1st of May 2006 by the Decision of the Senate of the University.

The academic doctoral studies have two components: a) the program of academic education. b) the program of scientific research, developed under the guidance of the doctoral tutor.

Both doctoral schools shape/build their offer from the perspective of the strategic European and national documentation, the competence specific to level ICED 8 and depending on the scientific profile of the tutor. In this way, within the PHD in Administrative Sciences at the doctoral school of the SNSPA the program for advanced academic education as well as that of research regard the Administrative Sciences, the public management, the European administration, the human rights in the context of the European institutional practices, technical and economical-administrative aspects, the public sector and the public institutions, the elements of administrative right and of financial-administrative procedure[22].

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[20] Wessels, K., *South African trends in masters and doctoral research in Public Administration*, „Administratio Publica", Volume 15, no. 2, 2008, p. 97-120.

[21] The addenda to Government Decision no. 681 of 28 June 2011 regarding the code of the doctoral studies. Published in the Official Gazette 551 of 3 August 2011.

[22] http://doctorat.snspa.ro/sites/default/files/doctorat/Brosura_analiza_strategii_si_prioritati.pdf, consulted on 15.04. 2019.

The academic doctoral studies within the Doctoral School of Administration and Public Policies (UBB) intend to educate the PHD students so that they may get a set of basic competencies and abilities in the field of the management of the public organizations and NGOs. These competencies and abilities are the result of a mixt approach regarding the process of teaching/ learning: theoretical lectures are accompanied by practical exercises. The methods of research are especially underlined because they represent the foundation for qualitative analyses and recommendations in the public sector and for the NGOs[23].

In order to speak of the identity of the PHD in Administrative Science, it should be looks upon from at least 5 perspectives: the scope of doctoral studies, their impact, written provisions for the award of the title, the process of examination, and finding the implicit and explicit criteria for the PHD[24]. From all of these perspectives, the PHD in Administrative Sciences in Romania gained a certain identity, yet not sufficiently shaped. The sensible part remains the impact that is hard to measure in social sciences. A more general question is the way how the PHD can be legitimated. The academic literature analyses especially the legitimacy of the research methods. The effort to legitimate new methods is not small, such as participative research based on community or research as participative action, such as the efforts to defend the „old" methods, such as philosophical argumentation in political sciences. We shall consider several aspects that legitimate the PHD as a whole. The first aspect that refers to the legitimacy of the PHD in Administrative Sciences is the fact that in the society based on knowledge the desirable social roles are given to those who can produce knowledge (at least as official declarations!). Coming to meet the request of the society based on knowledge, the offer expressed by the advanced academic education is generating new types or fields of knowledge. The status of academic discipline of the public/distinct specialization within the social sciences awarding qualifications that correspond to the three cycles of higher education is the second aspect invoked in order to legitimate the PHD. For the accreditation of the master programmes in the field of the Administrative Sciences, the national standards claim the presence of at least one professor and a reader, both from the university that organizes the PHD both having their initial education, PHD or habilitation and/or recognized and relevant scientific research in Administrative Sciences[25].

Nowadays, there are over 80 doctors in Administrative Sciences in Romania. Most of them develop academic careers or academic careers and public roles. The elaboration of the ID of the PHD in Administrative Science encounters

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[23] https://doctorat.ubbcluj.ro/ro/scolile-doctorale/, consulted on 15.04. 2019.

[24] Yazdani, S. & Shokooh, F., *Defining doctorateness: A concept analysis.* „International Journal of Doctoral Studies", no.13, 2018 p. 35.

[25] Decision no. 915, din 14.12.2017 regarding the change of addenda to the Government Decision no. 1.418/2006 in order to approve the Methodology for external evaluation, the standards, the standards of reference, and the list of the performance indicators of the Romanian Agency for Ensuring the Quality of Higher Education.

certain difficulties. If from the eprspective of the structure we can identify common/similar elements, the content is very distinct. The title is different within the same field (see the following table).

The content of the program of advanced academic education of the doctoral programmes

The Doctoral School in Administrative Sciences (SNSPA)	**The Doctoral School of Administration and Public Policies (UBB CLUJ)**
Advanced Studies in Administrative Law	Management and strategic planning in the public field and the NGOs
Evolution Processes of the Public Management	Policies and Public Policies Analyses
Research Methods in Administration in Europe (optional class J. Monnet department)	Research Methods in Administrative
Human Fundamental Rights and Freedoms	Finance and taxation
Institutional Law and European Material	

The common element of the programmes is their multidisciplinary, their juridical orientation, more evident for SNSPA. An analyse of the themes of interest shows that they are correlated to the economic sectors having a potential of growth in Romania.

4. Identity issues

As synthetical and interdisciplinary, the Administrative Science was unified by its subject of study – public administration. In terms of theories and methodology, it has always been pluralist that is a specific aspect for other social sciences, as well[26]. It undertook excellent evolutions, but also identity crises. The identity issues of the PHD in Administrative Sciences are the result of two problems largely discussed by the academic literature, that are not agreed upon yet. The former regards the status of science of public administration, and the latter regards its methodological legitimacy.

[26] Pollitt, C. *The Changing Face of Academic Public Administration*, Address to SNSPA, Bucharest, April 2014, p. 2. Available at: http://snspa.ro/wp-content/uploads/2018/06/Lectio_Prima_Christopher_Pollit.pdf, consulted on 15.04. 2019.

Once considered a field of the political science, public administration is now a new discipline with a distinct identity that contains most of the social sciences[27]. As a science, it adopted a variety of theoretical and methodological approaches, and the majority of researchers consider that this diversity provoked, intentionally or not, large frictions in the epistemological and methodological positions[28]. Under methodological aspect, a high degree of stability could be noticed, an excessive dependency to traditional methods (the most frequently used method being the research by survey), reticence towards learning and applying new approaches. The complexity of the subject of study determined positive evolutions under this aspect. If in the 80's a conservative approach could be noticed, regarding the methods of research, starting with the 2000's we may notice a considerable refreshment in terms of methods of research. A relevant synthesis regarding the evolution of research in public administration belongs to Christopher Pollitt. Pollitt considers that nowadays two strong and opposite theoretical approaches make shape. The former may be named scientific orthodoxy, and it is preferred in the USA, the former is preferred by the postmodern societies and the radical constructivists from the both shores of the Atlantic Ocean[29]. The scientific orthodoxy operates with premises according to which the world can be represented by a system of dependent and independent variables. These variables can and have to be measured in such a way as the relations among them should be converted in statistical relations. The essential elements for this paradigm of variables are presupposed to be the same in a variety of different contexts as they simply undertake different numeric values depending on the circumstances[30]. The scientific orthodoxy is criticised for not offering too many generalisations regarding the organization of the public services. In many situations, identifying the variables and testing the hypotheses is impossible. Moreover, Administrative Science has to also handle normative issues, and scientific orthodoxy has little to say here. Despite these limitations, the scientific orthodoxy is still very powerful within the academic communities, if not even more important than the other position, and it has a certain legitimacy of its own among practitioners.

The postmodern and radical constructivist approaches focus mainly upon the analysis of the political and bureaucrat rhetoric. The radical claims of the postmodernists are criticised for their destructive effect on the meaning of existence of Administrative Science. An Administrative Science that is limited to interpreting texts, that denies or doubts the existence of some reality, that attack the

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[27] Adams, K., *Divergences and convergences in public affairs education and research*. „International Journal of Public Policy" 1 (4), 2006, pp. 355–366.

[28] Ateş, H., Genç, E., *Rationalizing the Research Traditions in Public Administration Using the Phronetic Approach,* „The Journal of Knowledge Economy & Knowledge Management", Volume: XI Fall, p.77.

[29] Pollitt, C., *op.cit.*

[30] Pollitt, C. and Bouckaert, G., *Continuity and change in public policy and management*, Cheltenham & Northampton MA, USA, Edward Elgar, 2009, pp. 173-175.

relations between cause and effect is no longer a science of administration in the sense that so many scientists conceived. The postmodern premise in Pollitt's interpretation is: the best way to do research is conceived as narrative[31].

We agree to the fact that there are many ways of producing knowledge. The mediation between the two approaches that we already described can be realised by analysing the way how the details of some context help us analyse other contexts and by investigating the way in which particular issues relate to theory. The focus on identifying methods without any reference to ontology or epistemology obstructs making research that could come to logical and impartial conclusions. Metaphorically expressed, it is an issue that places the wagon in front of the horse[32].

5. Conclusions

Independently of the institutional contexts where it is done, research is important for the economic and cultural development, and for social solidarity. The doctoral studies represent only one of the institutional contexts within which research is done. The structural aspects and semantic explanations are not enough in order to appreciate the nature of the PHD. The PHD gets identity and legitimacy when it responds to the criteria of sufficiency and necessity. Because of these reasons we shall consider that a PHD is legitimated when it has a defied objective that responds to a social desirable need (on this stage, to the necessity of the society of knowledge), when there is an institutional context that supports the development and transformation through a proves of advanced education; through original contributions, it becomes relevant at the social level and has impact; qualification is recognized because of written provisions, and the referring to epistemology, ontology, and methodology are essential criteria.

The science of public administration is, no doubt, interdisciplinary and/ or multidisciplinary. This aspect presupposes that subjects such as finance, accountancy, history, management, economy, budget studies, planning etc., and the approach within a doctoral school should significantly differ from a strict approach of accountancy, history, sociology etc.

The present study intended mainly to offer a synthetic documentation regarding the evolution of the PHD in Administrative Sciences. The study of the social relevance/the impact of the doctoral studies is a subject that suits studies to follow. The studies regarding the impact of research serve as a fundament if information in order to shape the research, by focusing it on issues not sufficiently studied, by identifying the subjects of research, by improving methodologies of

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[31] Pollitt, C., *op.cit*.

[32]Raadschelders, J., *The future of the study of public administration: embedding research object and methodology in epistemology and ontology*, „Public Administratiion Review", 71:6,2011, pp. 916-924, *apud.* Christopher Pollitt, *op.cit*., 2014.

research etc. An exercise of summarizing the results gathered in almost 20 years will offer a synthetical image on the present and the future of the PHD schools in this field.

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The institution of civil servants in Romania, according to current legislation

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Abstract

All the functions and responsibilities established by the law in order to carry out the legal powers of public power by the central public administration, the local public administration and by all autonomous administrative authorities, designate the institution of the civil service. All the legislation in force defines the civil servant as the natural person, appointed under the law in a public position in Romania, who carries out the activities stipulated by the normative acts in force, activities that involve the exercise of the powers of public power. The total number of civil servants within the public administration central and local authorities and within the autonomous administrative authorities are the Corps of Civil Servants in Romania. The public state functions are established and approved according to the law, within the ministries, the specialized bodies of the central public administration, as well as within the autonomous administrative authorities. Territorial public functions are established and approved, according to the law, within the prefect institution, the deconcentrated public services of the ministries and the other bodies of the central public administration in the territorial-administrative units. The local public services are established and approved, according to the law, within their own apparatus, the local public administration authorities and the public institutions subordinated to them.

Keywords: *public function, civil servant, public administration, senior civil servants.*

JEL Classification: H11, H83, K23

1. Function and civil servant in Romania

According to the legal provisions[2] all the functions and responsibilities established by the law in order to carry out the legal attributions of public power by the central public administration, the local public administration and by all autonomous administrative authorities, designate the institution of the civil service. All the legislation in force defines the civil servant as the natural person, appointed under the terms of the law in a public position in Romania, carrying out the activities provided by the normative acts in force, activities involving the exercise of public authority, such as:

1) application of the laws and other normative acts;

2) the adoption of normative acts and other regulations specific to the

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[2] See the Provisions of Law no. 188 of 1999 republished and updated in 2018.

public administration institutions, starting from the principle of subsidiarity and the relationship with the citizens they represent;

3) adopting the policies and strategies, programs, studies, analyzes and statistics necessary for the implementation of the public policies necessary for the development of the territorial administrative unit to which it belongs;

4) internal public advisory, control and auditing activities;

5) human resources and financial management activities;

6) collection of budgetary receivables;

7) the interests of the administrative authority or public administrative institution to which it belongs, in its relations with the natural or legal persons of public or private law, from the country or abroad, within the limits of the legal competences;

8) performs activities compliant with the strategy of informatization of the public administration.

All civil servants within the central and local public administration, as well as within the autonomous administrative authorities are the Corps of Civil Servants in Romania. In accordance with its legal regime, the public service institution in Romania may be[3]:

- the public state function;
- the territorial public function:
- the local public function.

The public state functions are established and approved according to the law, within the ministries, the specialized bodies of the central public administration, as well as within the autonomous administrative authorities.

Territorial public functions are established and approved, according to the law, within the prefect's institution, the deconcentrated public services of the ministries and the other bodies of the central public administration in the territorial-administrative units.

The local public offices are established and approved, according to the law, within the own apparatus of the local public administration authorities and of the public institutions subordinated to them.

The public functions are divided into 3 distinct classes, in relation to the level of studies necessary for the occupation of the respective public function, as follows:

a) Class I, includes the public positions for which graduate diploma studies are required, respectively long-term higher education, graduated with a bachelor's degree or an equivalent;

b) Class II comprises the public positions for the employment of which are required short-term higher education, graduated with a bachelor's degree;

c) The third class includes the public positions for the occupation of

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[3] See Negoita, A., *Drept administrativ si stiinta administratiei*, Ed. All Beck, Bucharest, 2009, p. 67; Alexandru, I., *Structuri, mecanisme si institutii administrative*, Ed. All, Bucharest, 2015, p. 231.

which are required secondary education, i.e. high school secondary education, completed only with a baccalaureate diploma.

According to the level of the public office holder's attributions, they are divided into three main categories, as follows:

1) public functions corresponding to the category of senior civil servants;

2) public functions corresponding to the category of civil servants;

3) public functions corresponding to the category of civil servants of execution.

1) In the category of senior civil servants are included the persons who hold one of the following public functions:

a) Secretary General of the Government and Deputy Secretary General of the Government;

b) secretary general of ministries and other specialized bodies of the central public administration;

c) prefect;

d) deputy secretary general of ministries and other specialized bodies of the central public administration;

e) subprefect;

f) government inspector.

2) The category of civil servants includes persons who hold one of the following public functions:

a) general manager and deputy general manager of the apparatus of the autonomous administrative authorities, of the ministries and of other specialized bodies of the central public administration, as well as in the specific public functions assimilated to them;

b) director and deputy director of the apparatus of the autonomous administrative authorities, of the ministries and of the other specialized bodies of the central public administration, as well as in the specific public functions assimilated to them;

c) secretary of the administrative-territorial unit;

d) Executive Director and Deputy Executive Director of the deconcentrated public services of the ministries and of other specialized bodies of the central public administration in the administrative-territorial units, within the prefect institution, within the own apparatus of the local public administration authorities and of the public institutions subordinated to them, as well as in the specific public functions assimilated to them;

e) the head of service, as well as in the specific public functions assimilated to it;

f) the head of office, as well as in the specific public functions assimilated to it.

3) Public execution functions are structured on professional grades, as follows:

a) superior, as maximum level;

b) principal;
c) assistant;
d) debutant.

According to the legal provisions, the institution of public function in Romania is based on the following principles:

a) the principles of legality, impartiality and objectivity;
b) the principle of total transparency;
c) the principle of efficiency and maximum effectiveness;
d) the principle of responsibility for its application in strict compliance with the legal provisions;
e) the principle of continuous orientation towards the citizen;
f) the principle of stability in the exercise of public office;
g) the principle of hierarchical subordination of the public office;

2. Category of high civil servants

High civil servants perform top management in the central public administration and autonomous administrative authorities. In order to occupy a public function corresponding to the category of high civil servants, the person must cumulatively fulfill the following conditions[4]:

- a. be a graduate of a bachelor's degree program, graduated with a diploma or a long-term university degree, graduated with a Bachelor's degree or an equivalent;
- b. have at least 5 years of seniority in the studies necessary for the exercise of public office;
- c. be a graduate of specialized training programs for a public position corresponding to the category of high civil servants or have exercised a full mandate of parliamentarian;
- d. to promote the national competition to entry into the category of high civil servants.

Specialized training programs to occupy a public position corresponding to the category of high civil servants are organized according to the law.

Entry into the category of high civil servants is done through a national competition. The recruitment is performed by a permanent, independent, seven-member committee, appointed by the Prime Minister's decision. Members of the commission have fixed ten-year mandates and are appointed by rotation. The structure, the criteria for designating the members, the attributions and the way of organization and functioning of the commission stipulated in par. (1) shall be established by the Government Decision, at the proposal of the National Agency of Civil Servants. The persons who have promoted the national competition to

[4] See Bondar, F., *Politici publice si administratie publica*, Ed Polirom, Iasi, 2017, p. 132; Bratianu C., *Paradigmele managementului universitar*, Ed. Economica, Bucharest, 2012, p. 27.

entry into the category of high civil servants can be appointed to the public positions corresponding to the category of high civil servants. The appointment, modification, suspension, termination of service relations, as well as disciplinary sanctioning of senior civil servants shall be done, according to the law, by the Romanian Government or by the Prime Minister according to the legal competencies. Upon dismissal from public office, senior civil servants are entitled to material compensation under the law on the unitary pay system for civil servants. The evaluation of the individual professional performances of the senior civil servants is done annually, according to the law.

The general evaluation of the senior civil servants is done every two years, in order to confirm the professional knowledge, skills and abilities necessary for the exercise of public office.

High civil servants have the obligation to attend vocational training courses on an annual basis, according to the law. The annual evaluation and general assessment provided for by the law is carried out by an evaluation commission, whose members are appointed by decision of the Prime Minister, at the proposal of the Minister of Internal Affairs[5].

3. Conclusions

The public state functions are established and approved according to the law, within the ministries, the specialized bodies of the central public administration, as well as within the autonomous administrative authorities. Territorial public functions are established and approved, according to the law, within the prefect's institution, the deconcentrated public services of the ministries and other bodies of the central public administration in the territorial-administrative units. The local public functions are established and approved, according to the law, within the own apparatus of the local public administration authorities and of the public institutions subordinated to them. The public functions are divided into 3 distinct classes, in relation to the level of studies necessary for the occupation of the respective public function, thus:

a) Class I, includes the public positions for which graduate diploma studies are required, respectively long-term higher education, graduated with a bachelor's degree or an equivalent;

b) Class II comprises the public positions for the employment of which are required short-term higher education, graduated with a bachelor's degree;

c) The third class includes the public positions for the occupation of which are required secondary education, i.e. high school secondary education, completed only with a baccalaureate diploma.

According to the level of the public office holder's attributions, they are divided into three main categories, as follows:

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[5]See Negulescu P., *Tratat de drept administrativ*, Ed. Lumina Lex, Bucharest, 2013, p. 149.

1) public functions corresponding to the category of senior civil servants;
2) public functions corresponding to the category of civil servants;
3) public functions corresponding to the category of civil servants of execution;

1) In the category of senior civil servants are included the persons who hold one of the following public functions:

a) Secretary General of the Government and Deputy Secretary General of the Government;

b) secretary general of ministries and other specialized bodies of the central public administration;

c) prefect;

d) deputy secretary general of ministries and other specialized bodies of the central public administration;

e) subprefect;

f) government inspector.

2) The category of civil servants includes persons who hold one of the following public functions:

a) general manager and deputy general manager of the apparatus of the autonomous administrative authorities, of the ministries and of other specialized bodies of the central public administration, as well as in the specific public functions assimilated to them;

b) director and deputy director of the apparatus of the autonomous administrative authorities, of the ministries and of the other specialized bodies of the central public administration, as well as in the specific public functions assimilated to them;

c) secretary of the administrative-territorial unit;

d) Executive Director and Deputy Executive Director of the deconcentrated public services of the ministries and of other specialized bodies of the central public administration in the administrative-territorial units, within the prefect institution, within the own apparatus of the local public administration authorities and of the public institutions subordinated to them, as well as in the specific public functions assimilated to them;

e) the head of service, as well as in the specific public functions assimilated to it;

f) the head of office, as well as in the specific public functions assimilated to it.

3) Public execution functions are structured on professional grades, as follows:

a) superior, as maximum level;

b) principal;

c) assistant;

d) debutant.

According to the legal provisions, the institution of public function in Romania is based on the following principles:

- the principles of legality, impartiality and objectivity;
- the principle of total transparency;
- the principle of efficiency and maximum effectiveness;
- the principle of responsibility for its application in strict compliance with the legal provisions;
- the principle of continuous orientation towards the citizen;
- the principle of stability in the exercise of public office;
- the principle of hierarchical subordination of the public office.

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Considerations on certain legal issues regarding the establishment of the National Council for the Development of Human Resources in Public Administration

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Abstract

At the beginning of 2019, Law no. 69/2019 on the establishment of the National Council for the Development of Human Resources in Public Administration entered into force. It is an advisory, with no legal personality, non-permanent body that functions alongside the General Secretary of the Government under the Prime Minister's coordination. Although the role of establishing such a body has been intensely debated and appreciated as being of particular interest in the existence of a strategy to strengthen the administrative efficiency of the Member States of the European Union, including a reform of the public administration, the entry into force of this law was not exempt from contradictory discussions, culminating even with the claim of its unconstitutionality, through the submission in court of the exception of unconstitutionality.

Keywords: *human resources, public administration, unconstitutionality exception, administrative reform.*

JEL Classification: H83, K23, K30, K39

1. Introduction

Law no. 69/2019 on the establishment of the National Council for Human Resources Development in the Public Administration came into force at the beginning of 2019. This is a consulting body, without legal personality, with non-permanent activity that functions annexed to the Government General Secretariat and is coordinated by the Prime minister. Although the setup of such a body was intensely debated and considered to be of special interest for the consolidation of the strategic administrative efficiency of EU member states, fact which represents a reform of the public administration, the coming into force of the present law was not without its contradictory debate that have resulted in invoking an exception of unconstitutionality.

In accordance with Article 7 of Law no. 52/2003 regarding the decision-making transparency of the public administration, the Regional Development and Public Administration Ministry has published the project of this forthcoming law.

After its debate, the law has come into force on 31st of January 2019 fol-

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lowed shortly by a notice of its unconstitutionality made by the Romanian President himself.[2]

2. The purpose of setting up of the National Council for the Development of Human Resource within Public Administration

The purpose of the newly formed body is mainly consultative, to facilitate and promote an adequate institutional set-up for the coordination of the public, politic and actions that have an impact upon the human resources within the Public Administration. This way, the Council will ensure the human resources development within the public administration and also ensure that the Romanian Government fulfills its objectives within the human resources by supervising it.

The coordination of the Council is made by the Prime minister and in its absence, by the Minister of Regional Development and Public Administration. In case of the previous two's absence, coordination can also be made by representative of the General Government Secretariat, respectively by the representative of the Ministry of the Regional Development and Public Administration. The General Government Secretariat ensures the technical secretariat support of the Council.

The numerous Council members will have a four year mandate and will be as follows: a representative of the Government General Secretariat, a representative of the Ministry of Regional Development and Public Administration, a representative of The Labour and Social Justice Ministry, a representative of the Public Finance Ministry, a representative of the National Education Ministry, a representative of the National Agency for Civil Service, a representative each of the local public administration, two representatives from the academia designated by the Rectors National Council, a representative from the NGOs that concern the human resources and not least, two representatives of the national union confederation for public administration nominated by the Economic and Social Council.

The context of such law was the possibility of access to the European funds for the 2014-2020 period for the public administration, more precisely, the creation of a strategy to consolidate the administrative efficiency of EU member states. In order to reach such an objective, a reform of the public administration on multiple aspects was imposed. Among these are the analyses and strategic planning of legal, administrative and procedural reform, the development of quality system management, simplification and rationalisation of administrative pro-

[2] Law no. 69/2019 on the establishment of the National Council for Human Resources Development in the Public Administration, published in the Official Monitor of Romania, Part I, no. 329 of 25 April 2019.

cedure, the development and application of a politic and strategy for human resources as well as their development on all levels, development of procedures and instruments to monitor and value.

Its scope was to adopt a politic to the human resources system that was in keeping with demands of a modern administration by setting up a collective body of specialists within the human resources.

It was intended to create an independent structure for the Council, with a scope to evaluate the fulfilment and also report the objectives set up within the human resources. At the same time, the Council recommends the public policy and the important legal proposals by offering a consultation role and offering a warning mechanism concerning certain legal proposals, ensuring a balance view, transparency, and predictability of the state administrative body.

The Council Members are remunerated through a special indemnisation of limited time that represents a maximum 10% of the indemnisation established by law for the Secretary of State office. The Council meetings take place each quarter and any other time is deemed necessary. The meetings are called by the Council's coordinator.

3. Invoking the exception of unconstitutionality

Shortly after sending the law to the President to be promulgated, the President raised the exception of the unconstitutionality of the law as a whole, considering the arguments put forward, asking the Constitutional Court to find that the Law on the establishment of the National Council for Human Resources Development in the Public Administration is unconstitutional.

A first argument was the qualification by the very criticised law of the newly created council as an advisory body that functions alongside the General Secretariat of the Government, in coordination with the Prime Minister. According to the statement made, its establishment can only be achieved by a secondary regulation under the competence of the central public administration authority, respectively, by a Government decision. From this perspective, the establishment by law of the National Council for the development of human resources in the public administration contravenes the provisions of art. 1 par. (4) and par. (5) as well as art. 102 par. (1) and paragraph (2) of the Constitution.

Thus, the legislator clearly provided in art. 12 of Law no. 90/2001 on the organisation and functioning of the Romanian Government and of the ministries, that in order to solve problems within its competence, the Government may establish advisory bodies, while for the purposes of policy development, integration, correlation and monitoring, the Government may establish councils, committees and interministerial committees. The way of organisation and functioning of the created structures and their services is established by Government decision, within the limits of the approved budget.

From the paragraph above as well as from the possibility of their interpretation, it is understood that in the fulfilment of its constitutional role, the Government has a wide appreciation regarding the advisability of setting up bodies with an advisory nature, without any limitation on the fields or representatives of the bodies and what can be part of them. Under that circumstance, by corroborating the provisions laid down in Art. 12 of the Law no. 90/2001, as well as those of art. 102 of the Constitution, it is clear that the establishment of the National Council for the Development of Human Resources in the Public Administration can operate through its regulation in a Governmental decision and not by law, an aspect contrary to the provisions of Art. 1 par. (4) and (5), as well as of art. 61 of the Constitution.

Moreover, as the newly created council (consultative body) will be made up of two representatives of the national trade union confederations, that are made up of trade union organisations of the public administration employees designated by the Economic and Social Council, the provisions of art. 141 of the Constitution are violated. According to the legislative provision, the Economic and Social Council is a consultative body of Parliament and Government in the areas of expertise established by its organic law of establishment, organisation and functioning. The establishment of a new competence for the Economic and Social Council, namely to appoint representatives in the National Human Resources Development Council in the public administration, is a matter of the functioning of the Economic and Social Council, being a separate function, added to those already existing in the art. 5 of Law no. 248/2013. Thus, it must be exercised distinctly by the Economic and Social Council, without overlapping its advisory function, made by its members.

Consequently, in this second case, we observe a new problem of the regulatory way we have on the legislation adopted within our state. Such completion of the powers of a constitutional authority can only be achieved through organic law. However, the law deducted from the constitutionality control was adopted by the Parliament in compliance with the provisions of art. 76 par. (2) of the Constitution, so as an ordinary law, thus making the law criticised, to violate the provisions of Art. 141 of the Constitution, respectively those of art. 76 par. (1) of the Constitution.

Therefore, under the exception of unconstitutionality, attention was drawn to the fact that, by its role and attributions, the National Council for the Development of Human Resources in Public Administration is circumscribed to the regulatory field assigned by the Constitution to the Government. However, as the creation of the new body adds new competencies to the Economic and Social Council, the law deducted from the constitutional control is circumscribed to the field of organic law.

Another reason for which the criticised law was considered to be unconstitutional as a whole is also the fact that this council, according to art. 2 par. (2) letter d), among its attributions, will also need to endorse the national strategies

on human resources in public administration as well as the draft normative acts with impact on the personnel of the public administration, at national level. Thus, it was considered that the phrase "human resources in public administration" could generate multiple interpretations of the scope of the law, namely from the point of view of the recipients of the legal norm and could be qualified as imprecise.

Moreover, the various interpretations may also arise regarding the powers of the Council in view of the possible overlapping of its competences with those of the central or local public authorities or other authorities.

Thus, the extremely generic phrase "human resources in public administration" in the provisions of art. 2 par. (2) letter d) from the law criticised may concern all categories of personnel within the public administration referred to in Chapter V of the Romanian Constitution, respectively Art. 116-123, according to which the public administration bodies are the ministries, the specialised bodies of the central public administration, the autonomous administrative authorities, the armed forces and the Supreme Council of Defence of the country, the county councils, the local councils, the mayors, as well as the prefects.

As such, in the existing form, the provisions of the criticised law concern, or at least this is the result of interpretation, all categories of personnel within the central and local public administration bodies, including the armed forces and the Supreme Council of National Defence. From this perspective, the provisions of the criticised law do not meet the requirements of clarity and predictability, as the competencies of the National Council for the Development of Human Resources in Public Administration overlap in this matter with those of the Supreme Council of Defence of the Country.

Last but not least, as according to the provisions of art. 120 par. (1) of the Constitution shows that the public administration in the territorial-administrative units is based on the principles of decentralisation, local autonomy and the deconcentration of public services, the competencies of the National Council for Human Resources Development in the public administration seem to overlap in this area and those of the administration authorities local governments, who will no longer be able to decide on local interests, the government therefore, expanding its control over them.

Such a legislative solution is ambiguous in view of the overlapping of the competences of the National Council for Human Resources Development in the public administration provided for in art. 2 par. (2) letter d) from the law criticised with those of the National Agency of Civil Servants, stipulated in art. 22 par. (1) and paragraph (2) of the Law no. 188/1999 on the Statute of civil servants.

4. Conclusions

Although the notification that the Law on the establishment of the National Council for Human Resources Development in the Public Administration

is unconstitutional was rejected in unanimously as unfounded by the Constitutional Court, argument that is still to be published, the argument and notification made can not be ignored in relation to the legal process within Romania.

Using this argument, it is to be noted that in the last decades, the law has brought temporary solutions that has lost its role of being abstract, general and permanent. We have reached in time, as a result of the present political reality a restriction of the national law by the European Union, and specially a non-obeisance towards the state's national power in respect of the laws that it can adopt. As a result, we have often an interference by the executive power of the State in the legislative process, that can only have as an effect diminishing the role and power of Parliament as law adoption body.

What could be demonstrated by the formulated exception of unconstitutionality in the above case, despite the ruling of the Constitutional Court, and resulted therefore from the law adopting process, is the unpredictability and difficult access to the law.

We can argue that in the situation of the above described normative act and its exception of unconstitutionality, there still exists an unclarity of its contents and also a lack of predictability caused by the overlapping of competences between the newly created body and the attributions of other public authorities or institutions, without specifically regulating the relationships in which they work together.

However, compliance with the standards of clarity and predictability of the law is a constitutional requirement. It is precisely for this reason that the long period we go through at the legislative level is an alarm signal and can be considered a real crisis of the law as a result of the reconsideration of its rationality. The emergency of new normative acts, unfortunately does not rely anymore on its main pillars, namely the knowledge of reality and the correct and appropriate application of the legislative technique.

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The obligation to notify the judicial bodies in relation to commission of certain acts stipulated by the criminal law in connection with the exercise of state authority

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Abstract

Entailing criminal responsibility is the most severe form of liability in a rule of law. Knowing the criminal law is a task for all citizens. When the violation of these rules is done by the very persons who carry out tasks within the state authorities, this becomes even more serious. Our study aims to contribute to knowing the categories of persons who are criminally responsible for non-fulfilment of certain obligations deriving from their professional qualities when they are aware of commission of offenses and to determining their contribution to the initiation of criminal proceedings. The study of the judicial practice in criminal matters, in connection with the guidance decisions of the High Court of Cassation and Justice, helps to determine the scope of criminal liability of the civil servant when it has the obligation to denounce certain criminal acts which come to his/her attention from the perspective of his/her work duties.

Keywords: *civil servant, criminal liability, notification of the judicial body, criminal law.*

JEL Classification: K14

1. Introduction

The initiation of the criminal trial is the consequence of informing the judicial bodies about the commission of a crime, by one of the ways of referral provided by the law. Thus, depending on the effects they produce, the ways in which criminal prosecution bodies are notified are classified in general methods of notification (complaint, denunciation, ex officio referral) and special methods of notification (prior complaint, notification at the request of the competent body, authorization of the body provided by law). These means of notification determine the interest and/or obligation of the injured main subject in the initiation of criminal proceedings. On the other hand, in view of the exercise of the state authority for which, in particular, certain state institutions have been created, there is an obligation to denounce, therefore to notify, the acts provided for by the criminal law of which they become aware following the exercise of public office. Thus, the Penal Code provides in art. 267 the liability of the civil servant who, when becoming aware of the commission of a deed stipulated by criminal law in

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connection with the office where he/she performs his/her duties, fails to immediately notify the criminal prosecution bodies.

In addition to the provision of the Criminal Code imposing the obligation to denounce in terms of the civil servant, there is the regulation of Art. 291 of the Criminal Procedure Code, according to which it is mandatory and it is necessary to immediately inform the criminal prosecution authority regarding the commission of an offense for which the criminal action is initiated ex officio and of which, in the exercise of their work duties, the following categories of persons have become aware:

- those with a leading position within a public administration authority or within other public authorities, public institutions or other legal entities governed by public law[2];
- those with control duties[3];
- those exercising a public-interest service for which they have been vested by public authorities or which are subject to their control or supervision regarding the performance of that public interest service.

To this method of notification of the judicial body it is added, according to art. 288. par. (1) of the Criminal Code, the notification made by the ascertainment bodies, which are obliged to draw up finding documents, according to the law. Thus, according to art. 61 and 62 of the criminal procedure code, these deeds are concluded by:

- bodies of state inspectorates, other state bodies, as well as public authorities, public institutions or other legal entities governed by public law, for offenses that constitute violations of the provisions and obligations the observance of which they control, according to the law[4];
- the control and management bodies of public administration authorities, of other public authorities, public institutions or of other legal entities governed

[2] For example, in the Bucharest-Jilava Penitentiary, the head of the unit finds out, during the performance of the penitentiary activity verification tasks, about the placement of 5 telephones and 20 grams of heroin by chief agent X.Y. Thus, he/she has the obligation to announce the Directorate for Prevention and Control of Crime and Terrorism.

[3] For example: the general manager of a trading company having as sole shareholder the local council who, in the exercise of its duties, finds that the deputy director, knowingly, concludes contracts on behalf of this company, in breach of the legal provisions and of the decision of the general meeting of the shareholders , and thus causes damage to the patrimony of the company (a crime that meets the constitutive elements of the crime of abuse of office against the public interests stipulated by article 248 of the penal code), notifies the prosecutor or the criminal prosecution bodies.

[4] For example, evidentiary documents regarding violation of the provisions of the Forestry Code (Law no. 46/2008 published in the Official Gazette no. 238/March 27th, 2008) drawn up by employees empowered by the Romsilva National Forest Authority or by the central public authority responsible for sylviculture - forest rangers, foresters, forestry technicians; the evidentiary documents compiled by the financial-fiscal bodies - General Antifraud Directorate.

by public law, for offenses committed in connection with job duties by those under their subordination or control[5];

- the public order and national security bodies, for the offenses established during the exercise of the duties provided by the law[6].
- commanders of ships and aircrafts.

In the case of the first two categories of persons, the obligation to notify criminal prosecution bodies is doubled by the obligation to take measures to prevent the disappearance of traces of offenses, *corpus delicti* and other means of evidence. The latter obligation operates even if the criminal prosecution body has been otherwise notified of commission of the offense[7].

Therefore, we have several categories of persons who have the obligation to denounce/notify the commission of criminal acts ascertained as a result of the exercise of public office, giving rise to the need to clarify their status of civil servants, from which derives a series of obligations, some of which in the criminal sphere.

2. Theoretical and practical aspects of the issue

A civil servant within the meaning of the Penal law (Article 175 of the Criminal Code) is a person who, on a permanent or temporary basis, with or without remuneration: exercises attributions and responsibilities established by law in order to achieve the prerogatives of the legislative, executive or judicial power; exercises a dignitary public function or a **public function of any kind**; exercises, solely or together with other persons, within an autonomous corporation, another economic operator or a **legal person with full or majority state capital** or a **legal person declared to be of public utility**, attributions related to the accomplishment of its object of activity. Furthermore, a public official within the meaning of criminal law is a person who performs a **service of public interest** for which he/she has been vested by the public authorities or who is under their control or supervision with regard to the performance of that public service.[8]

[5] For example, the public servant of the General Directorate for Social Assistance and Child Protection, who becomes aware of a violent assault by a nursing assistant on the minor child under his/her care;

[6] By adopting Government Decision no. 535 of 26.06.2014 the Strategic Interministerial Group was established to increase the capacity of governmental institutions to prevent and combat the criminality of national security threats (GIS), with a platform strategic role for cooperation between the national security structures, as well as other governmental and non-governmental institutions, to ensure consistency in the implementation of crime prevention and control policies by pooling capabilities, reducing costs and increasing efficiency.

[7] Vintilă Dongoroz and others, *Theoretical explanations of the Romanian Criminal Code*, vol. IV, Academia R.S.R., Bucharest, 1972, p. 41.

[8] http://dorin.ciuncan.com/documentare/sesizarea-organelor-de-urmarire-penala-in-noua-legislatie-2/, consulted on 15.05.2019.

The notion of *public service* must not be confused with the notion of *public utility service*. While public service is carried out by a state organization, the public utility service is a non-state organization, namely associations and foundations[9] .

Referring to the *legal person under public law*, the Civil Code does not give an explicit definition of this person. Article 191 of the Civil Code provides that legal persons governed by public law are established by law, except when they are established by acts of central or local public administration authorities or by other means prescribed by law. The Civil Code provides that they are legal entities governed by public law: the State; administrative-territorial units; state bodies *empowered by law* to exercise some of the functions of the Government; the state bodies *empowered by the acts of the central public authorities* to exercise some of the functions of the Government if this possibility is expressly provided by law.

With regard to the person exercising a **public-interest service** for which it was empowered by the public authorities or which is under their control or supervision with regard to the performance of that public service, the High Court of Cassation and Justice decided on a series of officials as being part of the body of civil servants as a result of their function viewed in terms its obtainment or the fact that it is subject to the control of the state authority. Thus, we have: the employees of banks, namely, the bank clerk, employee of an entirely privately owned banking company, authorized and supervised by the National Bank of Romania, is a civil servant, in accordance with the provisions of art.175 paragraph (2) of the criminal code[10]; the professor of public pre-university education has the status of civil servant in the sense of the provisions of art. 175 par. (1) letter b second sentence of the Criminal Code[11]; the doctor who carries out the activity of performing a service of public interest, employed by work contract in a hospital unit in the public health system, has the status of a civil servant, according to art. 175 par. 1 letter b) the second sentence of the Criminal Code[12]; within the meaning of art. 175 par. (1) letter b) sentence II of the Criminal Code or within the meaning of art. 175 par. (2) of the Criminal Code, the natural person acting as chief doctor of a department at a public hospital, provided by art. 163 of Law no. 95/2006, is a civil servant or is considered a civil servant, on the basis of a management contract, provided by art. 185 par. (5) of the Law no. 95/2006 without

[9] Therefore, public utility, in the sense of Governmental ordinance no. 26/2000 on associations and foundations, published in the Official Gazette no. 39 of January 31st, 2000, means any activity aimed at achieving beneficial purposes in the activity of general *public interest* and/or of a community. The public authority responsible for granting public utility status is the Government of Romania (by means of the General Secretariat) which, by Government decision, grants this status.

[10] Decision no. 18 in file no. 977/1/2017/HP/P.

[11] Decision of the ÎCCJ no. 8/15.03.2017 was published in the Official Gazette of Romania, Part I, no. 290/25.04.2017.

[12] Decision of the ÎCCJ no. 26/2014, published in the Official Gazette, Part I, no. 24 of 13/01/ 2015.

having concluded, at the same time, a distinct individual employment contract for an indefinite period with that public hospital in respect of the physician activity in the department which he/she manages[13]; the technical forensic expert is a civil servant in accordance with the provisions of art. 175 par. (1) letter a) of the Criminal Code[14].

Persons exercising a public interest service for which they have been empowered by the public authorities or who are under their control or supervision with respect to the performance of that public interest service, are those laid down in the Statute of the professions of public notary, lawyer, physician, pharmacist, psychologist and who have the same responsibility as provided by Art. 267 of the penal code.

In the case of *persons part of senior management* within a public administration authority or other public authorities, they are those which perform certain functions within the central public administration or within the local public administration[15]. They have a dual obligation, in that the obligation to notify the criminal prosecution bodies is doubled by the obligation to take measures to prevent the disappearance of traces of the offenses, corpus delicti and other means of evidence. Denunciation is civic and voluntary, however exceptionally it is official and binding. We can thus say that the denunciation can be seen from two angles, first, the denunciation that a *civil servant* has to make regarding the offense committed in connection with the function, and the second, the denunciation viewed as a legal obligation to denounce the offense which came to his/her knowledge in the exercise of his/her profession. Reporting becomes mandatory in terms of its capacity and in relation to the activity it carries out[16].

In the case of this latter category, casuistry is very complex and closely related to subject-matter jurisdiction, as "*The surveillance of maritime borders*, for example, *is not limited only to detecting the attempts of unauthorized border crossing but extends to measures such as interception of ships suspected of attempting to gain access to EU territory without being subject to border verifications, measures aimed at addressing search and rescue situations that might arise during an operation of border surveillance at sea, as well as measures designed to ensure successful completion of the operation"*[17]. As an example in this case,

[13] Decision of the ÎCCJ no. 5/28.02. 2017, https://legeaz.net/monitorul-oficial-254-2017/decizie-iccj-5-2017-calitate-functionar-public-medic-sef-sectie-spital-public, consulted on 15.05.2019.
[14] Decision of the ÎCCJ no. 20/201, https://legestart.ro/expertul-contabil-judiciar-este-functionar-public/, consulted on 15.05.2019.
[15] The category of public management positions is found in Law no. 161/2003 on certain measures for ensuring transparency in the exercise of public servant positions, public functions and in the business environment, prevention and sanctioning corruption, published in Official Gazette no. 279 of 21.04.2003.
[16] Grigore Gr. Theodoru, *Treaty of criminal proceedings law*, Hamangiu Publishing House, Bucharest, 2013, p. 478-488.
[17] Adrian Lăzăroaia, *Management of the External Borders of the European Union and the Schengen Area*, Sitech Publishing House, Craiova 2018, p. 91.

the ship commanders' obligation is also related to the action/inaction of search and rescue of ships at sea.

