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THE HARMONIZATION OF THE INTERNAL RULES OF THE COMPANIES IN EUROPEAN UNION

Abstract

The regulation of this domain by the communitarian institutions through Directives shows the freedom of the member states to transpose the rules.

In the same time, the Directives can be invoked by the particulars (companies and Private persons) against member states and public authorities.

THE DIRECTIVE REGARDING THE INCORPORATION, ORGANIZATION AND THE ACTIVITY OF THE JOINT-STOCK COMPANY

The 2nd Directive of the Council no. 77/91 CEE December 1976 regarding the incorporation, organization and the activity of the joint-stock companies, it is applied to the joint-stock companies in the declared function as "tending to the coordination, for their equivalence, of their guaranties which are asked by the member states to the companies as written in the art.58 align.(3) from the TREATY, for the protection of associates, interests and also of the third parties, regarding the incorporation of limited liability companies and also the maintaining and the modification of their capital".

The issue of this directive was announced by the Program of eliminating the restrictions of the freedom of organization, initiated by the directive 68/151/CEE, the regulation is very important concerning the limited liability companies, as the activities of this company's braches out of the national frontiers.

The coordination of the national provision regarding the incorporation of the limited companies and the maintaining, the capital increase and decrease is very important to assure a minimal protection equivalent both to the shareholders, and to the creditors of the joint-stock companies.

The importance of this directive is given by the context in which it was adopted, when it was considered to be necessary the adopting of standard rules regarding European company.

The directive, foresees the minimal content of the memorandum of association and its publicity (art. 2-3), the responsibility for the undertaken

commitments till receiving the authorization of functioning (art.4), the consequence of decreasing the number of associates under number provided by law (art.5), minimal capital of 25 000 EURO (art. 6), the capital contents (art.7), the conditions which must be accomplished by the shares (art.8 and 9), the equivalence of the proportion in nature by an independent assessor and the publicity of the capital (art.10), the conditions of distribution the net profit so as not to change the capital structure (art.15-16), the capital reuse (art.17), buying the own shares by the company (art.18-19), the restrictions in attainment of the own shares (art.20-22), the capital increase and decrease (art.25 and the following)

The modification of the 2nd Directive in 2006

In order to establish the freedom of choice of a certain activity, the Council decides with the following directives after having consulted the Economic and Social Committee (art.44 part. 1 of The TREATY).

In the paper "The modernizing of the company's legislation and the corporative governing in European Union- a plan to go further" dated 21th day of May 2003, the Council and the European Parliament came to the conclusion that it is necessary a simplified and a modernization of The Directive 77/91 CEE. This improvement would concur in a significant manner to the promotion of the efficiency and competitiveness of the companies, without decreasing the protection which the shareholders and the creditors enjoy.

In this way, it was adopted Directive 2006/68/CE of the European Parliament and of the Council dated 6th day of September, 2006 to modify the Directive 77/91/CEE of the Council regarding the incorporation of the joint – stock company and its maintaining and modification.

The modifications from 2006 refer essentially to the contribution evaluation which constitutes the social capital.

Among the main modifications achieved with Directive 2006/68, we emphasize the followings:

- the states should permit the joint-stock companies to contribute to the social capital not only with cash down but also with something else without being necessary a special expertise in case there is an evident reference regarding the evaluation of the contribution;

- the possibility of controlling the evaluation must be guaranteed to the minority shareholders

- in the limit of the reserves, the joint companies should be authorized to achieve its own shares.

- the states should permit the joint companies to give financial support in order to achieve its own shares from third parties, in the limit of reserves;

- in order to reinforce the standard protection of the creditors from all the member states, the creditors should accomplish certain conditions, to appeal to the judiciary or administrative proceedings if its claims are compromised through a capital decrease;

- to prevent the market abuse, the member states should take into consideration the provision of the following communitarian act: Directive 2003/6/CE of the European Parliament and of the Council from 28 January, 2003 on the initiated actions and the manipulation of the market; The Statute (CE) no.2273/3/2003 on the application modalities of the Directive 2003/3/CE; Directive 2004/72 of the Commission regarding the application of the Directive 2003/3/CE.

The limit term for the implementation of the Directive 2006/68/CE was 15th day of April, 2008, at this date all the joint companies of European Union States will have the same conditions.

` DIRECTIVE REGARDING THE STRUCTURE OF THE JOINT-STOCK COMPANIES AND ALSO THE RIGHTS AND OBLIGATIONS OF ITS MANAGEMENT.

The 5-th Directive was issued in 1972, regarding the coordination of the member states concerning the structure of the joint-stock companies and also the rights and obligations of its management. For certain reasons, the 5-th Directive was not adopted.

Both The 5-th Directive and the 10-th directive were withdrawn by the Commission in 2001 because of a politic crisis

This failure emphasized the difficulties of the harmonization of national legislation.

1.2. The Directive regarding the limited liability companies with sole associate

The 12-th directive (89/885CCE/21 December 1989) concerning the legislation of the companies, regarding especially the limited liability companies with sole associate.

This provision was necessary for coordination; for equate some imposed guaranties of the companies from the member states defined in art. 58, the 2nd paragraph of the TREATY, for protecting the associates and third parties' interests.

Also, it is written that the reforms introduced in the legislation of certain states in the last years, to facilitate the incorporations of the limited liability companies with sole associate, produced divergences among the member states.

A limited liability company can have a sole associate in the moment of incorporation or can become such company when the shares are in possession of a sole associate. Till the coordination of the national provisions of groups' legislation, the member states can provide certain provisions or a sanction in case a Private person is a sole associate of more than one company or a sole associate company or any other juridical person is a sole associate of a company.

The member states are free to adopt norms to cover the risks which sole associate companies would present; as a consequence that they have a sole associate and in particular for assuring the paid of subscribed share capital.

The identity of a sole associate must be public by mentioning it in an accessible register as a consequence of the fact that all the shares are held by a sole associate.

The resolutions adopted by the sole associate, in its capacity, by the general meeting, must be recorded in written copies.

The contracts concluded between a sole associate and its company represented by the sole associate must be also recorded in written copies, considering the fact that those contracts do not regard the current actions developed in normal circumstances.

THE HARMONIZATION OF THE FISCAL RULES
THE DIRECTIVE REGARDING THE ANNUAL ACCOUNTS OF THE COMPANY

The 6-th Directive no.78/600/CEE from 25 Of July, 1978 was adopted according to the provisions of art. 54, paragraph 3 of The Treaty and regarding the annual accounts of a certain forms of companies.

The directive provides the coordination of the national disposals regarding the structure and the content of the annual accounts and of the management report, the evaluating methods and also the publicity of those documents, regarding especially the limited liability company, because it has a special importance for the protection of the associates and of third parties.

It is necessary to be provided, in the Community, the minimal juridical equivalent conditions regarding the extension of the financial information which should be made public by the competitors companies.

The annual accounts must reflect a true image of the patrimony, of the financial situation and also, of the company's performances.
The annual accounts must be audited by authorized persons whose minimal qualifications would be submitted in a subsequent coordination, as only the small companies can be exonerated by the obligation of auditing.

The 4-th Directive is divided in 12 sections. Hereby: in section 1 there are written certain definitions ("the annual accounts include the profit and loss account and the annex of the annual account. These documents constitute an entity."), section 2 refers to the general provisions regarding the account, the profit and loss account, section 3 – the structure of the account, section 4- particular disposals regarding certain position of the account. section 5-the structure of the profit and loss account, section 6- Particular disposals concerning some position of the profit and loss account, section 7- evaluating norms, section 8- the content of the annex of the annual account, section 9- the content of the management report, section 10- Publicity, section 11- Auditing, and the section 12 – final disposals.

THE DIRECTIVE REGARDING THE CONSOLIDATED ACCOUNTS

The 7-th Directive no. 83/349/CEE from 13th June, 1983 was adopted according to art. 54 align. (3) Lit. (g) Of the TREATY, regarding the consolidated accounts.
Although the 4-th Directive was adopted (Directive 78/660/CEE regarding the coordination of the national legislation of the annual accounts of some forms of companies) however it is necessary a regulation of the consolidated accounts.

Many companies are included in enterprise groups and consolidated accounts have to be elaborated so as to give the associates and third parties financial information regarding such groups of enterprises; the national legislations regarding the consolidated accounts have to be coordinated for the achievement of the compatibility and equivalence objectives of the information which the companies have to publish in Community.

To determine the conditions of consolidation, it have to be taken into consideration not only the cases in which the management control is based on a majority of votes, but also the cases in which this management is based on agreements, if these are allowed; in addition, the member states in which there is this possibility, should be allowed to establish the rules for cases, that in certain circumstances, the management is performed based on a minority participation.

The purpose of the consolidated accounts consolidation is to protect the interests of the companies of capitals; this protection implies the principle of elaborating the consolidated accounts in case the company is a member of enterprise groups and the elaboration of these accounts is compulsory at least in case the company is a holding enterprise.

The Directive contains the following sections: the elaborating conditions of the consolidated accounts (1), the elaborating of the consolidated accounts (2), the annual consolidated report (3), the auditing of the consolidated accounts (4), the consolidated accounts publicity (5) and the final and transitory provision (6).

THE DIRECTIVE REGARDING THE AUTHORIZATION OF THE RESPONSIBLE PERSONS FOR THE LEGAL CONTROL OF THE ACCOUNT DOCUMENTS

The 8-th Directive of the Council from 10th Of April 1984, no. 84/253/CEE was adopted according to art. 54 align. (3) Letter (g) of The TREATY CEE, regarding the authorization of persons who are responsible for the legal control of the account documents.

It was considered important to harmonize the qualifications of the authorized persons who carry out the legal control of the account documents and to assure that these persons are independent and have a good reputation.

The Directive also refers to the transitory provisions of the matter and emphasizes the fact that it is established neither the freedom of organization, nor the freedom to perform services regarding the persons who carry out the legal control of the account documents.

In section 1 ("The Application Domain") the coordination measures written in the Directive are applied to the legal regulation and administrative provisions of the member states regarding the responsible persons of:

- the auditing of the companies' annual accounts and controlling the exactness of the management reports with the respective annual accounts, situation in which the control and the audit are imposed by the communitarian law;

- the auditing of the groups of enterprises' consolidated accounts and the control of the exactness of the consolidated management reports with the respective consolidated accounts, situation in which, the auditing and the verification are imposed by the communitarian law.

The section 2 refers to the norms of authorization (art.2-22), in section 3 there are established the criteria which define the professional and independent integrity (art.23-27), and in section 4 the publicity is established.

THE HARMONIZATION OF THE RULES REGARDING THE REGISTERED OFFICE, THE COMPANY'S TRANSFER AND PUBLICITY

THE DIRECTIVE REGARDING THE MERGER OF JOINT-STOCK COMPANIES

The 3rd Directive no.78/855/CEE/9th October 1978 regarding the merger of joint –stock companies was modified with the Directive 82/891/CEE and the Directive no. 2007/63/CE of The European Parliament and of The Council from 2007.

The 1st chapter establishes "the organization of the merger by amalgamation of one or more companies by another company and the merger by incorporate a new company" (art.2-4).

The "merger by amalgamation" means that the operation of winding up one or more companies without being liquidated and transfers all its assets and liabilities to another company for the issuance of shares to the associates of the company or companies absorbed of the absorbed company and possibly, of a payment of cash of maximum 10% of the nominal value or in the absence of this, the equivalent account of the issued shares.

The "merger by incorporating a new company" means the operation in which more companies are winding up without being liquidated and transfers all its assets and liabilities to a new incorporated company, for the issuance of shares of the new incorporated company to their shareholders, and possibly, for a cash payment of maximum 10% of the nominal value or in its absence, the account equivalent of the issued shares.

The 2nd chapter establishes "The Merger by amalgamation" (art.5-22), concerning these matters: the project of merger (art.5), the publish of the merger project (art.6), the resolution of the general meeting regarding the merger (art.7), the report regarding the merger (art.9), the merger expertise (art.10), the actual effects of the merger (art.19) and the legal decision of the nullity of the merger by the Instance (ar.23).

The 3-rd chapter establishes "The merger by incorporating a company"(art.23).

The 4th chapter- referring to "The Amalgamation of accompany by another company, that holds at least 90% of its shares" (art. 24-29) provides the

rights and the obligations of the companies to this kind of amalgamation, and also the states obligations regarding the transpose of this chapter.

The 5th chapter- concerns other actions of the merger. In the case of one or other form of merger, the legislation of the states permits cash payment of over 10%, all the rules from the directive concerning the merger are applied.

THE DIRECTIVE REGARDING THE DIVISION OF THE JOINT-STOCK COMPANIES

The 6-th Directive (no.82/891/CEE from 17th December 1982 (modified with the Directive 2007/63/CEE- of the European Parliament and Council from 2007)- emphasizes that , the risks of the guaranties offered in the cases of merger from the Directive 78/855/CEE to be eluded because of the similarities of the actions of merger and division, and the risks can be avoided only if provisions for an equivalent protection in the cases of winding up are adopted.

The protection of the associates and third parties interests imposes a coordination of the member states legislation regarding the division of the joint-stock companies if all the member states permit such actions; in this coordination context, It is very important that the shareholders of the companies in division to be correctly and objectively informed, and their rights be protected in an adequate way.

The employees' rights protection in case of enterprises, unities or parts of unities' transfer, is established by the Directive 77/187/CEE from 14th February, 1977;shareholders or not, and also the holders of other rights of the companies being in a process of division must be protected so as the division do not affect their interests.

The publicity stipulated by the directive 68/151/CEE must be extended to include the division, so as the third parties be correctly informed. To assure the juridical certainty in the relations between the companies implied in a process of sharing, between these and third parties and between the associates, the cases of nullity must be limited and on the one hand, the principle of rectification must be provided as many times as possible, and on the other hand, it has to be provided a short term for the invocation of nullity.

The 2nd chapter "The Division by incorporate new companies"- defines "the division by constitute o new company" action in which, a company after being winded up without being liquidated transfers to more companies newly incorporated all its Assets and liabilities for the issuance of shares of the beneficiary companies to the associates of the devised company and if necessary,

a cash payment of maximum 10% of the nominal value of the allocated shares or in its absence, the account equivalent.

The 3rd chapter- establishes the division under the control of a judiciary authority and the IV chapter- refers to other actions of the divisions.

THE DIRECTIVE REGARDIND THE TRANSFRONTALIER MERGER OF CAPITAL COMPANIES

The DIRECTIVE 2005/56/CEE of the European Parliament and Council from 26th of December, 2007. In the Law no. 31/1990 regarding the companies and also in the methodological norms 2594/C approved by the Attorney general' decree regarding the organization of the register of commerce, registration methods and delivering of information there were modification as mentioned above in the Directive .

Art. 1 of the Directive defines the area of application, art. 2 defines the important terms (Capital Company and merger), art.3 contains the provisions referring to the area of application, art. 4 provides the conditions regarding the abroad merger, the merger publicity (art. 6), the management reports (art.7), the independent expert report (ar.8), the approval in general meeting (art.9), the certificate prior to merger (art.10), the control of the legality of merger (art.11), the date of the effective merger (art.12), incorporation (art.130, the effects of the abroad merger (art.14), some simplified formalities (art.15), the participation of the civil servants, (art.16), the merger validity (art.17), the Directive revision (art.18), the transpose (art.19), the coming into effect (art.20) and the addressees: member states (art.20).

THE DIRECTIVE REGARDING THE PUBLICITY OR THE TRANSPARENCY

The I Directive no. 68/51/CEE/9th March 1968 is also called the Directive of publicity or transparency and was modified by The Directive 2003/58/CE- of the European Parliament and Council, regarding the obligation of publicity of some forms of companies.

It is applied to the joint-stock companies, partnership limited by shares and Limited Liability Company.

Art. 1 The Directive I- refers to the harmonization of the provisions regarding the publicity of the companies (section I, art.2-6), the validity of the undertaken commitment of a company (section II, art. 7-9) and the nullity of the companies (section III, art.10.12).

The purpose of the directive was the establishing of standard rules for traders from the member states of EC, minimal and standard guaranties for third parties and also the strengthening of the commercial exchanges on the internal market This directive was edited- as written in the art.44, letter. G – with the purpose of protecting the third parties.

Section I of the Directive – "Publicity" aims at the fact that publicity should offer the same type of information for all the E.U companies so as those interested to know the important documents, information and the persons included in company(art.2).

The member states adopts necessary norms so as the compulsory publicity regarding companies to have at least the following documents and information:

a)– the memorandum of association, and also the articles of association, if they are the object of a separate act;

b)– any modification of the memorandum of association or of the articles of association, including the extension of the term of company;

c)– any modification of the memorandum of association or of the articles of association, the whole updated text of the modified act;

d)– appointment, ceasing of function, and also the persons' identity who are in the quality of a constituent part according to law or as a member of such an organization;

1. Have the competence to involve the company in partnerships with third parties and to represent it in Justice;
2. Participate in administration, supervision and control of company;

The publicity measures should specify if the persons who have the competence of involving the company in partnerships can do this action alone or together.

e)– at least once a year the value of the subscribed share capital, if the memorandum of association mentions an authorize capital except the case in which any increase of the subscribed share capital imposes a modification of the memorandum of association;

f)– the account and the profit and loss account for every financial exercise. The document which contains the account have to indicate the identity of the persons who will certify the account, according to law.

However, regarding the limited Liability company from the German, Belgian, French, Italian legislation, mentioned in art.1 of the Directive- and also

the joint-stock closed company from the Dutch legislation, the compulsory application of this provision is postponed till the date of a new provision regarding the content of the account and of the profit and loss account.

In this way, the member states have to institute an official Register of companies (The Register of Commerce) characterized by:

- accessibility (of the public);
- relevant information about companies should be published in a national review, established by the national law:
- on demand to give information and documents held by the Register.

There should be mentioned that companies are obliged to write some particular information as registration number, the company's form, the share capital in their letters or commands, also the companies should mention the responsible persons to fulfill the publicity formalities and sanctions in case of non-fulfillment.

The fulfillment of the publicity obligations regarding the persons who have the competence in this matter, determines the third parties impracticable action of any abnormity to the appointment of those, except the case in which the company can prove that those parties had knowledge about that situation.

In the resolution from 13th of November 1990 The Court of Justice of the European Communities indicates that the member states are banned to render the Directive 68/151/CEE regarding the issued purpose; the nullity can only be a result of the activity illegality, as mentioned in the articles of organization, and company's illegal actions.

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LES DROITS FONDAMENTAUX DE L'HOMME ET LEUR PROTECTION JURIDIQUE

Résumé

Pour l'homme de nos jours, ces droits fondamentaux et leurs protection juridique constituent une vraie religion. C'est pourquoi, chaque citoyen – et surtout chaque étudiant en droit – doivent connaître et faire respecter ces droits fondamentaux de l'homme, qui furent d'ailleurs connus et observés à l'echelle universelle depuis l'antiquité, mais aux dégrés différents.
Mots cléfs : droit, fondamental, homme, protection juridique.

Le concept des droits de l'homme s'inscrit dans l'histoire de la philosophie, dans laquelle il puise ses racines. Mais, l'affirmation de ces droits consiste dans l'aboutissement d'une longue évolution historique, marquée à la fois tant par leur émergence et leur consécration, que par le renforcement de leur protection juridique à travers des garanties juridictionnelles de plus en plus perfectionnées.

Pour parler de droits de l'homme, il faut d'abord rappeler la prise de conscience de la dignité humaine, de l'être humaine, par de plusieurs courants et doctrines philosophiques et religieuses a travers des siècles. Si pour Protagoras, par exemple, l'homme était „la mesure de toute choses", et pour les stoïciennes, l'homme est le fis de Zeus et citoyen du monde, en revanche, „pour la pensée judéo-chrétienne, l'homme était „l'ikone τοὺ Χριστου". D'ailleurs, force est à constater que même pour des juristes de nos jours, „… l'oeuvre et le message de l'Eglise, …, ont nettement pesé dans les origines de l'idée de droits de l'homme".[1]

Par le biais de Rosceline (sec. XII), Anselme de Canterboury, Guillaume d'Ockham et de John Duns Scot (sec. XIII – XIV), la philosophie nominaliste faisait de l'homme un individu. En même temps, la pensée patristique, de

souche byzantine, faisait de l'homme le partenair de Dieu et la valeur suprême sur la terre.

Pour la pensée politique et à la fois juridique de l'Europe du Moyen-Age, il s'agit de droits de l'homme, qui sont inspirés et protéges avant tout par la loi de la nature, par « lex naturale » et ensuite par le jus divinum (droit divin).

Á cette époque, on constate aussi l'émergence d'un individualisme qui va de pair avec la liberté de l'individu (ex. Thomas Hobbes (1508-1679), De cive (1642) et Léviathan (1651).

En conséquent, pour la pensée de cette epoque-la, l'homme est avant tout titulaire de droits individuels, ainsi comme pensait aussi John Locke dans son traité sur le gouvernement civil, publiée en 1690.

Cette pensée politique tenait pour autant à préciser qu'il ne s'agissait que de l'homme „né libre" (J. J. Rousseau, Du contrat social (1762). C'est aussi Jean Jacques Rousseau qui - dans son „Discours sur l'origine et les fondements de l'inégalité entre les hommes" - a cherché a conciliér entre pouvoir et liberté, „qui préfigure à ce titre la construction marxiste"[2].

Le premier texte, connu, relatif à la proclamation de droits de l'homme, a était la Magna Carta (Grande Charte) de juin 1215. La Grande–Bretagne se distingue aussi par des textes et documents marquants, comme, par exemple, La Pétition des droits (1628), le Bill of Rights (février 1689), l'Habeas Corpus Act (en 1679).

La tradition juridique britannique a été aussi reprise par la Déclaration d'Indépendance des Etats-Unis d'Amérique (juillet 1776), qui proclame la croyance de ses rédacteurs en une vérité „évidente d'elle-même, que tous les hommes sont crées égaux, qu'ils sont dotés par leur Créateur de certaines droits inaliénables, et que parmi ces droits figurent la vie, la liberté et la recherche de bonheur".

On a dit que la contribution française – en matière de droits de l'homme – est avant tout celle de la Déclaration des droits de l'homme et du citoyen du 26 août 1789. Mais, il faut précis et retenir le fait que cette Déclaration – qui allait constituer le Préambule de la Constitution de 1791 – distingue nettement entre l'homme et citoyen. Or, selon cette Déclaration, seul le dernier se rejouit de droits politique.

Des juristes français, de nos jours, reconnaissent que la Déclaration de 1789 „expose avant tout une philosophie des droits de l'homme marquée par des caractères singuliers. Tout d'abord – précisent-ils – on peut être frappé, particulièrement dans le préambule, par la référence explicite à la transcendance, qui … traduit une forme assez répandu … La Déclaration exprime également un net individualisme …"[3]

La Convention de Genève d'août 1864 fondait la Croix-Rouge, et, ipso facto, le „droit humanitaire". Or, due à cette Convention, on peut aussi parler des premières manifestations d'une protection internationale de certains droits de l'homme.

À partir du XX^{e} siècle, et particulièrement après 1945, par leur proclamation dans des textes internationaux, les droits de l'homme commencent cependant à être internationalisés, signe de la reconnaissance de leur universalité, que le droit coutumier les prescrivaient déjà depuis longtemps.

Les Nations Unies, conformément à l'esprit et à certaines stipulations de la Charte fondatrice de San Francisco de juin 1945, ont contribué très largement à l'internalisation des droits de l'homme, vers une dimension universelle. Ainsi, le 10 décembre 1948, l'Assemble générale des Nations Unies a adopté la résolution 217 (III) portant Déclaration universelle des droits de l'homme, qui avait été intiellement rédigé par René Cassin.

Comme on le sait, ce texte n'est pas juridiquement une Convention internationale, mais, elle demeure malgré tout un document de référence pour les droits de l'homme.

Il faut aussi rappeler la Convention européenne des droits de l'homme, instituée par la traite de Rome du 4 novembre 1950 et les deux Pactes internationaux (droits de New York), l'un relatif aux droits économiques, sociaux et culturels, l'autre relatif aux droits civils et politiques.

Quant a ceux deux Pactes, qui sont de véritables traités, il faut retenir qu'ils non seulement garantissent divers droits et libertés, mais instaurent également un système de garantie, sous forme de rapports au Comité des droits de l'homme des Nations Unies pour le premier, de recours individuels au même Comité pour la seconde, ...[4].

Á ceux-ci, on peut également ajouter la Convention pour la prévention et la répression du crime de génocide (décembre 1948), la Convention internationale

sur l'élimination de toute les formes de discrimination sociale (décembre 1965), la Convention sur l'élimination de toute les formes de discrimination à l'égard des femmes (1980), la Convention contre la torture et autres peines ou traitements cruels, inhumaine ou dégradants (1984) etc.

Suite à la mise en place de systèmes régionaux de protection des droits de l'homme, en octobre 1961 fut signée à Turin la Charte sociale européenne.

Les droits fondamentaux de l'homme se classent en catégorie en fonction de leurs rapports à l'Etat. D'habitude, on les classent en 5 catégories:

a) „droits – libertés";
b) „les droits – participation";
c) „droits – créances", qui exigent une action positive de la part de l'Etat ;
d) les „droits – garanties";
e) le „droit à l'égalité", qui impose à l'état de traiter tous les individus de la même manière et de garantir, parfois a l'encontre d'autres personnes, qu'ils seront tous traités également.

Le mécanisme de la protection des droits de l'homme, a l'échelle européenne, s'articule autour de trois organes: la Commission européenne des droits de l'homme, la Cour européenne des droits de l'homme et le Conseil des ministres. Suite à la reforme du mécanisme de protection, par l'entrée en vigueur du protocole no. 11 (1er novembre 1998), on a été institué un organe juridictionnel unifié, résultant de la fusion de la Commission et de la Cour, à savoir, La Cour européenne des droits de l'homme, dont siége se trouve à Strasbourg. Celle-ci se distingue pour autant de la Cour de justice des Communautés européennes – institutionnalisée par le Traite d'Amsterdam (2 octobre 1997) – ainsi que des Cours constitutionnelles nationales.

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Romeo IONESCU

NEW APPROACH ABOUT CAP

Abstract

The paper deals with the new challenges for CAP under world food crisis. For the beginning, we realise a retrospection of CAP during 1992-2008 in order to conclude that CAP is dynamic and it tries to adapt to the economic changes.

Environment protection became a constant restriction for CAP. Even that there is a strategic perspective for CAP, the conflicts between European Member States are still great.

Nowadays, CAP has to face to internal challenges and to international challenges too. More, some international organizations like U.N.O. and WTO or some powerful international partners like U.S.A. try to influent present CAP.

The present world food crisis postponed once again the diminution of the subsidies.

In 2009, CAP will benefit by 43 billions Euros. They represent more than 1/3 from common budget for different economic sectors.

On the other hand, European Commission considers that it is not necessary and not wished a radical reform of CAP until 2013

Nowadays, Common Agricultural Policy (CAP) is based on two pylons. The first one is common market organisations and it deals with common measures in order to regulate agricultural integrate markets' functions. The second is rural development and it deals with structural measures in order to support rural zones' harmonized development in connection with: social aspects, activities' diversity, goods' quality and environment protection.

Agriculture support and maintain a durable environment. As a result it has a positive impact in many situations. There are also some situations in which agriculture becomes an enemy for environment.

It's very difficult to realise equilibrium in the same time with the environment protection's restrictions.

In 2003, the reform of CAP eliminated the connection between direct payments and output by adopting conditionality. This means that farmers

receive subventions only if they respect special standards including environment standards too.

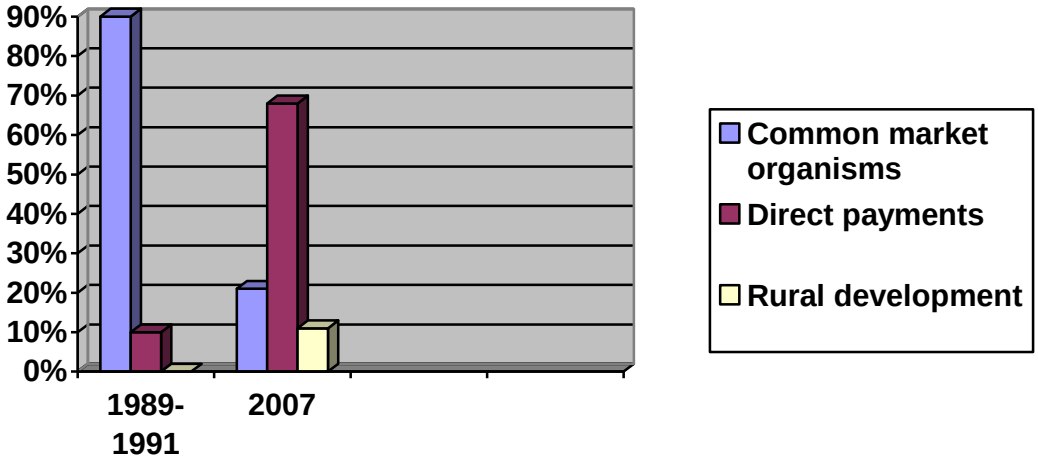

Fig.1. Reforms' impact on the budget FEOGA-G' structure (%)

On the other hand, the Member States have to allocate at least 25% from the budget for rural development to environment improvement and to rural zones. There are some common specific regulations, like that connected with nitrates, which guaranty the statement of severely environment standards.

As other European regulations, CAP is focused on sustainable character of the environment.

Still 1992, CAP was progressive adopted in order to be able to have a better answer to sustainable objectives using a fundamental reforming process. As a result, CAP realise the passing from a policy of prices and output sustaining to a policy of direct support for revenues and to measures of rural development.

PAC reform consolidated some measures in order to support methods of land uses which are environment friendly. These methods are connected with jobs policy and wages policy from first pylon and with rural development policy from the second pylon too.

First pylon contains measures like the following: decupling, obligatory conditionality and modulation.

Decupling means that direct payments aren't conditioned by the output. As a result, the intensive agriculture isn't encouraged.

Using conditionality, the direct payments depend on specific standards about agricultural exploitation, including environment standards.

Modulation allows payment transfers from first pylon to the second pylon in order to determine a growth of the budget for agro-environment measures.

There are some measures which support environment protection in the second pylon. These measures are those connected with Nature 2000 program and with support for less developed zones.

More, the eco-conditionality system reduces the level of payments for those farmers who don't respect European standards in agriculture.

On the other hand, there are many voices who want a simplification of CAP's mechanisms.

This process began in March 2007, as a result of the Report of Eco-Conditionality Commission. This report made proposals for control improvement and for a new scheme of penalties. These elements become a part of the specific law procedure during 2008-2009. More, these elements which simplify eco-conditionality scheme will be finding into Health Control too.

European normative guaranties the authenticity of the goods from ecological agriculture and correct ticketing of them.

The using of word ecological for some food outputs is the absolute attribute only for the goods from ecological agriculture. This offer a guaranty for the consumers about quality and security of ecological goods they will buy.

Still December 2005, the European Commission proposed a revision of the regulation for ecological agriculture for better information of the consumers. More, it proposed a simplified procedure for farmers and enlargement of existing texts applying area.

This process continued with sector reforms like the following: sugar (2006), vegetables and fruits (2007) and wine (2008).

On 24th of January 2007, Mariann Fischer Boel, the commissar for agriculture and rural development, declared that it was the moment to line up fruits and vegetables sector to all reforms from other agriculture sectors.

On 12th June 2007, the European Council approved the new common structure for fruits and vegetables market which became perfect adaptable to the new CAP.

The main objective of the reform in fruits and vegetables sector is its harmonization with other sectors of the CAP which were reformed still 2003.

During next period, the payments will not depend by the volume of output. They will be transformed into a unique payment for every agricultural farm.

In order to receive this payment, the farmers have to respect some normative about environment protection, food security and lands' administration.

The role of farmers associations will grow. These associations will have more instruments for crises administration and will be forced to stimulate consumption of fruits and vegetables. These measures will be applied still 2008.

As a general framework, the European leaders try to obtain progresses in such domains like the following: environment protection, bio-carburant, genetic modified organisms, food security and animals' health. These elements were essential parts of the "operational program" of European leaders in 2007.

The decisions of the European Commission will be influenced by the WTO's new regulations. One of these is the cut of export subventions until 2013 and it is considered by the E.U. like the beginning of a long row of concessions.

The rural zones (agricultural lands and forests) cover more than 90% from E.U.'s surface. The farmers and other persons who live in rural zones represent more than 60% from E.U.'s inhabitants in 2008.

On the other hand, the European agriculture has a large variety of tips and dimensions of agricultural farms. The average farms' dimension is about 16 hectares for E.U.25 and 11.5 hectares for E.U.27.

But we consider that the farms' dimension isn't representative for economic analysis. As a result, a little horticulture farm from Benelux, for

example, can not be compared with a big sheep farm from Scotland. These two farms are very different in costs, revenues and technical conditions.

Nowadays, 5% from E.U.27 farms have more than 50 hectares. Using E.U.'s criteria, these are big farms, even that they are smaller than in Australia, U.S.A., Russia or Argentina.

The dimension of a farm depends of more elements like: land characteristics, climate, old policies, land propriety legislation and history. Even inside E.U., the farms' dimensions are very hard to be generalised. For example, there are greater farms in East Germany than in West part of the country. More, the Czech farms are greater that E.U.'s average farms' dimensions.

The situation is more different in U.S.A. E.U. has 13 millions farmers and an average farm' s surface of 11.5 hectares. U.S.A. has only 2 millions farmers, but an average farm's surface of 180 hectares.

So, we can conclude that there are more familial farms in E.U.27 which affect efficiency and agricultural output.

Nowadays, the most affected farms are those big from U.K., Germany and Czech Republic. On the other hand, European agricultural reforms will not affect little farms from Italy, Greece, Poland and Romania. That means that every change of CAP determined deficits for someone inside E.U.27.

The system of subventions which reduces agricultural output determined a yearly lost of 125 billiards Euros as a result of greater prices and taxes. More, European food prices are with 20% greater than world average food prices.

On the other hand, lobby groups determined E.U. to eliminate some measures which were focused on the decrease subventions for big farms and on increase payments for little farms. Especially, Germany and France don't agree the reducing of the payments for the big farms.

European Commission proposed to continue the process of CAP's simplification and modernization and to eliminate last restrictions for farmers in order to support them to cover the present greater food demand.

The so-called Health Situation evaluation of CAP will reduce the connection between payments and output and will allow farmers to action under market restrictions evolution.

Some of these measures deal with elimination of obligation to exit arable lands from agricultural circuit, progressive growth of milk quotes before their elimination in 2015 and reducing state's intervention on market. These changes will eliminate restrictions for farmers and allow them to turn to account their maximum potential output.

Another proposal deals with intensification of modulating process in order to reduce direct payments for farmers and to transfer some funds to the budget for rural development.

As a result, the European agriculture will better face to the new challenges and opportunities. We refer to climatic changes, better waters' using and biodiversity protection.

Health Situation evaluation tries to free the farmers as they will be able to cover a greater food demand and to respond efficient to market signals.

During 2006-2008, the food prices grew more than inflation rate inside E.U. We can speak about a food crisis in 2008. As a result, the European Commission presented a new set of CAP reforms in May 2008.

This new project of CAP is considered not enough by U.K., because it tries to find a middle way. For the beginning, the project didn't want to be rejected by Germany and France which benefit of great subventions for their farmers. On the other hand, the project tried to simulate a support for free agricultural market mechanisms.

The present world food crisis postponed once again the diminution of the subsidies.

In 2009, CAP will benefit by 43 billions Euros. They represent more than 1/3 from common budget for different economic sectors.

On the other hand, European Commission considers that it is not necessary and not wished a radical reform of CAP until 2013.

The same European Commission adopted a communication about strategically possible reactions in order to reduce the effects of global prices growth for foods. This document was discussed at European Council between 19th -20th of June 2008. It analyses structural and cyclic factors and proposes a strategy based on three elements which includes:

- short-time measures in order to evaluate "health situation" of CAP and to monitory retail trade;
- initiatives for agricultural goods supply improvement and for food security insurance, including promoting of future generations of bio-carburant;
- initiatives to support global effort for elimination of the prices' growth impact on poor inhabitants.

Mr. Jose Manuel Barroso, the President of European Commission declared that E.U. action quickly and efficient at a response to the foods prices' growth. He considers that E.U. has to face with o problem which has many causes and which produces multiple effects. The solution is to action on many fronts. As a result, European Commission asks Member States to fight against this global challenge using a unitary European reaction. On the other hand, E.U. will cooperate with its international partners, U.N.O. and G8.

European Commission analyses the causes of the important foods prices' growths inside E.U.27 and across European borders. This growth comes after stagnation and a decrease of foods' prices during last 30 years.

Recent statistical data evident a decline of the goods' prices comparing with the beginning of 2008.

One of the structural causes which determined the foods prices' growth was a great growth of the demand for base foods and for foods with a high level of technology especially in the big emergent economies.

Other causes of the same phenomena are the general growth of world population and global climatic changes.

On the other hand, the costs of the energy grew up and they influenced goods' prices. The price of nitric fertilizers, for example, grew with 350% during 1999-2008. The costs of transport grew too.

The global agricultural output reduced with direct impact on agricultural stocks. This evolution is supported by dollar depreciation and by export restrictions in a lot of countries which are traditional suppliers on world agricultural market.

Speculations amplified agricultural prices' volatility.

Prices' growth for basic agricultural goods determined the growth of inflation across E.U.27. A short period, the effects of prices' growth were limited

by the Euro's appreciation, by decreasing of the rare materials percentage into production costs and by the relative little percentage of foods expenditures in total expenditures of the ménages.

But the impact was great in some Member States especially on those families with low revenues. On the other hand, the vegetal farmers obtained advantages from agricultural prices' growth, but animal farmers reduced their revenues.

Actual strategy of the European Commission is based on three components:

- on short-time: evaluation of "health situation" of CAP and monitoring trade in order to review common market according with principles of loyal competition;
- on long-term: improvement of agricultural supply, insurance of food security, development of agricultural researches and knowledge's' dissemination especially in developing countries;
- a better international reaction to the foods crisis under U.N.O. and G8.; promoting a free trade policy and offering a preferential regime to poorest countries on European market; greater financial support for long term project in developing countries in order to develop their agriculture.

In June 2008, Brussels Summit discussed about Lisbon Treaty and the growth of foods and combustibles' prices. The European farmers ask Brussels' authorities measures which are able to stop foods prices' growth and to adapt European agricultural policy to present conditions, in order to develop agricultural output and to cover global foods demand.

Maybe, the European subvention system contributed to present crisis because it stimulates uncultivated lands and the decrease of agricultural output. U.K., for example, wishes a specific payment for every hectare and a using of the lands according with markets changes.

France, which has E.U.27's presidency still July 2008, considers that CAP has to be changed. French politicians consider that E.U. has to pay a specific payment for every tone of cereals output.

Belgian farmers protested against the growth of the energy and rare materials prices in June 2008, in order to obtain greater sale prices for agricultural output.

At international level, at the Roma Summit of F.A.O. (5th of June 2008), some countries asked for abandon of CAP because it causes poverty. E.U.27 doesn't agree this proposal but it is favourable to a growth of agricultural output.

On the other hand, FAO's forecasts talk about a 100% growth of global foods demand for the next 30 years.

Even that all FAO's member states agreed the necessity of growing agricultural output, there are more disparities connected with the practical methods for this growth. U.S.A., for example, proposes genetic modified organisms, but E.U.27 doesn't wish such a way.

As a final conclusion, we consider that CAP has to be able to adapt to the new global challenges, to monitor active this situation and to change its strategy as often as it is necessary.

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CURRENT REGIONAL PROGRAMS IN ROMANIA

Abstract

The essential problem for Romania after it's adhering to the E.U. is to support a sustainable socio-economic development at regional level in order to decrease disparities between it and E.U.'s average.

As a result, Romania will benefit by European Structural and Cohesion Funds only if it will be able to have a great absorption capacity.

Romanian legislation has the same direction with European legislation, but there are some difficulties yet.

After it's adhering to the E.U., the only way for Romania is to correlate national policy with European policy, in order to adapt our country to socio-economic and competitive conditions from the European Structures.

During 2007-2013, Romania will receive 19.67 billions Euros from European Structural Funds. 98% of this money will be allocated to seven Operational Programs under Convergence objective in order to reduce socio-economic disparities between European regions.

The last 2% will be allocated to six Operational Programs under Territorial Cooperation with neighbour countries.

Table 1: Operational Programs in Romania during 2007-2013 (bill. Euros)

Convergence Objective		
Operational Program (OP)	% of total budget	Management Authority of Operational Program (OP)
1. OP Transport	23	Ministry of Transports
2. OP Environment	23	Ministry of Environment and Human development
3. OP Regional	19	Ministry of Development, Public works and Houses
4. OP Human resources development	18	Ministry of Labour, Family and Chances equity

5. OP Economic efficiency growth	13	Ministry of Economy and Finance
6. OP Administrative capacity development	1	Ministry of Intern Affaires and Administrative reform
7. OP Technical assistance	1	Ministry of Economy and Finance
Territorial cooperation Objective		
Operational Program (OP)	% of total budget	Management Authority of Operational Program (OP)
8-13. OP Territorial cooperation	2	Ministry of Development, Public works and Houses

The Regional Operational Program (ROP) is one of Operational Programs which are agreed by the European Union and an important instrument for the implementation of national strategy and regional development policies.

This program is applying to all eight development regions from Romania.

The general objective of the Regional Operational Program consists in supporting and promoting economic and social local sustainable development in Romania's regions by improving infrastructure's conditions and business environment which are able to support economic growth.

As a result, Regional Operational Program is focused on decreasing socio-economic disparities between developed and less developed regions.

In Romania, Regional Operational Program is financed by European Regional Development Fund (ERDF). It supports European regions which have a GDP per capita less than 75% from E.U.'s average.

The whole budget for Regional Operational Program is about 4.4 billions Euros during 2007-2013. European financing represents about 84% from the whole budget for Regional Operational Program. The difference comes from national funds, public co financing (14%) and private co financing (2%).

The distribution of the funds is made according with priority axes of the Regional Operational Program. Every priority axe uses a specific budget and it has a number of essential areas of implication which follow specific development objectives.

The general objective of Regional Operational Program consists in supporting and promoting a socio-economic equilibrate development for all Romanian regions using improvement of infrastructure and business

environment which support economic growth especially in less developed regions.

The Regional Operational Program has specific objectives too, as the following:

- improving of the general attractively and accessibility for Romanian regions;
- growing of regions' competitively as business locations;
- growing contribution of the tourism to regional development;
- growing of the socio-economic role of the urban locations.

The Regional Operational Program covers six priority areas, named priority axes. Every priority axe is divided into specific sections named key intervention domains.

The Priority Axe no.1 is connected with supporting sustainable development of the cities like urban poles of growth. This axe refers to the following:

- integrate plans of urban development;
- urban infrastructure rehabilitee and improvement of urban services, including urban public transport;
- development of a sustainable business environment;
- social structure rehabilitee, including social dwellings and social services improvement.

The second Priority Axe deals with improvement of regional and local transport infrastructure using rehabilitation and modernization of county roads and urban streets. It includes building or rehabilitation of belt highroad too.

The Priority Axe no.3 is focused on social infrastructure improvement and it is divided into following actions:

- rehabilitation, modernization and outfitting of health infrastructure services;
- rehabilitation, modernization, outfitting and development of social infrastructure services;
- improvement of endowing with equipments for operational basis during emergency situations;
- rehabilitation, modernization, outfitting and development learning infrastructure in order to support continues learning process.

The forth Priority Axe is connected with supporting local and regional business environment development. It is focused on:

- sustainable development of business support's structures;

- rehabilitation of pollutant and unused industrial centres and preparing them for new activities;
- supporting of micro firms' development.

The Priority Axe no. 5 is connected with sustainable development and tourism's promotion and it is divided into some specific objectives like these:

- restoration and sustainable valorisation of cultural patrimony, creating and modernization of colligate infrastructures;
- creating, development and modernization of specific infrastructures for sustainable valorisation of natural resources with tourist potential;
- valorisation of tourist potential and creating of necessary infrastructure in order to grow the attractively of Romania as a touristic destination.

The last Priority Axe represents technical assistance in order to:

- support the implementation, management and evaluation of the Regional Operational Program;
- support the publicity and information connected with the Regional Operational Program.

The National Developing Plan (NDP) represents a specific concept of the socio-economic cohesion policy in the E.U. in order to offer o coherent and stabile framework about Member States' development. This framework is translating into development priorities, programs and projects according with programming principle of the structural funds.

After Romania's adhering to the E.U., the National Developing Plan has a major role in lining up national development policy to European development priorities using incentives for socio-economic sustainable development at European level.

The National Developing Plan 2007-2013 represents the document of strategic planning and multiyear financial program approved by the Romanian government. This document was made under a large partnership and it is able to orient socio-economic development in Romania in according with the European Cohesion Policy.

The National Developing Plan is an instrument for public investments' priorities of development in order to cover the compatible priorities and objectives of the European Structural and Cohesion Funds.

As a result, the National Developing Plan isn't a national strategy for economic development, but it becomes one of the main components of this strategy. The National Developing Plan fundaments priorities and strategic

objectives negotiated with the European Commission for financing using Structural and Cohesion Funds during 2007-2013.

The National Developing Plan is the main document which supports National Strategic Reference Framework during 2007-2013. This framework represents the strategy approved and elaborated together with the European Commission in order to use structural instruments and operational programs.

As a result, the drafting of the National Developing Plan was made in the same time with the drafting of Operational Programs. This process ensured the compatibility between these documents.

The elaboration of the National Developing Plan was made under Government Regulation HG no.1115/2004, which established methodological principles, the institutional framework and partnership consulting mechanisms.

The development strategy from the National Developing Plan represents a reflection of the development needs for Romania in order to decrease as quickly as is possible the disparities between our country and E.U.

This strategy is based on European strategic orientations connected with cohesion, on the priorities of Lisbon Agenda and Goteborg in order to obtain the growth of efficiency, better conditions for labour and sustainable environment protection.

In 2004, Romania had only 31% from the average European GDP per capita. As a result, the global objective of the National Developing Plan 2007-2013 was established as the decreasing socio-economic disparities between Romania and E.U.'s Member States.

Until 2013, Romania would recover about 10% from its general lag comparing with E.U.'s average.

The global objective is supported by three specific objectives:

- long term efficiency growth in Romanian economy;
- basic infrastructure development at European standards;
- improvement and efficient using of Romanian human capital.

In order to achieve the global and specific objectives, there were defined six national development priorities during 2007-2013:

- economic efficiency growth and knowledge economy development;
- transport infrastructure development and modernization;
- environment quality protection and improvement;
- human resources development, labour and social inclusion promotion and administrative capacity growing;
- development of rural economy and growth of agricultural efficiency;

- decreasing development disparities between Romanian regions.

In order to ensure the resources concentration on realising those objective and measures with maximum impact on decreasing internal disparities and between Romania and E.U., it's necessary establishing of a limited number of priorities.

On the other hand, inside these priorities are influenced a lot of specific interventionist domains and sectors such as: education, health, energy, communications, IT and natural risks' prevent.

The regional policy in Romania and the ability of accessing European Funds depend on Lisbon Treaty signed on 13th of December 2007. This treaty modifies the Treaty of European Community and the Treaty of European Union because it accords juridical personality to E.U., analysis the possibility of a Member State to take back from the E.U., sets up the function of President of the European Council, grows the role of the European Parliament and of the national parliaments too.

The Lisbon Treaty has a solidarity clause between Member States about terrorism, human and natural catastrophes and difficulties in energetic sector.

On the other hand, the functional dysfunctions and regional disparities are still great in Romania. Regions have unequal development and the development rate is more different between urban and rural centres. The absorption of Structural Funds is too little, the transport infrastructure is not adequate and basic infrastructure grows up in a minimal rhythm.

More, Romanian companies have just a little success on European markets as a result of European competition, of excessive taxes and law instability. Foreign companies which operate in Romania criticise law, institutional and taxes instability which don't allow them to realise long term strategic development plans.

Even that European Regional Programs have pluses and minuses, they try to solve existing problems or potential future problems too.

After it's adhering to the E.U., the only way for Romania is to correlate national policy with European policy, in order to adapt our country to socio-economic and competitive conditions from the European Structures.

Romania made important progresses, but it had failures too, especially connected with absorption capacity and business environment conditions.

Romania needs an efficient and sustainable socio-economic development. It is the only way for real progress.

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Viorel DAGHIE

CONSIDERATIONS GENERALES SUR LA JUSTICE

Résumé

Dans une société démocratique, la justice a une tâche spéciale, totalement différente, parce que son rôle n'est pas de distribuer la justice, mais, par son propre activité, de ne pas créer des injustices.

De cette perspective il est à observer que l'activité judiciaire porte en soi-même le risque que, par une utilisation abusive ou négligence de son pouvoir, l'instance judiciaire puisse léser le droit et les intérêts des justiciables, autrement dit ajouter aux injustices réclamées par eux une injustice en plus, commise par la justice. La minimalisation d'un tel risque n'est pas possible que dans les conditions de respect par la justice des quelques règles d'équité qui constituent en même nombre de garanties de défense du droit fondamental de toute personne de bénéficier d'un jugement juste et équitable.

« Justitia domina et regina omnium virtutum» (La justice et la maîtresse et la reine des toutes les vertus) – cette appréciation a le rôle de souligner dès le début la place de la justice dans la société. Donc, la justice est une vertu, un sentiment d'équité. En fait, de plusieurs fois, ces deux notions, justice – équité, sont utilisées ensemble : « Justitiam colimus aequum ab iniquo separantes, licitum, ab ilicito discernentes » (On cultive la justice lorsqu'on sépare l'équité de l'iniquité, lorsqu'on distingue le licite de l'illicite).

De même, la notion de justice et d'équité interfère avec celle de raison et droit. Ainsi, Protagoras est-il connu comme l'auteur d'un mythe original et significatif de l'origine de la société humaine, en divisant ce procès en trois étapes. La première est un état naturel dans lequel, grâce à Prometeu, qui a amené le feu du royaume des dieux, l'homme a été capable de construire des maisons, de confectionner des vêtements, de pratiquer l'agriculture etc. Dans la deuxième période, les hommes ont cherché de se grouper dans les

agglomérations urbaines. Ne connaissant pas l'art politique, les gens ne se comprenaient pas les uns avec les autres, se haïssaient en recommençant de se disperser et de disparaître. Zeus, inquiet par le destin de l'espèce humaine, a envoyé aux hommes, par Hermes, quelques vertus indispensables pour qu'ils puissent vivre en harmonie. Ces qualités données à l'humanité ont été : le respect ou la pudeur, la solidarité ou la justice, interprétées aussi par le mot droit.

Un autre philosophe, Chrysipp (l'un des premiers stoïcien), en admirant la loi comme « la reine des toutes les choses divines et humaines », « l'arbitre du bien et du mal » et « de la justice et de l'injustice », exprimait son opinion « qu'il n'est pas possible de trouver un autre principe de la justice que Jupiter ou la nature primaire ou universelle.

L'homme ne doit seulement dire que la justice est placée à la droite de Jupiter, parce qu'il est en même temps le droit et la justice, il représente la plus antique et la plus parfaite loi ». Aussi, il y avait certaines discussions entre les sophistes et Socrate en ce qui concerne le caractère juste ou injuste des lois, en posant le problème si la justice et la loi sont identiques et se couvrent exactement. Quelques auteurs montrent que « le terme de justice, excepté tout contexte, est ambigu, même déroutant, les doutes et les malentendus regardant ses sens étant nombreuses et notables. Est la justice un équivalent du droit ou un élément distinct et supérieur par rapport au droit ? La justice, sous un certain aspect, consiste dans la conformation à une loi, quoiqu'on affirme que la loi doit être conforme avec la justice ». Cependant il reste établi que du point de vue pratique, le concept de justice est incertain et variable et a besoin des précisions pour le mettre en pratique, la loi ayant la mission de le transformer et de le fixer sur le terrain de l'applicabilité immédiate, bénéficiant des vertus directrices de la justice comme valeur. « La loi est en réalité destinée d'assurer l'ordre juridique dans une société donnée ; sont but est ainsi la justice, c'est-a dire la réglementation équitable, au moyen raisonnable et fortuit, parce que « pour qu'une règle de droit positive qui aspire à gouverner les sociétés humaines il est nécessaire qu'elle soit conforme avec un certain idéal de justice, autrement elle ne sera ni respectable ni respectée si elle rejette trop cet idéal. Ainsi, celui-ci, l'deal de justice, est une présence inhérente, structurale, en rapport avec la règle de droit définie comme une règle générale et abstract qui s'impose aux gens qui

vivent en société, dont le respect est assuré par la contrainte sociale et dont le contenu intérieur est une ordonnance au sens de l'idéal de justice, en fonction des situations qui répondent aux besoins des relations humaines, besoins variables après temps et espace ».

On a remarqué que dans des longues périodes de la vie des individus et des peuples, les deux notions, le droit et la justice, ont apparu comme réduites à une seule et on a considéré qu'il est juste tout ce qui est établi. En ce sens, Socrate, en « Criton », dérive l'obligation d'écouter les lois, même quand ceci sont dures ou injustes, de la liaison naturelle et quasi contractuelle qui unie un citoyen de sa patrie. Relatif à cette idée, Giorgio del Vecchio soulignait que « jamais un tel sujet n'a été-il développé avec une telle sublime simplicité ». Les gens sont réceptifs, passionnés en ce qui concerne la justice et dans leur cœur n'accepteront jamais un divorce entre ce qu'il est juste et ce qu'il est juridique. Mais la justice ne se confonde pas avec la juridicité. Le caractère idéal de la justice peut cependant expliquer l'antithèse justice – droit. Il est possible que des dates de l'expérience juridique entrent en conflit avec l'exigence absolue de la justice que la conscience ne peut toucher ailleurs que dans soi-même. D'ici résulte la classique distinction entre le droit en sens restreint (le juste positif ou légal) et le juste absolu ou idéal qui constitue le droit naturel ; d'ici résulte aussi la possibilité d'une loi injuste (le droit injuste).

Certains auteurs disent que les lois injustes sont des lois qui blessent le sentiment de la justice. Les moralistes et les théologiens ont élaboré la théorie d'une résistance légitime à ce type des lois. Premièrement il ya une résistance naturellement passive par laquelle le sujet se limite à ne s'obéir pas à la loi. Et puis, une résistance défensive, par laquelle le sujet se défense contre les mesures prises contre lui par les autorités. Finalement il apparait une résistance active par laquelle le sujet, seul ou avec les autres, passera à l'attaque pour obtenir soit l'annulation de la loi soit la démission du gouvernement.