According to the provisions of art. 288 of the criminal procedure code, on the acts concluded by the ascertainment bodies stipulated by law, whenever there is a reasonable suspicion regarding the commission of an offense, they shall be obliged to draw up a report on the circumstances found:

- bodies of state inspectorates, other state bodies, as well as of public authorities, public institutions or other public law legal persons, for offenses that constitute violations of the provisions and obligations the observance of which they control, according to the law;
- the public order and national security bodies, for the offenses established during the exercise of the duties provided by the law;
- the control and management bodies of public administration authorities, other public authorities, public institutions or other legal entities governed by public law, for offenses committed in connection with the public function by those under their subordination or control[18];
- commanders of ships and aircrafts, while the ships and aircrafts they command are outside ports or airports and for offenses committed on such ships or aircrafts.

According to art. 288 par. (3) of the penal procedure code, in the case of crimes committed by military personnel, the commander's notification is necessary only in respect of the offenses provided in art. 413-417 of the Criminal Code.

This report of the ascertainment bodies is not as valuable as specialized findings in the criminal proceedings. It is only an act of notification of the criminal prosecution bodies, the latter no longer needing to be notified ex officio. If they fail to fulfil their obligation to refer the matter to the judicial body, they are responsible for the act of omission to notify stipulated under art. 267 of the penal code.

The offense of omission of notification must not be confused with the offense of non-denunciation provided by art. 266 of the penal code. The difference between the two offenses is due to the capacity of the person notifying the criminal prosecution bodies/authorities and due to the nature of the offenses found. Thus, the case of the offence of omission to notify, refers to the deeds provided by the criminal law, but in connection with the function in which it performs its duties, while in the case of non-denunciation, the legislator refers to any deed stipulated by the criminal law against life or which resulted in the death of a person.

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[18] Example: the civil servant, a specialized inspector within D.G.F.P, who during the inspection finds, following the verifications, the commission of certain tax evasion acts, is required to immediately notify the prosecutor or the criminal prosecution body with regard to this matter.

3. Conclusions

The importance of knowing the attributions of each category of persons who are part of state authorities, especially when it comes to knowing and enforcing criminal law, it is particularly important when it comes to the speed of criminal proceedings. The competence and professionalism of the civil servant contributes to the performance of certain activities with celerity, within a reasonable timeframe and with the observance of the principles of criminal procedural law. Knowing the judicial practice of the courts ensures a unitary interpretation given by the High Court of Cassation and Justice. The issue of the civil servant has generated many discussions over time, and the clarification of all practical aspects of the notion in question ensures uniform application of the law, and this starts from the theoretical approach of clarifying the categories of people making up this category, which was the objective of the present study.

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Aspects on the practical utility of the transfer in the field of the employees and the public servant. Proposals *de lege ferenda*

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Abstract
The transfer institution aims to ensure the continuity of the individual labor contract/individual administrative contract[2] *and seniority, the new unit being subrogated to the contractual rights and obligations assumed by the first unit. Regarding the practical utility of the transfer, it should be stressed that the employment/ service relationship*[3] *does not cease with the first employer, and a new contract with the second employer is concluded; thus, the same individual labor contract/individual administrative contract is ceded definitively from the first to the second employer.*

Keywords: *individual employment contract; individual administrative; change contract; transfer.*

JEL Clasification: K23, K31

1. Introductory issues

A) The current Labor Code no longer regulates the transfer of employees, neither on request nor in the interest of the service – as a definitive way of modifying the individual labor contract.

As judiciously pointed out in the literature[4], the solution adopted by the legislator is justified by the new economic realities[5], but also by the legal norms that no longer have any negative effect on the employee who resigns and is employed by another employer – without make use of transfer.

B) Framework Law no. 153/2017 on the remuneration of staff paid from public funds[6] resorts to the legal transfer of the transferring institution within the

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[2] To be seen I.T. Ștefănescu, *Tratat teoretic şi practic de drept al muncii*, 4th ed., revised and added, Universul Juridic Publishing House, Bucharest, 2017, p. 24.

[3] *Idem*, p. 22-28.

[4] To be seen I.T. Ştefănescu, Ş. Beligrădeanu, *Prezentare de ansamblu şi observaţii critice asupra noului Cod al muncii,* „Dreptul", no. 4/2003, p. 25.

[5] For example, in Austrian labor law, transfer is permitted provided that this possibility is expressly provided for at the conclusion of the individual employment contract (www.natlex.ilo.org); according to the Labor Code of the Russian Federation, the permanent transfer to another unit is allowed only with the written consent of the employee (www.natlex.ilo.org); in the Labor Contract Act in Portugal, the transfer is allowed provided that this measure does not harm the employee (www.natlex.ilo.org).

[6] Republished in the "Official Gazette", Part I, no. 492 of 28 June 2017.

scope of art. 32; thus, par. 1 of art. mentioned above *expressis verbis* that the filling of a vacancy in the budgetary system can also be done by transfer.

The legal requirement to be fulfilled is to be achieved on a similar or equivalent budget item (art. 32 par. 1 of Law no. 153/2017).

Under the legal provisions applicable in the matter, it is established (*ex lege* – as we have indicated) the requirement for the transfer to be able to intervene as follows:

• in the interest of the service – in which case the written consent of the transferring person is imperatively necessary;

• at the request of the person, following the approval of the transfer request by the head of the public authority/institution to which transfer is requested and from which he/she is transferred (art. 32 par. 2 of Law no. 153/2017).

In addition to the requirements outlined above, art. 32 par. 4 of the Law no. 153/2017 requires the authorizing officer, in relation to the requirements of the post, to establish transfer selection criteria by consulting[7] the representative union organizations at the unit level or, where appropriate, consulting the employees' representatives, where such trade unions are not.

C) Mobility within the civil servants' body is achieved by changing the service relations: for the efficiency of the public authorities/institutions; in the interest of the civil servant – for the career development in the public office.

Modification of the service relationships of civil servants and senior civil servants takes place through: delegation; posting; transfer; moving within the public authority/institution or within another structure without legal personality of the public authority/institution; the temporary exercise of a public management function (art. 87 par. 2 of Law no. 188/1999 on the Civil Servants' Statute[8]).

2. Aspects regarding the transfer of employees/civil servants

A) As we have seen, the legal institution of the transfer of employees – a tripartite agreement between the two employers and the employee concerned, a definitive assignment[9] of the individual labor contract[10] – does not benefit from

[7] So, not with the consent of those involved in the decision-making process.
[8] Republished in the "Official Gazette", Part I, no. 365 of May, 2007.
[9] *A contrario* the posting of employees consists of the temporary change of the work place, at the employer's disposal, to another employer for the purpose of carrying out works in his/her interest (art. 45-47 of the Labor Code); in this case, however, we are talking about a temporary and partial assignment of the individual labor contract between two units. Posting implies a convention in the sense that the unit where the employee is employed under a contract of employment accepts to be temporarily replaced by another unit for the purpose of fulfilling the latter's own duties.
[10] To be seen I.T. Ștefănescu in *Dicționar de drept al muncii*, de I.T. Ștefănescu (coord.), M. Gheorghe, I. Șorică, A.G. Uluitu, B. Vartolomei, A. Vidat, V. Voinescu, Universul Juridic Publishing House, Bucharest, 2014, p. 348.

regulation in the current legislative context.

However, in the legal doctrine, contradictory views on transfer were expressed, namely:

• according to the first opinion[11], even if it is not expressly regulated, there is nothing to prevent the transfer being used even now by the parties' agreement. It is an application of the principle "*what is not forbidden by law is permitted*";

• according to the second opinion[12], the institution of the transfer may be used only if the special legislation expressly provides for this modulation of the individual labor contract;

• in line with those formulated in a third opinion[13], it is appreciated that the transfer has a legal basis in the Labor Code, respectively in art. 41 par. 1, which refers to the modification of the individual labor contract "*only by agreement of the parties*".

As a natural consequence of the above mentioned, we draw the first opinion[14], considering, on the one hand, the practical utility of the transfer and, on the other hand, the fact that the transfer institution is governed by special laws for several categories professional[15].

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[11] To be seen A. Ţiclea, *Tratat de dreptul muncii – Legislație. Doctrină. Jurisprudență*, 10th ed., updated, Universul Juridic Publishing House, Bucharest, 2016, p. 705.

[12] To be seen Al. Athanasiu, L. Dima, *Dreptul muncii*, All Beck Publishing House, Bucharest, 2005, p. 231-232; D. Ţop, *Posibilitatea transferului la un alt angajator în cazul persoanelor încadrate prin contract individual de muncă (I),* „Dreptul", no. 1/2007, p. 87-92.

[13] To be seen A. Cioriciu, *Consideraţii privind transferul personalului,* „Revista română de dreptul muncii", no. 2/2006, p. 54-59; A. Cioriciu*, Consideraţii privind transferul funcţionarilor publici,* „Revista română de dreptul muncii", no. 3/2007, p. 62-68; A. Cioriciu*, Transferul funcţionarilor publici care beneficiază de statute speciale*, „Revista română de dreptul muncii", no. 5/2007, p. 32-52; A. Cioriciu Ştefănescu, *Observaţii privind transferul funcţionarilor publici potrivit Legii nr. 188/1999,* „Revista română de dreptul muncii", no. 7/2009, p. 21-35.

[14] To be seen A. Ţiclea, *Tratat de dreptul muncii*, *op. cit.,* p. 705; Ş. Beligrădeanu, *Posibilitatea transferului la un alt angajator în cazul persoanelor încadrate prin contract individual de muncă (II)*, "Dreptul", no. 1/2007, p. 92-104; I.T. Ștefănescu in *Dicționar de drept al muncii*, *op. cit.*, p. 348.

[15] As an example, we highlight the following: in the case of civil servants, the transfer can take place between public authorities/institutions as follows: in the interests of the service; at the request of a civil servant (art. 90 par. 1 of Law no. 188/1999). The transfer of judges and prosecutors from a court to another court or from a prosecutor's office to another prosecutor's office or to a public institution is approved at the request of those concerned by the corresponding section of the Superior Council of Magistracy with the advisory opinion of the president of the court Chief Prosecutor of the appropriate prosecutor's office (art. 60 of Law no. 303/2004 on the Status of Judges and Prosecutors). The transfer of probation staff between probation services is approved at the request of the Minister of Justice with the approval of the Director of the Probation Division and the heads of probation services involved (art. 43 par. 1 of Law no. 123/2006 on the status of probation staff). The transfer is made on a vacant post in a function equivalent to the function held. By way of exception, the probation officer may be transferred, upon request, to probation counsel (art. 43 par. 2 and par. 3 of Law no. 123/2006 on the status of probation staff).

It can be appreciated that the principle of equality and non-discrimination between the citizens is violated – since in some professional categories the transfer is regulated and in others it is not.

There is no impediment, as we have seen, through a tripartite agreement[16] (between the employee, the employer and another employer) to make the transfer.

The transfer institution is intended to ensure the continuity of the individual employment contract and seniority, the new unit being subrogated to the contractual rights and obligations assumed by the first unit.

B) In the case of civil servants, the transfer may take place between public authorities/institutions as follows: in the interest of the service; at the request of a civil servant (art. 90 par. 1 of Law no. 188/1999).

The transfer[17] may take place in a public office for which the specific conditions set out in the job description are fulfilled (art. 90 par. 2 of Law no. 188/1999).

a) *The transfer in the interest of the service* may be done only with the written consent of the transferred civil servant; the lack of this agreement leads to the nullity of the measure[18]**.**

b) *The transfer on request* is made to a public position of the same category, class and professional rank or in a lower public office following the approval of the transfer request of the civil servant by the head of the public authority/institution to which the transfer is requested. In this case, the transfer may take place only between public authorities/institutions in the central public administration, between autonomous administrative authorities or, as the case may be, between public authorities/institutions in the local public administration (art. 90 par. 5 of Law no. 188/1999).

c) In the case of senior civil servants, the transfer may be made to senior management positions of the same level or, as the case may be, of a lower level, whose employment conditions and professional experience required for employment are similar to those of the post from which transfers the transfer (art. 90 par. 6 of Law no. 188/1999).

d) In the case of senior civil servants, the transfer on request may be made by the person having the legal power of appointment to the public position, at the

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[16] To be seen I.T. Ștefănescu in *Dicționar de drept al muncii*, *op. cit.*, p. 348.

[17] Decision no. 905/2017 on the General Register of Employees' Evidence (published in the "Official Gazette of Romania", Part I, no. 1005 of 19 December 2017) stipulates in the art. 3 par. 2 the obligation of the employers (to be mentioned in art. 1 of the same normative act) to complete the register in the order of employment of the persons, with the following data – without the enumeration being limiting: (...) j) date of the transfer as stipulated in art. 90 par. 9 of the Law no. 188/1999 on the Statute of civil servants and the identification data of the employer to whom the transfer is made; k) the date of takeover by transfer, as provided in art. 90 par. 9 of the Law no. 188/1999 and art. 32 of the Framework Law no. 153/2017 on the remuneration of staff paid out of public funds as well as the identification data of the employer from whom the transfer is made.

[18] As stated by the Bucharest Court of Appeal, Civil Division VII and for cases concerning labor and social conflicts within Decision no. 1426/A/2006.

motivated request of the high civil servant and with the approval of the head of the public authority or institution in whose structure the vacant public office is located is to be transferred, subject to the specific conditions laid down for the executive or executive public function (art. 90 par. 8 of Law no. 188/1999).

3. Conclusions

As a natural consequence of the highlighting of the applicable legal regime in the area covered, the following can be distinguished:

A) In the context prior to 1990, the transfer was an essential legal instrument for moving from one unit to another, while retaining uninterrupted seniority in work.

B) The legal regime applicable to the transfer involves the following: it does not cease the individual employment contract with the first employer, terminating a new contract with the second employer; the same individual employment contract is given up definitively (not temporarily, as we have shown – as in the case of secondment) from the first to the second employer.

C) We appreciate that the legal institution of the transfer does not have to bring any diminution of employees' rights; in relation to those underlined we are talking about mandatory provisions of the law which exclude any transaction, renunciation or limitation in relation to the rights recognized by the law (according to art. 38 of the Labor Code).

D) In the case of a transfer in the interest of the service in another locality, the transferred civil servant shall be entitled to an allowance equal to the net salary calculated at the salary level of the month preceding that in which he is transferred, to covering all transport expenses and to a paid five-day leave. The payment of these rights shall be borne by the public authority / institution to which the transfer is made, within no more than 15 days from the date of approval of the transfer (art. 90 par. 3 of Law no. 188/1999).

4. Proposals *de lege ferenda*

In addition to what we have learned, *de lege ferenda*, we appreciate that it would be useful for labor law to regulate certain aspects, and to proceed as follows:

a) It would be useful to regulate the transfer as a whole – in order to ensure the continuity of the individual employment contract and the length of service, the maintenance of the initial agreement in which the new unit is subordinated to the contractual obligations and rights assumed by the first unit.

b) The regulation of general transfer would also meet the requirement that employment or promotion be of a certain length of service (for example, in the case of magistrates).

c) The transfer should be regulated subject to the following conditions:

• the possibility for the parties to make use of the transfer – as a means of definitive modification of the individual labor contract – to be expressly stipulated in the individual labor contract concluded;

• the transfer is to be carried out in a suitable job for the professional qualification of the employee. Transferring to a job that does not respect professional qualifications is illegal – even if the salary, which had been changed prior to the contract change, is maintained.

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Administrative democratization: the participation of citizens in the Portuguese administrative system

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Abstract

This article is the result of a set of research related to Administrative Law and its evolution in Portuguese national territory. It takes as its starting point the evolution of the Portuguese Constitutions in the political systems since the first Republic in 1911 until today, taking into account its importance and its direct relationship with Administrative Law. In fact, the Constitution as a legal diploma is the basis of the entire Portuguese legal system, and thus the basis of all public law. In parallel, it is analysed the participation of Portuguese citizens in the evolution of the Portuguese Administrative System, and in that sense the way it is affected and inspired some of its Fundamental Principles. It will be also discussed some of those structural principles in the system and, as well, how the right of participation is behind some of the changes in the rule of law. Subsequently, and as a consequence of the theoretical development, practical issues will be addressed in relation to the powers admitted in the discretionary exercise of the Public Administration, such as the privilege of prior execution based on the public interest. All of this is based on the Administrative Procedure Code of 2015.

Keywords: *Portuguese Administrative System, democratization, citizens' participation, authority power, discretionary power.*

JEL Classification: H10, H83, K23, K40

1. Introduction

Throughout the process through which this article was carried out, several questions regarding Administrative Law were evaluated.

This article is possible to be divided into two distinct parts: a first part concerning the historical evolution of the Portuguese Constitutional Law itself, which serves as the basis for all the branches of law, including the Administrative Law, and a second part in relation to the administrative legal relations, in specific.

A study was carried out on the evolution of the Portuguese Constitution, during the Republican period, which began in 1911 with the implementation of

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the First Republic. In this sense will be demonstrated the influence and the very evolution of democracy and democratic principles, especially the right to citizens participation in the legal relations between them and the Public Administration.

Some of those principles were implemented in the last alteration to the Administrative Procedure Code, in 2015. In this scope, this article will reflect in how they restricted the authority and discretionary power of the Public Administration towards the citizens, in a sense to provide more adequate decisions that, in most cases, don't interfere with the interests of the administered.

An approach will be taken in relation to the current Portuguese administrative system and how the European Union has been strengthening and streamlining this branch of law.

The issue of citizen participation in the administrative procedure will also be dealt with in relation to the code in force, which has strengthened transparency and legal certainty in the administrative legal relations.

Secondly, it will be discussed the changes made to the procedure in the scope of the formation of the decision and execution of the act. In the new Code, it reflects upon the recent restriction of the Administrative self-guardianship, the adequation of procedure to the concrete case and the participation of the particular in an agreement with the Public Administration for the purpose of forming a decision.

In parallel, the analyses will also focus in the definition of the public interest as an undetermined concept, and how it is an exception to the use of the authority power of the Public Administration.

Finally, and as a consequence of the theoretical development, practical issues will be addressed in relation to the powers admitted in the discretionary exercise, always having the Administrative Procedure Code of 2015 as a basis and foundation of all development.

2. The historical evolution of the democratization of public administration

The democracy of the Portuguese Public Administration has met different configurations throughout the evolution of the Portuguese political regime. As Alves said, the Constitution of a country establishes the great principles of political-administrative action and delimits individual rights and obligations, to which one should adjust the general laws and the special laws[4].

The Constitution of the Portuguese Republic of 1911 contained in articles 66 and 67 some administrative legal rules, despite one of the main criticisms associated with this system being the its ineffectiveness.

Despite its characteristic centralization and concentration of power, the

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[4] Alves, Jorge Fernandes, *A lei das leis – Notas sobre o contexto de produção da Constituição de 1911*, "Revista da Faculdade de Letras", 3rd series, Vol. 7, 2006. p. 169.

State considerably increased the number of Directorates-General, whose typology was also complexified, and were no longer only regulatory bodies, being directly subordinated to the Government. The administrative function, until the Salazar regime was limited to law and order, that is, was characterized by a high degree of legal linkage[5].

During the *Estado Novo*, with the Salazar regime, the power of the General Directorates was reinforced, assigning to the Public Administration the function of coordination and control, in order to ensure continuity of the State administration[6].

One of the functions of the Government that was expressly foreseen, by counter position to the Constitution of 1911, is the Superintendence of the whole of Public Administration (article 108). As regards the local administrative organisation, i.e. the provisions relating to the administrative and local authorities contained in title IV of the Constitution of 1933 and special legislation.

As for the relationship between the administration and the Society, Araújo writes that the Salazar´s regime reinforces the traditional perspective of centralized character, being its bureaucratic structures, hierarchized with great power of authority by administrative regulations that disciplined the relationship of administration with citizens[7].

After the 25th of April, with the Democratic revolution and the new constitution of 1976 in its original text, the Government assumes itself as the *maximum* organ of the Public Administration with administrative competence expressly defined in its own title for Public Administration, in the articles 267 and following. As Madureira explains that in Democratic Portugal the reform in the Central Public Administration has been affirmed as a constant process[8], also provided by the entry of Portugal into the European Community (EEC) and the social pressures aimed at moving away from the legal, formal and authoritarian character of the system. With democratization, the rights and guarantees of citizens[9] and the structuring principles of the administrative organization were constitutionally consecrated.

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[9] Art. 269 of the Portuguese Constitution of 1976, in its original redaction.

2.1. The Portuguese administration system in the European Union

One of the main reasons that contributed to the restructuring of the Portuguese public administration was its entry into the EEC. The accession treaties established rigorous integration criteria which, in turn, required efficiency and effectiveness in their implementation[10]. Due to the heterogeneity of the political-administrative regimes of the Member States of the European Union, from the time of the communities to this day, we have an approximation within the possible regulation on certain matters, especially those relating to the efficiency of the system, without prejudice to the sovereignty of the countries.

The European Charter on Local Autonomy establishes the right of local authorities to regulate and manage, in accordance with the law, under their responsibility and in the interest of their populations, an important part of public affairs[11]. The law only admits that the government's guardianship is made *a posteriori*, with the municipalities having total freedom of initiative within their competence established by national law.

Another point of contact to which the administrative system is subject to a certain extent to the European provisions, irrespective of its organization, is the supervision of the European Union Court of Auditors on the use of Community funds by local authorities[12] on the part of their so-called missions.

Thus, we have found that the European Union plays a major role in the restructuring and continuous development of the Portuguese administrative system, especially with regard to effectiveness (which includes the debureaucratization and decentralization) and the greater participation of citizens, one of the central values of the Union.

3. The participation of the managed in the Democratic State

In a democratic state, the power emanans from the citizens. Citizens, as individuals, are the basic juridical and political element of society. Democracy, as we know it today, emerges with the French Revolution. The ideas of equality, freedom and fraternity spread the feeling of representativeness and participation of citizens in the social, political and juridical life of the community. The Constitution, as a legal diploma, consecrates the rights, freedoms and guarantees of all individuals forming the nation. The nation emerges as a group of communities, composed of individuals who have a common sharing bond. The state emerges

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[10] Araújo, Joaquim Filipe. *Gestão Pública em Portugal: Mudança e persistência Institucional*. Quarteto Editora, 2002. p. 64.

[11] Bilhim, João. *A Governação nas Autarquias Locais*. Coleção Inovação e Governação nas Autarquias, Sociedade Portuguesa de Inovação, Porto, 2004. p. 13.

[12] *Ibidem*. p. 14.

as a public legal person, in juridical terms, willing to find something in common to all of them. In this way, the abstract concept of public interest arises. The public collective person is opposed, in the doctrine of law, to the private legal person because, on the basis of the performance of any act practiced by the State should always be the satisfaction of the public interest and not particular interests, as is the case with the second.

The power of state management is defined through the public administration, which includes the legislative and tax, supervisory and regulatory power, through its organs and other public institutions.

The public administration is based on the privilege conferred on it by law, which allows it to execute its decisions, irrespective of prior judicial decision. This privilege stems from the power of Imperium, which ensures a singular position in the legal world, which meets the French doctrine that has employed the words *puissance* and *pouvoir*, when it deals with questions concerning the exercise of the defining power of the public administration and, as well, the State. Therefore, it can be verified that there is no real parity relationship between the binding parties in the legal-administrative relations. If, however, the administered, as individuals, are subjugated to the imperial power of the state, on the one hand; on the other hand, the participation of individuals in any democratic state must be in order to cover procedural deficiencies in the field of administrative activity.

The participation of citizens[13] in the procedural context prevents many of the administrative decisions from being totally triggered by reality, affecting negatively and directly the individuals and their own interests. There must be a minimum harmony between administrative power and private interest, based, among others, on the principle of reasonableness and good administration. The administrative power, however, manifests itself through regulatory power and unilateral

[13] Cramton, Roger C.. *The Why, Where and How of Broadened Public Participation in the Administrative Process*. "The Georgetown Law Journal", vol. 60, no. 3, February 1972. The document is available on: https://heinonline.org/HOL/LandingPage?handle=hein.journals/glj60&div=32&id=&page=&t=1557103688 [Last accessed: 25.04.2019]; Gelhornt, Ernest, *Public Participation in Administrative Proceedings*. "The Yale Law Journal", Vol. 81, no. 13. The document is available on: https://heinonline.org/HOL/LandingPage?handle=hein.journals/ylr81&div=26&id=&page=& t=1557103691 [Last accessed: 25.04.2019]; King, Cheryl Simrell, Feltey, Kathryn M., Susel, Bridget O´Neill, *The Question of Participation: Toward Authentic Public Participation in Public Administration*. "Public Administration Review", Vol. 58, no. 4, August 1998. The document is available on: https://www.jstor.org/stable/pdf/977561.pdf?acceptTC=true&acceptTC=true&jpdConfirm=tru e&s eq=1#page_scan_tab_contents [Last accessed: 25.04.2019]; Toro, Amy Lyn. *Standing Up for Listeners' Rights: A History of Public Participation at the Federal Communications Commission*. PhD thesis in Jurisprudence and Social Policy, University of California, Berkeley, 2000. UMI: 3002287. The document is available on: https://escholarship.org/ uc/item/7431b6hc [Last accessed:23.04.2019]; Wang, XiaoHu. *When Public Participation in Administration Leads to Trust: An Empirical Assessment of Managers' Perceptions*. "Public Administration Review", Vol. 67, Issue 2, Abril 2007. The document is available on: https://onlinelibrary.wiley.com/doi/abs/10.1 111 /j.1540-6210.2007.00712.x [Last accessed: 23.04.2019].

decision-making, the privilege of prior implementation and the special regime of administrative contracts.

The democratization of the administrative regime will only be possible from the moment that there is greater equality between the parties in the legal and administrative relations.

Democratic representation is a form of public participation where decisions taken are chosen by those who are democratically elected. However, one can only speak in a true participation of those managed from the moment when the public administration is governed by principles such as decentralization, deconcentration and desbureaucratization.

In a decentralized and deconcentrated system, there are multiple public collective persons, scattered throughout the national territory, within which there will be a division of competences between the upper and subaltern organs.

Administrative deconcentration increases the efficiency of public services, which makes the responses addressed to the most skeptics in relation to other administrative systems as well as in the best quality of services provided, as the specialization of functions is feasible. At the same time, it frees the superiors from making decisions of less relevance, creating the best conditions for them to ponder the resolution of other issues of greater responsibility. This form of deconcentration should be understood, not only at the level of the Central administration, but also at the level of Local administration, conferring autonomy to its organs for a better performance in the face of the issues in question.

As regards decentralization, it implies that the administrative function is confined to the state, but also to other territorial public legal persons, in order to guarantee local freedoms, serving as the basis and foundation for a pluralistic, limiting political power system. In this way, it provides individuals with their intervention and participation in public decisions on matters that concern their interests, this being one of the great objectives of the modern State[14].

4. The privilege of prior execution and the executive self-guardianship: the public interest

The privilege of prior execution is reflected in the power conferred on the public administration which allows the administrative bodies to perform any act without the need for judicial authorization.

The Code of Administrative Procedure of 1991 Portuguese (CPA)[15], prior

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[14] Article 2 of Portuguese Constitution.

[15] Amaral, Diogo Freitas do; Claro, João Martins; Garcia, Maria da Glória Dias; Vieira, Pedro Siza; Silva, Vasco Pereira. *Código do Procedimento Administrativo. Anotado*, 3rd edition, Almedina, 1997.

to the amendment of 2015, conferred on the Public Administration a greater autonomy and discretion[16] in the face of its actions practiced[17]. This system very characteristic of the type of French administration evidences an executive self-guardianship of the administrative system. In the view of Marcello Caetano, this scenario is defined by administrative law as a system of legal norms governing the organization and the proper process of acting in the Public Administration and discipline the relationships by which it continues collective interests and may use initiative and the privilege of prior execution[18].

In order to prevent any injustices arising from the action by the Public Administration, the legislator, under the guarantee of protection of the right to appeal litigation, allowed for the possibility of holding precautionary measures that prevented irreparable or hardly repairable injuries from the legally protected rights and interests of the administered. The most typical case was that of the suspension of efficacy of the contested act, regulated in articles 76º to 81º of the LPTA[19].

Thus, it was attempted to mitigate the power that the public administration exercised over individuals. However, these means created by the legislator were not fully effective, insofar as, in the period between the entry of the proceedings in the competent court, and the effective suspension of effectiveness of the contested act, much could have happened. Everything would depend on the speed with which the public administration acted against the concrete case, as well as the progress of the process itself, which in many cases could be time consuming.

In the Portuguese administrative legal regime, prior to 2015, the declarative and executive self-guardianship was in force through the administration's coercive action without the need for a preliminary ruling from the courts.

In 2015, the new regime came to reverse the previous one, limiting the scope of execution of the Administrative Act. In the preamble to Decree-Law No. 4/2015 that establishes the code, it is explained that the change reflects 30 years of opinions sustained by a large part of the doctrine and approaching the Portuguese administration system of French.

In the articles 175 and following of the amended CPA, the administration only has the power to enforce administrative acts strictly Without the need for prior judicial decision in cases expressly provided for in the law or in situations of urgent public necessity[20].

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[16] Andrade, Maria Paula Gouveia, *Prática de Direito Administrativo – Questões teóricas e hipóteses resolvidas,* 3rd edition, Quid Juris, 2015, pp. 38-39.

[17] Articles 149 and 151 of CPA 1991. Amaral, Diogo Freitas do; Claro, João Martins; Garcia, Maria da Glória Dias; Vieira, Pedro Siza; Silva, Vasco Pereira. *Código do Procedimento Administrativo. Anotado,* 3rd edition, Almedina, 1997.

[18] Caetano, Marcello, *Manual de Direito Administrativo*, 10th edition, vol. II. Almedina, 2013.

[19] Decision of the Supreme Administrative Court of Portugal, (Process: 036178ª), 30.11.1994.

[20] Article 176 CPA.

Filipa Calvão presents the project as an exhaust valve of the system, because as the restriction of the Coercive execution of the Act by the Public administration has as exception the urgency of the public interest we have a great opening for discretionary intervention, since it is the administration that possesses the concrete decision power of acting[21].

The prior execution in the new Code can only have three purposes: the fulfillment of a pecuniary obligation (payment of the right amount), compliance with the obligation to deliver the certain and determined thing or the obligation to provision of fact[22]. Execution is thus guided by a number of principles[23], specifically the principle of legality of execution, as we said earlier when quoting that prior execution can only be continued in cases of urgent need. The article 8 (2) of the Preamble Decree of the Administrative Procedure Code that article 176 (1) shall apply from the date of entry into force of the law defining the cases, forms and terms in which administrative acts may be coercively imposed by the Public Administration, to be approved within 60 days from the date of entry into force of the Decree-Law. In this context, the Public Administration would only have legitimacy for prior execution in the cases expressly typified in this legal diploma - which was never approved. Part of the doctrine believes that, since the Decree-Law has never been approved, the new regime that restricts the prior execution would be invalid and, therefore, not applicable. The solution would be to continue to apply the old regime, which focuses on the authority of the Public Administration.

The other part of the doctrine understands that the non-approval of this diploma, which regulates the cases in which the use of executive self-protection is legitimate does not contend with the application of the new regime of the code of 2015. If the law has never regulated the cases in which the administration may use that power, it is because we must then restrict ourselves to the provisions of articles 175 to 183 of the CPA and specially to article 176 (2), which provides that the enforcement of pecuniary obligations is always possible in conjunction with art. 179 and with the provisions relating to the implementation for the delivery of the right thing and the execution for the provision of fact.

Moreover, the principle of subsidiarity and the principle of proportionality are important when interconnected with the undetermined concept of public necessity, which is limited to the use of discretionary. The administration shall only make use of its authority, its *ius imperium*, when all other possible routes are exhausted, only to do so in order to inflict the slightest prejudice to the rights and the interests of individuals. Besides these, Freitas do Amaral also attentively

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[21] Calvão, Filipa Urbano, *O regime da execução do ato administrativo no Projeto de revisão do Código do Procedimento Administrativo*, "Projeto de Revisão do Código do Procedimento Administrativo", Universidade Católica Portuguesa, 2013. pp. 105-112.

[22]Articles 176 (2), 179, 180 and 181 CPA.

[23] Amaral, Diogo Freitas do, *Curso de Direito Administrativo*, 3rd edition, vol. II, Almedina, 2016. pp. 419-425.

to the principle of humanity of execution, provided in art. Article 178 (2) of the CPA, by reason of which the administration even if it has the possibility of making use of its authority cannot hurt the fundamental rights of the administrated. We can refer to the case of expropriation by public utility, for example, in which the situation of public necessity can be debatable, which enters into direct confrontation with the interest of the articular and with its right of ownership.

In this context it is important to discuss the concept of public interest, which presents divergences in the doctrine regarding whether it is coincidental to the collective interest of the community or if it presents itself as an interest of the individual organs of the State.

Already in the so-called administrative constitution we have the article 266 of the PRC which enshrines the principle of pursuing the public interest[24], in which all management operations of the administration are legitimate only if it is in view of the pursuit of the public interest, which reflects article 4 of the CPA.

After all, what is the meaning of this abstract expression? And is the public interest synonymous with collective interest?

To answer these two questions, it is essential to perceive the Portuguese administrative system, in particular, and the constitutional law, which is based on it, in particular.

In fact, Portugal, being a Republic[25], is founded on fundamental principles as important as the separation of powers. The powers attributed to the state do not come only from the Constitution, but also and mainly from the citizens, who have a moral obligation to vote, thus electing their representatives, Members of the Parliament[26]. The Government, as a maximum organ of the public administration is the governing body of the country's general[27]. Despite not being elected directly by the citizens, the Prime Minister initiates his duties with his possession, being appointed by the President of the Republic[28] who, in turn, is an organ elected by the people[29]. At the same stage, the ministers who form the government are appointed by the head of State, on a proposal from the Prime Minister[30]. In other words, although the government's organs are not directly elected by the citizens, they are represented in the Parliament[31] and are sworn in by the President.

As the doctrine diverges as to the concept of public interest, the same can be understood as the interest of the collectivity. In an organic sense, the Public

[24]Marques, João Pedro Marques e, *Princípios da Boa Administração*, *Eficiência e Economicidade*, Escola de Direito da Universidade do Minho, 2015.
[25] Article 1 of the Portuguese Constitution.
[26] Article 147 of the Portuguese Constitution.
[27] Article 182 of the Portuguese Constitution.
[28] Article 187 of the Portuguese Constitution.
[29] Article 187 (1) of the Portuguese Constitution.
[30] Article 187 (2) of the Portuguese Constitution.
[31] Artic1e 87 (1) of the Portuguese Constitution.

Administration is not an exclusive activity of the State, in fact other private entities may exercise administrative activity in favor of the public interest, in addition to pursuing their private purposes at the same time. We have as an example the foundations, the non-profit associations and even certain societies (civil or commercial) that in addition to their profit, they have an object that requires a certain public need.

Beyond the argument of administrative activity, it is not confined to the state, collective needs, or public needs, can acquire the most varied forms, whether the need for protection of persons and goods, in which there are the services of the fire department or police service provided by the State; the need to clean the roads, identify the individuals, or the need for speed for economic development. For all collective necessity, there is a public service, which can be more or less centralized by the State.

Another point that reappears and which enters into direct contact with the matter of the implementation of administrative acts is the guarantee of those executed, provided for in article 182 of the new CPA, cases in which the law allows individuals the right to challenge the act executed in accordance with articles 184 and following of the same diploma. In the case of expropriation by public interest, we have a confrontation between public and private interest in which individuals have the legitimacy to challenge those who have considered that they have had their particular interest in favour of collective necessity[32], which must always be substantiated, under penalty of being invalid.

A vision that cannot be applied in this case is that the public administration practices acts on the basis of interests unrelated to collective needs - personal interests of individuals occupying public office. We cannot confuse this with an "interest of the state", since it can only act on the basis of pursuing the public interest. Otherwise, it constitutes illegality and, more than that, an unconstitutionality.

It is therefore that the State, in the legal and administrative relations, has no legitimacy to use and dispose of the privilege conferred upon it by law, in situations where the urgency of the public interest is put in place. No particular interests may be found in the case of personal interests which are covered by the power of authority of the State, on the other hand, the interests of the administrated. Any power delivered to the state will only serve to achieve its ends more quickly and without major obstacles.

What is intended, in fact, is that the public interest coincides with the interest of the collectivity, as is apparent from the constitutional law.

[32] Should we consider the expropriation is not made without previously giving the said particular an indemnization in exchange for the violation of its property right.

5. Principle of procedural adequacy: the exercise of discretionary

The principle of the rule of law underlies the legal framework for the exercise of the power of public administration[33]. As is concluded from what was previously mentioned, its content translates into the subjection of power to the principles and legal rules, which encompasses the principle of the juridicity of the public administration.

The principle of proportionality[34] is a general principle of law[35]. The Portuguese doctrine has understood in order to establish this basic principle of administrative law in the essence of fundamental rights[36] and in the ideas of law and justice.

This principle constitutes a barrier to free will, having as a regular function and limiting the action by the Public Administration. On the basis of this principle, the public administration should adopt appropriate behaviors in order to achieve the sole purpose to which it is legally obliged to pursue, the public interest. In the perspective of Freitas do Amaral, the principle of proportionality is the principle whereby the limitation of private goods or interests by acts of the public authorities must be adequate and necessary for the concrete purposes that such acts pursue, as well as tolerable when confronted with those purposes[37].

It is concluded, therefore, that the principle of proportionality is related to a certain sense of measure-order adequacy ratio. Jorge Miranda emphasized that the adequacy meant that Providence was adequate to the desired goal, was intended to end the end contemplated by the norm and not to another.

However, this is a rather more complex principle than it may seem from now on. In fact, it is divided into three essential dimensions: the principle of adequacy, the principle of necessity and the principle of proportionality *stricto sensu*[38].

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[33] Article 2 of the Portuguese Constitution.

[34] Decision of the Constitutional Court of Portugal, no. 632/2008, of 23.12.2008.

[35] Ainda sobre este princípio: Binenbojm, Gustavo, *Da Supremacia do interesse público ao dever de proporcionalidade: Um novo paradigma para o Direito Administrativo*, "Revista de Direito Administrativo", n.º 239, pp. 1-31, 2005. The document is available on: http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/43855/44713 [Last accessed: 27.04. 2019].

[36] Article 266 (2) of the Portuguese Constitution.

[37] Amaral, Diogo Freitas do, *Curso de Direito Administrativo.* 3rd edition, Vol. II, Almedina, 2017. p. 133.

[38] Machete, Pedro; Violante, Teresa, *O Princípio da Proporcionalidade e da Razoabilidade na Jurisprudência Constitucional, também em relação com a Jurisprudência dos Tribunais Europeus.* XV Conferência Trilateral dos Tribunais Constitucionais de Espanha, Itália e Portugal, 2013. The document is available on: https://www.academia.edu/22471312/O_princípio_da_proporcionalidade_e_da_razoabilidade_na_jurisprudência_constitucional_também_em_relação_com_a_Jurisprudência_dos_Tribunais_Europeus_Relatório_do_Tribunal_Constitucional_de_Portugal [Last accessed: 29.04.2019].

Speaking of the principle of necessity and proportionality is to speak of the citizen's right to the smallest possible disadvantage and the State should use the least harmful or costly measures to be administered. It is therefore intended to ensure that the means employed are absolutely necessary for the pursuit of the purposes. The main operation is that of the comparison, of which one intends to make a judgement that will imply to define the most appropriate measure, from among all possibilities. In this way, this evaluation will be more complex than the adequacy.

Given the relative character of the comparison, the doctrine advanced in the direction of criteria that would allow for greater practical operationality. Thus, the principle of necessity in four fundamental requirements was unfolded: the material and spatial necessity, on the one hand, which allowed minimum restrictions on fundamental rights and the intervention of the measure and, on the other hand, the temporal necessity and the personnel, in order to delimit the measure in time and to enable the injured to its effective action against the position adopted by the Public Administration, for only this would have a real interest in acting. Thus, the principle of proportionality is not subject to an instrumental rationality.

The Federal Constitutional Court of Germany developed a distinct thesis, in which I included the measure of the effectiveness of the norm with regard to the operation of the comparison, i.e. the measure would be unnecessary whenever there was another, less harmful or onerous for the particular and equally effective in relation to the target purpose.

Vitalino Canas admits that adopting one of these strategies will always depend on the case in concrete.

The principle of proportionality *stricto sensu* seeks to evaluate whether the act practiced by the public administration is correct and is valid in the light of material parameters. This results in the mandatory benefits to be achieved, through a necessary and appropriate administrative measure, to bear the costs that it will entail[39].

As for the last subprinciple, that of adequacy, we see that it has implications before, during and after the administrative procedure. It is in this context that the principle of procedural adequacy is found, in which during the procedure, as we will see below.

Within the theme of the use of discretion, in pursuing the public interest, the principle of formal adequacy has a position of relevance, as it is a license to the administration for the legitimate use of its discretionary power. It is foreseen in art. 56 of the CPA and states that "in the absence of any injunctional rules, the responsible for the direction of the procedure enjoys discretion in its structuring, which, in accordance with the general principles of administrative activity, should

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[39] Article 7 (2) CPA.

be guided by the public interests of participation, efficiency, economy and speed in the preparation of the decision.

This is one of the new principles entered in the CPA of 2015, being also manifestations of the principle of good administration[40], which is a general duty that conditions the performance of the Public Administration. If there is no adequacy of the decision taken and neither compliance with the general duty of good administration, there will be addiction and the administrative act will be invalid, because it is contrary to law.

Thus, this is a flexibilization of the procedure that, in the sense of democratization, aimed to meet the expectations of individuals of debureaucratization and decentralization. The principle of procedural adequacy is only permitted in cases where there is nothing expressly foreseen, given the reduced margin of discretionary intervention compared with cases of urgency of public necessity which is the assumption of executive self-guardianship. Even so, both are situations in which the interests and rights of individuals can be harmed and, therefore, once again we must take into consideration the guarantee of the managed, as provided in article 184 of the CPA.

The administrative discretion is therefore not a freedom of administration to decide in the way that it well understands, but rather a margin for the easing of the procedure and the decision so that it suits the collective interest, for its best pursuit.

One of the principles most commonly used in conjunction with the adequacy of procedural is the principle of proportionality, as provided for in art. 7 of the CPA. In this sense, the use of discretionary power is in what form continues to have limits and therefore, within the scope of adequacy, The Public Administration cannot decide in a way that would harm the interests of individuals or even deviate from pursuing the public interest.

As a current example, we can analyse the case of the annual price assessment of telecommunications companies circuits in the second half of the year to prevent it from being based on cost estimates by the National Communications Agency (ANACOM) at 2017. In this case, MEO, NOS and VODAFONE were involved, and the latter, because it considered that it was able to properly pronounce on the proposal for a decision submitted by ANACOM and attentively the principle of procedural adequacy and considering that in the short term ANACOM will have the costs incurred by the MEO in 2016, it considers that it would be better for the regulator to wait for such a moment[41].

Thus, here we have an implication of the principle of stakeholder participation, the principle of proportionality and the principle of procedural adequacy,

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[40] Quadros, Fausto. *A revisão do Código de Procedimento Administrativo: principais inovações*, "O Novo Código do Procedimento Administrativo", Coleção Formação Contínua, pp. 9-30, Centro de Estudos Judiciários, 2016. p. 17.

[41] The case described above is available for further reading on: https://www.anacom.pt/render.jsp?categoryId=392034 [last accessed: 26.04.20199].

which in this case will have consequences in a procedure that could alter the costs of companies and ultimately of individuals (individuals and final consumers).

Once again, in invoking this principle, we are facing the discretionary power of the administration for the pursuit of the public interest.

5.1. Endoprocedural agreements

Besides the cases of restriction of the power of authority of the administration, as we refer to the regime of attenuation of the executive self-guardianship, we have more situations in which we can perceive the reflections of the greater participation of the interested parties, due to democratisation.

Still in the context of procedural discretion, developed with reference to the regime the principle of procedural adequacy, we have a situation that encompasses both participation when the adaptation of the procedure to the concrete case. This is the case of procedural agreements.

In the new CPA, these agreements have a legal basis in art. 57, and express the possibility of the particular taking part in the process of forming the decision of the administration, agreeing with this content the decision content of the Act to be issued.

The agreements are made in writing and have binding effect on the due act that must be issued by the administration. This is a flexibilization of the procedure, always surrounded by the principle of legality, which brings advantages to the administrative system, namely: the best decision for the specific case, since there is a concertation between the person concerned and the administrative body; and the reduction of the challenge and the litigiousness, once again by the fact that the agreement negotiates the content of the final decision (partially or totally), which will already be known to the particular.

According to Joana Loureiro, the existence of these agreements is a major breakthrough that determines a more effective exercise of the principle of the contradictory, which in some way decreases inequality between individuals and public administration[42], but without completely removing it from its power of authority. With the increase in participation, due to the continuous evolution of the Portuguese administrative system, the administration has achieved more balanced and fair decisions.

6. Conclusion

Taking into account all the matter of fact dealt with throughout this article, it is concluded that the same could be divided into two main areas: the first

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[42] Loureiro, Joana de Sousa. *Os acordos endoprocedimentais no novo CPA*. “Comentários ao novo Código do Procedimento Administrativo”, 4th edition, Vol. I, Editora AAFDL, 2018.

one concerning the evolution of the legal and administrative framework and the second one concerning the legal-administrative relationship itself.

On the basis of the development of these two areas, the strand on democratisation and the growing participation of those administered in the administrative procedure, as well as the formation of the decision taken by the Public Administration.

The evolution of the constitutional legal system was of great importance in the democratization of the entire Portuguese system, especially with regard to the legal and administrative regime and the subsequent relationship established between the Public Administration and those administered. In analyzing this relationship, in particular, and based on the Code of Administrative Procedure (CPA) of 2015, there is a greater participation and transparency over the main moments that will culminate in the practice of the Administrative Act. Thus, a greater protection is configured for the administered one, given the principles that have come to realize their participation.

The new changes introduced in the CPA of 2015 have restricted the power of authority of the public administration only allowing it to be applied when in question is the public interest in the context of executive self-guardianship.

Being the executive self-guardianship the means by which the Public Administration determines and executes, without prior judicial decision, the act to be practiced, according to criteria of convenience, opportunity and content of the act itself. It is concluded that this performance in everything relates to the discretionary power that the law assigns to it. Despite this freedom, the action by the Public administration is pending the legally consecrated limits, within which the principle of proportionality.

Also under the principle of proportionality, an innovation introduced was the principle of procedural adequacy, in which the Public Administration makes use of its discretionary power during the procedure. It may, on the other hand, decide to formulate an agreement with the particular in order to reduce the injury to the latter. In this case, it is necessary to participate in the administrative procedure in such a way that it can be heard, resulting in the act that best fits the concrete case. It appears that this results from an agreement between the parties to the legal-administrative relationship for the formation of the final decision, which gives the name of an endoprocedural agreement, which ends up linking the Public Administration in its final decision.

It is concluded that the public administration has evolved in order to increase the participation of individuals, deviating from the traditional way of acting based on rigidity, centralization, concentration and administrative bureaucratization.

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Practical problems regarding the suspension of the execution of administrative acts - a special look at the acts adopted at local government level as "internal acts" and/or the reorganization of some public institutions

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Abstract

The present study aims at analyzing the legal regime of the suspension of the execution of administrative acts, as this institution is based on the provisions of art. 14-15 of the Law on administrative contentious no. 554/2004. The analysis is mainly centered on the practical aspects of this procedure and on the legal effects of the court's decision to suspend the authority of whose administrative acts are subject to suspension. Another dimension of the suspension that will be subject to a special analysis of the specificity of the suspension in the case of the reorganization of a public authority or institution, in general and of one of the local public administration, in particular. It is manifested by these categories of public authorities and institutions, the tendency to interpret the suspension decisions in a discretionary manner, the main concern being to find arguments to violate them, not to respect them.

Keywords: *administrative act, suspension of execution, effects, enforcement, local public administration, reorganization.*

JEL Classification: H83, K23

1. The general legal regime of suspension of the enforcement of the administrative act

Understanding the suspension of the execution of the administrative act must, in my opinion, be based on that essential feature of the act, namely that it is enforceable ex officio.

The *executio ex officio* principle evokes one of the essential features of the administrative act, namely that forced execution may be executed if it is not enforced or not complied with directly on the basis of the act as it constitutes an enforceable title, to be legally binding.

Hence the conclusion that, in order to be able to ignore this feature of a person, it is necessary to intervene in a fact or legal act that would impede its execution for a period of time.

The second aspect to be considered for understanding the issue we are

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considering concerns the legal status of the suspension[2] itself, better revealed by the revocation.

Thus, if the revocation is a principle of the legal regime of the administrative act, suspension is an exception that occurs in cases expressly determined by the law and under the conditions stipulated by it. Also, as any exception, it obeys the principle contained in the Latin adage "*exceptio est strictissimae interpretationis*".

Starting from these two coordinates of the approach, we find that Law no. 554/2004 of the administrative contentious, regulates in art. 14-15 "Suspension of execution of the act" and "Application for suspension of the main action".

The two subtitles of the articles do not excel rigorously, the first of them appearing in the forms as "gender" and the second as a "specific difference", although both represent the "specific difference" of the suspension of execution of the act. The real difference between them is that, through art. 14 regulates the suspension requested after the preliminary complaint has been filed, and art. 15 regulates the requested suspension admitted to the main action. That should be, in fact, the correct subtitles of the two articles, which is why we make the proper proposal *de lege ferenda*.

If the first type of suspension can be claimed only by a stand-alone action, the suspension requested at the time of the main proceedings may take two forms, namely, the form of a stand-alone action and the form of a claim in the main proceedings which seeks the annulment, in whole or in part, of the harmful act.

In fact, such a possibility is expressly enshrined in art. 15 paragraph (1) second sentence of Law no. 554/2004.

The two texts must be interpreted and applied by corroborating each other, since most of the provisions of art. 14, more precisely, par. (2) to (7) constitute "*common law*" and for art. 15 of Law 554/2004.

2. The comparative analysis of the suspension provided by art. 14 and 15 of the Law on administrative contentious

We are the followers of the comparative method in the research of some legal institutions, because we appreciate that by putting them face to face, we are able to better highlight common elements and differentiations and, in this way, to better understand them.

Therefore, in the following, we will analyze them in parallel using several relevant criteria.

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[2] Concerning the legal status of the suspension of the act, see Verginia Vedinaș, *Tratat teoretic şi practic de drept administrativ*, vol. II, Universul Juridic Publishing House, Bucharest, 2018, p. 285-289.

2.1. Owner of the action

In both cases, the request for suspension may be made by the injured party in his or her right or in a legitimate interest by an administrative act. Article 14 refers to the "injured person," although in our opinion it would have been right for the text to speak of "the person who considers himself injured", because the confirmation that there is an injury through the administrative act takes place after the trial was tried and the court ruled on this.

While Article 14 uses, as we have seen, the phrase "injured person", Article 15 already refers to the "applicant", given that some steps have been taken in the meantime, the prior complaint has been formulated, which is not settled in favor of her author, or it was not solved at all, so that the court was brought to court, the injured being the plaintiff.

In addition to the injured party or the plaintiff, the action may be filed by the prosecutor, then "when the matter is a major public interest which seriously disrupts the functioning of a public service, ex officio or at the time of referral".

2.2. Procedural aspects

The request for suspension shall in both cases be accompanied by the act(s) the annulment of which is required. In the case of suspension proceedings based on the provisions of art. 14 of Law no. 554/2004 will also be accompanied by the proof of the preliminary administrative procedure consisting in the request addressed to the issuing or hierarchical organ, which shall bear in its evidence that it has registered with the public authority from which the act is issued harmful.

When the request for suspension is made on the basis of art. 15 of the Law on Matters, in addition to the two categories of documents, the reply to the preliminary complaint can be filed, even when the public authority, usually the issuing authority, responded. If no response has been submitted, only the prior application filed with the competent authority will be submitted.

These documents may be added to others, which the owner of the action considers pertinent and useful to the cause.

Common to both types of suspension requests are the following:

a) the urgency and especially the character of the judgment, which does not exclude the parties' citation, art. 14 par. (2) the first sentence expressly stipulating this;

b) the inapplicability of the procedure provided by art. 200 and 201 of Code of Civil Procedure (C. Proc. Civ.). Please note that art. 200 regulates the verification of the application and its regularization, by which the application has been randomly distributed, and art. 201 regulates in par. (1) the following "judge, as soon as he finds out that the conditions stipulated by the law for the request for a lawsuit are fulfilled, dispose by resolution a communication to the defendant,

having in mind that he has the obligation to submit a complaint, under the sanction stipulated by the law, which will be expressly indicated, within 25 days from the communication of the request for a summons, under the conditions of art. 165".

The celerity specific to adjudication of suspension requests led the legislator to stipulate in art. 14 par. (2), as amended by Law no. 212/2018, that the time limit for filing the testimony is at least 3 days before the deadline set for the trial. The acknowledgment of the case is usually made from the case file, according to art. 14 par. (2) the final thesis, but in practice this "usually" can become and often becomes an exception, because the case file, a few days before the deadline, is taken by the judges for the study and can no longer be found in the archive for that the applicant be informed of the grievance. That is why, in my view, the provision is relatively ineffective, and the legislator to cover this situation, which I do not know to what extent it was aware or not, provided that the complainant may request a deadline to take note of the content of the testimony.

2.3. The legal basis of the request for suspension

Paragraph (1) of Article 14, applicable, applicable to the same extent also in the case of suspension based on Art. 15 of the Law no. 554/2004 provides that such a request may be made "in duly justified cases and to prevent imminent damage". The conjuncture linking the two hypotheses, the real conditions, concludes that they must be met cumulatively. The phrase "well-justified cases" can be found in art. 2 par. (1) lit. t), evoking "the circumstances of fact and law, which are likely to give rise to a serious doubt as to the legality of the administrative act".

In other words, we have to deal with strong doubts about the illegality of the act, which must result from concrete, factual and legal circumstances, to which the cumulative addition of the "imminence of causing serious prejudice to an individual or a public service." The definition given by art. 2 par. (1) lit. and of Law no. The imminent loss is the "material, future and foreseeable damage or, as the case may be, the foreseeable disturbance, the functioning of a public authority or a public service". The conjunction "or" linking the two hypotheses leads to the conclusion that we have to deal either with material damage in the future or with a serious disruption of the functioning of a public authority or a public service, the ancients must be "predictable".

In fact, we have faced a very obtuse vision in practice in a case that we will present and comment, in which the inability to understand the meaning of the law with the bad faith is intertwined in the context in which it is judged that there is no imminent damage, since staff who are to lose their jobs will still be able, if the action for annulment is admitted, to receive the salary rights due during the period when they were subject to court appeals. It is also evident the lack of morality, deontology, of such argumentation, not just the lack of legality.

2.4. Effects of the judgment. Remedies

Against the decision of suspension under art. 14 or 15, as appropriate, may be appealed but not suspensive. This is because the suspension decision is enforceable by law. Given the timeliness of the petition for suspension, the time limit for appeal is 5 days from the communication.

However, the duration of the effects is different for the two types of suspension. In the case of actions based on art. 14, the suspension shall be suspended until the court of first instance has been pronounced. In the case in which the substantive action is admissible, the law provides that "the suspension ordered under Art. 14, is legally extended until the final settlement of the application, even if the applicant did not request suspension of the execution of the act under Art. 15 par. (1)", that is to say, with the main proceedings. We note the interest of this provision, which contravenes the principle of availability, specific to civil proceedings, but it has been enshrined in order to protect the injured party's interests or, in other words, to strengthen the protection of those legitimate interests or rights, in the context of the claimant both in the suspension proceedings and in the annulment, in the first instance of jurisdiction.

2.5. Other procedural aspects

Besides those already mentioned, we add others, which have been determined by what is actually happening in practice.

A first aspect is that found in par. (5) of art. 14, according to which "in case a new administrative act is issued with the same content as the one suspended by law, in this case the prior complaint is not mandatory".

The genesis of this rule lies in the tendency of the leaders of public authorities and institutions to defy judgments of suspension by issuing, adopting new administrative acts that have the same content, persisting in attempts to succeed at any cost in execution of various decisions, usually those by which different people are removed.

In particular, the case he faced with, including our late professor Antonie Iorgovan, with whom I was, in fact, initiators in the Senate of the amendments made in 2007 to Law no. 554/2004, aimed to suspend the dismissal of the director of a hospital by order of a minister and to issue, after the decision to suspend, an identical order as content, but with another registration number, by the Minister in-service health at that time. The phrase "have the same content" should not, in our opinion, be interpreted as meaning an absolute identity between suspended and newly issued orders. As a rule, additional cues are added to circumvent the similarity of content. It is to be understood in the sense that, within the new administrative act, there are statements with the same effect "concerning the same

subjects of law as the administrative act suspended by a court"[3]. Such practices, legally and deontologically illegitimate, have also been manifested at Government level, and exemplified by Emergency Ordinance no. 37/2009 which was declared unconstitutional by Decision no. 1257/2009 which the Government has maintained in practice through a new Emergency Ordinance no. 105/2009, which was also declared unconstitutional by Decision no. 1629/3 December 2009.

Similarly, it happened in administrative practice, which determined that, through the amendments to Law no. 554/2004 through the Law no. 262/2007 to be included in the Law no. 554/2004, the current norm from par. (5) of art. 14.

A second aspect concerns the prohibition to make several requests for suspension for the same reasons, contained in art. 14 par. (6) of the Law no. 554/2004. This provision was also introduced on the basis of the discovery of some discretionary and baffling practices, now given by the allegedly unlawful administrative acts.

Finally, but not at last, it should be mentioned the norm according to which in the case of suspension of the administrative act under the conditions of art. 14, the injured party has the obligation to bring the action for annulment within 60 days, otherwise the suspension will cease by law and without any formality.

3. Particularities of the suspension of acts issued or adopted by the local public administration

According to the provisions of Law no. 215/2001 of the local public administration (at present, the Administrative Code), in the exercise of the duties provided by the law, the authorities at the level of the territorial-administrative units issue or adopt, as the case may be, administrative acts bearing the name of decisions, in the case of the deliberative, respectively the county and local councils, and provisions, in the case of the executive, respectively the mayor and the president of the county council. As far as the latter is concerned, its status and the regime of the acts it issues continue to remain subject to debate because, on the one hand, the Constitution does not regulate it distinctly, as it does with the county council, and on the other hand, in art. 123 consecrated to the prefect, recognizes it in par. (4), which establishes the non-existence of subordination relations between the prefect and the autonomous local authorities (mayor and local councils) and the county (the county council and its president), but omits it in par. (5), which lists the categories of acts subject to the prefect's legality control. However, going over these "legislative fines", whose correction is required in the future, almost unanimously, by doctrine, the Organic Law no. 215/2001 (at present,

[3] See to that effect Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 526.

the Administrative Code) provides for attributions and acts issued in their exercise, both for the county council and for the president of the county council.

One of the attributions of the county council is to approve the organizational structure of the specialized apparatus and the regulation of organization and functioning. Periodically, these internal structures are subject to reorganization and, as the doctrine has pointed out and the jurisprudence has stated, such reorganizations are either a means or an opportunity, or both, to create the premises for the removal of certain persons, leadership or execution, on predominantly subjective criteria and the appointment in their place of others who are approved by the management of the respective public authorities.

In a case of this kind, by two judgments, the first of them called the "diplomat", "resolve to render efficiency through reorganization", there were substantive changes in the structure of the specialized apparatus of a county council.

We start from the beginning, the concern to use different procedural "engineers" to create arguments in defense in the event of litigation, asking the injured to annul such administrative acts, which this was also the case here.

Suffice it to mention that one of the most frequently cited defense was that the contested administrative acts did not reorganize but rather reorganize.

Both before and after the entry into force of Law no. 188/1999 on the Civil Servants' Statute (at present, the Administrative Code), it was found that, in general, the reorganisations have an illegitimate motivation, that they are nothing more than a means of removing some people from office, to name others in their place, which to be supported and to support, in turn, what they do, the leadership of the institutions and public authorities. Therefore, by Law no. 188/1999 established a strict regime of this legal operation, capable of eliminating some abuses and preventing others, which is found in art. 100 of Law no. 188/1999. The philosophy of this procedure is based on the condition that the reorganization is not formal and discretionary, but that it should materialize in certain measures that will not actually declare the internal structure and the related posts.

In the case under consideration, the court hearing the application for suspension, formulated on the basis of art. 14 of the Law no. 554/2004 of the administrative litigation, found that the two conditions, the well-justified case and the danger of imminent damages were fulfilled, and suspended the two decisions of the county council, which decided on the reorganization efficiency and respectively approved a new structure organizational and operational regulations.

The suspension sentence was not enforced by the county council chairman, who invoked various pretexts and continues to behave as if suspended administrative acts would continue to produce legal effects.

The reasons for their refusal are based on the fact that prior to the delivery of the court sentence certain promises have been issued, which have not been suspended, so that they remain in force and must be enforced. It is obvious the bad faith and the abuse of the law that is being done. Article 14 (7) of Law no. 554/2004 provides that "the suspension of the enforcement of the administrative

act shall have the effect of terminating any form of enforcement until the expiry of the suspension period". In interpreting this text, we understand that with the administrative act that was suspended, the effects of all previous operations triggering the enforcement of the suspended administrative act are interrupted and at the same time it is forbidden to issue other acts and administrative operations through which to continue to enforce it.

The approvals, as they appear from their names, are not legal, administrative or labor law. They are prior to the issuance of legal acts, namely the termination of the employment relationship, or, as the case may be, the service.

In practice, as we have seen, the concern is to find "fireworks" that violate the law in general, and the regime of suspension in the present case, instead of being observed, in the letter and spirit there.

The violation of the law and the morality of public life, the deontology specific to the activity of the local public administration, are interwoven in the most damaging way for the rule of law.

4. Conclusions

We have pursued, through our study, to consider, from the general to the particular, the regime of judicial suspension of the execution of administrative acts.

Suspension is generally understood in doctrine as a guarantee of the state of law, a sine qua non condition of the rule of law, because it interrupts the effects of a legal act on which it raises suspicions of its legal character.

Through her, until the clarification of these suspicions, the effects of the act cease temporarily. However, the suspension does not concern only the act itself, which is the subject of an action based on Article 14 or 15 of Law no. 554/2004, which was abolished.

With the respective administrative act, the effects of all operations and acts related to the suspended act by which it was enforced are also suspended. In the case I have been examining, it was about the issued debts for civil servants or contract staff under the suspended administrative act. There may also be administrative acts or operations relating to the organization of competitions for posts resulting from reorganization or attestations at the post for the same purpose. All this interrupts its legal effects during the period of suspension.

However, we believe that *de lege ferenda*, there is a need for additional provisions to strengthen the effects of suspension judgments and to counteract the tendency of authorizing public authorities of suspended acts to violate them. In our opinion, we might consider the following:

a) the express mention of the fact that, once the effects of the contested act have been suspended, the effects of the acts and operations triggering its enforcement have also been suspended and the issuance or execution of other administrative acts and operations to be continued of the suspended act;

b) the setting of sanctions for the head of a public authority that does not take a decision to suspend.

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Movable cultural heritage. Wisdom of the Earth by Constantin Brancusi: public domain and recovery of possession

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Abstract

The research and consolidation of cultural heritage legal institutions have only known scarce attention and timid evolution in the past decades in Romania. In turn, the Romanian society in general seems to share the lack of concern. A true national conscience, which embraces the profound values of cultural heritage, seems to be still in formation after the trials of the past regime. Such a conscience cannot be taken for granted; it must be developed, it must be explained with patience and understood in its essence, it must be nurtured with a drive to know the past and the present and to build a common future. In this context, the present study is intended as a useful and attractive instrument for the review of relevant legal institutions, such as the right of ownership over movable cultural goods, the public domain and the recovery of possession of movable cultural goods. Employing the critical analysis of relevant case law, apt to stir curiosity, this study also brings to the forefront our often times inadequate comprehension of cultural heritage legal institutions.

Keywords*: national cultural heritage, cultural goods, recovery of possession, public domain, Wisdom of the Earth.*

JEL Classification*:* K23

1. Premises of the study

As already pointed out in our previous studies, the momentousness of 2018 has prompted us to focus particularly on the cultural heritage institution in our research[2].

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[2] The following studies can be consulted: Cosmin Soare-Filatov, *National cultural heritage: interdisciplinary approaches. Reflections on the institution of responsability in the matter,* „Perspectives of Law and Public Administration”, volume 7, issue 1, 2018, pp. 43-52, edited by Adjuris International Academic Publisher; Cosmin Soare-Filatov, *Spre un Cod al patrimoniului cultural [Towards a Code of cultural heritage],* „Revista de Drept Public” [„Public Law Review”], Volume Supplement 2018, pp. 168-176, edited by Universul Juridic; Cosmin Soare-Filatov, *Built national cultural heritage: legislative risks and administrative deficiencies,* „Juridical Tribune – Tribuna Juridica”, volume 9, issue 1, 2019, pp. 44-59; Cosmin Soare-Filatov, *Unele considerații privind inițiativa legislativă de abrogare a art. 24 lit. a) din Legea nr. 50 din 1991 și rolul administrației publice în protejarea patrimoniului cultural construit [Some thoughts regarding the legislative initiative to repeal art. 24 letter a of the Law no. 50 of 1991 and the role of public administration in the protection of built cultural heritage],* in Emil Bălan, Cristi Iftene, Dragoş Troanţă, Marius Văcărelu (editors), 100 de ani de administrație în statul naţional unitar român –

We have thus marked the *Centenary of the Great Union* and the *European Year of Cultural Heritage* via a series of studies[3] which were meant to be part of the signals drawn to raising awareness on the fundamental importance of cultural heritage in the life and identity of current and future society, as well as to understanding the existence of an indissoluble interference of the same with a number of other fields, including public administration.

Inter alia, we welcomed and encouraged further proceedings on the Cultural Heritage Code, putting forward some *de lege ferenda* proposals, but we also called for the immediate discontinuance or dismissal of the legislative initiative to repeal legal provisions that would have led to the release of liability for unauthorised interventions on historical monuments. We have therefore sought to provide substantiated feedback to current events in public life, bearing a potential negative impact on the legal protection of cultural heritage.

In 2019 we pursue our research with a series of studies analysing from a practical perspective the cultural heritage legal institutions, the protection instruments and the remedies provided by law.

In particular, we will investigate from a legal perspective the institutions of law in charge with the protection of cultural heritage by refference to judgments or landmark events, all these being closely bound together by a true symbol of the Romanian cultural identity – *Constantin Brâncuși*. The choice is surely not fortuitous. On the one hand, this approach is intended to humbly honour the Romanian-French creator and, on the other hand, to promote in a new and innovative way the legal protection of cultural heritage.

Constantin Brâncuși's universality does not manifest itself only in the art of sculpture, that he reinvented according to the scholars[4], but he also had and

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între tradiție şi modernitate („One Hundred Years of Administration in the Romanian Unitary National State"), Wolters Kluwer Romania, 2019, pp. 241-250.

[3] Decision (EU) 2017/864 of the European Parliament and the Council of the European Union, 17th of May 2017, on a European Year of Cultural Heritage, published in Official Journal of the European Union no. 131, 20th of May 2017, pp. 1–9.

[4] See, *inter alia*, Vasile George Paleolog, *Brâncuși. Introducere la cunoștința operei lui C. Brâncuși,* Craiova, Ramuri Printing House, 1944; Vasile George Paleolog, *A doua carte despre C. Brâncuși,* Craiova, Ramuri Printing House, 1944; Vasile George Paleolog, *C. Brâncuși,* Bucharest, Forum Publishing House, 1947; Robert Payne, *Constantin Brâncuși,* in „World Review", the 3rd of October, 1949, pp. 61-65; Friederich Teja Bach, *Constantin Brancusi: Metamorphosen Plasticher Form*, Koln, Dumont Publishing House, 1987; Edith Balas, *Brancusi and Romanian Folk Traditions,* New York, Columbia University Press Publishing House, 1987; Sidney Geist, *Brancusi. The Sculpture and Drawings,* New York, Abrams Publishing House, 1975; Sidney Geist, *Brancusi. The Kiss,* New York, Harper & Row Publishing House, 1978; Sidney Geist, *Brancusi. A Study of the Sculpture,* revised edition, New York, Hacker Publishing House, 1983; Noica Ionel Jianou, *Introduction a la sculpture de Brancusi,* Paris, Arted Publishing House, 1976; Reginald Pollack, *Shaman and Showman, an intimate portrait of the legendary Romanian sculptor Constantin Brancusi, by the artist who was his next-door neighbor in Paris,* article published in Art and Antiques Review, May 1988; Marielle Tabart, *Brancusi. L'inventeur de la sculpture moderne,* Paris, Galimard Publishing House, collection Découvertes Editions du Centre Pompidou, 1995.

still has deep echoes at the level of the entire society - Romanian, French, European, worldwide. Constantin Brâncuși's work equally inspired fantasy, outrage, love, repulsion, simplicity, purity, return to origins, absolute novelty and infinite other emotions, sensations and experiences[5]. All these, however, reverberate over time in situations and events that bring to the forefront the interweaving of art with law. From the *Bird in Space* and Brâncuși's lawsuit against the United States to the *Kiss* work of art and the current struggles in front of the French courts of the heirs of Tatiana Rachewskaia[6], Brâncuși's creation has raised key issues of law, even contributing to the evolution of law.

2. Subject-matter of the study

The study hereunder focuses on the work *The Wisdom of the Earth* (the original title in Romanian is *Cuminţenia Pământului).* By putting forward a reference dispute settled by the national courts on this particular work, we are going to highlight two relevant institutions in the field of cultural heritage, namely the public domain and the action for the recovery of ownership. Taking our stand upon the right of ownership in respect of a property classified as part of the national movable cultural heritage, we will see how and why it was so much disputed both by the Romanian State claiming that the cultural good is part of the public domain and by two individuals claiming that the cultural good is part of their private property.

2.1. Proceedings brought before the court

By the petition to sue lodged on the 22nd of October, 2001, the plaintiffs P.I. and I.V. claimed that the court should rule upon ordering the defendants, the Romanian State, represented by the Ministry of Culture and Religious Affairs, and the National Museum of Art of Romania, the restitution in kind of *The Wisdom of the Earth* carved by Constantin Brâncuși. In the alternative, the plaintiffs

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[5] For a quick and close understanding of the impact of Constantin Brâncuși's work in his time, we recommend reviewing the book *Brâncuși împotriva Statelor Unite (Brâncuși against the United States of America). Carte-program,* carried through by George Banu, Bucharest, Curtea Veche Publishing House, 2016. The reader can easily notice both the consternation and the admiration that Brâncuși's work stirred in both the United States (pp. 65-120) and three decades later in Romania (pp. 121-125). To fully review the shorthand records of a revolutionary process for the world of art, see Margit Rowell, *Brancusi contre Etats-Unis: un procès historique,* edited by Adam Biro, 2003. A future study shall be dedicated to this topic, which shall reveal its timeliness and analyse the legal definition of the work of art.

[6] Furthermore, a future study shall be dedicated to this topic, which shall reveal ways to determine the movable or immovable character of cultural property and shall analyse the institution of the movement of cultural property. The latter institution shall also be analysed in a second part of this study, together with the institution of the preemption right of the State for the sale of property belonging to the cultural heritage.

claimed that the defendants should be ordered to settle the consideration of the claimed work.

In substantiating their claim, the plaintiffs have shown that the asset claimed is the work entitled *The Wisdom of the Earth,* created by the sculptor Constantin Brâncuși. It would have been acquired by the plaintiffs' father, G.R., by purchasing it from the sculptor, in the year 1911 - a date when the latter was not yet enjoying international recognition. The plaintiffs have shown that they are the heirs of G.R., according to the certificate of succession issued following the death of their author on the 9th of August, 1975.

The property claimed would have left the family's possession in consequence of the fact that it was taken over by the communist authorities. Steps undertaken subsequent to the collapse of the communist regime, aiming at the restitution of the work, remained unsuccessful. By the time the application was filed, the plaintiffs showed that the work was at the National Museum of Art of Romania.

By the defenses filed, the defendants essentially stated that the sculpture at issue belongs to the national cultural heritage, being a property of public interest. It would have entered the State's heritage by purchase from R.M., the wife of G.R., on the 30th of May, 1957, for the amount of lei 25,000.

The sculpture would have been registered in the national cultural heritage by Order no. 3543 dated 31st January, 1958 and passed from the administration of the Ministry of Education and Culture - The General Directorate of Fine Arts into the administration of the Art Museum of the People's Republic of Romania. Previously, by the Minutes dated 30th May, 1957, the sculpture had been handed over from the management of the General Directorate of Fine Arts to the Art Museum of the People's Republic of Romania. By the same Minutes, it was noted that several works submitted for purchase, including the one at issue, were subject to examination by a special committee that identified them as works of art, assessed them and decided on their purchase by the State.

In proving the purchase and settlement of the price, the defendants filed in evidence the count sheet of the cultural property, as well as an accounting report dated 12th February, 1958, held by the Directorate of Fine Arts covering "core funding - museum values, submitted by Order no. 3543/1958", totally amounting to lei 138,153.825. The defendants also indicated an article published in 1975 in the newspaper Flacăra, in which G.R. admitted that he had sold the sculpture to the Romanian State.

In terms of whom the cultural property at issue belongs to, the defendants pointed out that by Order no. 3042 of 14th July, 1998, the Ministry of Culture classified the sculpture in the national cultural heritage, the "Treasure" category[7].

[7] See item no. 16 of Closing Order no. 3042 of 14th July, 1998, file prepared at that time by Dr. Rodica Matei, art historian specialised in modern and contemporary Romanian art - Scientific Director of the National Art Museum.

Finally, the defendants also challenged the effects of the acquisitive prescription, the mere possession of the property by the State presuming its ownership right.

2.2. One of the solutions put forward by the national courts

Two of the courts referred with the settlement of this dispute ordered that the petition to sue be dismissed[8].

They essentially argued that the property at issue belongs to the national cultural heritage, being a property of public interest. Hence, considering the provisions of Article 136 of the Constitution of Romania and the provisions of Article 29 of the Government Ordinance no. 68/1994 on the protection of national cultural heritage[9], it follows that the plaintiffs cannot be entitled to ownership of such property and therefore lack standing in terms of the claim for the recovery of ownership which forms the subject-matter of the dispute.

The courts emphasized that the cultural property at issue was sold on the 30th of May, 2017, thus becoming the property of the Romanian State. Therefore, it belongs *to the national cultural heritage and to the public domain* of the State, being inalienable, unseizable and indefeasible, and cannot be subject to any action for the recovery of ownership. The plaintiffs could not thus inherit this right of ownership from their late father.

The courts also found well-reasoned the plaintiffs' defence consisting in challenging the effects of the instantaneous acquisitive prescription of the movable property, as an effect of the possession exercised.

2.3. The other solution put forward by the national courts

Three other national courts granted the petition to sue and ordered the defendants to leave *The Wisdom of the Earth* to the plaintiffs in quiet enjoyment and peaceful possession[10].

They checked the validity of the ownership title challenged by the Romanian State according to the provisions of Article 6 (2) of Law no. 213/1998 on the public property and its legal framework, as well as according to the provisions of Article 80 (2) of Law no. 182/2000 on the protection of the national movable cultural heritage.

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[8] Civil Judgment no. 990 of 7th November, 2003, issued by the Bucharest Court, VI Civil Division; Civil Decision no. 35/A of 11th March, 2004 issued by the Bucharest Court of Appeal, the Labour Conflicts and Disputes Division.

[9] Published in the Official Journal no. 247 dated 31st August, 1994.

[10] Civil Judgment no. 832 of 6th May, 2008, issued by the Bucharest Court, VI Civil Division; Civil Decision no. 206 of 17th March, 2009 issued by the Bucharest Court of Appeal; Civil Decision no. 806 of 10th February, 2010 issued by the High Court of Cassation and Justice, I Civil Division.

Corroborating the legal provisions referred to hereabove with the evidence submitted, the courts held that the Romanian State had no valid ownership title, the cultural property being *abusively taken over* by the communist authorities. The taking over being abusive, it follows that the defendants cannot oppose either the effects of the instantaneous acquisitive prescription provided for under Article 1909 (2) of the Civil Code. Similarly, the courts held that no piece of evidence filed by the defendants proves: (a) the consent expressed by G.R. or his wife R.M. for the conclusion of the contract for the sale of the sculpture, (b) their consent to the amount of the price, which was also fixed by the state authorities, (c) that the price of the sale would ever have been paid.

Thus, the property at issue was abusively taken over in the historical context of 1956-1957, in the absence of a valid translational ownership title, without being possible to ascertain a public utility expropriation in exchange for a fair and preliminary compensation, in violation of the right to private property.

3. Analysis of the relevant institutions of law

Taking our stand upon the main institutions of law analyzed by the national courts in resolving the aforementioned dispute, we shall put to the issue hereunder the public domain, the ways of acquiring the right to public property, the realm of the national movable cultural heritage and the recovery of a cultural property[11].

3.1. Public domain

In order to determine the meaning and purport of the concept of public domain, we shall first focus our attention on the right to property which, pursuant to Article 136 of the Constitution of Romania, is public or private. According to the Constitution, public property is guaranteed and protected by the law, while private property is inviolable.

At the legislative level, three statutory acts must be mentioned, namely: Law no. 213/1998 on the public property and its legal framework[12], Law no. 215/2001 on the local public administration[13] and Law no. 287/2009 on the Civil Code[14].

Under Article 553, the Civil Code establishes that any private use or interest goods owned by individuals, private law or public law legal entities, including goods forming the private domain of the state and of the administrative-

[11] The purpose of the study being solely to put in the readers' spotlight law enforcement institutions competent in situations and disputes relating to cultural property, we shall not carry out any analysis of the solutions put forward under the court judgments referred to hereunder.
[12] Published in the Official Journal no. 448 dated 24th November, 1998.
[13] Published in the Official Journal no. 123 dated 20th February, 2007.
[14] Published in the Official Journal no. 505 dated 15th July, 2011.

territorial units, *are subject to* private property. Therefore, the holders of the right to private property can be both individuals, the state and the administrative-territorial units.

On the other hand, under Article 554, the Civil Code establishes that any goods belonging to the state and to the administrative-territorial units, which by their nature or lawful purpose are of public use or interest, *are subject to* public property. Therefore, the *holders* of the right to public property can only be the state and the administrative-territorial units. Hence, the legislator defines public property under Article 858 of the Civil Code as the ownership right held by the state or by an administrative-territorial unit in respect of property which, by its nature or lawful purpose, is of *public use* or *interest*, provided that the same is *acquired* in compliance with the methods set forth by law. We argue hereunder that the latter condition is only applicable to goods subject to public property which, by their nature or lawful purpose, may also be subject to private property, hence other than those expressly provided for under Article 136 (3) of the Constitution of Romania and under Article 859 (1) of the Civil Code[15]. The latter cannot call into question the possible competition between a right to public property and a right to private property.

Taking its stand upon the subject-matter of public property, the legislator also establishes by the provisions of Article 860 of the Civil Code the concept of *public domain*, revealing that the goods subject to public property are part of the public domain. It also carries out a classification of the public domain, which is national, regional or, as the case may be, local. This classification is also found under Article 3 of the Law no. 213/1998 which establishes the purport of public domain at national, county and commune, town and municipality level. Likewise, this legal provision emphasizes in its second sentence our conclusion highlighted in the previous paragraph, *i.e.* the condition of being acquired in compliance with one of the methods set forth by law is applicable only in respect of goods which are not exclusively subject to public property.

The legislator also establishes under Article 4 of Law no. 213/1998 the existence of a private domain of the state and of the administrative-territorial units, which consists in goods over which the state and the administrative-territorial units hold a private property right.

Similarly, Law no. 215/2001 establishes under its Article 119 that the heritage of the administrative-territorial units consists of movable and immovable goods belonging to the public domain of the administrative-territorial unit, its private domain, as well as the property-related rights and obligations. The goods that, according to the law or by their nature, are of public use or interest and are

[15] Article 136 (3) of the Constitution of Romanian reads as follows: *"The mineral resources of public interest, the air, the waters with energy potential that can be used for national interests, the beaches, the territorial sea, the natural resources of the economic zone and the continental shelf, as well as other possessions established by the organic law, shall be public property exclusively."*

not declared by law as of national public use or interest, enter the public domain of local or regional interest. Any other goods held by administrative-territorial units that are not subject to public domain are part of their private domain.

In light of all the legal provisions referred to hereabove, it appears that the public domain is in fact the "basket" carrying each and any goods subject to the right to public property. Therefore, any goods entering the public domain can only have as owner of the property right the state and the territorial administrative units. Along with the holder and the legal framework of the property right, two other additional conditions must be fulfilled, that is, impacting upon the public use or interest by the nature of property or by law, as well as being acquired in compliance with one of the methods set forth by law[16].

3.2. Acquiring the right to public property

The legal methods of acquiring the right to public property are set forth under the provisions of Article 863 of the Civil Code. Thus, five main acquiring methods may be recaptured, plus the cases established by special laws. These are:

a. public procurement performed under the law. Via procurements, the state and the administrative-territorial units acquire ownership over property that is normally part of the private domain[17];
b. expropriation for public utility cause, under the law. The legal basis of expropriation is Law no. 33/1994 on expropriation for public utility cause and[18] Law no. 255/2010 on expropriation for public utility cause, necessary to achieve objectives of national, regional and local interest[19];
c. the donation or legacy, agreed under the law, if the property, by its

[16] For a comprehensive and in-depth analysis of the public domain in Romanian law, see C.-S. Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 275-364; Al. S. Ciobanu, *Inalienabilitatea și imprescriptibilitatea domeniului public în dreptul român și în dreptul francez,* Universul Juridic Publishing House, Bucharest, 2012. For an analysis of the main views expressed in the literature, see A. Iorgovan, *Tratat de drept administrativ,* Vol. II, Nemira Publishing House, Bucharest, 1996; V. Vedinaș, *Tratat teoretic și practic de drept administrativ,* Vol. II, Universul Juridic Publishing House, Bucharest, 2018; V. Vedinaș, Al. S. Ciobanu, *Reguli de protecție domenială aplicabile unor bunuri private,* Lumina Lex Publishing House, Bucharest, 2001, Chapter II *Privire asupra evoluției istorice a noțiunii de domeniu public;* M. Nicolae, *Considerații asupra Legii nr. 213/1998 privind proprietatea publică și regimul juridic al acesteia,* „Dreptul" no. 6/1999; D. Apostol Tofan, *Drept administrativ,* Vol. II, 4th edition, C.H. Beck Publishing House, Bucharest, 2017; O. Podaru, *Drept administrativ,* Vol. II, *Dreptul administrativ al bunurilor,* Hamangiu Publishing House, Bucharest, 2011; R. Rizoiu, *Unele considerații asupra condiției juridice a domeniului public și criteriilor de domenialitate,* „Dreptul" no. 9/2001.
[17] O. Podaru, *op. cit.,* p. 35.
[18] Republished in the Official Journal No. 472 dated 5th July, 2011.
[19] Published in the Official Journal no. 853 dated 20th December, 2010.

nature or by the will of the possessor, becomes of public use or interest;

d. the pecuniary agreement, if the property, by its nature or by the will of the acquirer, becomes of public use or interest;
e. the transfer of property from the private domain of the state into its public domain or from the private domain of an administrative-territorial unit into its public domain, under the law;
f. other methods established by law. The national law establishes various cases for acquiring the right to public property by the state and by the administrative-territorial units[20]. Relevant to our study is the special case provided for under Article 44 of Law no. 182/2000[21]. In this respect, it is established that the unprivileged heirs (heirs who can be totally disinherited, in Romanian *nerezervatari*) are held liable for the payment of inheritance taxes relevant for the classified movable cultural goods forming part of the estate. They may release such goods, at the expense of the inheritance taxes, which will become public property and will enter, under the law, in the administration of specialised public bodies, subject to the approval of the National Committee for Museums and Collections thereto. It is an unusual way for the state to acquire right to property, which, by making use of its right to inheritance taxes, can acquire classified movable cultural property in consequence of the will of the unprivileged heir not to pay such taxes.

Hence, it is hereby noted that for a good to be validly deemed and acknowledged as being subject to public property, and, consequently, part of the public domain, it must have followed one of the methods for being acquired by the state or by the administrative-territorial units as provided for under the law.