La justice s'annonce comme valable par sa propre autorité et là où les déterminations du système en vigueur contrastent irréparablement avec les exigences élémentaires de la justice, exigences qui sont elles-mêmes la raison de la vie de ce système-là et qui impérieusement renaissent des consciences. La justice est donc valable contre d'un système positif en vigueur, ce qui John Locke

dénomme « la lutte contre les lois écrites au nom de celles non-écrites ». Si la lutte pour la raison passe l'ordre établie, cela ne doit pas signifier un simple arbitraire, mais le respect pour une loi plus haute, plus sévère. Qui dit justice dit subordination à une hiérarchie de valeurs et rien n'est plus contraire à ce principe que le déplacement arbitraire des limites qui sépare le bien de mal, le mérite de ne mérite.

La réalisation de la mission du juriste dans la lutte pour la justice implique la réunion de la rationalité avec l'impérativité, la moralité avec la contrainte, la force spirituelle avec l'attitude intransigeante, toutes sous le signe zodiacal du caractère humain. Parce que, tel comme le professeur E. Speranţia soulignait, en plus de la formation scientifique, l'intelligence aigue, probité et impartialité, celui qui applique la loi doit porter un grand amour pour les gens, un chaud enthousiasme pour la justice et une claire connaissance du rôle qu'il a parmi les gens. « Si l'amour des gens est doublé par le sentiment vif de son propre responsabilité et par celui de la justice, sa clémence jamais va glisser dans une faiblesse indulgente qui soutient les violations de loi. Si le sentiment de la propre responsabilité et de la justice rigoureuse est retouché, mis au point par un grand amour pour les gens et par une subtile compréhension pour l'âme humain, jamais le juge ne frappera avec trop sévérité là où la correction et le rétablissement sont possibles, jamais ne laissera-t-il triompher le mal ou la perfidie habillés de formes légales ». En outre, le professeur E. Speranţia finissait son cours en 1946 « Introduction dans la philosophie du droit » en soulignant la haute mission de la justice, mais aussi l'idéalité qui élève l'homme : « La justice vient de dehors, du haut, est de la même nature et provenance avec le Verbe qui a créé le Monde. L'amour est force élémentaire de justice. C'est pourquoi, au lieu de la balance du magasin, l'emblème la plus éloquente de la justice serait un cœur ailé, en vol sur le ciel plein d'étoiles ».

Le droit évolue sous la pression du passé et celle de l'organisation présente de la société. Il tend vers la forme de l'idéal de justice que chaque société crée à son propre style. En ce sens, Gaston Jeze écrivait : « La justice est ce que les hommes, d'une époque, dans un pays donné, croient juste ». Aussi, M. Djuvara montrait que « du point de vue psychologique… chaque société conçoit en chaque moment dans une certaine manière la justice, qui….apparait comme une

généralisation, un résidu logique de l'observation des tous les cas concrets et des fais de la société respective »

Dans les sociétés primitives l'idéal de justice est réalisé non seulement par des formes avec caractère juridique, mais aussi avec un caractère moral et religieux. C'est pourquoi les lois primitives comprissent des dispositions des ces trois domaines sans faire un discernement entre eux. Mais, peu à peu, ces éléments commencent à se différentier entre eux ; la conscience collective et les institutions de ce temps-là font une distinction entre le droit, d'un côté et religion et morale d'un autre côté.

L'apparition du droit, aussi la formation de l'état, constituent une nécessité historique, un progrès réel, parce que dans la société scindée en classes antagoniques, le maintien de l'ordre ne pouvait plus être assuré avec le système des règles des communautés gentilices-tribales et on imposait la stabilité d'autres règles qui consacrent les réalités sociales existantes. « Le droit est un des plus profonds concernes de la civilisation de l'homme parce qu'il offre protection contre la tyrannie et l'anarchie, il est un des instruments principaux de la société pour la conservation de la liberté et de l'ordre, contre le mélange arbitraire dans les intérêts individuels ».

Ainsi, l'existence d'un droit positif, idéal dans ses tendances et réaliste dans son application de tous les jours, assurant un maximum de liberté est cependant compatible avec l'exercice d'un pouvoir supérieur, de l'Etat, justifiée par l'idée de garantie et protection, par force collective, du bon fonctionnement de l'organisme social. La justice tient avec une main la balance de la justice et avec l'autre le sabre avec lequel il le défend ; « le sabre sans balance est pure violence…la balance sans sabre est l'impuissance du droit…l'une ne marche pas sans l'autre ». L'Etat a donc la mission difficile d'organiser et faire respecter l'ordre sociale par l'appareil judiciaire et la force de laquelle il dispose et par laquelle il accomplit les faits décidés par la justice. On fait ainsi le contour d'un autre sens donné à la notion de justice. En ce sens plus restreint, par justice on comprend l'ensemble des institutions par l'intermède desquelles la fonction judiciaire peut s'exercer : les instances, les magistrats, les auxiliaires de la justice. Définie dans cette manière, la justice s'identifie avec l'appareil administratif

devant lequel on trouve le Ministère de la Justice. De cette perspective, la justice est un service public de l'Etat.

Aussi fait on le contour d'un sens plus technique, conformément auquel la justice est une fonction, la fonction de juger, de prononcer le droit à l'occasion d'une contestation. En ce sens on dit que le juge distribue la justice. Tellement comprise, la justice est une prérogative souveraine qui, dans la société moderne, appartient à l'Etat.

Le symbole de la justice, la déesse Themis, dans l'iconographie antique, a été représentée par la figure d'une femme sévère, portant dans une main une balance et dans l'autre un sabre, et de plusieurs fois, liée aux yeux. Ces symboles ont une signification remarquable : la balance et l'écharpe qui couvre les yeux suggèrent la fonction essentielle du juge, celle de dire le droit (jurisdictio) en conditions d'indépendance et impartialité. En examinant les causes, le juge doit peser les droits et les intérêts du chaque partie sans tenir compte des considérations étrangères aux procès, quelles qu'elles soient.

Le sabre signifie l'exécution forcée (imperium). La décision sans exécution resterait une simple opinion des juges et donc l'idée de justice ne s'accomplirait en totalité. Donc, le juge n'a pas seulement jurisdictio, mais aussi imperium, c'est-à-dire le pouvoir d'exécution forcée, exprimée dans la formule exécutoire. Le pouvoir d'Etat fait partie de l'essence de la décision, faisant la différence entre le juge et l'arbitre, ce dernier-ci étant également justifié, dans les conditions de la loi, de résoudre certains litiges, sans pouvoir ordonner l'exécution forcée.

Dans la littérature juridique on montre qu'excepté les entendus d' « organisation judiciaire » ou de « fonction judiciaire » (justice distributive), le mot justice exprime une permanente préoccupation pour quelque chose plus haut et plus pur (justice commutative). C'est-à-dire, la justice est l'idéal intangible du droit, la dernière et la plus haute expression du droit. Elle exprime encore en ce sens deux attributs essentiels : celui d'égalité et celui de généralité. En le même sens, on a affirmé que l'idée de justice suppose égalité rationnelle des quelques personnes libres, limitées dans leur activité seulement par des droits et des dettes, aussi comme la possibilité de la généralisation, donc l'égalité de toutes les personnes sans aucune faveur spéciale pour aucune, égalité au plus achevée qui ne s'obtient pas que par une étude le plus détaillée des situations de fait, dans les

limites des droits et des dettes. L'idée de droit comprend en soi l'idée d'équité, c'est-à-dire l'appréciation juste, du point de vue juridique, du chaque cas.

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PRIX DE TRANSFER ET L'ACCORD DE PRIX À L'AVANCE DANS LA LÉGISLATION FISCALE ROUMAINE

Résumé

Dans cette étude, nous analyserons d'une part, la définition du prix de transfert, la définition des personnes affiliées, les méthodes d'estimation pour les transactions qui ont lieu entre les personnes affiliées (à l'intérieur de l'entreprise) ainsi qu'on les retrouve dans Le Code fiscal roumain.

D'autre part, on présentera et commentera les dispositions de date récente concernant l'accord de prix en avance comme acte administratif fiscal émis par le M.E.F. (Le Ministère de l'Economie et des Finances). Cet acte doit solutionner la demande d'un contribuable visant les conditions et les modalités par lesquelles les prix de transfert seront déterminés dans le cas des transactions qui seront effectuées entre les personnes affiliées conformément au Code roumain de procédure fiscale.

Mots clés
accord de prix à l'avance, personne affiliée, Code Fiscal, Code de procédure fiscale

Considérations introductives

Sur le plan international on a enregistré de nombreuses tentatives de définir le prix de transfert, ainsi que sa réglementation dû au fait que dans le cadre des transactions commerciales intra-compagnies (ou bien entre personnes affiliées), les groupes multinationaux manipulent leurs profits de sorte à minimiser leurs obligations fiscales.

Les normes internationales relatives au prix de transfert élaborées par l'Organisation de Coopération et Développement Économiques (O.C.D.E.) (*Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, Paris, le 13 juillet 1995) s'inscrivent dans ces efforts.

Afin de régler les problèmes posés par le prix de transfert, au niveau de l'UE il y a eu les propositions suivantes :

- application de la Directive 90/436/CEE contenant la Convention sur l'évitement de la double imposition en ce qui concerne l'ajustement des profits des entreprises associées (personnes affiliées) dénommée brièvement la Convention d'Arbitrage (Publiée au J.O.C.E., no. 225 du 20 août 1990);

- un forum européen des prix de transfert pour identifier les principaux problèmes et suggérer des solutions applicables à tout l'espace de l'UE;
- possibilités d'harmonisation des documents justificatifs;
- en ce sens il sera adopté un Code d'élaboration des documents justificatifs relatifs au prix de transfert (Code of Conduct on transfer pricing documentation) .

Dans le droit roumain le problème des prix utilisés entre entreprises affiliées est réglementé par le Code fiscal et les Normes méthodologiques d'application du Code fiscal (il s'agit de l'article 11 de la Loi no. 571/2003 sur le Code fiscal, détaillé dans les Normes méthodologiques de mise en œuvre de la Loi 571/2003, approuvées par la Décision du gouvernement no. 1840 du 28 octobre 2004, publiée au Journal Officiel no. 1074 du 18 novembre 2004) et également par le Code de procédure fiscale concernant l'accord de prix à l'avance (il s'agit de l'article 42 du Code de procédure fiscale dont le contenu a été modifiée par la Loi no. 166/2006 sur l'approbation de l' Ordonnance d'urgence no. 129/2006 concernant la modification et le complément de l'Ordonnance du Gouvernement no. 92/2003 relative au Code de procédure fiscale, publiée au Journal Officiel no. 436 du 19 mai 2006).

Pour comprendre l'utilité de la réglementation établie par l'article 42 du Code de procédure fiscale (C.pr.fisc) sur l'accord de prix à l'avance, cette étude analysera les aspects suivants: le prix de transfert (section 2), l'institution de l'accord de prix à l'avance (section 3).

Les commentaires et les propositions de *lege-ferenda* se retrouvent dans la section finale intitulée conclusions.

Prix de transfert (transfer pricing)

Transfer pricing est un terme utilisé pour décrire tous les aspects relatifs aux transactions de matière imposable entre personnes affiliées (intégrées au même groupe de sociétés commerciales), transactions réalisées à travers la sous-évaluation des prix à la vente ou la surévaluation des prix d'achat. Plus précisément, transfer pricing est l'opération par laquelle les personnes affiliées fixent le prix d'une transaction réciproque de biens et de services .

Réglementation de l'O.C.D.E.

Les normes internationales en matière de prix de transfert, établies par l' O.C.D.E., prévoient trois conditions qu'une transaction doit accomplir pour relever de l'incidence de la réglementation sur le prix de transfert, à savoir:
- existence d'une transaction transfrontalière;
- transaction entre deux personnes affiliées;
- transaction ayant pour objet un bien, un service ou tout bien à valeur économique.

Ces conditions sont incluses à l'article 9 de la Convention modèle O.C.D.E. pour éviter la double imposition sous la dénomination d'entreprises associées.

Le principe unanimement reconnu guidant ces réglementations impose que toutes les transactions entre entreprises affiliées (faisant partie du même groupe, contrôlées directement ou indirectement par les mêmes personnes) soient conclues à un prix réel de marché, prix auquel la même transaction aurait été réalisée entre entités indépendantes. Ce principe international accepté par les pays membres de l'O.C.D.E. et aussi par d'autres pays pour déterminer le prix de transfert est le principe de la longueur du bras (arm's length principle). Celui-ci est énoncé à l'article 9 premier paragraphe de la Convention modèle O.C.D.E. (Ioan Condor, 1999) et il prévoit que lorsque deux entreprises sont liées dans leurs relations commerciales ou financières par des conditions acceptées ou imposées, différentes de celles qui auraient été établies entre entreprises indépendantes, les bénéfices qui dans l'absence de ces conditions-là auraient été obtenues par l'une des entreprises mais qui n'ont pas été obtenus à cause de ces conditions peuvent être inclus dans les bénéfices de l'entreprise et par conséquent soumis à l'imposition.

Bien que énoncé dans la Convention modèle, le principe de la longueur du bras est largement développé dans les Directives sur le prix de transfert entre entreprises multinationales et administrations fiscales (Directives de l'O.C.D.E.).

Le principe de la longueur du bras s'appuie sur l'hypothèse que dans les transactions non-contrôlées (c'est-à-dire entre entreprises indépendantes), les forces du marché sont celles qui modèlent les conditions et les termes de la transaction reflétant le prix correct.

Dans les transactions contrôlées (c'est-à-dire entre personnes affiliées), le contrôle exercé en raison du titre de propriété (par exemple une société-mère ayant en propriété le patrimoine de la société succursale) este celui qui dicte le prix. Le principe de la longueur du bras cherche à éliminer l'effet de la propriété sur le prix obligeant les parties à transactionner en tant que parties indépendantes

se trouvant à longueur de bras l'une par rapport à l'autre et non pas en tant que personnes rapprochées (affiliées). Les transactions non-contrôlées deviennent ainsi une référence pour celles qui sont contrôlées puisque le processus de négociation des conditions de la transaction reflètera l'apport et les droits de chaque partie aux bénéfices obtenus de l'opération close, droits valorisées plus tard du prix.

Quoique le principe de la longueur du bras soit unanimement accepté, son acceptation en pratique est difficile vu que des transactions identiques ou des situations similaires sont difficiles à identifier sur le marché libre.

Il est à remarquer que les directives de l'O.C.D.E. attirent l'attention sur le fait que le phénomène du prix de transfert ne doit pas être confondu avec la fraude fiscale même si l'un et l'autre suivent les mêmes buts. Voici pourquoi l'O.C.D.E. ne recommande pas de sanction pénale pour la pratique du prix de transfert mais un nouveau calcul des prix pratiqués et une imposition des bénéfices obtenus.

Réglementation roumaine

Tant dans le Code fiscal que dans le C.pr.fisc., le législateur roumain, lorsqu'il fait référence au prix de transfert il prévoit que dans le cadre d'une transaction entre personnes affiliées il faut déterminer et refléter le prix de marché de la transaction respective. En ce sens, le Code fiscal requiert à l'article 11 paragraphe 2 que dans le cadre d'une transaction entre personnes affiliées les autorités fiscales peuvent ajuster le montant du revenu ou de la dépense de toute personne affiliée selon le cas pour refléter le prix de marché des biens ou des services fournis au sein de la transaction. Étant défini comme le montant à payer par un client indépendant à un fournisseur indépendant au même moment et au même lieu pour le même bien ou service ou quelque chose de similaire dans des conditions de concurrence loyale (Selon l'article 7 paragraphe 1 point 26 du Code fiscal),on peut affirmer que le prix de marché ainsi défini est une valeur juste (Selon l'Ordre no. 1752/2005 pour l'approbation des règles comptables suivant les directives européennes, ch. 2, sect. 7, point 53, la valeur juste est le montant contre lequel un actif pourrait être changé volontairement entre parties en connaissance de cause dans le cadre d'une transaction à un prix fixé objectivement), correcte, déterminée objectivement dans le cadre des transactions entre personnes affiliées.

Dans le droit roumain la réglementation du principe de la longueur du bras se retrouve à l'article 19 paragraphe 5 du Code fiscal (le paragraphe 5 de l'article 19 a été introduit dans le Code fiscal par l'Ordonnance 83/2004 pour

modifier et compléter la Loi no. 517/2003 sur le Code fiscal, publiée au Journal Officiel no. 793 du 23 août 2004)selon lequel : Les transactions entre personnes affiliées sont réalisées conformément au principe du prix de marché libre suivant lequel les transactions entre personnes affiliées s'effectuent dans des conditions établies ou imposées qui ne doivent pas différer des relations commerciales ou financières instaurées entre entreprises indépendantes. Quand on établit les bénéfices des personnes affiliées on prend en compte les principes régissant les prix de transfert.

Dans le cadre d'une transaction entre personnes affiliées les autorités fiscales suivent la réflexion du prix de marché et analysent également le contenu économique de la transaction concernée. De la sorte, conformément à l'article 11 paragraphe 1 du Code fiscal: Quand elles déterminent le montant d'un impôt ou d'une taxe aux fins du présent code, les autorités fiscales peuvent ne pas prendre en considération une transaction n'ayant pas de but économique ou bien elles peuvent ré encadrer la forme d'une transaction pour relever le contenu économique de la transaction.

Pour l'application correcte des méthodes d'estimation du prix de transfert, l'inspecteur fiscal doit tout d'abord comprendre le mécanisme économique de la transaction, les fins mécanismes de la formation des prix, les mécanismes économiques du fonctionnement des sociétés multinationales qui diffèrent des mécanismes nationaux. Également, à travers l'approche économique de la transaction on fera une analyse des risques assumés par les participants à la transaction parce que les bénéfices à obtenir doivent correspondre aux risques engagés .

Le Code fiscal roumain régit toutes les cinq méthodes de détermination du prix de transfert proposées par les directives de l'O.C.D.E.

Le législateur roumain a repris toujours des normes internationales du prix de transfert le caractère transnational des transactions dans les Normes méthodologiques d'application du Code fiscal modifiées par la Décision du gouvernement no. 1840/2004 (publiée au Journal Officiel no.1074 du 18 novembre 2004).De cette manière, conformément au point 1 paragraphe 1 des Normes méthodologiques: Dans le cadre des transactions entre personnes morales affiliées roumaines on ne reconstitue pas la comptabilité (par l'autorité fiscale).

Concernant ce que nous devons comprendre par personnes affiliées selon le droit roumain, les définitions nous sont présentées toujours dans le Code fiscal à l'article 7 point 21, modifié par l'Ordonnance 83/2004.

De cette façon, une personne est affiliée à une autre personne si la relation entre elles est définie au moins par l'un des cas suivants:
a) une personne physique est affiliée à une autre personne physique, si celles-ci sont des parents de 3e degré inclus;
b) une personne physique est affiliée à une personne morale si la personne physique détient directement ou indirectement y compris les avoirs des personnes affiliées minimum 25 % de la valeur/du nombre des titres de participation ou des droits de vote détenus par la personne morale ou si elle contrôle effectivement la personne morale;
c) une personne morale est affiliée à une autre personne morale si au moins:
i) la première personne morale détient directement ou indirectement y compris les avoirs des personnes affiliées minimum 25% de la valeur/du nombre des titres de participation ou des droits de vote de l'autre personne morale;
ii) la deuxième personne morale détient directement ou indirectement y compris les avoirs des personnes affiliées minimum 25 % de la valeur/du nombre des titres de participation ou des droits de vote de la première personne morale;
iii) une tierce personne morale détient directement ou indirectement y compris les avoirs des personnes affiliées minimum 25 % de la valeur/du nombre des titres de participation ou des droits de vote aussi bien pour la première personne morale que pour la deuxième.

Nous remarquons que dans le Code fiscal il n'existe pas de définition de ce que représente le contrôle direct ou indirect. Le C.pr.fisc. comprend des dispositions sur ces notions, que nous jugeons pourtant imprécises, pouvant donner lieu à des interprétations contradictoires .

L'accord de prix à l'avance dans le droit roumain

Conformément à l'article 42 paragraphe 2 du Code de procédure fiscale, l'accord de prix à l'avance est l'acte administratif émis par le Ministère de l ' Economie et Finances et approuvé par une décision du gouvernement afin de solutionner une demande du contribuable concernant l'établissement des conditions et des modalités déterminant au cours d'une période de temps fixe les prix de transfert dans le cas des transactions effectuées entre personnes affiliées telles que définies par la Loi 571/2003 sur le Code fiscal avec les modifications et compléments ultérieurs.

En ce qui concerne l'utilité de cette proposition nous jugeons que la réponse se trouve dans le contenu de l'article 42 paragraphe 3 du C.pr.fisc. Ainsi,

dans le cas où MEF, après avoir analysé la proposition du contribuable la jugera correcte, émettra un acte administratif qui sera approuvé par une décision du gouvernement, acte qui prendra la forme d'un accord de prix à l'avance, qui est opposable et obligatoire vis-à-vis des organes fiscaux à condition que les termes et les conditions contenus dans cet accord soient respectés par le contribuable.

En d'autres mots, étant donné qu'il s'agit d'une situation de fait future, si les inspecteurs fiscaux en contrôlant l'activité du contribuable constatent que celui-ci a changé de méthode de calcul ou bien que autres données ont été utilisées dans le calcul du prix de transfert contenues dans l'accord, ils peuvent ne pas prendre en compte cet accord-là et procéder à un nouveau calcul des prix pratiqués par le contribuable selon les Normes méthodologiques de mise en œuvre du Code fiscal analysées précédemment.

Du point de vue du contribuable, le résultat immédiat sera l'établissement de l'obligation fiscale supplémentaire après le nouveau calcul.

Pour éviter une telle situation, le contribuable aura l'intérêt non seulement de calculer correctement les prix de transfert dans la variante proposée au MEF mais surtout de respecter entièrement les termes et les conditions établis par l'accord de prix à l'avance justement pour pouvoir les opposer aux organes fiscaux donc aux inspecteurs fiscaux également. Et ceci même si pour la procédure d'émission de l'accord de prix à l'avance il devra payer un certain montant au MEF pour la consultation donnée .

Cadre légal

Même si la réglementation de l'accord de prix à l'avance est récente, c'est-à-dire la Loi no. 210/2005 (publiée au Journal Officiel, no. 580 du 5 juillet 2005), qui par l'approbation de l'Ordonnance du Gouvernement no. 20/2005 modifiant et complétant l'Ordonnance du Gouvernement no. 92/2003 sur le Code de procédure fiscale, la réglementation de la solution fiscale individuelle anticipée (SFIA) a été aussi modifiée en 2005 par l'Ordonnance du gouvernement 20/2005. Ces deux institutions juridiques sont maintenant contenues dans l'article 42 du Code de procédure fiscale.

Le texte de l'article 42 du Code de procédure fiscale a été modifié par la Loi no. 166/2006 (publiée au Journal Officiel, no. 436 du 19 mai 2006) concernant l'approbation de l'Ordonnance d'Urgence du Gouvernement no. 129/2005 pour modifier et compléter l'Ordonnance du Gouvernement no. 92/2003 concernant le C.pr.fisc.

L'accord de prix à l'avance et la S.F.I.A.

Pendant que la réglementation de l'accord de prix à l'avance est récente, les dispositions relatives à la SFIA ont été formulées exactement pendant l'étape de projet du C.pr.fisc. La SFIA a été consacrée par l'Ordre du MFP no. 1033/2004 sur l'institution de la Commission fiscale centrale (publié au Journal Officiel no. 677 du 28 juillet 2004). L'Ordre no.1033/2004 a été abrogé par l'Ordre no. 39/2005 sur l'institution et les responsabilités de la Commission fiscale centrale (publié au Journal Officiel no. 87 du 26 janvier 2005); toujours en 2004, la SFIA commence à être également régie par le Code fiscal respectif via l'Ordonnance d'Urgence no. 123/2004 (publiée au Journal Officiel no. 1154 du 7 décembre 2004) modifiant la Loi no. 571/2003 sur le Code fiscal, à travers lequel, suivant l'article 6 paragraphes 5-8, la SFIA est l'acte administratif fiscal émis par la Commission centrale fiscale afin de solutionner une demande du contribuable relative à la réglementation des futures situations fiscales.

À partir de l'année 2005, le sort de la SFIA est similaire à celle de l'accord de prix à l'avance; les deux sont régis par la Loi no. 210/2005, leur régime juridique étant modifié via l'Ordonnance d'Urgence du Gouvernement no.129/2005, approuvée avec des modifications et des compléments par la Loi no.166/2005.

Avant l'année 2005 était-il possible que le contribuable fasse une demande pour obtenir l'accord des organes fiscaux sur le calcul du prix de transfert, étant donné qu'à partir du 1er janvier 2004 (date de l'entrée en vigueur du Code fiscal et du C.pr.fisc.) seulement la SFIA était réglementée?

Nous jugeons que la réponse est affirmative et la solution communiquée au contribuable pourrait revêtir la forme d'une SFIA. Les arguments sur lesquels s'appuie notre opinion sont les suivants:

- les deux institutions envisagent effectivement des situations futures;
- les deux sont valables conditionnellement, le législateur précisant que la sanction pour la modification des termes ou des conditions prévus dans la SFIA, respectivement dans l'accord de prix à l'avance, est l'inopposabilité envers les organes fiscaux;
- à travers les modifications apportées à la Loi no. 166/2006 les deux passent des compétences de la Commission fiscale centrale aux compétences du MEF;
- les deux sont communiqués uniquement au contribuable (bien que l'approbation via la décision du gouvernement suscite des réserves sur la confidentialité de la communication);

- les deux ne sont plus valables si les dispositions de droit fiscal sont modifiées; les deux cessent d'être valables par l'Ordre du président de l'ANAF (Agence Nationale d'Administration Fiscale).

La question qui se pose est la suivante: si la SFIA et l'accord de prix à l'avance ont un régime juridique similaire après 2005, et précédemment nous admettions qu'on pouvait fournir des réponses pour les prix de transfert sous forme de SFIA, quelle est la raison pour laquelle les deux institutions sont réglementées distinctement? Autrement dit: la réglementation de l'accord de prix à l'avance était-elle nécessaire?

Conclusions

Nous considérons que la raison pour laquelle le prix de transfert requiert une réglementation distincte dans le C.pr.fisc. sous la forme de l'accord de prix à l'avance est l'importance même de l'institution transfer pricing.

En premier lieu, les sociétés multinationales façonnent de manière de plus en plus appuyée les modèles du commerce couvrant à peu près deux tiers du commerce mondial .

En second lieu, comme nous avons précisé au début de notre étude, l'O.C.D.E. a adopté des normes spéciales en matière de prix de transfert et dans le cadre de l'U.E. son évolution réclame une réglementation codifiée.

En troisième lieu, l'évolution du secteur privé en Roumanie attire les investissements des multinationales dans notre pays, la preuve étant l'attention accordée au transfer pricing (par exemple, Pricewaterhouse Coopers a élaboré le Guide International Transfer Pricing dès 1999-2000) par les compagnies de consultation; d'autre part, les Normes méthodologiques d'application du Code fiscal dédient un chapitre distinct aux méthodes de calcul du prix de transfert, les règles établies étant destinées à servir aux organes fiscaux qui seront responsables des dispositions de l'accord de prix à l'avance.

Nous pensons que, compte tenu de l'expansion du phénomène du prix de transfert et de ses conséquences sur les revenus de l'État, la législation roumaine en matière fiscale devra subir des améliorations en ce qui concerne les aspects suivants:

- inclusion du principe de la prévalence de l'économique sur le juridique non seulement dans les documents comptables mais aussi dans les documents fiscaux;
- corroboration de la définition des personnes affiliées du Code fiscal avec les définitions du contrôle direct et indirect du C.pr.fisc. ;

- précision des documents justificatifs à utiliser par les contribuables dans les Normes méthodologiques de mise en œuvre soit du Code fiscal soit du C.pr.fisc.;
- élaboration d'une procédure claire et transparente d'émission de la SFIA et de l'accord de prix à l'avance favorisant tant les activités des organes fiscaux que celles des contribuables.

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LEGAL ENGLISH. A COMPARISON OF BRITISH AND AMERICAN LEGAL SYSTEMS

Abstract

Each legal system has its own vocabulary. It is the translator's job to search for terms that often do not fully correspond to the meaning of the word in the source language, or which may not even exist in the target language. Nevertheless, using the appropriate word does not only depend on a good dictionary. It also depends on the translator's technical knowledge.

Key words: Legal English, American law terms, British law terms.

Introduction

A legal background contributes significantly to the translator's and interpreter's professional success, as such knowledge will be crucial for avoiding erroneous translations which have no equivalents in the Romanian system.

Each legal system has its own vocabulary. It is the translator's job to search for terms that often do not fully correspond to the meaning of the word in the source language, or which may not even exist in the target language. Nevertheless, using the appropriate word does not only depend on a good dictionary. It also depends on the translator's technical knowledge.

Backgrounds

We surely have seen movies and television programs depicting both American court trials as well as those in England and perhaps we tend to think of English courts as judges and barristers wearing wigs, such as in "Rumpole of the Bailey"[1] while we think of American courts as dominated either by Perry Mason[1]

[1] ***Rumpole of the Bailey*** is a British television series created and written by British writer and barrister Sir John Mortimer, QC and starring Leo McKern as Horace Rumpole, an

or Johnnie Cochran[2]. In U.S. law, there are lawyers who may call themselves "trial lawyers" - they could be defense attorneys, lawyers in civil cases, as well as prosecutors working for the government or state. In Britain, there are solicitors - who basically represent people's legal needs, and barristers who are the ones with the wigs, taking cases to civil or criminal courts. Defendants in both legal systems have the right to face their accusers and are presumed innocent until proven guilty (the Napoleonic Code is not quite that liberal about innocence or presumed guilt).

Yet, while there are many similarities between English Common Law and the American legal system, there are a number of major differences. It is not so much that, from the very outset, there was an American system and a British system, going back to the 1700s.

The development of English Common Law, on which much of Anglo-Saxon laws are based, is dim as to its actual historical origins, unlike the law in France, for example, which is most definitely based on the Napoleonic Code of 1803. What was (and still is) certain is that, in many cases, British common law is based on very strict precedents.

Great Britain does not have a Supreme Court, in other words, a totally separate entity of government. Instead, the House of Lords is the court of highest appeal. Unlike America's legal system which separates state from federal courts

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aging London barrister who defends any and all clients. It has been spun off into a series of short stories, novels, and radio programmes.

[1] **Perry Mason** is a fictional defense attorney who originally appeared in detective fiction by Erle Stanley Gardner. He appeared in over 80 novels and short stories, most of which involved his client being put on trial for murder. Typically, he was able to establish his client's innocence by demonstrating the guilt of another character.

[2] **Johnnie L. Cochran, Jr.** (October 2, 1937 – March 29, 2005) was an African American lawyer perhaps best known for his leadership in the legal defense of O. J. Simpson, charged with murder of his former wife Nicole Simpson and her friend Ronald Goldman. Cochran also represented Sean Combs (during his trial on gun and bribery charges), Michael Jackson, actor Todd Bridges, football player Jim Brown, rappers Tupac Shakur and Snoop Dogg, and Reginald Oliver Denny, the trucker beaten by a mob during the 1992 Los Angeles riots. Cochran was known for his skill in the courtroom and his prominence as an early advocate for victims of alleged police abuse.

(and legal systems including judges), Britain includes the lowest criminal courts, called Magistrate's Courts, which deal with minor offenses. When one says that the House of Lords is more or less the equal of The U.S. Supreme Court, it has to be stated that the House's judicial functions are quite separate from its legislative work.

It is also interesting to note that Scotland and Northern Ireland have different legal systems, separate from that of England and Wales. Whereas the U.S. has an Attorney-General in charge of the legal system in the Executive branch, and the Supreme Court and Federal courts serving in the balance of power structure of the U.S. Constitution, in Britain it is the Home Secretary. Under the U.S. Constitution, the President has pardon power, and some of that was clearly demonstrated in some of the Presidential pardons that were handed out shortly before Clinton left office. Some of these pardons, in American jurisprudence, are political, of course.

While so-called "colonial law" in the decades before the American colonies decided to become the United States of America had some major differences from the laws of the motherland, in fact varying from state to state.

Trial by jury is different, as well. In the U.S., there is a jury composed of one's peers, and the jurors are chosen, not by the court or by the prosecution or defense, but by a willingness to agree on who shall serve and who shall be eliminated (or excused). The jury is not chosen by the Crown, or the Queen's Counsel, or any government-affiliated entity in the U.S. However, the idea of what we now know as a "grand jury" was actually developed by Henry II in the twelfth century.

A Latin legal term, ***stare decisis*** - "to stand by things decided" is used in common law systems expressing the notion that, according to case law, prior court decisions must be recognized as precedent. Though the term is the same in both British English and American English, its application, as a rule of law, has little differences.

Application to the U.S. legal system: In the United States Supreme Court, the principle of stare decisis is most flexible in constitutional cases; the U.S. Supreme Court reversed itself in about 130 cases.

Application to the English legal system: The doctrine of binding precedent or stare decisis is central to the English legal system, and to the legal systems that derived from it. A precedent is a statement made of the law by a Judge in deciding a case. The doctrine, states that within the hierarchy of the English courts a decision by a higher court will be binding on lower courts. This means that when judges try cases they will check to see if similar cases have come before a court previously. If there was a precedent set by an equal or higher court, then a judge should follow that precedent. If there is a precedent set in a lower court, a judge does not have to follow it, but may consider it. The House of Lords however does not have to follow its own precedents.

British *vs.* American

George Bernard Shaw famously said that the British and the Americans were "two nations separated by a common language".

When the source text is in Romanian, and it is translated into English, it makes a difference whether the target text is directed to American or English culture, because the terms and institutions of different cultures using the same language may be different. For example, a **Prison** in the British System is a **Penitentiary** in the American system, while in Romanian they are both translation, **închisoare**, respectively **penitenciar**. A **Magistrate's Court** in the British legal system is **Civil Court of Peace** in the American legal system, and they are both translated as **Judecătorie** into Romanian.

There are some differences between legal English usage in the United States and England arising from various branches of law that need to be highlight.

Any **Act of Parliament** or statute begins life as draft called **Bill**. This is the case of United Kingdom, when speaking of primary legislation, as the predominant sources of law. But in American English an **Act** is a **Bill**, and a **Bill** is a **Draft of Bill or Proposal**. Thus, Romanian **Lege** is translated in English **Act** or **Bill**, while **proiect de lege - Bill** or **Draft/ Proposal**.

There are differences within the legal profession as well. A **Barrister** in British English is an **Advocate** in Scottish English and a **Trial lawyer** or **Appellate attorney** in American English. All these terms are translated in Romanian **avocat**.

When a company is incorporated, in England, it must adopt **Memorandum of Articles of Association**, also known as the "**Mem and Arts"**; the American term used instead is **Articles of Incorporation.** The **Articles of Association** set out the relationship between the company and its shareholders, while in American usage of Legal English they are called **Bylaws**.

Competition law regulates anti-competitive conduct that harms the market. In Great Britain, the Competition Act follows Article 81 and 82 of the European Community Treaty. In United States, the branch is called **antitrust law**. In Romanian the branch is named **dreptul concurenței**, but when referring to its legislative acts **legilslație antitrust** is frequently used. It also covers **abuse of dominant position**, other legal term that differs from the US legal use of English **- abuse of monopoly power** must be used when talking about the American antitrust law. When dealing with **anti-competitive practices and agreements** one should that the US legal term for it is **restraint of trade**.

Employment law usually involves a mixture of contractual provisions and legislation regulating the relationship between employer and employee, and governing **labour** relations between employers and **trade unions**. American spelling for **labour** is **labor**; **trade unions** in US are called **labor unions**.

A **compulsory purchase** in United Kingdom is an **eminent domain** in United States, while the Romanian term for it is more or less the same with the term Canadian common law uses for the inherent power of the state to seize, without the owner's consent, the citizen's private property **- expropriere**.

Conclusion

Legal systems differ from one state to another. Every state (sometimes even regions within a state) has developed independent legal terminologies, whereas a multilingual international legal terminology is being only gradually created within supranational legal systems.

There is no direct correlation between legal language and legal systems. One legal system may use different legal languages (Canada, Switzerland, bilingual areas in Slovenia, Austria, Italy, Belgium, etc.), while one language area may be divided into different legal systems, as is the case in the United Kingdom or in the USA.

If the legal systems are analyzed as to their sources, their historical background, the extent of codification and the specific legal institutes applied within them, some legal families show a greater relatedness than others. Within the Anglo-American legal family, common law is the legal system in force in England, Wales and with some differences in the USA, whereas Scotland and Ireland have substantially different legal systems related to the continental law, similarly to the legal system of Lousiana, which has its foundations in the French law.

As we have said before every legal system has its own vocabulary, thus we should draw our students' attention on producing parallel texts that are identical in their legal effect, selecting carefully terms that are proper to the target legal culture.

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Georgeta MODIGA

LA REFORME PARAMETRIQUE DU SYSTEME PUBLIQUE ROUMAINE DES RETRAITES - NECESITE; REALISATION ET LES CONSEQUENCES IMMEDIATES

Abstract

At the Revolution from 1989, in Romania performed a few socials assurances systems based on the financing conventional principle "pay-as-you-go". The level of the social security was induced by the existence of more independent systems intended for different kind of occupations or activity sectors. Along with the public system of socials assurances and that of the supplementary pensions, were functioning another systems thereupon were participating exclusive the tillers, the army and also different smaller systems for the art workers (writers, singers, artists, etc), those from the religion cults, workers who activated in the artisanal cooperatives and the lawyers.

Aboard the 90's, the Work and Social Protection Department was the one who administered the social assurances budgetm inclusively that of the supplementary pensions, of the tillers and the unemployment fund. These systems were offering socials assurances for the lost of the work capacity/cash incomes in case of disease, motherhood, work accidents, professional diseases, disability, aging, survival of husband/wife and unemployment.

The single difference was represented by the health fund which was administrated by the Health Department.Only in 2000 was adopted the Law no. 19/2000 through which was trying to for state social assurances system reformation. This law was coming into force begining with April 1,2001, including important provisions regarding the system's comprehension/coverage degree, as well as the ways of improving the collecting contributions system.

A le moment de la révolution du decembre 1989, dans la Roumanie fonctionnaient davantages systèmes d'assurances sociales basées sur le principe traditionnel de financement "pay-as-you-go".

Le niveau d'assurance sociale etait influencé par l'existence davantages systèmes indépendants destinés aux catégories différentes de métiers ou domaines d'activité.

En plus du système publique d'assurances sociales et celui destiné pour la retraite supplémentaire, on fonctionnaient encore autres systèmes à quoi participaient exclusivement les agriculteurs; les cadres d'armée, mais des autres

systèmes plus réduits comme dimension pour les travailleurs du domain d'arts (les écrivains, les musiciens, les acteurs, etc.), ceux du domain des cultes, les travailleurs qui agissaient dans les coopétatives artisanales et les avocats.Selon qu'on sait, la décadence économique dès années '90 a causé une réduction ample du nombre de contribuables. Evidemment; ce chose a conduit à une stabilité financière insuffisante.Donc, dans la période 1993-1998, les systèmes destinés aux artistes[1], aux ecclésiastiques et artisans ont été intégrés gradué dans le système publique d'assurances sociales.

Au fil de la décennie passé, le Ministère de Travail et de la Protection Sociale a été celui qui a administré le budget d'assurances sociales, y compris celui des retraites supplémentaires, aux agriculteurs, ainsi que le fond de chomage. Ces systèmes offraient d'assurances sociales pour la perte de la capacité de travail/du revenu en le cas de maladie, maternité, des accidents de travails, des maladies professionnelles, invalidité, vieillissement, survivance du mari/femme et du chomage. La seule exception était le fond de santé qui était aministré par le Ministère de la Santé.

A peine dans l'année 2000, a été adoptée la Loi no. 19/2000 par l'entremise de laquelle on a essayé la réformation du système d'assurances sociales d'état.Celle-ci a été entré en vigueur commençant de le 1 avril 2001, contenant des prévisions importantes au sujet du degré de l'entoure/ couverture du système, ainsi que des moyens d'amélioration du processus de la collecte de contributions.

Le système publique d'assurances sociales pendant les années '90

Le budget d'assurances sociales de l'état

Les droits d'assurances sociales pour les personnes affectées par maladie, maternité, des accidents de travails; des maladies professionnelles, invalidité, vieillissement, ainsi que pour

ceux qui survivaient au mari/femme étaient payés du budget publique d'assurances sociales. La création et la fonctionnement de ce budget se basaient sur l'existence des contrats individuels de travail et, implicitement sur le

payement des engageurs de les contributions d'assurances sociales[2]. Autrement dit, l'engageur était obligé/ responsable mensuellement de calculer et de faire le virement la contribution pour les assurances sociales.

La base du calcul pour la détermination de la valeur de contribution était répresentée par l'entier fond de rétributions. Une loi[3] adoptée en 1992 a introduit une différenciation dans le moyen de calcul de la contribution tenant compte du type des conditions de travail: ordinaires, dures et très dures. Donc, le poids de la contribution dans le revenu brut a varié beaucoup, de 14% tant qu'il a été en 1990, à 30%, 35%, respectivement 40% pour les trois groupes des conditions de travail en l'anéee 2000. D'autre part, en 1990, les personnes occupées sur leur propre compte, ont obtenus le droit de participer à ce système.. Leur contribution avait un caractère volontaire et, donc, la participation au système a été negligeable.

Il ne doit pas etre oublié que, jusqu'à l'année 1991, le budget publique d'assurances sociales était partie du budget d'état. A grand peine, en 1992, on s'a produit la séparation de ceux deux, conférant au budget d'assurances sociales un statut indépendant ensemble l'adoption de la Constitution de 1991. En 1995, pour le premièr fois, le budget d'assurances sociales a enregistré un déficit.

Le fond de retraites supplémentaires

Le fond de retraites supplémentaires donne des droits d'assurances sociales en le cas d'invalidité, vieillissement et la survivance de mari/femme. Tous les engagés qui participent au système publique d'assurances sociales devaient qu'ils payent en outre la contribution pour la retrait supplémentaire. Celle-ci représente 3% du revenu mensuel brut, inclusivement les prix et les bonnifications qui se retrouvent dans son contrat de travail. En 1999, la contribution a élevé à la valeur de 5 %. Les contribution étaient réservées par l'engageur et transmis dans une compte spécialement ouvert à CEC. Le Ministère de Travail et de la Protection Sociale[4] était autorisé qu'il agisse pour la protection et l'utilisation des sommes disponibles temporairement. Le fond de retraites supplémentaires était l'unique schéme d'assurances sociales qui se basait au principe d'accumulation. En 1990, pour la première fois, les personnes ocupées sur leur propre compte ont reçu le droit de participer au ce fond.Aussi comme

leur participation volontaire au système publique d'assurances sociales, la participation au ce fond on a prouvé d'étre negligeable.L'année 1997 a été le première année pendant dequel le fond destiné aux retraites supplémentaires a enregistré un déficit.

Le fond d'assurances sociales pour les agiculteurs

Jusqu'à l'année 1992, les agriculteurs ont été obligés qu'ils participent à une schéme d'assurances sociales destinée spécialement aux agriculteurs.Commençant de ce moment, leur participation c'est devenue volontaire[5]. Le fond d'assurances sociales pour les agriculteurs payait les droits d'assurances sociales en le cas de maladie, maternité, invalidité,vieillissement et la survivance de mari/femme. Ainsi qu'on était attendu, seulement une poids réduit d'agriculteurs ont choisi de contribuer à ce fond dans un mode volontaire.La valeur de la contribution a été répresentée de 7% du revenu mensuel assuré, declaré dans le contrat d'assurance[6].

Essayant qu'ils compensent la participation réduite d'agriculteurs à ce système , les gouverneurs ont introduit une taxe payable par tous les compagnies qui produissaient, refaisaient et commercialisaient des produits alimentaires et des produits agricoles. La taxe variera de 2% à 4%, par rapport à l'activité de la companie.Pour les companies productrices et pour celles qui refaisaient les produits alimentaires et agricoles, la base de calcul pour la détermination de la valeur de taxe était rreprésenté par le revenu mensuel brut de companes, pendant que pour les comerçants le calcul se reportait à la différence entre le coùt de production et le prix de vendre. Ainsi, la soustenance financière du fond d'assurances sociales pour les agriculteurs a été en grand part réalisé par celles-ci companies, à travers des taxes payées, mais aussi par l'état, àtravers de les différentes subventions. En l'année 1995, le fond destiné pour les agriculteurs à enregistré un déficit, pour la première fois.En 1997, la situation du fond à devenu critique: 46% de l'encaissements provenaient de la taxation, 52% des subventions données par l'état, pendant que seulement 2% ont constitué par les contributions payées d'agriculteurs.

Le fond du chomage

A la diffèrence d' autres fonds/schémes presentés qui étaient depuis de decembre 1989, le fond de chomage a été fondé à peine en 1991[7], année dans quel le phénomène du chomage a été reconu officiellement. Les contributions étaient collectés autant de les engageurs, comme des engagés.Les personnes occupées sur leur propre compte pouvaient participer volontaire à ce système.

La contribution qui était reparti à l'engagé était de 1% de le revenu du salaire mensuel brut, pendant que l'engageur devait virer au fond du chomage 5% du fond total de salaires. Pour les personnes occupées sur leur propre compte, la contribution était de 5% de le revenu déclaré en le contrat d'assurance du chomage.

Le fond du chomage a été très solicité à la suite des programmes de réorganisation, de privatisation et, meme de la fermeture des unités économiques. Ces actions ont causé une quantité très grande de droits d'asurances sociales payées du fond du chomage, fait qui a écrit le système dans un *trend* d'évolution negative entre 1998-2000, quand a été enregistré le première deficit.

Le mécanisme de la collecte des contributions avant du moment de la réforme de l'année 2000

Suivre les années '90, la responsabilité de la collecte des contributions pour les assurances sociales et de celles pour les retraites supplémentaires, le fond d'agriculteurs et le fond du chomage revenaient au le Ministère de Travail et de la Protection Sociale . De cette manière, en 1991 le Ministère de Travail et de la Protection Sociale a été autorisé avec des responsabilitéesdans l'activité du control et avec autorité en organiser des inspections et autres actions destinés à améliorer le degre de la collecte[8]. Pourtant, dans la période qui a suivi, la politique concernant le volume des ressources humaines nécessaires n'a pas permis l'engagement d'un nombre adéquat des inspecteurs.

En 1996, essayant d'accélérer la récupération des dettes à l'état, l'administration a adopté une législation spéciale concernant les actions coercitifs de la collecte des contributions de l'agents économiques necompliants. Avant d'année 1996, le Ministère de Travail et de la Protection Sociale a eu l'intuition de

une série de procédures légales contre les débiteurs et les exécutants judiciaire étaient responables de leur contrainte pour la paye des contributions

En vertu de la nouvelle législation, les répresentants du ministère ont été autorisés d'arreter les comptes et meme de vendre les actifs des compagnies débitrices aux systèmes d'assurances sociales.

Commençant de l'année 1997, les engageurs ont été obligés de déposer mensuellement à la Direction Départamentale du Ministère de Travail et de la Protection Sociale des déclarations concernant les contributions agrégats vers le budget d'assurances sociales d'état, le fond des retraites supplémentaires, le fond d'assurances sociales pour les agriculteurs et le fond du chomage. Les documents contenaient la valeur totale de contributions dues, la déclaration d'engageur de la responsabilité civile, autant que les droits payés d'assurances sociales décrus de la valeur des contributions, si était le cas. A la suite de la note de ces déclarations, on se tenait une évidence précise autant des contributions payées, tant des dettes/arriérés vers l'état.Cette évidence a representé un première pas essentiel vers l'amélioriationde la compliance (les déclarations individuelles ont été introduittes à peine en 2001 pour le système publique du chomage et d'assurances de santé).

Les engageurs payaient leur contributions par transfert de leur comptes bancaires dans les comptes de la succursale départamentale de la trésorerie. Les documents étaient conservé de chaque direction départamentale du Ministère de Travail et de la Protection Sociale. Les problèmes qui ont apparues se devaient spécialement au fait que les Directions Départamentales utilisaient des softwares inadéquats en la procession des déclarations et concernant les ordres de payement.

Ainsi que, au fil des années '90, ont apparues nombreuse discordances entre les sommes dettes et celles payées, fait qui indiquent une accroissement de l'evasion fiscale. A la moitié des années '90, un nombre significatif des unités économiques, dequelles les plusieurs avaient un grand nombre des engagés, ont fermées de payer leur obligations aux systèmesd'assurances sociales.

Depuis 1998, aussi comme une mesure de préparation de la réforme, le fond de retraites sociales et le fond d'agriculteurs ont devenus des composants séparés du budget d'assurances sociales d'état. Ce fait a eu lieu seulement jusque

l'avril 2001, quand la nouvelle loi a entrée en vigueur.

La première réforme des institutions a eu lieu en 1999, concernant le fond du chomege et celui d'assurances sociales. Ont été fondées deux organismes spécialisées: la Maison Nationale d'Assurances de Santé et l'Agence Nationale d'Occupation de la Force de Travail[9]. La première institution collecte les contributions d'assurances de santé, pendant que la deuxième a assumée la tache de la collecte des contributions au fond du chomage du Ministère de Travail et de la Protection Sociale.

En plus que la collecte, le deux agences ont recevues aussi des responsabilités de controle et d'exécution. La Maison Nationale d'Assurances de Santé[10] c'est en sous-ordre du Ministère de Santé, pendant que l'Agence Nationale d'Occupation de la Force de Travail c'est en sous-ordre du Ministère de Travail , la Solidarité Sociale et la Familie.

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Georgeta MODIGA

LA NÉCESSITÉ DE LA RÉFORME DU SYSTEMES DE RETRAITES EN LE CONTEXT DE L' ÉCONOMIE POLITIQUE DE LA TRANSITION DU PLAN AU MARCHÉ

Abstract

The methods that are used in an economy and therefore in a society untill the achievement of the critical mass cannot repeat themselves in an objective manner, being the expression of an unique process in the history of the universal economy, respectively "the transition from plan to market". The only element worthily to take into consideration is the number of years untill the achievement of the critical mass and it can give indication about the nature of the process of transition and, therefore, about the stage in which is the rehabilitation of the tendency for saving/investment at the moment of achievement of the critical mass.

The economical regress and historical-paradigmatical treated in the present chapter, demonstrates that exists several stages that an economy which have been passed through the experiment of the centralized planification, have to cross them over in order to return to the devellopment level of the institutions and to gradually approach to the curent devellopment of the industrialised countries (collocutional occidentals, meaning Western Europem as well as the United States of America and Canada), namely: the plan to market transition stage, the functional market economy stage and the "mature" market economy stage.

Durant la deuxième moitié du siècle, sous l'influence des changements indépendants de la volonté nationale, l'économie a subi l'expérience de la centralisation qui s'est étendue sur une cinquantaine d'années (autrement dit, à peu près la même période dont on a eu besoin pour mettre sur pied l'économie capitaliste et en atteindre la maturité) et qui a balayé tout élément de l'économie de marché, amenant pratiquement le pays au bord de la faillite, mise en évidence par le train de vie de la population.

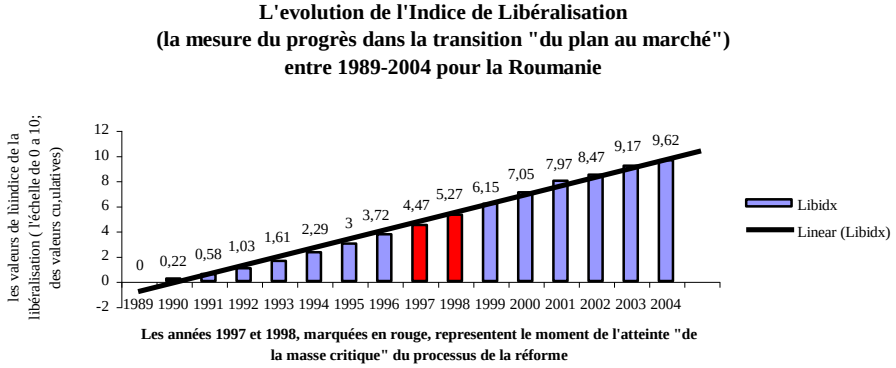
A la fin de 1989, la situation de la Roumanie, montrait le paradigme de la transition que Jean François Revel avait énoncé: „Lorsqu'un pays sort du communisme, il n'est plus au niveau de développement du début, mais à un niveau beaucoup plus bas."

À l'échelle de l'indice de libéralisation, construit par la suite par les chercheurs De Mello, Denizer şi Gelb pour la Banque Mondiale, afin de mesurer le progrès dans la transition du plan au marché, le niveau de la Roumanie était à zéro.

Lorsqu'une économie sort du communisme, elle doit traverser une „zone déserte" qui équivaut à une perte brutale de produit final (out-put ou baisse du PIB, aussi bien en termes absolus que relatifs) ce qui veut dire nécessairement que le mécanisme économique rejette les éléments non-fonctionnels, accumulés le long des décénies de planification centralisée, qui ne sont pas en mesure de réaliser des out-put en termes de services et de de produits qui soient capables de répondre aux exigences réelles du marché, chose très importante, essentielle même, dans le fonctionnement libre de tous les prix de marché.

La Roumanie a essayé de 1993 à 1996 de ranimer son ancien stock de capital, ce qui a entraîné une croissance économique inflationiste, dans la situation où beaucoup de prix étaient encore sous contrôle. De cette manière, les déséquilibres structuraux de l'économie se sont aggravés ce qui a imposé pratiquement une nouvelle libéralisation des prix, quasi-totale cette fois-ci, et un dernier pic d'inflation, vite suivi de l'atteinte de la masse critique pendat la période de 1997à 1998 (les valeurs de l'indice de libéralisation étant de 4,47 et respectivement 5,27). Même, si du point de vue économique tout cela signifiat l'épuration de l'économie de tous les résidus de la planification centralisée, du poin de vue social, elle a entraîné une économie de subsistance, favorisée aussi en Roumanie par le facteur naturel, propice à l'agriculture, ce qui a permis la prolifération des petites fermes familiales, grâce à la reconstitution des droits de propriété, mais qui a servi aussi de refuge face aux adversités économiques de la transition de type „stop and go".

Fig. 1



Indifféremment qu'il dure, ainsi que nous avons dit, les étapes plus grandes que 4-5 années sont contre-productives, l'intervale de temps écoulé de la sortie de l'économie planifié centralisée et jusqu' à l'atteindre de la masse critique c'est une période avec des évolutions sans reitération. Les méthodes qui se produit dans une économie est implicite dans la societé jusque à la réalisation de ce seuil essentiel, elles ne se reproduit pas de manière objective , elles étant la expression d'un proces unique dans l'histoire de l'économie universelle, respectivement " la transition du plan à marché[1]" .