Law no. 213/1998 establishes an administrative procedure for defining the specific purport of public domain, consisting in the inventory and the official attestation of such goods, depending on their owners – the state or the administrative-territorial units.

The public domain of the state is established by an inventory procedure which is carried out by ministries or, as the case may be, by the specialized bodies within the central public administration and the central public authorities managing such goods. This procedure is centralized by the Ministry of Public Finance and approved by Government Decision[22].

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[20] See, by way of example, Article 26 of Law no. 18/1991 on lands (republished in the Official Journal no. 1/1998); Article 42 of Law no. 107/1996 on waters (published in the Official Journal no. 244/1996).

[21] Republished in the Official Journal no. 259 dated 9th April, 2014.

[22] See Government Decision no. 1705 of 29 November 2006 approving the centralised inventory of property in the public domain of the state, published in the Official Journal no. 1020 dated 21st December, 2006.

The local and regional public domain is determined by an attestation procedure. This consists in a first stage where specifically-created committees, headed by the presidents of the county councils, respectively the General Mayor of Bucharest or by mayors, make an inventory of the administrative-territorial unit's goods. In a second stage, these inventories are appropriated by county councils or local councils by decision. Finally, the inventories are centralized by the county councils and submitted to the Government, which, by decision, attests the goods as belonging to the regional or local public domain.

The inventory procedure, the attestation procedure respectively, *is not* therefore *a method of acquiring the right to public property*. This is a consequence of acquiring a right to public property by the state or by the administrative-territorial unit under the law. In this respect, the judicial practice has consistently held that "the registration of a real estate in the centralized inventory of property belonging to the public domain of the state does not in itself constitute an ownership title in favour of the state, the validity of the attestation of the public domain of the state being conditional upon the existence, as a premise, of a legal method of acquiring public property."[23]

3.3. Movable cultural heritage

The legal regime of goods belonging to the movable cultural heritage is regulated by Law no. 182/2000 on the protection of the national movable cultural heritage.

According to the law, the national movable cultural heritage includes any goods identified as such, irrespective of the ownership thereof, which is a reflection and expression of the constantly evolving values, beliefs, knowledge and traditions; it encompasses all the elements resulting from the interaction, over time, between human and natural factors.

Thus, the goods included in the national cultural heritage have a special historical, archaeological, documentary, ethnographic, artistic, scientific, technical, literary, cinematographic, numismatic, philatelic, heraldic, bibliophile, cartographic and epigraphic value, representing material testimonies of the evolution of the natural environment and human relations with it, of the human creative potential and of the Romanian contribution, as well as of the national minorities to the universal civilisation[24].

Such goods may bear archaeological and historical-documentary value (such as archaeological findings, old books, archival documents, etc.), artistic value (such as works of fine arts, decorative art, worship, etc.), ethnographic value (such as tools, ceramics, furniture, ornaments, etc.), technical or scientific

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[23] See Civil Decision no. 1080 dated 28th February, 2012 passed by the High Court of Cassation and Justice, the Administrative Litigation Division. Source: www.scj.ro, referenced on 7th May, 2019.
[24] Under Article 3 (1) of Law no. 182/2000.

value (such as rare specimens of zoology or anatomy, unique technical creations, etc.)[25]. Sculptures are works of fine art falling into the category of cultural property bearing artistic value.

The goods belonging to the national movable cultural heritage may be both public property of the state or of the administrative-territorial units and private property of the state, of the administrative-territorial units or of private law individuals[26].

So, here we are in a confluence area of public property and private property, where the legal regime of the right of property becomes a secondary element, the primary being **the criterion of the highest values that shape our national identity**, be it artistic, historical, technical, scientific or other. These values, and, accordingly, our national identity, are essentially intended to be preserved and passed on to future generations. These grounds served as basis for regulations covering the protection of such goods[27].

In this context, Professor Antonie Iorgovan formulated the thesis of the public domain *lato-sensu*, shared and pursued by Professor Verginia Vedinaș. According to this thesis, "public domain means any public or private goods which, by their nature or the express provision of the law, must be preserved and conveyed to future generations, representing values intended to be used in the public interest, either directly or through a public service, and subject to an administrative or mixed regime, where the power regime is decisive, being owned or, as the case may be, secured by legal entities of public law."[28] According to the thesis proposed, "both goods subject of public and private right of property may be combined under the generic title of public domain, both categories being subject to a legal regime different from the one relevant for the ordinary goods due to the public interest they carry for various reasons: historical, cultural, urban, economic, etc."[29]

Other authors have expressed the view that there is a supposition of a special regime relevant for some private goods owned by the state, which is materialised by limiting the exercise of the right to property pursuant to Article 53 of the Constitution of Romania[30].

Regardless of the theory embraced, we note that in practice we encounter a series of goods that, even if regulated by private property, are subject to a special

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[25] Under Article 3 (2) of Law no. 182/2000.
[26] Under Article 5 of Law no. 182/2000.
[27] In the field of cultural heritage, depending on the nature of cultural property, of relevance are Law no. 182/2000 on the protection of the national movable cultural heritage, Law no. 422/2001 on the protection of historical monuments, Law no. 26/2008 on the protection of intangible cultural heritage, the Government Ordinance no. 43/2000 on the protection of the archaeological heritage and the declaration of certain archaeological sites as areas of national interest.
[28] A. Iorgovan, *op. cit.,* vol. II, p. 173.
[29] Al. S. Ciobanu, *op. cit.,* 2012, p. 105.
[30] See for further developments, D. Apostol Tofan, *Corelația proprietate publică – domeniu public, potrivit Constituției și legislației în vigoare (Part II),* „Juridica" no. 1/2001, p. 5 and 9.

legal regime. This special legal regime means the sum of the rules imposed by the legislator on the exercise of the right to property, possession, preservation, transfer of ownership, and so on. Such a legal regime also regulates the movable cultural goods constituting the national movable cultural heritage.

For instance, the movable cultural goods, whether subject to public or private property, may be included in the national movable cultural heritage by passing through a classification procedure, pursuant to Article 10 *et seq* of Law no. 182/2000. By this procedure, *ex officio* or upon the private owner's request, the National Committee for Museums and Collections decides whether a movable cultural good meets the criteria for being included in the national movable cultural heritage. The classification decision is issued based upon an expert report drawn up by accredited experts or specialists and is approved by order of the minister of culture and national identity[31].

By being classified, the movable cultural good is registered in the Inventory of the national movable cultural heritage, the treasure category, if bearing exceptional value for humanity, or the fund category, if bearing a remarkable value for Romania.

Owners, holders of other rights *in rem* or the right of management, as well as holders of any title in respect of classified movable cultural goods, undertake a series of specific obligations under the law as regards the conditions of property preservation, storage and security, aiming to ensure the protection thereof. Furthermore, any works for the preservation and restoration of classified movable cultural goods may be carried out only under special conditions provided by law. The movement of movable cultural property is, in turn, derogatory of common law. By way of example, movable cultural goods owned by individuals or legal entities of private law, classified in the treasure category, may be subject to public sale only provided that the Romanian State, via the Ministry of Culture and National Identity, exercises its preemption right.

A series of other rules - an expression of the particular legal regime - are applicable in respect of movable cultural goods on grounds of public interest.

[31] It is noteworthy in this context that, with regard to the sculpture Wisdom of the Earth, specialists of that time expressed the most diverse opinions, for various reasons. Thus, in the case of Brâncuși's lawsuit against the United States, there were important voices that claimed that the sculpture can not be considered a work of art (see answers to the questionings of witnesses Robert Ingersoll Aitken and Thomas H. Jones, in G. Banu, *op. cit.*, pp. 102-114, respectively pp. 115-120). Three decades later, in Romania, during the meeting of the Department of Language, Literature and Arts within the Academy of the Socialist Republic of Romania, held on 7th March, 1951, it was argued that Brâncuși's works cannot be considered masterpieces and cannot be accepted in the Republic's Art Museum (see the Minutes no. 10 of 7th March, 1951 of the Department of Language, Literature and Arts within the Academy of the Socialist Republic of Romania, apud G. Banu, *op. cit.*, pp. 122-123).

3.4. Recovery of possession

The recovery of possession, provided by Article 563 of the Civil Code, was defined as the effective claim by which the owner who lost possession of its property requests the restitution thereof from the non-owner[32].

The right to private property has prompted a lively interest, numerous controversies and consistent judicial practice in the decades following the fall of the communist regime. With the disappearance of socialist property, the Romanian society faced the need to identify the solutions by which the former owners, who had seen their property being abusively taken over by the Communist state, could be reinstated in the former position.

If, in the case of immovable property by reinstatement in the former position, the legislator also put forth the possibility of indemnification of former owners should restitution be impossible, the same was not the case for movable property. As far as this difference in legal opinions is concerned, the Constitutional Court was referred with settling the constitutional challenge relevant for the provisions of Article 5 (1) letter (b) of Law no. 221/2009 on political convictions and their related administrative measures, ruled between 6th March 1945 and 22nd December, 1989, having regard to the interpretation given in the appeal in the interest of the law under Decision no. 6 of 15th April, 2013 passed by the High Court of Cassation and Justice. By this Decision, the High Court held that "material damages may be granted only for the same categories of property subject to special statutory acts of redress, *i.e.* Law no. 10/2001, republished, as subsequently amended and supplemented, and Law no. 247/2005, as subsequently amended and supplemented, under which the party concerned was not already granted redress." In the opinion of those who raised the constitutional challenge, "if in the matter of restitution, in kind or equivalent, of immovable property, various statutory acts were gradually adopted in time, including Law no. 10/2001 and Law no. 247/2005, which refer to all individuals dispossessed of immovable property, Law no. 221/2009 covers a distinct category of individuals, that is, those who have been politically convicted, and there is no similar statutory act in the matter of restitution of movable property seized from such persons." Restricting the category of property for which material damages may be granted, under the law, is contrary to constitutional requirements in the view of the challenge's authors.

The Constitutional Court found, by its Decision 534 of 12th December 12,

[32] Civil Decision no. 806 of 10th February, 2010 issued by the High Court of Cassation and Justice, I Civil Division.

2013, that general and special law in terms of remedies generally relates to immovable property, taken over by various abusive methods[33].

In the Court's view, "when the legislator wished to extend the scope of property subject to the restitution regime to other property, this was carried out in an express and explicit manner."

Such cases are: (a) Government Emergency Ordinance no. 13/1998 on the restitution of real estate formerly owned by the communities of national minorities in Romania[34], which includes in item 13 of the Annex the movable property included in the inventory of the Batthyaneum Library and the Institute of Astronomy, (b) Government Ordinance no. 190/2000 on the regime of precious metals and gems in Romania[35] and (c) Law no. 182/2000 on the protection of the national movable cultural heritage.

Thus, only in specifically determined cases the movable property has also been subject to legislative remedies, the legislator expressly and restrictively indicating such property subject to the claim.

In the Constitutional Court's view, the legislator's option "is not likely to violate the right to property, because the State has a wide margin of discretion in the matter of regulating legislative remedies matching its actual compensatory possibilities and ensuring at the same time a fair balance between the rights and interests of individuals and the general public interest." Likewise, in its view, the limitation of granting compensation in the equivalent of the purport of immovable property abusively taken over is also grounded on "practical considerations, such as: the perishability of the movable property in general and its transferring capacity in physical terms; in the case of a movable property, possession is worth ownership (pursuant to Article 919 (3) of the Civil Code) and, to be claimed, a movable property must exist in its materiality, be individualised and the rightless holder or owner be identified, and there must be evidence to challenge the appearance of legal possession of property. These are features specific for the movable property that render much more difficult, if not impossible in some cases, an

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[33] Some examples are provided below: Law on lands no. 18/1991, republished in the Official Journal no. 1 of 5th January, 1998, as subsequently amended and supplemented, Law no. 112/1995 on the regulation of the legal status of certain residential buildings, transferred to state property, published in the Official Journal of Romania, Part I, no. 279 of 29th November, 1995, as subsequently amended, Government Emergency Ordinance no. 83/1999 on the restitution of real estate formerly owned by the communities of national minorities in Romania, republished in the Official Journal of Romania, Part I, no. 797 of 1st September, 2005, Law no. 1/2000 for the restoration of ownership over the agricultural and forest lands, claimed according to the provisions of the Law on lands no. 18/1991 and Law no. 169/1997, published in the Official Journal of Romania, Part I, no. 8 of 12th January, 2000, as subsequently amended and supplemented, Government Emergency Ordinance no. 94/2000 on the restitution of immovable property formerly owned by religious cults in Romania, republished in the Official Journal of Romania, Part I, no. 797 of 1st September, 2005, as subsequently amended and supplemented, Law no. 10/2001, republished, as subsequently amended and supplemented, or Law no. 247/2005, as subsequently amended and supplemented.

[34] Published in the Official Journal no. 255 dated 8th July, 1999.

[35] Republished in the Official Journal of Romania no. 77 dated 29th January, 2004.

action for the recovery of possession or restitution. Furthermore, considering the mandatory registration/transcription requirements in the land book or other similar registrations of the ownership title and the durability of such property, generally, the possibility of restitution in kind or equivalent is much more feasible in the case of immovable property. Unlike the case of the movable property, the possession of the immovable property does not lead to the presumption of ownership thereof."

This being the case, it is hereby noted that the Romanian legislator paid special attention to the claim of movable cultural property.

In this respect, as per the provisions of Article 93 of Law no. 182/2000, "the movable cultural goods unlawfully taken over by state authorities after 6th September, 1940 may be claimed by the rightful owners and shall be returned to the same by the institutions in their possession, based on a final court order. Such legal claims are exempt from stamp duty. Institutions holding archives on movable cultural goods should allow access to documents on their origin and takeover."

Thus, the general rule of exempting from stamp duty the recovery of possession of goods abusively taken over was addressed. The judicial practice also held that the general rule of non-applicability of statutory limitations to the claim for the recovery of possession is also relevant in this matter[36].

One particular element that is worth noticing is that public institutions possessing movable cultural goods abusively taken over should return these to owners on the basis of court orders. Under this legal provision, considering the practice of public institutions, the general interpretation that emerged was that the restitution was not granted in the absence of a final court order in this respect. We appreciate this interpretation as being somehow sheltered from criticisms bearing the importance of protection and the difficulty of tracking movable cultural goods. Establishing an individual's ownership in respect of a movable cultural good is a complex procedure with special consequences, which requires high-level precautionary measures.

In the same vein, *i.e.* the protection of movable cultural goods, the legislator established that property classified in the cultural heritage and in respect of which restitution was ordered may be passed on to the right holders only after the latter certify in writing having observed the legal provisions for the protection of the national movable cultural heritage. That is to say, the legislator wanted to ensure that the owners take note and, most important, become aware of the weight of the good returned and of the special legal regime regulating the same.

Finally, the law provides in respect of cultural goods constituting collections in the process of being classified that it can be returned to the owners, annually, by part of collections, as the classification procedure has been completed.

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[36] See, by way of example, the Civil Decision no. 3981 of 11th December, 2014 issued by the High Court of Cassation and Justice (available at www.scj.ro, referenced on 5th May, 2019).

4. Conclusions

The institutions of law regulated in the field of the protection of the national movable cultural heritage fully endorse the thesis of the public domain *lato-sensu* and the thesis of the special legal regime of goods constituting this type of heritage. The preeminence of a public interest vested in future generations to inherit the top-ranking national cultural values cannot be questioned against any particular interest.

Awareness of the fundamental role of cultural heritage in today's and tomorrow's society is a sinuous process for those peoples who for decades have endured oppression and vandalism in respect of the highest values and noble virtues. Rebuilding a national consciousness and spirit able to meet the effective requirements of cultural heritage protection can only be achieved through joint, sustained and interdisciplinary effort.

By bringing to the forefront a national symbol enjoying worldwide appreciation, and the unprecedented events of its works, by calling forth the interweaving of art with law, we humbly contribute to the reinstatement of senses like honour and national unity around the most precious common heritage of current and future generations - the national cultural heritage.

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Theoretical and practical aspects regarding the modification of the civil servants' employment relationship. Comparative analysis with the employees' situation

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Abstract

According to Law no. 188/1999 on the status of civil servants, their employment relationship may be modified by delegation, posting, transfer, transfer within the public authority or institution or within another structure without legal personality of the public authority or institution, according to the law, and for a temporary public management function. In the case of employees, the modification of the employment relationship is made by delegation, posting, but also unilaterally by the employer in cases of force majeure, as a disciplinary sanction or as a protection measure of the employee, in the cases and under the conditions provided by the Labor Code. The elements of differentiation between the two categories of workers will highlight the particularities of the change in the employment relationship of civil servants, which, unlike the legal status of employees, is better outlined by the legislator. On the basis of theoretical analysis, as well as of the elements of jurisprudence de lege ferenda proposals will be formulated in this field.

Keywords: *public servants, employees, modification of the employment relationship, transfer, delegation, posting.*

JEL Classification: K23, K31

1. Introductory aspects

The employment relationship of civil servants may be changed for the proper performance of activities within public institutions and authorities.

The Law no. 188/1999 on the status of civil servants[2] regulates the mobility of civil servants in art. 87-93.

The employment relationship of civil servants may be changed by delegation, posting, transfer, relocation within the public authority or institution or to another structure without legal personality of the public authority or institution, under the law, i.e. the temporary exercise of a public management position[3].

The mobility of the employment relationship of civil servants is carefully regulated by the legislator, in order to ensure the specific protective nature of the

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[2] Published in the Official Gazette no. 365 of May 29th, 2007.

[3] See D. A. Tofan, *Drept administrativ*, vol. I, 4th ed., C.H. Beck Publishing House, Bucharest, 2018, p. 436-439, C. S. Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public,* C.H. Beck Publishing House, Bucharest, 2016, p. 408 – 411.

civil service.

The legislator's protective nature is more pronounced in civil service than in the case of employees, conclusion resulting from the comparative analysis of the laws regulating the legal status of these categories of workers.

The Labour Code (Law no. 53/2003, with subsequent amendments and completions)[4] sets that the employment relationship of employees may be changed by delegation, posting, or even unilaterally by the employer under the law, respectively in cases of force majeure, as a disciplinary sanction or as a protection measure for the employee.

2. Mobility of civil servants

The **delegation** is the temporary exercise of job duties by the civil servant in the interest of the public authority or institution.

The maximum duration of the delegation in one year is no more than 60 calendar days. By way of exception, civil servants may be delegated for a period larger than 60 calendar days in one year, but only with their consent.

The legislator establishes that employers are required to bear the full cost of transport, accommodation and payment of the delegation allowance for civil servants.

As an additional protection measure for civil servants, which is not found in the laws specific to the employees (the Labour Code), the legislator sets in art. 88 that the civil servant may refuse delegation in the following situations: a) pregnancy; b) single parent upbringing the minor child; c) health condition, proven by medical certificate, which makes the delegation contra-indicated.

The **posting** of civil servants may be ordered for a maximum period of 6 months during a calendar year. The legislator does not define posting, so we are of the opinion that the provisions of the Labour Code in the matter are applicable. Civil servants may be posted for more than 6 months in a calendar year only with their written consent.

According to art. 89 para. (2) of the Law no. 188/1999, the posting may be ordered if the professional training of the civil servant corresponds to the duties and responsibilities of the public office, respecting the category, the class and the professional degree of the civil servant.

Postings may also be ordered for management positions or even for positions specific to senior civil servants if the requirements laid down by law are met, mainly concerning studies and length of service.

Civil servants with special status may be posted to general public positions equivalent to the specific public positions they occupy, with the prior notification of the National Agency of Civil Servants, according to art. 89 para. (2) of the Law no. 188/1999. Civil servants may also be posted to special civil service

[4] Republished in the Official Gazette, Part I, no. 345 of May 18th, 2011.

positions, under similar conditions, respectively with the prior notification of the National Agency of Civil Servants.

During the period of posting, civil servants retain their public office and salary, moreover, if the public office to which the posting is made implies a higher salary, the civil servant will benefit from that salary.

As in the case of delegation, the civil servant is entitled to the payment of the transport and the posting allowance plus the payment of the accommodation.

The legislator in art. 89 para. 30 of the Law no. 188/1999 on the statute of civil servants establishes that a civil servant may refuse to be posted if he/she is in one of the following situations: a) pregnancy; b) single parent upbringing the minor child; c) health condition, proven by medical certificate, which makes the delegation contra-indicated; d) posting is made in a locality in which no suitable accommodation conditions are ensured; e) is the only family provider; f) well-grounded family reasons justify the refusal to go on with the posting.

The High Court of Cassation and Justice, through the Administrative Litigation Section, decided that the public institution had violated the law when it did not give up the posting measure in the case of a civil servant who invoked personal family reasons in the sense that he was the sole caretaker of his old and sick parents, after he concluded with them a life maintenance contract.

The High Court of Cassation and Justice found that the posting order issued by Sibiu County Labor Agency was unlawful, adopted with excessive power by violating the civil servant's right to refuse posting[5].

As regards the posting of employees, the legislator set a first term unilaterally dispensed by the employer, namely for a maximum of one year, and subsequently the posting may be extended by successive terms of 6 months with the employee's agreement. From the comparison of legal regulations, it is noted that, in the case of employees, posting has a more lenient legal regime than compared to civil servants, but is still being deprived by certain legal measures to protect employees.

It should be noted that, unlike the delegation, which cannot be denied by the employees in terms of the first term, in the case of posting, according to art. 46 para. (3) of the Labour Code, the employee may refuse the posting ordered by his/her employer only exceptionally and for well-grounded reasons.

The legislator does not give any circumstances to these reasons, as it does for civil servants, but we consider that by analogy the reasons which are regulated by the legislator for civil servants are also applicable[6]. We underline, that the

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[5] The High Court of Cassation and Justice, through the Administrative Litigation Section, Decision no. 1135 from 2 March 2012.

[6] See I. T. Ștefănescu, *Tratat teoretic și practic de drept al muncii,* 4th edition, reviewed and added, Universul Juridic Publishing House, Bucharest, 2017, p. 418.

employees may also rely on other well – grounded reasons which justify the impossibility of posting.

The High Court of Cassation and Justice, through the Administrative Litigation Section, has ruled on the delegation and posting of civil servants in the sense that the public authority or institution can revoke the posting of civil servants and may order it to be replaced by the delegation within the time limit of 6 months from the date of the first decision, by two consecutive ministerial orders, even if the first order entered the civil circuit and produced legal effects[7].

As regards the **transfer**, in the case of civil servants, the legislator determined that civil servants could be transferred for institution or public authority's interests or on request.

The transfer for institution or public authority's interests is performed only with the consent of the transferred civil servant and according to art. 90 para. (4) of the Law no. 188/1999, is made to a public position of the same category, class and professional degree with the public office held by the civil servant or to a lower public office.

The transfer on request involves the approval of the transfer application filed by the civil servant by the head of the public authority or institution to which the transfer is requested.

With regard to the position that can be held by the civil servant by transfer on request, he/she may be on a public office of the same category, class and professional degree or on a lower public office, according to art. 90 para. (5) of the Law no. 188/1999.

The transfer may take place only between public authorities or institutions in the central public administration, between autonomous administrative authorities or, as the case may be, between public authorities or institutions in the local public administration (art. 90 para. (5) of the Law no. 188/1999).

The Constitutional Court pronounced relatively recently on an exception of unconstitutionality which referred to Art. 90 par. (5) of the Law no. 188/1999. The author of the exception claims that the way to carry out the transfer of civil servants on request includes discriminatory elements due to the fact that they are carried out on the same level of public administration.

The Constitutional Court, by Decision no. 117/14 March 2018[8], dismissed the exception as unfounded, stating inter alia that .... given that, as regards the type of transfer applicable to service relationships, civil servants transferred in the interests of the service are not in the same legal situation as those who have the initiative of transfer, in the case of the last hypothesis (transfer on request), the Court notes that the treatment of the law applicable to the two types of transfer may be different, depending on the legislator's option. Thus, in this situation, the

[7] The High Court of Cassation and Justice, through the Administrative Litigation Section, the Decision no. 1697 from 21 March 2007.

[8] Published in the Official Gazette no. 453 of May 31th 2018.

legislature prevailed on the public interest generated by the professional competence requirements required within the various levels of the public authorities or institutions, represented by the immediate and urgent need to respond to an exceptional situation arising from the realization of a public service, in relation to the personal interest of the civil servant, regarding the development of the professional career[9].

The transfer of management civil servants may take place to similar positions or even to public executive positions.

Regarding senior civil servants, the transfer is ordered by the person who has the legal power of appointment in the public position, at the motivated request of the senior civil servant and with the approval of the head of the public authority or institution in whose structure is the public vacancy to be transferred to, under the law.

The individual transfer of employees is a controversial issue in the legal doctrine, given that the legislator does not regulate it in the current Labour Code.

On this background of regulation, in the legal doctrine, several opinions were formulated regarding the possibility of individual transfer of employees, some authors being of the opinion that that it would be possible only if it is expressly regulated by the legislator[10], while other authors believe that the transfer is possible even if is not unregulated by the legislator[11].

Currently, through the Law no. 153/2017 on the remuneration of staff paid out of public funds[12], the legislator in art. 32 provided for the possibility of transfer for the employees in the budgetary system, for business purposes or at the request of the person, similar to the situation of civil servants.

However, the transfer situation for employees in the private system remained unanswered by the legislator.

Amid this regulation of the legislator, we believe, as we have stated in other contexts, that the transfer of employees from the private system is possible because, on the one hand, the legislator does not forbid it, the operation also being possible through REVISAL, and on the other hand it is an operation in favour of the employees[13].

However, a clear option for the legislator in the sense of expressly regulating the transfer would be necessary[14].

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[9] See the Decision text to web address: http://legislatie.just.ro/Public/DetaliiDocumentAfis/201086, accessed in the date 14.05. 2019.

[10] See Al. Athanasiu, L. Dima, *Dreptul muncii*, All Beck Publishing House, Bucharest, 2005, p. 231-232.

[11] See I. T. Ștefănescu, *op. cit.* p. 433-434.

[12] Published in the Official Gazette no. 492 of June 28th, 2017.

[13] See R. Ș. Pătru, *Situația concediului de odihnă în cazul transferului magistraților. Aspecte generale referitoare la transferul angajaților,* „Revista Română de Dreptul Muncii", no. 4/2017, p. 59, 60.

[14] *Ibidem.*

The **shift** is another element specific to the mobility of civil servants and takes place within the public authority or institution or within another structure without legal personality of the public authority or institution and may be permanent or temporary, according to art. 91 para. (1) of the Law no. 188/1999.

The permanent shift can only take place in situations strictly prescribed by law[15], and the temporary shift to another public position shall be motivated, in the interest of the public authority or institution, by the head of the public authority or institution, on a public equivalent position, of the same category, class and, if the case, of the same professional degree, for which the specific requirements stipulated in the job description are met or, as the case may be, with the assignment of the position corresponding to the position held by the civil servant for a period of maximum 6 months in a calendar year [art. 90 para. (4)].

Civil servants may request permanent or temporary shift for medical reasons. The shift may also be ordered in another locality, in which case the civil servant may refuse it for the same reasons for refusing the posting. The unjustified refusal of the civil servant to relocate represents a disciplinary offense.

In the case of employees, the Labour Code does not regulate the shift, this being possible through the will of the parties and represents a case of amendment of the individual employment agreement. In this case, the legal operation must be assented by an addendum to the employment agreement.

The temporary exercise of a vacant or temporarily vacant public position is made according to art. 92 para. (1) of the Law no. 188/1999, by temporarily promoting a civil servant meeting the requirements of studies and seniority in the specialty of the studies for the occupation of the public position and who does not have a disciplinary sanction applied upon, who has not been de-registered, under the law.

Exceptionally, the above provisions also apply to the positions of senior civil servants, which may be held by civil servants or civil servants with special status, with the mandatory notification of the National Civil Servants Agency 10 days before taking the measure.

In the exercise of their office, the civil servants benefit from the highest salary, so if the position exercised temporarily by the civil servant implies a

[15] These are the following: a) when the order is given by the head of the public authority or institution in which the civil servant performs his/her activity on an equivalent public position, of the same category, class and, where appropriate, of the same professional degree, or on a public low-level vacancy for which the specific requirements stipulated in the job description are met. In duly justified cases, the relocation may be justifiably ordered by the head of the public authority or institution, with the assignment of the position corresponding to the office held by the civil servant. In either case, the written consent of the civil servant is required; b) at the justified request of the civil servant, with the approval of the head of the public authority or institution, on an equivalent public vacancy, of the same category, class and, as the case may be, of the same professional degree, or on a public low-level vacancy for which the specific requirements stipulated in the job description are met; c) in other situations provided by the legal provisions.

higher salary compared to the basic position of the civil servant, he/she will benefit from this salary.

As regards senior civil servants, they are subject to mobility just like other civil servants.

The ungrounded refusal of appointments according to the mobility rules specific to the public position calls for the dismissal of senior civil servants and the transfer to the civil servant reserve body.

3. Conclusions

The mobility of civil servants is a highly important aspect for their careers.

The legislator has regulated a series of incumbent institutions in the sphere of mobility of civil servants, which are legally regulated by the legislator, by providing a legal protection framework for civil servants.

By carrying out the analysis in comparison with the situation of employees, we notice that the legal regulation for civil servants is more favourable than the similar provisions of the Labour Code concerning employees.

Thus, for public servants, the legislator regulated institutions such as the transfer, relocation, which are not covered by the labour law, and other institutions such as delegation and posting are regulated with a higher level of protection for employees.

This higher level of protection in relation to the labour laws concerning employees is normal for the public service, but given the model of the public service, we consider that proposals of *de lege ferenda* (future laws) can also be made in the field of labour laws. Thus, we believe that the legislator should regulate the transfer for employees in the private system by expressly regulating in the Labour Code the possibility of transfer by concluding a tripartite agreement between the employee and the two employers, as found in the previous legislation and improve the legal status of posting by regulating situations in which employees may refuse the posting, as in the case of civil servants.

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Processing of personal data.
Case study: a fair balance between the right to information and the right to privacy

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Abstract
All those who seek to achieve the concept of 'effective education', both institutions or governmental authorities that are part of the central or local public administration, educational institutions, teachers, or students, aim at achieving a standard that meets the attributes of quality, objectivity and equity in any level, the only ones who can configure and ensure the development of academic quality in a double sense, from teacher to student, respectively from student to teacher. Application and interpretation of personal data protection legislation has its own role in achieving and maintaining quality by continually correlating with everything involving objectivity and impartiality, the only one that can give a fair balance between the requirements of the European framework in the field and the proof of the quality of being worthy of confidence in the personal development and realization of students through the diligence that has been done to ensure the development of the academic body. The point of view is a plea that underlines the importance of correctly interpreting the scope of Regulation 679/2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[3] *and why not to overrule the case law of the European Court of Human Rights or the Court of Justice of the European Union, which does not expose us as representing not just a good practice.*

Keywords: *personal information, public interest information, just balance, administrative law*

JEL Classification: H83, K23, K38

1. Ensuring a fair balance between the right to information on the one hand and the right to privacy on the other

Personal information refers to what has already been appropriated and assumed in Romania in the second half of 2018 by all legal persons governed by public law or by private law and public utility as representing the concept of personal data and involved in the implementation of an analysis at a first glance only in terms of the specificity of the segment of activity to which it applies and the

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[3] Published in the Official Gazette no. 119L of May 4, 2016.

related legal framework of the union and the national one.

However, the support and form of expression of information of public interest, especially when at institutional level they can be part of personal information, puts us in another wider legislative context, which implies a corroboration of several normative acts, but above all the ability to correctly assess the way in which a fair balance is struck between the right to information and transparency on the one hand and the right to privacy on the other.

At national level, through Law no. 544/2001 on the free access to public information[4], a distinction was made for the first time between the two concepts, namely the data/information of public interest, respectively, of personal information/data[5]. As is apparent from the very first article of the normative act, the activities resulting from the exercise of the legal powers of a public authority or institution are based on one of the fundamental principles of relations between individuals and public authorities, namely the unhindered access of any citizen, any natural or legal person to any kind of information of public interest. Thus, we can say that the legal basis is the fundamental law, the Romanian Constitution, the international treaties ratified by the Romanian Parliament, but without any possibility, the personal data legislation intervenes when the requested public interest information is on the same support and with such information and in this context we could also invoke the Charter of Fundamental Rights of the European Union[6] or the European Convention on Human Rights[7].

Regulation of the European Parliament and of the Council of the European Union no. 679/2016 on the protection of individuals 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) redefines the date of application at national level in the year 2018, the concept of personal data, largely maintaining the definition enshrined in Law no. 544/2001 respectively Law

[4] Published in the Official Gazette no. 663 dated October 23, 2001.

[5] Law no. 544/2001 – „Art. 2. For the purposes of this law: b) "information of public interest" means any information relating to the activities or resulting from the activities of a public authority or public institution, regardless of the support or the form or mode of expression of the information; (c) "personal data" means any information relating to an identified or identifiable natural person."

[6] It was proclaimed by the European Commission, the European Parliament and the Council of the European Union on 7 December 2000 at the Nice European Council. Article 8: Protection of personal data. (1) Everyone has the right to the protection of personal data concerning him/her. (2) Such data must be dealt with correctly, for the purposes specified and on the basis of the consent of the person concerned or another legitimate reason provided by law. Everyone has the right of access to the collected data concerning him, as well as the right to obtain the rectification thereof. "

[7] Developed by the Council of Europe, it includes fundamental rights and freedoms, being signed on 4 November 1950 in Rome. "Art. 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. The interference of a public authority with the exercise of this right is only admissible insofar as it is provided by law and constitutes, in a democratic society, a necessary measure for national security, public security, the country's economic well-being, the defense of order and the prevention of deeds criminal law, the protection of health, morals, rights and freedoms of others."

677/2001 for the Protection of Individuals with regard to the Processing of Personal Data and the Free Movement of such Data[8], but this time there are no additional references. Thus, the term 'any information' refers both to an identified individual and to a person directly or indirectly identifiable by reference to different elements: „an identification number, location data, an online identifier, or one or more specific elements of his physical, physiological, genetic, psychological, economic, cultural or social identity."

It is clear from the case-law of the European Court of Justice that the use of the expression „any information" within the definition of personal data „reflects the objective of the Union legislature to assign a broad meaning to that concept, which is not restricted to sensitive information but potentially embraces any kind of information, both objective and subjective, in the form of opinions or appreciations, provided that they are "relevant" to the person concerned. As regards the latter condition, it is satisfied when, because of its content, its purpose or effect, the information is related to a particular person".[9]

If the field of "any information" has been clarified, it is necessary to undertake a brief analysis from the perspective of the jurisprudence of the court that ensures the unitary application of the law of the union in all the Member States, including Romania, of the provisions of Article 14 paragraph 1 of Law 544/2001, referring both to the provisions of Article 8 of the European Convention on Human Rights and to Art. 8 of the Charter of Fundamental Rights of the European Union. Thus, according to the text of the article invoked (14 paragraph 1 of Law no. 544/2001), we find a situation of strict interpretation, since it stipulates that "information on the citizen's personal data may become information of public interest only insofar as it affects the capacity to exercise a public function "and as we know, the teacher only on the segment of criminal liability can fall into the category of" public servant"[10]. By simply referring to the status of the teacher, it is practically the moment when it comes to the ability of a fair assessment of how to achieve a fair balance between the right to information and the right to privacy. According to the existing jurisprudence, "the right to personal development and the right to establish and develop relationships with others and the surrounding world" (see *Pretty v. The United Kingdom*, no. 2.346/02, point 61, ECHR 2002-III) as part of the notion of 'private life' which does not exclude activities of a professional nature (see *C. v. Belgium*, 7 August 1996, §25, Reports of Judgments and Decisions 1996-III). I have rarely encountered in recent times

[8] Published in the Official Gazette no. 790 dated 12 December 2001 and repealed by Law no. 129 of 15 June 2018 for amending and completing the Law no. 102/2005 on the establishment, organization and functioning of the National Supervisory Authority for Personal Data Processing, as well as for repealing the Law no. 677/2001.

[9] Judgment of the European Court of Justice of 20.12.2017 in Case C-434/16.

[10] Decision of the High Court of Cassation and Justice no. 8 of March 15, 2017, published in the Official Gazette no. 290 of 25 April 2017.

situations where the Constitutional Court[11] also stated that the national law "silently" „did not foresee any measure that could be qualified as a guarantee of the right to family or private life”, that the provisions of the national law are far from constitute, by themselves, guarantees of respect for the right to personal development.

We consider that such a situation is also incident in terms of the qualification as public information of the results of the evaluation by the students of the performance of each teaching staff. In order not to be misunderstood, we underline the fact that we agree with this assessment, we appreciate it as naturally and correctly framed as imperative, we agree that the results of the evaluations are public information, but certainly not by reference to the individualisation of each teacher in part, but by reference to an overall statistical expression on the university. Otherwise, we find ourselves not only in the presence of inequity, as the student has the right to request the confidentiality of his assessments, to ask for anonymization or password access to the grade obtained, and the teacher does not, but at a time when certain the right of the teacher to the protection of personal information related to his or her professional life is violated, just as the right to personal development is violated, because, not to forget, the goal of the legislator by introducing teacher evaluation by students was obtaining feedback on current performance and developing a professional development plan by improving sensitive learning outcomes. We could state in this context the situation as a case study, that again and again and again on this aspect, the national law (with reference to Article 303 paragraph 2 of Law 1/2011) 'silent', not paying any attention to his body or guaranteeing the right to professional life, we reiterate as part of the right to private life and the right to professional development.

In conclusion, on the one hand, in such a situation, a balance must be struck between the two rights, first enshrined in the principle of free and unrestricted access of any person to information of public interest, and second, the right to private life in relation to the processing of personal data which subsumes the notion of information of public interest as long as it results from the activities of a public authority or institution which is also related to the professional life of the natural person and are thus part of the life segment private. In this respect, it also distinguishes the European Court of Justice, which considers that „the fact that information is part of a professional activity is not such as to deprive it of the qualification of' personal data”[12]. Also, by the judgment of the ECJ of 20 December 2017 in Case C-434/16 ECJ, the court states by extension that data relating to professional activity, in a specific context such as an examination, may even belong to two persons: „provided by a candidate in the course of a professional

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[11] Decision no. 498 of July 17, 2018, published in the Official Gazette no. 650 of July 26, 2018.
[12] Judgment of 16 July 2015, ClientEarth and PAN Europe/EFSA, C 615/13 P, EU: C: 2015: 489, paragraph 30.

examination and any observations of the examiner concerning those answers constitute personal data within the meaning of that provision”.

2. The principle of public accountability in the education system in the context of an informed, legal and transparent processing of the data subject

Education is a service of public interest in a field of general public interest which in itself implies a guarantee of legality, even if it is achieved either through legal persons governed by public law or by legal persons governed by private law and also of public utility.

The national higher education system is based on several principles, of which the importance of the principle of public accountability is of particular importance, its assumption being the imperative condition of the possibility of exercising university autonomy at the level of any higher education institution either state or private. All providers of education are therefore bound by this principle to comply with all the legislation in force, including to comply with the provisions on quality assurance and transparency of the decisions and activities they manage.

Looking at another angle, we naturally find that education as a service of public interest must be seen in close correlation with the legitimate interest. The guiding and equally tantalizing idea is that compliance by higher education institutions with public-liability obligations is a public legitimate interest for any individual, regardless of status, teacher, student or simple citizen. Even the didactic functions, part of the management system, were found to be related to the concepts of "public interest" and "public function" and in close correlation with the notion of "public interest", „both aiming to satisfy the needs of general interest on the basis of constitutional prerogatives that make the public interest over the private interest prevail.”[13] And I support this statement in the circumstances in which, as has been pointed out in the case-law, including the person having the capacity of a teaching staff in higher education in a private university, he has the status of a civil servant, in the sense of the provisions of Art. 175 par. (1) letter b) second sentence of the Criminal Code: "a civil servant within the meaning of the criminal law is a person who performs a service of public interest for which he has been entrusted by the public authorities or who is under their control or supervision with regard to the performance of that public service."

It is on the basis of these considerations that the legislator considered that the requirements of fair and legal protection and promotion of the public interest require that the principle of public accountability be regulated and appropriate penalties should be imposed in the event of its violation. Such a violation, the legislator stresses, may also intervene in the case of refusal to communicate or false reporting of data of public interest requested. Therefore, in the context of

[13] High Court of Cassation and Justice, Criminal Section, decision no. 97/A of 23 March 2017.

all the legislation in force, including the provisions on the protection of personal data when they are on the same footing with the information of public interest, we have to distinguish according to the person requesting them: the ministry - as an administrative body central public, other legal person of public interest or any natural person.

The constant jurisprudence of the European Court of Justice in Luxembourg emphasizes that the legal provisions on the protection of individuals with regard to the processing of personal data and the transmission of such data must be interpreted as meaning that „a public administration authority of a Member State to communicate or transfer personal data to another public administration authority without the data subjects having been previously informed of that processing activity".[14] In conclusion, regardless of to whom the data are transmitted (a natural or legal person, whether public or private), the information of the individual concerned is identified as a precondition for obtaining or not consent, and also implies the indication of the type of "information about a person identifiable or identifiable physics" of the concrete processing operation[15], the identity of the person to whom it is intended to be transmitted, the purpose, the legal basis and the role of a necessary condition for the persons concerned to exercise their right of access, rectification or deleting processed data. "Consent" of the person concerned means any manifestation of will on condition that he is freely communicated, without constraints, unambiguous, unclear, after informing the person concerned by means of a definite and categorical action, unequivocally, that personal data belonging to him are processed[16].

Clearly, however, consent is deemed to be the appropriate legal basis as processing may be necessary in order to fulfill a legal obligation that may come to the operator. Regarding this legal obligation, which in fact implies an accountability enshrined in the text of a normative act, we could say that we need to further analyze my statement, highlighting the situations in which we can see that the legal texts do not contain guarantees regarding data protection personal data in order to ensure the requirement for the data subjects to be informed in advance of the possibility of exercising, including rights of access and rectification of transmitted and processed data, respectively the right of opposition to their processing. In Case C-201/14 of the CJEU, the Romanian Government stated that the National Agency for Fiscal Administration (ANAF) is required, under Article

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[14] Case C-201/14 - Preliminary references - Directive 95/46/EC - Processing of personal data - Articles 10 and 11 - Information to data subjects - Article 13 - Exceptions and restrictions - Member State of tax personal data for processing by another public administration authority.

[15] "processing" means any operation or set of operations carried out on personal data or on personal data sets with or without the use of automated means such as collecting, recording, organizing, structuring, storing, adapting or modifying, extraction, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

[16] Article 4, paragraph 1, point 11 of the General Regulation on the protection of personal data.

315 of Law no. 95/2006 to submit to the regional health insurance houses the information necessary for the National Health Insurance House (CNAS) to establish the insured person's status as a self-employed person, but the European Court of Justice has considered that this legal provision can not be a reason for avoiding information and does not allow the operator to be exempted from the obligation to inform the persons from whom the data on their income has been collected.

More concisely, we are in the presence of two kinds of information, legally assigned differently, and when it is necessary for both to be reproduced in the same document, for reasons of respecting both guiding principles, the solution at hand can be to approach the methods indicated in the Notice no. 05/2014 on anonymisation techniques issued by the „Article 29" Data Protection Working Party or pseudonymization[17] as defined in the provisions of the General Data Protection Regulation.

3. Prior notification if the transmission of personal data is ordered by a court order in a dispute in which the data subjects did not have the status of parties

The situation of the court's court order to transfer personal data to a dispute in which teachers did not have the status of a party puts us in the face:

- a solution by a court of administrative disputes with the disregard of mandatory practice as laid down in the constant jurisprudence of the CJEU[18], which unambiguously leads to the unlawfulness of the solution, given that the national courts are obliged to transpose the decisions of the European Court.
- determination by binding and authoritative character of the court's decision to transmit personal data belonging to targeted persons, disregarding their rights under the TFEU, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.

In such a situation, we consider that it was imperative to reshape the evaluation subjects and the owners of the personal data in the sense of expressing a procedural position by folding on the provisions of art. 78 paragraph 1 of the Civil Procedure Code, namely:

„(1) In cases expressly provided for by law, as well as in the non-contentious procedure, the judge shall order of its own motion the introduction of other persons, even if the parties object.

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[17] "Pseudonymization" means the processing of personal data in such a way that it can no longer be attributed to a particular data subject without the use of additional information, provided that such additional information is stored separately and subjected to technical and organizational nature to ensure that such personal data are not allocated to an identified or identifiable natural person.

[18] The acronym for the Court of Justice of the European Union is the Union's jurisdiction and consists of two courts: the Court of Justice and the General Court, whose main task is to examine the legality of Union acts and ensure the interpretation and uniform application of its law.

(2) In contentious matters, when the legal report deduced from the court's judgment so requires, the judge shall ask the parties to bring the matter to the attention of other persons. If neither party requests the third party to enter the matter and the judge considers that the case can not be resolved without the third party's participation, it will reject the request without ruling on the merits.

(4) When the necessity of introducing other persons in question is found at the deliberation, the court shall put the case to court by ordering the parties".

However, in the present obligation to enforce such a judgment and noting the absence of appropriate safeguards in the text of the normative act, in order to avoid the consequences of violation of the right to private life of the teachers, it is necessary to inform the persons concerned in advance, emphasizing the rights conferred by the rules of European Union law, which apply as a matter of priority, irrespective of the status or status of the parties, as regards:

- the completion of the steps preceding or not to consent to the transmission and purpose of further processing;
- ensuring that the necessary information is provided to the teachers concerned to ensure fair and transparent information on the period for which personal data will be stored;
- teacher's access to personal data, rectification or erasure, or restriction of processing or the right to oppose processing, as well as the right to data portability.

4. Conclusions

The Constitutional Court, in the recitals of Decision no. 498/2018[19], found that "a positive measure of the state, even a well-intentioned one, can produce negative effects of a particular magnitude in the privacy of the person." We do not want that, nor is it advisable to insist on implementing normative acts that represent intrusions into the privacy of individuals, disregard of the safeguards provided by European Union law, we reiterate, with priority applicability.

The principle of the Member States' liability for a breach of Union law must be understood as the most important factor, being mainly described as a decisive strengthening for the protection of the rights granted to all individuals by Union rules. This requires the submission of diligence, which is ultimately no extra, but natural in shaping the essence of the norms of law by corroborating the whole range of rights belonging to the individuals involved, regardless of their

[19] Decision no. 498 of July 17, 2018 on the objection of unconstitutionality of the provisions of art. 30 par. (2) and (3), as well as the phrase "the patient's electronic patient health system" in the art. 280 par. (2) of the Law no. 95/2006 on healthcare reform, was published in the Official Gazette no. 650 of July 26, 2018.

situation in such a state of fact, because as correctly noted in "Personal Data Protection: A New Beginning"[20]: "the person concerned is at the heart of the concern for protection".

At the same time, infringements committed by Member States by the absence in the content of national legislation of adequate safeguards in respect of the right to privacy, professional development and non-discriminatory development may give rise to damages which may result in the form of serious consequences including national public finances. And the same result may also exist in the case of a court decision which, by binding and authoritarian character, requires the transmission of personal data belonging to persons concerned who were not parties to the proceedings, disregarding their rights under the TFEU, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.

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5. Decision no. 498/2018 of the Constitutional Court on the objection of unconstitutionality of the provisions of art. 30 par. (2) and (3), as well as the phrase "the patient's electronic patient health system" in the art. 280 par. (2) of the Law no. 95/2006 on healthcare reform, was published in the Official Gazette no. 650 of July 26, 2018.

[20] Irina Alexe, Daniel-Mihail Șandru, *Protecția datelor personale: un nou început?*, „Curierul Judiciar” no. 2/2018, see http://www.curieruljudiciar.ro/2018/02/28/protectia-datelor-personale-un-nou-inceput/, consulted on 1.04.2019.

Theoretical and practical aspects on liability in administrative law

Professor **Iulian NEDELCU**[1]

Abstract

Human behavior has a diverse sphere of manifestation, but with all the complexity of behavior, man is referring to some principles, norms, values within the limits of what he considers to be good - bad, allowed - not allowed, right - unfair, licit - illicit. At the moment of choosing the individual's choice for a certain behavior (of all possible), the mechanism of establishing its social responsibility is triggered. This is due to its rational capacity to opt for a certain behavior, knowing, or having to know that the deed falls within the limits of generally accepted principles, and will have to bear the consequences for its negative conduct. Legal liability is the most serious form of social responsibility. Traditionally, legal liability is considered as a fundamental institution of law, an institution that tends to occupy the center of law in its entirety. Referring to this idea, Louis Josserand argues that in every matter, this problem of responsibility, in public law and in private law, in the field of persons or family, and in the field of goods, is at all times and of all situations, responsibility becomes the common neuralgic point of all our institutions, reflecting the stage of evolution of the whole society, the level of social conscience and responsibility. Legal responsibility, irrespective of the legal branch to which we report, has both a preventive educational purpose and a sanctioning purpose, meaning by this last aspect and the character of the remedy in case of material and/or moral damages.

Keywords: *legal liability, liability in administrative law, social responsibility, public servants.*

JEL Classification: K23

1. Introductory aspects

The Romanian Constitution contains express provisions regarding the liability and the various forms of legal liability, in general.

A first category of provisions is contained in Title II of the Constitution, dedicated to Fundamental Rights, Freedoms and Duties.

Article 23 regulates the individual freedom and uses two concepts: "individual freedom" and "security of a person" which, in the eye of the European Court of Human Rights, are in a situation of interdependence: "The right to liberty refers to the physical freedom of the person, and the security to the whole guar-

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antees that protect the person from any arbitrary interference of power in the freedom of the individual."[2]

Human behavior has a different field of expression but, regardless the entire complexity of the behavior, man refers to some principles, rules, values within the limits of what he considers to be good - bad, allowed - not allowed, fair - unfair, licit - illicit. At the moment of choosing the individual's option for a certain behavior (from all possible), it is triggered the mechanism of establishing its social liability. This is due to its rational capacity to choose for a certain behavior, knowing or having to know, that his deed falls within the limits of generally accepted principles, and will have to bear the consequences for its negative conduct.

2. Legal liability

A century and a half ago, Vasile Sturza, the first president of the newly established Court of Cassation, expresses his hope that Romania will begin to "heal its big evil", namely, mistrust the justice.

Over a century and a half, a former president of the High Court of Cassation and Justice considered that: "the healing of society by the big evil can not only be done by a judge, doesn't matter how technically skilled he is and by how many efforts would do the judges' community in the process of recovering the positive image, the regaining of public confidence in the act of justice. It is necessary to involve in this process the components of the political society and also the mechanisms of the civil society".[3]

Legal liability is the most serious form of social liability and can be characterized by:

- it has always as a basis the violation or non-compliance with a legal norm;
- it is always linked to the exclusive activity of some public authorities which have the power to formally ascertain the non-compliance or the violation of the rule of law, to appreciate the degree of guilt and to establish and enforce the sanction provided by the legal norm;
- it is a general – mandatory liability, rising from the imperative nature of the rule of law and from the coercive capacity of the state;
- the consequences of legal liability are particularly serious, and may even impose sanctions for freedom deprivation[4];
- the concrete determination of legal liability is not an act or an action strictly legal but a multiple value act (in the act of legal liability there are focused

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[2] Crişu Anastasiu in I. Muraru, E. S. Tănăsescu, *Romanian Constitution, Comments on articles*, C.H. Beck Publishing House, Bucharest, 2008, p. 214.
[3] Nicolae Popa, *Year of Justice*, Editorial, „Magazine of Public Law” no.1/2013, p. 9-18.
[4] According to Article 23 paragraph (13) of the Constitution, new text introduced by the Revision Law no. 429/2003, the freedom deprivation sanction can only be based on criminal grounds.

evaluations not only on a strict legal nature but also on moral, social, economic, etc.)

Therefore, legal liability supposes a complex of related rights and obligations, provided by the legal norms, rights and obligations that arise as a result of the commission of an illicit act and which constitutes the framework for achieving the state constraint, namely, the application of the sanction.

Traditionally, legal liability is analyzed as a fundamental institution of law, an institution that tends to occupy the center of law in its entirety. Referring to this idea, Louis Josserand argues that we get to this problem of responsibility in every field, in the public law and in the private law, in the field of individuals or family, as well as in the field of goods, it is at all times and of all situations, liability becomes the common bottleneck point of all our institutions[5], reflecting the stage of evolution of the whole society[6], the level of social conscience and responsibility[7].

Given the importance of legal liability, there have been numerous discussions about its problems, both from the perspective of the general theory of law and from the perspective of law branches sciences. The most numerous discussions, implicitly works in our doctrine, as well as the comparative law, have as their object the forms with century-old existence of the legal liability: civil liability and criminal liability. There has always been a tendency to explain any new issue emerging in the field of legal liability, either through categories, theoretical constructions, civil liability institutions, or criminal responsibility.

Therefore, in the legal specialty literature, it has been traditionally analyzed only the phenomenon of legal liability, but starting from the distinction that some authors[8] make between the concepts of liability and responsibility, starting from the delimitation done in theses of philosophy, sociology, etc., between social liability and social responsibility. Thus it has come to be discussing, in the science of administrative law, about the liability and responsibility with regard to the public administration authorities, the civil servants, as well as the liability and responsibility of the citizens to each other and to the legal norms.

With regard to the social *responsibility of civil servants*, it has been defined by its conscious reporting on social needs, on the duties they have and which

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[5] Louis Josserand, *Preface to A. Brun's work, Rapports et domaines des responsabiliites contractuelle et delictuelle*, Libr. du Recueil Sirey, Paris, 1991, pp. 78-91.

[6] I.M. Anghel, Fr. Deak, M. Popa, *Civil Liability*, Scientific Publishing House, Bucharest, 1970, p. 5.

[7] See, on the concept of responsibility, Mihai Florea, *Responsibility for Social Action*, Scientific and Enciclopedic Publishing House, Bucharest, 1976, p. 57.

[8] Verginia Vedinaş, *Introduction to the Study of Administrative Law*, Era Publishing House, 1999, p. 95; Stelian Ivan, *Legal responsibility of the Romanian policeman*, Hiperion Publishing House, Cluj, 1997.

they consider to be the first-order duties[9]. For these civil servants, socially responsible, the accomplishment of the service duties, solving in time and with seriousness the citizens' problems, are both a way of being ant the purpose of their social existence. We rally to the views of the doctrine that with regard to public servants, as well as to the officials, the responsibility comes first over the liability.

3. Liability in administrative law

Administrative law, but especially the science of administration, has studied a number of moral obligations, some of which have acquired a professional character, these being the basis for the public servant's social responsibility: devoting his activity to the administration, respect for function, loyalty, impartiality, professional discretion and professional secrecy, honesty and good faith, probity, obligation of subordination, etc.[10]

The current legislation regarding the public positon field and the public servants (Law no.7/2004 regarding the Code of Conduct for Public Servants[11], Law no.188/1999 republished[12], regarding the Public Servants' Statute, Law no.161/2003)[13] regulates a series of principles that governs the professional conduct of the public servants: professionalism, impartiality and independence, moral integrity, freedom of thought and expression, honesty and fairness, openness and transparency, avoidance of incompatibility and conflict of interest, etc.

In contrast to the conscious attitude of social responsibility of the public servants, there is the attitude of laziness, indifference and bureaucracy to the problems of those that they have to serve. In addition, the public servant may fall on the slope of corruption, abuse of authority or politicization, committing acts considered by law to be crimes[14].

When public servants commit misconduct, cause damages and disturbances to the good functioning or prestige of the authorities of which they are part,

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[9] See Cătălin-Silviu Săraru, *Administrative law, Fundamental problems of public law*, C.H. Beck Publishing House, Bucharest, 2016, p. 416-417.

[10] See Verginia Vedinaş, *Administrative Law*, 8th ed., Universul Juridic Publishing House, Bucharest, 2014, p. 286-290, and Alexandru Negoita, *Administration Science*, Didactic and Pedagogical Publishing House, 1977, p. 127; Ivan V. Ivanoff, *Deontology of the Civil Service*, University Press Publishing House, Târgovişte, 2004, p. 43; Marius Profiroiu, Anton Parlagi, Eugen Crai, *Ethics and Corruption in Public Administration*, Economic Publishing House, Bucharest 1999, p. 65.

[11] Published in the Official Gazette of Romania, Part I, no. 525 of 2 August 2007.

[12] Republished in the Official Gazette of Romania, Part I, no.365 of 29 May 2007.

[13] Law no. 161/2003 regarding the certain measures for ensuring transparency in the exercise of public officials, public functions and business environment, prevention and sanctioning of corruption, Official Gazette of Romania, Part I, no. 279 of 21 April 2003.

[14] At the time of drafting the present thesis, Romania is in a special situation on this issue, with numerous cases of corruption at the highest level in the field of public servants and officials.

commit abuses of any kind or damage the legitimate rights and interests of citizens, it intervenes the so-called legal liability of theirs.

In the conception of authors who rightly distinguish between social responsibility and liability, it is stated that "responsibility precedes liability and can eliminate it... When the value system is denied, man ceases to be responsible; he becomes liable for his illicit behavior"[15].

Therefore, the responsibility of the public servant must come first to the liability, the accomplishment, with a belief that arises from the rational understanding of the phenomena, of his duties, confident that the faithful service of the public interest is the basis of his professional and moral behavior[16].

As it is known, public administration makes as basis of its work the principle of legality, law enforcement in its letter and spirit.

4. Conclusions

Deviating from the law by committing illicit acts, attempt to protected legal values, attracts legal liability in its various forms.

Legal liability, irrespective of the law branch to which we report, has both a preventive educational purpose and a sanctioning purpose, meaning by this last aspect also a remedy character in case of material and/or moral damages.

By any form of the liability, it is reestablished the broken order as a result of the commission of the illicit deed, and the application of the sanction and the determination of the compensation make the deed's author aware of the consequences of the committed deed, so that he no longer violates the law.

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[15] See V. Vedinaş, *op. cit*, 2014, p. 152 and Mihai Florea, *op. cit.*, 1976, p. 58.
[16] A. Iorgovan, *Treaty of administrative law*, Vol. II, 4th ed., All Beck Publishing House, Bucharest, 2005, p. 331 et seq.

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The collective negotiation and collective agreements – legal task or opportunity, in the management of the legal service relationships of the police officers

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Abstract

The issue of collective negotiation will always be of interest from the point of view of the permanent concern of the people employed to maximize the guarantees received from the employer, regardless of whether he is a public or private person, in connection with the satisfaction of economic and social interests, patrimonial or non-patrimonial, which arise from the legal relations between them. Even though, in terms of service legal relationships, in the public sector in general, but also in particular those of police officers, collective negotiation takes on a particular form, much more articulated by rules legally required for organization and conduct, on the merits, but, the importance of this issue determines at least the same concerns. In this context, it has become of interest to study and analyse to what extent, at the level of the public institution involved, in this case the Ministry of Home Affairs, which is entrusted with the overall material competence to manage police officers' relations, to bring together the social partners in a negotiation collective for the conclusion of a collective agreement can be identified and capitalized as an opportunity to obtain benefits also at institutional level, or it remains exclusively the exercise of a legally imposed obligation from which only benefits can be obtained for the policemen and, at the institutional level, at most, the concern to "get" losses or costs as little as possible, implicated in what is offered or accepted in the negotiation. The carried out analysis is based mainly on documentary analysis, which has covered both a part of the existing doctrinal space in the field, the ideological anchoring of the approach in the general landscape of the problem, as well as the normative framework in force in the field, to ensure the legal framing of the resulting conclusions and to size as accurately as possible the proposals formulated and launched for debate or further development.

Keywords: *collective negotiation, collective agreement, social dialogue, parity commission, service relations.*

JEL Classification: K10, K12, K23

1. Social dialogue and collective negotiation - general considerations

The evolution of social relations, at least the recent one, has been (and is still) heavily influenced by and through communication in all its forms. From the

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point of view of social relations circumscribed to work, whether these are exercised at the public or private level, in the form of working or service relationships, communication continues having this role in both individual and collective dimensions.

At the individual level, communication is carried out directly between people having their own interests, respectively between the person of the employee or, as the case may be, of the civil servant with the person representing the interests of the employer, respectively the public civil servant with whom there is a hierarchical report, as representative of the employing public authority. Also, individual communication can also be manifested inter-personally, horizontally, between the employed people in cooperation/ collaboration relations in the performance of work, respectively between civil servants among whom there are no hierarchical relations of subordination.

Collectively, the communication is carried out in the form of an institutionalized dialogue, organized according to special rules, established on the principles of representation and representativeness, called social dialogue. Depending on the number of parties involved in this form of dialogue, social dialogue can be bipartite when it is only supported by employees' representatives or civil servants, whether or not syndicated, and representatives of employers or public institutions through direct participation, or organized in employers' or tripartite representation structures, when, in addition to the two sides described for bipartite dialogue, it is involved in social dialogue and government.

This dimension is also presented by the International Labour Organization, which, in addition to identifying and classifying typologies from the international or state level, also offers a perspective on the conceptual content of the notion. Social dialogue is defined to include "all types of negotiation, consultation or simply exchange of information between or among representatives of governments, employers and workers on issues of common interest relating to economic and social policy"[2]

Depending on the level at which it is organized and the type of social dialogue, its objectives can be circumscribed either to achieve consensus in addressing issues of common interest between partners, or to bring and maintain social peace. Whatever the purpose is, the benefits to the development of social work relationships in general are indisputable, all the more so if we consider them in terms of the necessity of fulfilling the basic condition for this type of relationship, namely good faith.

Why has this concept of social dialogue emerged?! As the evolution of social relationships related to the field of work has claimed the need to find the most efficient way to regulate, adjust, reconcile the potential (or even actually)

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[2] The perspective on the notion of social dialogue presented is in line with the one available on the International Labor Organization website, in English, in an online version at https://www.ilo.org/ifpdial/areas-of-work/social-dialogue/lang--en/index.htm)%20%20a, accessed on May 4, 2019.

dominant position behaviour in which the employer is, or is, broadly in relation to employees. In this context, all parties involved, having, as appropriate, professional, economic and/or social interests, can be seriously influenced or affected by such a relationship; the behaviour of the parties is largely dependent on the appetite for contradictory at the social level in general over which the potential abuse of a dominant position from the employer may overlap. Each Party's awareness of the negative effects caused or driven by conflicting tendencies or, at least, the opposition status of employees and employers from the point of view of mutual correlative rights and obligations, has always supported the creation of effective communication mechanisms between in order to maximize the chances of meeting their own objectives. As a consequence, the results obtained through the development of permanent communication mechanisms between the parties that brought the consensus or whether they consisted of reciprocal information on, for example, the up-to-date situation of the organizational environment or the level of motivation among employees, employer consultations with employees on organizational development measures that are intended to be implemented to assess their acceptance potential or collective negotiation on topics of professional, economic interest and social. In parallel, the same mechanisms have also found their applicability in the tripartite system, contributing to a superior form of consensus, generalized, with strong influences in society that has brought or contributed decisively to social peace.

Therefore, the mechanisms attributed to the concept of social dialogue are those that ensure, from the point of view of the social relations specific to the work, the achievement and the transition from the individual, the organizational and the social balance, generalizing the organizational consensus in the social peace.

Through the concerns expressed by international bodies and also by the national legislator, social dialogue has become an effective solution for achieving the objective of social peace as a legally anchored obligation[3]. The appraisal derives from the fact that it is approached as "a simple and concrete way that explicitly pursues the realization of economic and social democracy by bringing to the table the dialogue, the discussions and the negotiations of the two major social partners who meet both in the labor process, but also in various business management activities "[4].

These developments led, among other things, to an increase in the interest in the association of the individual, who, being more and more interested in satisfying the interests in the social relations in the field of work, at least those of

[3] See I. Tr. Ștefănescu, *coord.*, *Dicționar de drept al muncii,* Universul Juridic Publishing House, Bucharest, 2014, p. 149.
[4] See Al. Țiclea, *Tratat de dreptul muncii*, 2nd ed., Universul Juridic Publishing House, Bucharest, 2007, p. 129, *apud.* V. Dorneanu, *Dialogul social*, Lumina Lex Publishing House, Bucharest, 2005, p. 8.

professional, economic and/or social, he wanted to be represented in the communication with the employer. At the same time, on the other hand, in the tripartite communication, employers also showed the same type of interest, having a need to know their well-represented interests. The result was the emergence and development of trade union organizations, and later of the employers 'organizations, while continuing to maintain unrelated representation through employees' representatives, all integrating the category of social partners or social dialogue.

Of all these mechanisms, collective negotiations are one of those, by way of deployment, place the parties in a situation to constantly adjust their own positions and initiatives for the purpose and until obtaining consensus and transposing it into a convention, contract, agreement or other agreed and agreed-upon document, on the basis of which, for a mutually agreed period of time, everyone will guide their behaviour.

In other words, collective bargaining provides a means of solving and integrating the conflicting interests of employers and employees, which are profitable for both sides, achieving a balance between the inequalities between them and, implicitly, the establishment of social working relations on fair bases[5].

The generalization of these communication mechanisms, on the basis of their usefulness, has made the social dialogue gradually achieve an institutional dimension, established both by international legal documents and by consolidated legal norms in national legislation.

In our country, at present, the issue of social dialogue is fairly well regulated, with constitutional guarantees and developed by subsequent legal norms, including the infra-legal level.

Thus, at constitutional level, we find the main benchmarks related to the right of association in trade unions, employers' associations and professional associations, as well as the right to collective negotiation derived from the right to work and social protection of labour. The constitution and activity of trade unions, employers' associations and professional associations are guaranteed by the Constitution of Romania, at the general principle level, at art. 9, where the constitutional basis for the adoption of its own statutes and the regulation of the legal issues is attributed, while expressly acknowledging their contribution "to the defence of the rights and the promotion of the professional, economic and social interests of their members". Also, within the framework of the constitutional regulation of the right of association, at art. 40, as a fundamental right, the possibility for Romanian citizens to "freely associate (...) in trade unions, employers and other forms of association" is guaranteed. Collective negotiation is also constitutionally constituted, as a fundamental right, derived from the right to work, at art.

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[5] See C.-A. Moarcăș Costea, *Dreptul colectiv al muncii*, C.H. Beck Publishing House, Bucharest, 2012, p. 145-146, *apud.* Al. Athanasiu, *Drept social comparat. Negocierea colectivă în țările occidentale și în România*, University of Bucharest, Faculty of Law, Bucharest, 1992, p. 9.

41 par. (5), according to which "the right to collective negotiation in respect of employment and the binding nature of collective agreements are guaranteed".[6]

Subsequently, at the law level, the issue of social dialogue and, implicitly, collective negotiation, is addressed globally in a normative act with code claims in the field, namely Law no. 62/2011 of the social dialogue, republished, with subsequent modifications and completions, in which all related mechanisms and instruments are provided, the corresponding legal institutions, the involved parties, as well as other specific organizational aspects. The specialised procedural aspects of the are also subject to some intraregional regulations, to the level of the decisions of the Government and even to the administrative normative acts issued by the heads of the involved institutions or public authorities.

2. Particularities of collective negotiation for the conclusion of collective agreements on police service relations

Collective negotiation is seen by law as "the negotiation between the employer or employers 'organization and trade union or trade union or employees' representatives, where appropriate, which regulates the working or service relations between the two parties, as well as any other agreements on issues of interest common"[7]

In this definition, the legislator sought to include a description which would lay down in the same plan both employees who have employment relationships on the basis of individual labour contracts and civil servants, including those with special status, who carry out their professional activity basis of service relationships. The negotiating parties are established, respectively, on the one hand, the employer who may be "a natural or legal person who can, according to the law, employ a labour force based on an individual employment contract or a service relationship" and, on the other hand, trade union or trade union organization or, in the absence of trade union representation or representation of trade union organisations, employee representatives, who are "elected and mandated by employees to represent them, according to the law." At the same time, the subject of the negotiation is identified, which may consist either in the regulation of working or service relations, but also in obtaining and initiating, by agreement, the consensus on issues of common interest. As is already stated in the constitutional text on the right to collective bargaining, as a rule, this procedure aims to conclude collective agreements, which the Social Dialogue Law treats with the

[6] See the full text of Art. 9, 40 and 41 of the Romanian Constitution, republished, available online at http://www.cdep.ro/pls/dic/site.page?id=339, accessed on May 6, 2019.

[7] See the provisions of art. 1 of the Law no. 62/2011 of the social dialogue, republished in the Official Gazette of Romania, Part I, no. 625 of August 31, 2012, as subsequently amended and supplemented, available in the updated version, at http://legislatie.just.ro/Public/Detalii Document/140944, accessed on May 7, 2019.

concepts of collective labour agreements or collective agreements. As regards collective agreements, these are described in the form of conventions concluded "in writing between trade unions of civil servants or civil servants with special status, their representatives and representatives of the public authority or institution".[8]

Although the Law on Social Dialogue explicitly deals with collective negotiation for the conclusion of collective agreements, even if the employer is a legal entity in the public sector, when it discusses collective negotiation for the conclusion of collective agreements for civil servants, makes only a generic reference to "legal provisions in the matter".[9]

Before identifying special legal rules on negotiation and conclusion of service agreements, it should be made clear that this approach tends to show the legislator's intention to offer civil servants, including those with special status - policemen, an extension, from those statutory elements specific to service relationships, considered to be slightly rigid, governed by explicit and quite restrictive legal norms, describing a legal regime of administrative law, to a legal, complementary legal regime with negotiated contractual connotations. While the two plans may appear to be contradictory, we will further notice that this negotiated contractual party is strictly limited in content, with express reference to the issues that may be the object of the negotiation. Therefore, the freedom to negotiate collectively about specific aspects of service relationships is not a complete one without clear coordinates guiding the parties in this procedure but is restricted to issues that cannot affect or substantially change the legal regime administrative law, under which the service relations of civil servants in general are managed.

For civil servants, the applicable professional status, namely Law no. 188/1999 on the Civil Servants' Statute, republished, as subsequently amended and supplemented[10], contains provisions devoted directly to the issue of the conclusion of collective agreements, as well as to the one related to the establishment of joint committees. Subsequently, the issue is developed in the Government Decision no. 833/2007 on the rules for the organization and functioning of the joint commissions and the conclusion of the collective agreements, with the subsequent amendments and supplements.[11]

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[8] *Ibidem.*

[9] See the provisions of art. 139 of the Law no. 62/2011, republished, as subsequently amended and supplemented.

[10] See the provisions of Law no. 188/1999 on the Civil Servants' Statute, republished, as subsequently amended and supplemented, available in the updated version in the online version at http://legislatie.just.ro/Public/DetaliiDocument/82411, accessed on 8 May 2019, at 12:45 a.m.

[11] Government Decision no. 833/2007 on the norms for the organization and functioning of the parity commissions and the conclusion of the collective agreements, was published in the Official Gazette of Romania, Part I, no. 565 of 16 August 2007, as subsequently amended and supplemented, available as an online version at http://legislatie.just.ro/Public/DetaliiDocument/84528, accessed on May 8, 2019.

As regards the civil servants with special status – police officers, the applicability of Government Decision no. 833/2007, as subsequently amended and supplemented, derives from the general legal norms contained in Law no. 62/2011, republished, with the subsequent amendments and supplements, regarding the conclusion of collective agreements, taking into account that their own professional status, namely Law no. 360/2002, as subsequently amended and supplemented[12], does not contain regulations dedicated to this issue. Moreover, it is expressly stipulated in this normative act that "within the public authorities and institutions in which the police officers have the status of civil servants of special status may be constituted joint committees for this category of personnel".[13]

In this context, at the level of the Ministry of Home Affairs, by order of the minister, a police parity committee is set up and functioning, respecting the size appropriate to the number of police officers employed at the level of the institution (which is above the maximum of 150, established by law) 6 members and two alternates nominated on the principle of parity and equal representation, half by the head of the public authority or institution and the other half by the representative union of the police officers, if only one is representative or by the majority of the police , if the union was not representative or they would not be organized in the trade union. Taking into account the fact that at the level of the Ministry of Home Affairs (organized in terms of representativeness criteria for trade union organizations) on the unit-type structure are constituted several representative trade unions of the police officers, the appointment of the representatives in the joint commission is done by written agreement, concluded between all of these.

In the procedure for setting up the parity commission for police officers, several mandatory stages are laid down by the law, starting with the order of the minister of home affairs, by order, to initiate the procedure, indicating the period in which the representatives of the commission are appointed. The respective administrative act shall be displayed at the headquarters of the institution and on the official website within 3 working days of the decision making and shall remain on display until the completion of the procedure for setting up the joint committee. At the level of the joint committee, a titular/full secretary and a deputy secretary, who are not members of the commission, appointed, among the police officers in the institution, by the administrative act establishing it, carry out their activity.

The members of the Joint Committee shall be appointed for a three-year term which may be renewed only once by professional lawyers who have a good

[12] See the provisions of Law no. 360/2002 on the Status of Police officers, as subsequently amended and supplemented, available in the updated version, online at http://legislatie.just.ro/ Public/Detalii Document/36819, accessed on 8 May 2019.

[13] See the provisions of art. 34 of the Government Decision no. 833/2007, as amended and supplemented.

reputation and are not in one of the following situations:

a) is a spouse, relative to the fourth degree inclusive or affinity with the minister of home affairs or with the members of the governing bodies of the representative trade unions that designate members;

b) is a member, alternate member or chairman of the discipline/board;

c) has been disciplined and the disciplinary sanction has not been cancelled, according to the law;

d) has been convicted by a final sentence for acts of a criminal nature, except in the case of rehabilitation. [14]

30 working days before the date of expiry of the term of office of the members of the Joint Committee, the formation of the future Joint Committee shall be carried out in accordance with the procedure of constitution. If, 30 days before the expiry of the mandate of the members of the Joint Committee, the representative trade unions have not concluded one another for the appointment of the representatives of the trade union, the choice of the policemen shall be made between the candidates proposed by each representative trade union organization. [15]

Any interested police officer may lodge, in writing and in due course, an appeal to the Minister of Home Affairs concerning the procedure for appointing police officers within the Joint Committee within two working days of the date of the nomination procedure. If the appeal proves to be well founded, the Minister of Home Affairs shall annul the results of the designation procedure and its resumption. Also, the entire constitution procedure may be appealed, under the law, to the competent administrative court. The establishment of the Joint Committee shall be finalized by the order of the Minister of Home Affairs, which shall establish the full composition thereof, issued within 15 working days from the date of finalization of the designation procedure. [16]

In conducting mechanisms for the conclusion and application of collective agreements, parity commissions play an essential role. One of the main tasks set out by the law is to draft the collective agreement and to participate, in an advisory capacity, in negotiating it. Therefore, the first signal on the parties' views on matters of interest to be transposed into the collective agreement is given by the members of the Commission, who are directly involved, as far as possible through consensus, in the development of a first working document. When the Joint Committee finalizes the process of drafting the collective agreement draft,

[14] See the provisions of art. 8 and 15 of the Government Decision no. 833/2007, as amended and supplemented.
[15] See the provisions of art. 6 and 12 of the Government Decision no. 833/2007, as amended and supplemented.
[16] See the provisions of art. 10-12 of the Government Decision no. 833/2007, as amended and supplemented.

it is the subject of collective negotiation between the representatives of the institution and the representative police trade unions or, as the case may be, their representatives, including the members of the committee who can be consulted during the negotiation of the content of the negotiated agreement.

Another role played by the joint committee on collective agreements is related to the application of their provisions, which it pursues on a permanent basis, also compiling quarterly reports on compliance, with a view to informing the management of the institution as well as the leadership of representative police unions or, as appropriate, their representatives.

Negotiation of the collective agreement is mandatory when it is expressly requested by one of the two signatory parties within 30 days of the approval of the budget of the public institution, in our case, the Ministry of Home Affairs. If none of the parties requests the commencement of proceedings for the conclusion of the collective agreement within the prescribed time limit, it shall be deemed to have been mutually waived the right to terminate it for the following year. [17]

Consequently, in the case of collective agreements, collective negotiation does not become mandatory ex lege, but only when expressly requested by one of the parties, usually the trade union or police representation, which creates an obligation for the other party, respectively of the institution, the non-fulfilment of which may lead to a conflict brought to the court of administrative jurisdiction by the requesting party. [18]

3. Social partners involved in collective negotiation for the conclusion of collective agreements on police service reports

In order to correctly identify which social partners are involved in collective negotiation for the conclusion of collective agreements on police service relations, we must clearly identify the coordinates in which this process can be organized and carried out.

Firstly, the Social Dialogue Law identifies the category of social partners as being "trade unions or trade unions, employers or employers' organizations, as well as representatives of public administration authorities who interact in the social dialogue process."[19]

We have established above that the collective agreement can be concluded between the representatives of the police officers, appointed under the law, and those of the public institution of which they are members, in this case, the

[17] See the provisions of art. 23 of the Government Decision no. 833/2007, as amended and supplemented.
[18] See R. Ș. Pătru, *Contracts and Collective Labour Agreements*, Hamangiu Printing House, Bucharest, 2014, p. 249, *apud*. I. T. Ștefănescu, *Theoretical and Practical Treaty on Labour Law*, Universul Juridic Publishing House, Bucharest, 2014, p. 191.
[19] See the provisions of art. 1 lit. a) of Law no. 62/2011, republished, as subsequently amended and supplemented.

Ministry of Home Affairs. Also, we are talking about the representation of police officers in the parity committee organized at the level of the Ministry of Home Affairs, on the part of the trade union organizations, or we are talking about the designation of those who are part of the negotiating team, from the same side of representation, with an active role in conducting these procedures are and must be representative at the level of negotiation organization. Depending on these coordinates, the potentially involved social partners can be precisely established.

In particular, taking into consideration that since the entry into force of Law no.62/2011, republished, with the subsequent amendments and supplements, the competent authority in the field, namely the current Ministry of Labour and Social Justice, confirmed that the particularities, the size and the complexity of the Ministry of Home Affairs recommends it in the procedural context of the social dialogue, as a group of units, the level of representativeness necessary for the organization and conduct of collective negotiation and the conclusion of collective agreements on police service reports is that of a group of units.

The Law on Social Dialogue establishes the group of units for public institutions and authorities as constituted at this level if there are "other legal people that employ the labour force" in the institutional structure, subordinated or coordinated.[20] In the situation of the Ministry of Home Affairs, the police relations are concluded with the public institutions and managed, as a principle, at the level of the units whose leaders have the capacity of authorizing officers. In the process of organizing the social dialogue, this establishes the structure of a group of units to which all the procedures pursued in this field are related.

Therefore, at the level of a group of units in the Ministry of Home Affairs, in order to be representative of a trade union organization of the police officers, they must cumulatively fulfill the following conditions:

"a) have legal status as a trade union federation;

b) have organizational and patrimonial independence;

c) component trade union organizations accumulate a number of members of at least 7% of the staff of the respective group of units, i.e., of the total number of police officers in the Ministry of Home Affairs".

In the process of negotiating collective agreements, the unions found, under the law, may be represented as representative at the level of the group of units within the Ministry of Home Affairs or if the trade union organizations of the police do not fulfill the conditions to be representative at this level but there are organizations federative trade unions found to be representative to which the police officers are affiliated, collective negotiation takes place by delegating representation on behalf of the representative federation through designated representatives from among the members of the police union. At the same time, if a trade

[20] See the provisions of art. 1 lit. l) of Law no. 62/2011, republished, as subsequently amended and supplemented.

union federation is found to be representative at the level of the Ministry of Internal Affairs, based on the number of members belonging to professional categories other than police officers, it can not be considered as a social partner in the dialogue organized for the benefit of if it does not, as affiliated members, have trade unions with members of this professional category.

Therefore, in the collective bargaining for the conclusion of collective agreements on police service reports, organized as a bipartite social dialogue procedure, the employees' side is represented by persons appointed from among the representative trade union organizations at the level of the group of units in the Ministry of Home Affairs, compliance with the appropriate representation and representativeness criteria. On the other hand, the institution, respectively the Ministry of Home Affairs, receives, as a correlation, the quality of social partner, from the employer's perspective, opposing the trade union.

4. The procedures for drafting, negotiating, concluding and implementing collective agreements on police service

The collective agreement on police service relations is a particular form of collective agreement resulting from the collective negotiation procedures, guaranteed even from the level of the constitutional text in force. It shall be concluded in writing between the Ministry of Home Affairs, represented by the person in charge of the Minister, on the one hand, and the police, on the other, represented by their representative unions.

The document may not contain clauses that exceed the legal provisions in force, can not establish rights and obligations below the minimum level established by law, and, regarding the legal content of these rights, they can not be restricted or supplemented to the level established by law in the performance of police service reports. From the point of view of the areas covered by the collective agreement, according to the legal norms in force, it aims annually to establish "measures regarding:

a) setting up and using funds to improve conditions at the workplace;

b) health and safety at work;

c) daily work schedule;

d) professional development;

e) measures other than those provided for by law, relating to the protection of those elected in the governing bodies of trade union organizations or designated as civil servants." [21]

From a structural point of view, the collective agreement must include at least the following elements:

"a) information relating to the two parties, including the quality of the

[21] See the provisions of art. 22 and 25 of the Government Decision no. 833/2007, as amended and supplemented.

signatory people and the act by virtue of which those people have a right of representation;

b) the period for which the collective agreement is concluded;

c) scope;

d) the obligations assumed by the two parties in each of the areas for which it was negotiated;

e) the date of the signing and the signatures of the representatives;

f) other information, according to the obligations established by law."[22]

Certainly, depending on the contextual need during collective negotiation, this minimum of mandatory information can be duly completed with others, deemed by the parties to be necessary and relevant, while respecting the general limitations imposed by law for the provisions of such a document.

Prior to the opening of the collective negotiation process, taking into account the attributions established by the law to the joint committee, to draft the text of the draft collective agreement, the necessary measures are available at this committee level (from the agenda of the meetings, meeting members, discussing specific issues and drafting texts), and pass, within a fixed term or number of meetings, the stages of drafting the document. Specialists of the specialized structures of the Ministry of Home Affairs may be invited to the work of the joint committee to provide the technical support needed to outline the solutions that are transposed into the text of the draft agreement. The presence of the specialists invited by the ministry does not change the parity and the balance of representation existing in its structure, the invitations taking part only in an advisory role. Decisions on the form and content of the draft text, within the limits imposed by law, within the joint committee shall be taken, as far as possible, by consensus or, where this is not achieved, by the simple majority vote of the members.

Finally, the institution is informed about the joint committee's assumption of a draft collective agreement on police service reports, with a view to launching collective negotiation procedures. After receiving the project, the institution will be given the necessary measures to trigger collective negotiation, establishing the person in charge of the ministry that will coordinate the procedure and its representation group, as well as the notification of representative trade union organizations at the level of the police units' group with regard to the intention to start it. At the same time, these organizations are required to designate their own representatives in the negotiating team, in compliance with the relevant legal provisions.

Thus, as a rule, in the case of the existence of more than two representative trade union organizations, the nominal designation of their representatives in the collective must be the subject of a joint written agreement. If the written agreement can not be presented as representative trade unions or some of them

[22] See the provisions of art. 27 of the Government Decision no. 833/2007, as amended and supplemented.

do not consent to it, the appointment of trade union representatives for collective negotiation shall be done among the people proposed by each of them by conducting a procedure of election by the majority vote of the police officers of the Ministry of Home Affairs. Such a hypothesis is unlikely to be met in practice, given the difficulty of organizing such a procedure, given the presence of a large number of police at the level of the group of units, territorially disposed at central level as well as in the all counties of the country.

When the trade union representatives are established in the collective negotiation team, according to the law, the Minister of Home Affairs approves, by means of an internal document, the composition of the negotiating team consisting of the representatives of both sides, the administrative details of the process and, as far as possible, and a deadline for its completion and the conclusion of the collective agreement.

Through the specialized structures, in order to fulfil the obligations laid down by law, and to ensure fair treatment in collective negotiation for the social partners involved, the institution "will provide the representative unions (...) with all necessary information for the conclusion of the collective agreement"[23]. In the process of collective bargaining for the conclusion of the collective agreement, the law places the parties in full legal equality, so that the exercise of their roles can be achieved freely. They also have the option to be assisted in the process by third parties, subject to third party's submission of confidentiality commitments.

At the end of the negotiation process, the collective agreement on police service relations is concluded and signed, the legal condition establishing a number of two original copies, one for each signatory party. From practice, taking into account the existence of several representative trade union organizations, in order to ensure a similar treatment, the number of original copies will be determined so that each of them receives one. At the same time, a copy of the collective agreement is also submitted to the joint commission, which, according to the attributions established by the law, will monitor, during the period of validity, the application at the level of the structures of the Ministry of Home Affairs.