Autrement dit, les tendances de cette période il ne faut pas et il ne peut pas être etendue, elle ne pouvant pas servir comme fondement d'une prédiction. Le seule élément digne d'être prise en consideration est le numero d'années jusqu'à l'atteinte de la masse critique, il pouvant donner des indications sur la nature du proces de transition et, en conséquence, sur le stade dans lequel se trouvent la refonte de la tendance vers l'économie/investissement à le moment de l'atteinte de la masse critique.A grand peine, les évolutions qui s'enregistrent apres l'attouchement de ce seuil peut être prise en considération pour des prédiction, étant donné que , apres ce moment se considere que les éléments

de l'économie capitaliste sont prépondérant dans l'économie respectivement et, en conséquences, sont repliquable.

Néanmoins, il faut souligner que, les cycle d'affaires , essentiellement pour la décision d'investissment, ne font pas l'apparition plutot qu' une distance de temps au-dela de deux décennies après l'atteinte de la masse critique.On se produit practiquement la reprise des évolutions les ainsi dits " les tigres Asiatiques[2]" (Korea du sud, Taiwan) qui ont connu des étapes de l'élevation du niveau économique, consécutives, etendues sur des décennies (biensur que les variations % annuél de PIB ne sont pas constantes , pas même invariable croissante, elle pouvant manifester des grades differences d'un année à autre, mais elle sont invariable positives, même sans qu'il eut passe par une transition economique.

En peu de temps après de l'atteinte de la masse critique, respectivement dans un interval de 3-5 années, une économie en transition doit atteindre la valeur cumulative 10 à l'échelle de l'indice de libéralisation (les valeurs annuélles sont entre 0 et 1, pouvant être cumulées d'une année à autre, crèant de cette manière une échelle de 1 à 10 practiquement), qui conventionnel marque "le fin de transition", rendit officiel dans en certains cas de l'attribution (pour les pays qui ont passé ou qui passent à travers le processus d'integration à l'Union Europene) de l'obtention de le qualificatif de l'économie de marché fonctionnelle" ou, autrement dit, de l'économie capitaliste dans laquelle les mécanismes essentiels se réalisent en principe, quoique les structures de les établissements public spécifiques (avec des implicationes très fortes vers le cadre institutional de les marchés financière et, donc,vers aussi les organismes colectives de placement qui sont les fonds de retraites) il y à encore dans un stade rudimentaire, à ses débuts d'évolution.

Pour les économies comme celle de Roumanie, l'atteindre de ce niveau signifique le retour à le niveau anterieur entree en communisme. Pour des pays comme la la République Tchèque[3] , par exemple, l'atteinte de ce niveau ne signifique pas du tout l'atteinte du niveau anterièure celui de Le Deuxième Guèrre Mondiale quand le pays était le cinquième pouvoir industrielle du monde.

Donc, encore une confirmation de paradigme revelien de transition.Ce moment peut être aussi associe avec l'entree en l'Union Europene (le processus

d'integration étant maintenant unanimement reconnu comme un determinant majeur de le changement et réforme économique, inclusivement en ce qui concerne le temps nécessaire pour l'atteinte de la masse critique), quoique une partie de les 10 nouveaux pays membres ont atteint ce niveau avant l'integration.

Pour Roumanie[4], l'atteinte de ce niveau, respectivement de valeur 10 à été prevu pour l'année 2004, ce qui signifique que, practiquement, la période optimale de transition, qui est 8-10 années (4-5 années vers l'atteint de la masse critique et encore 3-5 années vers "le fin de transition") à été depassé avec autour 50%, mettant de cette manière la Roumanie dans une position précaire dans l' ensemble économique continental quoique, grace à le niveau un peu reduit de développement de notre pays avant de l'entrée en le communisme (du à certaines vicissitudes historique) le retour à ce niveau, en conformité avec le paradime revelien de transition, c'est plus facile.

De ce point de vue , il en resulté que une région avec une économie de subsistance, generateure des revenus relativement persistera dans l'économie roumaine encore après le moment d'integration en U.E, affectant de ce manière la tendance générale vers à économiser/ investir .

Néanmoins, le récours économique et historique-paradigmatique realisé dans le chapitre present, demonte qu'il y a davantages étapes qu' une économie qu' a passé à travers l'expériment de la planification centralisée, il faut le parcourent pour pouvoir révenu, d'une part au niveau de développement institutionnel (du point de vue des institutions d'une marché libre) et, d'autre part,
vers s'approcher gradué du niveau de développement courant des pays indutrialisées (colloquement occidentales, entendant par cette autant l' Europe du ouest, aussi que U.S.A. et Canadie), a savoir:

- ***L'étape de transition du plan au marché***[5] , avec le moment de l'atteinte de la masse critique situé parfaitement à 4-5 années de début de transition. La durée idèale de cet intervalle de temps c'est 10 années et, en meme temps, dans cette période la tendance marginale vers économiser/investir revient graduellement , plus facile dans le cas d'une transition linéaire et plus difficile dans le cas d'une de type "stop and go". Les tendances et les évolutions

antérieure de l'atteint du moment de la masse critique sont sans répétition et, en conséquences, elles ne peut étre utilisées pour le pronostic ou la projection les évolutions prochaines , sourtout a lesquelles à temps longs.

L'établissement dans cette période d'organismes colectives de placement de type fonds de rétraites occupationelle a du succès limité.La changeante amarrer de cette période c'est la tranche d'inflation, la reconstruction de la stabilité du prix et des mécanismes de concurrence pour la détermination d'elles pour pouvoir de cette manière refaire la fonction du prix de signal économique, c'est essentielle.Elle s'établit normative. Les évolutions d'après l'atteinte de la masse critique peut étre prise en considération pour des pronostics et des projections de développements prochains , biensur avec les réserves de rigueur.

- ***L'étape de l'économie de marché fonctionnelle (rudimentaire).***

Cette étape c'est relativement inexpérimenté mais, meme avec les limitations de rigueur , les évolutions des états comme celles de l'Asie du sud-est ou l'expérience des états qui ont éntrés plus tarde en l'Union Europene et qui ont connus elles aussi une période de "transition", meme si elle etait prépondérant politique, on peut dire qu'elle peut durer approximativement 30 années, mesurées à partir de l'atteinte de la masse critique.

Cette période devrait étre caractérisée par une élévation du niveau économique quasi-continue, avec les rythmes moyen annuels pour des états comme Roumanie qui dépasseraient 10%, vu que justement le décalage très grand accumulé parmi les 40 années de planification centralisée et donc le fondement extrememente diminué de qui se prende pour point de départ (d'ici la possible analogie avec les états de l'Asie du sud-est).

Dans cette période la variable amarrer reste toujours la tranche d'inflation, le maintien de la stabilité du prix pour une longgue période du temps, sourtout dans le cas des états qui ont connus dans la période de transition une évolution de type "stop and go", donc avec une stabilité du prix prolongée, étant une precondition pour des gains de stabilité sociale-économique (de type de celles exprimées de l'Indice de la Stabilité, une mesure synthétique calculée par Lehman Brothers), ce qui entraineraient practiquement des accroissements de productivité et revenus et d'ici une accentuation de tendance vers

économiser/investir avec le corollaire du développement plus accentué des marchés du capital. Vers le fin de cette période, on se produiront des mouvements de "shifting", à sens que, la variable amarrer deviendra "l'accroissement économique", autrement dit apparaitrons les cycles d'affaires.

A le fin de cette étape, on peut dire que, Roumanie et les autres pays qui ont passées à travers l'éxperience de celle, atteinteront le niveau de développement et implicit de train de vie (mis en évidence d'indicateur PIB/loc, PPC), qui caractérisent aujourd'hui les pays de l'Europe du ouest.Autrement dit, s'agir de l'horizon de l'année 2029-2030.

- ***L'étape de l'économie de marché "mure" ou sofistiquée*** qui on peut commencera à peut près 30 années à partir de l'atteinte du niveau de l'économie de marché fonctionelle (ici nous nous guidons après l'exemple de l'Espagnie et le Portugal, qui se considérent que à grand peine sont devenues maintenant "des démocraties mures", donc aux 30 années de l'effondrement des régimes dictatoriales).

Dans ce stade apparaitent les cycles économiques. On se manifestent la première recession plus importante de type de celles qui caracterisent les économies de marché mures et qui permettent une purification périodique de l'économie des éléments de non-performance et qui permettent aussi le guidage des investiteurs.

La variable amarrer c'est l'atteinte économique, la stabilité des prix et sourtant le processus de concurrence pour leur détermination étant un objectif atteint depuis longtemps. Les organismes colectives de placement ont maintenant la possibilité de dévelloper et d'exploiter les opportunités d'investitissement. Elles deviennent vraiment une source d'accroissement de la sécurité sociale de population.

La portefeuille d'investitissement s'amplifie, respectant de ce manière un nombre élevé d'opportunités (et biensur des risques) que l'offre une économie capitaliste "mure". On commence un processus de convergence avec les états occidentales.

La tendance décroissante de la population c'est inversée, celle-ci recommençant sa tendance croissante et tendant probablement vers l'atteinte de

son potentiel qui n'a pas jamais été réalisé (de à la différence des états occidentales), du precisement à l'accident de la planification centralisée.Cette phase commencera probablement suivant l'année 2030.

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Drumea ROXANA

NON PROFIT ORGANIZATION IN THE ROMANIAN SOCIETY

Abstract

The non governmental organizations are institutionalized structures of a private nature that can activate as informal groups or as juridical persons, which are independent from any public authority.

In a democratic society, the non governmental organizations have a large role in responding to some of the community necessities that are not totally covered by other types of institutions (of the public or business sectors) and offer the possibility of participation to a large number of citizens.

The constitution of a non governmental organization is similar to a business opening.

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In a democratic society, the non governmental organizations have a large role in responding to some of the community necessities that are not totally covered by other types of institutions (of the public or business sectors) and offer the possibility of participation to a large number of citizens.

The beginnings of the transition period in Romania meant the apparition of hundreds of NGO, which had access, several years, to the external financing.

After 1995, the external financing ended and the NGO encountered a matter that they haven't taken into account before: the self-financing. From that point ahead it wasn't sufficient to have a good project on paper - they had to reach for financing, as well.

As the external financing came to an end, the NGO ought to deal with the problem of self-financing, baring the responsibility of spent money and finding new sources of funds.

"In '90 funds came from outside for some immediate issues; those funds were understood by most NGOs as money to be spent", told us recently Monica

Tatoiu, Oriflame Romania general director, organization which financed numerous projects carried out by local NGOs. [1]

Features of the beginning of '90 show the existence of over 30.000 NGOs and the fact that behind those, different more or less legal commercial activities took place that all together compromised the hall idea of NGOs by 1997. Official features show us that their number had dramatically decreased. A black period followed, familiar to any transition, but today, a 7 year tradition NGO is a viable organization for at least the fact of survival of that period, tells us Claudia Macovei, the organizational development department (fund rising) of the Save the Children NGO.

The law isn't friendly to sponsors.

There are a very few advantages for companies willing to help NGOs. The law of sponsorship 32/1994 provides that a part of the tax due to the state could be provided for sponsor matters. There is no other possibility for interested companies, the one and only advantage is the publicity received in exchange for sponsorship, thus the hall idea becomes a budget of marketing.

These kind of limitations stipulated by the law make the sponsorship a less attractive and small activity.

"It is true that in US we speak about a greater deductibility of taxes stated by the law of sponsorship, compared to Romania", says Annabelle Towson, Peace Corps Romania member. More fiscal possibilities there are, more companies would be generous and there would be a bigger flexibility, which would include more and various programs, to be taken into account.

The Community Relation Association initiated a research on the philanthropic conduct of the Romanian companies. The preliminary results of which show that only 5% of companies have a fixed budget and 25% try to build a constant system of sponsorship, 70% of sponsoring companies make their decision on the spot, based on instant impulse.

Beside the legislative motivation, in Romania there is a philanthropic culture.

The target is the emotion of the donator, rather that the tax deduction.

If the sponsorship was deductible expenses with whole title, companies would surely be more motivates to support social programs and the public

authorities would receive a greater help from the private sector.

The only reason for companies to make such decisions, at this point, is the existence of interest at the top of the firm.

Multination companies came into our country with a great experience. The research recalled earlier proves that too. The emotion is stronger, when taking steps for sponsorship than the need of publicity.

New category of companies that are implied in social programs are publicity agencies and public relation agencies. For publicity agencies, NGOs represent another kind of target than corporate clients: there are less exigency for a social spot than for a commercial one, thus creative person find their place in such project and ideas that rejected for commercial publicity are welcomed in this type of spots. The result is the possibility of winning awards, in specialty contest, for such campaigns.

Examples are: Young&Rubicam (the non drugs campaign), D'Arcy (anti drugs and breastfeeding campaigns), Image Promotion (juvenile smoking), McCann Erickson (home violence campaign), Grafitti/BBDO (handicap person campaign), Saatchi&Saatchi (anti abandonment campaign).

Another point is that Romanian firms do very rarely use sponsorship as a way of public image consolidation.

There are two explanations: NGOs don't have the image or the power of transmitting messages and lots of companies don't have the financial power to get implied in such activities.

The bigger is the company, the greater is the number of sponsorship. Within the firms that participated in social programs, we can mention: BRD-Groupe Societe Generale, Orange, Henkel, Beiersdorf, Medicover.

There are also, objective reasons for which NGOs don't manage to media cover as the sponsor wishes.

As the law of broadcasting states that any publicity should be paid, this kind of service in return for the fund given isn't easy to provide, as it was.

Another matter to consider is the approved budget of the company. The NGOs, as the research shows it, come for funds too late.

An issue between the NGOs and the funding companies is that the last cited don't agree to pay additional expenses for accepted programs.

In such conditions help is asked from other non-profit donators, as Phare, UNICEF, USAID, SOROS, organization that give funds unconditionally.

As for the future, almost a half of the local companies say that a sponsorship is possible in the future, if the tax condition and the rate of profit increase.

Non governmental organizations, associations and foundations received 16 millions from the state last year. From the state budget came directly 10.450.000 lei and from the central authorities budget 13.5 millions euro. The sums were publicly announced by the representatives of the Civil Society Development Foundation and by those from the Assistance Centre for NGOs, both have elaborated reports on NGOs financing. [2]

According to this report, in Romania there are 7.000 active NGOs, most of them activating in social area and the number of who took advantages from the funds is of hundreds. The Ministry of Labor awarded the 13.5 mullion euro, from what 12 million for 102 NGOs, 750.000 euro for National Agency of Youth and 500 NGOs, etc.

The author of the report, Valentin Burada, is worried the traditional supporter of NGOs, the EU will stop the financing toward the organizations and the Romanian state isn't willing to cover the deficit. Thus, the only source that remains is the tax paying people, which are not very interested in donating the 2% from the global tax to NGOs. Nonetheless, the sum raised last year was 5.3 million euro.

The lack of interest of Romanian as donators motivated. The author of the report stresses that the evaluation of NGOs is not made accurately, thus frauds are frequently committed.

The constitution of a non governmental organization is similar to a business opening.

The functioning of non governmental organizations must serve the enforcement of the non profit sector and respond to the needs and interests of the society.

To this accomplishment, non governmental organizations can have diverse functions, such as:

1. The intermediation of the relation between authorities and citizens
2. The social and political integration of citizens (organizations represent a frame for civil participation);
3. The delivery of goods and services to the community;
4. Representing the interests of some social groups.

NGO are obliged to adapt their structure in command to the public they represent and can elect them independently, opposed to both governmental agencies, where the public is general and can't be elected and private agencies, here the public is the one buying services or goods, without being implicated in the directing structures.

Non governmental organizations, as active entities in the social area, are influenced by the sphere in which they activate. A simulative frame could play a positive role on its dynamic, as a severe frame could reduce the average of constitution of new organization.

The influence of the atmosphere is observed both on the organization level and on its compound elements, non governmental organizations are mostly of a collective nature.

Non governmental organizations must fulfill the following demands:

To function as a structured entity – must proof a certain institutionalized organizational structure (has its own structure of decision, elaborates and respects during its activities its own rules and proceedings, etc). Usually these institutions are juridical persons, but their functioning is possible without having the juridical personality;

To be of private nature – they are institutionally separated from public authorities, based on the right of free initiative and association;

To respect the non profit distribution criteria – they may generate income, and get profit from their actions, but these must not be distributed to their members or to their directors; they are only used to achieve declared purposes;

Self governing – they have the capacity of assuming their own decisions of their internal functioning or of their relations with other institutions; the directing structure are not dominated by public authorities' representatives;

To volunteer – they are based on voluntary implication in the actions

they take or in the directing process;

To be of public interest – they serve some public interests or contribute to a public interest achievement;

A part from the mandatory criteria, there are two criteria of recommendation nature:

Not to be religious – they shouldn't have for purpose the promotion of a specific religious, this might be the case, although, of the religious education purpose;

Not to be politically involved – they must not be involved in promotion of both candidates and political party, but they may organize action in order to influence the public opinion.

It is said that in Romania there are 40.000 non governmental organizations. Only a small amount of them (15%) might be considered as active organizations.

We have witnessed, everywhere around the world, lately, a great increase of the interest for a large category of social institutions that operate outside the market or state borders. Known as "the nonprofit sector", or "voluntary", or "independent", or simply "civil society", this kind of institutions includes a body of entities – hospitals, universities, social clubs, professional organizations, daycare centers, environmental protection, family counseling agencies, sport clubs, professional training, organizations that defend the humans right, and so many others.

Even though they are so diverse in their activities, these entities are gathered by common characteristics. These are:

1. *Organizations*, have an institutional structure and are present in civil life;
2. *Private*, are institutionally separated from the state;
3. *Non profit distributive* ;
4. *Self governing*, they have the control of their own operations;
5. Voluntary , to be part of them is not legally required, they may gather time or money contributions.

A non governmental organizations analysis must be related to the need of enforcing the non profit sector in response to the social interests in which they take actions.

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ASPECTS HISTORIQUES DU CONTRAT DE TRAVAIL JUSQU' A LA REFORME DE 1864

Résumé

Les institutions du droit du travail, plus que les autres institutions juridiques ont connue et continue de le faire, une profonde transformation dans le contexte des multiples modifications législatives dans le droit du travail, qui viennent, d'une part, des transformations structurales survenues dans l'économie roumaine, et de l'autre, de la nécessité d'harmonisation de la législation avec l'acquis communautaire.

Bien sur que, l'institution du contrat de travail, en général, et, son parcours historique, en particulier, ont été soumis au même procès de transformation.

Conte tenu de ce fait nos préoccupations se sont canalisées envers une approche compréhensive de cette institution, essayant de révéler les fondements socio juridiques des réglementations dans le domaine concerné.

Ayant pour base des documents divers, nous avons essayez d'établir un nombre de repères de la législation de travail, en les analysant un par un.

On a accomplit cette incursion dans l'histoire législative de la Roumanie, compte tenu d'un petit nombre des documents, de la période dacique. Le trésor des archives ne contient pas des informations de l'époque antérieure a ces siècles et un petit nombre d'informations de l'époque antérieure a la romanisation de la Dacie nous sont parvenues – époque des thraces dont l'esprit se retrouve dans la vie psychologique du peuple roumain.

Voilà, les points de départ des investigations de l'ancien Droit du travail.

Dès le moment, qu'on nommerait le *moment thrace*, on a cherché, tout d'abord, de trouver l'originalité du Droit roumain, en allant, au fil de l'histoire, jusqu'à la deuxième moitié du XVIIIe siècle – le moment de l'import de Droit écrit byzantin – la période peut-être plus longue encore, parce que le droit nouveau, celui écrit, byzantin, n'a pas remplacé le droit ancien, celui non écrit, roumain…

Dans le contexte créé, on relève le fait que les modifications d'ordre législatives ont suivi le cours des transformations de la base matérielle et de la conception juridique et philosophique pour ce qui est de l'institution du droit du travail.

Les objectifs de notre investigation se rapportent au contrat de travail dès ses premières réglementations de la période de formation de l'état roumain.

Ainsi, jusqu'à la formation de l'état, on peut caractériser la société roumaine d'un développement continu, du point de vu économique et politique.

En ce qui concerne les relations de travail de cette période, elles sont profondément influencées par la formation d'un système normatif, de portée coutumière.

Apparaît, ainsi, la propriété privée, en maintenant la vieille forme de la propriété en commun, caractéristique pour la période antérieure, les élevages deviennent l'objet de la propriété de la famille – le symbole de la richesse, et plus tard la terre, devient, elle aussi, l'objet de la propriété privée.

La force du travail avait deux composantes structurales, résultat des différences sociales de plus en plus soulignées – le peuple et les esclaves – comme force de travail serviable.

Le système de droit qui caractérise cette période est celui coutumier, qui a pour base l'idée de réciprocité – "celui qui est condamné par la société est assujetti à quitter la communauté ou bien à commettre suicide"[1]

Une fois la révolution économique et sociale se fait place, on constate une diversification du travail, qui, vu le développement de la production et de la transformation de la propriété commune en celle privée, obtient une nouvelle dimension. Ainsi, les grands domaines royaux, mais aussi, ceux de la noblesse apparaissent. De ce point de vue, on peut parler, en contrepartie de la période avant la formation de l'état dace, des relations de travail qui se développaient sous l'autorité des ceux qui avaient la propriété de la terre, des élevages des bovins, les mines et même les moyens de travail. La diversité des entreprises des géto-daces corroborée avec la stratification sociale, résultat du développement de la propriété privée, nous amènent à croire que les rapports de travail, spécifiques pour cette période, étaient soumis à des obligations multiples dans le syntagme de la force de travail.

Tout en considérant le travail (comme occupation), mais cette fois, dans la sphère de la classe supérieure, on observe l'apparition de certains « *dregători* » qui ont la tache de surveiller (les travaux d'agriculture, la sécurité des forteresses, la rencontre et l'expédition des dignitaires, et d'autres) et des diplomates, assujettis à l'autorité du roi.

Seulement après la conquête de la Dacie par les Romains, le droit a connu une évolution accentuée, mais les Romains ont maintenu le droit indigène pour réglementer certains rapports ; ces rapports ont été réglementés par la « coutume » (consuetudo, mos maiorum), ce que représente, dans notre opinion, une autre forme de l'expression du droit.

On a analysé, également, tout au long de notre recherche l'importance des tables cirées de Roşia Montană pour ce qui est de l'origine des relations de travail. Une source de l'histoire de valeur incontestée, les tables cirées découvertes à Alburnus Maior (Roşia Montană) confirment l'application du droit romain dans cette provence.

Les triptyques de Transylvanie sont formés de trois petites tables de sapin liées ensemble.[2] Les triptyques sont nommés également tables cirées, parce que les cotées intérieures étaient légèrement découpées et cirées d'une couche fine, sur laquelle s'appliquait, avec le bout d'un stylo de bois, une écriture en lettres italiques.[3]

Les premières tables cirées trouvées ont été découvertes dans les mines d'or dans la Roşia Montana, entre les années 1786 et 1855, en nombre de 25.

Toutes les tables cirées découvertes dans la région de Alba, entre les années 1786 et 1855 représentent des documents de valeur exceptionnelle pour l'histoire sociale et économique de la Dacie romane (pour ce qui est de l'organisation, structure et développement de la province, mais aussi du droit privé, public et de leurs liaisons avec le droit romain en général), considérées des leurs découverte, mais surtout dans la moitié du XIXe siècle, comme un miracle archéologique et épigraphique. Le contenu de celle-ci comprend quatre contrats de vente, trois contrats de rente (location), un contrat de société, un contrat d'apprentissage (un collège), un contrat de dépôt et un contrat de dépenses.

Les tables cirées, même si réduite en nombre, ont offert des dates importantes en rapport avec la modalité de conclusion des premiers contrats du

droit du travail, compte tenu du fait qu'en premier temps les relations de travail n'étaient pas réglementées sous cette stricte dénomination.

Il est digne d'observer l'objet de la première forme contractuelle du travail, parce qu'il serait impropre de s'y rapporter comme d'un contrat de travail, que « *operae suae* » le forme, c'est-à-dire le travail des bras du débiteur, qui s'est embauché lui-même, qui est entré dans le service pour la période de temps fixée dans le contrat. Les contrats des tables cirées appartiennent au groupe des contrats « locatio operarum », ils sont donc des contrats de service. Cette affirmation est vraie, elle ne peut pas être controversée. Elle reflète l'opinion générale de tous les romanistes. Mommsen, Bruns, Karlowa et Girard voient dans les triptyques des contrats de service, de location des travaux, « locatio operarum ».

Le moment historique des tables cirées de Transylvanie représente le moment de départ des relations de travail, ainsi que de notre thèse.

On a étudié le thème abordé et on a recherché les aspects qu'il implique d'une triple perspective :

1. **Du point de vu historique**, nous avons considéré les premières réglementations des relations de travail stipulées dans différentes formes dans les tables cirées de Roşia Montană et nous sommes allés au fil de l'histoire jusqu'au Code de travail de 1950.

Ce dernier acte normatif, avec toutes ses implications a approfondi la notion de contrat de travail, parce que la garantie d'une stabilité de travail était caractéristique au régime pendant lequel il a été élaboré, le législateur était alors préoccupé des modalités de consolidation de la stabilité de travail.

2. **Du point de vu de la doctrine**, nous avons mené des recherches sur les opinions exprimées dans la littérature de spécialité, avec beaucoup d'attention pour les idées des savants de la Roumanie, France et Allemagne. On a étudié ainsi, D. Firoiu, Hamangiu, E. Cernea, E. Molcut et d'autres, qui ont eu un apport substantiel au développement du contrat de travail.

A. Fontaine, Ch. Gides, et Saleilles sont les représentants de la doctrine française qu'on a abordée et Potthoff, Wald L. et Wollmann, V, ceux d'origine allemande. Tous ces auteurs ont étudié une diversité des sujets de droit du travail et précisément, le contrat de travail.

3. **Du point de vu de la jurisprudence**, ont a mis l'accent sur la recherche du mode dans lequel les éléments du régime juridique du problème en question, se retrouvent dans la pratique des instances judiciaires des différentes périodes analysées.

On a pu constaté ainsi, que dans la jurisprudence de la période dacique ou romane, ce problème est rarement abordé, chose qui s'explique par une législation pauvre dans le domaine. Les choses ont beaucoup changé dans la période du féodalisme, quand les litiges relatifs au travail deviennent nombreux.

Dans ce contexte, on relève le fait que les modifications d'ordre législatif ont suit le cours naturel des transformations de la base matérielle et de la conception philosophique et juridique de l'institution du droit du travail.

On a accordé un grand intérêt, dans notre travail, aux relations de travail de la période des premières formations politiques féodales qu'ont été les différents types des principautés. [4] Au cours du temps celles-ci se sont unies et ont mis les bases des quatre états féodaux centralisés roumains : Transylvanie, Moldavie, Valachie et Dobrodja.

Tout au long de cette période de développement des relations sociales dans l'habitat rural le Jus Valachicum (le droit roumain) s'est formé, ou bien le Jus Olahorum (la loi des roumains), droit qui s'est appliqué pendant l'étape de la monarchie et de sa chute, avec des échos dans l'étape suivante, celle de la monarchie centralisée et absolutiste, en formant le noyau du droit coutumier de cette période.

Ce droit était formé par la **Traditionnelle Loi du pays**, sauvegardé par les Roumains même sous les occupations étrangères. Les différences des dénominations existent parce que les étrangers ont mis l'accent sur le caractère ethnique des « valaches » et ont conçu leurs normes juridiques comme un droit personnel, tandis que dans leurs propres états ils les ont nommé La Loi de la terre, conformément au caractère territorial des celles-ci.

La formation des états féodaux roumains a permis, également un développement ascendant des relations de travail.

Le Jus Valachicum, lex Olahorum – la loi roumaine (des roumains) est née, donc, comme une coutume de la terre chez les roumains, dans l'habitat rural.

Ce droit a réglementé la propriété de la terre (ce que plus tard se nommera la propriété foncière). Droit des communautés territoriales, il a donné sens à la propriété de la communauté, y ajoutant les réglementations qui ont apparues dans ces formations territoriales, mais au niveau du développement de la société roumaine des siècles X et XIII, moment, attesté par les documents, d'une augmentation de la propriété personnelle.

Les documents serbes du XIVe siècle rappellent que les paysans roumains qui travaillaient les terres des laïques ou du claire ont été obligés, conformément au droit roumain d'avoir des journées de « claca » - travail (trois par an), de donner en nature, et de faire de services de transport. Il s'agit, donc, des obligations caractéristiques aux rapports qui se sont établis entre les propriétaires de la terre et les paysans qui la travaillaient, pour cette première phase du développement du féodalisme.

Dans le XVIe siècle on a fait de grands progrès avec l'impression de la **Loi des Saints Apôtres**, un règlement religieux, avec des éléments laïques, dans les annexes des Prières de 1545, publié de l'initiative du prince Radu Paisie.

Le XVIIe siècle représente une grande importance, parce que tout au long du celui-la les grandes lois roumaines (*pravile* – du slave droit, règle, loi) ont été imprimées. Chronologiquement, les plus importantes lois roumaines sont la **Loi de Govora ou la Petite loi**, de 1640, un règlement du droit religieux avec des éléments du droit laïque, **Le livre roumain des savoirs des lois royales**, imprimé a Iasi en 1646, au souhait de Vasile Lupu, *la première loi laïque officielle promulguée est investi de l'autorité légale*, a la rédaction de laquelle on s'est servi de : la loi agraire byzantine *(nomos ghirghicos), Praxis et theoriae criminalis,* traité de droit pénal du juriste Prosper Farinaccius, mais aussi la coutume de la terre (du pays), et la Grande Loi, imprimée a Targoviste en 1652.[5]

Une première remarque sur ces documents de notre droit féodal est leur caractère profond de classe. Les mesures édictées par ceux-la, par un caractère sévère, ont assuré la forte liaison des paysans avec leur terre et une soumission totale envers leurs propriétaires féodaux.

Le contenu des loi religieuses est très varié, parce que tout au long des dispositions a caractère juridique se trouvent des textes divers tels : les extraits des travaux religieux, dates historiques sur les synodes et les auteurs des loi

(pères d'église), les tables de calcul du temps, des chroniques, différentes formulaires de réalisation de certains actes.

Les dispositions juridiques proprement dites ne sont pas transmises de manière systématique, par branches et institutions, ainsi qu'aux normes de droit canonique suivent des normes du droit laïques et vice-versa, celles du droit civil avec celles de droit pénal de la sorte - phénomène nullement surprenant si on pense au moment de l'évolution juridique de l'époque.[6]

Ces lois se caractérisent alors par la consécration de *l'inégalité* entre personnes, une inégalité déterminée par la position sociale. La classe dominante a été nommée « boierime » (noblesse), ceux de sang noble, les plus grands, et les paysans : pauvres, paysans bête et gros, les petits (comme signifiance, importance), les petits et bêtes.

Une deuxième remarque à propos de ces documents législatifs se rapporte à la tendance continue de leur application, sans que les coutumes juridiques soient oubliées. Par contre, les lois reconnaissent aux coutumes leur autorité légale.

L'élaboration des lois n'a pas été seulement l'expression, mais aussi la contribution politique de centralisation du pouvoir et de consolidation de l'état féodal. Il est important de mentionner que ces lois ont eu des conséquences visibles sur la formation du droit roumain, mais un rôle didactique, également.[6]

Avec le XVIIIe siècle, les lois royales (*hrisoavele domneşti*) – comme forme d'expression de la volonté de la classe dominante – occupent une place de front et les princes phanariotes les ont utilisé pleinement.

Par les reformes de Constantin Mavrocordat la dépendance personnelle a été abolit, les producteurs directs sont devenus des personnes libres, sous le rapport de la capacité de droit la liaison avec la terre qu'ils travaillaient et le droit des propriétaires de disposer de leur existence n'existaient plus, l'émancipation intervient par le paiement.

Dans les siècles suivants de nouveaux phénomènes apparaissent dans l'économie des Principautés Roumaines. C'est l'économie qui a pour base l'échange de bien contre argent. Ceci représente une étape nouvelle dans le développement de la société féodale, qui apporte au propriétaire des revenus de

plus en plus grands, d'ou la nécessitée de tenir le paysan lié a la terre, pour qu'il ne puisse s'y échapper.

L'histoire des paysans du XVIe siècle nous prouve que le procès d'assujettissement de ces derniers est fleurissant.

Du document historique qu'est le traité entre Mihai et Sigismund Bathory de 20 mai 1595 on relève les situations des féodaux, d'une coté, et des paysans, de l'autre. Le but de cette réglementation est d'annuler le droit de transfère des paysans, les assujettissant définitivement à la terre.[7]

Dans la période après le règne de Mihai Viteazul, de raisons des inassouvissements et révoltes parmi les paysans provoqués le retrait du droit de transfère, les princes qui l'ont suivit ont du faire de certaines concessions a l'égard des paysans.

Le XVIIe siècle marque une nouvelle période dans l'histoire de l'économie féodale.

Les Règlements Organiques ont divisé les paysans en : de front, moyens et les derniers et leur ont donné de la terre de manière différenciée, réduisant a un tiers ou même a demie la quantité de terre antérieurement offerte aux paysans. Par conséquent, les obligations de travail des paysans ont grandi.

Ces règlements ont promu l'idée des « droits saints des propriétaires » (art. 70), reconnaissant aux propriétaires des terres le droit de propriété complète sur un tiers de la terre, ce qui a fait augmenter les obligations de travail des paysans, en les agrandissant le nombre des jours de travail et utilisant, largement, une forme juridique nouvelle comme l'était **le contrat de location.**

De cette période on remarque un certain nombre des actes normatifs qui ont eu un impact direct sur le développement de la société de la période en question.

Ainsi, la loi ***Pravilniceasca Condică***, de 1780, de l'auteur Alexandru Ipsilanti, a eu comme source la coutume de la terre mais aussi les lois byzantines et constitue une loi féodale par excellence. Le nombre de jours de travail gratuit (claca) est de 12 par an, le propriétaire ayant le droit de le convertir en argent. La taxe payée au propriétaire (dijma) représente 1/10 de tous les produits agricoles, mais les autres produits y succombent également.

La nouvelle loi n'apporte rien de neuf aux réglementations antérieures. La nouveauté consiste dans le fait que cette loi ne fait pas de différence entre les saisons quant aux jours de travail gratuit.

Le manuel juridique de Andronache Donici, imprimé en 1814, la première œuvre originale d'un juriste autochtone, un manuel et un code a la fois.[8] La conception féodale définie l'œuvre.

Le ***Code Calimach*** a été promu par le roi du pays par une loi (hrisov) le 1 juin 1817.[9] Il contient trois parties. Ce qu'il apporte de neuf a la législation existante, c'est la systématisation et développement de la matière, abordant les lois existantes du point de vu bourgeois et une forme moderne d'inspiration française (le Code Civil de 1804) mais aussi une inspiration autrichienne (Le Code Civil de 1811).

Legiuirea Caragea[10], écrite a l'ordre du prince I. Caragea, par Atanasie Hristopol et Nestor, qui ont été aidé par d'autres auteurs. Les sources pour cette loi ont été les lois byzantines (Basilicalele), la coutume de la terre, quelques lois existantes en Valachie (Pravilniceasca Condică) et dans une petite mesure le Code français de 1804.

Pour ce qui est du contrat de travail, la loi Caragea établit qu'on s'engage de servir quelqu'un pour une certaine période de temps, mais si la personne n'est pas contente de la manière dont elle est servie, elle est libre de s'en dispenser.(III, 7, -10)

La loi établit également que les engagements se font « par écrit mais aussi sans lettre ». « Les engagements écrits ont valeurs lors de la signature des personnes qui y consentent. » Cette loi, elle aussi fait preuve d'un caractère féodal.

En revenant aux Réglementations Organiques, on rappelle que celles-ci ont été nommées « Code du travail gratuit ». Pour ce qui est des contrats (la dénomination de la loi – tocmeala – engagement), ils ont été classifiés en : écrits et non écrits (verbaux) en tant que Le Code Calimach y ajoute une autre classification en : unilatéraux et bilatéraux. Les réglementations en question ont catalysé une certaine évolution de la location.

On peut dire, ainsi, que les relations de travail dans la période des engagements agricoles ont été directement influencées par la forme de la

propriété sur la terre et par les moyens de productions, mais aussi par le contexte social économique et culturel et national.

La société roumaine de cette période se caractérise essentiellement par l'existence des deux classes sociales : les féodaux et le clerc, d'une coté et les paysans, de l'autre.

Au cours de l'histoire, entre les propriétaires et les travailleurs de la terre de certains relations et rapports se sont établis, qui en première phase ont connu le nom de « la coutume de la terre », puis ces coutumes ont commencé a être réglementées par différentes types des lois. Conformément a ces dernières, il commence a exister toute sorte d'engagements entre les propriétaires et les villageois, des contrats même – forme, toutefois, reconnue au XIXe siècle.

Le début du XIXe siècle est marqué par des voix de plus en plus nombreuses, qui demandaient la dissolution des journées de travail gratuit et l'appropriation de la terre par les paysans, dispute mise en question également par la Révolution de 1848, mais qui n'a pas été solutionnée, faut de son échec.[11] D'autant plus que dans l'année 1851, dans les deux principautés roumaines ont été adoptées des lois nouvelles pour « Les droits et les obligations réciproques des propriétaires et des travailleurs de la terre »[12]. Ces réglementations n'ont nullement aisé la situation des paysans, par contre les ont fait des locataires sur la terre du propriétaire, le dernier ayant le droit d'établir les parcelles de terre attribuaient aux paysans et pour le reste de terre il pouvait faire des engagements écrits avec les paysans.

En conclusion, sur la période jusqu'à la reforme de 1864, on pourrait dire que les rapports de travail étaient profondément dominés des obligations difficiles a accomplir pour être soutenues et en ce qui concerne les droits, qui auraient du existaient en contrepartie des obligations, étaient insignifiantes pour être tellement dénommer. On parlerait plutôt des relations de travail comprenant un travail non payé, ou simplement en faveur du propriétaire.[13]

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[3]I. Peretz, *Cours d'histoire du droit roumain*, I, Bucharest, 1926, p. 272; I. Baltariu, *Les triptyques de Transylvanie*, Aiud, 1930;

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[5]Voir L*'histoire du droit roumain*, traité, vol 1., op. cit., p. 207-212; I.N. Floca. *De l'histoire du droit roumain,* II, *Le livre roumain de savoir des lois royales et d'autres régions,* Iaşi, 1646, Sibiu, 1993

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FINANCEMENT DES EXPORTATIONS PAR CREDIT ACHETEUR

Résumé

Le crédit acheteur représente une technique relativement récente de financement des exportations et connaît un grand développement en quelques pays. Il a commencé à être utilisé beaucoup plus que le crédit fournisseur, le succès montrant que ce financement répond mieux aux besoins des exportateurs.

Le crédit acheteur représente le contrat par lequel la banque ou une autre institution financière du pays du fournisseur accorde un prêt à l'acheteur étranger par l'acceptation de l'engagement de paiement par la banque pour le fournisseur autochtone, si on présente les documents prévus dans le contrat avec l'obligation pour l'acheteur étranger de restituer la somme d'argent et l'intérêt.

§ 1. Notion et définition du crédit *acheteur*

30. Le crédit acheteur est une création de la pratique internationale dont l'utilité a été reconnue par le législatif qui la règlemente ensuite, dans quelques systèmes de droit[1].

La formule du crédit acheteur est apparue au cours des années 1960 pour suppléer les inconvénients du crédit fournisseur.

On a affirmé sur l'apparition et le développement de cette technique de financement qu'elle illustre le phénomène de création spontanée par la pratique de nouveaux contrats non nommés[2]. À coup sûr, il ne s'agit pas d'une construction juridique ex nihilo, le crédit acheteur faisant appel à différentes institutions existantes dans le droit national des États et étant un exemple d'exploitation des ressources de la théorie générale des obligations.

SI dans la législation des États comme la France[3], le crédit acheteur est réglementé juridiquement, dans la législation roumaine on ne trouve pas une réglementation de ce type de crédit, même si quelques actes normatifs y font référence[4].

Étant donné le manque d'une définition du crédit acheteur dans la législation nationale, c'est la doctrine qui doit définir ce type de contrat.

Dans une publication de référence pour l'étude de cette institution[5], le crédit acheteur international est défini comme un type de crédit par lequel une banque ou un organisme public de crédits pour exportation, du pays exportateur,

s'engage d'accorder un prêt directement à l'acheteur étranger, au but d'acquérir des biens et des services d'un fournisseur du pays exportateur.

Par la suite, l'auteur souligne dans l'étude de cette institution, le mécanisme de paiement direct par lequel la banque (ou l'organisme de financement) va virer dans le compte de l'exportateur les fonds prêtés à l'acheteur étranger.

Le crédit acheteur est défini[6] aussi comme un crédit bancaire accordé par une banque locale du pays de l'exportateur directement à l'importateur étranger ou à sa banque, ainsi que celle-ci paie directement à l'exportateur à la livraison.

Nous avons des réserves face à cette définition, tout en en résultant que le prêt est fait avec le transfert de l'argent dans les mains de l'importateur ou de sa banque, ainsi que celle-ci paie directement à l'exportateur au moment de la livraison.

En fait, dans la pratique actuelle du commerce international, le crédit est accordé directement à l'acheteur et non pas à sa banque[7], celle-ci en garantissant éventuellement la restitution du crédit; le paiement est fait par la banque qui a consenti le crédit, directement à l'exportateur, après que celui-ci accomplisse quelques-unes ou toutes les obligations, au moment de la présentation des documents conformes ou après quelque temps.

Cette technique d'octroi du crédit à une banque du pays de l'acheteur a été utilisée une courte période (1967 – 1972) par l'Office National du Ducroire Belge, qui acceptait d'assurer les crédits acheteur à des conditions extrêmement restrictives[8]. De même, dès années 70 apparaissent des consortiums bancaires qui accordent aux banques des importateurs des crédits acheteur[9]. Cette technique présente l'avantage d'être plus sûre pour le créditeur, les banques étant appréciées généralement comme meilleurs débiteurs, mais dans ce cas, celui qui crédite effectivement l'acheteur est son propre banquier.

Nous considérons pour cela qu'on ne devait pas inclure dans une définition la situation qui constitue l'exception.

On a montré aussi que ce type de crédit[10] consiste dans l'octroi par la banque d'un crédit à l'acheteur étranger, ce qui lui permet d'acquitter ses obligations face à l'exportateur, celui-ci étant dégrevé de tous les risques dès l'accomplissement correct des obligations du contrat.

Même si les bénéfices des parties sont présentés correctement, on ne souligne pas la technique juridique utilisée, essentielle pour une telle définition.

Face à ces manques, nous considérons nécessaire d'essayer la formulation d'une définition étendue, qui surprenne la spécificité de ce type de crédit.

En ce sens, le crédit acheteur peut être défini comme le contrat par lequel la banque ou une autre institution financière du pays du fournisseur accorde un prêt à l'acheteur étranger avec la prise en charge de l'engagement de paiement par la banque, face au fournisseur autochtone si les documents prévues sont présentés, avec l'obligation pour l'acheteur étranger de restituer la somme d'argent et l'intérêt.

Pour passer un contrat de crédit acheteur, il est nécessaire d'exister séparément un contrat d'exportation, entre le fournisseur autochtone et l'acheteur étranger, contrat qui justifie le crédit acheteur, mais qui, de point de vue juridique, est complètement séparé de celui-ci.

Dans la pratique, le crédit acheteur s'est révélé un instrument flexible, étant accordé tant dans la monnaie nationale (de la banque et du fournisseur) que dans le devise et existant tant dans la variante monobloc que dans la variante de paiement progressif.

Au cas du crédit acheteur de type monobloc, son utilisation est faite au moment de l'accomplissement par l'exportateur des obligations commerciales, à la présentation des documents justificatifs. Ce type de crédit peut être utilisé dans plusieurs tranches, dans la mesure de l'exécution de quelques obligations contractuelles distinctes, expressément déterminées de point de vue juridique (par exemple, pour plusieurs livraisons de produits).

Le crédit acheteur à paiement progressif sert au financement de la période de fabrication des biens, le fournisseur étant payé soit à un terme prévu dans le contrat (mensuellement, semestriellement etc.), soit à l'accomplissement d'un stade prévu tant dans le contrat commercial que bancaire.

Dans ce cas, les tranches de crédit payées au fournisseur sont déterminées par rapport aux documents présentés qui peuvent être des factures émises par le fournisseur et acceptées par l'acheteur ou des procès-verbaux de réception rédigées dans la présence d'un observateur hors du contrat. Face au risque de sur financement et de l'utilisation exagérée du crédit par un marché frauduleux pour la banque, entre l'acheteur et le fournisseur, dans la pratique, on préfère le deuxième système.

Aujourd'hui, l'assurance du crédit acheteur est devenue une règle dans les relations commerciales internationales pour chaque crédit[11], la prime d'assurance payée par la banque qui donne le financement se retrouvant dans le coût du crédit acheteur et étant donc supportée indirectement par l'acheteur.

§2. Les rapports juridiques entre les participants

Dans la pratique, le crédit acheteur peut supposer plusieurs participants que ceux montrés dans la définition (banque, fournisseur et acheteur), par la création des structures contractuel-financières complexes.

Ainsi, il est possible que l'objet du contrat commercial d'exportation entre fournisseur et acheteur ne soit pas accompli par le fournisseur-même, mais par des sous entrepreneurs ou que le fournisseur ou l'acheteur apparaisse comme un commissionnaire d'une tierce personne.

De même, il y a la possibilité que ce crédit accordé soit financé par plusieurs banques ou organismes financières, il s'agissant de crédits consortiales ou « multisourcing ».

Face aux risques élevés qui peuvent être rencontrés dans le commerce international, dans la quasi-totalité des cas, ce crédit est assuré par un assureur professionnel.

Comme l'intervention de l'assureur sera largement analysée ultérieurement, nous allons analyser en bref les relations entre les participants principaux: fournisseur, acheteur et banque.

2.1. Les rapports juridiques entre fournisseur et acheteur

Ces rapports sont réglementés par le contrat commercial d'exportation qui constitue la base du montage financier entier.

Le paiement du prix représente une obligation essentielle au cadre de ces relations ainsi que le contrat commercial comprenne des clauses concernant la modalité de paiement et les documents nécessaires pour la réception du prix.

Entre le contrat d'exportation et le contrat bancaire il y a, contrairement à leur autonomie, une étroite relation, donnée par le fait que le premier est vu soit comme une cause de l'obligation du banquier qui découle du crédit acheteur[12], soit comme une condition suspensive[13].

Si dans le droit roumain qui appartient au système de droit romano-germanique on peut parler de la notion de cause, dans le droit anglo-saxon, cette théorie de la cause este ignorée, la notion de « considération » correspondant à un concept différent[14], de « équivalent effectif, qui est donné ou accepté en échange d'une promesse ».

Dans la pratique, pour exister une corrélation entre les prévoyances des deux contrats, au cours des négociations du contrat de base (commercial), la

banque sollicite une lettre d'intention, par laquelle celle-ci indique les conditions où elle donnerait son accord de financer l'opération d'exportation.

En ce qui concerne les relations de base entre fournisseur et acheteur, au cas de litiges entre eux, elles ne peuvent pas être opposées à la banque par l'acheteur pour suspendre le paiement.

Mais les banques sont directement intéressées du déploiement en bonnes conditions du contrat d'exportation. Pour se protéger de quelques-uns des effets non désirés de la non-réalisation de ce contrat, les banques sollicitent l'engagement du fournisseur pour le cas où, avant de rembourser le crédit, l'acheteur est soumis à une procédure collective due à la détérioration de sa situation comme effet du non accomplissement conforme des obligations commerciales que le fournisseur avait face à lui.

2.2. Les rapports juridiques entre acheteur et banque

Ces rapports sont réglementés par le contrat de crédit acheteur. L'acheteur a la qualité d'emprunteur et c'est une personne juridique avec le siège social à l'étranger ou même une filiale étrangère (conformément au critère objectif, adopté aussi par le législatif roumain[15], avec la nationalité du pays où elle est constituée) ou de la même nationalité avec l'exportateur. Comme une vente-achat passée entre une société et sa filiale d'un autre État, mais de la même nationalité (conformément au critère subjectif), qui suppose l'expédition de la marchandise au dehors de la frontière, représente une exportation, et la nationalité différente entre l'acheteur et le vendeur n'est pas d'essence au crédit acheteur, cette variante est aussi possible.

On exclut[16] de la sphère de cette notion, les prêts accordés par des organismes internationaux comme la Banque Mondiale, l'Association Internationale de Développement[17], la Banque Européenne d'Investissement[18], la Banque Européenne pour Reconstruction et Développement[19], parce que, quoique la technique utilisée est la même plusieurs fois, il est plus important l'aspect d'aide pour le développement et le soutien de l'exportation qui n'est pas rencontré au cas du crédit acheteur classique. En plus, ces opérations sont multinationales, les organismes impliqués sollicitant des offres internationales et en finançant diverses opérations qui ne prennent pas en compte la nationalité du fournisseur.

Une autre raison pour l'exclusion de ces crédits de la sphère du crédit acheteur c'est le fait que, si pour le dernier on applique la loi des parties ou la loi de l'État de nationalité de la banque (la partie avec la prestation caractéristique),

pour les prêts accordés par les organismes internationaux sont appliquées les normes du droit public.

Même si au crédit acheteur on rencontre des organismes de soutien de l'exportation qui actionnent au sens de la stabilisation de l'intérêt à un niveau précis (par exemple: BCFE en France, EXIMBANK SUA, EXIMBANK Roumanie ou EXIMBANK Japon), leur intervention n'est pas déterminante pour la passation des contrats de crédit acheteur, leur existence étant possible aussi sans le support de l'État de l'exportateur.

Entre les deux parties, acheteur et banque, on passe le contrat de crédit qui constitue une ouverture de crédit internationale.

Les principales clauses du contrat de crédit sont généralement les mêmes, indifféremment du système de droit et, d'habitude, elles sont imposées par les assureurs. Étant donnés les risques que cette transaction suppose, la majorité des banques qui financent[20] cherchent la protection offerte de l'assureur par la passation de contrats d'assurance du crédit. Pour bénéficier de cette assurance, les banques vont essayer de ne pas s'écarter des modèles de contrats de crédit acheteur mis à disposition par les assureurs et vont imposer aux acheteurs ces modèles[21].

Bien qu'on n'établisse le plus souvent aucun rapport juridique entre le débiteur et l'assureur de crédits (à l'exception de la situation où le débiteur est le contractant de l'assurance passée au bénéfice de la banque), on apprécie que pour la passation du contrat d'assurance du crédit, le premier va devoir autoriser la banque ou l'institution qui finance d'utiliser les informations qui résultent du contrat de crédit.

À défaut de cette autorisation, l'assuré, qui doit fournir à l'assureur de crédits des informations concernant l'objet de l'assurance, le crédit acheteur, sera passible de responsabilité pour la violation du secret bancaire.

La convention de crédit acheteur comprend les obligations principales de la banque, du prêt-acheteur, les conditions d'utilisation du crédit, de remboursement normal et anticipé, les garanties, le droit applicable et la résolution des litiges.

a) Les conditions d'usage. Celles-ci sont établies en fonction du type de crédit acheteur (monobloc ou à paiement successif), et en contrat est prévue l'obligation de l'acheteur-prêté de présenter des documents d'où il résulte la régularité de sa constitution et les autorisations émises par les autorités locales compétentes[22].

Au cadre de cette convention, l'acheteur-prêté souscrit des billets à ordre représentant les taux de crédit qu'il faut restituer. Étant donné qu'on ne peut pas préciser exactement la somme et le délai de paiement des taux (elles dépendant du moment auquel le fournisseur accomplit ses obligations du contrat d'exportation et il est payé), l'acheteur donne mandat à la banque soit pour compléter les billets en blanc, soit pour modifier les billets existants[23].

Il est nécessaire de souscrire plusieurs billets, parce que, si aux États-Unis les billets à ordre à taux multiples sont permis[24], ni dans le système de droit roumain[25] ni dans les pays signataires de la Convention de la Genève en adoptant la Loi uniforme sur les traites et les billets à ordre (du 7 juin 1930), on ne connait pas la validité de ces billets.

Le mandat donné par l'acheteur à la banque pour la modification des billets à ordre est licite, ayant en vue le fait que la Loi uniforme adoptée à Genève permet la régularisation des billets à ordre (art. 10), elle interdit seulement l'altération des billets à ordre, mais non pas leur modification.

b) L'obligation de paiement direct dans les mains du fournisseur. Dans le système du crédit acheteur, on doit analyser l'obligation de la banque de verser dans les mains du fournisseur du crédit accordé à l'acheteur.

Dans les conventions type de crédit acheteur utilisées en France et en Belgique on a prévu la clause conformément à laquelle « l'emprunteur (…) donne mandat au prêteur de payer au fournisseur les sommes mentionnées ».

À partir de ces prévoyances, on a affirmé que l'obligation de payer directement au fournisseur doit être qualifiée comme un mandat dans l'intérêt commun de l'acheteur et de l'exportateur[26]. Ayant en vue la nécessité de garantir pour l'exportateur du paiement direct, ce fondement juridique a été trouvé non satisfaisant à une étude approfondie[27]. En effet, dans le droit national de divers États sont prévues des clauses de révocation du mandat auxquelles le mandant ne peut pas renoncer par anticipation (par exemple, le dol grave du mandataire ou la force majeure), ainsi que la possibilité de renoncer au mandat. Comme dans le cas de l'obligation de la banque de paiement, la manifestation de volonté de la banque de renoncer à l'exécution de l'obligation ne peut pas produire des effets juridiques, cette obligation ne peut pas être qualifiée comme provenant d'un mandat. Pour les mêmes considérations, ni la théorie d'un mandat donné par l'acheteur ne peut être acceptée.

Face à ces désagréments de la théorie du mandat, on a essayé l'analyse de cette obligation de paiement par son assimilation à d'autres institutions, ainsi que la stipulation pour l'autre (qui n'est pas connue dans le droit anglais et ne justifie

pas l'inopposabilité des exceptions), la cession de créance (pour laquelle on n'a pas accompli les conditions, c'est-à-dire la créance n'est pas certaine et on ne respecte pas la formalité de notification de la cession) ou la délégation (qui dans le droit belge et américain ne justifie pas l'inopposabilité des exceptions du rapport délégant – délégué).

Face à toutes ces difficultés, dans la doctrine[28], on a émis la théorie conformément à laquelle l'obligation de paiement direct du cadre du crédit acheteur est spécifique à une technique juridique sui generis créée par la pratique internationale commerciale et qui résulte d'un contrat unilatéral passé entre banque et l'exportateur – bénéficiaire de l'obligation de payement.