As stated above, the time the collective agreement is concluded is, as a rule, appropriate for a period overlapping with the budget year. Generally motivated, in view of the necessity and opportunity required by law, that the consensual solutions set out in the agreement, within the legal limits accepted, are rather consolidated and highly predictable in practice, its validity is usually more than two years, with the possibility for the parties to agree to the prolongation for another year.

The provisions of this type of document, in this case, the rights, obligations, individual or collective, as well as the negotiated measures, are opposable, in the form in force at the time of exercising the right or the fulfilment of the

[23] See the provisions of art. 22 of the Government Decision no. 833/2007, as amended and supplemented.

obligation, excluding the Ministry of Home Affairs and all its component structures, which represents the professional, economic and social interests arising from police service relations and all police officers working for the institution. In this context, the law also establishes the right of any interested party, negotiating party or third party in relation to the respective process, to appeal to the competent administrative court in order to find an alleged nullity of the collective agreement.

The applicability of the provisions of the collective agreement could not be ensured without an effective advertising procedure, which is why the document, which by law has attributed the character of information of public interest, must be made public by default by displaying it at the headquarters of the Ministry of Home Affairs, in places specially arranged for this purpose, and by publishing on its own website, in the section for information of public interest.[24]

Once concluded, the collective agreement becomes mandatory for any signatory party, against whom, in the event of non-fulfilment of the obligations assumed, a form of legal, civil or disciplinary liability can be committed, as the case may be.

During the period of application, if a mutual agreement between the parties is reached, such a measure may be established by the conclusion of an additional act assumed by the signatories of the parties, which shall be brought to the attention of the public under the same conditions with the original act, within 15 calendar days at the latest. Under the sanction of nullity of law, no change can be made to the collective agreement by exerting pressure, determined either by abuse of a dominant position from the institution or, on the other hand, by creating or speculating a context with a potential to affect stability or image institutional or professional, for the imposition of measures of personal or group interest, with the obvious abuse of the constitutional limits and guarantees on freedom of expression, freedom of assembly or the right of association. Nullity is found by the competent administrative court of law, under the terms of the law, and may intervene "if the amendment of the agreement is the result of pressure exerted by one party on the other party for the purpose of accepting the request for amendment".[25]

The application of the provisions of the collective agreement is monitored on a permanent basis by the joint commission, which draws up quarterly reports on compliance and implementation of this document at the level of the structures of the Ministry of Home Affairs, for the periodic information of the institution's leadership, as well as the leadership of the representative trade unions of the police.

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[24] See the provisions of art. 27 par. (4) of the Government Decision no. 833/2007, as amended and supplemented.

[25] See the provisions of art. 28 par. (2) of the Government Decision no. 833/2007, as amended and supplemented.

According to the law, the application of the collective agreement may be suspended, but only until the termination of the causes determining it, in the following situations:

"a) in case of force majeure;

b) by the will of the parties, if the established measures can no longer be achieved due to financial restrictions or legislative changes regarding the rights or obligations in the fields stipulated in the collective agreement, which have occurred after their conclusion." [26]

A collective agreement on police service relationships may cease, at any time during its applicability, by the agreement of the signatory parties or the completion of the term for which it has been concluded unless the parties otherwise provide. As a rule, as mentioned above, its term of validity is set at two years, with the possibility, usually accessed, that the parties will agree to the extension for another year.

In practice, as regards the prolongation of the applicability of the collective negotiation agreement, negotiated previously as a possibility and as such contained in the document, a particular situation arises from the refusal of one of the signatory trade unions to accept such a measure. In fact, the institution initiated and signed as part of a written agreement to extend the applicability of the collective agreement for another year, proposing further to the relevant trade union organizations, which also signed, acceptance, except for one. Given that, according to the law, the collective agreement produces effects for civil servants within the public authority or institution, and given that the vast majority of signatory trade unions have agreed to prolongation, it was argued that police officers (the final beneficiaries of the negotiation process collectively transposed into the protected collective agreement, as we know, even at constitutional level) can not be deprived of the benefit created by its existence and its applicability. Under these circumstances, it was legally and expeditiously that the validity of the agreement could be extended on the basis of acceptance by those signatories, all the more so since, in the present case, they were registered as members in the majority proportion by the staff of the professional reference category. Consequently, the collective agreement, together with the written agreement to extend the term of applicability, continued to produce countervailing effects for all police officers who sought to base their access to rights and conditions, and for the trade union organization that had not accepted the prolongation not for its members) the collective agreement was no longer opposed.

Another cause of ceasing he collective agreement is related to the finding its nullity by the court and intervenes at the date of the final and irrevocable stay of the ruling.

[26] See the provisions of art. 29 of the Government Decision no. 833/2007, as amended and supplemented.

In order to negotiate a new collective agreement, when the old agreement is no longer applicable, by the effect of one of the aforementioned cases, the negotiation procedure shall again be duly applied with the involvement of the parties entitled under the law but with the establishment of the representation in agreement with the up-to-date situation regarding the representativeness of police union organizations.

5. Conclusions

Undoubtedly, the legal rules that have established social dialogue mechanisms, and in particular those of collective negotiation, have reached maturity, have brought about a re-establishment, a very necessary adjustment of employers' mentalities in managing employees' employment relationships. This has even helped to strengthen the assessments that have described, over time, the entire branch of labour law as a right in favour of the employee.

All concerns at the level of state powers about labour issues have created the impression that they have often combined their prerogatives to increase, and most of the time, rightly, the protection of the worker against his employer.

Thus, at the constitutional level, strong guarantees are in place in order to have, in fact, fundamental rights and freedoms that are incidental to its labour and mobility. As a rule, mechanisms for managing legal employment relationships are regulated fairly. The inaccuracies sometimes encountered by theoreticians and practitioners in the field of labour relations have been determined in addition to the differences in doctrinal vision between the different political formulas of government and a dynamic and spectacular evolution in the field of labour relations both from the perspective of modern forms and typologies labour supply, as well as that of labour migration.

If at the level of the legislative power the evolutionary context of the labour-related phenomena determined such an approach in shaping and/or adjusting the legal framework in the matter, the executive power organs could not manifest otherwise, where the measures ordered for the execution and application of the higher- they were directly proportionate and oriented, as was normal, in terms of employee's protection.

Including at the level of the judiciary, in a juridical context, oriented to the employee, the analysis of jurisprudence mostly reflects favourable solutions in the causes and conflicts of work deducted from the judiciary, thus contributing to the completion of a general picture describing, at present, a good level of safety of employees in working relationships.

It is therefore obvious that the current system of law and employment relationships, including their particular forms of exercise, of service relationships, provide effective protection and an enabling framework for employees to access all the rights deriving from or supporting the provision work. All these find, on

the other hand, the employer's correlative obligations, the fulfilment of which is held by the sanctioning system for the different forms of legal liability. This context is also found in the issue of organizing and supporting social dialogue mechanisms, namely collective negotiation and the conclusion of various forms of collective agreements, including those for police officers and their service relationships.

But beyond the perspective of legal obligations established in this case under the responsibility of the Ministry of Home Affairs, collective bargaining and the conclusion of a collective agreement on police relations also bring institutional benefits?! The answer is definitely yes.

It is time to look at these mechanisms of social dialogue as creative and institutional opportunities! This approach will lead to a proactive institutional behaviour in relation to the launching of collective negotiation procedures for the conclusion of police officers' service agreements.

From the definition of social dialogue law, we understand that the purpose of this process is to obtain "agreements on matters of common interest". From this perspective, a first benefit is created for the institution, through the development of the collective negotiation mechanism, that of obtaining consensus on issues where the employer's interest intersects with that of the employee, the solution of which is also profitable for the institution.

The social peace context (approached in proportion to the typology of the social partners involved and of the professional category and the public authority represented), ensured by systematically conducting social dialogue procedures, which result in consensus approaching and managing, within the limits that support the benefit of both parties, the interests deriving from police service relationships, is another opportunity to be valued at the institution level.

From the same perspective, for a public institution such complex and valuable as the Ministry of Home Affairs is, collective negotiation and benchmarking in the collective agreement leads to a facilitation of identification and action in order to minimize the risk potential generated by the degradation of working conditions, and non-adaptation of procedures specific to the field of health and safety at work, with implications for operational capacity.

In addition to maintaining operational capacity, concluding the collective agreement after the negotiation creates the opportunity to provide a common denominator between the institution and the social partners in addressing the issue of the flexibility of organizing the work programme, facilitating the establishment of adapted procedures and the institutional interest determined by the evolution of the operational situation.

In the context of the evolution of staff shortages in recent years and, above all, of the effects of institutionally mitigated measures, the vocational training component addressed in collective negotiation can create in turn an important benefit for the institution, with the negotiating partners, the necessary consensus

can be obtained to intensify and support solutions that will reduce the qualitative dimension of this staff shortage.

These few milestones, important for the institution, from the perspective of maintaining adequate operational capacity for the fulfilment of the legal attributions, first of all, by maintaining at the appropriate level the main resources in the management, the human resource, can and must always maintain an interest actively to organize a real and effective social dialogue, by involving, in this approach, all decision makers at its structures.

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Living assistance for people with disabilities

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Abstract

The living assistance of the disabled people involves using a pet to help the person in need to overcome their disabilities. The living assistance for people with visual impairments through guide dogs has become a new concern for the decision-makers in Romania. This paper aims to trace and extract those elements that may favor the development of this type of assistance in Romania as well, from the experience of other states in the use of guide dogs. The research articles in the field show that certain elements of the legislative context are necessary for a good implementation of the living assistance programs. But they are not enough either. The high cost of guide dogs training programs can be a serious inconvenient in this direction. This is where specialty medical literature comes to our attention. It is the one that complements the normative study and provides us with medical research that highlights a number of predictors of the guide dog training success. Applying the results of these research can greatly reduce the costs of training programs, thus facilitating the development of this form of assistance.

Keywords: *live assistance, guide dog, legal framework, predictors of success.*

***JEL Classification*:** H83, K23

1. Introduction

Concern about the support of blind people in Romania through dedicated public policies and national assistance programs is a recent one. Compared to other European countries, Romania is at a considerable distance back to this chapter. For example, in the UK, there is an association that has been operating since 1931 and which specializes in training and providing live dog assistance services (Guide Dog). The number of guides dogs in the UK is estimated at 5000.

In Romania, Parliament adopted in 2015 a draft law that provides for the funding of living assistance programs within programs of national interest for persons with disabilities. The Government of Romania also announced the launch of a pilot program to increase the number of guild dogs.

One of the main obstacles to the development of living assistance programs is the funding and persuasion of governmental authorities for the allocation of medium and long-term budget resources for the training of guiding dogs. This is done through a complex process of identifying dogs with potential, training and accommodation along with the beneficiary.

In the context of this recent openness to finding these types of support, it is the medical field and scientific research that can support and encourage this

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openness by better highlighting the benefits of living assistance programs and the obstacles that arise in practice.

This paper therefore proposes a transdisciplinary approach. We start from a synthesis of the main benefits of interaction between the blind and the guide dog, and then proceed with an exploratory approach to the legislation of other European countries regarding support measures for blind people. We believe that this approach brings benefits to the development of living assistance as a form of support for people with disabilities in Romania and particularly visually impaired people.

2. Methodology - specialized medical literature, comparative study

We will begin by illustrating the results of medical research and pointing out the relevant information for the applicability of developmental programs of living assistance. We will then make a comparative study of lawmakers from different European countries and look at support for blind people.

3. Debate: live assistance and its benefits

3.1. Government-centered effects

Budgets that governments need to provide for visually impaired people can be reduced as a result of using guide dogs to assist these people. The assistance that guides dogs can provide in fact reduces the need for paid or unpaid care for a blind person[444].

On the other hand, training and turning a regular dog into a professional guide dog is a fairly complex and costly process. According to an assessment of Australia's Guide Dogs NSW/ACT, it can reach $ 30,000 in Austral. The success rate in guiding dogs 50% -56% contributes considerably to these high costs[445]. Research in the field of veterinary medicine helps to reduce these costs by providing inputs on factors that can predict a dog's predisposition to be transformed into a guide dog[446]. We will return to the end of the article when presenting such studies.

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[444] Allen KM, Blascovich J., *The value of service dogs for people with severe ambulatory disabilities: A randomized controlled trial*, „The Journal of the American Medical Association", 1996, 275(13), p. 1001–1006.

[445] Batt, L.S., Batt, M.S., Greevy Mc, P.D., *Factors associated with success in guide dog training*, „Journal of Veterinary Behavior", 2008, 3, p. 143-151.

[446] M.E. Goddard, R.G. Beilharz, *Genetic and environmental-factors affecting the suitability of dogs as guide dogs for the blind*, „Theor. Appl. Genet.", 1982, 62, pp. 97-102; M.E. Goddard, R.G. Beilharz, *A factor-analysis of fearfulness in potential guide dogs*, „Appl. Anim. Behav. Sci.", 1984, 12, pp. 253-278; B.W. Knol, C. Roozendaal, L. Vandenbogaard, J. Bouw, *The suitability of dogs as guide dogs for the blind: Criteria and testing procedures*, „Vet. Q", 1988, 10, pp. 198-204; J.A. Serpell, Y.Y. Hsu, *Development and validation of a novel method for evaluating behavior and*

3.2. Effects centered on the beneficiary

The origin of the idea of supporting people with disabilities through forms of living assistance derives from the results of scientific research on human-animal interaction and its effects. The benefits of helping blind people share in psychological, social benefits and functional benefits. Competition is given between different means of assistance and how they manage to generate these benefits. Live assistance through guide dogs is most often compared with the use of the white stick - technical means and quite widespread assistance, the English term being the white cane.

The development of live animal care through pet animals occurs as a result of observing the positive effects of human-pet interaction.

The companion of a visually impaired person by a guide dog manages to shift the attention of other people from the deficiency to the ability to handle a dog. The perception of the person with disabilities changes. Thus, a guide dog succeeds in increasing the likelihood of social interaction of the visually impaired person with others[447].

A quantitative study on a sample of 1000 cases identified that the effects of stress are ameliorated among pet owners. However, according to researchers, certain conditions such as depression or anxiety may be diminished if people are permanently in the company of an animal[448]. In particular, dogs are those animals correlated with a higher rate of success in generating these effects.

The clinical effects observed by the researchers as a result of an animal's consolation are: decreased blood pressure, heart rate, and cholesterol levels[449].

In the literature[450] there are several hypotheses regarding the correlation between health and pet ownership.

The first hypothesis reveals a non-causal relationship between the two. Thus, having an animal can be caused by the predilection of having an animal and a good health.

A second hypothesis supports the existence of a possible indirect link between holding a pet and health. Thus, pets are seen as facilitators of social contact with other people, which maintains the feeling of social integration and belonging.

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temperament in guide dogs, „Appl. Anim. Behav. Sci.”, 2001, 72, pp. 347-364; A. Kikkawa, Y. Uchida, Y. Suwa, K. Taguchi, *A novel method for estimating the adaptive of guide dogs using salivary sIgA*, „J. Vet. Med. Sci.”, 2005, 67., pp. 707-712.

[447] Lane, D. R., McNicholas, J., & Collis, G. M., *Dogs for the disabled: Benefits to recipients and welfare of the dog*, „Applied Animal Behaviour Science”, 1998, 59(1-3), p. 49-60.

[448] Zasloff, R.L. and Kidd, A.H., *Loneliness and Pet Ownership among Single Women*. „Psychological Reports”, 1994, 75, p. 747-752.

[449] Anderson, W.P., Reid, C.M. and Jennings, G.L., *Pet Ownership and Risk-Factors for Cardiovascular-Disease*, „Medical Journal of Australia”, 1992, 157, p. 298-301.

[450] Lane, D. R., McNicholas, J., & Collis, G. M., *op. cit.*, 1998, p. 50 et seq.

Finally, the third hypothesis asserts that there is a direct causal link between holding a pet and health, resulting from the perception of a dog as a relationship in the life of the master.

3.3. The importance of the context in developing the form of live assistance through guides dogs

There are several factors that can favor the interaction of the visually impaired person with the guide dog, thus influencing the manifestation of all the potential effects I have referred to above.

They have to be taken into account by countries that intend to develop living assistance programs, as is Romania.

The context of the physical, cultural and legal environment is a factor influencing the impact of guild dogs on assisted persons[451].

Among the conditions of the physical environment are the dogs resting places or the possibility of feeding with water.

Particular social and cultural conditions are those that can also lead to specific inconveniences in the use of guide dogs. These conditions may be: dog rejection in restaurants, fear of other people towards dogs, allergies to dogs and/or other animals.

The success of living assistance programs also depends to a large extent on the attitude of visually impaired people to take this form of assistance. An important role in this respect is awareness of the role and functions that a guide dog can do.

Depending on these issues, a horizon of expectation is created for people with visual impairments in day-to-day care. If this is confirmed, living assistance may be appreciated by the blind person as a success, and as a failure, the person is looking at other forms of assistance. According to the quantitative research[452] made on a sample of 831 cases of visually impaired or completely unobtrusive, the main expectations regarding the role of a dog are mainly centered on:

- Mobility, independence and trust. The sample included equal shares of visually impaired people who have a guide dog or visually impaired people who do not have a guide dog to assist them.

For 75% of dog owners the guide answered that the reason they applied for a guide dog is mobility. Nearly 74 percent of men and 63 percent of women who do not have a guide dog think that a guide dog can help them move.

Greater differences between the two groups appear to the expectations of the independence that a guide dog can bring. Thus, 30% of men and 41% of women who already have a guide dog claim to have applied to bring them more

[451] Shlomo Deshen and Hilda Deshen, *Managing at Home: Relationships between Blind Parents and Sighted Children*, „Human Organization: Fall”, 1989, vol. 48, no. 3, pp. 262-267.
[452] Whitmarsh, L., *The benefits of guide dog ownership*, „Vis Impair Res.”, 2005, 7, p. 27–42.

exercise, while only 25% of men and 27% of women who do not have a guide dog believe that he could offer them independence. Therefore, the perception of the independence that a guide dog can bring to a visually impaired person can be a good predictor of the person's predisposition to ask for a guide dog and to follow this form of living assistance.

The situation is reversed when the expectation of confidence given by a guide dog is measured. Only 1 out of 10 owners claim they have applied to increase their self-confidence, while 26% of men and 17% of non-dog owners claim that a guide dog can give them confidence.

- Company, security and socialization. The companion role of the guide dog is perceived as being particularly important among those who are not dog guide owners. 25% of them mention this role as important. Instead, only 5% of the owner of the dog guide claims to have applied for the dog company.

In terms of security, 4% of the owners claim that they have also applied for this reason, compared to 6% among those who do not own, but claim to apply for this reason. 3% said that socializing or meeting other people led them to apply for a guide dog, compared with 8% of non-holders who said they would apply for socialization.

The quantitative study also reveals a lack of awareness of the role of a guide dog in one of eight blind people who do not have the assistance of a guide dog.

According to the same author[453], the main difference between the technical assistance and guided dog dogs, demonstrated by the research, is the predilection with which the latter meet the psychological and social needs of people with visual impairments, unlike the first. On the other hand, technology assistance manages to respond more rapidly to the physical needs of people with disabilities[454].

According to Sachs-Ericsson et al.[455], guide dogs compensate for certain deficiencies caused by deficiency and the benefits of assistance through guide dogs crystallize at the following levels:

- at body functioning through health improvements, lowering tension
- at the level of activities through increased functionality and mobility
- at the level of participation by increasing independence and involvement in the social environment, in family activities, in the workplace, and increasing personal security.
- contextual factors by increasing social recognition and acceptance, lowering the sense of loneliness and depression.

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[453] *Idem*, p. 30 et seq.

[454] Allen K, Blascovich J., *The value of service dogs for people with severe ambulatory disabilities. A randomized controlled tria*l, „The Journal of the American Medical Association”, 1996, Apr. 3, 275 (13), p. 1001-1006.

[455] Natalie Sachs-Ericsson, Nancy K. Hansen, Shirley Fitzgerald, *Benefits of Assistance Dogs: A Review*, „Rehabilitation Psychology”, 2002, vol. 47, no. 3, p. 251–277.

However, the effectiveness and appropriateness of the assistance provided by guide dogs at all these levels varies depending on the social and legislative context[456]. Internal regulations and laws play a key role in this.

For example, in the Britannia Sea, there is a Disability Discrimination Act that recognizes the importance of living assistance for the quality and independence of people with disabilities.

The assistance and movement of blind persons accompanied by guided dogs is regulated in some of the European Union states. We will continue to present the main legislative references in the UK, Italy, France, Portugal, Belgium, Austria and Germany, and then focus on the UK as a public policy model dedicated to living assistance.

4. International and European regulations on assistance provided by guide dogs

Worldwide, the rights of persons with disabilities are governed by the UN Convention on the Rights of Persons with Disabilities. The Convention was adopted in 2007, and 17 EU states signed and ratified it in October 2010. Romania is also one of the signatories. The Convention is considered to be the first legally binding instrument on the human rights dimension to which the EU and its Member States are party. Article 9 of the Convention states that the accessibility of persons with disabilities must be guaranteed on an equal footing without discrimination. Accessibility must cover a range of environments ranging from the physical environment to the means of transport and up to the information of communication, including information and communication technologies and systems, but also to other types of services open to the general public. Of course, it must target both in urban and rural areas.

At Community level, a strong emphasis is placed on ensuring the right of movement for people partially excluded from mobility. Sectoral regulatory acts regulating this are:

- Regulation no. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when traveling by air;
- Regulation no. 1177/2010 of the European Parliament and of the Council of 24 November 2010 on the rights of passengers when traveling by sea and inland waterway and amending Regulation (EC), text of relevance to the EEA.

At present, the right of free movement of visually impaired and hearing impaired persons with guide dogs among EU Member States and beyond is part of the general legislative framework on the rights of persons with disabilities or special needs. At the same time, the free and free access of guide dogs to public

[456] Whitmarsh, L., *op. cit.,* 2005, p. 35 et seq.

transport (buses, trains, planes, taxis, boats, etc.) is guaranteed. These spaces include the leisure areas such as shops, hotels, libraries and restaurants. Last but not least, it is stipulated to facilitate the access of people with disabilities to means, mobility devices, assistive technologies and active forms of assistance and quality mediation. In federal states, the situation is regulated at land/region/community level (Austria, Germany, Belgium).

Within this continuous process of adapting modern society to the needs of people with disabilities, non-governmental organizations have a very important role to play. They mediate between the parties and are responsible for designing helpful materials for better law enforcement, materials such as good practice guides on the rights and fair accessibility of people with disabilities (the UK case), but they also have the role of monitors implementation and improvement of legislation.

Great Britain. In the Great Britain, the rights of persons with disabilities assisted by guide dogs are part of the legislation on discrimination and equality. According to it, people with disabilities and guide dogs accompanying them have the right to free and free access to public transport (buses, trains, airplanes, taxis) as well as to shops, banks, hotels, libraries, restaurants and restaurants.

The Equality Law stipulates the rights of persons with disabilities, assisted by guide dogs, when they are transported by taxis or rented cars. Taxi drivers have the obligation to ensure the transport of the person with disabilities and the guide dog without requiring any additional transport tax for the guide dog. Taxi drivers who refuse to transport the two are liable to penalty by fine.

Taxi drivers may be exempted from the mandatory dog guide policy only for medical reasons or to the extent that they have exempted certificates from licensing authorities that show incompatibilities between the characteristics of the car and the transport of guide dogs.

The national rail transport company gives access to guide dogs alongside their owners in restaurant wagons and individual cans without requiring additional fees. Also, the national air transport company allows free access of guide dogs to airplanes during the flight to Great Britain.

A non-governmental organization in the Great Britain (Guide Dog) has developed mini-guides for good practice in accessing guide dogs alongside their recipients in leisure facilities (restaurants, hotels, stadiums, sports clubs and more). Service providers are advised primarily to abandon the policy of restricting access to dogs in their locations, not discriminate against a person with disabilities with a guide dog, provide poor quality services, and ensure that the person with disabilities and the guide dog benefit from adequate space. The guide dog must never be separated from the recipient, abruptly or harassed, communicating with him exclusively through the owner. Service providers should also provide people with disabilities with information adapted to their disability (Braille alphabet or easy to read or understand) and to train their staff to provide services tailored to the needs of people with visual and auditory impairments. And, last

but not least, service providers must provide water and relief places for guide dogs.

Italy. Since 1974, there have been three acts regulating the access of visually impaired people with guide dogs in different environments.

Law no. 37 of 14 February 1974 on the free transport of blind guides to public dogs provides for the right of blind persons to travel in public transport without paying guides for dogs accompanying the cost of the ticket or any other surcharge.

Law no. 376 of 25 August 1988 on the free transportation of guides to the blind for the blind and the right of access to public places for guards of dogs, provides for the right of blind persons to have access to public spaces for physical exercise, socializing and training dogs' guides.

Law no.60 of 8 February 2006 amending Law no. 37 of 14 February 1974 on the free transport of blind guides dogs into the public funds introduces fines between EUR 500 and EUR 2500 for the persons responsible for the management of public transport activity and for those who manage public spaces for exercise and training of guides and which prohibits, directly or indirectly, the access of blind persons accompanied by guide dogs in these places.

France. The Law of 30 July 1987 and the Law of 27 January 1993 regulate the access of guide dogs to the blind in public places (shopping centers, holiday centers, public transport).

Under Article 88 of Law 87-588 of 30 July 1987, access to public transport or public places in which a professional, educational or educational activity is carried out is authorized for blind guides or assistant dogs accompanying the holders of the certificate of disability, provided by art.241-3 of the Family and Social Care Code.

Under Article 77 of Law 93-121 of 27 January 1993, the prohibition or attempt to prohibit the access to public places of dogs accompanying persons holding the handicap certificates provided for in Article 174 of the Family and Social Care Code is punishable by a fine for 300 €. The penalty doubles in case of relapse.

Since 1982 guiding dogs have been authorized to accompany their owners in the grocery stores, according to art. L 125A of the Code of Hygiene and Nutrition. The circular of the Ministry of Social Affairs and National Solidarity no. 40 of 16 July 1984 provides access to guides dogs in hospitals, reception centers, waiting rooms.

Law no. 2005-102 of February 11, 2005 stipulates the granting of compensation for the maintenance of guides dogs; expenditure on the maintenance of guide dogs for the blind or assistant dogs is not taken into account in the calculation of the compensation if the dog has been trained in a special structure with qualified instructors, according to the conditions established by the decree.

Portugal. Unlike the Great Britain and France, in Portugal the regulations for guides dogs are more recent. Thus, in 2007 was adopted the Decree -

Law no. 74. The Act defines the concept of assistant dog around three possible roles: assistant dog trained to accompany a person with visual disability, assistant dog to help a person with hearing disability, work dog to accompany mentally disabled, organic or engine.

The Decree provides that persons with disabilities have the right to be accompanied by assistant dogs in public places, means of public transport, but also in public institutions.

Belgium. Both the Royal Decree of 15 September 1976 and the Royal Decree of 20 December 2007 provide for free travel for blind persons.

Although the Royal Decree of December 22, 2005 forbids pet access to food processing, handling or storage, guiding dogs accompanying visually impaired people are an exception to this ban.

The Law of 15 February 1993 regulated the establishment of the Center for Equal Opportunities and the Fight against Racism. It monitors, among other things, alerts received from persons accompanied by assistant dogs who are denied access to hospitals, both as patients and as visitors.

In part, each Belgian region has its own regulations.

Thus, in the Walloon Region, the assistance of the assistance dogs in public places is made by the Decree of 23 November 2006 and by the Walloon Government Decision of 2 October 2008. The Walloon Government Decision of 3 June 2009 implementing the Walloon Decree of 18 October 2007 taxi services and rental of driver cars stipulate that it is forbidden to travel without the consent of the driver dogs or other animals, except for guides for blind people and dogs accompanying all persons having a form of disability.

The 2007 Government Decree of March 29, 2007, stipulating that it is forbidden to travel without the consent of the driver dogs or other animals, except for guides for blind people and dogs offering accompanying all persons having a form of disability. Also, according to the Decree, persons accompanied by service dogs had to document this role of the animals. This was changed following the Decree of the Government of 13 December 2007 stating that it is not necessary to have a transport title in respect of guide dogs for the blind or for the dogs accompanying any person with a disability.

In the Flemish Region, the Flemish Government Decree of 14 May 2004 provides for the free transport of guides to the blind. It was followed by the Decree of 20 March 2009 on the access of persons accompanying assistant dogs to public places, which provides that in case of refusal of access of persons accompanied by assistant dogs in public places, the court designated for this purpose by the Flemish Government will impose an administrative fine of 100 €.

Austria. The 9 Austrian Länder have each authority to regulate matter in accordance with the Constitution of the country and federal laws. Throughout the state, blind people may be accompanied by guide dogs who are allowed to wear no leash and nipple. This provision is contained in acts such as: the Law on Animal Holding (Vienna); The Law on Public Safety (Steiermark), the Order of the

Federal Chancellery regarding the access of the accompanying dogs to the grocery stores, etc.

In Austrian public transport (train, subway, bus, taxi, airplane, boat), the guide dogs are allowed for the blind. Visually impaired and guide dogs benefit from a 50% discount (or one full fare ticket) for national and regional rail network users. The regulations on the benefits of blind people in urban transport vary from one city to another.

However, the Austrian regulations also have a vulnerable point, namely that the access of accompanying dogs to public buildings (institutions, hospitals, schools), cultural and sports facilities, detention facilities (restaurants, hotels) and shops is not regulated by law. In general, dog access is not restricted and depends largely on the will of those managers.

Germany. Based on the provisions of the Federal Constitution and the Equal Treatment Act, which prohibits discrimination against persons with disabilities, blind persons with companion dogs have access to public buildings (institutions, hospitals, schools, etc.).

The 16 German Länder have their own legislation in the matter, in accordance with the Constitution and federal laws. Regarding the access and accessibility of people with certain disabilities, there are no legal regulations at the level of the Länder. In practice, permission is required to enter with the guide dog in a public building.

In national and regional rail transport, visually impaired people and their guide or guides are free of charge within 50 km of their home town. However, these reductions do not apply to high speed races. Private operators do not apply reductions granted by state-owned railway companies.

Regarding inter-state rail transport, the German national railway company is a signatory to the IUR Agreement on the Transport of the Blind (the blind person accompanied by guide/guide dog receives a free ticket for him if the return ticket is purchased from the country where he was released the handicap card).

In local public transport, blind companion dogs who printed the B card on the handicap card have the right to circulate free of charge with the dog by any means of public transport. Taxi companies do not have the right to refuse a customer with a guide dog, but they have the obligation to have a car for this category of customers in the car park.

5. Good practice models - the Great Britain and the movement of blind people accompanied by taxi guides

As we have seen, the Great Britain has advanced legislation on the promotion of rights to live support for visually impaired people. And in the field of implementing these rights, things are equally advanced. The Guide Dogs for the Blind Association, an organization that has been working on this field since the 1930s, has developed a guide to promoting the rights of people accompanied by

guide dogs using the cabin of the means of transport. The guide explains how taxi drivers should react and what rights they have to provide to visually impaired guys with guides. Driver training on how to deal with people with disabilities is the responsibility of taxi companies.

For a better understanding of the blind person's right to be accompanied by a guide dog, it is explained that the latter is a working dog, is particularly attracted to these tasks and is monitored and continuously checked by veterinarians. A first point of the material stipulates that no additional costs are to be claimed for the accompanying dog. Moreover, any taxi driver who does not respect the right of the blind person to be accompanied by his guide dog is liable for the offense and receives a fine. Dog guides must wear a harness and jacket with the name of the association they were trained to identify. In the car, the dog must stand at the feet of the master, as he is also trained, and if the car causes damage to the car, the driver can claim damage.

Taxi drivers can only refuse access to the guide dog in the car if they have a medical certificate attesting to health problems that do not allow them to stay close to dogs (allergies, asthma or other problems). Furthermore, they are required to display an "Notice of Exemption" notice with the letters ED (Exemption Dog) containing tactile symbols in such a way that people with visual impairments can recognize them. However, companies must ensure that drivers who can carry deficient viewers with guide dogs are available at all times.

At the same time, the guide provides drivers with advice on how to communicate with visually impaired people, how to guide them, how to help them get up and down in the car, how to inform them when they go on a different route they are accustomed to it. Other recommendations are made for taxi dispatchers. They must inform the driver that he will carry a guide dog and ask the driver to approach the first passenger. Last but not least, licensing authorities need to ensure that enough taxis are allowed in each area to transport guides to dogs.

This guide shows the degree of detail of public policies that provide live form of assistance in the UK. Romania and other states where the forms of living assistance are still at an early stage can take these public policies as models of good practice but after thorough research into the needs of local blind people and the way they are responded at this point.

6. Implementation of live assistance programs provided by guides dogs, guides dog training programs, medical implications

I was saying in the first part of this paper that the guiding dog training process is complex and costly. Early recognition of dogs that are suitable for such an activity can significantly reduce training costs. In this respect, over the past 30 years, a series of behavioral tests have been carried out on potential guide dogs to identify predictors of successful dog training: social contact test, passive test, follow-up test, noise test, dog distraction test and unexpected test. Several values

were measured in the tests, such as salivary cortisol.

We will stop on one of these, namely the study led by a group of Sydney researchers, with the support of Gossodia Training Center of Guide Dog NSW/ACT.

113 dogs of different breeds and between 13 and 17 months of age underwent a first stage of behavioral tests and not only. Dogs who showed health problems during the tests were excluded from the sample to prevent the test results from being influenced by particular factors. After the end of this period, the dogs entered the training program for 20 weeks. Later, the dogs who were able to complete the training program were each assigned to a visually impaired person. The success rate reached 49.6%. Health reasons accounted for 24.6% of failures, and the remaining 75.4% of failures were due to behavioral problems.

The research by Tomkins et al outlined several factors contributing to the success of dog guides:

Results of passivity and noise tests. The more disturbed the dog is, the lower its concentration and the low ability to act safely alongside the person it accompanies.

The likelihood of success for those who did not sit down to the third noise test performed in the first stage of the study is only 21.5%. Thus, this test can be used to reject potential guide dogs in a pre-selection stage by organizations wishing to train guide dogs.

The results of the distraction test. Another important predictor, correlated with the dog's attention, is behavior around another animal. The higher the level of stress in the presence of another animal, the lower the rate of training for guild dogs. Specifically, the success rate has dropped from 82.3% to 60.9% when the dog has groped at the dog's distraction test.

On the other hand, the test of the appearance of a sudden object and the level of activity of the dog in the shelter do not have enough predictive factors of dog success in the training program.

Dog behavior in the shelter. Biochemical values such as salivary immunoglobulin have not been a predictor of success despite the fact that this is a recognized marker of stress[457]. This is due to other factors such as seasonal variations or canine cough that can influence the increase in this value both in successful training dogs and those who have been rejected.

Instead. the time spent by a dog in the individual shelter for resting during the surveillance hours proved to be a prediction factor. As the dog rested longer, the higher the success rate.

[457] A. Kikkawa, Y. Uchida, Y. Suwa, K. Taguchi, *op. cit*., 2005, p. 709 et seq.; Skandakumar, S., Stodulski, G., Hau, J., *Salivary IgA: a possiblestress marker in dogs*., „Anim. Welfare”, 1995, 4, p. 339-350.

7. Conclusions

We have embarked on this assumption that there is an increased interest of decision-makers in Romania in the implementation of living assistance programs dedicated to people with visual impairments. We have therefore proposed an exhaustive analysis of the operation of this assistance method on various plans. We started from presenting the origin and scientific foundation of this form of assistance. We have seen that the psychological benefits of man-pet interaction are the ones that have led to the idea of training and training dogs that can accompany visually impaired people. At the same time, they are also those who benefit in practice from this form of assistance to other forms of assistance through technological means. The guide dog functions as a social facilitator and therefore manages to increase the degree of social interaction of the person with disabilities. This brings benefits to people's mental state, increasing self-confidence, social acceptance of the person, increasing the person's involvement in activities.

We have also seen that both the social and the legislative context play an essential role in implementing community-based living support programs. We have, therefore, made a retrospective review of the main regulations in several European countries on the rights of visually impaired people, including accompanying a guide dog. Even though most of these regulations refer to the public transport of the person with shortcomings accompanied by the guide dog, they capture the degree of concern for this form of assistance shown by the analyzed states. A very great leap on public policies that support living assistance has been observed in the UK. There is an organization dedicated to this field since 1930, and the multitude of non-governmental organizations dealing with visually impaired people have made it possible to carry out a quantitative study[458] of large dimensions on a sample of 831 cases visually impaired people, half representing people who had a guide dog, and the other half representing people who did not have a guide dog. The study analyzed in detail the perception of guide dogs, their interaction with the beneficiaries, the factors influencing the decision to have a guide dog, the expectation report - proven benefits and how this report can influence the success of using a guide dog from the perspective of the direct beneficiary.

Finally, we have leaned on research in the field of veterinary medicine that provides a valuable input in terms of characteristics that can show dogs with a greater predisposition to becoming guided dogs following a training process. The study conducted in Australia shows that the results of the test of sound, the distraction test with another dog, and the dog's resting behavior in the doghouse are effective predictors of the success rate of the guide dog training. These results can significantly contribute to reducing the training costs of guide dogs.

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[458] Whitmarsh, L., *op. cit.,* 2005, p. 36.

By synthesizing all of these references, we wanted to provide a comprehensive picture of the form of live assistance offered to visually impaired people through the guide dog. We believe that the transdisciplinary approach, the merging of the presentation of the results of the medical researches with that of the normative framework operating in other states can be of real use in the field of public policies in Romania to support living assistance.

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Legal regime of requests for voluntary intervention in public procurement trials

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Abstract

The public procurement procedure is a complex procedure that is carried out in accordance with the provisions of Law no. 98/2016 and Law no. 99/2016 and in accordance with the steps and rules described in the normative acts already mentioned. Because in the procedure are involved factors with own interests and often contrary, Law no. 101/2016 provided the legal possibility to challenge any act of the contracting authority/entity contrary to the legal provisions. Thus, as injured persons, economic operators can attack administrative acts and administrative contracts, but, at the same time, they can intervene in the trials opened by other parties involved. The most commonly used tools are the requests for ancillary and main intervention. The paper aims to treat these working tools provided to the economic operators by the civil procedure code from the perspective of legal provisions and the case law in public procurement.

Keywords*: public procurement procedures, requests for voluntary intervention, National Council for Solving Complaints, winner, admissibility of request.*

JEL Classification: K23

1. Introductory considerations

In general, the legal regime regarding the request for ancillary and main intervention is regulated by Law no. 134/2010 regarding the Code of Civil Procedure[2]. Thus, in a trial before courts, beside the plaintiff and the defendant, other persons may also participate through the request for main and ancillary intervention.

According to art. 61 Code of Civil Procedure (C. proc. civ.), anyone interested may intervene in the process judged between the original parties. The request for intervention is main when the intervener claims for himself, in whole or in part, the right attached to the judgment or a right closely related to it. The intervention is ancilllary when it supports only the defense of one party.

The paper aims to analyze the legal regime of the requests for intervention in the specific field of public procurement, both in the litigations filed with the National Council for Solving Complaints or with the competent courts, taking into account the normative acts in force and the case law existing in the field.

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[2] Published in the Official Gazette no. 247 from 10th of April 2015.

2. Requests for voluntary intervention in disputes at the National Council for Solving Complaints

It is to be mentioned that, until the entry into force of Law no. 101 of 19th of May 2016[3], respectively Government Emergency Ordinance (GEO) no. 34/2006[4] and Governement Decision no. 925/2006 regarding the approval of the methodological norms of GEO no. 34/2006, there were no express provisions regarding the possibility of any economic operator interested in making a request for voluntary intervention in the dispute.

In the practice created by the application of GEO no. 34/2006, there were divergences of opinion as to the admissibility of the application for main intervention, as some courts considered that the procedure is only contradictory to the contracting authority, so only the applications for ancillary intervention are admissible. Under these circumstances, the legislator understood to regulate expressly, through art. 17 par. (3) of Law no. 101/2016, the request for voluntary main and ancillary intervention under the provisions of Law no. 134/2010[5].

Thus, according to art. 17 par. (3) of the Law, until the resolution of the contestation by the Council, the economic operators interested to participate in the award procedure, respectively, as the case may be, the economic operators participating in the awarding procedure may formulate a request for voluntary intervention in the dispute, according to the provisions of Law no. 134/2010 on the Civil Procedure Code, within 10 days from the date of publication on the electronic platform of the appeal. In the case of proceedings not initiated by publication on the electronic platform, the 10 day period is calculated from the date of the communication of the appeal (as amended by GEO no. 45/24th of May 2018[6]).

It is therefore possible to formulate both a main intervention request and an application for an ancillary intervention. In this context, the request for intervention lodged with the Council will be communicated to the other parties of the case within two days of receipt. The initial form of the article provided that the request for voluntary intervention was made with the notification of the parties.

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[3] Law no. 101 of 19 May 2016 on remedies in the field of the award of public contracts, sectorial contracts and works concession contracts and the concession of services and the functioning of the National Council for Settlement of Claims in procurement law public, was published in the Official Gazette no. 393 from 23rd of May 2016.

[4] Government Emergency Ordinance no. 34 of 19th of April 2006 on the award of public procurement contracts, public works concession contracts and service concession contracts.

[5] Court of Appeal Bacău, Decision no. 1082 from 14th of september 2016 available in Dumitru-Daniel Șerban, *Commented case law on public procurement*, vol. VI, Hamangiu Publishing House, Bucharest, 2017, p. 54.

[6] On 4th of June 2018, par. (3) of article 17 was modified by point 11, article IV from Governement Emergency Ordinance no. 45 from 24th of May 2018, published in the Official Gazette no. 459 from 4th of June 2018.

By expressly laying down this obligation, it has been adopted a unitary regulation on the obligation of communicating the request. In practice, in the past, some courts have decided that, since there is no rule obliging the Council to notify the other parties the request for intervention, failure to communicate the request is not a violation of a law[7].

At the same time, through the modification of the article, concerning the obligation to notify the other parties, the legislator realized a movement of the obligation from the intervener to the Council. It is believed that this change will result in an unjustified prolongation of the existing process before CNSC and a violation of the principle of speed in the settlement of the dispute.

According to art. 15 par. (1) of the Law, "the appeal procedure shall be conducted in accordance with the principles of legality, speed and contradictory, ensuring the rights of the defense, impartiality and independence of administrative-judicial activity".