En effet, nous acquiesçons à l'opinion conformément à laquelle cette obligation de paiement est une obligation *sui generis* qui résulte d'un contrat unilatéral, pour les arguments suivants:

- entre banque et acheteur intervient un contrat bilatéral où la première partie, la banque, assume aussi, parmi d'autres obligations, la prise en charge envers un tierce (le fournisseur) une obligation en nom propre;
- ce contrat de crédit acheteur est parfait dès sa passation; si la banque n'accomplit pas l'obligation prise en charge, elle serait responsable envers l'acheteur pour tous les dommages produits par cette non exécution;
- le fournisseur ne pourrait pas avoir une action directe contre la banque s'il fondait ses prétentions uniquement sur le contrat de crédit entre la banque et l'acheteur, parce qu'il ne connait pas leur rapport juridique;
- du moment où la banque notifie au fournisseur la passation du contrat de crédit acheteur, elle assume une obligation en nom propre envers celui-ci;
- cette obligation résulte de la déclaration de volonté de la banque, acceptée par le fournisseur, donc qui provient d'un contrat entre ceux-ci (la formation de l'accord de volonté);
- ce contrat est unilatéral, donnant naissance à des obligations dans la responsabilité de la banque; même si le fournisseur a l'obligation de présenter à la banque les documents prévus dans le contrat, ce n'est pas une contreprestation, mais une condition que la banque effectue le paiement.

Le contrat étant unilatéral, passé dans l'intérêt du fournisseur, il est parfait du moment où la déclaration de volonté est arrivée à la connaissance du fournisseur, celui-ci n'étant pas tenu à communiquer son acceptation[29].

c) Des clauses concernant l'inopposabilité des exceptions. Comme nous avons montré au-dessus, quoi qu'il y ait une étroite liaison entre le contrat bancaire et le contrat d'exportation, à savoir le premier est passé pour se réaliser

le paiement du prix du deuxième contrat ou une condition suspensive (l'obligation de la banque de paiement devient actuelle au moment de l'accomplissement par l'exportateur des obligations du contrat de commercialisation; au cas où le contrat d'exportation n'est pas amélioré ou il est réalisé avant de prester les services ou de livrer les marchandises, comme l'obligation de paiement du prix n'existe pas, la banque ne va pas avoir quoi payer au fournisseur), par la volonté des parties, on fait un « éloignement » de ceux-ci, au sens où on prévoit que les deux contrats produisent les effets indépendamment l'un de l'autre.

Ainsi, dans le contenu du contrat de crédit acheteur on stipule la clause conformément à laquelle le prêteur (la banque) ne connaît pas du tout le contrat passé entre l'acheteur et le fournisseur, l'acheteur ne peut pas se soustraire de l'accomplissement de l'obligation assumée par ce contrat (de crédit acheteur), par l'opposition envers le prêteur des réclamations ou des exceptions qui résultent de l'exécution du contrat de base ou des rapports personnels avec le fournisseur (nommée dans le droit français, la clause Isabel[30]).

La clause étant stipulée dans l'intérêt de la banque, elle peut renoncer à inopposabilité. D'ailleurs, dans les contrats de crédit acheteur, on stipule aussi la clause conformément à laquelle au cas de l'annulation ou de la résiliation du contrat d'exportation, la banque peut demander le remboursement anticipé du crédit.

La clause qui contient l'inopposabilité des exceptions qui découlent du contrat d'exportation a été contestée, en affirmant qu'au cas où l'exportateur n'accomplit pas correctement les obligations contractuelles, il faudrait reconnaitre à l'acheteur le droit d'interdire à la banque le payement dans les mains de l'exportateur. Mais cette clause a été reconnue comme valable par les instances arbitrales, dans les causes soumises à leur jugement[31].

d) La délégation du fournisseur. Pour éviter les irrégularités dans l'utilisation du crédit acheteur, ses mécanismes juridiques imposent aussi la délégation en faveur de la banque d'une créance que l'acheteur peut avoir envers le fournisseur.

En effet, il y a des situations où le fournisseur bénéficie du paiement par le crédit acheteur, mais conformément au contrat commercial, il doit lui-même de l'argent à l'acheteur (pénalités, dommages-intérêts).

Si le fournisseur donnait ces sommes à l'acheteur, cela signifiera en fait qu'il a encaissé ces sommes d'argent de la banque conformément au crédit acheteur et il a payé une partie de ces sommes à l'acheteur, ce qui signifie que ce

crédit a eu comme finalité que l'acheteur-prêté obtienne des liquidités, à savoir le détournement du crédit de la fin pour laquelle il a été accordé.

Davantage, au cas où l'acheteur a une créance contre le vendeur qui résulte du contrat de commercialisation, celui-ci devrait se compenser avec la créance du vendeur contre l'acheteur, en consistant dans le prix établit, jusqu'à la concurrence de la plus petite. Si après la compensation, le vendeur doit encore recevoir de l'argent de l'acheteur, cette somme devrait être versée par la banque au vendeur conformément au contrat de crédit.

Mais comme une entente entre le vendeur et l'acheteur n'est pas possible à la suite de laquelle la banque ne prenne pas connaissance de l'existence de la créance de l'acheteur, pour éviter une telle situation, on prévoit la délégation imparfaite que le fournisseur doit accepter par écrit.

La délégation est une convention conformément à laquelle un débiteur, le délégant, dans notre cas l'acheteur, amène à son créditeur, le délégataire, la banque qui finance, l'engagement d'un deuxième débiteur, le délégué, le vendeur, près de lui[32].

Sans effet novateur, il résulte que par l'intermédiaire de cette opération juridique, il ne s'agit pas de l'extinction d'une obligation et son remplacement avec une nouvelle, mais entre délégué et délégataire prend naissance un rapport juridique, sans annuler le rapport initial.

L'obligation initiale apparaisse comme une « garantie » de la deuxième, au sens que si le délégataire n'obtenait pas la réalisation de sa créance du délégué, il va avoir droit de poursuite contre le délégant[33], mais dans ce cas, uniquement dans les limites d'une créance de l'acheteur envers le fournisseur.

Comme en matière commerciale on exclut l'idée d'assumer un engagement comme une libéralité, le vendeur délégué sera obligé à payer au délégataire la somme d'argent qui représente la créance de l'acheteur envers lui, du vendeur.

e) La loi applicable et la clause concernant l'arbitrage. La loi applicable au contrat de crédit acheteur est, bien sûr, choisie par les parties. La plupart des pays prévoient dans la législation nationale la possibilité que les parties contractantes choisissent la loi applicable. En ce qui concerne les États membres de l'Union Européenne, ce droit est prévu par la Convention entre les États membres de la Communauté Économique Européenne concernant la Loi applicable aux obligations contractuelles, adoptée à Rome, au 19 juin 1980[34].

Si les parties n'ont pas choisi la loi applicable au cadre du contrat, il revient à l'instance judiciaire ou arbitrale sa détermination.

Au cas du crédit acheteur accordé par une seule banque ou plusieurs banques du même État, le droit applicable est à coup sûr le droit de la partie avec la prestation caractéristique, à savoir de la banque.

Pour les contrats de crédit acheteur avec financement provenant de la partie de plusieurs banques ou institutions de financement de l'exportation de différentes nationalités, la loi applicable sera déterminée par la loi de l'État avec lequel le contrat a les liaisons les plus étroites[35].

Ayant en vue qu'on ne peut pas déterminer toujours la banque qui participe le plus à financement, nous considérons que la loi applicable devrait être la loi de la banque principale (chef de file, lead manager) ou de la banque (des banques) située dans le territoire de l'État du fournisseur.

En ce qui concerne la solution des litiges, on observe en pratique l'insertion fréquente de la clause compromissoire. On explique[36] l'existence de ces clauses principalement par la volonté d'éviter les instances judiciaires de l'État du débiteur[37], les arbitres présentant plusieurs garanties d'indépendance que ces instances, surtout au cas où une entité publique est partie en procès.

D'ailleurs, l'appel aux instances arbitrales se justifie pour d'autres considérants aussi, par exemple la célérité de solution des causes, le coût réduit de tels litiges et surtout la confidentialité des débats pour le prononcé d'une sentence arbitrale.

Les clauses compromissoires sont préférées dans le droit continental et anglais, les conventions type délivrées par EXIMBANK SUA prévoyant la solution des litiges par les instances judiciaires de l'un des États-Unis. (art. VIII de la Convention).

2.3. Les rapports juridiques entre fournisseur et banque

Le fondement de cette relation est constitué par l'engagement pris par la banque face au fournisseur, par une notification qui comprend la notification de celui-ci concernant le crédit acheteur mis à sa disposition, les documents qui doivent être présentée pour remettre les documents et le délai maxime pour les présenter.

La banque ou l'acheteur ne peuvent pas révoquer ou suspendre le crédit au détriment de l'acheteur, que pour les conditions prévues dans la notification.

Par notification, la banque indique le fait qu'au cas de commencement d'une procédure collectives sur l'acheteur ou au cas de l'annulation ou de la résiliation du contrat commercial, elle n'est plus tenue de verser les fonds aux

mains du fournisseur, ce qui représente en fait une résiliation du contrat de crédit acheteur.

Tant la doctrine que la pratique a sanctionné par l'absence des effets la formule qui apparaît d'habitude dans ces notifications, conformément à laquelle la banque précise que la notification concernée ne représente pas une garantie ou une confirmation de sa part, étant adressée au fournisseur à titre d'information.

Pour obtenir les sommes d'argent qui représentent le prix dû par l'acheteur, le fournisseur doit présenter à la banque les documents justificatifs, prévus tant dans le contrat bancaire, commercial, que dans la notification de la banque (facture, documents de transport, polices d'assurance, certificat d'origine etc.).

La banque va vérifier ces documents conformément aux Règles et Usances Uniformes concernant les Crédits Documentaires RUU, à savoir va contrôler «l'apparence de véridicité», étant exonérée de la responsabilité pour les manques concernant la forme, l'exactitude ou l'authenticité des documents concernés[38].

Ce renvoi à RUU ne fait pas que d'autres règles de cet acte soient applicables. Ainsi, par la sentence arbitrale no 4603 du 4 septembre 1984, prononcée par CCI Paris, on a établit que, au cadre du crédit acheteur, la banque n'a pas l'obligation, dans l'absence d'une disposition contractuelle, de remettre à l'acheteur les documents reçus du fournisseur, mais elle doit l'informer seulement au sujet de la valeur du crédit utilisé.

Conclusions

Le crédit acheteur représente une technique relativement récente de financement des exportations et connaît un grand développement en quelques pays[39]. Il a commencé à être utilisé beaucoup plus que le crédit fournisseur, le succès montrant que ce financement répond mieux aux besoins des exportateurs.

En effet, au cadre du crédit acheteur, le fournisseur ne supporte plus le risque de non paiement du crédit commercial qu'il a accordé à l'acheteur étranger, ce risque étant assumé par la banque.

Même si le fournisseur, au cadre du crédit fournisseur, a la possibilité de refinancement par la mobilisation de ses créances sur l'acheteur, il reste encore soumis au risque de non paiement: au cas où le débiteur étranger n'acquitte le débit, la banque va actionner contre le fournisseur par les techniques habituelles du droit cambial.

On a affirmé[40] encore que, dans quelque mesure, le crédit acheteur est plus « orthodoxe », parce qu'il permet de créditer l'acheteur face aux biens

d'investissement, dont l'autofinancement va permettre le remboursement des prêts.

De ce point de vue, il est normal qu'en ce qui concerne les biens d'investissements, ce crédit soit accordé à l'acheteur, l'exploitation de ces investissements assurant le paiement à terme du crédit, que demander au vendeur de jouer au banquier face à l'acheteur et, en conséquence, d'assumer la responsabilité de trésorerie des créances.

La méticulosité et la rigueur nécessaires dans le financement d'une exportation par le crédit acheteur sont moins attractives pour l'acheteur. La double négociation (le contrat de crédit et le contrat commercial) doit bien synchronisée et elle est plusieurs fois la mise en œuvre de cette modalité de financement, et suppose une période plus longue que le financement par crédit fournisseur.

Pour les banques, le coût de gestion d'un crédit acheteur est plus grand, cette opération devenant rentable au cas où le quantum du crédit est grand[41]. Cette circonstance fait que le financement par crédit acheteur ne concerne pas les opérations d'une importance réduite.

Le crédit acheteur est, en échange, utilisé en opérations complexes (par ex.: le contrat d'entreprise à clé) ou pour des biens à grande valeur et d'usage à long terme.

Dans la mesure où le quantum du crédit est assez grand pour être rentable, les banques seront intéressées à cette modalité de financement qui leur permet de mieux apprécier l'état économique de l'acheteur et de soutenir les intérêts de l'exportateur qui, le plus souvent, est son client.

Ces opérations ne seront pas financées par le crédit fournisseur, les exportateurs ne pouvant pas assumer un tel risque. D'ailleurs, du point de vue comptable aussi, le crédit acheteur avantage l'importateur. Si au cas du crédit fournisseur, ils inscrivent dans la comptabilité la créance qu'ils ont contre l'acheteur étranger et acquittent dans la majorité des systèmes de droit l'impôt sur profit afférent sans que cette créance soit comblée, au cas du crédit acheteur, dès la prestation à laquelle il s'est obligé (au cas du crédit acheteur monobloc) ou à l'atteinte d'un certain stage du travail (au cas du crédit acheteur à paiement progressif), à bref délai, le fournisseur va encaisser le prix (ou seulement une partie).

LES REFERENCES

[1]Par exemple, les systèmes de droit belge, français.

[2] G. Cornu, L'évaluation du droit des contractes en France, Journée de la Société de législation comparée, 1979, p.447.

[3]La première réglementation juridique apparaît dans l'art. V de la Loi no 65-1159 du 30 décembre 1965 concernant les finances, et les dispositions principales qui réglementent cette institution apparaissent dans les Instructions du Ministre de l'Économie et des Finances et BFCE.

[4] La norme no 17/2002 de BNR (M. Of. no 700 du 25 septembre 2002) ; l'Ordre no 103/2002 du Conseil de la Concurrence (M. Of. no 591 bis du 24 mai 2002) ; l'Annexe concernant les solutions visant l'application de quelques prévoyances légales concernant l'impôt sur le profit corroborées avec les réglementations comptables harmonisées avec les directives européennes et avec les standards internationales de comptabilité (M. Of. no 781 bis du 6 novembre 2003) (la Décision no 9 du 8 octobre 2003 du Ministre des Finances Publiques).

[5] G. Bordeaux, Le crédit acheteur international, Ed. Economic, Paris, 1995, p.2.

[6]P. Bran, Relaţii valutare financiare internaţionale, Ed. Didactică şi Pedagogică, Bucureşti, 1990, p. 114.

[7]Contrairement, Al. Deteşan, D. Porojan, Plăţile, riscurile, eficienţa în contractele comerciale internaţionale, in Relaţii economice internaţionale, vol. V, Ed. Revista economică, Bucureşti, 1980, p.71.

[8]Pour des crédits de type monobloc seulement, plus grands de 250 millions francs belges, accordés pour plus de cinq ans, si l'exportateur et la banque démontraient la nécessité de recourir à cette technique.

[9]Voir Al. Deteşan, D. Porojan, œuvre citée, p. 72.

[10] J. Ferronnière, E. de Chilot, Les opérations de banque, Dalloz, Paris, 1980, p. 599.

[11]Al. Deteşan, D. Porojan, œuvre citée, p. 72.

[12]G. Bordeaux, œuvre citée, p. 243.

[13] J.D. Calamari, J.M.Perillo, Restatement of the Low of Contract, paragr. 11-2; J.P. Mottout, Droit Bancaire international, Ed. Banque, p. 76.

[14]O. Căpăţână, B. Ştefănescu, Tratat de drept al comerţului internaţional, Bucureşti, Ed. Academiei, 1985, vol. I, p. 132-133.

[15]L'article 40 alin. (1) de la Loi no 105/1992 concernant la réglementation des rapports de droit international privé, la personne juridique a la nationalité de l'État où elle a établi le siège social, conformément à l'acte constitutif.

[16]G. Bordeaux, œuvre citée, p. 3.

[17]Agence intergouvernementale pour l'octroi de crédits dans des conditions très avantageuses aux États membres moins développés, en vue de réaliser des projets de développement économique prioritaires ; elle déploie une activité parallèle avec la Banque Mondiale, à laquelle elle est affiliée.

[18]Organisme financier régional constitué en 1958 au cadre de la Communauté Économique Européenne, avec le siège à Luxembourg et comme objectif principal la

fourniture de fonds aux institutions financières et aux entreprises particulières des pays membres et associés, pour des investissements d'intérêt communautaire, ainsi que pour le financement des objectifs d'investissements au but de valoriser les régions moins développées des pays membres.

[19]Institution financière internationale siégée à Londres, fondée à l'initiative de la France, par l'accord signé entre les représentants des 42 États fondateurs, au 9 avril 1990, au but de contribuer à la stabilisation économique et politique des démocraties est-européennes basées sur les principes de l'économie de marché par l'extension, la consolidation et la stimulation du secteur privé dans les pays de l'Europe Centrale et d'Est, ainsi que l'encouragement des investissements occidentaux dans ces pays.

[20] Par exemple, la Banque Commerciale Roumaine a passé avec EXIMBANK une Convention-cadre d'assurance des crédits acheteur qui vont être accordés par la première d'entre elles en tant que banque qui finance – www.samexpo.ro.

[21] En France, il y a un modèle élaboré par la communauté bancaire avec la collaboration COFACE; aux États-Unis, le modèle type de convention de crédit acheteur a été élaboré par EXIMBANK et comprend à peu près les mêmes clauses que le modèle français. Dans les Conditions générales d'assurance à moyen et long terme – crédit acheteur, EXIMBANK Roumanie a prévu de ne pas accorder des indemnisations d'assurance au cas des pertes qui résultent de la rédaction incorrecte ou des omissions de la Convention de crédit.

[22] Sous l'influence du droit américain, en pratique on sollicite aussi une attestation délivrée par un juriste local (du pays de l'acheteur), qui certifie la validité de la convention de crédit acheteur du point de vue du droit du pays de l'acheteur.

[23] G. Bordeaux, œuvre citée, p. 103.

[24]UCC – section 3-106.

[25] Conformément aux dispositions de l'art. 36, alin. (2) de la Loi no 58/1936 sur la traite et le billet à ordre, les traites avec des échéances successives sont nulles.

[26]J.P. Mattout, Droit bancaire international, Ed. Banque, Paris, 1995, p. 84.

[27]G. Bordeaux, œuvre citée, p. 219.

[28]G. Bordeaux, œuvre citée, p. 223.

[29] Conformément aux dispositions de l'art. 38 C. com. roumain, dans les contrats unilatéraux, la proposition est obligatoire dans le moment où elle arrive à la connaissance de la partie à laquelle elle est faite.

[30] Selon le prénom d'une stagiaire de COFACE, qui a proposé l'utilisation de cette clause.

[31] Les sentences arbitrales no 4502 du 30 août 1984 et no 4605 du 4 septembre 1984 de la Cour d'arbitrage de CCI Paris, apud J.P. Mattout.

[32] C. Stătescu, C. Bîrsan, Drept civil. Teoria generală a obligaţiilor, Ed. All, Bucureşti, 1997, p. 323; R. Motica, E. Lupan, Teoria generală a obligaţiilor civile, Ed. Lumina Lex, Bucureşti, 2005, p. 233.

[33] R. Motica, E. Lupan, œuvre citée, p. 233.

[34] Conformément à l'art. 3, alin. (1) de la Convention: un contrat sera gouverné par la loi choisie par les parties. Le choix doit être exprimé expressément ou être déterminable conformément aux prévoyances du contrat conformément aux circonstances concrètes du cas. Les parties vont pouvoir opter en ce qui concerne la loi applicable pour tout le contrat ou pour une seule partie.

[35] Conformément aux dispositions de l'art. 103 lettre c) de la Loi 105/1992 concernant la réglementation des rapports de droit international privé, dans l'absence de loi convenue par les parties, on applique dans les contrats bancaires, y compris dans les contrats de garantie bancaire autonome, la loi du siège de l'entreprise de crédit ; dans les rapports des deux banques, on applique la loi de la banque qui déploie le service à la faveur de l'autre.

[36]G. Bordeaux, œuvre citée, p. 248.

[37] La préoccupation des banques est déterminée par le fait que la plupart des systèmes de droit établissent des compétences de solution d'un litige en faveur de l'instance du siège / domicile du défendeur. Par conséquent, au cas de non accomplissement des obligations assumées par l'acheteur, les banques vont devoir s'adresser à l'instance nationale de l'acheteur.

[38] Conformément à l'art. 13, lettre a), de la Publication no 500 de CCI Paris, les banques doivent examiner tous les documents précisés dans l'accréditif avec un souci raisonnable pour s'assurer s'ils sont ou pas en concordance avec les termes et les conditions de l'accréditif. La concordance des documents précisés avec les termes et les conditions de l'accréditif sera déterminée par les pratiques bancaires internationales (…).

[39] Conformément à J. Masson (Creditele bancare pentru întreprindere, Ed. Rao, Bucureşti, 1994, p.131), du total des exportations françaises à la fin de l'année 1995 plus de 95 % ont été financées par l'intermédiaire du crédit acheteur.

[40] J. Masson, œuvre citée, p.131.

[41] Y. Simon, S. Mannai, Techniques Financières Internationales, Ed. Economica, 2002, Paris, p. 582.

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PLURALITY OF CRIME

Some aspects of the forms that you can wear plurality of crime and crime unit in accordance with existing criminal the laws of Romania and Moldova.

Abstract

In front of the paper are found and presented some similarities and difference between criminal law of Romania and the Republic of Moldova on example - plurality of crimes and the crime.

To interpret the provisions of the Criminal Code of the Republic of Moldova, bring some critics on the reason the existence of certain provisions relating to unit the crime and is the author's personal views regarding establishment justness of Punishment, goals of criminal law, and respect the principles of national law .

Are presented and opinions existing in the literature and some data solutions practice law in the Republic of Moldova cases which fall within the certain provisions of the Criminal Code of it.

Showing personal views relating to possible changes of the provisions related to speech was made in this paper.

Studying criminal provisions relating to the plurality of crime and the crime in our law and in the Republic of Moldova, I found similarities but also some other issues.

I. In regard to the plurality of crime, found that in our legislation and in the Republic of Moldova, it takes several forms.

According to art. 32 Romanian Criminal Code, the plural forms are the offenses and relapse.

Similarly, the Moldovan Criminal Code provides in art. Article 32. 2 as forms of crime plurality of the crimes (which can be ideal and real, according to Article 33 align.2-4) and relapse (which according to art. 34 align 2-3 could be "dangerous" and "very dangerous "). With regard to these forms of crimes plurality between the two laws are so many similarities.

However, with regard to the crimes we could predict a point of differentiation, related to the categories of crimes that may be in the contest. Thus, according to Romanian criminal law, could be competitive in two or more crimes which can be provided in the Criminal Code or in special laws or laws no–penal with criminal provisions, since the law does not make any distinction.

In criminal law of the Republic of Moldova, however, expressly provided in Article 33 Criminal Code that may be in competition only crimes specified in articles strictly from the special penal code. [1]

II. Differences exist with respect to the kinds of crime unit. In criminal law of our country unit offense may be natural and legal. Natural forms unit offense under our laws are [2]:

- Simple offense (characterized by a single action / inaction and a single form of guilt);

- Crime continues (characterized by extension the natural, natural action / inaction that is the subject side targets after consuming them and to an intervention force contrary);

- Deviated crime (committed by the diversion action in the subject or the person against whom it was facing due to fault the perpetrator of his error on another person or object than the perpetrator wanted to damage him).

The establishment of laws are:

- Continued infringement (that is committed by the same person at different intervals of time and achieve the same criminal judgments, of shares / no action which, in each hand, the same crimes);

- Complex offense (which includes content that constituent or aggravated an action / inaction that itself constitutes an act of criminal law provided for (;

- Progressive offense (after consumption, without any intervention from the perpetrator, is rising gradually follow, or track production in November, matching a more serious crime)

- Usually offense (whose content is achieved by repeating the crime by a number of times to highlight the habits, occupation author).

According to the Criminal Code of Moldova offense may be:

• Single (represented by "the action / inaction or system actions that qualify under the provision of a single rules of criminal law" according to art. 28 Criminal Code of the Republic of Moldova);

• continuous (characterized by the commission "uninterrupted period of time, criminal activity and, in this case there is no plurality of crime" as a provision art. 29 align (1) of the same Criminal Code;

• extended (committed with intent and one characterized by two or more identical criminal acts, committed by a single goal, the whole constituting a crime according to Article 30 paragraph 1 of the Criminal Code.

The Criminal Code of the Republic of Moldova provides in addition to the above crimes exposed as forms of crime and the establishment of "repeat offender".

Since this is not listed among forms of crime plurality , limiting exhibited in art. 32 of the Criminal Code of the Republic of Moldova, means that it can be a form of crime unit.

In accordance with Article 31pct.1 and 2 of the Criminal Code Rep. Moldova is considered "repeat offender" committing two or more identical or similar crimes [3] provided by the same criminal standard, provided that the person was not convicted of any of them and have not expired limitation period.

Meanwhile, everything will be considered "repeat offender" commit "two or more crimes in different articles of this Code, in cases provided for in a special part of this code."

It may be noted that in some cases expressly provided for a special part of the Criminal Code Rep. Moldova is regarded as being repeated offenses are not identical, but homogeneous. For example make reference to the art. Criminal Code 186, Paragraph 4 Rep. Moldova believes that "repeated" offenses in art. 186-192 same Criminal Code, if author has previously committed one of (where the form□the facts set out in paragraph. (1) of the articles mentioned is submitted simple no getting worse them).

Basically, as establish and criminal doctrine of the Republic of Moldova, robbery (stipulate of art. 188 Criminal Code) will be considered "repeated" if its author has previously committed a petty larceny (stipulate the same code art.186

), Or a simple robbery (stipulate of art. 187), which has not been convicted nor has reached the limitation period of criminal liability.

Regarding the sentencing of duplicative offence , mention that the legislation of the Republic of Moldova there is no express provision relating to the application of punishment in case of repetition crime "or as a form of plurality offenses, as any form of crime unit. Express provisions relating to the application of punishment appear in connection with cases of relapse (Article 82 Criminal Code-Rep. Moldova) and competitive crimes (Article 84 the Criminal Code) as the only forms of plurality of crime (according to art. 32 align (2) Criminal Code-Rep. Moldova).

Of the criminal law of the Republic that if the contest offenses, each offense will receive a qualification own, following the court to decide the punishment for each crime separately, and subsequently to establish punishment for the final contest by totally or partially overlapping the punishment applied, or, where appropriate, through absorb punishment easier for the stern, as the nature of crimes committed.

In the repetition of the crime, if the repetition is made up of the same crime, all will receive a single qualification, according to a single article of the Criminal Code. If, however, repetition is made up of similar crimes, then you will need, we believe, be applicable while the rules related to repeat offender, as well as those of the offenses. This is because repetition can form and crimes that are provided and sanctioned by various articles of the Special Criminal Code of the Republic. Moldova, in which case will be taken into consideration, we believe, the provisions of Article 84 of the Code on the application of punishment for offenses contest, and the circumstances relating to the commission repeatedly, which increase criminal liability.

In this respect there is a recommendation by the decision of the Supreme Court of Justice of the Republic of Moldova (at point 24) on the practice in criminal matters in criminal cases on the unlawful removal of goods, the number 23/28.06.2004.

By decision is recommended for cases where one of the crimes referred to in paragraph. (1) of art.186-192 Criminal Code-Rep. Moldova was committed after the event:

a) an offense homogeneous (like a theft followed by a robbery)

b) an offense referred to a paragraph of the same article of law (such as a simple theft followed by a theft committed by two or more people)

c) an offense that was interrupted in another phase of criminal activity (such as when a theft consumed was followed by an attempt at theft or theft of a training viceversa6 times,

d) an offense in which the perpetrator was "another legal role (such as in the first case was the author, and in the second organizer, instigator or accomplice, or vice versa), the qualification to be made in accordance with the rules of competition offenses.

Other provisions relating to repeat offense than those mentioned in art. 31 Criminal Code-Rep. Moldova and paragraphs some of the specific items of the same code no longer appear. We have in mind that many of the crimes sanctioned in the special code that the legislature has provided qualified form or aggravated committing "repeated" the same crime (in simple form) and as such, has ordered for these . We believe that the presence of□cases the application of a heavier penalties such terms would help to understand the necessity of distinguishing the crimes of duplicative offense, and also to understand the difference between the two, □as they are currently exposed to the Criminal Code Republic of Moldova.

In fact , researching and doctrine of criminal Rep. Moldova in the matter, found that Article. 31 of the Criminal Code of the Republic and are criticized by some experts, who propose to take the "repeated crime", considering that, in fact, this is practically a way of the real contest of crime. They believe the term "repeated" is actually a real avoidance of liability offender a criminal who committed crimes in the same way, stressing that "the legal system of criminal liability for repeated offense is more gentle than for competition, which not and find a logical explanation, because in both cases shows the same trend of anti offender "9.

And interpreting the specific provisions of the Criminal Code to which we, the authors believe that, being implemented provisions of paragraph (4) of the Criminal Code art.186, is no longer comply with the provisions of art. 16. (1) of the same Cod10 relating to the classification of crimes. Also, they consider that

being implemented those provisions of art. Article 186. (4) of the Code, is produced and a violation of the principles of criminal law, mainly of equality before the law. He moved the point of view of those considerations that according to provisions robbery will be repeated if the person has previously committed a theft, and its author will receive a more severe penalty compared with the reverse situation, when the perpetrator that committed a robbery and later a do what will be regarded as repeated, will receive a lighter penalty.

We consider this critical to fair legal provisions which make reference. Indeed, according to these laws, theft no getting worse is considered a less serious offense, being punished with a maximum penalty of which may particularly be 3 years in prison. If it is followed by a robbery in simple form, the committed will be qualified as a crime of robbery committed repeatedly (provided by art. Article 188. (2) Criminal Code-Rep. Moldova), which is a serious crime (being punished with whose maximum jail particular is 15 years). If, however, hold no getting worse (which is a serious offense) and followed by swindle no getting worse, then those committed under Article 186 paragraph. (4) the same code, will be qualified as a crime of theft committed repeatedly, which is punished with imprisonment which may reach the maximum of 5 years especially, is considered an offense "less serious".

From this example we conclude that the danger of concrete social facts committed just is not always appreciated and practically rights and individual freedoms are violated, applying different treatments to those who have committed the same terms, the same act punishable by criminal law.

This "repeated offender" as a form of unity of crime has no correspondent in the criminal law of Romania, it may not be identical with any forms of unity, be it natural or legal infringement.

Performing an analysis of the unit forms of crime in criminal law of Romania, found that it could find some elements of comparison between the existing repeat offender law in the Republic of Moldova and the offense continued "existing law Romania.

Thus it is found that both forms of legal crime unit, are legal actions. However, unlike 'offense continued, as represented by "repeat offender" in the legislature Rep. Moldova has assimilated phenomena that are not identical: the

plurality of crime and crime unique because it is considered "repeat the offense and committing two or more crimes in different articles of the Criminal Code. Unlike this form, shape 'offense continued "is characterized in that all actions or failures to form the content of a single crime.

Also, unlike 'offense continued "(as seen in law Romania), in the" repeat offender ", Rep. of the legislature. Moldova makes no reference linked to the existence of any intentions or single purpose single in the commission of crimes forming recurrence.

Another distinction between the two forms of crime were provided in the laws of the two countries concerns the length of time elapsed between action or inaction committed: according to the law of criminal Rep. Moldova, the only condition related to this issue is not to have reached the limitation period of criminal liability. In different ways, the Romanian legislation a prerequisite for the continued existence of the crime as a form of crime unit, refers to the intervals of time between drained action / inaction, which should be neither too short nor too long to not there is suspicion of a single criminal or decisions of various criminal offenses and some distinct.

Another difference lies in how and sentencing of the two forms of crime unit:

- Where "duplicative crime" - if the offenses committed are covered by a single article of the Criminal Code of the Republic of Moldova, the repetition is made up of the same crimes and all will be qualified in accordance with one-time criminal. If, however, repeat offenses is made up of homogeneous, it will be concurrent application of rules relating to "repeat offender", and "the crimes". It notes so that in case of repetition of similar offenses.

In Romania legislation does not appear this problem the way for sanctioning the crime continued to form a unity of crime, the perpetrator being applied to the penalty provided by law for the offense (single) which has committed an action or inaction by it.

Analyzing criminal provisions in the two countries on the crime unit and plurality of crime, we appreciate that the existing provisions in the legislation of the Republic of Moldova, referring to "repeat offender" would be desirable to be repealed. These provisions not help, we believe in establishing the just, equitable

sentencing, and the goals of criminal law. Yes, on the contrary, by applying their principles are violated some of the criminal law, such as equality before the law, since there is the possibility of applying different penalties for committing the same crimes, but in a reverse order.

Moreover, we believe that "repeat offender" as a form of unit offense and would have had reason if it were made from a recurrence of acts which, viewed separately, not as separate crimes and whether the legislature should be stressed the need for a single criminal judgments and a single purpose. But the provisions of the Criminal Code of the Republic of Moldova is not any of these conditions, we believe essential to be in the presence of a unit of offense.

In conditions described as "repeat offender" in the current legislation of the Republic. Moldova, we appreciate that it appears rather as a manifestation of plurality offenses, as shown in the Criminal Code of Romania, in art. 33 (a) (as two or more crimes which were committed by the same person before it was finally convicted for one of them).

For this reason we appreciate that the existing criminal law of the Republic of Moldova on repeat offender and have no sense and should not be adopted and the Romanian legislature. On the contrary, we believe that it would be desirable that they be removed from the criminal law of the Republic of Moldova, will be effectively yeah, and in these circumstances the provisions relating to the offenses. Thus, we believe, would avoid confusion and controversy arising in practice and doctrine on the subject. Also, there should no longer differentiate between the legal treatment of "repeat offenses" and "the crimes", as currently exist. In accordance with the current crime for a "repeated" the legal system is more gentle, we believe that unduly in relation to the competition of crimes.

In our opinion the provisions of the Criminal Code of Romania on the offenses (listed in art. 33 (a) - (b) Criminal Code) are sufficiently clear with regard to situations where there is plurality of crime in the form of competition (real and ideal) in practice no problems related to the identification of situations in which they committed more crimes in the contest.

For these reasons, dared to believe, perhaps, a research and the provisions of the Criminal Code Romanian would be a real help legislator from Moldova in

the event of change in the future of criminal force on the forms of crime unit, the plurality offenses within the meaning of provisions relating to the elimination of "repeat offender".

REFERENCES

In Article 33 paragraph. 1 Criminal Code of the Republic of Moldova stipulates: "The contest is considered by committing crimes by a person or two more crimes, in different articles or different paragraphs of a single article of special part of this code, if the person has not been convicted of any of them and if it has not expired limitation period. In paragraph. 2 provides that: "the ideal person there when ... commit two or more crimes in different articles or different paragraphs of an article of this Code "; in paragraph. 4 shows "real competition exists when a person through various actions / no action ruble, commit two or more crimes in different articles or paragraphs of a different article of this code.

See and C-tin Mitrache, "Romanian criminal law. Part general, "House Press imprint and" Chance LLC, Bucharest 1994, p. 112-122.

In the doctrine of criminal Rep. Moldova are defined:

- Homogeneous crimes as those crimes that are committed by different facts, but with common features and out rage the same general objective. "

- See Stela Botnaru, Alina Savga , Vladimir Grosu, Mariana Geană , "Criminal Law. P. General ", vol I, second edition, edit. Legal Cartier 2005, p. 290-291

- Offenses identical-signs with those crimes falling under the same article of the penal law (for eg-theft no getting worse followed by aggravated robbery) to see Sergiu Brînză, Vitalie Stafi, "The repeat offender: arguments in favor of exclusion The Criminal Code of the Republic. Moldova, the National Law Journal "No. 2, 3 / 2007, p. 14-19; 6-12.

- Offenses-homogeneous as those crimes that are committed by different facts, but with common features and to attack to the same general objective is to see stars and team Botnaru, op. cit. , p. 290-291.

By analyzing the art. 31 Code pen.-Rep. Moldova, the doctrine considers uniform crime, those crimes that have signs which are subject to various paragraphs of the same article of the penal law, for example. The offense of theft no getting worse followed by a theft committed by two or more people, so qualified. All homogeneous but are valued and crimes that have signs that fall under different articles of the penal law as eg. The offense of theft followed by the robbery - see Sergiu Brînză, Vitalie Stafi , op. cit..

It is crimes of theft (Article 186), robbery (art. 187), robbery (art. 188), blackmail (art.189), extortion (Article 190), embezzlement of foreign assets (art.191), theft (Article 192) for the Code. Rep.. Moldova. Noted that for these crimes in paragraph. (4) of art. 186 same Code provides that the paragraph. (2) of art. 186-192 (where no-states that form and aggravated the commission of the offense repeatedly), is considered repeated those crimes that were committed by a person which had previously committed a crime stipulate the paragraph. (1) of the articles mentioned, but was not convicted for them.

Such as a provision art. Article 84. (1) Criminal Code-Rep. Moldova.

According to art. 26. (1) Criminal Code-Rep. Moldova is considered preparation for offense, understanding prior to commit a crime, purchase, manufacture and adaptation of means or instruments, or the intentional creation of the other way, of Conditions for committing them if, due to factors beyond the perpetrator, not the offense - The effect of the product. Is punished with a penalty which may not exceed half the maximum most harsh punishments prescribed by law for the offense consumed, according to art. Article 81. (2) Criminal Code-Rep. Moldova.

For example make reference to art. Article 152. (2). (A) Code pen.-Rep. Moldova on the injury of average limb or health, Article 159 paragraph. (2). (a) the challenge of illegal abortion, art. Article 165. (2). (A) on human trafficking, art.166 section (2). (3) the deprivation of liberty.

Code enacted to 6. 09. 2002, implemented through the law no. 1160-xv/21.06.2002 and published in the Official Gazette of the Republic. Moldova, no. 128-129 (1013-1014) of 13.09.2002 as amended by Law no. 211/29.05.2003 into force on 13.06.2003, Official Gazette of the Republic. Moldova. 116/2003.

Sergiu Brînză , paper cit., National law no. 2, 3 in 2007, p. 14-19, 6-12.

According to art. 16. (1) Criminal Code-Rep. Moldova, depending on the nature and extent of injury, crime stipulate by this Code are classified into the following categories: mild, less serious, serious, very serious and exceptionally serious. In (2) - (6) of the same article explained that the legislature deems it means each of the categories listed in the first paragraph.

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ROBBERY. THEORETICAL AND PRACTICAL ISSUES

Abstract

In front of the paper are found and presented some similarities and difference between criminal law of Romania and the Republic of Moldova on example - plurality of crimes and the crime.

To interpret the provisions of the Criminal Code of the Republic of Moldova, bring some critics on the reason the existence of certain provisions relating to unit the crime and is the author's personal views regarding establishment justness of Punishment, goals of criminal law, and respect the principles of national law .

Are presented and opinions existing in the literature and some data solutions practice law in the Republic of Moldova cases which fall within the certain provisions of the Criminal Code of it.

Showing personal views relating to possible changes of the provisions related to speech was made in this paper.

From the definition given in paragraph art.221. 1 Criminal Code that robbery is a particular way of theft, which contains in addition to the making of a good mobile in possess or detention of another in order taking wrongly, a series of adjacent, expressly provided by law , which carried out in order to achieve the theft (violence, threat or placing the victim in a state of unconsciousness or impossible to defend). This is why it is included in the category of crimes against heritage , although prejudice and life , limb, health or freedom of the person .

Unlike theft, robbery is a complex content whereas, according to the definition, affect both the detention and possession of movable (subject to legal principal) and life, limb, health or freedom of the person (subject to legal secondary). In this way, is to hold material mainly mobile asset held by imprisonment or another, and cover the body of secondary material on which the person does the activity of secondary (violence , threat , etc.) . It is possible ,

however, the threat that person to achieve through the use of violence on a good (for example, cutting the victim car tires so that it can not save the escape) in which it will retain robbery in competition with destruction. [1]

Robbery can be perpetrated by any person. In case of participation for the existence robbery's , it is necessary for all participants , regardless of the form of participation, to know the circumstances that theft is done through the means provided by law for robbery, regardless of being at the same time, if the author has committed or not theft in the manner envisaged by accomplice (violence, threat or other means).

As for coauthor, is sufficient, because of the complex, directly commit any of the activities are part of the objective side of robbery (eg only the achievement of violence or threat or unlawful removal only asset) . So , to coauthor there is not necessary that each of the perpetrator may have committed an activity to cover the entire side of the offense objective robbery , but it is enough that each direct perpetrate to an element of it , that is the main , or an adjacent . [2]

If one of the defendants exercising violence and uproot bag victim and the other is away and receiving stolen property, even if this mode of operation has been established previously indicted, we believe that there is a coauthor, but an author and an accomplice. [3]

Has been criticize ,in relatively recent legal literature correctly in our view and argued, a solution adopted by the Supreme Court , which decided that the fact the person who, under a Criminal Section prior agreement , transported by car, two other people near the victim's home and then discontinued electric lighting , giving their ability to deprive the victim through violence, a significant amount of money and to ensure escape, the acts of coauthor to commit the offense of robbery.

Certainly not believe that the activities of the defendant could be considered acts of enforcement action or adjacent to the main characterizing the material side of the objectives of the crime robbery, even if they had been determined in advance and distributed, being essentially acts typical of support for helping the perpetrators to commit robbery , so acts of complicity.

Content objective of the crime robbery is composed of the following actions:

1. Action purpose: the making of a good mobile in possess or imprisonment of another, without his consent, identical to that of theft , to signify main action in the case robbery . It is so petty larceny and theft qualified, which can be committed in order to take unjustly, or in order to use wrongly, if the vehicle.

Linked to this matter, in practice, decided that the existence of the crime of robbery is necessary, in addition to the existence of violence or threat to execute a removal action likely to be placed in art.208 Criminal Code, and not any other act of circumvention. If operation of steal considered independent , falling in the range into special law, as is the Forest Code, no longer can hold that the offense robbery, but the two crimes retain their autonomy, achieving a competitive crimes. In particular it noted that the defendant was surprised by the ranger and forester after stealing trees in the forest to escape a threatened the two with a axe 6, to consider finally forestry crime and the outrage in the contest, not the robbery.

Because the means specific robbery , action-making is done, sometimes, and forced submission to the mobile asset, made even the property owner or holder , which call into question the difference between robbery and blackmail. Between the two offenses there are similarities, since both objects that have special legal freedom and imprisonment and possession of a good mobile, but if blackmail is affected primarily freedom of the individual (hence Blackmail is part of the category of crimes against individual freedom) and only a subordinate other values, while the reverse is the case robbery (mainly affected assets and is in a subordinate person). On this basis it is considered that if the perpetrator, required under threat, a good remission, and the victim immediately meet this demand, is not blackmail but robbery.

By the same token, the practice decided that it is not robbery and blackmail accused of threat, and therefore to the deed itself coat person injured by knife determine the victim under threat of death, to remit a good what belonged . To stressed that if robbery danger which threatens the victim must be imminent, soon, the victim of having an alternative than to comply immediately demand the perpetrator to regain freedom, while the danger of blackmail in

which a victim is exposed should be one future rather than immediate, and the result of violence or threat followed the perpetrator must be in a range longer to the action of coercion.

The making is indispensable in its lack not able to talk about robbery.

2. Shares means: that an alternative, meaning that the realization of any of them is sufficient for the existence robbery . They are:

a) Use of violence by "violence" it mean any physical constraint put on the person. It must meet the following conditions:

_ To be committed against a person (If violence is committed on the property, the deed constituting thievery. However, violence against property would be a threat, which means that the deed could be robbery, but how the threat);

_ To be effective;

_ To have the ability to defeat the resistance of the victim, not necessary that the violence has an irresistible force.

In connection with the meaning of the concept of "violence" in practice a gave contradictory solutions, as well as the views expressed in legal literature, especially about making a good hand or from the victim's body, through pluck. Dominant opinion, which is gaining ever more ground is that if rending unexpected object in your hand or body on the injured person remain robbery specific violence, as in this case, seizure of property by mobile perpetrator is done by violence.

Thus, a decided that rend a chain of the neck injured person against it constitutes an act of violence, within the meaning of art.211 Code penal 9 also, that the theft of a bicycle by rend it in the hands of a minor offense of robbery, rend because it is an act of violenţă10

b) the use of threats

The threat lies in any act by which the moral coercion of a person should be made in this regard refers both to the art.193 Criminal Code, which criminal the act as a distinct threat and Art.46 Criminal Code, whereas, practically a mental or moral coercion.

In this respect, a decided that the fact the defendant to take the threat, goods on the victim, the crime of tâlhărie11.

The threat may be not only explicit, but implicit, for example, on the assumption that the accused, being accompanied by three friends and met people injured on a dark street after a requested a cigarette in circumstances where it was surrounded him and his friends, took advantage of darkness and fear created by the presence of the victim group of people, to stealing glasses and a sum of money.

Also, a felt that using a special device to break the tires to determine stopping vehicles a unintentionally created a stressed state of panic and fear of drivers, equivalent to a state of threat specific content offender robbery 12.

c) Putting the victim in a state of unconscious which means bringing the person injured in the no to see the perpetrator, and to not charge (by intoxication with alcohol, through the use of narcotic drugs, sleeping pills or other substances).

The state of unconsciousness, must be due action perpetrator and not other causes independent of the action, and the perpetrator to push against the person who has good mobile possession or detention, on which is heading the making. Also, the perpetrator for the victim in a state of unconsciousness must be prior to taking the property.

d) Putting palsy victim to defend itself – lies in bringing the injured person in a position to use the possibilities to no defense which as otherwise could use (for example, by linking immobilization victim hand and foot table in order to circumvent an amount of money in your wallet under the pillow or push the victim to the access door in the basement and then scale, providing the door with latch , because then back in the home and to acquire more goods, etc.).

In this connection, the legal literature to conducted discussions on the issue of whether the case robbery the way absences which takes the form of freedom illegally will retain the offense provided by art. 189 Criminal Code in competition with the robbery, provided by art. 211 Criminal Code or will not hold more than one offense of robbery, which absorbed the content of the complex deprivation of liberty unlawfully.

According to an opinion 13 , in this case face a competitive ideally will be to retain both the offense of robbery and the deprivation of liberty unlawfully, while alţii14 have argued that deprivation of liberty unlawfully, to the extent that it was necessary to commit robbery is included in the material of its action as adjacent , loss of autonomy.

We believe that this latter view is correct, so to the extent it is established that deprivation of liberty unlawfully is indispensable for the theft or other purposes set out in art.211 Criminal Code, it is absorbed naturally into the offender robbery.

This does not mean, however, that there may be situations when it is able to retain , separately, in real competition , and the offense of deprivation of liberty unlawfully, along with the robbery.

Shares middle, and actions called adjacent to the theft (or the use of violence, threats, putting the victim in a state of unconsciousness or failure to defend) to be part of the objective of the crime of robbery, must meet on the conditions mentioned above, the following general requirements:

To serve as effective means for:

–perpetrate theft;

–for keeping stolen property;

– to eliminate all the offense;

–to guarantee escape of perpetrator;

To take place concurrently with the time perpetrate theft or at most a short period of time in relation to the theft, that is, whether before or after committing theft, so as to establish links in the middle to end these actions between secondary and primary action .

When the theft and the adjacent there is a big departure time, no one speaks of the existence of the crime robbery, but a plurality of crime, depriving the unit has operations (primary and secondary) is in essence a complex crime (eg , The perpetrator commits a robbery, and after three days, meeting with the injured party, to ensure escape, a hit).

To be directed against either the owner or holder of the mobile asset or against any other person who would intervene to prevent theft or perpetrate for catching and dispossess of perpetrator of stolen property.

As for the subjective side, as well as to theft, robbery can not do than with the guilt of a direct intention, because specific purpose theft (wrongfully appropriating, or use unfair if the vehicle) , and of her own (use violence, threat, putting the victim in a state of unconsciousness or impossible to defend , to commit theft , for keeping stolen property , or to delete all the offense or insurance escape perpetrator)

To take goal wrongly there must be at perpetrate crime without the need while his actual achievement. If this goal can not be missing speak of the existence robbery , because theft is not done, which is absorbed into the main content robbery. In this respect, a considered that there can be no crime of robbery when taking property through violence, threat, etc. , not conducted in order to take unjustly , but to determine the person injured in fulfilling certain obligations to author 15.

But despite a constant practice in this regard, even the supreme court decided in to a similar case, that there is robbery. It is no decision. 1732 from June 15 1995 the criminal department of the Supreme Court of Justiţie16 the reasoned that "wrongfully appropriating referred to the Criminal Code art.208 exist and where the property is wrongfully detained by the defendant in order to determine outside the legal framework , the injured party to meet its claims deriving from litigation activities , whereas , the person injured is constrained to meet the perpetrator claims to recoup a things , so the perpetrator will have them. "

It retains that is no purpose to which the goods were taken , the defendant following to resolve a dispute activities outside the legal framework , namely to done alone , which is inadmissible. "

But do not believe that is not relevant order in which the goods were taken, which was not in any case the of taking , so failing that we can not talk robbery (or , theft).

For that crime , robbery is not relevant whether the defendant has sought dispossess injured party for a good before using violence or threat , or whether this effect occurred with the use of such means in order to achieve the theft , since by law, any robbery is theft committed by violence or threats. Therefore, there will initially hold even if the perpetrator intended to commit only one of the

components of the objective (either theft or the acts of violence or threat) and then during its perpetrate or shortly thereafter , intervened and decision to commit on the other.

When theft is followed by use of means shown in art . 211 Criminal Code (for keeping stolen property or to remove traces crime, or to ensure that the perpetrator to escape) decision robbery consummation of the birth, usually after consuming theft . As regards the other end (of use violence, threat, etc.) it must exist even when the perpetrator use a violence , threats , etc. , because without them the work is not done the secondary (middle) has robbery . If the criminal activities affect more people , asked whether so many crimes Note how many people are injured or a single offense.

Thus, in the question a decided that the theft committed by the use of violence on several people, but the purpose of material goods of their common heritage constitutes an offense single robbery, not a plurality of crimes in the contest, in relation to the number agrsate.17 persons in question, defendants have entered the housing victims, a family consisting of four persons, which they hit and stolen goods in their value 2 000 000lei.

Supreme Court reasoned that are not completed all the special features of the crime of robbery in relation to each of the injured , so we are in front of a contest of crimes, since stolen goods constituted their common heritage , and no distinct heritage of each of them.

In another case it was also decided that the one offense of robbery in a situation where the defendant removed a bag of sugar wagon injured party , hitting her when she tried to resist, and then another intervention people to keep stolen property , hit her and this . 18

In another case it was decided that committing the crime of robbery , while the more people injured, the threat and impact , constitutes as many crimes of robbery, in perfect competition , how many subjects are passive , and not a single crime. 19

In paragraphs 2 and 2^1 of art. 211 Criminal Code (as amended by Law 169/2006) are provided more qualified forms of crime robbery, in which some (in paragraph 2. A, b, c and alin.2^1 point . A , B and D) have content identical to those of qualified theft .

In terms of paragraph 2 . c) to commit robbery in a public place or in a public place or in a vehicle, regardless of its nature.

With regard to aggravating the paragraph . 2 [1] item (robbery was one of the consequences shown in art. 182 Criminal Code) does not believe that it raises special problems, the clear wording of the text.

Remains in question only exacerbated by the same paragraph letter . c , which penalizes more serious robbery committed in a home or office thereof (this was aggravated provided by the entry into force of Law nr.169/2006 in Article 211. 2. f Criminal Code).

Since the introduction of the aggravated by Law no. 140/1996, literature and legal practice has expressed views and solutions adopted contradictory apple discord represent it matter if in this situation, the author entry into a dwelling or outbuildings it, followed by robbery victim, the only offense of robbery , Or should retain the contest, that means crime and violation of domicile.

By decision no. 2494 of 17 June 1999 Supreme Court decided that the robbery committed in a home or office thereof does not constitute the crime of home invasion and robbery in the qualifying competition , but a simple offense complex , prev. of Article 211. 2. f Criminal Code , the decision based on the motivation that according to Article 41 al .3 Criminal Code, the crime is complex when its contents enter the element or as an aggravating circumstance action or inaction that constitutes in itself an act provided for criminal law . This means that , absorbed in the complex offense, that element or aggravating circumstances must be stated expressly in statute incriminating . Or , in accordance with Article 211. 2. f Criminal Code, the offense is aggravated robbery , whether it was committed in a dwelling or outbuildings of these .20

Leaving to a situation when entering the house the injured party has made with its consent, which everyone agrees is that not only can lead to detention robbery offense, in other cases it was considered that he should retain or not the violation of domicile, as penetration in the home or dependency was made without the consent of the injured party or breaking , climbing or use without a real key or a key of lying .21

In what concerns us, we believe that the aggravating of art. 2 [1] align 211 points. Criminal Code that relates to the perpetrate of robbery and not how to commission and that, since it supports the idea that robbery as shown above and when the housing enters the injured party with its consent, then you must accept and the idea that penetrating without the injured party, regardless of whether the entry was made simpler or breaking , climbing, etc.. and committed robbery in the house, the author has committed the crime and the violation of domicile.

The position that we express is consistent with trends increasingly insistent to practice it is consider injustice _conform more than that, in terms of theft, where penetration in the home was made by breaking , climbing , etc. , will be Note only qualified theft, and if penetration has not been done by these rules, and to retain the offense of violation of domicile.

Therefore, regardless of the views expressed and solutions adopted in practice, we believe that if penetration without consent in the victim's house (no matter how penetration) and robbery it must retain the contest, the offenses of breach of home and robbery in the manner prescribed by art.211 alin.2 [1] point. c Criminal Code.

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Gheorghe Teodor ARAT

OPINIONS ABOUT THE INCRMINATION OF MEDIATIC GENOCID

Among all the illicit deeds that are known by people, the crimes against humanity are considerent the most sever ones, that can be commited by some persons, no matter if they act either as agents of a State or the are integrated in some criminal organizations, having the ability from the State Organs.

Thes violence deeds are against other collectivities, bigger or smaller, on behalf of ideological, religious, rasist and nationalist adverse doctrine.

Theoretically it appeared in 1993, genocide crime, had its basis and practical sansctions during the criminals'war trials, from Numberg.

Next, in 1948, the genocide was juridically settled, like the most serious deeds, with criminal nature, in spite of the final deeds that are about this term.

It is incredible but true the note, that in spite of all the efforts from the society in punishing in the most sever manner these deeds, between 1945-1988, the elites of power from different countries/state authorities/put downin genocid terms crime, about 7 and 16 milions of human beings all over the world.

After these events, due to the emotions that may have the circumscripts deeds of genocide crime, the states that signed the International convention from 1948, eluded to condemn people who are suspected of having commited some illicit deeds, except one, which unfortunately, waspronounced on 25th of December in 1989, in our country.

After many years, another type of crime, appeared; that is The Ecocide. It was juridically written by the Commitee of International Law, from The Organisation of World Nations.The study of military conflicts from the last 30 years, revealed the existence of another type of Genocide, more subtle, extremely sophisticated and hardly perceived (by the society, in groups, by persons and single) and it hasn't had its modalities, yet; this is the Mediatic Genocide.

The History consigned and still continues to consigne - numerous and abominable actions of physical, biological and cultural destruction, that are done against some human collectivities, from different reasons, all over the continents.

Obviously, they precede the appearance the moral and juridical concept of Genocide, to the International Convention and national penal laws (where they are) and include it in the sphere of admitted illicite sphere so as to be incriminated in laws.

The carnages that are in episode of different lengths, and in many situations, for years, whose victims were persons who are grouped in some collectivities, ended by surpressing the life of different people, the number of those who are oppressed may be suspected in the lack of officious documents or sometimes official. Their presence horripilated later (in some cases even during the commission), the intern and international opinion. In most of the cases such collective tortures, were stopped by the state authorities themselves where the crimes were commited. This aspect is due to the fact that - in an opinion made up on a large documentation - such global crimes may be done by gouverners, by the elite which is leader against the people who are gouverned, no matter if the gouverners are in majority or minority in that society.

The Genocide is one of the crimes of powerfull elite-international crimes or by their nature-which set out in the theory and less in the intern and international juridical practice.

The necessity of forbidden of penal deeds, whose commitement implies the international contravention and the organization of a cooperation between nations for this detestable scourge, as well as the responsibility of practical activities, and dates from the precursory decade of the second World War.

Raphael Lemkin has proposed to The Nation League, since 1993, at about 20 years after the armean Genocide, when the abominations of this crime had still persisted in the vivid memory of the people, in a special report that was talked about at the fifth Conference, about the Consolidation of the Private International Law (Madrid, 14-20 october 1933), the idea of replication against the vandalism and destruction which are against the ethnic communities and collectivities that are based on the social and confessional bindings using for this type of actions

the term Homocide. Lemkin used this word, because he had talked about the carnage of the armean, during the first world war, by the gouverner order, and he proposed them like a barbarian international law crime-delicta juris gentium[1].

The ideologist, R. Lemkin came to the term of genocide, by chance, while he was listening to a radio announcement. On 24 august 1941, the first british prime minister Winston Churchill, attended an inauguration of radio company in London, and that was an occasion to talk about the german war against Sovietic Union, barbarians and atrocities that had been done by germans in the occupied territories; he also said „the mankind is besides some crimes, that have no name".

Until that time, the crimes of genocide hadn't been met, all the contraventions had been named War Crimes.

In his book, which has the title „Axis Rule in occupied Europe", Lemkin analyzed the essence of genocide, using for the first time, to describe the extermination of the big groups of people, the term genocide that is opposite to that of homicide.

Lemkin didn't invent a new contravention, but he chose a term either to express an opinion about the criminal forbidden of some international law rules, that are against the extermination of some ethnic groups.

The first official document where the genocide is incriminated is the Military High Court Status, in Nurenberg, that categorizes into Crimes against people, the persecutions according to political, rasial and religious, reasons, the deeds that belong to genocide, on condition that these deeds have been done, in

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[1] The author of the report considered that these activities must be incriminated like guilty and they have to show 2 delicts which have the reason to exterminate such persons and use for this one, different methods; barbarian actions, that refer to the human being's life, the submination of state power, vandalism deeds;

a) the children transfer frorn a group of people to another one;

b)the forced retrival of cultural elements which refer to a group of persons;

c)the forbidding to use the mother tongue in the human relationships;

d)the distruction of books that are written in people's language , the destruction of museums, historical monuments, art institutions and other cultural objects of the group.

conection with other crimes, which were commited by defendants who took part in aggression war.

The trial's results from Nurenberg, the prosecution sustained that "The defendants did the genocide deliberately and sistematicaly, that means the extermination of the social and national groups, among civil people, who are in the occupied territories, to destroy some mankind or classes of population, even the national, rasial or religious groups"[1], reffering to the extermination deeds of Jew, gipsy people and other types of reppresion , ordered by defendants and made in Alsacia and Lorena, in the Low Countries, in Norweig, and other areas of Europe.

The High Court from Nurenberg, finally condemned the deffendants for crimes against peace and War Crimes. The crimes against people like genocide, were taken into account and were written in The High Court decision, being included in the first categories of crimes.

In its third session in O.N.U. the General Convention that was adopted on 9 December, the text if Compact to warn and repress the genocide of crime, establishment.

Due to the article 1 of the Compact "The contractor hands, confirm that the genocide, is commited either when is peace or when is war, and this is an International Law Crime, whom they comment to warn and punish".

As this article is written, one can understand, when the Compact appeared , the genocide crime imposed itself like a customary law and was recognized by the Internaţional Community, which had condemned the deeds, such as genocide, and assented the rules that had punished the main criminals of Second World War.

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[1] Process des grands criminals de guerre, Tribunal Militaire International de Nurenberg, Document Oficiels, Tome 1, Nurenberg, 1947, p. 46

The second article, of the Compact in 1948, has written in its text, that the genocide is made with intention of total destruction of a national, ethnic, rasial or religious group which consists of:

- the killing of members group;
- the serious harm of rightness;
- the deliberate submitting of the group under the conditions that neccesarly train its partly or total destruction.
- some measurement that can endors the inhibition of births in the group.
- the children forced transfer from one group to another.

The genocide is characterized by the intention of destroying a human group, that is based on some criteria.

The qualified intention of an author of genocide crime is to destroy either a total or partly special human group. So, it is not neccesarly to be a genocide of crime to destroy totaly a human group, because of its deeds. The partly destruction of a group like an intention, is a good condition to be a genocide contravention like a total destruction.

To be a genocide of crime, it is necesar the qualified intention of the authors to a destruction, no matter how big it is. The human group that did these deeds against the persons and they are members of the group, must exist.

In the Law literature, we could meet opinions about the genocide that is incriminated in ecocide and consist of destruction deeds that hits the environment of an area to human belief criminals, and they are made by the help of military means, nuclear weapons and different tehnicques that are able to change the weather into military purposes, doing some compact projects.

An example of a connection between ecocide and genocide we can find in the events that took place in Darfur, where the climate challenges had an important support for the insurgents, who refused to sign the peace from the

Abuja[1], on 5th of May 2006. On the other hand, the swidish government tried to stop the organisation of a congress that want to link the combatants commotion and to resume the negations by the assistance of "International Community"[2].

In the Washington Post newspaper, The general secretary of United Nations Ban Kimoon said that one of the violence's reason in Darfur consists of ecological crisis that appeared 40 years ago, when the precipitations were bellow 40 degrees because of the man destructive activities upon Nature.

The International Law Commmite included in the code project of crimes against the peace and human security such an incrimination that has the content „Every man who deliberately induces or orders to challenge serious damages to the environment, will be punished".

The training of genocide application is shortened enough, the juridical literature pointing out after 1989, only 2 circumstances when some persons were judged and condemned, for genocide crime, in Bangladesh[3], after the event from 1971 and Cambodgia 1979[4], although the reality of life has consigned since 1948 until now, many circumstances of total devastation of some people, because of the ethnic or national, rasial, religious origin or because of the multitude of other reasons.

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[1] 0n 9th November at Abuja (Nigeria) a peace was successfully ended Between swidish government and the rebels from Darfur. After few hours that the peace was signed the special troups attacked again some people in Darfur, and this peace allowed to U.S.A. to come in Darfur.

[2] Gerard Prunier, in his magazine "Le monde diplomatique"- romanian edition no. 26, MAY 2008, The third year.

[3] A group of five generals were accused of leading the events in 1971, and at that time over a million people died.

[4] Pol Pot, a leader of communist motion of red kmeries, imposed on Cambogia a dictatorial order, reducing the cultural masses reeducation and to come back at agriculture. Due to this plan, over millions people died. After that, some people from Vietnam died. He was condemned to death and continued to check the important areas. He died in freedom in 1998.

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The Mediatic Genocide

Nowdays the genocide isn't done through physical violence. The Informational War is neither new nor unknown. Its advantages have revealed the antiquity by Sun Tzu and were intensively used during the two world perturbations and it is a main and was compulsory part in any type of conflict.

The information in its shape and modalities of transmission, has been a vital necessity for people activity, since the mankind society has existed. As the human society was growing up from social, economical and cultural point of view, the information became a good that is constantly asked, sold and eaten like any other good. Today, due to the dissapeareance of technical limited of communication, the earth is not only a global village but an electronic one, in whose space, the information - real, partial, trunchiated or falsified - circulated in high speed.

The newspapers and magazines, radio and the television, as well as The Internet, became the main arrays to transmit the information, closing until the simultaneity, the moment of impact between its communication and transmission all over the world.

People early understood how much to take advantages from this ambiguity even the most recent information, because the procent between the true content is neither fixed nor guaranted, nothing is easier than to add involuntarily approximations or to practice the fraud deliberately.

Having the theoretical basic paper of French psihologist Gustave Le Bon "The crowds psychology", the English founded The Tavistack Institute for Human Relationship for Sussex University, the biggest institution for "brain washing".

Using the methods of lumps handing made by Tavistack, U.S.A.'s population, was easily convinced to take part at the second world's war. As an

effect of this big success, under the guidance of dr. Kurt Lewin the Americans did their own structures to develop new techniques of psihological war. The amplitude of these techiniques of professionalism used by employed persons, as well as the logistics, it would be a part of a big study.

We can show the role and task and this mechanism, in order to synthetize, and we also can underline that it is a main source of power elite, what is named "the future shocks", people would become incapable to decide their destinies. Another major aim, of this state to maintain the power is "the violation of crowds". Both of them are addressed to the people and they take advantage the fact that the intellectual level of people is low enough. By repeating the same slogans, images the mental tiredness is installed, and the political will is introduced. Due to the special impact of mass-media upon people concioussness, the information may be a litle falsified, and can be used in different purposes.

Our contemporary History, consigned 2 classical cases that imposed imprevizible reactions on those which had talked about them.

It is about the Radio post CBS from U.S.A. in 1938, american people were announced that they had been invaded by aliens. The 250 000 listeners tried some feelings, from curiosity to panic, and the help of police was welcomed, because they could make people not to be unimpatient.

The dictatorial gouvernmnet from 1989, brought over 60000 death people and this horipilated the opinion, because our country had a reputation like a barbarian and uncivilised people[1].

After 1990, the number of genocide will increase.

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Florin TUDOR

SOLUTIONS ON FISCAL APPEALS

Abstract

The fiscal authorities that deal with solving the fiscal appeals issue decisions through which they order the annulment of the act of fiscal taxes and the issuing of a fiscal administrative act by re-assessing the situation de facto which was the basis of establishing the basis to be taxed, without mentioning if the appeal has been admitted, totally or partially and without deciding on the effects that come as a result of the decision issued.

Such a decision may put the subordinate fiscal authorities at an advantage in relation to the claimant, even if there are not any other findings or extra information, most of the times violating the principle of the fiscal control being unique for the same tax and the same fiscal period of time.

Keywords: *annulment, legality, fiscal inspection being unique*

1. As related to the legal reason to reject the appeal for not fulfilling the procedures [1], in theory, the following solutions were found as a result of the analysis of the appeal by the administrative fiscal authority [2]:

- total admission, when the claimant has brought and the authority meant to solve the appeal has received all the claims formulated;
- partial admission, when the claimant has brought and the authority meant to solve the appeal has received only a part of the claims formulated;
- the rejection of the appeal as unfounded, if, from the evidence brought it results that the claim is not founded or it is not supported by the evidence brought in due course;
- the rejection of the appeal as inadmissible, in the cases when the petition was formulated and introduced to the authorities by a physical or juridical person that did not have an active juridical quality or with no interest or when against the act to be contested there cannot be introduced an appeal as a legal procedure;
- the rejection as being unfounded, in the situation in which the facts that were presented have not made the object of the fiscal administrative act;

- the rejection as being overdue, in the case that the appeal has been filed too late [3].

According to p. 179.1 of the Methodological Norms for applying the Govern's Decision no. 92/2003 with regard to the Code of fiscal procedures (named hereafter the Code of fiscal procedures), when solving the appeal, the authorities of the National Agency of Fiscal Administration (hereafter ANAF) has pronounced its decision, when legal contest of some administrative fiscal acts are concerned that have as object sums allotted to the state budget.

By this decision, according to art. 216 of the fiscal procedure Code, the appeal may be admitted totally or partially, or rejected. In case of the admission of the appeal, there is decided accordingly total or partial annulment of the act contested. At the same time, by this decision, the fiscal administrative act may be totally or partially annulled (Art. 216. par 3) in case the competent authorities of ANAF after analyzing the documents, cannot establish a decision on how to set the basis to be taxed. In this final situation, "*a new fiscal administrative act is going to be issued which will have in view strictly the decision to solve the appeal*" [4].

2. Although the judiciary practice and some authors have drawn the attention through solutions and viable comments about the danger that may come from not applying correctly the stipulations of art. 216 par. 3 of the fiscal procedure Code [5], the competent authorities of ANAF are still issuing decisions [6] through which they order the annulment of the fiscal taxing act and recommend the issuing of a new fiscal administrative act by re-analyzing the situation de facto when establishing the basis to be taxed, without making a decision, first to admit the appeal, totally or partially and without deciding on the consequences of this decision.

Although in the civil law there are no noticeable differences between the notions of annulment and suppression of these effects [7], practically in both situations the juridical act having no effects, the authority that has issued art. 216 of the fiscal procedure Code has made the difference between the two notions.

In our opinion, the authority meant to solve the appeal must firstly analyze if the act contested is legal or illegal, in relation to the evidence at their

disposal and the legal norms to be applied in the case. Also, the competent authorities of ANAF must issue a decision on some possible illegal operations that have been at the basis of the issuing of the fiscal act contested.

We believe that when the decision to annul the fiscal act is not made [8], the decision to totally or partially annul the fiscal appeal may be taken only after admitting it totally or partially [9]. Once the competent authorities have decided the annulment of the contested act, they also have the obligation to dispose the annulment of the acts that result from it.

In case the principles stated by the art. 216 par. 1 from the fiscal procedure Code (admitting an appeal) are not respected, we believe that the Courts of administrative contentious have the obligation to sanction by annulment the decisions pronounced by the competent authorities of ANAF.

3. From the facts mentioned above also results that the annulment of a fiscal administrative act rightfully brings the obligation of the fiscal authority meant to record the facts, to issue a new fiscal administrative act.

In the sense of the facts mentioned above, the literature in the field quoted has claimed that the decision of the competent authorities of ANAF, decision through which they ordered the control to be repeated and issued another fiscal administrative act, may become the object of a law suit where the interested party may have a legitimate interest to obtain the annulment of such a decision.

We believe that by issuing a new fiscal administrative act, which makes the object of the control for the same period of time and for the same taxes, the interests of the tax payer are affected when obtaining a solution for his fiscal appeal.

The damage consists in the fact that throughout the period of the administrative procedure needed to solve the appeal, the sums of money owed to the state budget are blocked for an undetermined period of time. It is desirable that "the law courts should censure the fiscal authorities' possible abusive practices of uselessly prolonging the period of solving the fiscal appeals" [10].

4. By annulling the tax act and recommending to the fiscal authority to re-analyze the situation de facto, the ANAF authorities that solve these situations,

may create this way advantages for the subordinate fiscal authorities (departments of public finances, customs, financial control department, etc.) in relation with the claimant in debt, in the sense that although theoretically there cannot be other reports or extra information, there can be decided another control for the same tax and the same fiscal period, only stated differently or having another juridical frame, with additional evidence that is interpreted this time in the sense of the recommendations received from the jurisdictional authority meant to solve it.

This way, we think that the procedural principle of the art. 105 par. 3 of the fiscal procedure Code is broken, principle that states that *"the fiscal inspection is made only once for each tax, contribution and other sums owed to the general consolidated budget and for each period of time when taxes are paid"*.

To support these ideas, we also bring as arguments the exception mentioned by art. 105 par. 3 of the fiscal procedure Code: *"the competent leader of the fiscal inspection may decide to claim a certain period of time if, from the date of fiscal inspection and up to the prescription date there appears extra information unknown to the fiscal inspectors at the date when the control was made or there are some calculation errors that influence their results"*.

Practically, we may say that by annulling the tax acts in all cases, followed by the recommendation of the fiscal authority in control to issue a new fiscal act, a basic principle in the control activity has been broken, i.e., the one of the fiscal inspection being unique, according to which the fiscal inspection is carried out only once for each tax for each period of time under fiscal control [11].

In conclusion, the total or partial annulment of the contested decision presupposes firstly, the motivated admission of the appeal, totally or partially. If this does not happen, the contentious court has the obligation to sanction by annulling such a practice that seems rather current with the jurisdictional authorities of ANAF.

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[7] Gheorghe Beleiu, *Civil Law, 10th edition, revised and completed*, Ed.Universul Juridic, Bucharest, 2005, p. 198 and others.

[8] The considerations which will comprise the real reasons that led to the decision of the authority solving the case must be „clear, non-contradictory, so that based on all the evidence brought in this case, on the juridical arguments and judgment, principles and rules of substantial and court law, there can be given a just solution" (Constantin D. Popa, *op.cit.*, p. 138)

[9] the mechanism of the decision consists of the solution pronounced according to art. 216 of the Fiscal Procedure Code, as well as the indicating the way to contest it that the claimant may have, as well as the deadline in which this can be done in front of the competent contentious law court.

[10] Daniel Dascălu, Cătălin Alexandru, *op.cit.*, p.567

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Gheorghe IVAN

THE COMMUNITY PRINCIPLE OF PROPORTIONALITY IN PENAL MATTER

Abstract

Since 1st of January 2007, the date of Romania's adhesion to the European Union, a new matter has raised in judicial thinking, that of the penal implications of the European integration.

One of these implications regards the community principle of proportionality according to which in the matter of economical-financial offence, the applied sanctions must be proportional to the committed deed, not to impede the free movement of goods and persons.

Key words: *community law, principle of proportionality, economic offences, customs offences, sanctions, free movement of goods, free movement of persons, measure equivalent to a quantitative restriction.*

1. Recently, in our doctrine, there has been the opinion that the community law represents a real direct issue of criminal law – substantial or procedural – on the basis of priority principle, without being necessary the adoption of national norm [12]. In this context, an important community principle with implications in penal matter is being analyzed by us : the principle of proportionality.

The Court of Justice of the European Community (C.J.E.C.), made an appeal for many times to the application of proportional sanctions in the economic matter.

This principle has been explained in the community instance, as follows: "In general, criminal legislation and rules of criminal procedures are problems for which the member states are responsible [15]. However, according to a constant jurisprudence of the Court, the community law imposes certain limits regarding measures of control that the law allows to the member states regarding free movement of goods and persons. Administrative or repressive measures must not exceed the necessary, and the control procedures must not be

elaborated in such manner that restricts the freedom asked by the treaty and must not be accompanied by disproportionate sanctions comparing to the gravity of offence so that they become impediments for using that freedom. [4] "

To estimate if a provision of community law is in connection with the principle of proportionality, it is necessary to state, first of all, if the means it uses for reaching its objective correspond to the importance of the objective and, secondly, if they are necessary for the aimed result [5].

According to dispositions of the Treaty Establishing the European Community (T.E.E.C.), the goods from a third country, after paying the customs taxes, are free to move in a member-state of the Community, being assimilated by the goods even from one of the member states.

It was a case about the import in France of such goods for which the customs taxes had been paid by another member state of the Community, when, the Correctional Tribunal from Lille, finding out that the import is based on misrepresentations of origin of goods, sentenced some Belgian traders to prison for 1 month and three months with postponement, and respectively with a fine equivalent to the value of the imported goods, meant to replace seizure of goods that could not be sequestered, as well as payment of a supplementary fine equal to the double value of the imported goods.

According to Art. 234 from the Treaty Establishing the European Community, the amended version, the Customs Court of Appeal asked the European Court of Justice two questions, especially about interpretation of provisions from the treaty that eliminate restrictions to free movement, within the Community, of the goods from a third country, being in free pratique in one of the member states.

The Court criticized the way in which The Correctional Tribunal severely sanctioned the committing of customs offence, showing that exigency of an indication from the origin country in the customs statement, in the member state of import, for the products of free-pratique and whose community status is accepted by a certificate of community movement, does not represent a measure equivalent to a quantitative restriction, under the condition that these goods depend on the measures of commercial policy taken by this state, according to the Treaty. However, such an exigency represents a measure equivalent to a

quantitative restriction when it is requested to the importer to declare as it concerns the origin, other things that he knows or he can rationally know, or if omission or inexactness of this statement is so severely sanctioned, as the French instance did, and equivalent to a punishment disproportional with the nature of offence that has an administrative pure character. All administrative or restrictive measures that exceed the framework of what is necessary, in the member state of import, for obtaining some complete and accurate information reasonably about movement of goods that depend on the particular measures of commercial policy, must be considered as measures equivalent to a quantitative restriction forbidden by the Treaty [6].

Such arguments have been repeated by the Court [7], that led to establishment of a constant jurisprudence in the sense of forcing the national instances to give priority to the disposition from the community legislation and to bring modifications in the judicial specification of the facts or to minimize the applied punitive sanctions [1; 2].

Subsequently, the French legislator and national instances followed these indications of moderation for applying the punitive sanctions in customs and economic offences, certainly of those under community right. Thus, for example, for the import of goods on the grounds of a misinterpretation of origin, the instances decided to that there must be applied a fine according to Art. 410 from the Customs Code. This rule is not valid for the illicit traffic of drugs, matter in which the French Court of Cassation motivates that even C.J.E.C. decided that there must be applied sanctions proper to the severe danger that such facts represent [3]. In his turn, the French legislator replaced the fixed punishment with fines by punishments relatively determined (Law from 21st of December 1977), and subsequently (Law from 8th of July 1987) limited the fine to the quantum of twice the value of the imported goods, in case of contraband of import or export without statement of origin. In the same way, by another law, it was emphasized that the intensification of the sanctions in these domains must be reported to the reduced gravity of the committed infringements (Law from 20th of September 1986).

In our penal law there are legal criteria – general and special – that the instance court must obey considering individualization of the punishment (Art.

72 – Penal Code); among these it is also included the degree of social real danger of committed offence or the real gravity of the committed offence [13]. Nevertheless, we dare to say that for applying the punitive sanctions, in customs and economic offences, certainly those that belong to the domain of application of community right, the instance courts must also take into consideration the community principle of proportionality. In the same way, the Romanian legislator must precede to an assessment of penal legislation to remove the possible legislative impediments ahead of exercising the free movement of goods and persons in the community space.

2. We must mention that at the jurisprudence level, the national judge has the obligation to verify if an internal penal norm is against a provision of community legislation; in case he finds that it is incompatible with a community norm, he is obliged not to enforce it. If the judge does not see this incompatibility, the C.J.E.C. shall take action [14].

Regarding the last affirmation, it is to be considered a short review of the institution "preliminary decision".

Art. 234 from the Treaty Establishing the European Community (TEEC) shows the following:

"C.J.E.C." is forced to decide by preliminary title:

a) towards interpretation of the treaty;
b) towards validity and interpretation of the documents adopted by the institutions of the Community and Central European Bank (C.E.B.)
c) towards interpretation of the rules of bodies created by an Act of the Council, if the rules mention this [paragraph [1]].

When this matter is questioned before the instance of a member state, this instance, when it considers that for stating it is necessary a decision upon this matter, it can ask the C.J.E.C. to decide [paragraph [2]].

When this matter is questioned in a pendinte cause before the national instance whose decisions cannot subject to a way of action in internal law, this instance is forced to go to law C.J.E.C. [paragraph [3]].

From these normative dispositions, two important aspects result:

Firstly, interpretation of the community law cannot be left for the judges from the member states. On the whole territory of European Union (E.U.) this interpretation must be equal, considering the diversity of national judicial systems that may lead to unequal interpretations; it is considered that exigency of equality for applying the community law is inherent in the proper existence of E.U. for insurance of an equal interpretation, the treaties invested in C.J.E.C an independent and mandatory position of interpretation of community law, and put at disposal of the national judges a procedure, that one of preliminary decision, for reaching this objective.

Secondly, to the community instances it has been given the exclusive competence to verify legality of documents of community institutions; the national judge needs a decision from C.J.E.C. regarding the possible aspects of illegality.

3. Regarding the "preliminary rulings", we are able to show that the sending for a preliminary rulings have two features: a facultative one and a mandatory one.

The *facultative* sending comes when the national judge does not find a solution in the last instance. He appreciates discretionarily if a decision of C.J.E.C. is necessary to help him judging the cause he is given.

The sending is *mandatory* when a national instance judges a cause in the last instance. In this condition, the place of an instance in the jurisdictional system of a state is irrelevant, as far as its decisions are irrevocable, and undisputed internally [10].

Some national judges tried elusion of the rule from Art. 234 paragraph 3, Treaty Establishing the European Community (regarding mandatory sending), appealing to the theory of "acte clair" from the French administrative law, according to which the national instances do not need to ask to the C.J.E.C. for interpretation of a matter of community law, if it is clear enough.

Regarding this theory, it has been questioned if it is also applicable in the community law. The Doctrine emphasized that regarding Art. 234 paragraph 2 from Treaty Establishing the European Community (regarding facultative sending) there are no problems, because the national judge is free to decide if a

matter of community law is clear enough. But, regarding Art. 234 paragraph 2 from Treaty Establishing the European Community, the national instances are forced to solicit a preliminary ruling when a matter of interpretation of the community law is raised before them [11].

But, the national instances are not forced to send for a preliminary ruling in the following circumstances:

A. Causes judged in emergent procedure, because by waiting for the answer from C.J.E.C., there could be made a violation of the urgent character of the procedure. For this reason, C.J.E.C. stated the following: a) Brief and urgent character of a national procedure does not impede C.J.E.C. to consider it valid on the grounds of Art. 234 paragraph 2 from Treaty Establishing the European Community, if a national instance considers necessary an interpretation; b) Art. 234 paragraph 3 from Treaty establishing the European Community (T.E.C.) must be interpreted as a national instance is not forced to inform C.J.C.E. about a problem of interpretation or validity approved by this article, when the matter is raised in a temporary procedure (*einstweilige Verfugung*), in which the taken decision within this procedure cannot subject to a recourse, providing that any part to have the possibility to subsequently open a judgment on the merits, during which the matter of community law temporary treated in the brief procedure to be examined and submitted to sending according to Art. 234 paragraph 3 from Treaty establishing the European Community (T.E.C.) [8].

B. Causes when the matter of community law is nor relevant, meaning when the possible obtained answer from C.J.E.C. cannot affect the solution of interest.

C. When the raised matter is identical to one that was already subjected to a preliminary ruling of C.J.E.C. in the same manner or when the matter of law was solved by C.J.E.C. under its jurisprudence, irrespective of the nature of proceeding that led to that decision and not only to the sending for the preliminary rulings, as for example interpretation of C.J.E.C. on the occasion of fulfilling an action of the Commission against a member state, on the basis of Art. 226 from T.E.C.

D. When the correct applying of the community law imposes in such circumstance that does not allow any reasonable doubt [9].

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[11]In our act it is sustained that the community instance accepted the theory of "clear act", invoking Decision C.J.E.C., from 6th of October 1982, Srl CILFIT et Lanificio di Gavardo SpA against Ministere de la sante, cause C-283/81, in (O. Manolache, Community Law, 4th edition, Publishing House All Beck, Bucharest, 2003, p.684). However, in this decision, the community instance does not confirm the theory of "clear act", but, on contrary, it reminds the fundamental exigency of the

judicial community order regarding uniformity of interpretation and application of community law that imposes to the national instances, as well to C.J.E.C. itself.

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[15]We must not forget that it is about the position of the Court in 1981. Nowadays, it is stated an indirect penal European integration, by means of penal procedural norms it is taken action upon the substantial penal norms (see institution of the European warrant).

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MEDIATION – AN ALTERNATIVE TO JUSTICE

Abstract

Mediation – appears in our country for the first time, with the emergence of Law 192/2006 – and is an alternative to court.

Optional is a way of settling conflicts on the amicable way in which an appointed mediator, trying to parties with which it mediates to find a solution convenient, efficient and sustainable accepted by them that would end the conflict.

It is a voluntary process, optional, and can trigger only at the express request of the parties.

As an alternative to conflict resolution between the parties, presents many advantages :

- Is fast and that takes time, much less than the court itself,

- Involves fewer expenses than the process,

- Is confidential,

- Implies respect,

- Mediation, the parties are not adversaries,

- Mediation, the parties are those who take decisions,

- Mediation, all parties win, even when they make compromises.

Mediation can be used to solve a broad areas of conflict.

The procedure for mediation ends when the parties have reached an agreement with a report of mediation, which if necessary, will be sent to court or the notary login to become enforceable.

Brief history.

Switching to a market economy, Romania's accession to the European Union to reform its justice, harmonization of domestic legislation with European legislation, increasing conflicts, the need to resolve them as rapidly, are only part of the conditions which have led and made possible the emergence of the institution mediation in our country.

If the U.S. and European countries developed strong, mediation, as a means of resolving disputes, and has found place in the legal system a long time

ago, our country has emerged as a necessity, since the entry into force of Law 192/2006.

Law 192/2006 – governing mediation and the occupation of mediator, has made possible the establishment of the Mediation Centers in Romania, the representative body of mediators, consisting of the Mediation Centers in all counties of the country.

Although talk of the existence of specialists trained in mediation, although talk of the existence in each county of an association of mediators and the existence of a law in the field, things are quite difficult in the sense that they have not released any up to the current authorizations operating for those trained in the profession as we can not speak of any real willingness to courts or lawyers, that he would like mediation as an alternative to justice.

This situation is the organization in a swoon, but also a certain mentality which still is not proper application of law mediation as soon as possible.

If you were to customize the only city in Galati have already established an association of mediators who are founding members of a number of 10 (ten) lawyers from the Bar of Lawyers Galati, the Association is only symbolic, on paper and although it is not working Expected much impatience with many of those interested.

What is mediation ?

„According to law 192/2006 – mediation – is optional how to resolve conflicts through amicable, with a third party specialist, as a mediator in conditions : neutrality, impartiality and confidentiality".

„In another words, mediation is an alternative method of settling disputes in which an appointed mediator assists the parties in conflict, trying to find a deal acceptable to the parties, to achieve a solution mutually convenient, efficient and sustainable".

Mediation is being done equally for all persons, irrespective of race, sex, age, religion, nationality.

Particularities of mediation.

Mediation is :

- An alternative to the judiciary, to resolve conflicts between parties;

- Voluntary, the parties come to mediation, if they so wish:
- An optional way of settling conflicts through amicable, the parties can not be forced to resort to this procedure, no law, no court, but neither of their lawyers, calling her if they so wish.

The object of mediation :

Mediation can be used to solve a wide area of conflict :

Civil Law :

Claim, share claims, evacuation, the obligation to make, etc.

Family law :

- Divorce, shared common goods, minor conviction, separate maintenance, etc.

Comercial law :

- Claims, notice of payment, etc.

Criminal law :

- Criminal cases for which the law provides criminal complaint prior existence and reconciliation parties : Tapping, dirt, etc.

Labor law :

- Financial entitlements, selling contract work, imputatii decision, etc.

Other subjects :

Can not be subject to mediation :

- Strictly personal rights relating to the status of the person and any other rights of the parties, according to the law, may not have the understanding or any other manner permitted by law.

When we can address mediation ?

To are situations where we can address mediation :

- Between the parties there is a state conflict and to prevent and put an end to trigger a process, we can resort to mediation;
- Conflict between the parties is already deducted judgment, there were already pending before the court hearing a record.

Towards resolving the dispute mediation may take place :

- At the request of the parties in the process;
- On the recommendation of the court, a recommendation to be followed by acceptance of the parties in dispute.

How much is mediation ?

Mediation is not an activity performed free of charge. It assumes spending, but much lower than what we have to make towards resolving the conflict judgment.

The parties will have to pay a fee Ombudsman, which will be determined through negotiation with the mediating parties, and will be fixed depending on the nature and complexity of the case subject to mediation.

Along with these expenses, the parties will incur attorneys' fees, lawyers and what comes to mediation, and where appropriate, expert and notary fee.

What does a mediator ?

- Explains the parties to mediation procedure and answer their questions;
- Ensure that mediation should be done with respect for freedom, dignity and privacy of the parties;
- Diligentele to make all the parties to reach a settlement conveniently within a reasonable time;
- Helps the parties to discuss open issues and to identify the real needs;
- Helps the parties to understand and simplify the misunderstandings between them;
- Helps the parties to control and feelings, emotions, so that they could make mutual compromises;
- Helping the parties negotiate to resolve and achieve a result convenient to them;
- Helps the parties to find lasting solutions to resolve the conflict, avoiding lawsuits, expenses, stress, etc.;
- Helps the parties to see if unpleasant aspects of disagreement, such as the risk of losing, the risk of winning, process costs, emotional stress, etc.
- Preserve the confidentiality of information received from the parties throughout the mediation;
- Uses various techniques to interact with the parties and to help them reach an agreement, such as neutrality, impartiality, optimism, questions neutral, etc.
- Deontologiei professional rules.

Why should not make a mediator ?

- Decide son who is right;
- Do not judge what happened and not seek quilty;
- Parties not give solutions;
- Do not oblige them to negotiate;
- Not intimidating;
- Do not mind;
- No trick;
- Can not be heard as a witness in connection with the acts and deeds of which is aware of the proceedings in Mediation;
- Does not represent or assist in any of the parties to mediation.

The Ombudsman is elected by the parties in conflict and it can be any person owning knowledge of law, medicine, sociology, psychology, etc. Person possesses specific techniques and methods base don communication and negotiation.

Qualities of a good mediator.

An effective mediator, is the one that meets the following qualities :

- Sensitivity;
- Flexibility;
- Optimism;
- Creativity;
- Persistence;
- Conviction;
- Sense of humor;
- A modest behavior, etc.

Why choose mediation ?

Mediation presents many advantages. The most convincing of these are :

- Is fast and saves time;
- Saves money;
- Implies respect;
- In mediation, both sides win;
- In mediation, the parties in conflict are not adversaries;
- Mediation is voluntary;
- Mediation is confrontational;

- It makes sense, the idea that the parties have control, they take decisions;
- Mediation work, meaning that although they have failed in mediation, the parties are winning, they got o the negotiating table, knowing more about their dispute, and so it's closer to original positions.

Technical procedure of mediation.

Mediation can take place at a time or more time, may involve a single joint session ar a joint session with several separate session, or more sessions joint and several separate sessions.

The date and time fixed, the mediator should be the meeting room ready.

In the joint session, the mediator :

- Meets with the parties and as appropriate with their lawyers;
- Make welcomes, which took place after the presentations;
- Inform the parties about the dispute and the purpose of mediation;
- To record advantages of mediation;
- Signals about the neutrality and impartiality;
- They warn that it can not give solutions, verdicts, but they can help to find themselves the most convenient and sustainable;
- Inform the parties that can no tuse him as a witness;
- Reminds the parties of the mediation that they are then invited to sign it;
- Clarifies the position of parties;
- Decide which party will discuss first.

In a separate session, the mediator :

- Meets separately with each side;
- Seek further information about the conflict;
- Clarifies desires, needs of the parties;
- Explains the realities;
- Develop options;
- Obtain a position of one of the parties that transmit the other party;
- Gives a task with which the party discussed.

After the separate session, the mediator meets again in joint session with the parties and lawyers, and as appropriate :

- Establishes result purpose;
- Tries to overcome the deadlock;
- Encourage future attempts to resolve;
- If the case is complex, with the agreement of the parties can appeal to the authoritative apinion of an expert, without disclosing their identity.

The procedure for mediation ends as appropriate :

- The completion of an agreement between the parties, after settling;
- By finding FAILURE OF ESSENTIAL mediation by the mediator;
- By submitting the contract mediation by a party.

Minutes of mediation – is the final act of this procedure, which attests to act and resolve the case by way of mediation, which act as appropriate, will be submitted to the court hearings, or will go to the notary for authentication, with a view to transforming it into enforceable.

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BONA FIDE IN TERMS OF PROPERTY RIGHT. THE CLAIM STIPULATED DE ARTICLE 45 OF LAW NO. 10/2001

Abstract

In general, in the case of the sale of another person's goods, bona fide (good faith) can lead to obtaining the private property right only associated to other principles of right. In the special case instituted by article 45 (former article 46) of the special reparatory law no. 10/2001 we notice an exception from this rule, since good faith alone shall lead to obtaining the private property right.

The communist regime established after 06.03.1945 has as fundamental desideratum the liquidation of private property. After the abolition of this regime, the Romanian legislature is faced with the problem of repairing the damage[1] created by the abusive taking over of the private property during 06.03.1945-22.12.1989.

The first step is made in this direction by editing the Law no 112/1995[2] on the regulation of the legal situation of real estate intended for housing passing over to the State property.

As a general feature of this law one should notice that it only partially appear being a reparation law, whereas concerns only the restitution of real estate intended for housing passed over to the State or to other legal entities. The beneficiaries are those who live in buildings of their former property under a lease contract, or whose buildings are vacant, not occupied by the tenant.

As such, the scope of beneficiaries of this legal remedy is very limited, because most of the buildings intended for housing were occupied, meanwhile, by tenants who according to Law no 112/1995 have created the opportunity to buy the rented buildings. Moreover, the scope of beneficiaries of this law is restricted to Romanian natural persons; therefore, former owners or legal persons who have become foreign citizens or Stateless persons could not be holder of the right of reconstitution under this law.

Two different situations can be distinguished from the application of Law no. 112/1995: when there is a title, or when we talk about the factual taking over, when the passing was made without the existence of legislative support. In the first case, the passing over to the State was made by „the title" and in the other case, it was „without basis"[3].

It should be made a distinction between taking over „with no title", that is, just factual of a building, without the existence of any legal act, practically through forced eviction of the owner, and the situation in which the real estate became State's property by abusive enforcement of these laws, so "without valid title"[4].

The distinction between the expressions „with title", „title less" or „no valid title", it is useful to determine which action is at the reach of the former owner deprived of his property.

In the case of a „title less" taking over, the former owner uses a vindication action of common law with the legal foundation art. 480, art. 481 of Civil Code. If crossing over to State was made by infringing the act of retrieval, it can't be said no more that the former owner starts an action in claim based on common law, because, undoubtedly, the holder of such actions must prove the quality of *owner*. Or, if the building was taken over by the State, the title of the former owner was abolished, in addition to the birth of ownership in favour of the State.

In this case, the former owner will have to formulate an action that would abolish first the State's title, citing inapplicability of the law in respect of him, and the abusive nature of the measure taken, and only afterwards, regaining the title of ownership of the real estate , to exercise the powers conferred by ownership[5].

Since the scope of buildings subject to reconstitution in kind, in terms of this law is very limited, the legislative power has covered the possibility of repairing the damage created by equivalent, so the former owners or their heirs / successors are receiving cash compensation for the houses which could not be returned in kind. One should remember that the limit of compensation is set below the value of the building taken over abusively by the State.

Is required another intervention of the legislator, that regulates the problem of abusively taken buildings.

Only in 2001 it adopted the Law no. 10/2001 concerning the legal status of abusively taken properties, during 06.03.1945-22.12.1989[6], as amended by Law no. 247/2005 and republished on 01.04.2007.

This new legal concept which is partially fruit of the jurisprudence of the European Court of Human Rights, referred to in that period by a series of actions concerning the violation of property rights (guaranteed by art. 1 of the First Additional Protocol to the International Convention of Human Rights) and also the recommendations of European bodies on the amendment of legislation in this area.

By Resolution No. 1123/1997, the Parliamentary Assembly of the Council of Europe recommended Romania to amend the law in terms of confiscated and expropriated assets and, in particular, Law no. 18/1991 and 112/1995, the purpose of providing restitution of property *in integrum*, or if this is not possible, by providing fair compensation.

In this context it is adopted the Law no. 10/2001. As a feature of this law one may notice that it concerns the whole area of abusively taken over real estate by the State, by cooperative organizations, or any other legal entities that are being irrelevant buildings intended for housing or destination other than the housing. By buildings, for the purposes of this law are concerned that construction and land, nay, more, even mobile assets become property through incorporation in construction or equipment and facilities taken over by the State with the building.

As a basic rule the principle of restitution in kind enshrines, and only when restitution in kind is no longer possible it was created the opportunity to repair the injury by equivalent. There are receiving remedial measures, in kind or equivalent, individuals and legal entities, former owners of such property or successors of their rights, even if they now have the status of foreign citizens or Stateless persons.

Tenants in buildings covered by the law enjoy legal protection, realising a legal extension of lease contracts.

Regarding the former tenants who bought homes that can form the subject of this law, legal acts of alienation remain valid if they have been completed in compliance with the laws in force at the date of their disposal, and the under-acquirers former tenants had been good faith / *bona fide*[7].

The impossibility that the owner regains in fact and in law the real eState, under the circumstances in which no one abolished the title, or more, the legislature confirms the its validity, is certainly a case for the sale of other's good in connection with the law, it is recognized the principle of *bona fide* / good faith, exclusively the constituent effects of rights in rem[8].

This exception to the rule has stirred controversy in theory.

Some authors[9] State that can not be said about art.45 alin.2 of Law No. 10/2001 that would validate the acts of alienation in the buildings taken over by the State with no valid title, documents concluded with violations of the laws in force at the time of drawing them up, as an absolute invalid act, according to the law existing at the date on which it was delivered, can not be validated by a subsequent law. The drawn conclusion would be that the subject of art. 45 para. 2 is constituted only from acts of alienation concluded after the entry into force of the law, violating any provision of Article. 15 of the Constitution. Thus, on the assumption that both sides have been *bona fide*, the act of disposal is struck by the relative emptiness for error over the essential quality of the alienator, and the true owner can successfully initiate real estate vindication action. If both sides and, at least the alienator were *mala fide* / bad faith, the contract is struck by the absolute void, in which case the true owner may initiate either the action for invalidity or the claim in action.

Faithful to older views expressed in specialised literature, another author[10] argues that Law no. 10/2001 has only to give a legal consecration to the creations of doctrine and jurisprudence, according to which the rule *resoluto jure dantis*, *resolvitur jus accipientis* suffers a consistent attenuation in the case of acts available for consideration concluded by a *bona fide* under-acquirer. So, the under-acquirer's title will be maintained by considering its good faith, but also the need to ensure security and stability of civil circuit.

It is said then, that "art. 46. para. 2 (current art. 45) is a legal consecration of the theory of appearance in law, designated to rescue the legal invalid act,

issue which has nothing in common with the un-retroactivity of the latest law, which provisions would apply to both sale contracts completed until the date on which entered into force Law no. 10/2001, and also this moment on"[11].

Considerations of order and social stability, made that art. 45 para. 2 of Law no. 10/2001 to consacre with retroactive effect and absolute novelty a validation of an null act, where the mere *bona fide* / good faith is not only necessary but also sufficient to gain a real estate right in rem for another person than the true owner, says another author[12].

According to another opinion, art. 45 of Law no. 10/2001 would be an exceptional situation in which the legislature has expressly enshrined the principle of protection of third party good faith, without further stipulating the need for other conditions, such as common error, in all other cases will operate the Theory of apparent owner[13].

In an article whose writing was determined by the court ruling for the purposes of admitting an claim of action against the former tenants who, in good faith were buying an apartment living based on Law no. 112/1995, an author argues that the application of the principle *resoluto jure dantis resolvitur jus accipientis* would meet an exception, where the subsequent act of acquisition would not be abolished, allowing him, to the under-acquirer, to retain the right won in a *non-dominus*. The situation of exception governed by art. 45 of law, has in mind the cases where the under-acquirer is *bona fide* and the acquisition title is one consideration, plus the condition of common errors, the exception finding reason on equity and social utility[14].

In another point of view it was appreciated that there is the protection of the good faith under-acquirer only in situations where the property was taken over without a valid title, and by applying the wrong law, or in the case of art. 45 "is not about the alienator's nullity title which attracts the under-acquirer's nullity title, but about the lack of the seller's title" which means a sale of another's good. But, in such a sale the operating principle that no one can transmit more rights than he has himself, the State was unable to send the buyer the right property, so that the true owner may intend a notice of claim, the sale not being opposable[15].

Another point of view States that "the provisions contained in art. 46 para. 2 (now art. 45 of Law no. 10/2001 is nothing more than simply enunciation without practical utility of the principles of common law, well known and consolidated, namely: the principle that legal acts with respect for legal norms in force on the date of completion are valid (para. 1), the principle that acts legal agreements in contravention of mandatory legal norms in force on completion of their absolute zero (para. 4), the principle that legal acts dispose of other work are absolutely void if the seller and the buyer were *mala fide* / bad faith, knowing that the goods belongs to another and that alienating other's property is not hit by absolute invalidity if it was bought in good faith at the time of conclusion of the act"[16].

Controversial in terms of theory, as I noted above, art. 46 para.2 (now art. 45) of Law no. 10/2001 and has found numerous screenings in law.

The vindication and annulment action of the contract which, under Law no. 112/1995 the State sold the tenant abusively nationalized building should not be admitted if the buyer was in good faith, operating under *error-comunis facit jus*, an invincible and common error concerning the ownership of the seller. That, prior to the selling of the dwelling, the owner deprived by State, notified the committee formed to implement the law no. 112/1995 to receive a "compensation" - and not restitution in kind - reinforces the conviction, for tenant who buys that the seller (State) was the owner, from which it was entitled to buy the property[17].

The admission of the vindication action is conditioned by the acceptance of the application of the invalidity of the contract by which the State sold the lessee the nationalized property, even if the property was acquired without a valid title. Only proved the existence of bad faith at the lessee buyer may lead to the abolition of the contract of sale in absolute nullity, the *bona fide* presumed according to art. 1899 para. 2 of the Civil Code. As long as there were performance from the seller and also the buyer, it can not be forfeited violation of article 966 from Civil Code, on penalty of duty without question, or a question based on false or illicit cause. The selling price determined in accordance with the Law nr.112/1995 can not be considered untrustworthy[18].

The recognition of the prevalence of under-acquirer's interest was imposed based on reasons with a much wider application and have created a true principle, of concerning about the security civil circuit and the stability of legal relationships. From a legal viewpoint, the solution was, therefore, in support of pragmatic reasons, resulting in the principle of valid appearance in law, whose essence is expressed *error comunis facit jus[19]*.

Noteworthy is the point of view of the Constitutional Court, which in considerations of a decision on the unconstitutionality of art.46 line 2 of Law no. 10/2001 (the current art. 45) memorized "in reality, the only element of novelty brought by the controlled text is included in *consecration in terminis*, of the principle of protecting the bona fide / good faith in a particular area, but with major social interest l, that the legal regime of buildings abusively taken over by the State on in the period March 6, 1945-December 22, 1989"[20].

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[1]In this case, it is applied the rectification of the actual damage caused in conjunction with the principle of repairing in kind of the injury involving restitution in kind of property misappropriation. The practice is uniform; in this connection, for example, the Supreme Court, in guidance dec. no 2 / 1970 in Romanian Law Magazine no. 571,970, p. 118;

[2] Law no 112/1995 was published in the Official Gazette of Romania no. 279/29.11.1995;

[3]The title, as the acceptance of this law, is applied to a certain situation of provisions of a regulation, under which the passing over to the State was stipulated and not when it was proceeded to a simple fact of taking over the buildings. Into this „tiltle" category there are regulation edited by government bodies, regardless of their nature, laws, decrees, decisions of the various organs of the State, regulations under which started the passing of real eState, over to the State or to other legal entities.

[4]The law enforcement is either right or wrong for a certain regulation, in a particular case. If, when the building has taken over, the law was obeyed, the States holds a valid title of that real eState, even if such a law could be regarded as abusive in terms of a democratic society. So, there are buildings taken over to the State „without a valid title", the one for who, although there is a legal act of passing over that represents the legal basis for establishing the ownership of the State, it has been applied infringing its provisions.

[5]Ioan Adam, *Law no. 10/2001. The legal regime applicable to buildings that were abusively taken over*, All Ed Beck, Bucharest, 2001, p. 10-12;

[6]Law no.10/2001 was published in Official Romanian Gazette no. 75/14.02.2001;

[7] Ioan Adam, *Law no. 10/2001. The legal regime applicable to buildings that were abusively taken over*, Ed. All Beck, Bucharest, 2001, p. 1-7;

[8] Felician Sergiu Cotea, *Bona fide. Implications on property rights*, Ed Hamangiu, Bucharest, 2007, p. 491;

[9]R. Popescu, R. Dincă, *Disscusions about the admissibility of the vindication action of the true owner against the under-acquier good faith of a building (I)*, The Law no. 6 / 2001, p 4-5; R. Popescu, R. Dincă, discussions about the scope of legal documents that fall under art. Article 46. (2) of Law no. 10/2001, no rights. 7 / 2002, p. 82.88;

[10] P. Perju, *Disscusions about the admissibility of the vindication action of the true owner against the under-acquier good faith of a building*, The Law no. 6 / 2001, p. 16;

[11] Pavel Perju, *Discussions about the scope of legal documents covered by art. 46 alin.2 of Law no. 10/2001*, The Law 2 / 2002, p. 67-68;

[12]F. Baias, B. Dumitrache, M. Nicholas, T*he legal system of abusively taken over real eState. Law no. 10/2001 discussed and annotated*, Ed Rosetti, Bucharest, 2002, p. 297;

[13]R. Sas, *Discussions about the application of the principle of law resoluto jure dantis resolvitur jus accipientis*, Law no. 10/2004, p. 116-118;

[14]Al. Ticlea, V. Lozneanu, *Reflections in connection with the protection of the under-acquirer's good faith*, Law no. 12/2000, p. 43-45;

[15]Eugen Chelaru, *Law no. 10/2001 concerning the legal status of properties illegally taken during the March 6 1945-22 December 1989, commentated and annotated*, All Ed Beck, Bucharest, 2001, p. 246-247;

[16] D. Chirica, *The juridical regime of vindication the real estate taken over by State without title from the under-acquirers which prevail their bona fide at the time of the transaction* , The Law no. 1 / 2002, p. 59;

[17]Claim. Residential, taken over by state nationalization. Request for cancellation of the contract that sold home to the lodgers. Action recorded previously to law no. 10/2001. Good faith / *Bona fide* Î. C.C.J., the department of civil and property rights, decision no. 6429 of 17 November 2004;

[18] Î. C.C.J, the department of civil and property rights, decision no. 417 of 25 January 2005, the Property Law, legislation updates, Ed Morosan, Bucharest, 2006, p. 301;

[19]Claim. The nationalization was in contravention of Decree no. 92/1950. Good faith of the tenant when concluded the act of sale; Court of Appeals Constanta, department civil decision no. 352 / C of 13 July 2005;

[20]C.C., Decision no. 191/2002, in M.Of. No. 567 of 1 August 2002.

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INTERNATIONAL CUSTOM FORMATION. SYNTHESIS OF TRADITIONAL THEORIES

Abstract

The two elements of custom: usage "the material and detectable element" and opinio iuris, the "immaterial and psychological element" have been offered by François Geny. These two elements form the core of traditional theories concerning custom formation and thus the object of analysis in the present study. The first part approaches the material element of the custom, emphasising different views regarding its four requirements: duration, repetition, continuity generality and uniformity. The second part approaches the psychological element of the custom through the most important theories concerning it: the error hypothesis, the consent, acquiescence and lack of protest hypothesis.

Key words: custom, sources of public international law, usage, opinio iuris

Introduction

Sources of public international law and among these, especially from the 19th century, custom has been more and more in the attention of the writers on international law. Prior to that century, as Professor D'Amato asserts in his study ´´The Concept of Custom In International Law´´, no author has addressed himself to the details of custom-formation.

The first steps in inquiring the process of formation of international customary law were taken by Putcha and Savigny, in the 19th century. They showed that customary law has a psychological[1)] aspect and thus a need for a reconciliation of the psychological and the overt elements of custom appeared.

It was François Geny who provided the synthesis in his "Methode d'interpretation et sources en droit prive positif", published in 1899. He offered two elements of custom: usage (repeated practices) and *opinio iuris sive necessitatis*, meaning that the usage must amount to the "exercise of a (subjective)

[1] Puchta, Das Gewohnheitsrecht (1828); Savigny, Vom Benef Unserer Zeit fur Gesetzgebung (1840) in A. A. D'Amato, The Concept of Custom in the International Law, Cornell University Press, 1971, p. 48.

right of those who practice it". Usage is "the material and detectable element" in custom and *opinio iuris,* the "immaterial and psychological element"[1].

These two elements of custom passed immediately into international legal thinking, both the Statute of the Permanent Court of Justice (1919) and the Statute of the International Court of Justice embody this doctrine in their article 38 which, referring to custom, reads as follows: ´´the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: …international custom, as evidence of a general practice accepted as law´´. But the scholars[2] have given different interpretations of each element and of the relation between usage and opinio iuris.

1. The Material Element

In the traditional views, the requirements for the material element of the custom (usage), though not entirely separate from one another, are duration, repetition, continuity and generality.

1.1 Duration

Duration – the temporal element – covers the broadest possible range in traditional writings, from[3] the "immemorial custom" of the classicists to the "single act" theories of some contemporary writers. The literature contains no standards or criteria for determining how much time is necessary to create a usage that can be qualified as international customary law. Even so, the time factor cannot be ignored. The establishment of custom required a long time in the past when international life was slower and communication primitive, but today custom may be formed rapidly since "every event of international importance is universally and immediately known"[4]. This argument suggests a communication factor in custom, reminiscence of Mateesco's observation

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[1] Gény, Méthode d'interprétation et sources en droit privé positif (1899) in D'Amato, The Concept of Custom in the International Law, Cornell University Press, 1971, p. 49.

[2] R. Miga-Beşteliu, Drept internaţional public, vol. 1, Bucureşti, Ed. All Beck, Bucureşti, 2005, p. 68-74, A.. Bolintineanu, A. Năstase, B. Aurescu, Drept internaţional contemporan, Ed. All Beck, Bucureşti, 2000, p. 49-52.

[3] Plucknett, A Concise History of the Common Law, (1956) in A.A. D'Amato, The Concept of Custom in the International Law, Cornell University Press, 1971, p. 56-7.

[4] K. Wolfke, Custom and Present International Law, Kluwer Academic Publishers, 1993, p. 59-61.

regarding the need for a custom to be "notorious"[1)] in order to be valid. So, the idea of communication or notice may be more basic to custom than the mere fact of duration.

1.2 Repetition/ Density

Repetition or the density of the usage is more significant than the temporal factor[2)], but duration cannot be separated from density since both serve to call attention to the overt acts making up usage.