Going further, in this context, judicial practice provided that "no legal provision obliges the Council to communicate to the party to whom the request to intervene has been granted, the applications, the written observations and the conclusions of the complainants, as well as the point of view of the contracting authority. Contradictoriality and the right of defense do not necessarily imply communications and do not have the same meaning and application as in the trial phase before the court, but they are given particular applicability in the administrative and judicial proceedings before the Council"[8].

On this point, art. 19 par. (1) of the law grants the parties, upon request, the right of access to documents of the file filed with the Council under the same conditions in which the access to files established at the courts is made according to the provisions of Law no. 134/2010, except for the documents that the economic operators declared to be confidential.

In addition, following the analysis of the decisions of the Council, it has been detected, with regard to requests for voluntary intervention under art. 17 par. (3) of the Law, a common approach for tenderers rejected in the procurement procedure who ask for:

- admission in principle of an application for main intervention, given that there is a proper right defended, and

- as the alternative, should the Council consider the application for main intervention for its own benefit to be inadmissible, admission of the application for ancillary intervention in the interest of the contracting authority.

The Court will classify the request for voluntary intervention in each

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[7] Court of Appeal București, Decision no. 5789 from 4th of July 2014 available in Dumitru-Daniel Șerban, *Commented case law on public procurement*, vol. V, Hamangiu Publishing House, Bucharest, 2015, p. 265.

[8] http://jurisprudenta.avocats.ro/Achizi%C5%A3ie-public%C4%83--Procedura-de-solu%C5%A 3ionare-a-contesta%C5%A3iilor-%C3%AEn-fa%C5%A3a-CNSC--Respe.php, consulted on 1.04. 2019.

case, depending on the arguments put forward in the application and what the intervener requires regarding the specificity of the public procurement procedure.

For example, if the winner requests the admission of the application for main voluntary intervention and, in the alternative, the approval of the ancillary request, the Council, in relation to the main voluntary intervention application, takes into account that the intervener pursues the same purpose as the contracting authority, namely the maintenance of the acts issued during the procedure. Practically, the object of the request coincides with the point of view expressed by the contracting authority.

In this situation, having regard to the provisions of art. 68 of Law no. 101/2016, art. 61 par. (3), art. 63, art. 65 and art. 67 of the Code of Civil Procedure, the Council will classify the request for action as an ancillary one in the interest of the contracting authority[9].

However, if it is found that the parties do not want such a re-qualification and expressly express their disagreement about the re-qualification of the name or the legal basis of the action, the Council or the court is obliged to refrain from re-qualification and to give effectiveness of the principle of availability, because, as stated in art. 9 par. (2) C. proc. civil, the object matter and the limits of the trial are determined by the parties' requests and defense[10].

Finally, if it is a question of correcting material errors, the petition must be made before the judicial body on which the material error is claimed. So, if material errors were made in the Council's decision, the only one that can correct these errors is the National Complaints Board[11].

3. Requests for voluntary intervention in disputes before the courts

Concerning the litigations in courts in the field of public procurement, through Law no. 101/2016, three complaints are identified, namely complaints against Council's decisions, appeals settled directly before the courts and proceedings concerning the award of damages caused during the award procedure, as well as the cancellation or nullity of contracts.

3.1. Complaints against Council's decisions

Regarding **the admissibility of the request for voluntary intervention in the trial on public procurement, during the applicability of GEO no.**

[9]http://portal.cnsc.ro/sivadoc/download.aspx?docUID=YTQ1ZGZmY2UtMzQ3My00MmViLT gzYjMtYTI1YzQ3OTc3MDg1&pdfa1=ZmFsc2U=&filename=Qk8yMDE4XzYxMTUucGRm&action=aW5saW5l, consulted on 1.04. 2019.

[10] Court of Appeal Suceava, Decision no. 1463 from 8th of november 2016 available in Dumitru-Daniel Șerban, *op. cit.*, 2017, p. 481.

[11] Court of Appeal București, Decision no. 4963 from 13th of June 2014 available in Dumitru-Daniel Șerban, *op. cit.*, 2015, p. 242.

34/2006 and GD no. 925/2006, there were two trends.

In the context of the first tendency, the requests for voluntary intervention were rejected on the grounds that "according to art. 283 of GEO no. 34/2006, the complaint procedure against the Council's decision is that of the cassation, so that, at this stage of the proceedings a request for intervention in its own interest is inadmissible"[12].

The second tendency, which became majoritary, manifested itself in the sense of admitting in principle the requests for intervention formulated in such litigation. It was underlined the fact that "it should be taken into account that the complaint regulated by GEO no. 34/2006 is a special way of appeal, which supposes the examination of the case in the first and last instance, the elements loaned from the cassation regarding the formation of the panel of judges and the extent of the analysis that it is required to do will not change its nature. So, the Court being asked to settle the case in the first instance, it is admissible to make a request for intervention in its own interest"[13].

Moreover, following the amendment of art. 283[14] par. (3) from the GEO no. 34/2006 by Law no. 76/2012, which entered into force on 15 February 2013, the complaint becomes a distinct action and the notion of "remedy" can be interpreted only in terms of the right of access to the court, which does not involve more degrees of jurisdiction[15].

The Law no. 101/2016, with art. 29 et seq., regulates the legal status of the complaint against the Council's decisions before the courts. Thus, Council's decisions may be appealed by the contracting authority and/or by any person injured by the measures ordered by the Council with a complaint before the competent court, both on grounds of illegality and irrationality, within 10 working days of in the case of the parties, and from the date when other injured parties are informed (as amended by GEO no. 45 from 25th of may 2018).

The initial form of article 29 established that Council's decisions may be appealed by any of the parties. By GEO no. 45/2018 was removed also par. (2) of art. 29, according to which, during the trial on complaint, it can not be changed the legal framework established before the Council, the quality of the parties, the cause or object of the appeal, nor can new claims be made.

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[12] Court of Appeal Constanța, Decision no. 1649/CA from 21th of december 2009 available in Dumitru-Daniel Șerban, *Commented case law on public procurement*, vol. II, Wolters Kluwer Publishing House, Bucharest, 2010, p. 91.

[13] Court of Appeal Alba Iulia, Decision no. 686/CA from 20th of April 2010 and Decision no. 1456/CA from 16th of December 2009 available in Dumitru-Daniel Șerban, *op. cit*., 2010, p. 97.

[14] Art. 283 par. (3) from GEO no. 34/2006, modified by Law no. 76/2012, „(3) The provisions of section 9 are applicable", section 9 called „Settlement of litigation in court". Before modification, par. (9) had the following content". The complaint shall be settled in accordance with the provisions of art. 304^1 of the Civil Procedure Code. The provisions of Section 9 apply accordingly".

[15] Court of Appeal Bacău, Decision no. 2375 from 7th of June 2013 available in Dumitru-Daniel Șerban, *Commented case law on public procurement*, volume IV, Hamangiu Publishing House, Bucharest, 2014, p. 68.

It will be kept in mind that, according to art. 68, the provisions of Law no. 101/2016 are supplemented with the provisions of the Law on administrative contentious no. 554/2004, with the subsequent amendments and completions, of Law no. 134/2010, republished, as subsequently amended, and those of Law no. 287/2009, republished, with the subsequent amendments, insofar as the provisions of the latter are not contrary.

So, in this context, if the intervener filed an application for intervention before the Council, the intervener has acquired the status of party to the proceedings and a new application for an intervention at the stage of the complaint is inadmissible[16].

Concerning **the request for an ancillary formulated directly at the stage of the complaint,** there were two directions in judicial practice:

- as to the admissibility of the request for ancillary intervention. Being the case of an application for intervention in the interest of one of the parties to the dispute, it was considered that the procedural framework did not change, the provisions of art. 63 par. (2) C. proc. civ. by reference to art. 68 of the law. However, there must be a third party's own interest in making a request and a link between it and the complaint.

- recalling that the intervener was not a party in the dispute before the Council and the provisions of art. 29 par. (2) of the Law no. 101/2016, the court ruled that an application for an interlocutory intervention at the stage of the complaint is in principle inadmissible (before the modification of art. 29)[17].

At present, it is considered that the applications for ancillary voluntary intervention are admissible at the stage of the complaint, given the wording of art. 29 of the law, according to which Council's decisions may be appealed by the contracting authority and/ or any person injured by the measures ordered by the Council. The injured party is defined by law as any economic operator who cumulatively fulfills the following conditions: (i) has or has had an interest in an award procedure, and (ii) has suffered, suffers or is liable to suffer injury as a consequence of an act of the contracting authority likely to produce legal effects or, as a result of the failure to resolve within a legal time a request for an award procedure.

Thus, by modifying art. 29 of the law, it was revoked the restrictive interpretation that only the parties of the case could make a request for voluntary intervention in the process of solving the complaint.

Going further, in the field of public procurement, the successful tenderer is often the one who makes a request for voluntary intervention and intervenes in the process where a rejected tenderer disputes the procedure report issued by a

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[16] Court of Appeal Timișoara, Decision no. 8769 from 23th of october 2014 available in Dumitru-Daniel Șerban, *op. cit,* 2015, p. 603.

[17] Dumitru-Daniel Șerban, *op. cit*., 2017, p. 403.

contracting authority requesting it to be canceled[18]. The winner is, as a rule, an accessory intervener in the interest of the contracting authority[19]. There are opinions and decisions in the sense that the winning bidder can formulate only accessory requests[20].

In view of the bidder's status as well as the nature of the claims he can make in a lawsuit, since he does not request the cancellation of an act issued by the contracting authority, nor the obligation of any party to any prestation[21], it is agreed that the above statement is correct.

If anancillary intervener intervenes in the interest of the contracting authority but has a position contrary to that expressed by the authority, in such a case such an application for an ancillary intervention is inadmissible in the interest of the authority, the two parties having contrary interests, motive for which the intervention was not approved in principle[22].

It is also inadmissible for the intervener to challenge the rejection of its tender, since the dispute in which it wishes to intervene concerns the evaluation of other tenders. In practice, the offer of the intervening association was rejected by the contracting authority and did not contest the act issued by the authority, but formulated an application for an ancillary intervention in the appeal lodged by another rejected tenderer. As a result, the condition that the intervener acquires for himself the right attached to the judgment or a right closely related to him, provided by art. 61 par. (2) C. proc. civ., was not met[23].

Also, in the process, the accessory intervener must always bear the expenses he/she makes with the request for voluntary intervention, regardless of whether or not the decision was in favor of the party for which he intervened, this being argued that voluntary accessory intervention should not have as a result the increasing of the costs incurred by the unsuccessful party[24]. Conversely, the Bucharest Court of Appeal declared, by Decision no. 5765 of 3rd of July 2014, in the sense that "the right of the intervener to grant the costs can not be denied as long as it is based on the culpability of the complainan, and the intervention in the court proceedings was justified by the protection of an intervener's own right".

In our opinion, the solutions given by the courts in the first direction are

[18] Dumitru-Daniel Șerban, *op. cit.*, 2015, pp. 261-262.
[19] Court of Appeals Timişoara, Decision no. 4164 from the 23th november 2016.
[20]http://portal.cnsc.ro/sivadoc/download.aspx?docUID=YTQ1ZGZmY2Ut-MzQ3My00MmViLTgzYjMtYTI1YzQ3OTc3MDg1&pdfa1=ZmFsc2U=&file-name=Qk8yMDE4XzYxMTUucGRm&action=aW5saW5l, consulted on 1.04. 2019.
[21] Court of Appeal Timișoara, Decision no. 1465 from 22th of March 2013 available in Dumitru-Daniel Șerban, *op. cit.*, 2014, p. 581.
[22] Court of Appeals Cluj, Decision no. 4438 from 26th of May 2014 available in Dumitru-Daniel Șerban, *op. cit.*, 2015, p. 348.
[23] Court of Appeals Brașov, Decision no. 168/R from 4th of February 2015 available in Dumitru-Daniel Șerban, *op. cit.*, 2017, p. 65.
[24] Court of Appeals Alba-Iulia, Decision no. 1098 from 1th March 2012.

correct also by reference to the provisions of the Code of Civil Procedure concerning the payment of legal costs. "In order to award the costs, it is not sufficient to acquire the capacity as a party to the proceedings, but it is also necessary for that party to win the trial, meaning to obtain all or part of the claims claimed by the appeal, art. 453 corroborated with art. 454 thesis I C. proc. civ. being explicit in this sense". The accessory intervener, although party to the proceedings, does not have a claim in the process in order to become a "party winning the trial", but supports only the defense of one of the parties, accordingly to the provisions of art. 61 par. (3) C. proc. civ. [25].

According to art. 67 par. (4) C. proc. civ., the appeal of the intervener shall be considered inadmissible if the party for which he intervened has not exercised the remedy, has waived the appeal, or has been annulled, obsolete or rejected without being examined in substance[26]. Basically, there is no longer a court in which the application is to be formulated.

The solution adopted by law takes into account the principle of *accessorium sequitur principale*, according to which the accessory action always follows the path of the main action, based on the principle of subordination. An accessory intervener does not protect a personal right, but tends to defend and rely on the right of the person in whose favor he has intervened, precisely because of this through his actions he can not act and contravene the interests of that party[27].

Moreover, considering that the Law no. 101/2016 does not contain special rules regarding voluntary intervention before the courts, it will be applicable the general legal regime established by the civil procedure code, respectively the provisions of art. 67 paragraph (4) C. proc. civ[28].

In case law, there are also judgments in which the complaint of the accesory intervener is admissible, even if the party in whose favor he intervened has not lodged a complaint[29]. In this situation, the courts invoke the provisions of art. 29 of the Law, which provides that decisions of the Council may be appealed by the contracting authority and/or any person injured by the measures ordered

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[25] Court of Appeals Suceava, Decision no. 1861 from 13th of September 2016 available in Dumitru-Daniel Șerban, *op. cit*., 2017, p. 478.

[26] Court of Appeals Bucharest, Decision no. 4956 from 12th of June 2014 and Decision no. 1052 from 20th February 2015, available at Dumitru-Daniel Șerban, *op. cit*., 2015, p. 241 and p. 309; see also Court of Appeals Cluj, Decision no. 3149 from 7th of April 2014.

[27] Court of Appeal Craiova, Decision no. 16317 from 8th of november 2013 available in Dumitru-Daniel Șerban, *op. cit*., 2015, p. 390; to see also the decision available at: https://www.jurisprude nta.com/juris prudenta/speta-12pz97hj/, consulted on 1.04. 2019.

[28] Court of Appeal Timișoara, Decision no. 9865 from 2nd of December 2014 available in Dumitru-Daniel Șerban, *op. cit.*, 2015, pp. 605-606.

[29] Court of Appeal Bucharest, Decision no. 5363 from 23rd of June 2014 available in Dumitru-Daniel Șerban, *op. cit*., 2015, p. 250.

by the Council [30]. The inadmissibility of the complaint is rejected, since the accessory intervener was a party to the proceedings before the Council.

An interesting aspect encountered in case law, it is the request for an ancillary voluntary intervention formulated by a tenderer in the interest of another tenderer and not in the interest of the contracting authority. In the context of a dispute, a tenderer made a request for action in the interest of the applicant, requesting its admission, since his rights and interests were harmed by the attitude of the defendant contracting authority, who understood to carry out the electronic tender procedure without previously declaring offer inadmissible and without being given the opportunity to participate in the electronic auction stage.

In that case, the court declared the application for an ancillary intervention inadmissible because the intervener's interest in challenging the proceeding derives from the address of the outcome of the proceedings, while the address and interest of the applicant to challenge the tender procedure derives from another allegedly harmful act, another address for communication of the outcome of the procedure. This means that, as competitors in the public tender procedure, their rights and interests do not converge, not even at the stage of judgment, because each tends to gain its auction rights on its own. As the court holds, the plaintiff's right and interest are distinct from the rights and interests of the intervener[31].

In the field of public procurement, voluntary self-interest requests are rather uncommon, as the law provides for rejected tenderers the possibility of appealing against acts of the contracting authority before the Council or the courts. In the case of a main action, the right to the court is unique but claimed by both parties.

Usually, tenderers who have been rejected in proceedings which have not challenged the address for communication of the outcome of the proceedings, intervene in their own interest in the complaint made by another unsuccessful tenderer. In this case, the application is inadmissible because it is an unlawful way for the bidder in passivity and fault to obtain the public procurement contract.

3.2. Appeals to courts, trials for damages and nullity of contracts

At the same time, according to art. 49 et seq. of Law no. 101/2016, the complaint may also be settled by judicial process, the injured party being directly addressed to the competent court according to the law, the decision being open to cassation to the hierarchically superior court.

The trials and claims for damages caused during the award procedure, as

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[30] Court of Appeal Bacău, Decision no. 1006 from 21st of july 2016 available in Dumitru-Daniel Șerban, *op. cit.*, 2017, p. 50.

[31] Bucharest Tribunal, Sentence no. 2582 from 5th of october 2010 available in Dumitru-Daniel Șerban, *op. cit.*, 2014, p. 611.

well as for the annulment or nullity of the contracts are settled at the first instance, urgently and especially according to art. 53 of the law.

In the latter two types of proceedings, the legal regime established by the Code of Civil Procedure will apply to voluntary requests for intervention.

3.3. The position of the intervener

Art. 65 C. proc. civ. provides that the intervener becomes a party to the proceedings only after the admission of his application in principle. The intervener will take over the procedure as it stands at the time of the intervention, but will be able to request the taking of evidence through the application or at the latest by the first hearing after the application for action.

In judicial practice, it was considered that the request of an intervener for the admission of expertise exceeded the procedural framework. Taking into account that judging the causes of public procurement is done in a quick manner, technical expertise is a test that naturally and undoubtedly implies the allocation of a much longer time[32].

We also bear in mind that, according to art. 31 par. (3) of the law, no new evidence may be filed, except for new documents with the complaint, respectively with the encounter.

In the case of a request for intervention made by the successful tenderer, if the complaint submitted by an unsuccessful tenderer before Council or the courts is rejected as unfounded, the request for ancillary incidental intervention shall be admitted. On the contrary, if the appeal is admissible, the request for ancillary intervention will be rejected. The solution to the request for intervention does not imply any additional reasoning on the appeal[33].

4. Conclusions

In conclusion, we note that the practice of the courts has varied along the applicability of normative acts mentioned above. Law no. 101/2016 attempted to resolve a number of opposing trends in litigation decisions but, in turn, tends to give rise to further discussions in the light of the new changes of the law.

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7. Law no. 134/2010 on the Code of Civil Procedure, republished in the Official Gazette, Part I no. 247 of 10 April 2015, as amended.

Practical aspects regarding the motivation of administrative acts in antitehese with the motivation of judging decisions in accordance with the New Code of Civil Procedure

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Abstract
Subjects of the study: Common aspects regarding the motivating criteria for the administrative act, the motivating criteria in decisions of the contentious procedure in the preliminary procedure, and the court decisions motivating criteria, as well as the measures ordered in the contravention law and contained in legal provisions: Fiscal Procedure Code (Article 46 to Article 54 - Issues regarding motivation of the fiscal administrative act, and Article 272 to Article 274 - Issues related to the motivation of the decisions solving appeals against the fiscal administrative act); the Administrative Contentious Law no. 544/2004 (Article 7 - Preliminary Procedure); Govern Ordinance no. 2/2001 on contraventions (Article 16 to Article 20 - the report-minute on finding of contravention) and corroborated with the New Civil Procedure Code (Article 193 - Preliminary Procedure and Article 425 - Content of the judgment). Research Methods Used: analyzing the legislative aspects by means of own practice and existing jurisprudence, and leading to a judicial syllogism. The results and implications of the study: Safeguard, promoting and defending legitimate rights and interests of citizens, taxpayers, offenders and petitioners in the administrative and fiscal contentious proceedings.

Keywords: *motivation, administrative act, judging decision, New Code of Civil Procedure.*

JEL Classification: K23, K41

1. Introduction

In primis, we bring to the attention of the Honorable Auditor, as well as to distinguished colleagues, that the most important thing within a State of Law, as Member of the European Union, with full rights, both by sovereignty and independence, is to succeed having the legal leverage to protect and safeguard the legitimate rights and interests of its citizens, through which the objective as a climate of security and safety of civil legal relations is ensured through decisional and institutional accuracy, regarding the motivation of procedural acts and which, in the end, ensures the binding and the bridge to the observance of the Romanian Constitution and the fundamental rights of the citizen.

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The motivation of an administrative act, of a Court Judgment, of a *exempli gratia* the Report - Minute finding an offense, in the measure, is practically a respect for the fundamental principles of the settlement of a legislative system and which must directly lead to a unified and clear understanding of acts issued by the Authorities in Romania.

Moreover, we have an analogy by the fact that any consequence of a fact or legal act, irrespective of the extent to which it refers (administrative law, fiscal law, civil law, etc.) must reflect a factual situation by means of a clear presentation of the facts, of the arguments and of one part and the other, through equality of means, a proof that becomes conclusive, useful and necessary in taking a Decision or the settlement of a law case, namely providing in substantive law or providing in procedural law applicable through all its valences and specific relationship (*specialia generalibus derogant*).

Motivation is important because the reasoning of the authority, the institution to comply with the law must be observed with the utmost precision, and to sanction or prevent the commission of illegal or unlawful damaging actions through disciplinary, administrative, tort liability and eventually prosecution.

The motivation in fact and in law shows us the power of understanding of the conduct and which must be constantly respected by us as citizens and we must learn from these acts of legal disposition to have a stability of the civil legal relations by observing the democratic principles and contrary to antithesis with anarchy and oligarchy that can intervene in an imminent way. The most important is that the law, by its abstract forms and formulas, and possibly its philosophical, virtual ones, must be understood by the citizen by the norms of edited legislative technique and that are common to everyday life of a person and who understand what is necessary to do, and if it is wrong or not, or to show us a prevention situation (*prevention must prevail*). The motivation of an authority or institution for acts issued is a guarantee of the state's supremacy, a coercive form of a sanctioning form, but within the limits of respect for the right to defense, equality of arms and a fair trial for the individual, by fully understanding a judicial syllogism and based on rules of accuracy, fairness and full clarity, so that there is no ambiguity, otherwise the principle of criminal law can be applied, *in dubio pro reo*.

In this paper we propose to bring into the foreground the common aspects regarding the criteria for motivating the administrative act, the rulings in the contentious procedure on preliminary procedure, and the judgments, as well as the measures ordered in contravention law and contained in the provisions:

- The Administrative Contentious Law no. 554/2004 (Article 7 - Preliminary Procedure);

- Govern Ordinance no. 2/2001 on contraventions (Article 16 to Article 20 - the report-minute on finding of contravention);

- Fiscal Procedure Code (Article 46 to Article 54 - Issues regarding motivation of the fiscal administrative act, and Article 272 to Article 274 - Issues

related to the motivation of the decisions solving appeals against the fiscal administrative act);

and corroborating with New Code of Civil Procedure (Article 193. - Preliminary Proceedings and Article 425. - Content of the judgment).

From our point of view, this approach to motivating Court Judgments in several areas of law is novelty in the light of the parallel to be presented, departing from the general provisions of the New Civil Procedure Code (hereafter "The Civil Procedure Code") and by comparing them with those of the Special Laws, respectively the Fiscal Procedure Code, of the Law of Administrative Contentious with no. 554/2004 (hereinafter referred to as "Law no. 554/2004") , as well as from G.O. with no. 2/2001 on the legal regime of contraventions (hereafter referred to as "Government Ordinance no. 2/2001").

However, in order to be able to take these aspects into account, we must start from the basis of the law in relation to the judgment, respectively the definition of the Court Judgment and which is, according to the legal dictionary a "final act of ordering, by which the court resolves the dispute subject to judgment."[2]

It is important to note that, the Court Judgments category consist in both Sentences and Decisions, as well as the Minutes, as set out in art. 424 Code of Civil Procedure.

This paper consists of 7 Sections, the research being carried out by analyzing the legislative aspects in terms of own practice and the existing jurisprudence and leading to a judicial syllogism in order to observe the constituent elements of each act and the fact that they all impose the scope of the deeds of fact and law.

From our point of view, it is imperative that in the existing practice, the Courts of Justice, the issuing tax authorities or the founding agent should present a clear and concise, detailed and reasoned statement and give the right to petitioner/offender the opportunity to understand the reason for the solution, but also to enable the superior body to verify the legality and merits of these documents.

2. Motivating court judgments through the Code of Civil Procedure and their components

According to art. 425 of the Code of Civil Procedure, the Court Judgment must contain mandatory, under the sanction of nullity provided by art. 174. et seq. in Code of Civil Procedure the following:

A. The first part, also referred to as the ***preliminary of the Judgment***, which is made up of all the elements provided in art. 233. par. (1) and paragraph (2) Civil Procedure Code, in the case in which the judgment is pronounced on the day when the debates according to art. 233. par. (3) the Civil Procedure Code, respectively those included in the content of the Minutes of the Session;

[2] See *https://legeaz.net/dictionar-juridic/hotarare-judecatoreasca,* visited on 06/05/2019.

They must also include "*the given solution and the measures taken by the court, with the reasons, in fact and in law*".

On the other hand, as stated in Art. 425. par. (1) letter a), the second sentence of the Code of Civil Procedure, as mentioned above, shall not be found in the Court Judgment, in the event that the debates were recorded in a Minute of the Meeting following the adjournment of the pending ruling, the preliminary being to include only ”*name of court, case file number, date, name and surname of judges and clerk, name and surname of the prosecutor, if he participated in the said trial, as well as the mention that the other data are shown in the minute*”.

We note that the conclusion of the debate will form an integral part of the Judgment, under the sanction of nullity.

As an element of differentiation, in the case of judgments delivered by the High Court of Cassation and Justice of Romania, in their preliminary the name and surname of the assistant magistrate and not of the clerk will be indicated.

B. Grounds - the most extensive part of a Judgment - shall include, according to Art. 425. par. (1) letter b) Civil Procedure Code the following: "*subject of the request and the brief submissions of the parties, exposition of the facts dealt with by the court on the basis of the evidence adduced, the factual and* ***legal grounds on which the solution is based, for which they were admitted, as well as those for which the claims of the parties were removed***”.

It is important to note that the lack of factual and / or legal reasoning of the Court Judgment raises the virtual and absolute nullity, the same being the solution also in the case of implicit motivation of some heads of claim or requests, the Court having the obligation to express individual views on each of them, but the arguments put forward by the parties in order to give the same reasoning in the report to several arguments put forward.

In this sense, it is also *Decision no. 3338 of 11 April 2011 in the appeal of the Civil and Intellectual Property Division of the High Court of Cassation and Justice of Romania* delivered under the former provisions, incidental jurisprudence even today: *"the motivation of the judgment must be clear, concise and particular in accordance with the evidence and documents in the file, thus constituting a guarantee for the parties to the trial against any eventual arbitrary, judicial and otherwise the only means by which it is possible could exercise judicial control. The motivation of a decision is not a matter of volume, but of essence, of content, and, moreover, it is circumscribed to the notion of a fair trial under the conditions provided by art. 6 of the European Convention on Human Rights.*"[3]

It should be noted that in the case of the appeal there is derogation from art. 425 par. (1) letter b) of the Civil Procedure Code, as provided by art. 499.

[3] Decision no. 3338 of 11 April 2011 in the appeal of the Civil and Intellectual Property Division of the High Court of Cassation and Justice of Romania and published on the website *https://legeaz.net/spete-civil-iccj-2011/decision-3338-2011,* visited on 07/05/2019.

Code of Civil Procedure: *"the judgment of the court of recourse will contain in its grounds* ***only the reasons for the cassation relied on and their analysis****, showing why they were admitted or, as the case may be, rejected. If the recourse is dismissed without being substantively investigated, or cancelled, or no longer established, the recourse court decision shall contain only the reasoning of the decision, without any evocation and analysis of the reasons for the cassation."*

C. The Ordering (the reproduced minute plus the identification data of the parties) - the most important part of the Court Judgment, in terms of enforcement, must contain the following elements: "*name, surname, personal numerical code and the place of residence or domicile of the parties or, as the case may be, the name, the registered office, the sole registration code or the fiscal identification code, the registration number in the trade register or the registration in the legal persons and the bank account, the solution given to all the applications deducted from the court and the amount of the trial expenses granted.*"

According to par. (2) of art. 425 Code of Civil Procedure: "*If the judgment was given to the benefit of several plaintiffs or against several defendants, it will show what is appropriate to each of the plaintiffs and what each defendant or, where appropriate, the obligations of the parties are unalterable or indivisible.*"

In par. (3) of the same article it states that "*the final part of the ordering shall state whether the judgment is enforceable, whether it is the subject of an appeal or that it is final, the date of its pronouncement, the statement that it was delivered in public or in another way provided by the law, as well as the signatures of the members of the panel. When the judgment is subject to appeal or recourse, the court with which the application for appeal is also filed shall also appear.*"

In relation to the elements that make up a Court Judgment, the following aspects were taken into account in practice, in the Civil Decision no. 101/14.02.2019 delivered on appeal by Division III Administrative and Fiscal Contentious, Labor Disputes and Social Insurance of the Arad Court (own case-law): *"The judgment appealed has a clear distinction between preliminary, grounds and ordering, each part of the judgment, as the judge of the first jurisdiction has understood to conceive it, being separated from the others by free spaces and the specific title. Making the court's findings of competence, estimation of the duration of the trial, or its solutions to evidence, only in ordering, but not in the preliminary, although the verification and settlement of such requests in a public hearing is mentioned in preliminary without being stated on adopted solution, mentioned as shown only in ordering, does not affect the lawfulness of the appealed sentence."*

3. Contents and motivation of the court judgments through the preliminary procedure according to Art. 7. from the Law no. 554/2004 and having regard also to Art. 193 Code of Civil Procedure.

By corroborating the provisions of art. 7. of the Law no. 554/2004 with those of art. 193 in the Civil Procedure Code, if there is a procedure prior to the referral to the Court of Justice, it must be observed, otherwise the solution being the inadmissibility of the action, the preliminary procedure being regulated as an imperative condition for the exercise of the right of action in trial.

In the same sense, it has also been recognized in the case-law: "*In accordance with the provisions of art. 7 of Law no. 554/2004 a preliminary procedure is a condition for admissibility of the action in administrative contentious, the applicant being held to have requested, prior to the promotion an action before the court, to request the public authority issuing the contested administrative act or the superior public authority, if any, within the 30 days from the date of communication of the act, the revocation in whole or in part thereof.*"[4]

"The procedural document, in the present case the prior complaint made over the legal term stipulated by the law is, in accordance with art. 185 para. 1 final part of the Civil Procedure Code, invalidated. Without any legal effect, it can be concluded that the calling before court was made without any proof that the prior procedure was complied with in accordance with the requirement imposed by art. 7 paragraph 1 of the Law no. 554/2004 and as a result in accordance with the provisions of art. 193 par. 1 of the Code of Civil Procedure correctly dismissed the petition for legal action before court as inadmissible."[5]

In the absence of a preliminary procedure, the Court of Justice will admit the objection of inadmissibility and, by Court Judgment, it will only consider this exception without going into the trial in merits, meaning that the **reasoning will only focus on the analysis of this exception**.

The same solution is also applicable to other special laws requiring a preliminary procedure, as is the case with Law no. 77/2016 on payment settling, the solution being also a rejection of the case as inadmissible.

Moreover, the preliminary procedure can not be completed during the trial, that is to say after the filing of the Request before court, but the applicant has the possibility, after the rejection of the Action, if it is found within the time limit, to perform preliminary procedure, and to bring a new application before the

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[4] See *Civil Sentence no. 130 from 15.01.2015, pronounced in substance by the Cluj Tribunal* and published on the site *https://legeaz.net/spete-contencios-ca-cluj-2015/except-inadmissibility-lips-process-preparable-4886-2015,* visited on 07.05.2019.

[5] See *Decision no. 4886 of 2015 issued by Section II Civil, by ContenciosAdministrative and Fiscal of the Court of Appeal Cluj* and published on site *https://legeaz.net/spete-contencios-cacluj - 2015/exception-inadmissibility-missing-procedure-previous-4886-2015*, visited on 07.05.2019.

court, as the previous one being final only as regards the non-observance of the procedure.

This was also noted in the case file no. 5986/176/2016, by Decision no. 9/22.01.2019 delivered by the Civil Division of the Civil Court of the Alba Iulia Court of Appeal (own case-law), in the circumstances in which the interpretations and subsequent decisions of the Initial Law and pronounced by the Constitutional Court of Romania, The Court of First Instance during the trial, pending the case, did not offer party any possibility to go through a preliminary procedure due to the interpretation of the law and its immediate application to the court proceeding through a later retaliation and the resumption of the procedures *ab initio*, as well as a reinstatement in the term *ope legis* and according to art. 186 Civil Procedure Code, although the legal purpose had to be noticed and without thus arriving at a form without substance through the defendant's prism and defence: *"the provisions of art. 5 of Law no. 77/2016 establish a mandatory and prior prerequisite for notification to the creditor. This procedure can not be completed after the court has been notified. In this respect, the grounds of Decision no. 95/1917 of the Constitutional Court of Romania, clause 46, which makes clear that the creditor notification procedure is mandatory for the debtor who must "go through" this stage firstly and, only afterwards, to request the court's conciliation for the finding of the extinction of the debt, including for the previous alienation of the property that is the guarantee.*

Even if the decision of the said Constitutional Court of Romania was published in the Official Gazette on 9.08.2017, the appeal and the recourse courts are obliged to observe it, including the grounds under clause 46.

The debtor has the way of notifying the creditor and following a new procedure under art. 5 and 8 of Law no. 77/2016, the solution to the present case can be regarded as definitive only in terms of non-compliance with the provisions of Art. 5 of Law no. 77/2016."

4. Components of the report - minute attesting a contravention according to Government Ordinance no. 2/2001

As provided by the provisions of Art. 15. and seq. of G.O. with no. 2/2001, the contravention shall be attested by a Report-Minutes and shall include the following mandatory elements: "*date and place where it is concluded; the name, surname, quality and institution of which the attesting agent is a member; the name, surname, domicile and personal numerical code of the offender,* ***the description of the offense with the indication of the date, the time and the place where it was committed, as well as the circumstances that may serve to appreciate the seriousness of the deed and to assess possible damage; indication of the normative act establishing and sanctioning the contravention;*** *mention of the insurance company, in the event that the deed has resulted in the occurrence*

of a traffic accident; the possibility to pay, within 15 days from the date of handing over or the communication of the report-minutes, half of the minimum fine provided by the normative act; the time limit for the appeal and the court to which the complaint is lodged."

In addition to those mentioned above, additional elements must be mentioned in particular situations according to art. 16. paragraph (1^1); par. (5) and paragraph (6) of the aforementioned normative act: "(1^1) *In the case of the offenders foreign citizens, persons without citizenship or Romanian citizens residing abroad, the following data shall be included in the Report-minutes: the passport series and the passport or other State border crossing document, the date of issue and the issuing State. (5) If the offender is a minor, the report-minutes shall include the name, surname and address of the parents or other representatives or legal guardians thereof. (6) In case the offender is a legal person, it shall mention in the report-minutes, the name, the registered office, the registration number in the trade register and its fiscal code, as well as the identification data of the person who represents."*

Also, in all the situations mentioned above, under the heading "Other Mentions" of the report-minute shall be recorded the offender's objections or the fact that there are no objections, after which the act will be signed by the attesting agent who also made the offender, or the refusal/impossibility to sign it or the document was drawn up in absentia.

As art. 17. from G.O. no. 2/2001, *"the lack of any mention of the name and surname of the attesting agent, the name and surname of the offender, the personal numerical code for the persons who have assigned such a code, and, in the case of the legal person, the name and address of the legal person, the deed committed and the date of its commit, or the signature of the attesting agent, nullifies the report-minutes. Nullity is also established ex officio."*

As well as in the case of irregularities found in the case of an unannounced control carried out by A.N.A.F. and if several offenses are committed and which were found at the same time, a single Report-Minutes will be concluded.

The provisions of Art. 16 par. (1) from G.O. no. 2/2001, are infringed in case of lack of description of the deed, of the way of committing it, of the circumstances, as well as of the offender's guilt according to art. 1 of G.O. no. 2/2001, in view of the lack of social danger and in relation to which the sanction applied should be proportionally established, as stipulated in art. 5 par. (5) of G.O. no. 2/2001.

Furthermore, the model, series, number or any other identification of the radar device, its approval and metrological verification must be entered in the content, and it needs to be individualized in the Report-Minutes attesting contravention.

From our point of view, the lack of these elements prejudices the offender and makes it impossible to know whether the radar apparatus was in accordance

with the legal provisions in the field and was functional in normal parameters, with the current and approved metrological verification rules, as required by the mandatory provisions of art. 5.2.1. and art. 5.3. of the Rule of Metrology NML 021 - 05 "Vehicle Speed Measuring Devices (Speed Meters)" of 23.11.2005, approved by Order no. 301/2005 and of art. 121 par. (2) of the Regulation for the application of Government Emergency Ordinance no. 195/ 2002.

By corroborating these provisions with the provisions of art. 181 par. (1) of the Regulation for the application of G.E.O. no. 195/2002, it is clear that such a contravention must be ascertained through a Report-Minutes compiled according to the model set out in Annex no. 1D of the Regulation mentioned above and containing the mentions of the technical means of registration.

In relation to the elements that must be contained in the Report-Minutes attesting contravention, there is also the Sentence no. 519/18.09.2018 delivered by the Lipova Court in the case file no. 805/250/2018 (own case law): *"The report-minutes contain the essential data, in the absence of which it is affected by the invalidity, including those that allow the identification of the technical means used for finding contravention, mentioning the registration plate of the vehicle on which it is mounted, the MAI xxxxx with which the registration was made. This, according to the information contained therein, attests that the certified device has been legally used and within the specified time period as confirmed by the marginal data of the technical registration. In the case file, evidence that the radar device is metrologically verified is the metrological verification report attesting to the fulfillment of such a legal requirement."*

According to art. 47. from G.O. no. 2/2001, the provisions of this ordinance shall be supplemented with those of the Civil Procedure Code, as well as those of the Criminal Code.

5. Motivation of fiscal administrative acts and decisions by which appeals against them are resolved

With a view to the lawful, correct and complete drafting of the fiscal administrative act, the issuing fiscal body must include in its contents the following elements, as stipulated in the provisions of art. 46. par. (2) of the Fiscal Procedure Code:

"a) the name of the issuing fiscal body;

b) the date on which it was issued and the date on which it takes effect;

c) identification of the taxpayer/payer and, where applicable, identification data of the person empowered by the taxpayer/payer;

d) the subject of the fiscal administrative act;

e) the reasons for facts;

f) the legal basis;

g) the name and the quality of the authorized persons of the fiscal body, according to the law;

h) signature of the authorized persons of the fiscal body, according to the law, as well as the stamp of the issuing fiscal body;

i) the possibility of challenging, the deadline for filing the appeal and the fiscal body to which the appeal is lodged;

j) Statements regarding the hearing of the taxpayer/payer".

As a peculiarity, if the fiscal act is issued in electronic form and not on paper, it will not include the elements of the letter h), the signature it will contain is an electronic one.

If the fiscal administrative act was so issued and then "*printed through a mass print centre",* it remains valid if it fulfills the legal criteria, although it does not include the signature of the competent person and the stamp of the issuing body

The lack of any of the elements mentioned above leads to the nullity/ void ability of the fiscal administrative act depending on the missing aspects of its content according to art. 49. of the Fiscal Code.

In the situation where there is a clear and objective syllogism and motivation, as is imperative, art. 46 of the Fiscal Procedure Code, the administrative act is a form without content, being formulated without an intrinsic analysis of the factual and legal grounds exposed on the basis of fiscal judicial syllogism, contrary to the solution and in addition to the provisions of art. 46. *The content and reasoning of the fiscal administrative act* - Fiscal Procedure Code, in the sense that any reasoning must be given as a result of an analysis of legality, officially and good-faith principles of law, respecting defences and combining evidence and existing grounds.

Similar with Court Judgment is the decision to settle the contestation issued by the fiscal body, which has three parts - art. 274 of the Fiscal Procedure Code:

A. Preamble - unlike the Court Judgment in which it is called an introductory or preliminary part - includes: *"the name of the body assigned to the settlement, the identification data of the contestant, the registration number of the appeal to the competent resolution body, the subject of the case, as well as the summaries of the parties' submissions when the competent body for resolving the appeal is not the issuing body of the contested act"*;

B. Considerations - are made up of the ***reasons of facts and law*** *which formed the conclusion of the competent resolution body in issuing the decision*";

C. Ordering - presents *"the pronounced settle, the remedy, the period within which it may be exercised and the competent court."*

As in the case of Judgments of the Court, the Report-Minutes attesting a contravention and Fiscal Acts drawn up and the Decision shall be signed, the person having this attribution shall be the "*leader of the dispute resolution structure or the head of the issuing fiscal body of the administrative act appealed or by their substitutes, as appropriate*" according to art. 274 par. (5) Code of Civil Procedure.

Recognized aspects of motivation in own practice:

- Decision no. 2341/05.06.2018 delivered in the recourse by the Section of Administrative and Fiscal Contentious of the High Court of Cassation and Justice of Romania in file no. 3019/2/2016: *"such obvious, factual and/or legal circumstances that are of nature; to raise a serious doubt as to the legality of an administrative act (administrative-fiscal act) were held by the High Court as: issuing an administrative act by an incompetent or over capacity of body, an administrative act issued under statutory provisions unconstitutional,* ***non-reasoning of the administrative act****, the important modification of the administrative act in the way of the administrative appeal, etc. (...) Motivation of Decision no. 149/21.06.2016 issued by the respondent authority demonstrates that there are serious doubts about the existence of the tax claim established by the SC A SRL, doubts expressed by the administrative control body itself in the said act.*"

Exempli gratia and non-limiting of nullity situations:

Null Judgment under the Civil Procedure Code	**Nullity Report - Minutes of finding the contravention under G.O. no. 2/2001**	**Nullity Fiscal Act according to the Fiscal Procedure Code**	**Null Preliminary Procedure according to the Law no. 554/2004 and the Code of Civil Procedure**
Lack of motivation in facts and/or in law	The lack of any essential element according to art. 17, as well as art. 16, and therefore lack of reasoning in facts and/or in law	In the situations provided by art. 49 para. (1)	Addressing the prior complaint over the legal term prescribed by law
When, by that judgment, the court violated the rules of procedure for whose non-compliance the sanction of invalidity is involved.	Failure to complete the section of the Report - Minutes - *"Other Mentions"*	The fiscal administrative acts drawn up without any substantiation in facts and in law are void	

According to art. 3. par. (2) of the Fiscal Procedure Code: "Where this Code does not prescribe, the provisions of the Civil Code and the Code of Civil Procedure, republished, shall apply, in so far as they may be applicable to relations between public authorities and taxpayers/payers."