1.3 Continuity

Continuity of the practice no longer holds good[3)]. Interruption often prevents the formation of a custom but this does not mean that every break should lead to such consequence. On the contrary, returning to the same practice after the interruption may sometimes help establish a new rule of customary law.

These requirements should be different tackled as one is referring to non-acts forming practice. The majority of authors agree that custom can arise as a result of abstention[4)]. M. Sørensen demonstrated the relative character of abstention[5)]. According to him, abstention is often a result of a positive decision or an action, the decision process of an administrative authority.

As concerns the role of the non-acts to custom formation one may identify two basic types of non-acts having different results in the process. On the one hand, there is a discretionary non-action, a failure to act because of choice or technological incapacity which has no legal consequence. On the other hand, there is an obligatory negative practice, a failure to act because of a legal duty not to act, which leads towards a different solution.

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[1] Mateesco, La coutume dans les cycles juridiques internationaux (1947) in A. A. D'Amato, The Concept of Custom in the International Law, Cornell University Press, 1971, p. 56-57.

[2] Waldock, Generale Course of Public International Law (1962) in A. A. D'Amato, The Concept of Custom in the International Law, Cornell University Press, 1971, p. 59.

[3] K. Wolfke, Custom and Present International Law, Kluwer Academic Publishers, 1993, p. 60.

[4] K. Wolfke, Custom and Present International Law, Kluwer Academic Publishers, 1993, p. 61.

[5] Sørensen, Les sources du droit international (1946) in K. Wolfke, Custom and Present International Law, Kluwer Academic Publishers, 1993, p. 61.

1.4 Generality

Generality of the custom has been seen by the writers either as a broad general participation[1)] or as a participation of those countries that hitherto had an opportunity to apply the practice in question. Neither of these groups denies that limited participation creates legal precedent, but there was judge De Visscher who suggested, referring to Cobbett's analogy, that some users will "mark the soil more deeply with their footprints than others … because of their weight"[2)]. The idea that the participation of the major powers in a usage should be regarded as more significant than the one of small states was reiterated by W. Bishop.

On the bases of the principle of legal equality of all states, a theory has been developed requiring a certain degree of representativeness of the practice[3)]. The criterion is, in a sense, qualitative rather than quantitative, which means the question is not how many states participate in a practice, but which ones. Still, one should add that the weight of one state practice in the formation of a customary rule does not depend on the power of the state. In the words of ICJ, in the North Sea Continental Shelf cases, the practice must include that of states whose interests are specially affected: ´´(…) it was indispensable that state practice (…), including that of states whose interests were specially affected, should have been both extensive and virtually uniform (…)´´ (ICJ Reports 1969, p.43)

Who is "specially affected" will vary according to circumstances. There is no rule that major powers have to participate in a practice in order for it to become a rule of general customary law. Still, given the scope of their interests, both geographically and ratione materiae, they often will be "specially affected" by a practice; and to that extent and to that extent only, their participation is necessary. We may conclude that for a rule of general customary international law to come into existence, it is not necessary for the state practice to be universal, but to be general, which means to be both extensive and representative.

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[1] Kunz, The Nature of Customary International Law (1953) in A. A. D'Amato, The Concept of Custom in the International Law, Cornell University Press, 1971, p. 64.

[2] De Visscher, Theory and Reality in Public International Law (1957) in A. A. D'Amato, The Concept of Custom in the International Law, Cornell University Press, 1971, p. 65.

[3] Final Report of the Committee on Formation of Customary General International Law of the International Law Association – London Conference (2000), p. 23-26.

1.5 Uniformity

As it was pointed in the international law doctrine, for a state practice to create a rule of customary law, it must be virtually uniform, both internally and collectively[1]. "Internal" uniformity means that the behaviour of one state, considered as custom-formative should be virtually the same. "Collective" uniformity means that different states must not have substantially different conduct as concerns the practice in question.

2 The Psychological Element

As regards the second element of the custom, the psychological element, one may find several sets of theories[2]. A reason for this may be the apparent chronological paradox[3] involved by the traditional bipartite conception of customary law. The states creating new customary rules must believe that those rules already exist, and their practice, therefore, is in accordance with law. This requirement would seem to make the development of a new customary rule impossible. This paradox led Kelsen and Guggenheim to conclude that *opinio iuris* is nothing but a pseudo-element that allows judges to exercise wide discretion in their analyses of state practice and thus, both authors abandoned this position.

2.1 The Error Hypothesis

The first set of theories[4] relates to the circularity of *opinio iuris*. The idea suggested by Geny and Kelsen as one possible response to the chronological paradox is the keystone of these theories. They argued that for a new rule of customary law, the relevant actors must erroneously believe that they are already bound by that rule. The error hypothesis had been rejected. The reasons for this

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1 Final Report of the Committee on Formation of Customary General International Law of the International Law Association – London Conference (2000), p. 21-23.

2 A.A. D'Amato, The Concept of Custom in the International Law, Cornell University Press, 1971, p. 66-72.

3 M. Byers, Custom, Power and the Power of Rules. International Relations and Customary Law, Cambridge University Press, 1999, p. 130-133.

4 A. A. D'Amato, The Concept of Custom in The International Law, Cornell University Press, 1971, p. 66-72; 187-215.

may be the fact that a mistake of this nature can not turn nonexistent law into positive law and even the fact that is difficult to imagine that all states participating in custom formation were erroneously advised by their legal counsel as concerns the requirements of prior international law, especially since states themselves ultimately decide the content of international law.

2.2 The Consent, Acquiescence or Lack of Protest Hypothesis

A second group of theories would equate *opinio iuris* with consent, acquiescence or lack of protest. This school of thought considers that a state is not "bound" by a rule of international law unless it has previously "consented" to that rule. This is a form of the positivist tradition and it requires for a rule to bind an individual state express or implied consent or acquiescence to it. The procedure of consensus[1)] involves an acceptance of a practice as law, acceptance that can be either express, by means of express declaration or tacit, by means of a presumption based upon various kinds of active or passive reactions to the practice by the interested states. In order to mask some of the difficulties that a term like consent might raise, the doctrine has created[2)] the concept of "acquiescence".

Even sometimes it is not easy to distinguish between consent and acquiescence, especially between implied consent and acquiescence, some writers have attempted to do that by expanding the latter notion to cover situations falling short of implied consent. MacGibbon defined it as "silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection" [3)]. So, in international relations one may find state practice requiring an expression of protest on behalf of the states concerned or state practice not requiring such kind of behaviour. If the lack of protest in the first situation is acquiescence as concerns a certain rule, in the second one we may speak of tacit consent.

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[1] K. Wolfke, Custom and Present International Law, Kluwer Academic Publishers, 1993, p. 62-63.

[2] A. A. D'Amato, The Concept of Custom in the International Law, Cornell University Press, 1971, p. 195-215.

[3] MacGibbon, The Scope of Acquiescence in International Law (1954) in A. A. D'Amato, The Concept of Custom in the International Law, Cornell University Press, 1971, p. 195.

On the basis of this theory, Brigitte Stern developed a theory saying that *opinio iuris* constitutes state will, and the meeting of such wills as manifest through state practice is the immediate cause of legal obligations. The contents of each will depend on the power situation existing at any particular time within the international order. The first states contributing to the birth of a customary rule manifest a free will, a "volonté libre". The other states, the silent majority, manifest wills that are conditioned by the irresistible wills of the first states. The result is the adoption of a rule by "consensus", that is to say, without express manifestation of either positive or negative will, but rather a simple tacit manifestation[1)].

Another important issue is the one about the persistent objectors[2)]. If a certain pattern of practice is emerging or have emerged, states may wish to diverge or dissent from if. A persistent objecting state is not bound by the eventual customary rule if the objections are maintained from the early stages of the rule onwards, up to its formation and beyond, and they are consistently. In the second situation, that of a state dissenting from a customary rule after its formation, the main rule is that a general customary rule is binding an all states and can not be the subject of any right of unilateral exclusion, exercisable at will by anyone of the members of international community in its own favour. Still, in cases of a large number of subsequent objectors, their behaviour, even if it amounts to breaches of obligations, may lead to desuetude or the modification of the rule.

One may criticize this theory saying that a failure to protest doesn't always mean a consent or acquiescence on behalf of the state concerned[3)]. It might be governed by political or diplomatic considerations (including often-realistic sense of the futility of protest) or even might be a way to prevent the establishment of the usage's notoriety (especially when a protesting state is not directly involved in an action or practice).

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[1] Stern, La coutume au coeur du droit international (1981) in M. Byers, Custom, Power and the Power of Rules. International Relations and Customary Law, Cambridge University Press, 1999, p 131-132.

[2] K. Villinger, Customary International Law and Treaties. A manual on the Theory and Practice of Interrelation of sources, Kluver Law International, 1997, p. 33-37.

[3] A. A. D'Amato, The Concept of Custom in the International Law, Cornell University Press, 1971, p. 70-71; 196-7.

From these and other situations one may say that, in fact, we can speak not about acquiescence, but about presumed acquiescence which is not an analytically useful concept.

Even more, there are some examples of state practice that calls into question the "doctrine of agreement". First, it must be mentioned the situation of new states which have never been asked to consent to existing rules of law. Secondly, the same is the result as regards the states acquiring for the first time an access to a certain activity. Another example is the fact that states rights and duties in international law are not "impaired by changes in law, government or constitutional structure, no matter how violent, at least as long as the core of its territory and population remain the same".

2.3 Other Hypothesis

A third set of theories on *opinio iuris* concerns the formation of international custom by the inclusion or repetition of rules of law in a number of bilateral or multilateral conventions.

A final category of theories equates *opinio iuris* with "the shared expectations about the requirements of future decision".

These two final groups of theories are either self-contradictory or so broad as to be functionally useless.

3. Related Problems as Concerns the Custom- Formation

Some related problems to the custom theory concern either the first or the second element of it.

As concerns the material element, one may see that there are different opinions. Some writers consider that only acts and not statements count as state practice, other argue that any instance of state behaviour – including acts, omissions, statements, treaty ratification, negotiating positions (as reflected in *travaux préparatoires*) and votes for or against, resolutions and declarations – may constitute state practice for the purposes of customary international law. This more inclusive approach has been implicitly endorsed by ICJ, in 1950 Asylum case where "official views" and "treaty ratification" were taken in consideration in determining that a "constant and uniform usage" did not exist (ICJ Reports 265, p 277). One may say that the same is the International Law Association's view as regards state practice. As it was pointed out at the London Conference (2000), both verbal and physical acts, as long as they are public, count as state

practice. They are both forms of conduct, the distinction is the weight to be given to them.

Another related issue is whose conduct[1)] may count as state practice. On the one hand, the practice of the executive, legislative and judicial organs of the state is to be considered as state practice, but on the other hand, the acts of individuals, corporations, territorial governmental entities which do not enjoy separate legal personality do not, as such, constitute state practice unless carried out on behalf of the state or adopted (ratified) by it. Although international courts and tribunals derive their authority from states, it is not appropriate to regard their decisions as a form of state practice.

[1] Final Report of the Committee on Formation of Customary General International Law of the International Law Association – London Conference (2000), p. 13-19.

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4. Miga-Beşteliu Raluca, *Drept internaţional public*, vol. 1, Bucureşti, Ed. All Beck, Bucureşti, 2005
5. Villinger, Mark I., *Customary International Law and Treaties. A manual on the Theory and Practice of Interrelation of sources*, Kluver Law International, 1997
6. Wolfke, Karol, *Custom and Present International Law*, Kluwer Academic Publishers, 1993
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THE PROBLEM OF TRANSPOSING COMMUNITARIAN ACQUIS IN THE INTERNAL LAW OF EU MEMBER STATES

Summary

Elaborating the tasks of the European Union represents a task of considerably bigger difficulty than the one that devolves the internal legislation of member states. In general, the directives are elaborated by the committee in French or English, and the texts in other languages, although having equal juridical value, are translations. The directives should be done in neutral terms, although this sort of activity would prove itself difficult in certain cases.

Keywords: *communitarian acquis, directives, rules, procedures, juridical system*

Elaborating the tasks of the European Union represents a task of considerably bigger difficulty than the one that devolves the internal legislation of member states. Besides the inherent difficulty of the effective process of decision making, it is necessary the reconciliation of diverse juridical systems, of different attitudes towards law and different national interests and objectives followed by member states. [1]

All selected member states for Robin Bells [2] study registered problems in the domain of transposing EU legislation that were comparable in some situations. These states mentioned concept and foreign terms in directives, especially in the hypotheses in which the committee elaborated a proposal for a directive or another juridical instrument by referring to a certain juridical system from a certain member states or certain members. According to this report, the directives should be done in neutral terms, although this sort of activity would prove itself difficult in certain cases.

In general, the directives are elaborated by the committee in French or English, and the texts in other languages, although having equal juridical value, are translations.

Detailed directives. The opposition between precise and vague terms is not identical to the one between precise and detailed terms that can be in an equal

way vague and imprecise. In his report Robin Bellis offers as an example two directives that although are detailed, have certain imprecise formulations. In principle, the directives must be elaborated in general terms, mentioning the formulation of article 249 from the Treaty, "the result to be done", but "leaving local national authorities the choosing of forms and methods". For the directives there was the tendency to become even more detailed, that they could be regulations, and in contrary, regulations could turn into directives. [3] According to R. Bellis' Report, "in case of a detailed disposition, that follows the instituting of a degree of uniformity in the EU, without leaving member states a freedom in transposing, the best choice would be the regulation". [2]

Transposing trough referencing. As a consequence of the tendency for many details, some member states have decided to incorporate in internal law directives, so that they have direct juridical effect. This situation is possible only if the certain directive is detailed and its application uniformly is followed, without member states have the prerogative of appreciating the possibilities of transposing (in Finland, Denmark, Holland and Ireland). Also France has done the same in the situation of the directive regarding labeling foods. [4]

Foreword of the directive. A rising tendency is referring to the foreword of the directives, of which abuse the committee, but also the member states so that they occupy a third of the decisional process. The foreword to state the objectives of the directive and the description of every main dispositions of the directive, not being normative, although some times they are used by member states to insert normative dispositions on which no agreement could be made. These practices are contraire to the inter-institutional agreement regarding elaborating the communitarian legislations (R. Bellis quotes in the report the situation of a directive that has approximately 16 articles, but had 64 point in the foreword) and are considered problematic for those preoccupied with the purpose and effect of the directive, especially by those whose task is to transpose it to internal law.

Re-elaborating directives. The re-elaborating of directives, that trough their nature follows a direct effect, is useless and leads in error. This situation creates a false thrust to those affected, when elaboration can be infirmed by instances in appreciating the direct effect of a disposition of the directive.

Although this practice exists in some member states, in which it is followed the re-elaboration of these sort of dispositions, it is also found in the tendency to take as given trough copying, leaving instances orientated to the Court of Luxemburg, if the situation turns up, to decide the application of such dispositions in particular situations.

Cascade agreements. In what regards legislation, the traditional approach in states that are under there influence of the Napoleonian Code was to entrust the legislation the declaration of principles. Robin Bellis defines the cascade agreement "as the situation in which primary legislation adopted by the National Assembly and by the Senate, after obtaining some opinions from the States Council over the text, defines the principles and general frame, delegating the ministries the prerogatives to adopt the decrees, trough the State Council, or of the resolutions, autonomously to state the details". For example, the directive of electronic signature was transposed trough a short amendment to the French civil code, inserted in the new article 1316-4, but was completed. Because of necessary details, imposed by the certain directive, trough subordinated legislation, under the form of two decrees and a resolution.

Indicating the derivation from the communitarian source of transposing dispositions. In the present there is no coherent and containing way of clearly indicating in transposed legislation of the implemented directive. R. Bellis suggests that "the explanatory notes that accompany the legislation must be even more in detail" and "must have a greater degree of information regarding the transposed directive and over the effect in situations as the possibility to induce in error". [2] The directive request the legislation that transposes it in national law to make a reference to it in the text or in a document published together with it.

The rules of interpreting the transposing legislation. In the situation in which it is given a greater importance to the transposing method to a directive (by copying it), supposing also that the elaboration procedure of the Union's legislation is not improving, the situation can turn up where, as in the case of the UK, to intent an action in front of the High Court to a resolution of interpreting the transposing legislation, through a reference, where necessary. That action can be intended by physical or juridical persons or by their representatives.

According to the Bellis' Report this can be "the case for recognizing a right of taking to notice the instance for a resolution of interpreting"

The approach of the interpretation. For the juridical instances in the UK, the traditional approach is that of interpreting the legislation as to the literal meaning of the words, being thus presumed the authors intentions. Such an interpretation can be facilitated trough declarations of the government at the moment of deposing the legislation, but also through official reports that lead to a recognition from the moment of adhering to the European Community.

Interpreting the EU regulations, directly applicable, also the internal legislation that transposes the objectives imposes a different approach meaning the one adopted by the Court of Luxemburg regarding the interpretation of communitarian law. This interpretation is named teleological, meaning the interpretation of structure and purpose of the legislation, together with literal interpretation of the words used.

In the case of the UK, the teleological interpretation of the transposing legislation was adopted by the higher instances, by the Juridical Committee from the Lords Chamber, by the Appeal Court and by the Divisional Court, existing the tendency in the future to adapt in the lower instances also and in other public organs with the role of interpreting the legislation, if it is clearly seen that the legislation in discussions has communitarian origin.

The transition situation between the two approaches contrasts with the situation in France, Spain and Sweden. In these states, the traditional approach is the teleological one. Thus, the interpretation statues the literal meaning of the words, but the juridical instances also have in sight the purpose followed by the law maker, meaning the actual purpose; this is why the precursory papers are watched(followed) as being parliament or ministerial documents

The recommendations formulated in the Bellis' Report aim at:

- *The experience needed for redacting the normative document at the EU level*

Because of the difficulties that must be brought together and the quality system of those communitarian normative documents, many of the problems referring to

the transposing the acquis come from the redacting mode's quality of the communitarian legislation.

Member states have diverse systems and legislative internal law expertise institutions. In the case of UK, there is a hierarchy system in which projects are elaborated by the parliamentary council or by governmental counselor, in the basis of instructions received from the department responsible with the politics in case the councilors are accountable for the redacting the text and of it's integrity in the course of the procedure, also the form of the normative document (law or settlement).

In the states with continental tradition, every member states has a system trough which the department responsible elaborates the initial project, formulating a decision regarding the form, after being forwarded to a mechanism that can decide over the eventual modifications regarding the form. In France, the respective mechanism can decide the forwarding of the text to be adopted under the form of a decree of State Council and not trough a law adopted by the parliament. In the situation in which the project has amendments during the legislative procedure, it comes back to that mechanism for approval. In France and Spain that mechanism is the State Council and in Sweden it is the Legislative Council.

At the EU level there is no equivalent to those systems, meaning a specialized organ in redacting law texts that is accountable for the integrity of the text for the whole length of the procedure, until it is adopted.

- Copying directives

The directives' dispositions that aim at an uniform application in all member states, that utilizes the formulations of the respective normative document, does not leave any margin of appreciation, having a form of EU regulation. These dispositions must be copied, indifferent if they are clear or not. A member state risk of braking the obligations imposed by the treaty in the case when that state was following of obtaining a higher level of precision, because it endangers the uniformity of dispositions, besides the purpose followed by the directive.

Because the communitarian regulations are directly applicable, but are elaborated the same way as directives, R. Bellis appreciates that "it would not be justified a higher degree in the directives' formulations, in the situation in which

this thing is not realized through regulations, directly applicable". In consequence, the first task imposed to those that redact the legislation of transposing is that of identifying this sort of dispositions "with form of regulation", to distinguish the dispositions that leave member states appreciation prerogatives (as for example art.6 – a disposition regarding accountability – from the electronic signature directive)

In the situation of defining "work time", from the directive regarding the organization of working time, the UK simply copied it, although its dispositions were not clear. An instance from Spain forwarded the court an action of interpreting regarding this definition. The court, responding to this action, clarified the sense of "working time", and the UK was in the situation of not being obliged to modify the national legislation of transposing the directive. The resolution of the court was applied directly only in Spain and defined the sphere of "working time". [2]

- The information disposition

To ensure the fact that juridical instances and other responsible mechanisms with applying the legislation through which directives are transposed adopt a teleological interpretation, sooner than literal, the disposition must be included in all explicative notes, mentioning he directive or the part of the directive that was transposed, specifying more information about the transposed dispositions of the directive, prerogatives of the treaty in the basis of which it is adopted and the resolutions of the Luxemburg court of interpreting communitarian legislation.

The internal law disposition is accompanied by a table, that mentions the particular disposition of the directive in a column and those of the transposing the legislation in another. Robin Bellis suggest including every disposition of the directive, as Sweden does, or how it was done by the department of Commerce and Industry in the UK for the postal services directive. This situation involves the particular articles that don't need transposing in internal law that obliges to a justification this situation. The Bellis' Report quotes the situations that can be met; the communitarian disposition is found already at a level of general norm in internal law; it was not transposed; it will be transposed; there is an international obligation that does not impose transposing in internal law. This table must not be part of the text of the normative document, but is an orientating note,

published with the normative document, being at the disposition of juridical instances and all interested by applying the legislation.

In the situation in which there can be settled a certain national disposition deriving from a directive, the juridical instances in the UK, together with other interested parts of it's interpretation, they can recognize the special statute of the words used, adopting for them a more teleological than literal interpretation.

In the case of a section from a law that, together with the transposing in internal law of a stipulation from a directive, solves and certain options from a national policy, instances must not have a difficulty regarding their interpretation, with the condition of utilizing some formulations conveniently specified in the transposing note, that must indicate including in the certain juridical norm and other aspects.

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4. CJCE accepted the validation of uniform and detailed disposition in directives, with the condition of justified their necessity in the perspective of followed settlement objectives: Cause 38.77 ENKA, In ECR [1977]2203, in special paragraph 11. Member states keep the possibility of choosing in what regards the measures and methods that can utilize in applying the directive by the national authorities; these depend of the result that the Council or the Commission want to reach.

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Mihaela-Adina APOSTOLACHE

THE ACTUAL IMPLICATIONS OF EUROPEAN UNION MEMBER STATE QUALITY

Summary

Romania, by adhering to the European Union, became part of the most achieving system of political and economical organization known in history.
It can be appreciated the fact that the national parliament has a multiple role in what regards the harmonization of the national legislation with the communitarian acquis, in the process of adhering to the EU, but also in the effective integration of the state in communitarian structures, implicitly in the transposing and applying the communitarian legislation in internal law.

Keywords: *adherence,* ***integration, ratification, member state,*** *communitarian acquis*

Defined at Bucharest but also at Brussels as an "event with political, economical and social high significance", the adhering, which represented an important step to integration in the EU, involved measures, including of juridical nature, that Romania adopted so that "the strategically objective of integration to be reached". The adherence, but also the integration are complex processes during which natural interests of nations were defined and stated the reports of those interests whit those of the EU, in present and in perspective. [6]

The far reaching reform stated trough the entering in vigor on the 1st of January 2009 of the Lisbon Reform Treaty "will have a direct effect over the development of Romanian constitutional law, assuring a balance between putting to good use the interest and traditions and the prominence of great communitarian values, based on the respect for freedom of the individual and solving, trough common effort, of the continent great economical problems". [1]

The pro-European option of Romania is fully based from a political, economical and strategic point of view. Romania belongs to the European family and has adhered to the set of values that define this civilization. Romania's

integration in the EU is mutually favorable for Romania and for the European policy construction.

By adhering to the European Union, Romania became "part of the most achieving system of political and economical organization known in history". [5]

In a European Union with 27 members, Romania is the 7th country as size and population. After the debates for the reform treaty, Romania will benefit form 14 votes in the Council of Ministries, as part of the intense negotiations that took place regarding the repartition of votes in this council, because, during the repartition, an important part was the population number.

A careful analysis of the mode in which the votes of the Council of Ministries were assigned, would prove that besides the primary role that should come to population number, it has been kept in mind, a special impact having the quality of negotiators to better protect their interests, as the case of polish negotiators. This is the proof that to ca country with a population under half that that of Romania has received 12 votes in the council, while our country got 2 extra votes, meaning 14. [7]

The analysis of Romania's place in an extended EU must be based firstly on the evolution of potential elements that give force and realism to any governmental option or strategy of development. [4]

The process of "becoming constitutional" at an European level has involved the approach of issues of principle in a new spirit. It is about, on the first hand, to accept a new was of exerting in common law some prerogatives of state sovereignty. [3]

On the second hand, there must be kept in mind the rethinking of some traditional prerogatives of the main state mechanisms, because, inevitably, accepting the priority of communitarian law, an especially in applying directly communitarian documents, operates certain diminutions in the Parliament's competence, considered for a very long time as an unique mechanism of law making.

On the third hand, accepting the communitarian acquis does not just impose the assimilation of a cod of rules that were elaborated at the level of the European institutions, but also a new optic regarding exerting citizens rights,

with the European citizenship, with the imperative standards that are today accepted and recognized at European level.

"Romania's entry in the EU, at the 1st of January 2007, forced the Romanian authorities to learn the states concepts and categories inside the Union, thus the decision that they adopt to be according to the rules existing at the Union's level". [6]

It can be imposed the problem of degree of convergence of the communitarian acquis with the other European juridical norms (treaties, agreement, conventions), having in mind that the most important have been ratified by Romania and are part of internal law. In the more dynamic and under juridical evolution areas, adopting a normative document after the model of the one in the EU, represents not only a step forward in the process of harmonization with communitarian law, but also an alignment to the stipulations in the Council of Europe, that finally, determining the modernization of the hole system of law.

From a juridical point of view, Romania's role "as member state of the EU in the frame of external and common security policies and cooperation in the domains of justice and internal affairs is different from it's communitarian role", difference that is explained trough the objectives if those policies, but also trough the institutional options that the objectives inspired. [9]

Romania's interests must be permanently harmonized with those of Europe being in a continuous movement, institutionally, but also political – socially. Thus, the role of Romania must not be quantified only in the number of votes that can be used in the process of decision making, but also in the contribution and dynamic flow that Romania is capable of offering to European construction.

The state dimension of the communitarian system justifies the determining of the role of member states and explains the turning to the principle of institutional autonomy that characterizes the ways of national intervention, principle whose limits are taken from the communitarian exigencies.

The general dispositions regarding the role of member states must be obviously completed with different other dispositions that come from the documents adopted by communitarian dispositions, that fix in their task different obligations for national public authorities. Also, the European Court of Justice

has defined constantly the role of member states, it's jurisprudence regarding article 5 of the CE treaty (in new numbering article 10) distinguishing this tendency. The Court has given article 5 a larger importance, considering that this constitutes the base of what was called, communitarian loyalty or communitarian cooperation, but applying this text having some limits.

In what regards the contents, remained unmodified by the Amsterdam treaty, the European Court of Justice has distinguished, in paragraph 1, especially positive obligations in the tasks of member states, obligation that enlighten the original impact of this disposition, as the communitarian jurisprudence was interpreted, while the consequences resulting from paragraph 2, according to the court correspond in a great measure to the principle of communitarian law primacy over national law.

The loyal cooperation between the European institutions and Romania imposes especially to it to respect the specific and general obligations of informing that are stated, and that are of nature to allow the European Commission to fulfill it's task, meaning to oversee the applying of the treaty and the dispositions taken by institutions in it's base.

The national legislation that will be elaborated must keep in mind the stipulations of the Lisbon Treaty in it's integrality. "The principle of supremacy of the communitarian law over internal law will apply also in Romania. Romania's Constitution allows, in an integral way, the supremacy of the communitarian law over Romanian national law."[11]

The doctrine of direct effect of the communitarian law was developed with the occasion of interpreting the stipulations in the treaty. These criteria will be used in derived communitarian law.

For Romania and the Romanian system of law, the effects that the different reports between the two normative layers have because of integration are very complex. First of all, it must be observed the adding of internal juridical springs, also traditional, of European sources of law. The consequence was redefining the national juridical space in the sense of it's enlargement and the entering of Romanian legal norms in juridical reports of posteriority and anteority with already adopted communitarian laws and with those that are not

emitted yet. In solving these reports, the principle of direct applying and that of primacy of the communitarian law have a greater importance.

Second of all, as a result of giving up a part of national sovereignty trough integrating in the EU, the Romanian law is transformed from a closed normative system and generally impermeable to external influences, in one open to applying superior legal dispositions, emitted by Brussels. It becomes, also, a complex system of law that had many transformations because of internal adopting of the principles and norms of communitarian law. Even dough some of these principle are common to Romanian law, others inspired by the German or Anglo-Saxon law constitute an absolute novelty for Romanian practitioners' of law. An example in this way is the fact that the European Court of Justice's jurisprudence has become an internal spring of law, a totally unusual aspect for a right constituted in the French principle of a law as a spring of law.

It might be said that, trough the act of integrating Romania in the European communitarian structures, the jurisdictional system has lost, once again, a significant part of self-thinking, being forced to use, in even more domains, the juridical authority of the European Court of Justice. [8]

These major changes, mostly due to on the first hand effects of the integrations in the EU, so in a new political-juridical space, had a powerful impact over the state and internal structure of Romanian law in it's whole. On the background of diminishing Romanian state autarky, the internal juridical system has a process of opening and continuous structural adaptation to the principles and norms that act at the level of the European Union.

Romania's position over the role of national parliaments in the EU

It can be appreciated the fact that the national parliament has a multiple role in what regards the harmonization of the national legislation with the communitarian acquis, in the process of adhering to the EU, but also in the effective integration of the state in communitarian structures, implicitly in the transposing and applying the communitarian legislation in internal law.

Regarding the role of national parliaments, form 2001 Romania considers that in the spirit of opening to the European citizens creating a "Committee of national Parliaments", after the model of the Economical and Social Committee of regions. Defining the role of this new mechanism must start from the proposed model for the future Union, existing two alternatives: one minimal, in the sense that it will be constituted a new committee in the same position with the two existing and that would have a consultative role on the problems that regard the intergovernmental cooperation, and one maximal, in the sense that this new structure will receive important competences by taking over legislative functions of the council, in co-decision with the European parliament. [10]

Delimiting the competences between the EU and member states reflects the principle of subsidiary, whose comprehensive consequences are clearly contoured.

Romania supports the cooperation in an inter-governmental plan and identifying some common project and policies that would facilitate the development of a role more visible of the EU in an international plan. At the same time, Romania is pronounced in favor of transforming the EU in an actor in which national identity is preserved, national interest are harmonized with the Union, and trans-national solidarity and cultural and religious tolerance are respected, having as a result creating an European society.

Romania's representatives participate at the COSAC reunions, expressing Romanian points of view over the integration process and perfecting commune bilateral agreements with the representatives of Commission for European Affairs form the parliaments of other states. The Romanian Parliament is thus involved in forming Romania's position regarding the strategically directions of action of the EU, that are adopted in the European Council, also in forming Romania's position regarding the main European themes or policies. There is also a "parliamentary reserve": the government's negotiator in the EU council is obliged to ask for the postponing of the negotiation until receiving the opinion of the Romanian Parliament.

All the project of European documents is processed, indifferently of the number of those that will be selected for effective analysis. The Commission for European affairs, in the quality of permanent common commission of the Deputy

Chamber and Senate of Romania, has competences regarding the transposing of European legislation, but acts only to the request of one of the chambers.

The Romanian system for parliamentary monitoring of European affairs is still in development. The Commission fore European Affairs of the Romanian Parliament is empowered, as after examination, to express the point of view of the Romanian Parliament regarding European affairs and grant negotiations mandate to the government for projects of European documents in the procedure of decision of the EU Council.

Since the convention for the future of Europe, in the plenary session from 6-7 of June 2002, the Romanian participants have revealed the report that exists between democratic legitimacy of EU actions and associating national parliaments to it's activity.

Also the necessity of deepening the control of national parliaments regarding the positions of the governments of member states in the Council was underlined, also the necessity of consolidating the institutional frame of cooperation between the national parliaments, between them and with the European Parliament.

Two interventions of Romanian parliamentary people regard especially the problems of COSAC. Puiu Hasotti estimated that: "The COSAC experience should be extended to other committees tasked with sector polices for creating in the end and European network of such committees. Meanwhile, an more efficient COSAC need a tighter relation between the European Parliament and national Parliaments." Senator Liviu Maior, referring to COSAC, has pronounced in favor of "a reevaluation of it's functions, also for it's reform". [12]

The Romanian parliamentary has also participated to a work group in the European convention regarding "the role of national parliaments in the actual architecture of the Union".

In the frame of this group it has been revealed the request for consolidating the communication flux with all communitarian institutions, especially those between euro-parliamentary and national parliamentary people, also using COSAC as a consultative mechanism at a sector level.

It can be estimated that in the frame of national debates, the idea of the relation between the Romanian Parliament and the communitarian institutions

was widely examined. The discussions started especially starting from problem of principle – prerogatives, competence delimiting, and informational flux – to applicative problems regarding the ways and forms in which the national control is exerted. [2] There has been unanimity in what regards the further using of COSAC and perfecting it's mechanism of functioning, but also regarding other form of organizing of inter-parliamentary reports and intensifying links between national parliaments and European Parliament.

The existence of a second chamber in the European Parliament, composed form representatives of national parliaments, would lead the rising of visibility of national parliaments in the process of European integration and strengthening the democratic legitimacy of the EU. This idea has few supporters "preferring to put an accent on raising the role of the conference of national parliaments as a more supple form, more facile and more direct link between the elaboration of new parliamentary structures at an European level". [2]

Regarding the direct link between the national parliaments and the European Parliament, senator Liviu Maior has considered that "the conference of presidents of national parliaments" as being "the cooperation formula inter-parliamentary the best and most coherent, that can be stated trough treaties" this would be "the most adequate forum for raising the problem of an agreement of inter-parliamentary cooperation".[12] Also Romanian deputy Puiu Hassoti has pronounced against those proposals that regarded the forming a new chamber at the level of the European Parliament, considering that doing this proposition "would lead inevitably to the further complication of an institutional frame already complex". Also "raising the European Parliament to the condition of an full equality with the council, in the quality of co-legislators is an idea more suited for satisfying the legitimacy, but also the efficiency, would lead to a bi-chamber classic legislative , in which the European citizens would be represented in the parliament, and member states in the council. Thus, a chamber having members of national parliaments would actually mean, a third chamber with an evident lost of efficiency."[12]

It has been revealed the fact that a adequate solution could be "establishing some ad-hoc parliamentary conventions, with European parliamentary members, but also national parliament members, with different

specific tasks, as an example the revisal of constitutional arrangements of the EU or the decision regarding directly financing the Union".

In the discussions there ahs been evoked the idea of granting right of appeal to national parliaments to the European Court of Justice, on problems regarding subsidiary. Is has been underlined that choosing the implication model of national parliaments must have in mind the necessity of simplifying the decisional process and of associating national parliaments to the decisional process of the Union under consultative form.

Regarding the activity of the Romanian Parliament in the period that past from the constitutional reform, it must be mentioned that, in this period, the parliament has been very active, decreasing visibly the number of emergency ordinances of the Government. The high number of normative documents that need adopting in the present need a considerable effort from the parliament members, but also the experts, of specialist called to ensure the accuracy and efficiency of normative documents.

"The to communitarian order will have to ensure a larger role of national parliaments, the coming together if communitarian general interest with those of member states, the elimination of non-functionalities that might appear between communitarian interests and national level divers interests."[2]

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Cătălin ANDRUŞ

THE EVOLUTIONS OF THE RELATIONS BETWEEN THE EUROPEAN UNION AND ROMANIA – FROM THE PROCESS OF ACCESSION TO THE CONDITION OF MEMBER STATE

Abstract

By redirecting Romania to the Euro-Atlantic structures and by redefining the EU's objectives allowed Romania's gaining the condition of member state of the EU, Romania has become the seventh state of the EU as dimension.
Romania's accession to the EU has proceeded to reinforcement of the country's position in the worldwide economic background and for the EU it has brought a larger common market, as well as the riparian status of the Black Sea region, with a high relevance for the external and defense policy of the EU as well as a series of economic projects, especially present energetic ones.
So, Romania is expected to promote the EU's interests in the region, but it is questionable whether it will be able to stand up the expectations.
Key words : European integration, EU-Romania, EU accession;

I. The impact of the collapse of the communist regime on the relations with the European Communities/European Union

The collapse of the communist regime and the removal of the strictly practiced influence of the URSS on the satellite states have permitted Romania to fundamentally redirect its external policy and start a policy of opening and collaboration with EC/EU, these becoming, after 1989, the main economic partner.

Like all the central and east-European past communist countries, Romania has crossed "*the long way of capitalism to capitalism through communism [1]*" and, at the beginning of the 90s it had to redefine the political and economic options.

The economic evolution has been accompanied by political-military transformations which have affected the European continent in a much bigger way than the other people. For example, the dissolution of CAER and Warsaw has had numerous repercussions on the adjacent countries, because the United States have gained new military influence zones. Signing the Partnerships of Peace (Romania has been the first East-European state which signed the Partnership with NATO) has meant "*the open expression of the wishes of the East-European states to liberate themselves from the military point of view from the influence*

zone of URSS, and the accession to the military structures of the European Union, at the beginning of the 1990s has stressed this decision [2]".

Romania has officially acknowledged the European Communities even from the first months of 1990 and on 14th April 1990 the first ambassador of Romania has been accredited under the community bodies from Brussels.

This evolution has come true by concluding a Trade and Cooperation Agreement signed on 22nd October 1990 at Luxemburg, and the effectiveness of this agreement, produced on 1st May 1991, has led to eliminating the discriminating quantitative restrictions and their gradually abolishment to Romania's imports from the European Communities. The collapse of CAER (the commercial zone of the socialist block) has brought a rapid – but not abrupt – reorientation of the Romanian trade to the EU, phenomenon which is characteristic to all the other countries from Central and Eastern Europe.

Until the end of 1991, all Central and East-European countries, including URSS, have concluded such "first class" agreements with the EC.

These agreements have represented a first stage necessary in the further development of the relations with the EC even if they stipulated only a reduced liberalization of trade. The Trade and Cooperation Agreements have blazed the trail of the negotiations led within the framework of the meetings of the reunited committees and the PHARE program, leading to the second class of association agreements, concluded between 1991 and 1993.

II. The association agreement or the beginning of the process of Romania's European integration

2.1. Pre-requisites of concluding the Association Agreement

The political, economic and social evolutions unleashed in Europe as a result of the revolutions from the Eastern and Central part of the continent during 1989-1991 have had a decisive impact on the inter-European and global relations[3].

The events happened in this period have changed the history. The idea of a new extension of EC to Eastern and Central Europe has not been rejected; on the contrary, it has been regarded as a chance to realize "*an integrated Europe from the Atlantic to the Urals*", as the French president de Gaulle used to say years ago. The idea of extension has been present on the level of testimonies and political discussions; although on the declarative level the positions of the European officials were for the idea of a new extension, the positions of the member states

were not the same, but sometimes contradictory, especially regarding the concrete conditions and the moment when the accession is to happen.

But completing the process of accomplishing the common market, the political union and the beginning of achieving the Economic and Monetary Union by signing the Treaty of Maastricht[4] and in accordance with the ambitious ideas promoted through Treaty of Rome and Single European Act, the European Union redefines its priorities[5]. In this way, the Treaty of Maastricht represents a turning point in defining the future objectives and what is to become the community site[6].

The principle of extension has been sanctioned in 1993, in Copenhagen, when it was officially decided that EU would be "opened" to the new democracies. Moreover, it has been strengthened at the European Council of Essen (1994), when it was elaborated the strategy of pre-accession, and then at Cannes and Madrid (1995), when to the strategy of Essen there has been added a concrete plan of integration in the Common Market, on the one hand, and, on the other hand, there has been stated the principle of equal opportunities for all the nominees.

The events that happened in 1990, in Eastern Europe, as well as the resolute option that the Eastern countries have directly expressed regarding the integration in the European structures have taken by surprise the member states and the authorities of the EU. As a result, their reaction has not been prompt and well defined. The attitude of the EU has not been well expressed, but, as the process was running, it was mostly formed and defined as "ad hoc".

The solution was the association agreements, as a proper frame for the relations of CCEE[7], as the British govern first suggested in November 1989. In the next month, the European Council of Strasbourg has agreed to elaborate "a suitable way of association", and the General Direction of External Relations has rapidly designed a large frame. Subsequently, the Dublin European Council has easily approved the creation of "the European Agreements" for the leaders of the reform as *"a new type of association agreement, part of the new kind of relations in Europe"[8].*

Analyzing the situation from Romania's point of view, it has preferred the integration in the European and Euro-Atlantic structures and its option has been accepted by all the political forces of the country[9]. For this reason, since January 1991, Romania has enjoyed the PHARE program, through which it has received technical and financial support in the most important spheres of the economy. During 1991-1993 the Communities have granted 360 millions to

Romania through PHARE program and it has become the second beneficiary after Poland[10].

2.1. The political, economic and juridical implications of the Association Agreement

The peculiarity of the European integration process has determined the endorsement of a large number of community acts necessary in order to create the European Union, through which it was created the Monetary and Economic Union, the Political Union. As a consequence, it was necessary an earnest briefing of the states which expressed their intention to join.

In this context, the European Union has created the European Association Agreements as basic juridical instruments concluded between EU and the states willing to join.

"The Association Agreements of second class" called also "the European Agreements" have been conceived to represent the main frame of the relations between the European Community (subsequently the European Union) and the states from Central and Eastern Europe until their accession to the EU.

In May 1991, Romania has referred an official request in order to begin the negotiations for the accession to EC and as a result, in December 1991, in Bucharest, there were started explorer discussions regarding the conclusion of an "**European Act of Romania's Association to EC"**.

The proper negotiations took place during 6 rounds (May – November 1991) and ended by completing the Association Agreement on 17th November 1992 and signing it on 1st February 1993. In the meantime, there has been negotiated and signed an Acting Agreement of applying the commercial provisions. The European Association Agreement was ratified by the Parliament of Romania in March 1993, and after a few months (May 1993) its commercial component part came into effect (through the Acting Agreement), followed by the Agreement on the whole, on 1st February 1995. Thus, Romania has become the forth East-European member as a state associated to EC after Poland, Hungary and Czechoslovakia. Since 1991, there were also signed treaties with Slovenia, Bulgaria, Estonia, Leetonia and Lithuania, which added to the treaties which had been previously signed with Turkey (1963), Malta (1970) and Cyprus (1972).

For Romania, substituting the old Cooperation and Trade Agreement with the Association Agreement is considered to be, both from the political and economic point of view, the first important step in the process of "returning to Europe".

On 1st August 1996 came into effect the Protocol additional to the European Association Agreement which was signed on 30th June 1995, regarding the opening of the European Union's program to Romania in order to supervise the way how the European Association Agreement is being implemented.

The juridical foundation of these agreements is the article 310 TEC (238 EC), which stipulates the Community's possibility to conclude agreements with a third parties – state or international organization – through which is created an association of states with mutual rights and duties, through common actions and specific procedures[11].

Practically, most of the Association Agreements have also commercial components (like tariff discounts or the elimination of quantitative restrains), and thus, its juridical basis includes also article 133 TEC and, sometimes, article 308 TEC[12].

The association agreements can be included in the category of the "*joined agreements*", because they do refer not only to the economic problems, but also to the political ones and other domains towards which the Community does not have purposeful or implicit powers. In the case of these joined agreements, the member states of the EU are partners both individually and together. That is the reason why it is necessary that the agreements to be ratified by the European Parliament, the parliaments of every member state of EC and the parliament of the associated states. In the case of Romania and Bulgaria, the procedures of ratification have been ended in 1994[13].

The general principles which define the association relations, gathered in the Association Agreement of Romania, follow the idea of legality, the observance of human rights, the political pluralism and the market economy.

"*The Association Agreement establishing an association between Romania, on the one side, and the European Communities and their member states, on the other side*" is meant to "*assure a proper frame for the political dialogue between the parts*", (…) "*the trade development and the harmonization of the economic relations*", the growth of cooperation in the economic, social and cultural domain, a more substantial support for Romania in trying to develop the market economy and the democratic system, the assurance of a frame for the gradual integration of Romania in the EU[14]. The preamble of the agreement also contains the firm commitment of respecting and applying by all the contracting parts all the principles and provisions in the final Act of CSCE, the final documents from Vienna and Madrid, the Chart from Paris for a new Europe, the final document of the meeting from Helsinki, entitled "*The Challenges of Change*", and in the European Chart of power.

Associating Romania to the EU has meant, from the economic point of view, creating an area of free exchange, economic and financial cooperation, in order to support reorganizing the Romanian economy, and from the political point of view, creating an institutional frame in order to realize a permanent political dialogue between the parts.

In accordance with the objectives of the European Union and Romania, this Agreement contains provisions regarding the elaboration of some common policies aiming at the progressive comparison of the levels of the economic development, in a Union where the principles of loyalty and solidarity must work. These common commercial policies refer to: free traffic of goods, traffic of workers, supply of services between the Community and Romania, actual payments and the movement of the capital, competition and economic cooperation.

1. Free traffic of goods requires the creation of a Custom Union, an area of free trade of non-sensitive[15] goods based on the mutual and well-balanced duties which will be gradually established after a transitory period, of at the most 10 years divided in two successive stages, each of them lasting, theoretically, 5 years.

The transition period was characterized by asymmetry in according concessions to the parts, which came true by the fact that, while the Union was making its commitment in the first stage, Romania was applying it in the second stage. However, the economic balance of the Union with Romania is going to remain mostly positive.

The agreement stipulates also that, since the effectiveness, in the trade between Romania and the Community will not be introduced new custom duties or quantitative restrictions on import and export, and those that are applying will not be of a majority. The two parts will refrain from any measure or practices of intern taxation, which would, directly or indirectly, introduce discrimination among similar original products from other countries.

The contracting parts engaged themselves to refrain from introducing regulations which would contradict the provisions of this Agreement until its effectiveness. Moreover, they expressed their reserve that, during the transition period, they would act in concordance, depending on the concourse of events from the spheres aimed at, in order to reduce periodically and analyze the mutual concessions, including speeding up the time of their application.

2. Traffic of workers requires that the treatment offered to the Romanian workers, legally hired on the territory of a member state, should exclude any

discrimination based on nationality, and in what are concerned the conditions – remuneration, hiring, other conditions of work or hiring. These regulations are based on the community legislation[16] which stipulated the abolition of the restrictions of traffic and residence in the EU for the workers of the member states and their families[17].

3. The supply of services between the Community and Romania requires the hiring of the two parts in order to be adopted the necessary measures that would permit progressively the supply of services by the companies and their citizens.

For this reason, Romania engaged itself that – during the transition period – its legislation should be progressively adapted, including the administrative and technical rules, to the community legislation from air and land transport, as long as it facilitates the mutual access to the market of the parts.

4. Actual payments and the movement of the capital. Through the Association Agreement it was established that, during the first 5 years, the parts should adopt measures that would permit the creation of the necessary conditions for the gradual application of the Community's rules concerning the free traffic of capital.

The liberalization of the traffic of capital is connected to the problem of payments and the currency convertibility, creating the competitive financial spheres in the associated states which will be tackled in the first stages after the effectiveness of the association agreements. In the second stage, the parts will take measures in order to create the necessary conditions for the gradual application of the community rules in what is concerned the free traffic of capital.

The parts are forced to authorize, in the available convertible currency, any payment from the current account of the balance of payments, when is concerned the traffic of goods, services and individuals among the parts, which has been liberalized. Until the introduction of the convertibility of leu, Romania can apply, in exceptional circumstances, exchange restrictions connected to granting and taking over the credits on short and medium terms, restrictions that must not run counter to the Romanian condition in the relations with FMI.

5. Competition and economic cooperation requires the engagement of both parts to avoid constraining restrictive measures, including measures on import for the purposes of the balance of payments, in the case when they can affect the trade between the two parts.

In the case when there might occur serious difficulties of the balance of payments, there can be adopted restrictive measures from one side or another, including measures regarding the import, which will have a limited duration.

The contracting parts engaged themselves to adjust periodically the commercial monopoly. Therefore, after five years from the effectiveness of this agreement, any discrimination between the citizens of Romania and those of the other member states on that time should be abolished.

The European Association Agreement (come into force, on the whole, in February 1995), has represented, until signing the Accession Treaty, in April 2005, the main instrument in consolidating the relations between Romania and the European Union. The agreement was different from the other institutionalized forms of cooperation between Romania and the EU (the Generalized System of Custom Preferences granted to Romania by the European Community in 1974 or the Agreement concerning the exchange of industrial products, concluded in 1980) through the political objective it suggested – accepting Romania as member of the Union with absolute rights – as well as the complexity of the economic relations this process implied.

III. The accession treaty and the obtaining the condition of member state of the European Union

3.1. From the Association Agreement to the Treaty of accession to the EU

3.1.1. Evolution of the relations between Romania and the EU preliminary to the negotiation process

After the effectiveness of the Association Agreement, Romania has proceeded to ranging on the EU's coordinates for the countries on the way to the European integration. On the basis of the prerogatives granted through the condition of associated state and those gathered in article 0 of the Treaty of Maastricht, Romania has submitted, on 22nd June 1995, the request of accession to the EU, together with "the national strategy of preparing Romania's accession to the EU" and a declaration signed by the president of the country, that of the Senate and the Chamber of Deputies, the first minister, and the leaders of all the political parties represented in the Parliament (Declaration of Snagov). The Minister Council of the Union has consequently proceeded to introducing the procedure of consulting the European Committee in what is concerned Romania's request to obtain the condition of member of the EU with absolute rights.

As a consequence of this approach, the Committee has proceeded to detailed analysis, carried on a quite long period of time, regarding the economic and political situation of Romania, together with the criterions of accession to the EU and the possibility of our country to achieve them. Therefore, in June 1997,

the Committee gave its opinion for adjourning the beginning of the negotiations of Romania's accession to the EU. As a result of the European Council of Luxembourg, it was decided that the official beginning of negotiations should be done with all the countries that are nominees in the same moment. Romania has received the document entitled "Accession Partnership", which had the role to facilitate the elaboration of the national strategy of accession and has laid down "the national program of Romania's accession to the European Union". At the end of 1998, there have been published the first country analysis regarding the phase of fulfilling the accession criteria, but the actions of Romania until that point have been characterized as insufficient[18]. This is the reason why Romania has missed the first chance and the negotiations with the states of the "first wave", from which Romania has not been a part, have begun in 1998.

The Council of Helsinki[19] (10-11 December 1999) has decided to open the negotiations of accession with six other applicant countries, among which Romania[20]. The decisions of the summit of Helsinki have represented for our country a moment of impelling the intern efforts of preparing for accession and sizing them, in order to achieve in a committed manner the goals that this process implied.

In this way, on 15th February 2000, at Brussels, during the reunion of the Council of the EU for General Affairs, dedicated to initiating the **Intergovernmental Conference Romania – EU**, there has been officially initiated the process of negotiating the accession of our country to the European Union.

3.1.2. The process of negotiating the accession

In March 2000, the European Committee has decided the beginning of negotiations over five chapters, and in May 2000 it was decided the temporary cancellation of these five chapters.

The second Intergovernmental Conference of Romania's Accession to the EU, developed on ministerial level (Luxembourg, 14 June 2000), has confirmed the opportunity of opening other 11 chapters of negotiation. Subsequently, it has been conveyed to the European Committee the proposal of opening the negotiations of accession for eight other chapters from "the acquis", in the time of the French Presidency of the EU Council.

During 26-27 February 2001 there has taken place at Brussels the 11th reunion of the Joint Parliamentary Committee European Union – Romania, and in the agenda of the reunion there were the exchange of opinions regarding the answers of the European Council of Nisa (8-9 December 2000), the priorities of the Swedish Presidency, the stage of Romania's arrangements for the accession

and the evaluation of the progresses concerning the accession negotiations[21]. The minister of the European integration has presented on this occasion the **National Program of Legislative Harmonization on the year 2001** and had established the priorities on 2001 regarding the transposition of the community acquis in the national law.

In the analysis worked out by the European Committee on 13th November 2001 regarding the progresses that Romania has registered, it is shown that it has achieved the political criterion[22].

On 9th October 2002, in the strategy entitled "To an enlarged Europe", the European Committee has announced that it would elaborate, on the basis of the analysis registered in 2002, detailed plans of action for Romania and Bulgaria, in order to grant pre-accession assistance to the two countries. In the meantime, the European Council has expressed its support in order that Romania and Bulgaria should achieve the goal to become members of the European Union in 2007.

In order to embrace the community acquis, in the autumn of 2007, Romania has proceeded to revising the Constitution and putting it in concord with the community law.

At the beginning of 2004, the European Committee has elaborated a communiqué through which it established the financial package for the negotiation of accession of Romania and Bulgaria. Alike the case of the ten countries that have become members of the European Union in May 2004, one of the main elements in preparing the completion of the negotiation of accession for Romania and Bulgaria is represented by the settlement of a coherent financial "package".

The European Council of Brussels (17-18 June 2004) has praised the progress registered by the two countries and has reaffirmed the support of the European Union for the accession of Romania and Bulgaria, on 1st January 2007.

On 17th December 2004, Romania has received the political confirmation to conclude the negotiations of accession and on 13th April 2005, the European Parliament has confirmed its position regarding the accession of Romania and Bulgaria.

The negotiations of accession have taken place on the level of the European Committee, and Romania's representative (the chief negotiator) has occupied the position of state minister. The negotiations have taken place in subcommittees, on chapters, based on the comparison of the community acquis with the Romanian law in subject, meaning to relate and harmonize it with the rules of the European Union[23].

One of the fundamental principles of the accession of the EU is that the largest part of the community acquis is not negotiable, but it constitutes the base of the EU's construction. Alike the other states that have previously joined the EU, Romania has negotiated a number of 31 chapters, each of them aiming at a specific domain of the community law[24].

3.2. The institutional frame of cooperation within the framework of the accession process

After signing the Treaty of Accession, Romania has accredited an ambassador under EU, in Brussels, and the European Committee has opened a deputation in Bucharest in September 1993[25].

In order to achieve the goals and the engagements that the two parts have taken by signing this agreement, there has been instituted an institutional frame that would facilitate the fulfillment of the provision of this act.

This institutional frame was formed by three main bodies:

- The Association Council was a political body with supreme competence, which comprised members of the Council of the EC and members of the partner countries' governs; it had the power to take decisions stipulated in agreements and to implement the respective decisions. Moreover, the Association Council had the role to solve the conflicts that might have occurred as a result of interpreting and applying the provisions of the agreements.
- The Association Committee had the role to support the Association Council (in preparing the reunions etc.) and to discharge some of its duties in the case of the competence delegation. The Association Committee was formed, on the one hand, by the members of the EC Council and the members of the EC Committee and the members of the partner countries' governs, on the other hand.

The reunions of this organism were taking place annually, in October as a rule, alternatively in the capital of Romania and in Brussels.