6. Conclusions

The factual and legal reasoning of any of the above procedures is an obligation of the issuer to respect the rights to defense, to a fair trial/procedure, its lack and an objective, correct and complete analysis being a violation of the legal provisions incidents and which attract the sanction of the nullity of the act.

Therefore, from all presented above, it can be concluded that the factual and legal reasoning of the legal acts presented is the essence of these, being necessary both to comply with the legal provisions and to give an overview and give an opportunity to check their legality and merits by the higher court or the hierarchically superior body to the person who drew up the contested act.

To conclude, reasoning in facts and in law is set up to protect, promote and defend the legitimate rights and interests of citizens, taxpayers, offenders and legal persons in administrative and fiscal contentious proceedings, as well as in other branches and areas of law.

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Trans-institutional teams - a possible solution for effective use of human resources in public administration in accessing European funds

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Abstract

The objective of the article is to investigate the following hypothesis: changing the legislation on the mobility of civil servants (posting, delegation, temporary relocation) in order to create an attractive legislative framework for setting up trans-institutional project teams can become an efficient way of managing the human resource for effectively increase the institutional capacity to absorb European funds. The research methods used: empirical research based on the data and professional experience of the author and the institutions where he worked. The author documents the process of accessing European funds starting with 2007 by consistently collecting data for public institution and local authority contractors from the territory of Sibiu County and has participated in activities of accessing European funds within the institution in which he is currently active institution of reference and in other institutions. The expected results of the author are: providing legal and managerial arguments to raise awareness of the need to update legislation on mobility of civil servants in accessing European funds with the following implications: Law no. 188/1999 on the status of civil servants, Chapter IX - Modification, suspension and termination of service report, art. 87-89 requires update; mobility in the public position must be approached interdisciplinary in terms of the principles of modern public management; increasing the absorption capacity of European funds can be effective.

Keywords: *trans-institutional teams for accessing European funds, efficient mobility in the public office, modification of the legal framework on posting, delegation and temporary transfer, increasing the absorption capacity of European funds.*

JEL Classification: H83, K23

1. Context

We are in the run-up to the programming of the third Multiannual Financial Framework (MFF) for the period 2021-2027.

With the thought of the expectations and the contribution to this financial exercise, we tried a retrospective analysis and made some findings.

For the 2007-2013 financial framework, the public institution in which I activated has had the opportunity for alternative financial sources to the state budget, both in terms of eligibility and the amounts allocated. This reality has been capitalized by identifying eligible funding lines, initiating and formulating

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projects documentations appreciated by funders with very good scores and over 50% and with the conclusion of financing contracts.

For the 2014-2020 multiannual financial framework, we had fewer opportunities to access European funding as the eligibility of the reference institution has been drastically diminished, even if there are significant unspent amounts so far.

Reporting the above-mentioned data to the general phases of the project cycle[2] (programming, identification, formulation, financing, implementation, evaluation) I consider that the reference institution has the institutional capacity to carry out the activities related to the identification, formulation, financing and evaluation phases. Insurmountable difficulties, at least up to now, we had at the level of the reference institution in the phases of implementing some potential projects. Difficulties, partly external to the reference institution, have also been at the programming stage (in the sense of accurate and firm estimation of needs in the programming phase of the multiannual financial framework and their capacity to impose to the programming authorities). Extending the analysis at the level of the public institutions and local authorities in the county does not confirm nor reveal a pattern of success or failure in the same project phases or in a certain project phase. It is notorious that some phases are more difficult. At the local level, the sub-phase of the public procurement activities under the project implementation phase was most difficult, but these difficulties were overwhelmingly proportional to the amounts reimbursed. At the level of managing authorities, the main source of difficulties arises in the programming phase. The data used in the analysis took into account all sectoral operational programs and operational programs applicable in Sibiu County, as the specificity of each program is relevant for certain project phases or categories of beneficiaries.

The only common factor in this analysis of all operational programs, projects and phases of the project cycle is the human factor, in this case civil servants. Here we take into account the category of civil servants within the programming authorities (central, regional and local intermediary bodies) and civil servants at the local and territorial level.

Analyzing, within the budget, the success or failure of some operational programs and projects, we identified, with reference to the shared factor (the human factor in the managing and territorial authorities and potential beneficiaries), some common elements: in the above-mentioned institutions there are civil servants in different job positions but only a fraction of them have the necessary project management skills (decision, coordination, financial accounting, legal, public procurement, technical, communication, payroll, databases, etc.) and there is

[2] Project cycle management: manual, Blueprint International, Bucharest, 2003 ISBN 973-86539-1-6, http://www.mie.ro/_documente/phare2003/dezv_afaceri/training/Manual_project_management_ro.pdf, consulted on 1.04.2019.

a declared willingness to access to European funds and financing needs are identified. However, analyzing these common elements in more detail, it becomes obvious that there is a non-uniform distribution of the number of civil servants with different categories of competencies necessary to carry out the projects. If each institution has at least one decision-maker willingly and has identified certain financing needs, there are situations where institutions lack the need for officials with real competencies in a certain category (technical, financial, procurement, etc.) or have a surplus of skills in some areas. The degree of access does not appear to be influenced either by the size of the public institution or the local authority nor by its level (territorial or local).

The common factor retained, analyzed in its entire body of civil servants in the area under consideration, holds in varying proportions all the elements necessary for access, but they are not merged or distributed constructively in a functional and efficient ensemble. This situation can be very simplistic, "the right man, in the right place, at the right time", an expression that takes us to the dynamics.

The dynamics of the civil servant's career is enshrined in Articles 87-91 of *Law 188/1999 on the Civil Servants' Statute*, Chapter IX - M*odification, Suspension and Termination of the Revised Service Report*, with subsequent amendments and amendments, under the term "mobility".

2. Analysis of the legal framework specific to the mobility of civil servants (in part) - secondment, delegation, temporary move

Chapter IX *Changing, Suspension and Termination of the Service Report*, Section 1 *Changing the Service Report*, Art. 87, par. 1, it is stipulated that mobility is done for two purposes, exhaustively formulated:

- to make the activity of public authorities and institutions more efficient,
- in the interest of the civil servant, for the career development in the public office.

To this end, the legislator provided for art. 87, par. 2, letters a), b) and d) in part that mobility takes place by: delegation, posting, moving.

We assume that in practice, the other two legal modalities of mobility within the body of civil servants for execution officers provided in art. 87, par. 2, lit. c and part d, the definitive move and the transfer are less a form of mobility and more a form of recruitment from a limited and specialized category, the body of civil servants, since it involves a final re-appointment into another post and a new report on duty. Initially, the legislator of the *Civil Servants Statute* did not envisage the transfer as a form of mobility but as a way of terminating the service relationship. *The temporary exercise of a public management function* goes beyond the present analysis, as the project management team with European funding does not imply a hierarchy in the meaning of the *Civil Servants' Statute*.

We do not have a numerical representation of how concrete implementation of the mobility provisions is being carried out, as in the Reports of the National Agency of Civil Servants (hereinafter ANFP) on the management of civil service and civil servants in 2016 and 2017 (2018 not yet published) only quantitative indicators on the strict number of officials subject to mobility between general and special civil status posts and on vertical mobility, and the number of officials temporarily performing senior civil servants and senior civil servants, are retained[3]. It is noted that the ANFP granted 2,734 opinions for the temporary exercise of 3,959 senior public positions and corresponding to the category of senior civil servants from public authorities and institutions in the central public administration, deconcentrated departments of ministries as well as from local public administration (according to Article 89 and Article 92 of Law no. 188/1999, republished, as subsequently amended and supplemented). As regards the opinions on mobility between general and special civil servants, the Agency has issued 45 opinions for 51 public offices. The only recent indicator on posting and delegation is a quantitative indicator of the "number of petitions" published in the *Report on Civil Service and Civil Servants Report for 2016*[4], which states that referring to the theme of "mobility" petitions with the following details: delegation - 10, detachment - 32, transfer - 87, move - 56, exercise management - 11. From the published data we deduce that ANFP and petitioners interest and interpreting difficulties are greater for transfer, the temporary exercise of public management positions and are almost absent (or at least not published) for delegation, posting and temporary move.

From the analysis of the figures published by the ANFP, one can not appreciate either of which was pursued by the employer in the substantiation of the decisions: the efficiency of the activity of the public authorities and institutions or the interest of the civil servant for the career development in the public office.

By briefly reviewing the contents of art. 88, 89, and 91, we notice some restrictive formulations.

From the point of view of the stated purpose, secondment is carried out *"in the interest of the public authority or institution in which the official is assigned"* and the delegation is strictly *"in the interest of the public authority or institution in which the civil servant is to carry out his activity".*

From the point of view of the pre-existence of a post and the territorial competence, the delegation and posting presuppose the previous existence

[3] *Raportul privind managementul funcției publice și a funcționarilor publici pentru anul 2017-* National Agency of Civil Servants, the document is available online at http://www.anfp.gov.ro/R/Doc/Ionut/Raport%20Management%20FP%20%202017.pdf, p. 8, accessed on 9 May 2019.

[4] *Raportul privind managementul funcției publice și a funcționarilor publici pentru anul 2016-* National Agency of Civil Servants, the document is available online at http://www.anfp.gov.ro/R/Doc/2017/Raport%20activitate%202016/RaportManagementFunctiePublica2016.pdf, p. 16, accessed on 9 May 2019.

of a post with at least the same characteristics in the institution in which the delegation or posting will take place. For a temporary move, there is a possibility to allocate the post, but the move is conditioned only within the same credit instructor.

From the point of view of the length of time of the change in the service relationship, the periods are limited by the law: 60 days/year for delegation, 6 months/year with the possibility of extension for detachment and 6 months/year for temporary move.

From the point of view of rights and obligations, the posting and the delegation are unilateral acts, ordered by the employer, which can be refused only under the limiting conditions stipulated by the legislator (pregnancy, self-raising minor child, health condition, proven by medical certificate, contra-indicated delegation is carried out in a locality that does not provide adequate accommodation, is the only family sponsor, good family reasons justify the refusal to postpone the posting).

From the point of view of the opportunity of the amendments of the service reports, it is not invoked in this chapter the need to substantiate the decisions based on the principles of modern public management or the reiteration of the principles stipulated in art. 3 of the Civil Servants' Statute, which underlie the exercise of public office (transparency, efficiency and effectiveness, orientation towards the citizen).

A more generous wording brings the legislator into the contents of Government Decision no. 611 of June 4, 2008 *for the approval of the rules regarding the organization and development of civil servants' career*, with subsequent amendments and amendments, but unfortunately the speaker uses a declarative language and does not detail the concrete ways of implementing the provisions, although the specificity of the normative act, The Civil Servants' Statute required that. The legislator stipulates that, under the terms of this decision (Government Decision no. 611/2008), in order to acquire new knowledge and skills in the specialty in which they carry out their activity, public execution officers may carry out practical training sessions in other relevant public authorities and institutions from point view of the specific activity. The internship periods referred to in the preceding paragraph may be organized through institutional arrangements between public authorities and institutions and shall be carried out with the consent of the civil servant. The internship period of the civil servant may not exceed 15 working days per year.

3. Conclusions

Of course, the current legislation on public-service mobility does not categorically exclude the possibility that mobility will be used to create trans-institutional teams for accessing European funds. But this possibility, according to the

legal axiom *quad non est in actis non est in mundo*, according to which an unconscious thing in an act is as non-existent, is not exploited effectively and is not used, of what we know.

Perhaps until the emergence of the need for streamlining the way European funds were accessed, the current regulations were sufficient. However, the reality and public perception of the administration shows us that the mobility of civil servants needs to be reanalyzed through the principles of efficiency and through an interdisciplinary approach in the light of the principles of modern public management.

We did not identify proposals for improvement of the specific legal framework of mobility exhaustively formulated neither in *the draft of the Administrative Code of Romania*[5], nor in the *Strategy for Strengthening Public Administration 2014-2020*[6], so we consider necessary and we propose by law the following steps:

1) improving the restrictive and demotivating regulatory framework:

a) **from the point of view of purpose**, the mobility of civil servants should be fair and just to answer both the efficiency of the activity of the public authorities and institutions and the public servant's interest in the career development of civil servants,

b) **from the point of view of the condition of the pre-existence of a post and of the territorial competence**, this condition must be re-examined in view of the specific conditions of the activity of a project team (the flexibility of the state of functions, the assessment of competence not only from the territorial point of view but from project management too),

c) **from the point of view of the length of time of the change in the service report**, the reconsideration of the period of change of the conditional service relationship and the duration of each phase of the project,

d) **from the point of view of rights and obligations**, create a motivating framework. And here we do not just refer to a financial factor,

e) **from the point of view of the opportunity** of changes in the service reports, the obligation to substantiate the modification of the service relationship must be introduced and here we refer firstly to criteria of economic efficiency, transparency and orientation towards the citizen.

2) creating human resource databases that already have the necessary skills on project phases. Databases must be indexed with territorial, quantitative and qualitative indicators,

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[5] The draft law no. L132/2018 - Legislative Proposal on the Administrative Code of Romania, available online at http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=21037&cam=1, p. 278-286, accessed on 9 May 2019.

[6] The Strategy for Strengthening Public Administration 2014-2020 - SCAP - Annex 1, the document is available online at: http://www.dpfbl.mdrap.ro/documents/strategia_administratiei_ publice/ Strategia_pentru_consolidarea_administratiei_publice_2014-2020.pdf, p. 41, accessed on 9 May 2019.

3) conducting pilot projects with mixed teams both at the level of the managing authorities (with participation in the programming phase of the territorial resource to which the programming documents will be addressed in the end) as well as at the level of the territory (with the participation of the central resource which will then be able to pursue its objectives and verify the judgments after adopting the programming documents and will be able to make any corrections in due course).

4) it is necessary that the Operational Program dedicated to the increase of administrative capacity, in the title and format to be chosen in the period 2021-2027, as well as the axes dedicated to the technical assistance of all operational programs, analyze the opportunity of trans-institutional teams at least at territorial level. Choosing ways to share (sharing) at the expense of initiation and training brings the advantage of synchronization with immediate capitalization, including silent knowledge. Management uses the "knowledge management" tool, which is to provide the right people with the right knowledge or correct knowledge (including people) at the right time[7].

The direct consequences to be expected are: lowering the costs of technical and training assistance with the possibility of allocating the amounts earmarked for other investments, increasing the motivation of civil servants, flexibility and increasing the quality of projects by stimulating the interdisciplinary approach.

Nil tam difficile est, quin quaerendo investigari possiet (nothing is so difficult that it can not be clarified through research). I invite practitioners and researchers to deepen and confirm or refute the hypothesis of the present, in order to find effective solutions for accessing European funds.

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[7] One of the sources of documentation for KM is http://www.knowledge-management-tools.net/knowledge-sharing.html, accessed on 9 May 2019.

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The legal regime of competition in Germany

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Abstract

Antitrust law first came to Germany in 1947, while the building of an antitrust framework was constitutive of the forming of the European Coal and Steel Community (ECSC) in 1951 – the first step towards the creation of a European Community. However, during the first ten years, these two developments remained only loosely coupled. After 1957, a year marked both by the passing of the first German antitrust act and the signing of the Treaty of Rome, the German and European antitrust stories became much more closely interconnected.

Keywords: *federalism, competition, Germany, European Union.*

JEL Classification: K22, K33

1. Introduction

The evolution of modern competition law is a process located at the intersection of political, economic and social aspects.

Begining with the occupation period through the development of modern German competition law to the regionalization of competition law within the European Union, one can follow the various external influences at work in post-war Germany and the importance of a local regulatory culture. In our days, competition law continues to evolve, responding to globalization's challenges with a variety of transnational and regional mechanisms. So an example, recent years are the witnesses of a sharp increase in legal instruments used to coordinate enforcement efforts across national boundaries.

2. General aspects

When the Rome Treaty was signed, Germany was once the only member state with a competition law regimeand even there it was only emerging. Today, all member states have competition regimes, shaped and inspired, in one way or another, via the European Community opposition regime.

At the beginning, the affect of American antitrust tradition and experience was once undeniable. The German postwar antitrust experience additionally had some affect on the construction of a European competition regime. This Ger-

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man improvement itself mirrored an encounter between strong American influence, national ordo-liberal thinking, country wide institutional legacies and local resistance.[2]

Following World War II, German competition regulation developed in opposition to the backdrop of U.S. influence, exerted in part directly, throughout the occupation years, and in section indirectly, through U.S. involvement in the subsequent shaping of both German and E.U. competition policy.[3]

The law's development is a story of the successful integration of that impact into a nearby philosophy regarding competition enforcement.[4]

It starts by means of addressing the transition from occupation regulation to current German competition law, a process that displays the absorption of U.S. influence, however with an essential interweaving of German priorities and philosophies concerning market legislation such that a national regulatory identity can be viewed to emerge.

It then considers the subsequent regionalization of opposition law withinthe E.U., inspecting the extent to which the German regulatory identification withstood entire subsumption within the regional framework.[5]

The German competition policies consist of three regimes: the cartel prohibition, the prohibition on the abuse of a dominant position and merger control. Germany used to have one-of-a-kind rules for horizontal and vertical agreements.

The German Competition regulation (GWB) prohibited horizontal agreements in prevalent terms. As regards vertical agreements, pursuant to the old model of GWB only contracts on resale price maintenance had been prohibited, and different vertical agreements had been allowed, store for a few exceptions.[6]

A system of dynamic references to the EC block exemptions has been laid down. According to this provision the Community block exemptions are additionally immediately applicable to the cartel prohibition, irrespective of the fact whether the agreement, the decision of an association of undertakings or concerted practice at hand does or does no longer have an effect on intra-Community trade.

Hence, according to existing German competition law, vertical agreements ought to be reviewed against thesame guidelines that are applicable to this type of agreements in EC opposition regulation (notably the EC Block exemption

[2] Sigrid Quack, Marie-Laure Djelic Discussion, *Towards National System Change,* Beyond Continuity, 2005, p. 10-22.
[3] *Idem*, p. 10-23.
[4] Hannah Buxbaum, *German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement*, „Berkeley Journal of International Law", Volume 23, Issue 2, 2005, p. 476.
[5] *Idem*, p. 476.
[6] Johan W. van de Gronden, Sybe A. de Vries, *Independent competition authorities in the EU,* „Utrecht Law Review", Volume 2, Issue 1, 2006 p. 41.

on vertical restraints). Furthermore, it be noted that the GWB additionally includes a unique regime dealing with Mittelstandskartelle. These cartels are exempted from the cartel prohibition, furnished that they do not extensively avert competition on the market, and they beautify the competitiveness of small or medium-sized enterprises.[7]

The prohibition on the abuse of a dominant role has been laid down in GWB. Pursuant to this provision abusive exploitation of a dominant role is prohibited. The GWB provides an explicit definition of market dominance. A mission is considered to be dominant if it has no competitor, if it is not exposed to any extensive opposition or if it has a paramount market position in relation to its competitors. This popularity relies upon on, amongst other things, market shares, financial sources and – attainable – entry barriers. A single association is presumed to have a dominant position, if it possesses at least one third of the relevant market. Compared with the case law of the Court on article 82 EC, in accordance to which the threshold for presuming dominance is 50%, it does not take all that a good deal for an association to be viewed dominant in German competition law.[8]

A team of undertakings, consisting of two or three undertakings, is presumed to be dominant if the market shares of the undertakings worried is no less than 50%. If a group of companies consists of 4 or five firms, the threshold is two-thirds of the market share. If a dominant task disproportionately harms the ability of different undertakings to compete or detrimentally impacts consumers, its behavior is regarded abusive under German competition law. An example of abusive behaviour is excessive pricing. In German competition regulation exceptional attention is paid to the protection of smaller undertakings against dominant firms.[9]

In this admire it should be noted that pursuant GWB a challenge that has highest quality market power over different competitors is no longer allowed to promote beneath valuerate besides objective justification. This provision in particular protects small or medium-sized enterprises towards dominant undertakings.

In German competition regulation the noticeable test, in the mild of which mergers are assessed, is still the advent or strengthening of a dominant position. However, a concentration that quantities to the creation of the strengthening of a dominant function should be authorized if its improvements outweigh its disadvantages. In order to effectively practice this 'improvement defence' the parties involved have to show a causal hyperlink between the claimed upgrades and the merger at hand.

Only effects on the market shape are viewed as improvements within the

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[7] *Idem*, p. 42.
[8] *Idem*, p. 42.
[9] *Idem*, p. 42.

which means of the German regulations on merger control, and modifications consisting of mere modifications of behavior are not taken into account. From the outset it can't be dominated out that in German law considerations comparable to the efficiencies that play a function in the new EC attention regime, should be taken into account. However, practical journey is to be awaited to see to what extent both concepts overlap. The attention manipulate provisions are applicable to a merger if this merger exceeds certain thresholds.[10]

Concentrations that fall within the scope of German opposition regulations hould be notified and approved in advance.

2. Institutional aspects

The Bundeskartellamt (BKartA) is the in a position opposition authority at federal level. In addition, the BKartA is also the capable authority to practice Articles 81and 82 EC, provided that the case at problem does not difficulty a competence of a nonfederal competition authority. If the BKartA is the ready body, it is additionally entitled to cooperate with the Commission and competition authorities of other member States in the European Competition Network.[11]

This physique is a selbständige Bundesoberbehörde (independent federal authority). The tasks of this authority fall within the scope of the federal Ministry for Economic Affairs and Technology.

The impartial popularity of the BKartA implies that the German legislature has defined a policy field (competition) with admire to which this federal nation organ has its personal powers, and consequently the Minister is no longer allowed to take away these powers. For instance, in a certain case the Minister cannot take over the role of the BKartA and make a decision. In this respectit need to be noted that there are regulations for the public accountability for the BkartA, as each two years this authority publishes a report, which the authorities submit to Parliament.[12]

A quintessential characteristic of the independence of the BKartA is its decision-making structure. The so-called Beschlussabteilungen (Decision Divisions) are at the heart of the decision-making procedure in the BKartA. These divisions take the competition regulation decisions, and they are regarded as Kollegialspruchkörper (Collegiate bodies), which make their selections as a panel.

The Beschlussabteilungen are panels consisting of three participants (one of them being the Chairman).[13]

However, in practice besides these three contributors who have a right to vote, about three other people take part in the work of such a decision division.

[10] *Idem*, p. 43.
[11] *Idem*, p. 44.
[12] *Idem*, p. 45.
[13] *Idem*, p. 45.

According to GWB the members of these panels need to operate in an impartial way from undertakings, and as a consequence they are no longer allowed to be a president of an enterprise. Actually, the Beschlussabteilungen are the units that take decisions on behalf of the BKartA, and as an end result have a primary affect on the way opposition law is applied in Germany. It must be noted that even the President of the BKartA cannot impact the choices taken by Beschlussabteilungen.

The Chairman of a Beschlussabteilung is a civil servant appointed for existence and is required to be qualified for the position of a judge (he/she must have a positive law degree). The different two members need no longer be lawyers; additionally, economists are allowed to have a seat in a Beschlussabteilung.[14]

By issuing a decree the President of the BKartA decides on the division of instances amongst the Beschlussabteilungen. This decree ought to be approved by way of the Minister for Economic Affairs and Technology.

It appears from the organization chart of the BKartA that eleven Beschlussabteilungen are operating, whose areas of responsibilities are geared up according to financial sectors (mechanical engineering and wholesale and retail) and the nature of instances (licensing agreements).

Moreover, the Sonderkommission Kartellbekämpfung (Special Unit for Combating Cartels) assists the Beschlussabteilungen in getting ready and analyzing the results of positive lookup working in cartel proceedings.

Thus, from the foregoing it seems that in German opposition law a sizable attribute of the decision-making system has a quasi-judicial structure. It is believed that this structure facilitates efficient dealings between the BkartA and industry, and, furthermore, that decision making procedures are reasonably obvious and environment friendly in German opposition law. The quasi-judicial structure also reinforces the impartial status and functioning of the BKartA.[15]

The BkartA is entitled to behavior any investigations and to acquire any evidence. The BKartA also has the strength to impose fines on undertakings that have violated German and European competition regulation in accordance to art 81 GWB and following articles. According to existing German competition regulation the amount of the first-rate that is imposed in case of severe infringement can be up and to 10% of the turnover of the task concerned.

The BKartA can skim off the revenues that are the end result of the violations of German and European competition law. These sanctions fall inside the scope of administrative law. In the context of its enforcement powers the BKartA applies a leniency programme (Bonus Regelung).[16]

In addition, Germany competition law ought to also be enforced via penal

[14] *Idem*, p. 45.
[15] *Idem*, p. 45.
[16] *Idem*, p. 46.

law, as article 298 of Strafgesetzbuch (Code of Penal Law) consists of a penal sanction. It has to be noted, in this respect, however, that this Article only covers Submissionsbetrug (collusive tendering). Other kinds of infringements of competition regulation can't be prosecuted beneath the Strafgesetzbuch.

Furthermore, parties can invoke competition regulations earlier than civil courts. In this recognize it need to be referred to that civil courts need to alert the BKartA about disputes that contain each the GWB and EC competition law, and the BKartA frequently presents its views in personal suits. Moreover, GWB implements the procedure of cooperation between the country wide courts, the European Commission and the national competition authority. A necessary function is the enchancment of the civil enforcement of competition law.[17]

For instance, provided that certain stipulations have been met, a collective private party may additionally start a civil law suit with a view to skimming off the revenues that are the result of the infringements of the opposition rules.

The BKartA additionally has other duties except these in the area of competition law. Units having special powers in the subject of public procurement (Vergabekammern) additionally operate inside the shape of the BkartA. The BKartA therefore additionally has powers in the discipline of public procurement.

The President of the BKartA does not serve a fixed term, and furthermore the BKartA is responsible for its personal group of workers policy and has a separate budget. Although the assets of the BKartA appear to be declining and are as a substitute small to deal with an economy as largeas Germany's, it seems that this national opposition authority is running in a fairly efficient way due to the fact of its institutional culture.[18]

As regards the enforcement of the BKartA, it typically focuses on the prosecution of price, quota and submission cartels. In this aspect the case on cement cartels setting quota and territorial agreements for many a long time is illustrative, as in this case the BKartA imposed administrative fines amounting to a whole of 702 million Euros.

At federal stage the Monopolkommission additionally fulfils a big feature in German competition law.[19]

The committee has as its principal project to supply a file on the attention traits in Germany each and every two years. Moreover, the Monopolkommission can difficulty exclusive reviews on particular subjects, at the request of the authorities or on its personal initiative.

This Monopolkommission consists of 5 members, who are appointed with the aid of the President of the Federal Republic of Germany, after they have been nominated by way of the federal government. They are often economic or law professors as well as lawyers and enterprise people. Like the BKartA, this

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[17] *Idem*, p. 46.
[18] *Idem*, p. 47.
[19] *Idem*, p. 47.

body operates in an unbiased way and has published essential reviews and pointers on regulation and competition.

The Monopolkommission is not regarded as an in a position competition authority (Kartellbehörde) inside the which means of German competitionlaw, and as an end result it does now not have the electricity to problem binding decisions, like the choice to impose fines. The GWB does not comprise frequent provisions governing the role of the Minister für Wirtschaft und Technologie (the Minister for Economic Affairs and Technology, hereafter: the Minister for Economic Affairs). Nevertheless, it has been acknowledged that the Minister for Economic Affairs is entitled to provide instructions to the BKartA, but he has rarely used this power. It is believed that these orders can also cowl well-known instructions. General instruction shall to be published.[20]

Until the art. 7 GWB-Novelle entered into force, the Minister used to be entitled to intervene in the way the cartel prohibition related to horizontal agreements used to be applied, through issuing Sondererlaubnissen (special authorizations). For coverage reasons, he had the electricity to approve horizontal agreements that were opposite to German competition law. These coverage motives have been now not linked to competition considerations, however to the financial system as a total and the public interest.

In this respect it be mentioned that these interventions of the Minister solely take location hardly ever and are viewed to be controversial. Nevertheless, a choice taken by way of the Minister according to GWB would possibly have a sizeable have an effect on on German competition policy.[21]

Accordingly, from the foregoing it appears that on the one hand the political have an effect on used to be now not large in German competition and has grow to be even less. On the differenthand, relatively in the area of merger control, this variety of have an impact on nonetheless exists. So, even in German competition law, the place from the early days of this regulation the significance of an impartial competition authority has been acknowledged, the need exists for a political physique that is entitled to intervene with a view to the public interest, at least in accordance to the national legislature. In addition, it need to be pointed aut that the BKartA doesnot like to integrate coverage issues other than competition in its choices and is also uncomfortable with the recommendation that is must promote competition policy. Promoting competition coverage is viewed as a mission of the Monopolkommission.

[20] *Idem*, p. 48.
[21] *Idem*, p. 48.

3. Special aspects

Several features of Germany's law make it distinctive. [22]

It classifies horizontal agreements in terms of their function and hence their possibly effect, alternatively than provide regularly occurring grounds for exemption from an established prohibition. It truely distinguishes vertical agreements from horizontal ones, and for this reason avoids the apparatus of block exemptions to regulate their content. It has dealt with behavior by means of dominant companies mainly via precise policies about exclusive dealing and discrimination, instead than via a widespread prohibition against abuse. Germany was among the first in Europe to use merger manage to try to prevent the advent of dominant firms. Germany used to be also first to develop doctrines of abuse of monetary dependence as part of competition law.[23]

For many years, Germany had the mostlively application of merger control in Europe. The substantive fashionable is whether the transaction is predicted to create or give a boost to a dominant position. This check resembles the take a look at that used to be later adopted in the EC's merger regulation. The concepts of dominance that are used in merger control, along with the market share presumptions about single-firm and joint dominance, are taken from other components of the law that deal with dominance. The notion that is most regularly applicable in merger cases is the firms' "paramount position." The BKartA will be concerned if an already paramount role is probable to grow to be even stronger. The probably results of a transaction are assessed from 2 perspectives, first on the function of the events and the market structure, and 2nd on the development of opposition in the future. A merger that creates or strengthens a dominant position can also nonetheless be accepted if the parties can exhibit that it will enhance the conditions of competition in a one-of-a-kind market and that the improvements will outweigh the results of the dominant position. On the different hand, a merger involving low market shares may additionally be rejected where otherfactors, such as economic strength, vertical integration, and lack of a shut competitor suggest long-term detrimental effects.[24]

The merger manage wellknown does no longer depend explicitly on economic criteria. The function of economic analysis is in market definition and figuring out market-dominant positions.

Market definitions are based greatly on substitutability in use, however may additionally use on economics-motivated tools such as price cross-elasticity.

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[22] OECD Report *Institutional and procedural aspects of the relationship between competition authorities and courts. An update on developments in proceedure, fairness and transparency* (2011) p. 12.

[23] *Idem*, p. 18.

[24] *Idem*, p. 19.

Defined markets reportedly have a tendency to be narrow, making it extra probably that the BKartA will locate dominant positions. Issues of market structure and felony analysis show up to dominate the review process, and the presentation of professional monetary opinion is relatively uncommon. The BKartA is doubtful about an effectivity "defence", believing that merger-specific gains would now not commonly benefit buyers in prerequisites of market dominance due to the fact in thos conditions by way of definition there is no discipline on the dominant firm's conduct.[25]

Whether a merger is difficulty to manage is decided basically via the measurement of the parties.

A merger must be notified and accredited if the parties' mixture annual worldwide turnover exceeds €500M and the home turnover of at least one party exceeds 25 million Euros. Two clauses remove minor matters.

They exempt de minimis events (with international turnover underneath 10 millions euros) and mergers in minor markets (with complete sale volume of all market participants below 15 million euros). German merger manipulate law does no longer follow to a merger that is challenge to the EC merger regulation, and it would only follow to a transaction that has an effect within Germany. Special guidelines about computing turnover have the effect of contracting or increasing the insurance in precise sectors. For exchange in goods, solely 3/4 of turnover is considered, but for media and publishing, turnover is elevated with the aid of 20. For an asset acquisition, determination of turnover (and market shares, in the notification material) is confined to what is attributable to the assets being sold.[26]

To make sure huge coverage, each technical and functional principles are protected in the legal characterisations of an awareness that is difficulty to merger control. One is acquisition of all the assets or a "substantial part" of them. Acquisition of shares is situation to notification and manipulate at 2 thresholds, 25% and 50%. Acquisition of control, direct or indirect, constitutes a concentration that must be reported. Control is described in common and purposeful phrases instead than formal ones, using concepts that are comparable to those that follow in the EC merger regulation. Finally, there is a catchall, extending oversight to "any different combination" that allows the workout of a "competitively significant" influence. This would now not catch transactions that had been beneath the size thresholds, however it could be used to control arrangements or to prison constructions that strive to ward off other conceptions of a "concentration."[27]

Covered mergers have to be notified and authorised in advance. Expiration of the examination period, of 4 months, besides BKartA action constitutes clearance. In most cases, high-quality action comes a great deal earlier. The

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[25] *Idem*, p. 18.
[26] *Idem*, p. 19.
[27] *Idem*, p. 19.

BKartA need to inform the agencies inside a month if it has initiated a "main examination." If it has no longer (as is the case in over 90% of filings), it issues an informal observe of clearance. The notification fabric from the parties ought to include some fundamental statistics for the BKartA's analysis: their turnover (in Germany, the EU, and worldwide) and their market shares (and the bases for their calculations or estimates), if the aggregate share of the events exceeds 20%. The BKartA can alsorequest in addition data about these subjects. The BKartA's regular investigation powers may alsoadditionally be used to obtain information from the notifying events and from third parties. Deadlines run from the submission of the complete notification with its statements about turnover and market share. That is, the deadline would not be tolled because of disputes over compliance with requests for in addition information. In a "main examination" proceeding, the BKartA publishes a formal choice with its reasoning regardless of the outcome. The decision may impose prerequisites on clearance. If the BKartA proposes to prohibit a transaction, the authorities in the Länder where the parties are headquartered ought to have a chance to comment.[28]

Mergers that are carried out besides authorisation are legally void, and these than implemented despite the BKartA's prohibition may also be dissolved. The parties' violation of the prison prohibitions would additionally difficulty them to the standard penalty for substantiveviolations, a first-rate of €500,000 or more, up to three instances the extra proceeds from violation. Non-compliance with a request for information may result in a nice up Intervention to practice different policies, though infrequent, can be important. The Minister of Economy and Labour can also authorise an attention that the BKartA has rejected, if the restraint of opposition is outweighed by means of benefits to the economy as a whole or if the concentration is "justified by using an overriding public interest." International competitiveness of the parties can also be taken into account.[29]

There is some constraint on the scope of the Minister's discretion: authorisation may be granted only if the restraint on competition that outcomes does not jeopardise the market economy system.

Parties can follow to the minister within a month after the BKartA's prohibition. The technique is subject to an admonition about excursion and some necessities about transparency. The Minister "should" figure out inside 4 months. Before deciding, the minister ought togain a document from the Monopolies Commission and solicit comments from the governments of the Länder the place the firms are registered. The Monopolies Commission's document is not an enchantment of the BKartA's views about the competition merits. Rather, it examines the claims about the non-competition coverage interests and evaluates them against the BKartA's findings about the results on competition. Until the recent

[28] *Idem*, p. 19.
[29] *Idem*, p. 19.

Ruhrgas case, the Minister had now not disagreed with the Monopolies Commission's recommendation about such a count for the reason that 1989. Since 1973, out of 140 mergers that the BKartA disapproved or approved difficulty to conditions, the parties took 17 to the Minister, who accepted the disputed merger 7 times. Since 1994, there have been solely two such applications, and the Minister authorized one of them.[30]

4. Procedural aspects

Application of the law, either by the BKartA or by using a Land competition office, includes both administrative duties such as reviewing notifications and requests for authorisation and investigation and enforcement against behavior that violates the prohibitions. Most of the procedural provisions deal with "objective prohibition" actions, that is, with proceedings that might end result in an order controlling conduct in the future. A separate chapter deals with habits that might be subject to administrative fines for these proceedings, the regulations are set via the administrative offences.

The prosecutor may grow to be concerned when the Criminal Code's penalties for procurement fraud are utilized to bid rigging.

The enforcement authorities can provoke lawsuits ex officio. A grievance is no longer necessary.

Proceedings are not formally adversarial, but there may additionally be hearings if the parties request.[31]

There should be a public listening to in cases of abuse of dominance, untilthe parties consent to do without it. The enforcers have the power to issue a preliminary injunction to regulate conduct pending a closing decision. Information is typically bought thru casual requests, backed up by formal authority that is subject to stringent due process protections. Formal requests for facts mustbe made through a decision, for proceedings at the BKartA, or via a written order, for proceedings via a Land enforcement body or inquiries via the Ministry. That formality, calling for an assertion of reasons and placing out recommendation about legal remedies available, affords a foundation for the recipient to appeal to the courts.

In practice, a precondition for such an enforceable formal request for information is a concrete initial suspicion of a violation. Enforcing compliance with investigative requests can require going to court. In theory, events face an administrative exceptional of up to €25,000 for failure to comply with a BKartA request, but in exercise that sanction is irrelevant. Parties that lose in court generally then turn over the information, and the court does no longer implement the fine. At the BKartA, the most commonly used requests for facts are issued through the choice

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[30] *Idem*, p. 19.
[31] *Idem*, p. 20.

divisions. For examination of documents on the employer or affiliation premises, consent of the BKartA president is necessary.

For a search, there need to be a court order. The request for statistics ought to set a realistic deadline for response, which is normally 2 to four weeks.[32]

The implementing authority may additionally take possession of proof and enter premises to search for evidence, under the supervision of the local court. The imposing authority can act barring prior judicial approval in some circumstances, highly if there is threat of prolong that would jeopardise the investigation. Procedures for searches, which are especially necessary in cartel enforcement, are taken from the Rules of Criminal Procedure. Criminal investigation departments of the Länder typically guide these efforts. On-premises inspection and copying of documents, although provided, is no longer regularly used.

Enforcement action can lead to orders and good sized monetary sanctions. Liability for anadministrative nice relies upon on subjective intent or fault, that is, the conduct has to now not solely violate the law, but it additionally should be wilful or negligent. By contrast, an order to manipulate future conduct may be issued regardless of the parties' intent or fault. Orders are commonly prohibitory, to prevent repetition of the violation in the future. Mandatory orders are viable if they are the only capacity to eliminate a restraint, for example, by ordering a company to deal with some other on non-discriminatory terms.[33]

Structural relief such as divestiture is not authorised, except in merger cases. Administrative fines are the equal for all substantial violations: up to three instances the additional proceeds bought as a result of the violation, or €500,000. The constant sum is now not a minimum or mandatory fine, however it is intended to make certain that a huge excellent may want to be imposed even if the gain from the violation is not great. There is no cap on the exceptional based on the size of the violation, even though the lawsuits are subject to a 5-year statute of limitations, which can also set a higher certain at 5 years' well worth of excess profits. Fines may additionally be assessed against herbal folks as nicely as prison men and women and associations. The method for computing economic sanctions is consistent with financialtheories of deterrence, by making the sanction proportionate to the firms' anticipated gain from violation and by way of multiplying that by using a thing to correspond roughly to the possibility of detection and successful challenge.[34]

The BKartA's discretion in putting fines is large adequate to aid a leniency program, to encourage participants of a cartel to come ahead with evidence. The BKartA posted the terms of its leniency program in 2000. The BKartA generally does now not impose a first-class on an informer who is the first to grant information that makes a decisive contribution to uncovering a cartel earlier than

[32] *Idem*, p. 24.
[33] *Idem*, p. 24.
[34] *Idem*, p. 25.

an investigation is initiated. Leniency is conditioned on the informer's full cooperation. The informer must no longer have played a decisive role in the cartel and should have discontinued participation through the time the investigation is started.[35]

More limited leniency, a discount in first-rate of at least 50%, is offered to an informer who comes forward at a later point, after an investigation is below way.

Appeals from selections applying the ARC can also be taken to the Court of Appeal the place the enforcement authority is located. For BKartA decisions, this courtroom is in Düsseldorf; before, these appeals went to the courtroom in Berlin. Because the BKartA's cross to Bonn changed the court room that tends to specialise in competition matters, the information that had developed in Berlin ought to now be developed anew in Düsseldorf, where the courts' ride with competition regulation used to be more limited. An enchantment from a Landlevel enforcement motion would go to the Court of Appeal where the local enforcer is located.

Appeal can be based totally on new data or evidence, and the Court of Appeal has strength to investigate facts ex officio. Appeals from selections of the Minister may additionally be taken to the identical Court of Appeal in Düsseldorf (and no longer to the one the place the ministry is located, which is now Berlin). Although the motivation for the Minister's choice will generally involve things of coverage that judges will not question, allegations of defects in system have supported successful challenges, most these days in the Ruhrgas case.

An in addition enchantment on points of regulation is possible to the Federal Supreme Court. There are special chambers in the Courts of Appeals and an "antitrust senate" of the Federal Supreme Court that decide all competition matters. Competition instances are therefore dealt with with the aid of a small group of judges who can increase greater know-how in the subject, which have to promote consistency. Normally, appeal suspends the order being appealed.[36]

A court may also order instantaneous enforcement, but the necessities to attain that relief are stringent.

This makes it hard to use opposition regulation correctly the place the hassle is get entry to or refusal to deal. This state of affairs is due to change in part, as the upcoming electricity regulation reform would make network get right of entry to orders high-quality immediately. With the presumption reversed, it will be the respondents who will have to persuade the court docket that immediate enforcement be waived.

Whether that burden will be challenging to carry in practice remains to be seen.

[35] *Idem*, p. 25.
[36] *Idem*, p. 25.

5. Conclusions

In the last years we can observe some changes in Germany's competition law.

One is the effect of the arose in the regional context, in the form of a new European Council Regulation modernizing competition law enforcement.

The other is the transatlantic context, in the form of a series of cases that threatened to expand further the jurisdiction of U.S. courts over extraterritorial anticompetitive conduct.

In both contexts, Germany was against the potential undermining of its local competition enforcement philosophy.

The U.S. cases considering expanded jurisdiction, for instance, addressed hard-core price fixing-conduct that violates German and E.U. law as well as U.S. law.

The objectives of the E.U. modernization program, mainly to preserve European Commission resources for the prosecution of the most economically harmful anticompetitive behavior are consistent with Germany's own interests.

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