Through its procedure rules, the Association Council established the duties of the Association Committee and the working of the Committee.

- The Association Parliamentary Committee included members of the European Parliament and members of the parliaments of the partner states. It has the right to be informed about all the decisions of the Association Council, as well as the right to make recomandations to the Association Council.

The implied parts participate with 12 members, the leaders of the delegates assure in the same time the co-presidency of the Association

Parliamentary Committee and its reunions take place two times a year, in Bucharest and Brussels.

The reunions are closed by adopting and signing a final document, with writ of recommendation, a document with political value. It is submitted to the Govern of Romania and to the community institutions, in the same time. The document is considered adopted through the vote of the majority of every part that participates to the reunion.

As a result of the complexity of the process of the European accession, it was to be constituted, at the level of the Parliament of Romania, a special joined committee of the both chambers, entitled the Committee for European Accession. It had a large sphere of atributes and it has pemanently co-operated with the committees of external politics of the Chamber of Deputies and Senate.

It was decided that, since 1994, with every country with which it had been concluded an association agreement, it should have existed an annually cicle of reunions of the Association Council and the Association Committee, as well as numerous reunions of the multi-disciplinary subcommittees.

The association subcommittees, which have a developing procedure similar to the Association Committee, punctually analyse the domains that are of concern of the Association Agreement. During the reunions of each subcommittee, there are discussed problems concerning the transposition of the national law in the community acquis, the institutional development as well as the relations Romania – EU that have occured as a result of applying the Association Agreement.

3.3. The treaty of accession – background of Romania's accession to the European Union

3.3.1. The structure and the main elements of contents

On 25th April, during an official ceremony which has taken place on the Abbey of Neumunster from Luxembourg, the president of Romania, Traian Basescu has signed the Treaty of Accession to the European Union, alike the first minister of Bulgaria, Simeon de Saxa Coburg, together with the representants of 25 member states. On 1st January 2007 Romania was becoming member state of the European Union, 14 years later after signing the association agreement. One of the most important aspects of signing this treaty has been the changing of the condition of our country, which has become from an associated state a nominee state to the accession and, subsequently, a member state of the European Union.

This treaty is based on the principles and the methodologies used in 2004 for typing the treaty of accession of the ten new member states. The proper treaty

of accession (which contains six articles) sanctions the accession of Romania and Bulgaria to the European Union, as well as the fact that, through the accession, the two states become part of the Treaty of Setting up the Constitution for Europe, in the conditions stipulated by the Protocol enclosed to this treaty. The treaty contains a case regarding the alternative effectiveness of the Association Agreement and the Accession Protocol[26].

Because the treaty has instituted a Constitution for Europe, it has not been ratified. As a result, the two countries have become parts of the treaties that the Union is based on, with the subsequent modifications and completions.

The accession act / accession protocol contains five parts.

Part I (Principles) comprises definitions and provisions regarding the compulsory nature of the fundamental treaties and the acts adopted by the community institutions and the European Central Bank before the accession to the EU of Romania and Bulgaria. The application of the regulations of the original treaties and the acts of the institutions is submitted to the derogations decided during the negotiations of accession with each candidate state. There is stipulated the duty of the two new member states to access to the conventions and agreements that the Union has concluded with the third states, the conventions that have been concluded with the member states, as well as the appropriation of the Schengen acquis. The list of the conventions concluded between the member states is enclosed in the Act/Protocol. Romania and Bulgaria have the duty to modify, until the time of accession, the treaties concluded with the third states and that are incompatible with the community law. On the contrary, these treaties will be denounced.

Starting with the time of accession, Romania and Bulgaria will participate to the Economic and Monetary Union, being considered states departed from adopting the single currency.

Part II comprises the institutional provisions: the participation of Romania and Bulgaria to the institutions of the European Union:
Romania has 35 places earmarked in the European Parliament, for 2007-2009. After this time, the number of places in the European Union will be established through a decision of the European Council. Romania was supposed to have 14 places in the European Council and had the right to a judge in the Court of Justice of the European Union and one in the Court of First Instance. Romania has also 15 places earmarked in the Economic and Social Committee and 15 places in the Committee of Regions.

Romania has the right to appoint members in the Guiding Committee of the European Bank of Vested Interests, as well as in the Scientific and Technical Committee stipulated by the EURATOM Treaty. There is stipulated that the Romanian and Bulgarian language are to become official languages of the Union.

Part III (Permanent provisions) stipulated the acceptance of the negotiated permanent measures (stipulated in an appendage), as well as the reference to the mechanism of making the technical adjustments to the acquis adopted until 1st October 2004. It is about the acts adopted by the institutions of the European Union in various domains that will be adjusted in order to apply them to Romania and Bulgaria.

Part IV (Temporary provisions) refers to the provisional measures (comprised in appendages), the institutional and financial provisions, as well as the protection clauses. The financial provisions refer to the contributions of the two states to the various funds governed by the European Union.

Besides the contribution of Romania and Bulgaria to the funds of the European Union, the financial provisions comprise the support that the EU has offered in the transitory period, just after the accession. The European Union committed itself to offer financial support to the two states, under the form of the non-repayable loans and preferential credits, in order to improve some domains of activity, such as: protecting the environment, developing and consolidating the administrative and juridical capacity of the two states to apply the community provisions, the rural development, implementing the acquis of the Schengen area and the control of frontiers etc.

3.3.2. The protection clauses

The treaty contains three protection clauses.

The general protection clause refers to the possibility that the states, parts of this treaty, have, in a three-year time limit, in order to ask for the authorization of the Committee to take protective measures in the case of some serious and persistent difficulties.

The protection clause regarding the common market refers to the possibility that the Committee has in order that, in a three-year time limit, take the necessary measures in the case that Romania and Bulgaria do not acquit themselves of the duties stipulated in the treaty.

The protection clause regarding the justice and the home affairs refers to the possibility that the Committee has in order that, in a three-year time limit, to take the necessary measures in the case that the two states do not respect the engagements concerning this negotiation chapter[27].

IV. Romania's perspectives in the position of member state of the European Union

Romania's accession to the European Union is going to bring a clear reinforcement of the country's position in the global economic frame, as well as from the social and security point of view. The extension of the European Union and Romania's gaining the condition of member state has a positive impact on the Romanian economy, because, besides the historical opportunity to overpass the division of Europe after the war and to bring peace and stability for the continent, it will also consolidate the largest common market of the world, bringing the total number of consumers to over 500 millions. **A larger and more competitive common market will be for the benefit of the consumers and the Romanian enterprisers**, but it will also consolidate the position of the European Union in the global economic domain.

The geostrategic position of Romania and its importance for the European Union

A decisive importance of the decision of the European Council of Helsinki regarding the accession of our country to the EU's area of liberty and justice has also been the geostrategic position of our country.

Romania's accession to the European Union determines the EU to assume the characteristic elements of the geostrategic identity of the country. Besides the dimension of territory and population (which define Romania as the seventh country of the EU, as dimension), what is relevant in this framework is its geostrategic position on the East border of the EU with the entire set of challenges and opportunities that this position is going to bring. In this framework, there is relevant the next representation of Romania's geostrategic position illustrated below.

It is important to highlight Romania's position in the "extended area of the Black Sea", which is situated on the crossing point of three "tectonic boards", from the geopolitical point of view:

1) The area of the EU that represents the European pillar of the trans-Atlantic community;
2) The ex-soviet area, less the Baltic countries;
3) The area of the Enlarged Middle Orient and that of the North Africa.

It is interesting the fact that none of the border areas of the EU does include a proximity of such complexity and relevance for the external and defence policy of the EU, as well as for a series of economic and actual energetic projects.

Extending the EU with Romania and Bulgaria brings the Black Sea to the border of the Union. Thus, it would be obvious that riparian countries, such as Romania and Bulgaria, should think about extending the condition of the Mediterranean area related to the EU and to the Black Sea.

Taking into consideration the characteristics of this area and the presence of the some frozen conflicts, Romania will have to be the initiator of the proximity policy.

Under the conditions of a more stressed energetic insecurity of Europe caused by the more and more large energetic dependence on Russia, the EU looks for alternative sources of supplies and transport of the energetic resources. One of these alternatives might be the Nabuco project. The basis of this project has been established with the participation of five profile companies: Botas (Turkey), Bulgargaz (Bulgaria), Transgaz (Romania), MOL (Hungary) and OMV (Austria). The project has in view connecting and capitalizing the resources of natural gases from the Caspian Sea[28] and the Middle Orient with the European markets. The importance of this project has also been recognised by the community organisms, by being included by the European Committee in the Trans European Netwoks (TEN) project, on the list of the prioritary list. Recently, the EU has named a former Dutch minister to coordinate the project in order to hasten its accomplishment.

Another project that implies Romania and aims at reducing the energetic dependency of the EU is the oleo duct *Constanţa–Pancevo–Omisalj–Trieste* which will receive Caspian petrol from Azerbaidjan. The terminal will assure the transport of 35 million tones of petrol annually, which will cross the Black Sea until Constanta. From here, the petrol will reach Trieste, in Italy, through a duct of 1400 kilometres and whose construction has received the endorsment of the EU, through the comissar for power, Mr. Andris Piebalgs, but which is also supported by the Americans.

The great growth of power request, amplified by the economic development of China and India, combined with maintaining the production on a constant level are a consequence of the fact that Romania is situated on a critical crossroad of the petrol flows and natural gases. Because of its strategic position, on the coast of the Black Sea, Romania may become the crucial point for the energetic routes from the Caucasus and the Caspian Sea, which try to avoid Russia. The geopolitical importance of these routes determines in this way the new role of Romania as a connecting point to Europe.

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The paper proved to be an analysis of the way that Romania has passed, in order to prepare itself for the accession to the EU, and a perspective over the future challenges that are implied by the condition of member state in the European Union, which is not static, either.

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THE NECESSITY OF ADOPTING A COMMUNITARIAN REGULATION REGARDING HUMAN RIGHTS

Abstract

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One of the basic principle of the European Union and the essential condition on which is based its legality is the respect of the fundamental rights.

The Court of Justice reaffirmed in many turns this obligation of the European Union. At this time, in all Europe, the problem of human rights must be looked from two perspectives.

Nowadays, the only control mechanism of respecting human rights is the European Court of Human Rights (CEDO), which started to work in the new formula at 1 November 1998. Any limitations in exercising the rights and freedoms accepted by the Charta must be in the law and to respect the essential content of the rights and freedoms mentioned.

The respect of the fundamental rights is one of the basic principle of the European Union and the essential condition on which is based its legality. In the first paragraph of Article 6 (F) from the European Union Treaty is mentioned that the Union is relied on the principles of liberty, democracy, respecting the fundamental human rights and liberties of the law state, common principles of the Member States, and the second paragraph of the same article underlines that: the Union will respect the fundamental rights guaranteed by the European Convention for the Protection of the Fundamental Human Rights and Liberties, signed at Rome on 4 November 1950, rights that have their provenience from the common constitutional traditions of the Member States, as general principles of the communitarian law. The Court of Justice reaffirmed in many turns this obligation of the European Union.

At this time, in all Europe, the problem of human rights must be looked from two perspectives. On one side, depending on the European Council norms in the domain of the human rights, protection of the rights and liberties is the main objective of this European organization, and on the other side regarding the documents of the European Union which, it looks like, are more and more involved in this domain. This demonstrate first of all that the proclamation, in December 2000, of the Charta of Fundamental Human Rights in the European Union, a document that is distinct to the European Convention of Human Rights, adopted by the Europe Council in 1950 [1] and, including this Charta , integral, in the stipulations of the Treaty of institution of the European Constitution.

Regarding this aspects, a first distinction must be retained between the two documents reminded earlier: Charta of Fundamental Human Rights in the European Union and the European Convention of Human Rights.

Another distinction that must be made is the one between European Council – like an intergovernmental organization with regional character that acts in favor of the European unity by: protecting and strengthening the pluralist democracy and human rights; defining common solution s for the problems of the society; the understanding and reevaluating of European cultural identity - and the European Council and the European Union Council that are institutions of the European Union.

Nowadays, the only control mechanism of respecting human rights is the European Court of Human Rights (CEDO), which started to work in the new formula at 1 November 1998. Until that date, for protecting the rights and liberties sustained by the Convention, the persons who considered that those were violated, could introduce a complaint to the Commission, against the state responsible for violating those rights and liberties, under the condition that the state in cause recognize the competence of the Commission to take notice of those complaints. The Commission could, also, be informed with a complaint by a state regarding the violation of the Convention by another state [2].

The social implications of the realization of the Economic and Monetary Union and of the introduction of the EURO, sustained the importance of assuring fundamental rights to a European level. So, the fundamental rights were considered as an indispensable part in building a social union and guaranteeing and developing European social model.

Although some specialists[3] sustained it wasn't necessary a new Charta, as long as existed already the European Convention of Human Rights and European Social Charta, it was concluded that these documents aren't sufficient ample, and can't be legally applied to guarantee the whole gamma of civil rights, political rights, social and economical rights. A *"European Charta of fundamental human rights"* could have given for the first time to everyone that lives in the European Union a common frame of greater applicable rights.

Regarding this context, at the summit in June 1999, was decided the elaboration of a *"Charta of Fundamental Rights for Europe"*. The support for the European integration project risked to be lost through the social effects of introducing the unique coin and the finalization of the Unique Market. The citizens lost faith in Europe. It was important that in that moment the social

dimension of European integration to be reaffirmed by pointing out the importance of protecting fundamental rights to a European level.

In October 1999, meeting at Tampere, in Finland, the European Council decided to found a Convention composed by national and European parliamentary[4], and also representatives of the governments, to elaborate the Charta of rights, Convention that should take place at regular intervals through the year 2000 and consulting with a large specter of civil society organizations, before elaborating and adopting the Charta, until October 2000.

The content of the European Union Charta regarding the Fundamental Rights

Charta of Fundamental Human Rights in the European Union reaffirms the rights that results especially from the constitutional traditions and from the common international obligations of the member states.

The content of the Charta is extended more than European Convention of protecting human fundamental rights and liberties. If this Convention is limited only to the civil and political rights, the Charta, also the economical and social rights stated by the Communitarian Charta of social rights of the workers, adopted in 1989, and also the cultural rights.

In the condition of the actual treaties, the Union has no competence to impose the European Convention of human rights, from Rome. On the other hand, the Constitution refers express to next possibility of the Union of adhering to this Convention (art.9).

The preamble of the Charta says that "the Union is established on the indivisible and universal values of human dignity, liberty, equality and solidarity. Is based on the principle of law state, putting the person in the center of its actions, instituting the citizenship of the Union and making a space of liberty, security and justice".

Charta reaffirms the rights that results especially from the constitutional traditions and from the common international obligations of the member states, from the European Convention of protecting human fundamental rights and liberties, from the social Charta adopted by the Union and by the European

Council, and also from the jurisprudence of the justice Court of the European Union and the European Court of human rights[5].

In the Charta, the rights, liberties and fundamental principles are divided in six titles, a seventh title defining general dispositions.

So, in Title I, named *"Dignity"* are written the next: human dignity; the right to live; the right to human integrity; the interdiction of torture and punishments or inhuman treatments; interdiction of slavery and forced labour.

In Title II, named *"Liberties"* are enumerated: the right to freedom and security; respecting private and family life; protection of data with special character; the right to marriage and to start a family; the freedom of thinking, conscience and religion; the freedom of expression and information; the freedom of gathering and association, the freedom of art and science, the right to education, professional freedom and the right to work, the freedom to develop an economic activity; the right to posses, the right to asylum; protection in case of evacuation, expulsion and extradition.

In Title III, named *"Equality"* are written the next: equality in rights; indiscrimination, cultural, religious and linguistic diversity, equality between men and women, the children rights; the elders rights, integrity of the persons with disabilities.

In Title IV, named *"Solidarity"* are written the next: the right of workers to information and consulting inside the company; the right to negotiation and collective activities, the right to access the shelter services, protection in case of unjustified dismissal; correct and equitable work conditions; interdiction of children labour and protection of the young at the work place; professional and family life, social security and assistance[6], medical assistance, access to services of general economic interest, environment protection, consumers protection.

Title V of the Charta, is consecrated especially to the presentation of the European Union citizens rights.

European Union citizenship was instituted by the stipulations of the Maastricht Treaty, which introduced in C.E. Treaty Part II named *"The Union citizenship"* having art.8(17)-8E(22).

The rights that emerge from the quality of citizen are:

1. *The right to elect and be elected in the European Parliament.*

According to this disposition any citizen, man or woman, from the Union has the right to elect and be elected in the election for the European Parliament, in the member state where he is resident in the same conditions as the resortisant of that state. The members of the parliament are elected by universal, direct, free and secret vote.

2. *The right to elect and be elected in the local elections.*

Any citizen, man or woman, from the Union has the right to elect and be elected in local elections in the member state where he is resident in the same conditions as the resortisant of that state.

3. *The right to good administration*

Any person has the right to benefit from an impartial treatment from the institutions, organizations and agencies of the Union, regarding his or hers problems. This right involves, especially: the right of each person to be listen before taking any individual measure which can affect her/him in an unfavorable way; the right of each person to access his own dossier, with respecting the legitimate interest regarding confidentiality and professional secret; the obligation of the administration to motivate its decisions. Also, each person has the right to ask for compensation from the Union for the damage caused by institutions, organizations or agents which execute their duties, according to common general principles and the rights of the member states.

4. *The right to access files.*

5. *European Mediator[7]*

Any citizen, man or woman, of the Union and any physical or juridical person, with residence in one of the member states has the right to inform the European mediator regarding some cases of bad administration in the activity of institutions, organizations and agencies of the Union, except the European Justice Court and General Court, in the exercitation of theirs jurisdictional functions.

6. *The right to petition*

7. *Traveling and staying freedom*

According to this disposition any citizen of the Union, has the right to travel and stay free on the territory of member states. The freedom of traveling and staying can be given, according to the Constitution, to any resortisant.

8. *Diplomatic and consular protection*

Any citizen of the Union benefits on the territory of a third state in which the member state whom citizenship he has, is not represented, by the diplomatic and consular protection of any member state, in the same conditions as the citizens of that state.

In Title VI of the Charta, named *"Justice"* are underlined the next:

1. *The right to gain access to an impartial court*

Any person whom rights and liberties granted by the law of the Union are broken has the right to gain access to a court. Any person has the right to have his cause analyzed in an equitably way, public and in a reasonable time by an independent and impartial court, established earlier by law. Also, any person has the possibility to be conciliated, defended and represented. Free juridical assistance is given to those who can't afford the assistance to justice.

2. *The presumption of innocence and the right to defend*
3. *The principles of legality and proportionality of crimes and punishments*

No one can be condemned for an action or inaction that, in the moment that was committed, wasn't considerate a crime according national or international law. At the same time, is not given any punishment bigger than the one given at the moment when the crime was committed. The punishment can't be disproportional to the crime.

4. *The right not to be judged or punished two times for the same crime*

In the final part of the Charta are presented general dispositions that regulate the interpretation and its applicability.

So, the Charta does not extend the applicability of the Union law outside the borders of the Union, does not create any competence and responsibility for the Union and does not modify the competences and responsibilities established by the other parts of the Constitution.

Any limitations in exercising the rights and freedoms accepted by the Charta must be in the law and to respect the essential content of the rights and freedoms mentioned. Respecting the constitutionality principle, it can be limited only if necessary and if it responds to the general interest objectives recognized by the Union.

No disposition of the Charta must be interpreted as if it limits or brings touch in their appliance field, fundamental human rights and freedoms

recognized by the European Union law, international law, international convention at which the Union is part or all the member states, especially the European Convention of defense of fundamental human rights and freedoms, also by the Constitutions of member states[8].

Also, no disposition of the Charta must be interpretive as involving a certain right to carry on an activity or make an act that has as objective the destruction of the rights and freedoms recognized by the Charta, or to bring to the rights and freedoms biggest limits than the one from the Charta.

The special attention that the European Union given to the problem fundamental human rights came from the fond conditions and those of politic nature established, that must be fulfilled by any state that wants to be member of this international organization.

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[1]Guy Isaac, Blanquet M. , Droit de communautaire general, Paris, Masson, 2001,page. 205

[2]The role of the Commission was to examinate these complaints , establishing the facts and trying to solve them in a peacefull way. When the solution was not a peacefull one, the Commission wrote a report regarding the fact that was or wasn't a violation of the Convention stipulations. The report which contained the opinion regarding the allegation of violating the stipulations of the Convention, was sent to the Minitry Committee of the European Council. In a three months interval from the elaboration of the report, the European Court of Human Rights could be informed, or by a state or by a group of states interested regarding the violation of the dispositions of the Convention. For the Court to intervene was necessary, beforehand, a decision of the Commission, and the rejected decisions pronounced by the Commission couldn't be cenzored by the Court, which didn't have competences in that sense.

[3]Philip Manin, Les communautes europeennes. L'Union europeenne. Droit institutionnel, Paris, Ed. A. Pedone, 1993, page. 165.

[4]Marian Mihăilă, Dan Stan, Carmen Suciu, Communitarian Institutional Law, Publishing house „Eftimie Murgu", Reşiţa, 2000

[5]Octavian Manolache , Communitarian law Treaty, Publishing house C.H.Beck, Bucharest, 2006, page 89.

[6]Augustin Fuerea ,The European Union Book, Publishing house Universul Juridic, Bucharest, 2006,page143.

[7]The European Mediator which is elected by the European Parliament receives complaints regarding the cases of bad administration inside the institutions,

organizations and agencies of the Union in the terms written in the Constitution, investigates them and makes a report regardig those complaints. The European Mediator execises his atributions in full independence

[8]Nicoleta Diaconu, European Union Law, Publishing house „ Lumina Lex", Bucharest, 2007, page 278

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L'ORGANISATION ET LE FONCTIONNEMENT DU GOUVERNEMENT DE LA GRANDE BRETAGNE ET DE 'ESPAGNE

Résumé

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Le Royaume Uni et l'Espagne sont deux de les plus importantes monarchies européens. La premier pays est une monarchie constitutionelle où le pouvoir exécutif est atribuée au Gouvernement-Le Cabinet, nomé Le Gouvernement de Sa Majesté. Son pouvoirs sont basées sur la coutume , parce que Le Royaume Uni n'a pas une constitution écrit. L'Espagne est, aussi, une monarchie constitutionelle ou le Goverement exerce la fonction exécutive et la pouvoir de réglementation selon la Constitution et les loys de l'état.

Le Royaume Uni este une monarchie constitutionelle où le pouvoir exécutif est atribueé au Gouvernement. Le Gouvernement de Sa Majesté et provient du Parlement. C'est l'un des seuls pays actuels qui n'a pas de Constitution. Le premier ministre este le chef du Gouvernement et il este responsable devant la Chambre des Communes, la chambre inferiéure du Parlement. Ce système de gouvernement a été utilisé aussi dans l'autres parties du monde et il est connu sous le nom de système de Westminster.

Le souverain a théoriquement des grands pouvoirs, mais, en réalité, el a un rôle essentiellement cérémoniel.

Le souverain est celui qui promulgue les lois décretées par le Parlement. De plus, il ouvre chaque année la session du Parlement avec l'ainsi - dit Message de la Couronne qui est ,en effet , un programme de gouvernement. La souverain du Royaume Uni est monarque aussi dans autres 15 pays du Commonwealth. Le suverain actuel du Royaume- Uni est la reine Elisabeth II qui a accédé au trône en 1952 et a été couronné en 1953.

Le Parlament est l'institution législative nationale du Royaume. Il comprend deux chambres- la Chambre des Communes, avec des members élus, et la Chmabre des Lords, dont les membres sont, généralemet, nommés. La chambre des Communes a des pouvoirs plus grands que celle des Lords et peut promulger des lois rejetteés par la dernière.

L'Espagne este une monarchie constitutionnelle avec une monarchie héreditaire et un Parlement composé de deux chambres, Cortes ou L'Assemblée Nationale. Le pouvoir exécutif est formé par le conseil des Ministres présidé par le Président du Gouvernement ,il a un rôle comparable à célui d'un premier ministre, proposé par le monarque et élu par L'Assemblée Nationale après les élections légisaltives.

Le pouvoir législaltif est composé du Congrès des députés - Congreso de Los Diputados – qui compte 350 membres élus pour quatre ans au suffrage direct sur des listes bloc et le Sénat-Senado constitué de 259 membres dont 208 sont directement élus au suffrage direct et les autres 40 désignés par les régions, toujours pour quatre ans.

L'Espagne est en present l'état des autonomies mais, en effet , elle fonctionne comme une fédération de communautés autonomes, chaqune d'elles ayant des pouvoirs et de lois differénts- par example certains ont leurs propres systèmes d'éducation, de santé et d'autres n'en ont pas.

Il existe quelques problémes avec ce système parce que certains gouvernements autonomes - ceux conduis par des parties nationalistes - essaient des relations plus fédérales avec l'Espagne pendent que le gouvernement central essaie de réprimer ce que les autres considèrent comme une autonomie excessive des communautés autonomes comme Les Pays Basques et Catalogne.L'Espagne est divisée en 17 régions appelées communauteés autonomes , coom Le Pays Baque et Catalogne. L'Espagne est divisée e 17 régions , apelées communautés autonomes. Chacune d'elles dispose d'une certaine indépendence , étant une sorte d'etats fédéraux, surtout parce que les compétences cédées par l'état varient et que les termes indépendance et fédéral sont a l'ordre du jour.

I. La Grande Bretagne

Le premier ministre

L'insititution du premier ministre est apparue et a évolué comme une conséquence du renoncement des monarques au droit de diriger personnellement les séances du cabinet. Au début , le premier ministre était seulement l'un des ministres designés par le roi a guider , à sa place , les

séances du cabinet. Sa position n'avait rien en commun avec la notion de premier ministre au sens modern du terme , parce qu'il dépendait directement du roi et non pas de l'electorat.

L'institution moderene du premier ministre este un produit de la Reform Act de 1832, qui a institué l'obligation de nommer le premier ministre , le leader du partie majoritaire de la Chambre de Communes.

La position du premier ministre a été longtemps basée sur un accord écrit et non pas sur une convention , au sens proprement dit du terme. Même si Disraeli a signé , en 1878, le traité du Berlin comme premier ministre du Royâume Uni une telle fonction n'apparait pas explicitement dans un document législatif qu'en 1917 et une clause sur la rémunération du premier ministre seulement en 1937.

Le chef du parti qui se trouve au gouvernement devient premier ministre et choisit les membres les plus compétents pour son Cabinet. Tant que le premier ministre et le Cabinet peuvent compter sur le soutien de la majorité dans la Chambre des Communes , ils peuvent garder leurs position, mais ils preuvent être destitués par un vote de méfiance.

Les plus nombreuses prérogatives du premier ministre sont basées sur des conventions qui sont assez réelles pour avoir ce rôle. La premiere et la plus évidente est celle de l'élection du Cabinet . Les membres sont nommés par la Reine , a la proposition du premier ministre et peuvent être destitués de la même manière.

Les prérogatives du premier ministre en ce qui concerne les nominations ministérielles includent non seulement les 20 membres du Cabinet, mais aussi les ministères du premier rang et encore 80 membres du gouvernement.

Parmi les prérogatives les plus importantes on compte les réunions avec les premiers ministres des pays du Commonwealth dans le cadre des conférences périodiques et avec les chefs d'autres gouvernements , dans le cadre des réunions a haut niveau.

Le premier ministre fait les recommendations pour les nominations de l'église anglicane pour les juges de la Houte Cour de justice , pour les conseilers privés.

Le premier ministre est un figure très importante, peut -être la plus importante , de la vie politique britannique. À l'affirmation de son prestige ont contriibué et contribuent aussi dans une grande mesure ses qualités personnelles , son caractère, sa manière de travailler aves ses collaborateurs les plus proches , les membres du Cabinet. Ses grandes fonctions leui permettent d'exercer une influence considérable sur la vie politique britannique.

Selon l'affirmation des lordes Oxford et Asquith en 1921" la fonction du premier ministre est de comprendre ce qu'il doit faire avec elle". Le premier ministre occupe une position dominante dans le Cabinet et sélecte les problemes qui doivent être discutés tout en proposant des solutions et même arbitrant les divergences entre les ministres.

Ses idées ont la plus grande chance d'être acceptées , parce que'il est aussi le chef du parti de gouvernement et le port- parole de la Chambre des Communes. La tendence objective qui se manifeste dans la vie politique britannique va dans le sens de l'augmentation de son pouvoir dans le système constitutionnel. Marley considère que la premier minister este la chef de voûte de l'arcade.

Le Cabinet

L'institution britanique du Cabinet a son origine dans le désire anticipe d'avoir un exécutif restreint pour solutionner les problemes courants du pays.

Aù début ,les monarques nommaient un Conseil restraint qui les aidant à prendre des décisions et qui portrait initialement le nom de Curia Regis , et qui este ensuite dévenu le Conseil privé. Au XII –ème siècle , Le Conseil Privé état un établissement puissant avec des attributions précises. En practique , les competences du Conseil privé ont varié en function de la puissance et du caractère du Roi. Ainsi, dans les periodes oû Henri III, Richard II, et Henry VI, étainet mineurs c'est le Conseil qui a gouverné le pays, mais sous Henry VII il servait spécialement pour enregistrer les décisions du Roi. Les proclamations du Conseil représentaient des moyens de communiquer la volonté royale a la nation , tot en prenant les medures administratives nécessaries.

Mais, le Conseil avait aussi certaines attributions judiciaries pour solutionner des petitions adresées au Roi Pendant la dynastiè des Tudors, le Conseil était devenu un vrai noyau de gouvernament aux functions législatives, exécutives et judiciaries . Il éméttait des ordonnances , contrôler l'administration et punnisait ceux qui ne respectainet pas ses décisions. Le tribunal de la Chambre étoilée est devenu fameux pour l'investigation des offences politiques et l'utilisation de la torture pour obtenir du témoignage.

Au fur et à mésure que le Parlement s'opposait véhément au pouvoiur du Roi, le pouvoir du Conseil privé etait en decline. Restauré en 1660 ses pouvoirs ont éte considerabelment reduits. Le Conseil privé contenait approximativement 300 membres, ministres et anciens ministres , clergé, d'autres functionnaires et judges- qui se réunissent seulement quand le souverain meurt ou annonce l'intention de se marier.

D'habitude , les problémes courants du Conseil sont résolus par 4-10 membres qui sont en général des ministres du Cabinet qui se reunissent dans la présence de la Reine.

Por contracarrer les difficultés lors de la convocation du Conseil dans les problèmes urgents, le roi Carol II a élu un petit nombre de membres avec lesquels ils se consultait fréquemment et qui ont constitué le cabinet nommé ainsi d'aprés les réunions dans la chambre secrete du roi. Le Cabinet portat aussi le nom de Cabal –ou cabale dans la laugage courant , nom formé à partir des initiales des cinq hommes politiques qui le composait .

À présent, les members du Cabinet sont désignés par le premier ministre. De nos jours, le Cabinet comprend approximativement 20 ministres qui dans la majeure partie , sont des members du Parlement , certains d'entre eux étant members de la Chambre des Lordes. Le nombre exact des members du Cabinet est établi de la premier ministre . La plupart de ministres du Cabinet dirigent de départaments guvernamentaux majeurs, mais il existe quelques uns qui ont des responsabilités specifiques ou des responsabilités cumuleés comme Le Lord President du Conseil ou Le Lord Gardeur du sceau. En ce qui concerne les responsabilités des membres du Cabinet , on parle de deux secteurs du gouvernement , les membres faisant partie en même temp de l'exécutif et du législatif.

A la difference d'autres systemes politiques, en Grande Bretagne les members du Cabinet sont élus parmi les députés du partie majoritaire dans la Chambre des Communes. Un Gouvernement qui a été vaincu lors d'un debat majeure dans le Chambre de Communes doit démissioner ou demander à la Reine la dessolution du Parlement. Un gouvernement qui a été vaincu à l'occasion du suffrage , doit démissioner immé. Les ministres sont tous responsables pour les décisions du Cabinet. Le cabinet a dans le système britanique des fonctiones importantes pour decider en ce qui concerne les grandes directions poolitiques qui seront traduites dans la vie sur le plan interne et en ce qui concerne les grandes problemes internationaux:

- Envisager les détailes de la politiques
- Coordoner les politiques des différents départaments
- Prendre des décisions dans les problèmes urgentes et exposer des projets d'avenir.

Même si les séances du Cabinet avaient lieu chaque jeudi, dans la salle de conférence de 10 Downind Street – la résidence du premier ministre , il peut être convoqué plus fréquement, si besoin. L'agenda des séances du Cabinet est controlé par le premier ministre qui décide les problemes qui doivent être inclus à l'ordre du jour et établit les priorités .Les décisions ne sont pas proposées et votées mais, d'habitude c'est le premier ministre qui utilise son influence pour arriver à un consensus.

Dans le XX -ème siècle on a beaucoup critiqué le fonctionnement du Cabinet britannique . On y remarque l'affirmation que sa procédure est inefficace qu'il n'a pas réussi a formuler directement et effectivement une politique à longue terme qu'il n'a pas pres de measures pour l'utilisation complète et eficace des experts et la coordination des départments a été un fiasco.

Réceptifs à ces critiques , les différents gouvernements ont pris une série de mesures pratiques pour développer l'efficacité des activités comme par example , la nomination d'un secrétariat permanent du Cabinet , la réduction de nombre de members du Cabinet , la constitution de comités contenant des experts, l'organisation systematique de commissions du Cabinet.

À présent, il y a plus de 20 départements de haut nuveau au Service Civil où les nominations dépendent directement du premier ministre et de plus , un

ministre ne peut pas licencier son secrétaire permanent- qui est chef de département , sans l'accord du chef du Cabinet.

Le Cabinet comprend un grand nombre de comités et de sous comités. Ce systeme a été fondé en 1945. À présent il existe approximativement 25 comités et sous comités permanents et un nombre de 100 telles commisiones sont temporaries. Les plus importants comités sont ceux qui s'occupent avec la politique externe et de défence , la stratégie économique, les affaires socials et la législation.

Bien que le premier ministre puisse inviter certains membres du Cabinet aó assister aux séances du Cabinet , cela ne constitue pas une pratique habituelle. Jusqu'au début de notre siècle , le Cabinet ne disposait pas de personnel spécialisé , il n'avait pas de secrétariat.

Le secrétaire du Cabinet est une personne très puissante et très rapproché au premier ministre dans son travail, son bureau étant en liaison directe avec celui de 10 Downing Street.

Le bureau du Cabinet est plus qu'un simple sécretariat , parc qu'il inclut aussi :

- le bureau central de statistique
- le bureau pour le personel et l'administration qui, avec le service civil s'occupe du personnel et de sa formation
- une section historique , qui garde les documents gouvernamentaux.

Selon l'oppinion des autres britanniques, Harvez et L. Bather le cabinet britannique doit être aujourd'hui regardé comme un élément qui couvre différents groups qui élaborent la politique . Au lieu de représenter un organisme ayant comme mission d' elaborer de décisions , La Cabinet, dans sa totalité est devenu un instrument pour coordoner et implémenter les décisions des différents comités pour donner plus de cohérence au travail du gouvernement. La structure de Gouvernement britannique fait l'object des plusieurs conventions constitutionnelles . L'organisation interne appartient à des prérogatives royales. Le terme gouvernement a en Grand Bretagne trois acceptions

1. la majorité gouvernamentale

2. l'administration de l'état
3. l'ansemble composé d'approximativement 100 persons qui comprend
   a. les ministres départamentaux qui portent le nom de sécretaires d'état pour les plus anciens ministères et de ministres au cas de ministères plus récents
   b. les ministre non-départamenteaux qui occupent traditionnellement des fonctions , le plus souvent honorifiques
   c. les parlamentaires qu devient organiser le vote.
   d. Les conseillers juridiques du Gouvernement.

La designation de ministres est decidée par le Premier ministre. Il etablit aussi la structure du Cabinet qui est la veritable organisme de décision gouvernamentale. Il etablit, aussi, qui contient les ministres les plus importantes.

Mis, certains membres de gouvernement entre dans la structure du Gouvernement d'office. La liberté en ce qui concerne les membres du Gouvernement et du Cabinet y compris leur remenient ets le choix du Premier ministre. Il est possible que le premier ministre dirige aussi un ministère. Le cabinet se réunit à l'initiative du Premier ministre qui établit l'ordre du jour. Les décisions sont pris par l'accord général qui est obtenu grâce à l'autorité de Premier ministre sur les autres ministres, le désaccord d'un ministre se manifestant seulement par sa démission.

II. L'Espagne

En ce qui concerne la structure de l'administration en Espagne , le deuxième article de la Constitution garantit l'unité de la nation espagnole et aussi le droit à l'autonomie pour les différentes nationalités et régions.

La teritoire national est divisé en municipalités, provinces et communautés autonomes qui réjouissent d'une autonomie qui répond aux intérêts de chacune.

Tout en prévoyant, la possibilité de créer dentre elles des communautés autonomes, la nouvelle Constitution reconnait officialement l'attitude traditionnellement indépendente de certines régions, la Catalogne et le Psys basques, en particulier.

Les povoirs de ces communautés sont établis par la Constitution . Quand à l'allocation des pouvoirs adm,inistartifs , il faut distinger entre ceux pouvoirs qui sont intrinsèques à la communauté et ceux qui sont exercés par délégation. Les pouvoires administratifs il faut distinger entre ceux pouvoirs qui sont intrinsequés aò la communaute et ceux qui sont exerces par délégation.

Le gouvernement dirige la politique interne et externe , l'administration civile et militaire et la défence de l'État. Il exerce la fonction exécutive et la pouvoir de réglementation selon la Constitution et les lois. Les fonctions et les prérogatives qui réviennent au Gouvernement sont en liaison directe avec le caractère de la forme politique de l'Espagne- monarchie parlamentaire.

Dans les monarchies parlamentaries et constitutionnelles ou avec certains nunaces constitutionnelles, le pouvoir excécutif réel revient au Gouvernement, le Premier ministre étant la personne la plus influente et avec un role décisif dans le jeu politique.

À la différence de la tradition d'autres monarchies parlamentaires, en Espagne, conformément à la Constitution de 1978 , le Chef du Gouvernement qui est le Président du gouvernement n'est pas nommé par le roi.

La désignation du candidat pour le fontion du Président du Gouvernement se fait par un accord entre le Roi et le Président du Congrès des Deputes. Le candidat doit obtenir le vote de confiance du Congrès en majorité absolue. Si la majorité absolue n' a pas été realiseée alors, après 48 heures de deliberation, la majorité simple est suffisante. C'est juste après cette procédure que le Président du Gouvernement est nommé et peut former le Gouvernement.

Les autres membres de Gouvernement sont nommés et destituéòs par le Roi à la proposition du President du Gouvernement et les secrétaires d'Etat sont nommes par le Président de Gouvernement.

Les remaniements gouvernamentaeaux restent toujours dans la charge de ce dernier. Mais, il faut mentioner que seulement le premier Président du Gouvernement apres 1978 , Adolfo Suarez, -a été nommé par le Roi, vu la periode de transition vers la democratie. Le deuxième, Satelo, a été nommé par son prédécesseur qui a démissioné.

Un autre président, Felipe Gonzales, s'est imposé comme étant le chef du parti qui avait la majorité absolue dans le Parlement. Il n'y a pas d'incompatibilités entre la fonction gouvernamentale et celle parlamentaire.

Le mandat du gouvernemant prend fin dans les cas suivantes:

- nouvelles élections
- la démission du Président
- l'adoptation par le Congrès des Deputés d'une motion de censure constructiv, accompagnée par l'éléction d'un autre Président du Gouvernement.
- le refus d'accorder un vote de confiance demandé par le Président du Gouvernement , sitaution dans la quelle la Constitution espagnole exclut la disolution de Parlement.

Relativement à la structure gouvernamentale, la Constitution espagnole prévoit seulement que le Gouvernement comprend le Président du Gouvrernement, le vice président, les ministres et d'autres membres prevus par le loi.

Le Gouvernement fonctionne comme organisme collégial, sous la direction de son Président qui le represente devant le chef d'État , le Parlement et l'opinion publique. Le vice président du Gouvernement assure la suppleance et l'interim du President , en cas de decès.

Chaque ministre, a ◌ l'exception du Président et du vice président du Gouvernement dirige de règle un ministre , le nombre de ceux –ci étant établi par loi. On parle ici aussi de la fonction de secrétaire d'État , fonction qui est incluse dans la structure des minsitères, dans la subordination du ministre . Les secrétaires d'État ne font pas parti du gouvernement et ne participent pas au Conseil de Minsitres.

Le Conseil de Ministres, qui est la formé de travail comprend tous les membres du gouvernement , se réunit chaque semaine, sous la direction du Président. Les décisiones sont prises par accord unanime ou par vote.

Les Ministres peuvent être révoqués par le Roi à la proposition du Premier Ministre. À part les résponsabilités politiques, le premier ministre tout comme les membres deGouvernement répondent pénalement pour les faits commis les, étant jugéspar la section pénale du Tribunale Supréme.

Le premier ministre peut proposer , à ses risques et périls, la dissolution du Parlement on d'une chambre . En ce cas, la dissolution est décretée par le loi. Le décret de dessolution décide la date des élections parlamentaires.

Au cas où le Congrés doit voter une motion de censure, sa dissolution tout comme ce de Parlement ne sont pas autorisées.

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LA CLAUSE RESOLUTOIRE, UNE VERITABLE SANCTION POUR L'INEXECUTION DU CONTRAT

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Résumé

La clause résolutoire est une convention par laquelle les contractants sanctionnent l'inexécution par la résolution du contrat, en subordonnant à l'inexécution l'attribution au créancier de l'obligation du droit de résoudre le contrat. La clause résolutoire et la résolution judiciaire sont de nature différentes. En stipulant une clause résolutoire, les parties ont instituié un lien de cause à effet entre l'inexécution et la résolution, lien dont l'origine ne réside pas dans la loi, mais dans leur volonté. Tandis que l'article 1021 C.civ. permet au contractant envers lequel l'obligation n'a pas été exécutée de demander au juge de prononcer la résolution du contrat, la clause résolutoire lui confère le droit de résoudre le contrat.
Mots clé: clause résolutoire; pacte commissoire, inexécution, force obligatoire, résolution, résiliation, sanction .

1. Notion et justification

Le respect des obligations contractuelles implique de sanctionner leur défaut d'accomplissement, conformément au principe de la force obligatoire des conventions. Parmi les sanctions de l'inexécution, la résolution occupe une place originale en ce qu'elle vise à détruire le contrat dont les obligations ne sont pas respectées. L'exécution forcée, voire la responsabilité contractuelle, restent parfois, en effet, inefficaces. Acte de confiance, le contrat suppose une exécution scrupuleuse et il doit être permis au créancier de renoncer à ce qui ne lui est pas donné de bon gré et de cesser ses relations avec le partenaire défaillant. On comprend dès lors que le contractant envers lequel l'obligation n'est pas exécutée préfère, plutôt que d'en poursuivre l'exécution forcée, mettre fin au contrat. A cette fin et en vertu du principe de la liberté des conventions, les parties peuvent convenir d'une clause résolutoire, autorisant le créancier de l'obligation inexécutée à rompre unilatéralement le contrat.

Ainsi, pour limiter ou pour écarter le rôle de l'instance de jugement dans la prononciation de la résolution, les contrats peuvent contenir des clauses expresses, dérogatoires des prévisions de art. 1021 Code civil, par lesquelles les parties stipulent la résolution de plein droit en cas d'inexécution des obligations

par une des parties. Autrement dit, sur la base de art. 969 Code civil, les parties peuvent stipuler dans les contrats conclus des clauses expresses de résolution du contrat ou des pactes commissoires expresses, et, en cas de défaut, les dispositions légales visant la résolution judiciaire deviennent applicables.

Actuellement, la plupart des droits connaissent la clause résolutoire. De nombreux Codes civils étrangers lui consacrent des dispositions, témoignant par là de la fréquence de son usage.

Le terme de pacte commissoire est originaire dans la dénomination de *lex commissoria* utilisée dans le droit roumain pour designer la convention conclue séparément, mais en liaison avec un contrat de vente achat, par lequel les parties prévoyaient que la vente est annulée dans le cas ou l'acheteur ne payait pas le prix, dans un certain terme établi.

Prêtant cette dénomination du droit roumain, le droit moderne – tenant compte aussi de l'évolution enregistrée dans l'ancien droit français, tant dans le droit canonique, que dans le droit civil laïque – se caractérise par une distinction entre le pacte commissoire sous-entendu et les pactes commissoires expresses.

Les dispositions des articles 1020-1021 du Code civil roman – inspirées par les dispositions d'article 1284 du Code civil français – réglemente le pacte commissoire sous-entendu, ou, autrement dit, la résolution et la résiliation judiciaire. Dans ce cas, pour que la sanction de la résolution et de la résiliation soit opérative, il est nécessaire une décision judiciaire prononcée par la suite d'une action formulée par la partie intéressé.

Conformément au dictionnaire de droit civil, par pacte commissoire on comprend une clause contractuelle ou une convention accessoire à un contrat, par lequel les parties conviennent à l'annulation du contrat principal, dans le cas ou une des parties n'exécute pas la prestation assumée. Stipulant un pacte commissoire exprès, les parties remplacent, par volonté déclaré, l'action en résolution judiciaire avec une clause résolutoire conventionnelle. La clause résolutoire ne se confond pas avec la condition résolutoire, parce que dans le cas de la condition résolutoire (modalité du contrat), la résolution dépend d'un événement futur et incertain, étrange du comportement du debiteur et n'a pas caractère sanctionnatoire, tandis que dans l'hypothèse du pacte commissoire, la

résolution est une conséquence due exclusivement à l'inexécution des obligations contractuelles par le debiteur et est mis en valeur à l'initiative du créditeur.

La condition résolutoire, si accomplie, constitue un élément objectif, capable de déterminer par soi même l'annulation du contrat, condition qui peut être invoquée par n'importe quelle partie.

Le pacte commissoire exprès permet la résolution ou la résiliation de la convention seulement comme effet de l'association de l'accomplissement des conditions nécessaires pour appliquer cette sanction avec un élément subjectif, la manifestation de volonté du créditeur.

Aussi, il faut faire une dissociation entre les pactes commissoires exprès légaux et les pactes commissoires exprès proprement dits. Un exemple de pacte commissoire exprès légal est rencontré dans la matière du contrat de vente – achat – art. 1370 Code civil: „Aux ventes de produits et de produits mobiles, la vente sera résolue de droit et sans mise en retard dans le bénéfice du vendeur, après le terme pour les revendiquer " – ayant une fonction similaire à celle du pacte commissoire exprès de degré IV inséré dans le contrat.

Dans ce travail, on a en vue les pactes commissoires exprès proprement dits, qui sont le résultat de la volonté des parties.

En principe, les pactes commissoires sont valables, même si ils n'ont pas été réglementés, mais la jurisprudence les interprète restrictivement et sévèrement, tenant compte de leur conséquences sur l'existence du contrat, aussi que des désavantages qu'ils pressentent, voire : peuvent compromettre la stabilité des situations juridiques ; les terces sont soumis aux conséquences qui dérivent de la rétroactivité de la résolution conventionnelle ; d'autre part, étant imposés par contrat, par la partie plus forte de point de vue économique, ils constituent des sources d'inégalité pour la partie plus faible de point de vue économique. Il est peut-être sain que le législateur intervienne parfois pour l'interdire ou en limiter les effets en tout ou partie. Les chroniques sont encore unanimes pour saluer le rôle modérateur du juge qui, inspiré de la règle morale, s'attache à la mauvaise foi du créancier, voire à la bonne foi du débiteur, pour protéger ce dernier contre les abus. Parmi leurs avantages on peut énumérer : l'évitement des dépenses processuels, l'enlèvement des incertitudes résultés du pouvoir d'appréciation du juge, la possibilité de la résolution dans ces contrats

dans lesquels la loi ou la jurisprudence, en principe, l'enlève (le contrat de rente viagère – art. 1647 Code civil).

Pour être efficace, un pacte commissoire doit être expressément stipulé, de résulter sans équivoque du contenu d'un acte juridique. Ces pactes peuvent être stipulés dans n'importe quels contrats, même s'ils ne soient pas synallagmatiques.

L'intervention de l'instance de jugement n'est pas enlevé dans le cas d'existence d'un pacte commissoire exprès, mais seulement minimisée, réduite à constater le fait qu'un tel pacte est intervenu est le contrat a été annulé sur la base de la volonté des parties.

Mais, pareil au cas de la résolution judiciaire, la résolution conventionnelle suppose une inexécution coupable de l'obligation assumée par une des parties, et le pacte commissoire peut être invoqué seulement par le créditeur de cette obligation, et pas par celui coupable de l'inexécution. En conclusion, indépendamment du fait qu'elle soit judiciaire ou conventionnelle, la résolution ne perd pas son caractère de sanction civile. Aussi, la partie justifiée peut opter entre la résolution et l'exécution forcée.

La spécificité de la clause résolutoire se manifeste encore nettement à l'étude de son mécanisme qui conduit à l'examen de l'existence et de l'exercice du droit de résolution. Titulaire, en cas d'inexécution fautive, d'un droit de résolution, le bénéficiaire de la clause est dans une situation incomparablement supérieure à celle du créancier agissant sur le fondement du Code civil.

2. Types de pactes commissoires

Dans la littérature de spécialité, les pactes commissoires exprès ont été classifiés, en fonction des stipulations contenues, de l'intensité de l'effet produit, en quatre catégories. Il y a ainsi des pactes commissoires de quatre degrés.

Le pacte commissoire du degré I est celui qui prévoit que, en cas d'inexécution coupable, le contrat est annulé. Une telle clause est en fait la réitération de art. 1021 Code civil, ainsi qu'on appliquera toutes les règles de résolution judiciaire. C'est pourquoi certains auteurs considèrent qu'il y a seulement trois types de pactes commissoires. Par conséquent, l'annulation du contrat n'opère pas de droit, la partie intéressé devrant introduire une action en résolution ou de résiliation, avec tous les désavantages impliqués.

Les effets de ce pacte commissoire exprès ont été compris dans la même manière que dans la pratique judiciaire, en précisant que, dans le cas ou les parties reproduisent dans leur convention la disposition de art. 1020 Code civil, l'annulation du contrat n'a pas lieu de droit, étant nécessaire une décision judiciaire ; aussi, le pacte commissoire rédigé sous cette forme n'enlève pas la faculté de l'instance de juger d'accorder au debiteur un terme de grâce pour l'exécution de l'obligation (Trib. Suprême, section civile, décision nr. 2299/1955).

Dans ce cas, la résolution est judiciaire ; dans les contrats synallagmatiques, ce type de pacte commissoire est, pratiquement inutile, il étant applicable et efficace dans les contrats ou la résolution n'est pas prévue par la loi, ainsi que dans les contrats unilatéraux.

Ainsi, dans les cas ou le législatif a restreint le domaine d'application de la résolution ou de la résiliation, précisant que le pacte commissoire n'est pas sous-entendu dans certains contrats, la clause contractuelle par laquelle on stipule que l'inexécution des obligations d'une partie autorise l'autre partie de demander la résolution du contrat est celle utile. Par exemple, dans la pratique judiciaire on a décidé que, dans le cas du contrat de rente viagère, bien que le pacte commissoire ne soit pas sous-entendu, considérant les dispositions de art. 1647 Code civil („Le seule non-paiement des termes expirés de la rendite ne donne pas le droit à celui pour lequel elle a été créée de demander le retour du capital, ou la remise en possession du fonds aliéné. "), quand même les parties ont la liberté d'introduire une clause de résolution, sur la base de laquelle le crédirentier pourra demander en justice l'annulation du contrat si le débirentier n'exécute pas ses prestations. Les dispositions de art. 1647 Code civil (respectivement art. 1978 Code civil français) ont été considérés comme exceptionnelles et supplétives.

Dans le même sens, on a apprécié que, dans le cas du contrat de division, si les parties ont introduit un pacte commissoire exprès, la résolution conventionnelle sera opérative.

Le pacte commissoire du degré II est celui qui dispose que, si une partie n'exécute pas son obligation, l'autre partie est autorisée de considérer le pacte comme annulé. L'interprétation de cette clause sera faite par le fait que la résolution sera opérative sur la base de la déclaration unilatérale de résolution de la partie autorisée, sans caractère judiciaire.

Quand même, le rôle de l'instance judiciaire n'est pas enlevé complètement, mais seulement minimisé car, dans le cas ou la partie autorisée s'adresse à l'instance de jugement, elle ne peut plus accorder un terme de grâce, mais seulement de constater si la résolution a opéré ou pas, par la suite de l'inexécution ou de l'exécution de l'obligation par le debiteur, par la mise en retard – une formalité nécessaire pour assurer la fonctionnalité de ce pacte commissoire.

Le pacte commissoire du degré III consiste dans une clause qui affirme que à la date de l'inexécution coupable de l'obligation, le contrat est résolu de plein droit.

Ainsi rédigé, le pacte commissoire exprès enlève la possibilité de l'instance judiciaire de disposer elle-même l'application de la sanction, ainsi qu'on ne pose plus le problème d'apprécier l'opportunité de la résolution ou de la résiliation, ou d'accorder un terme de grâce.

Quand même, la résolution ou la résiliation ne se produit pas comme effet d'une simple inexécution, étant nécessaire l'accomplissement des formalités légales pour la mise en retard du debiteur. Par conséquent, si le debiteur exécute son obligation, même si tardivement, mais avant la mise en retard, sans tenir compte du temps passé de l'échéance, l'instance saisie dans ce sens, constatera qu'il n'est pas intervenu la résolution ou la résiliation sur la base du pacte commissoire exprès.

Dans la matière de la vente, la possibilité d'un pacte commissoire rédigé dans la forme mentionnée ci-dessus est expressément prévue dans art. 1367 Code civil: „Quand, dans une vente de immeubles, on mentionne que en cas de défaut dans le paiement du prix au terme établi, la vente sera résolue de droit, l'acheteur peut payer après l'expiration du terme, s'il n'est pas mis en retard par le vendeur par une interpellation de forme (dans une des modalités prévues par la loi); mais après une telle interpellation, le juge ne peut pas attribuer un terme ".

Même si cette disposition est inscrite dans le Code civil seulement dans le titre qui réglemente le contrat de vente – achat, elle a quand même une valeur générale. La disposition confirme, dans un cas particulier, que les textes de loi qui réglementent la résolution et la résiliation ont un caractère supplétif. En observant les limites des libertés de volonté, les parties peuvent déroger de ces

dispositions légales, y compris par la rédaction d'un pacte commissoire dans la forme mentionnée ci-dessus.

Il est facile à observer que l'annulation de droit du contrat, sur la base d'un tel pacte, ne peut pas être confondue avec l'annulation de droit d'une convention par la suite de l'accomplissement d'une condition résolutoire, comme modalité de l'acte juridique, conformément au art. 1019 Code civil (respectivement art. 1183 Code civil français).

La syntagme *annulation de droit* a une acception spéciale dans le contenu de ce pacte ; la simple inexécution n'est pas suffisante pour déterminer l'annulation du contrat, dans ce sens étant nécessaire aussi la manifestation de volonté du créditeur visant l'obligation inexécutée, par la mise en retard du debiteur. Le créditeur a, ainsi, un droit d'option entre utiliser le pacte commissoire et une action par laquelle il puisse demander l'exécution forcée des obligations du debiteur. Sous cet aspect, l'idée de la mise en retard, expressément prévue au art. 1167 Code civil (art. 1656 Code civil français), a une valeur générale.

Le pacte commissoire du degré IV est le plus énergique pacte commissoire et il prévoit que l'inexécution coupable de l'obligation assumée par contrat conduit à l'annulation du contrat, sans nécessiter la mise en retard ou tout autre formalité.

Dans la présence de ce pacte, le rôle de l'instance est enlevé en totalité en ce qui concerne la prononciation de la résolution ou de la résiliation. Dans le cas ou une des parties saisit quand même l'instance de jugement, elle peut seulement vérifier si toutes les conditions prévues dans le pacte commissoire exprès ont été respectées.

Bien que par ce pacte commissoire exprès on stipule l'annulation de droit du contrat en cas d'inexécution de l'obligation, le créditeur n'a pas renoncé à demander l'exécution forcée.

Le pacte commissoire exprès rédigé dans cette manière suppose seulement la renonciation avec anticipation au caractère judiciaire de la résolution ou de la résiliation, ainsi que la partie qui n'exécute pas son obligation n'aura plus la garantie du contrôle judiciaire, la sanction de l'annulation du contrat étant l'effet direct de l'inexécution du debiteur et de la volonté du créditeur d'appliquer cette sanction. Même si la manifestation de volonté du

créditeur ne doit plus être communiquée au debiteur par une formalité légale de mise en retard, cette manifestation de volonté doit exister comme tel, sans tenir compte de la forme d'expression.

La ration pour la conclusion d'un pacte commissoire exprès consiste dans l'enlèvement, partiel ou total, des désavantages présentés par la résolution ou la résiliation judiciaire pour un créditeur. Ainsi, le pacte commissoire contient une clause de faveur pour le créditeur. Mais, si on accorde au debiteur le droit d'invoquer le pacte commissoire dans son bénéfice, ou la clause de faveur se transforme dans une de défaveur pour le créditeur.

Accepter que le debiteur peut invoquer l'annulation du contrat sur la base du pacte commissoire signifie ignorer que la sanction de la résolution ou de la résiliation suppose, parmi autres, la condition d'innocence. Or, dans un tel cas, même si seulement le debiteur est coupable pour l'inexécution de l'obligation, il demande la constatation du contrat contre la volonté du créditeur, bien que le dernier n'ait eu aucune coulpe ; on créerait ainsi une confusion entre la question de la résolution ou de la résiliation et la question des risques.

Cette confusion empêchera même l'attribution des dommages intérêts, bien que, s'agissant d'une sanction, le créditeur a le droit, en plus de l'annulation du contrat, à l'équivalent du préjudice souffert. Autrement dit, par pacte commissoire le créditeur a compris de se renforcer la position par diminuer ou enlever le contrôle judiciaire, mais pas l'affaiblir, par créer un obstacle dans la voie de l'attribution des dommages intérêts.

3. Le rôle de l'instance de jugement

Les pactes commissoire exprès ont été conçus sous la forme d'instruments juridiques pour diminuer ou même enlever, dans la mesure u possible, le rôle de l'instance de jugement dans l'application de la sanction de la résolution ou de la résiliation. Quand même, le rôle de l'instance de jugement ne peut pas être exclus en totalité parce que, même si les parties ont conclu un pacte commissoire exprès, sa force juridique dépend de sa modalité de rédaction. Plus, il peut apparaître des dissensions entre les parties en ce qui concerne l'accomplissement des conditions nécessaires pour l'annulation du contrat sur la base d'un certain pacte commissoire exprès, et dans ce cas, la partie intéressée, conformément aux dispositions de art. 21 de la Constitution de la Roumanie qui règlement el

principe de l'accès libre à justice, peut introduire une action en justice pour résoudre le litige

La possibilité d'appeler à la justice, même dans la présence d'un pacte commissoire exprès, a été reconnue dans la pratique judiciaire dès la fin du dernier siècle, en précisant que, dans un tel cas, le rôle des instances judiciaires est réduit à reconnaître le fait qu'il est surgi l'annulation du contrat, par la suite de la volonté des parties.

En conclusion, il este essentiel de souligner que la résolution ou la résiliation gardent leur caractère de sanction civile même dans l'hypothèse dans laquelle les parties ont conclu un pacte commissoire exprès. Ainsi, même si l'intervention de l'instance de jugement soit enlevée ou diminuée en ce qui concerne l'application de ces sanctions, elle ne peut pas opérer que toutes les conditions générales de la résolution ou de la résiliation soient accomplies, accompagnes par la manifestation de volonté de la partie intéressée et autorisée d'invoquer le pacte.

4. Conclusions

L'utilité pratique de la clause et sa légitimité apparaissent clairement. Sanctionnant l'inexécution, elle permet au créancier de se libérer. Mise en oeuvre à l'initiative et dans l'intérêt de ce seul créancier, elle est moins l'instrument de ruptures hâtives qu'une puissant incitation au respect des engagements contractuels. Accessoire de la créance concernée, la clause résolutoire se caractérise par son caractère pénal qui la distingue de la condition résolutoire.

La clause résolutoire est un contrat, ce qui la sépare nettement de la résolution judiciaire. Entre les deux institutions, il n'y a cependant pas concurrence mais complémentarité: le Code civil permet au créancier de faire résoudre par le juge un contrat dont l'exécution est impossible ou gravement compromise; la clause autorise une partie à mettre fin au contrat si l'autre ne respecte pas ses obligations. La volonté des auteurs de la clause résolutoire ne consiste pas à détourner mais à compléter la règle du Code civil.

La clause résolutoire s'inscrit parfaitement dans le mouvement sinon de renouveau du moins de maintien de la peine privée au sein de notre Droit. Ce mécanisme retient à juste titre l'attention de la doctrine contemporaine, qu'il se manifeste à propos de la clause pénale, de la responsabilité civile et désormais de

la clause résolutoire. Il est en effet directement lié au besoin de sécurité juridique auquel doit répondre un respect accru de la force obligatoire du contrat. Instrument de prévision permettant d'ordonner dans le temps l'activité économique et sociale, le contrat doit être respecté non seulement en raison d'exigences morales mais encore et surtout pour des raisons d'utilité et de paix publique, parce que la défaillance des uns peut provoquer la ruine des autres. L'inexécution délibérée est hélas le spectacle quotidien de la vie des affaires.

La voie contractuelle suivie par le créancier mettant en oeuvre la clause résolutoire peut être donc utilement efficace. Encore faut-il qu'il n'abuse point sinon le juge qui n'est pas intervenu en sa faveur pourrait se manifester pour protéger le debiteur. Mais au fond tout ceci n'est que justice...

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PROBLÈMES D'INTERPRÉTATION EN CE QUI CONCERNE L'APPLICABILITÉ DE LA LOI COMMERCIALE EN MATIÈRE DES CONTRATS COMMERCIAUX

Résumé

Les commerçants, pour éviter de tolérer le risque de l'érosion de la monnaie nationale à cause de la rate de l'inflation, surtout au cas du commerce extérieur, prévoient des clauses de protection contre le risque des devises étrangères par la fixation du prix du contrat en monnaie étrangère avec le paiement en monnaie nationale au cours officiel de BNR au jour du paiement effectif.

Notions introductives

De plusieurs fois on apparaît des divergences en ce qui concerne l'applicabilité de la loi commerciale aux catégories originales des rapports juridiques commerciaux. Ces inconvenances apparaissent au moment où les participants aux opérations commerciales sont d'autres catégories de personnes que les commerçants : les personnes physiques, les institutions publiques, les fondations, les associations etc.

Une autre catégorie de problèmes qui peuvent apparaître dans le déroulement des opérations commerciales est liée avec la conclusion des contrats, la notion de contrat étant susceptible des significations spécifiques au droit commercial.

L'exécution des contrats, le moment de début des prestations des parties, la monnaie de paiement du prix mais aussi les modalités de demander des pénalités par la partie préjudiciée présentent également des caractéristiques controversées.

La qualification des rapports juridiques comme étant commerciaux

Les faits de commerce (objectives ou subjectives) peuvent être **bilatérales** (quand l'acte ou l'opération a le caractère d'un fait de commerce pour les deux

parties impliquées dans le rapport juridique) ou **unilatérales** ou **mixtes** (quand l'acte ou l'opération a le caractère d'un fait de commerce seulement pour une partie, pour l'autre étant un acte de nature civile ; par exemple, un contrat conclu entre un commerçant et un agriculteur pour acheter une quantité de légumes).

Grâce à la circonstance que les faits de commerce unilatérales peuvent être comprises dans la sphère des faits de commerce objectives ou subjectives, on parfois considère qu'ils ne constituent une catégorie distincte des faits de commerce.

Ab initio doit montrer le fait que basé sur l'article 56 Code commercial „*Si un acte est commercial seulement pour une partie, tous les contractants sont soumis, en ce qui concerne cet acte, à la loi commerciale…".*

La solution se justifie par le fait qu'étant en question un acte juridique, il ne peut être soumis, simultanément, aux deux réglementations : l'une commerciale et l'une civile.

Il faut quand même souligner que la loi commerciale réglemente seulement le rapport juridique sans avoir aucune conséquence sur le statut juridique du non-commerçant. Le non-commerçant n'est pas transformé en commerçant, ne lui imposant donc des obligations professionnelles du commerçant (par exemple l'obligation de registration au registre du commerce, tenir les registres commerciaux ou le déroulement de l'activité aux limites de la concurrence licite).

Cette false représentation de la situation de fait n'est que le résultat d'une inconnaissance des relations sociales avec caractère spécifique au droit commercial.

Ainsi expliquerai-je dans les suivantes quelques particularités de cette branche du droit privé.

Dans la conception du Code commercial roumain, l'accomplissement par une personne, n'importe si elle a ou non la qualité de commerçant, des faits de commerce, a comme résultat l'apparition des rapports juridiques commerciaux.

Donc, les rapports juridiques commerciaux sont des rapports de droit privé, comme les rapports civils. Ayant la même essence, les rapports juridiques commerciaux et les rapports juridiques civils sont soumis aux mêmes règles générales qui sont comprises dans le Code civil. Mais entre les deux catégories de

rapports juridiques il y a des certaines différences. Les aspects particulaires des rapports juridiques commerciaux sont réglementés par des normes spéciales comprises dans le Code commercial, Livre I, Titre V, « Sur les obligations commerciales en général ».

La réglementation des rapports juridiques commerciaux par les normes du Code commercial et celles du Code civil trouve son support légal dans l'article 1 Code commercial qui prévoit : « Dans le commerce on applique la loi présente. Là où elle ne dispose pas on applique le Code civil ».

Les obligations commerciales, comme les obligations civiles, ont comme sources les actes juridiques (le contrat et l'acte juridique unilatéral) et les faits juridiques (licites ou illicites). De toutes les sources des obligations commerciales, le plus important pour l'activité commerciale est, sans doute, le contrat.

Le principe de la liberté contractuelle

Toute personne physique ou juridique peut manifester librement son volonté, conformément à ses intérêts. La volonté d'une personne est limitée seulement par les dispositions légales qui concernent l'ordre publique et les bonnes mœurs (article 5 Code civil).

Concernant la conclusion des contrats, les parties manifestent librement leur volonté au sens de la naissance, de la modification, de la transmission et de l'annulation des certains droits et obligations. La liberté de la manifestation de la volonté des parties contractantes se définit comme une liberté contractuelle et constitue une expression des droits et des libertés de l'homme.

La liberté contractuelle consiste dans le droit d'une personne de conclure tout contrat, avec tout partenaire et avec les clauses que les parties conviennent, avec les seules limites imposées par l'ordre public et les bonnes mœurs.

La liberté contractuelle est un principe du droit prive, c'est-à-dire du droit civil et du droit commercial. Dans le droit commercial, le principe de la liberté contractuelle a une application générale ; il concerne non seulement les rapports contractuels auxquels participent les entrepreneurs particulaires (des commerçants individuels ou des sociétés commerciales), mais aussi les rapports de ceux auxquels prennent part les régies autonomes et les sociétés commerciales avec capital d'Etat.

Pour marquer le changement fondamental envers les rapports juridiques entre les entreprises d'Etat, au cadre de l'économie planifiée, la Loi no. 15/1990 a consacre, *in terminis*, l'application du principe de la liberté contractuelle aux rapports juridiques auxquels participent les régies autonomes et les sociétés commerciales constituées par la réorganisation des entreprises d'Etat.

Conformément aux articles 47 et 48 de la Loi no. 15/1990 : „Les relations commerciales entre les régies autonomes, celles entre les sociétés commerciales avec capital d'Etat, aussi les relations entre elle ou entre elles et l'Etat se dérouleront ayant des bases contractuelles. Les contrats conclus entre les agents économiques mentionnés au paragraphe 1 seront gouvernés par le principe de la liberté contractuelle et par les réglementations comprises dans le Code civil et le Code commercial roumain, avec les exceptions découlant de la loi présente. Les régies autonomes et les sociétés commerciales avec capital d'Etat pourront pratiquer entre elles et dans les rapports avec les tiers, les prix découlant de l'action conjuguée de la demande et de l'offre, exceptant la situation quand sur le marche roumain n'existent pas au moins trois agents économiques qui commercialisent le même type de bien, travail ou service et aussi exceptant les cas où les prix sont subventionnés par l'Etat conformément à la décision du gouvernement. Dans ces derniers cas, les prix seront établis par le gouvernement par négociation avec les agents économiques".

Une conséquence du principe de la liberté contractuelle réside dans la liberté d'expression de la volonté à la conclusion du contrat.

Les contrats, conformément aux normes en vigueur, se concluent par le simple accord de volonté. Au cas du contrat commercial, ceci se conclut en concordance avec les intérêts des parties contractantes soit en forme écrite, verbale ou téléphonique etc.

Par suit, il est erronément considéré qu'il n'y a pas un contrat in absence d'un document en forme matérielle parce qu'on ne connaît le fait que la notion de contrat en matière commerciale s'interprète, d'habitude, comme *negotium juris* et non comme *instrumentum probationem*.

L'exécution des obligations commerciales

En ce qui concerne l'exécution des obligations commerciales, si les parties n'ont pas convenu un terme pour exécuter l'obligation contractuelle, cela va être interprétée comme exécutable tout de suite, ayant à base les principes du droit civil („les clauses des contrats vont être interprétées au sens de produire des effets juridiques") et du droit commercial („dans les contrats commerciales, en cas de doute, on applique la règle qui favorise la circulation").

En aucune façon peut un contrat être une commande qui n'a pas été acceptée par l'offrant, parce que, pour que le contrat soit conclu on doit rencontrer les manifestations de volonté des toutes les deux parties contractantes.

En ce qui concerne le manque des conséquences de non-respecter les obligations contractuelles, il faut être invoquées les réglementations applicable en matière commerciale au sens que, conformément à l'article 43 du Code commercial „*Les dettes commerciales liquides et payable en argent produisent les intérêts de droit dès le jour quand elles deviennent exigibles*". Donc, il n'est pas nécessaire de stipuler expressément en contrat cet aspect, il est sous-entendu, seulement le cas où on avait désiré le paiement de certaines dédommages plus grands que l'intérêt légal.

La monnaie de paiement du prix

En ce qui concerne la monnaie dans laquelle le prix d'un contrat commercial est établi, aucune réglementation n'interdit d'établir le prix en monnaie étrangère, comme a statué l'instance suprême – C.S.J., section commerciale, décision no. 323/1999 dans la Revue de Droit commercial, no. 11/2000, page 201.

Dans certains cas, à cause de la modification du prix de la marchandise ou de l'urgence d'exécution des obligations, les parties ne sont pas en mesure d'établir le prix dans les contrats commerciaux qu'elles conclurent. En ce type des cas, on considère que les parties contractantes ont eu en vue le prix réel ou leur prix courant.

Le Code commercial reconnaît le caractère valable de la vente même si le prix n'est pas prévu dans le contrat, mais les parties ont convenu de faire référence au prix réel ou au prix courant (article 61 Code commercial). On croît

que la même conclusion est valable aussi dans la matière d'autres contrats commerciaux.

Un problème qui se pose est celui de savoir qui sera le destin d'un contrat de vente-achat commercial au cas où le prix n'a pas été déterminé en contrat et ni on n'a pas prévu des éléments à l'aide desquels le prix soit déterminé ultérieurement. On croît de nouveau que, les conclusions de la matière de la vente-achat peuvent s'élargir dans la matière d'autres contrats.

Certains auteurs considèrent que, dans un tel cas, en absence de l'un des éléments du contrat de vente-achat, le contrat est nul. D'autres auteurs croient que l'opération est valable parce qu'on suppose que les parties contractantes ont fait référence au prix courant.

La dernière opinion nous parait bien fondée, mais elle concerne seulement les cas où il y a un prix de bourse ou de marché. Au cas contraire, le contrat est valable seulement si le prix courant peut être établi par tout type de preuve, dans les conditions de l'article 40 Code commercial.

On entend qu'au cas où il y a un prix légal, le contrat de vente-achat est valable, même si dans le contrat on n'a pas prévu le prix concret, le prix de la vente sera celui établi par l'acte normatif.

Par prix réel on entend le prix établi par les listes de la bourse ou par les mercuriales de la place où le contrat a été conclu ou en absence, après la plus proche place ou après tout type de preuves.

Les dispositions de l'article 41 du Code commercial contiennent des certaines stipulations qui font référence au prix. Elles se réfèrent à la situation des obligations ou des contrats commerciaux où le paiement du prix a été fixé en monnaie étrangère.

Le texte a en vue seulement ces situations-là dans lesquelles le paiement du prix va se faire en monnaie étrangère. Ainsi : a) la monnaie du contrat a un cours légal en pays ; b) la monnaie du contrat a un cours commercial en pays ; c) la monnaie du contrat a un cours d'échange fixé par les parties ; d) la monnaie du contrat n'a aucun de ces cours ; e) la monnaie étrangère, inscrite en contrat, a été établie d'être payée „effectivement".

Le problème de fixation de la monnaie dont le paiement de l'obligation commerciale va être fait présente une importance remarquable dans les situations

d'instabilité monétaire. Comme certains produits sont amenés de l'import, le commerçant (respectivement la société commerciale) achète un produit dans l'argent du pays de fabrication, le problème avec lequel l'importateur se confronte est celui de la vente sur le marché interne. D'habitude on fait ça dans l'argent national. Les difficultés ne peuvent pas apparaître dans les cas où le contrat de vente se conclue entre des personnes présentes et quand le paiement du produit se fait par la conversion de la monnaie du producteur en monnaie nationale, au cours d'échange du jour.

Sur le territoire de la Roumanie les encaissements et les paiements entre les résidents se font dans la monnaie nationale (le leu), tel comme la Banque Nationale de la Roumanie a réglementé dans l'article 18 du Règlement no. 3 de 23.12.1997 (en vigueur au moment de la conclusion du contrat avec S.C. Romger S.R.L. Bucarest), annulé en présent par le Règlement no. 1/2004 de la Banque Nationale de la Roumanie qui reprend dans l'article 8 ces dispositions mais avec quelques exceptions énumérées limitativement.

Qu'est ce qui se passe quand entre l'échéance et le paiement, le cours d'une monnaie étrangère qui se paie en lei, souffre des changements ? En ce cas dans la littérature juridique on a établi clairement le principe exposé en ce qu'il suite.

A. Si une baisse du cours de la date de l'échéance passe, le débiteur payera au cours de la date de l'échéance. Le créditeur ne peut souffrir aucune perte parce que le débiteur n'a pas accompli son obligation à l'échéance.

B. Si le course monte, de ce relèvement bénéficie aussi le créditeur. La loi a eu en vue le course de l'échéance, croyant que le débiteur va exécuter à cette date. Quand le débiteur recours à la justice et un long terme s'interpose entre l'échéance et le paiement, le créditeur ne doit pas souffrir parce que la décision s'obtient avec retard. Le créditeur serait dédommagé si à la date du paiement il avait payé à un cours plus petit, celui de l'échéance, quand il n'est pas coupable de retard.

En pratique il peut apparaitre des diverses situations. Par exemple, la pratique judiciaire s'est exprimée au sens que l'avance d'un montant d'argents en lei avec la stipulation qu'il serve pour le paiement en franc français des prix des marchandises qui avaient été délivrées à l'acheteur ne constitue pas une opération fictive, avec des risques pour les deux parties, pour remplir les

éléments d'un jeu de bourse, mais une opération réelle, une modalité de paiement d'une dette qui, pour le créditeur, en spécial, exclut toute idée de risque, il ayant de recevoir, au plus mauvaise situation, le montant en francs français, n'importe les fluctuations des valeurs du leu.

On a montré aussi que si la loi accorde au débiteur obligé en monnaie étrangère la faculté de payer dans la monnaie du pays au cours d'échange à vue au jour de l'échéance et à la place du paiement, les éléments facilement calculable même par l'agent qui exécute les décisions, cette faculté ne peut faire la situation du créditeur plus difficile en l'obligeant de parcourir inutilement tous les degrés de juridiction pour la fausse manque de liquidité de la créance.

Mais les difficultés apparaissent quand la convention se conclue entre des personnes qui ne sont pas présentes. Dans la période écoulée entre la manifestation des volontés il peut apparaitre des modifications du cours d'échange. Pour éviter les conséquences indésirables il est pratiqué le système du caractère valable de l'offre à terme court.

En ce qui concerne les hypothèses avancées par l'article 41 Code commercial il est à observer que le législatif roumain a en vue seulement trois formes de paiement dans la monnaie étrangère, à savoir : la monnaie étrangère a un cours commercial dans le pays, la monnaie a un cours d'échange fixé par les parties ou qui a un cours légal dans le pays.

Les termes „cours commercial", „cours d'échange" et „cours légal" ont constitué objet de controverse doctrinaire et jurisprudentielle.

Le professeur Cesare Vivante considérait qu'au cas où dans un contrat il est mentionné une monnaie étrangère qui doit être utilisée pour éteindre une obligation il faut vérifier si la monnaie respective a un cours légal ou commercial dans le pays. On considère qu'au cas où une monnaie n'a pas un cours légal elle ne peut avoir un cours commercial si elle fait l'objet des transactions de banque permanentes ou si elle est quottée à la bourse d'échanges qui concernent les devises étrangères. Au cas où la monnaie étrangère n'a pas un cours d'échange ou un cours commercial, la loi permet au débiteur de payer ses dettes par conversion avec la monnaie sûre qui a un cours légal.

Le cours des monnaies à la bourse n'est pas un cours commercial, mais d'échange. La monnaie qui a un cours commercial est celle qui circule dans un

pays à côté de la monnaie qui a un cours légal et qui est acceptée comme monnaie légale. Cette opinion a été consacrée aussi par la pratique judiciaire roumaine.

Mais elle a été contestée, en se considérant en fait qu'à l'époque présente il n'existe pas une différence scientifiquement justifiée entre la monnaie avec un cours commercial et la monnaie avec un cours d'échange légal. La différence entre ces deux cours est artificielle, son origine étant d'ordre historique. Elle date du période de l'occupation du nord de l'Italie par les autrichiens, quand la monnaie commerciale était celle italienne, et celle légale était l'autrichienne.

Dans ces conditions on a exprimé dans la littérature juridique l'opinion conformément à laquelle « le prix d'échange d'une monnaie est une chose et le cours commercial est un autre ». Le fait que dans la Bourse on fait des négociations sur les devises ne signifie pas seulement que certaines devises étrangères peuvent avoir un cours d'échange.

Pratiquement, si le paiement a été stipulé dans une monnaie étrangère, sans cours légal, l'article 41 Code commercial accorde au débiteur la faculté d'effectuer le paiement dans la monnaie du pays, après le cours de l'échange des devises étrangères de la date de l'échéance et de la place du paiement.

Comme on a été montré dans la pratique judiciaire, l'article 41 Code commercial, quand on fait rapport au jour de l'échéance, on s'est occupé du cas normal, quand le débiteur exécute son obligation. Mais quand il est mis au retard, le cours d'échange auquel il est tenu est celui de la date à laquelle le débiteur éteint par paiement l'obligation et non le cours de l'échéance.

Pour prévenir les spéculations des devises étrangères, encore la pratique judiciaire a décidé qu'au cas où le paiement n'a pas été effectué au terme après le cours du marché en monnaie stipulée dans l'offre, celui qui a reçu l'offre ne bénéficie pas de la baisse du cours parce que le fait qu'il n'a pas payé à temps constitue son coulpe.

Une autre décision de la pratique judiciaire este encore plus tranchante : „Par le jour de l'échéance, au sens de l'article 41 Code commercial, on entend le jour de paiement quand le paiement se fait correctement dans le jour même de l'échéance, sans un retard de paiement qui interpose un temps entre l'échéance convenue et le paiement effectué. En cas de retard du paiement, les dédommages

vont être supportées par la partie en coulpe, car celui qui a fait toutes les diligences pour s'exonérer de l'obligation de paiement ne peut être déclaré responsable de la fluctuation des devises étrangères".

En ce qui concerne la clause contractuelle à laquelle se réfère la partie finale de l'article 41 Code commercial conformément à laquelle les parties peuvent agréer que le paiement soit fait « effectivement » en argent étranger, celle-ci doit être traitée comme une obligation de « faire ». Le débiteur devra procurer l'argent étranger promis, et quand il n'est pas possible il faut payer dans l'argent national, y compris les dédommages. Bien sûr, l'impossibilité du débiteur doit être appréciée de cas au cas. Dans un cas on a décidé que si l'appelante s'est obligée au paiement en livres sterling, sans avoir précisé le cours de cette monnaie étrangère, et comme le livre sterling a eu et a un cours commercial sur notre marché, elle doit être obligée au paiement dans la monnaie prévue et après le cours au moment du paiement. Il n'importe si on a accordé un terme de grâce au débiteur, parce qu'il doit supporter les conséquences du retard au paiement. Cette-ci est une application des quelques règles que l'équité demande, parce qu'en cas de retard du paiement le dédommages doivent être supportées par la partie en coulpe, car celui qui a fait toutes les diligences pour s'exonérer de l'obligation de paiement ne peut être déclaré responsable de la fluctuation des devises étrangères.

Comme conclusion, les commerçants, pour éviter de supporter le risque de l'érosion de la monnaie nationale à cause de l'inflation, surtout au cas du commerce extérieur, prévoient des clauses de protection contre le risque des devises étrangères par établir le prix du contrat dans la monnaie étrangère avec le paiement dans la monnaie nationale au cours officiel de BNR au jour du paiement effectif.

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Elena POPA

THE IMPACT OF EUROPEAN INTEGRATION ON THE GENERAL INSURANCES MARKET IN ROMANIA

Abstract

The present article aims to proving that the business concentration is the main tendency witch is to become manifest in the insurance field, determined by the increasing interest of international strategic investors to penetrate or consolidate their position on the Romanian insurance market.

The pressure settled by the competitors, determined by free access to the auchthonous market and by the inroading of an increasing number of European companies as well, will generate significant reorganizations, mergers, alliances and acquisition between local operators.

Actually, in the near future, the specific industry is going to settle, meaning that only the efficient insurance companies are meant to last through the years, most of them being international companies. The coming of the these international companies will determine a stiff competition and the final result is to be favourable for the client, the one who buys the insurance, improving the quality of services provided.

The efforts to develop new insurance products, the interest in diversifying the insurers' portfolio towards non-auto categories and consolidating the territorial networks as well as some alternative distribution channels, constitute measures in Romanian insurance industry maturation.

Insurances represent one of the areas in our country that has undergone serious transformations in order to sustain our country's integration in the European Union. During the preparing stage, a series of profound legislative changes took place, most of them being mainly directed towards harmonizing with the community acquis.

The European Insurance and Reinsurance Federation (CEA - Comité Européen des Assurances) includes 33 National Unions that represent over 5,000 insurance and reinsurance companies in Europe. Romania is represented by the National Union of the Insurance and Reinsurance Companies.

Among other advantages, our adhesion to CEA offers Romania the access to the debates that are currently taking place regarding all the regulations that are to be adopted with respect to the insurance market and to the discussions between the insurance industry and the European organisms.

The segment with the highest representation (80%) on the entire insurance industry in our country is represented by the general insurances, non-life insurances. If at the European level, the car insurances, although the most important class of the general insurances, do not represent a higher rate than 13% of the whole portfolio or 33% of the general ones, in Romania in the last 5 years, the car insurances have never represented less than 50% of the entire market or 60% of the general insurances.

CICR – Compulsory for the European Romania

The standards of the European Union in the compulsory insurance of car owners' civil responsibility area refer to the existence of the necessary legislation and mechanisms that oblige any car owner to have a CICR functional on the entire European space, including Switzerland. Since Romania's adhesion to the EU, the compulsory insurance of car owners' civil responsibility is functional on the entire territory of the European Union, including Romania as a member-stat, as well as Iceland, Norway, Lichtenstein and Switzerland. Thus, since the adhesion in the European Union, car owners have paid for only one policy for the compulsory insurance of car owners civil responsibility functional on the entire territory mentioned above.

The fees for the compulsory insurance of car owners' civil responsibility policies are exclusively established by companies. They are the only ones to decide whether they increase or diminish them, depending on the fed-back they get for this form of insurance, the average damage, the frequency of the damage or purchase expenses. Yet, the insurance agents must notify the Insurance Survey Commission (ISC) upon their fees as well as publish them. The modification of the CICR fees cannot be put into practice earlier than three months since the last notification.

According to the stipulations in the CICR for damages resulting from car accidents, put into practice by the Order 113133/2006 of ISC (published in the

Official Monitory, Part I, no. 977 of the 6th December 2006), the insurance agents print the CICR policy and the vignette insurance on the same document with the Green Card.

Since the 1st of January 2007, it was necessary for the CICR to turn into a type of insurance available on the entire territory of the European Economic Space (EES), with a unique fee. Since until the 1st of January, Romania had not yet signed the Warrant Multilateral Agreement with all the member states of the Agreement, it was necessary that the CICR document, available since the date in point, to be made up of the CICR policy and the standard Green Card form. Presently, Romania must still sign the document in case with only one state of the 32 member states of the Agreement so that the CICR will shortly be available on the entire territory of EES, without including the Green Card form.

In order to sign the Warrant Multilateral Agreement, Romania had to reach a level of 90% cars that have CICR. The common transport vehicles do not pay the Green Card policy.

Since the 1st of August 2007, in the member states of the European Union, Switzerland, Norway, Iceland, Croatia and Andorra, the CICR documents are no longer checked for the cars registered in Romania that circulate on their territory (this decisison was taken by the European Commission on the 9th of July 2007, which noticed that Romania's National Bureau signing the March 8th 2007 Addendum 3 to the Warrant Multilateral Agreement between the National Insurance Bureaux of the states mentioned above assured that all the conditions for the elimination of the CICR checking were observed according to the Directive 72/166/EEC).

The Warrant Multilateral Agreement only refers to the elimination, between the states that signed the Agreement of the border control, of the CICR for the cars registered or matriculated in Romania and Bulgaria. For all the other states of the Green Card system, but which have not signed the Multilateral Agreement (Moldavia, Ukraine, Serbia, Turkey, etc.), the control of the CICR document (Green Card) remains obligatory.

This decision of the European Commission does not eliminate the obligation of the car owners and users in Romania to conclude and maintain

functional the CICR that is functional on the territory of the states mentioned above.

According to Law 136/1995, with the subsequent revision and completions, and to the Order CSA 113133/2006in the case of controls made by the Romanian authorities on the cars registered and matriculated in Romania, the proof for having the CICR is the CICR document and the vignette insurance.

Romania has made intense efforts in this direction, taking measures both in making the public aware of the importance of having the CICR and in facilitating the checks concerning the cars that do not have the CICR, and CICR dissemination.

The Official Monitor of Romania, Part I, no. 686 of the 9th of October 2007 published the Order 11 of CSA meant to put into practice the new regulations concerning the civil insurance of car owners' civil responsibility for damages coming from car accidents. Besides some technical revision, the limits of damage have been raised starting from the 1st of January 2008 both for the material damages and for physical damages, with no patrimony prejudices produced by the same car accident, to 150,000 euros and, respectively, 750,000 euros per event, in 2009 the sums being likely to double compared to 2008.

The Law 304/2007 for the revision and completion of the Law 136/1995 concerning the insurances and reinsurances in Romania (published by the Official Monitor of Romania, Part I, no. 784 of the 19th of November 2007) eliminated the agreement of the insured person who is responsible for the accident, the damage being established and paid on the basis of the insurance available at the date of the accident or by the judge decision.

CICR – online

The CICR agents must transmit in the CEDAM database, the complete recordings of their own database concerning the concluded CICR contracts, which helps in checking to what extent cars are insured in Romania.

The CEDAM online database offers an easily accessible evidence for the CICR policies concluded in Romania. According to the plate number or the series of the vehicle bodywork, it is easy to check whether the car is insured on the website http://cedam.csa-isc.ro/index.php. The purpose of the CEDAM

database is to better watch the legislation observation concerning the car insurances and to facilitate the access of all the persons interested to the information concerning the existence of a CIRC policy for a certain car. The database is permanenetly updated in order to reflect the present situation of the compulsory insurance of car owners civil responsibility in Romania.

Expired CICR – Suspended Regsitration

Since the 1st of April 2006, the non-insured cars registration is suspended 90 days after the expiration of the technical inspection or the CICR insurance.

30 days after the annullation of the status of juridical person, in case the latter owns cars in circulation, their registration is automatically suspended until they are registered again, or depending on each situation, until they are legally taken out of his/her ownership.

If cars are driven on public ways after their registration has been suspended, drivers are fined 3,000 to 5,000 RON.

These stipulations were approved by the Governement in an Emergency Order 189/2005 (published in the Official Monitor, Part I, no.1179 of the 28th of December 2005). The order allows a strict monitoring on the car registration, while the CICR insurance companies and those that are entitled to perform periodical technical inspections (ITP) are obliged to provide data to the Inusrance Survey Commission and the Romanian Car Register.

The Street Victims Protection Fund

All the insurance agents authorized to conclude CICR policies for damages caused in accidents must set up the Street Victims Protection Fund.

In the Order 113127/2006 of CSA (published in the Official Monitor, Part I, NO. 733 of the 28th of August 2006), the norms concerning the Street Victims Protection Fund were put into practice.

The Street Victims Protection Fund was created in 1996, but starting with 2004, it functions as in all the member states of the European Union.

The Fund was made up in order to provide information to the persons injured in car accidents, such as the information center (CEDAM), and in order to pay damage to the persons injured in car accidents under certain conditions.

Thus, the Fund pays damage to Romanian physical and juridical persons, as well as to the residents in Romania or in the states of the European Economic Space, the Swiss Confederation and Croatia, for the prejudices coming from car accidents taking place on the territory of Romania - accidents caused by trams registered in Romania that do not have CRIC for the accident damage or car accidents whose author is not identified. In the case of car accidents whose authors are not identified, the damage is paid only for injuries or deaths, and in the case of accidents produced by identified authors with unregistered trams and cars, money is paid for material damage, too.

The money paid as damage by the Fund is established according to the legislation concerning the CICR in Romania. In case of money paid for material damage caused by unregistered cars and trams, the person who is damaged must pay a franchise rising to 100 euros or its equivalent in RON according to the currency rate communicated by BNR at the date when the accident was produced. If, as a result of the car accident having an unidentified author, the victim has suffered physical damage which calls for hospitalization for more than 60 days, the Fund pays money also for the material damage caused in the accident in case. In these cases, the victim also has to pay a franchise of 500 euros or its equivalent in RON according to the currency rate communicated by BNR at the date when the accident was produced.

As for the foreign citizens non-resident in Romania, they can be paid damage under the Street Victim Protection Fund incidence only if the mutual principle is respected: if the country they come from provide Romanian citizens the same right.

The Street Victims Protection Fund does not pay damage to persons guilty for the accident or those who were willing to be in the car in case or if it was proved they knew the car was not insured. If the damaged persons can recuperate the damage by an optional insurance, the Street Victims Protection Fund does not offer financial damage. The Fund does not pay damage for the public ways or urban "furniture" destruction.

Before 2004, the Fund only paid damage created by unidentified authors. The administrator of the Fund is the Cars Insurance Bureau of Romania (CIBR) which is an independent non-professional company.

In the states that are members of EU, this regulation has functioned since 1988 and is harmonized at the community level.

Generally, in all the states in the EEC and Switzerland, the fund that pays damage caused by unauthorized cars is called the Warrant Fund. Only in Italy, it has a name similar to that of Romania – the Street Victims Protection Fund.

CIBR recuperates all the damage provided by the Fund, through the regress right, from the person responsible for producing the car accident or from the one who did not fulfill the duty to conclude the compulsory insurance of car owners civil responsibility. Besides the insurances, the CIBR has to right to ask for the sums spent for maneuvering and paying the damage.

Since the 1st of January 2007, CIBR has been reinsured by the Swiss Re. The reinsurance agent covers the damage that exceeds a certain level.

The CIBR reinsurance is one of the conditions that had to be accomplished by Romania in order to sign the Warrant Multilateral Agreement.

The Amiable Notification, Regulated by the Government

The necessity to harmonize with the European Union practices and to align to the European standards concerning cars circulation in Romania has determined the modification of the normative documents in the insurance area. In order to meet this necessity, at the specialized European missions recommendations, ICS initiated a legislative project that facilitates a faster and less bureaucratic solution for the traffic incidents that result into slight crashes, without breaking the present circulation legislation.

The status of member state of the European Union stimulates Romania in adopting a series of good practices, having as reference other European experiences. The number of vehicles in circulation has registered a spectacular rise in the last years, which led to an increasing number of accidents and the increase of the demands addressed to the insurance societies for damage recuperation.

The law 304/2007 for the revision and completion of the law 136/1995 concerning insurances and reinsurances in Romania (published in the Official Monitor, Part I, no. 784 of the 19th of November 2007) introduced the concept of

"amiable notification" in case of car accidents that resulted into material damage.

Introducing this concept led to shortening the periods of damage recuperation in case of car accidents that resulted into material damage, representing an alternative to their solution. Their turning into a protocol by the police remains valid in the present legislation.

Thus, in case of slight car accidents where there are no injuries, the notification of the insurance companies can be based only on a typical form made by the insurance agent called "amiable car accident notification" where car drivers put down the circumstances where the accident took place, the identification data of the persons and cars involved as well as the insurance agency ones. They are sent to the insurance agency together with the insurance CICR policy. The "accident amiable notification" form is simultaneously handed in with the CICR. The insured driver may ask, during the availability period of the CICR policy, one or more documents in case the one he/she initially got was used, given away or lost.

The norms for using the "accident amiable notification" have not been elaborated yet.

The Optional Car Insurance - CASCO

The general insurance area is mainly represented by car insurance since cars play an important part in every individual's life. Besides, cars are bought either using credits or in leasing, so they are compulsorily insured. The market will be dominated by the car insurances which is in fact specific to the Eastern European. In case of low incomes, people are tempted to make insurances for the highest risk.

Car insurances are and will be the most important ones. However, since insurance companies are confronted with a lower damage rate, it is imperative for them to find common solutions to reduce damage that refers to the ways of damage liquidation, specialized assessment software, a unitary politics for the relationships with services. Since the value of the damage registered by the CASCO policies has lately exceeded the CICR, some of the insurance companies have started to accept changing the offer system concerning the CASCO

insurances. Thus, it has been introduced a system that allows differentiated fees for drivers. It offers wise drivers the cheapest insurances on the market, and the most "daring" ones, who cause more accidents, more expensive insurances. Older drivers, the married ones especially, who do not cause accidents, will pay lees for an insurance while those who cause more accidents will pay a higher insurance fee. Therefore, the company will act as a social justice maker (everyone will pay depending on the accidents he/she produces), but, in the same time, he/she will diminish the costs with the damage paid to the insured individuals.

Insurance companies have concluded conventions with car services, having also negotiated the cost of the devices, components and maneuver costs; they have also introduced the franchise costs to the CASCO policies and limited the commission costs, which did not lead to diminishing this market segment.

Until 2006, all the insurance agents members of the Car Insurance Bureau of Romania used to have the CASCO insurance available only for the damage caused on the Romanian territory and could extend their availability to other countries upon request. This was possible by paying a supplementary fee or for free in case a person bought the Green Card from the same insurance agent.

Since the 1st of January as a result of the unification of the two types of insurances, the Green Card and the CICR, the extension of the risks covered by the CASCO insurance is done only if the person having a CASCO insurance purchased the CICR insurance from the same insurance agent.

Building a common database capable to facilitate the assessment of the individual risks for the car insurances so that the Bonus-Malus system might be put into practice is an imperative necessity for the car insurances in Romania. It depends to a great extent on the introduction of the amiable notification introduction. If the Bonus-Malus system is not practiced on the entire market, insurance agents will not have means to discourage frauds that are possible under the condition of the amiable notification.

Home Insurances

As it is known, Romania is one of the European countries significantly exposed to natural disasters, especially earthquakes, floods and ground gliding.

The Government approved a law project (adopted by the Senate on the 5th of November 2007, according to the stipulations of the art. 76 pargraph (1) of the Constitution, which is republished) that refers to the compulsory insurance of homes against natural disasters. The maximum sum that home owners will annually pay on the new home insurances will be 20 euros for homes of A type and, respectively, 10 euros for homes of B type. Physical and juridical persons will be obliged to insure against natural disasters all the buildings destined to be dwelt, found in their ownership, registered in the evidence of the fiscal organs. In the case of physical persons who benefit from social aid, the compulsory insurance is paid from local budgets, from the sums allotted from the state budget.

According to the stipulations of this law project, the sum of money compulsorily insured is 20000 euros, equivalent in RON (at the curency rate communicated by BNR at the date of the home insurance contract conclusion) in case of homes of A type (buildings with resistence stucture made of ferro-concrete, metal or wood or with stone exterior walls, burnt brick or any other type of material resulted after a thermic and/or chemical treatment). The insurance rises to 10000 euros for homes of B type (buildings with exterior walls made up of non-burnt bricks or any other material that does not ask for thermic and/or chemical treatment). In case a home makes the object of a financial leasing contract, the conclusion of the insurance contract is the lodger's task.

In case of dwelling buildings in co-ownership, there will be one compulsory home insurance contract concluded under legal conditions for each of the buildings, irrespective of the number of owners. There will be only one fee paid, and a percentage owed by each co-insured individual is establisehd as a share that becomes the respective individual's duty.

The compulsory home insurance contract is annually concluded only by the insurance agents associated to the Insurance Pool against Natural Disasters (set up as an insurance - reinsurance commercial society) and who are authorized to conclude such contracts.

As for paying the fees partially or totally subsidised, it will be paid in the Pool's account from the local budgets, from the sums especially transferred from the state budget.

In case any of the risks stipulated in the contract is produced, the damage is paid upon a damage request that can only be drawn by the beneficiaries of the insurance policy against disasters.

Besides, the law creates some facilities with social character for the persons who dwell in social homes, respectively for those who benefit from social aid meaning that in their case, the insurance may be entirely or partially paid by the local authorities.

In case physical and juridical persons do not observe the obligaton to insure homes is a midemeanor and is sanctioned with a fine going from 500 to 1000 RON. The authorized insurance agent's refusal to conclude the home compulsory insurance is fined with 500 to 1000 RON.

Travel Medical Insurances – The Health Card

One year has elapsed since the principle of persons' free circulation has been successfully applied in the European Union territory and the travel medical insurance is no longer necessary when leaving the country. At the end of 2006 and the beginning of 2007, the majority of the specialists on the market estimated a high fall of the sales of this type, on the one hand due to its non-compulsory character, and on the other hand because of the introduction of the European health card. After a year of European integration, the sales of this type of insurance have not diminished at all.

Private medical insurances for travels abroad cannot be replaced by the European Health Card. Although both the Health European Card and the private health insurance for travels abroad are instruments meant to cover medical expenses, there are essential differences between the two, the benefits of the medical insurance being superior. Thus:

- the European Health Card is functional only in the European Economic Space plus Switzerland unlike the private medical insurances for travels abroad that are functional in any state of the world, depending on the needs of the person who wants an insurance;

- the European Health Card can be used only if the owner addresses a provider of medical services covered by the social security system corresponding to the legislation of the host state; a private insurance covers the medical expenses made in the private system;

- The European Health Card has a limited action, the types of medical care provided being necessary during the stay on the territory of the member

state, taking into consideration the type of actions and the length of the stay. This care is provided in order for the person needing it not to return to the home country and to continue the stay in secure medical conditions;

- unlike the card, a private medical insurance also covers the expenses associated to the sanitary repatriation, the expenses necessary for the repatriation in case in death, all the expenses for the hospitalization, all the accidents of any type happening during the stay on the territory of the country in case; the European Health Card offers its owner the rights offered by the public system that are similar to those of the residents of the state they visit;

-in certain member states there is a possibility for a card owner to be obliged to pay on the spot the value of the medical care provided, his/her request to be paid back is to be addressed to the Local Health Insurance House; in case a person has a private insurance, all the expenses are taken over and directly paid by the medical services providers from outside the country so that the insured person will not be obliged to pay himself/herself the expenses;

- last but not least, it must be mentioned that the European Health Card can be obtained only by persons that have paid their contributions to the health insurance public system, unlike the private medical system for travels abroad where there is not such a condition.

As a conclusion, because of the differences between the two instruments synthetically shown above, the European Health Card cannot substitute a medical insurance for travels abroad. Besides, the experiences of the states from the European Union where the insurance cards system has functioned for years show that all the owners of such a card also have insurance for the travels abroad concluded in a insurance private company.

Once the unique European market has grown since the end of the XXth century and given the tendency of globalization in economy, the insurance companies have engaged in a series of intense activities of merging and purchase in order to concentrate themselves under the form of big groups of insurance, whose capacity to provide financial systems and insurances at the international level may resist the global competition and in the same time to benefit from a more adequate diversification of the risks.

The fight for more and more territory in the central and eastern Europe is greater, revealing a higher interest of the international specialized groups in the high potential of countries such as the Czech Republic or Poland, but especially the new member states of the EU, Romania and Bulgaria.

The business concentration is the main tendency that will manifest in the future in the insurance area, determined by the high interest of the international strategic investors to inroad the Romanian insurance market or to consolidate their position here. The pressure of the competition determined by the free access to the national market and the penetration of a great number of European companies in Romania will generate significant force grouping, merging, alliances and purchases between the local operators.

Practically, a high number of specialized European companies will make it possible only for the efficient companies to remain on the market, most of them international ones. By their presence, the competition will become more exclusive which will lead to improving their services for the client. The interest in developing new services, the interest in diversifying the portfolio of insurance companies in the direction of non-car classes, the development of some strong territorial networks and of some alternative distribution channels represent measures whose implementation will surely contribute to maturing the insurance industry in Romania.

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THE IMPACT OF EUROPEAN INTEGRATION ON PENSION INSURANCE MARKET IN ROMANIA

Abstract

The present article chose to treat this work whereas the pension insurance market in Romania is a young growing market. Romanians started to become that, if they want a decent pension, they must take a decision and allocate a sum of the annual budget in this direction.

Insurance is one of the areas in our country that have suffered the most profound transformation in view of European Integration. A series of legislative changes have produced while preparing the accession to the European structures, in order to take into account harmonization with the acquis communautaire.

The legislation on private pensions is being prepared, with the deadline for completion July 2009. For preparing the draft law it has appealed to international consultancy.

Insurance is one of the areas in our country that have suffered the most profound transformation in view of European Integration. A series of legislative changes have produced while preparing the accession to the European structures, in order to take into account harmonization with the acquis communautaire.

Everyone must accept the fact that Romania is in direct competition with the insurance market in other EU countries, in terms of institutional and economic performance after January 1 2007.

Insurance companies in Romania must face specific conditions: frequent legislative changes, management objectives changing, dynamics of development , dynamics of services, synchronization phenomena and processes with the insurance accounts, dynamics of insurance contracts (termination, suspension, cancellation, supplementation, resumption of the force, etc..), staff training in terms of products offered, strengthening of responsibilities, development of

hardware and software equipment, synchronization of changes in application, and the algorithms, etc.

Although the segment with the largest share (80%) throughout the insurance industry in our country is general insurance (non-life insurance), the proportion of non-life segment will fall in favor of life insurance and the private pension, due to expansion of the middle segment of the population, in the years immediately following.

Prospects are good for pension insurance market. Romanians started to become aware of the fact that, if they want a decent pension, they must take a decision and allocate a sum of the annual budget in this direction. Specialists estimated an increase of 25% on fund of raising awareness to educate the population on this field, following the implementation of private pension reform. The development will continue in the coming years, so that in 2015, life insurance and private pensions will hold half of the total insurance industry in our country. This increase will be based on increasing investment in the strength of sales, advertising, but also a possible modification of the Fiscal Code for the purposes of placing deductibility to complete life and pension insurance for employees by employers.

The main purpose in 2007 was to implement the system of private pensions. Interest was maintained in 2008 too, when the first contributions were collected, when administrators began to publish their first results.

Until the introduction of private pensions, pension insurance was included in the class life insurance, as currently they are a distinct class of insurance.

Private pensions is, by definition, a form of long term savings, with a specific destination, having major social impact, that makes the authorities of each state to be very interested in the proper functioning of the system.

Mandatory private pension benefit is that by paying the same contributions to the pension system, future pensioners will receive a higher pension and in case of death of the participant during the payment of contributions, the fund accumulated will be inherited.

Pension reform in Romania means the introduction of the pension system based on 3 pillars proposed by the World Bank and implemented successfully in other European countries:

Pillar I - the current system of state pension

Pillar II - system of mandatory private pension

Pillar III - system of voluntary private pension

Pillar I - The current system of state pensions - is governed by the provisions of Law no. 19/2000 on public pension and other social security, with subsequent amendments.

According to the provisions of Law 19/2000, the following categories of persons are provided in the public system of pensions:

- self-based individual contract of employment and public officials;
- people who work in elective office or appointed under the authority of the executive, legislative or judicial office during and cooperating members of an organization of craft co-operatives, whose rights and obligations are assimilated in the public pensions, with those employees with individual contract of employment / civil servants;
- unemployed;
- people who carried out a gross income per calendar year, equivalent to at least 3 average gross wages and which are found in one of the following situations, and those who carried out the overlapping gross income per calendar year, equivalent to at least 3 salaries Average gross and which are found in two or more of the following situations: single-member, associate comanditaria or shareholders, directors or managers who contract administration or management, family members of the association, persons authorized to conduct self-employed in international institutions if they are not insured, the other people who are making income from professional activities.

Pillar II - The mandatory private pensions - is governed by the provisions of Law no. 411/2004 on pension funds managed privately, republished with subsequent amendments (published in the Official Gazette, Part I, no. 482 of 18.07.2007).

According to the provisions of Law no. 411/2004, the private pension funds will be mandatory contributed by employees aged less than 35 years who are insured under art. 5. 1 of Law no. 19/2000 on public pension and other social

security, with subsequent amendments. People aged between 35 and 45 years, contributing to public pension system, may join in the pension funds managed privately (Pillar II), membership being optional for participants in that age group.

To participate in a private pension scheme it is mandatory that the person under the age of 35 years to be engaged and to pay CAS, to choose a pension fund to bring in and sign the instrument of individual accession.

According to the legislation mentioned, all employees aged less than 35 years old, who entered the labor market starting on January 18th 2008, are obliged to choose a pension fund by pillar II in less than four months after the approval of the fund manager. Those who choose not to fund in these four months or those who have signed more than a pension fund during this period enter into the lottery, that is, are randomly distributed in proportion and between funds. The law also allows employees aged between 35 and 45 years who have not previously acceded to do so now - but they are not bound and therefore not get in the lottery.

Pillar III - Participation in a voluntary pension fund - is permitted in accordance with the provisions of Law no. 204/2006 on optional pensions (published in the Official Gazette, Part I, number 470 of 31.05.2006) for all employees, civil servants, persons authorized to carry out an employment or income persons who engage in professional activities or agricultural. Law no. 204/2006 does not specify an age limit up to which one can adhere to a voluntary fund. In the above mentioned act in art. Article 93 2. it is stipulated that "the right to voluntary pension opens at the request of the participant, with the following cumulative conditions":

a) the participant has reached the age of 60;

b) 90 monthly contributions have been paid at least;

c) personal assets are at least equal to the amount necessary to obtain the pension provided by voluntary minimum standards adopted by the Commission.

Considering legal retirement age of 60 years, one may opt to join a voluntary pension fund until the age of 52 years.

Judging in the spirit of the law, the text states that "the right to voluntary pension opens at the request of the participant". It follows that, in principle, a participant is not required to open the right to optional pension at the age of 60 years, necessarily, but he may decide to contribute a period, which would allow him to complete the 90 contributions even if he entered into the system after 52 years. We can conclude that if this age overcome it will be necessary to request the opening of the right to a pension at a date later than when reaching the legal retirement age of 60 years, so the contribution to reach 90 months.

The law contains indicators on the situation in which the participant, for various reasons, can not meet the three conditions cumulatively. Thus, if the participant decides to request the opening of his rightfull pension at the age of 60 years, even if the length of contribution of 90 months has not been achieved or acquired assets have not reached the minimum required for the minimum optional pension, it may receive "the existing account or single payment or installment payments staggered over a period of up to 5 years, at his option."

Under current legislation, the level of contributions transferred to the mandatory private pension increase from 2% of gross income in 2008 with half a percentage point per year to 6% of gross income in 2016.

Committee on Oversight System of Private Pensions (COSPP) is preparing a proposal to accelerate the increase contributions transferred to the mandatory private pension (Pillar II), the half-percentage point per year to one percentage point per year, because the level of contributions to reach 6% in 2012, not 2016, as required by current legislation. But the pace of increase in contributions is included in the mandatory private pension law, which is why the amendment may be made only by Parliament. Speeding contributions will help to increase the assets of pension funds and will give participants the chance of higher private pension.

COSPP has proposed to the Finance an increase in deducitility for the voluntary pension of 200 euros per year (for both the employee and the employer) to a variable phased deducitility, which can reach up to 1.000 euros per year for both the employee and the employer - ie a total of 2.000 euros per year. Deducitility increase in Pillar III will take the modifying Fiscal Code in September 2008. This increase in tax deducitility for optional pensions (Pillar III)

will be included in the draft amendment to the Fiscal Code, the project will be completed by the Ministry of Economy and Finance in September, to enter into force on 1 January 2009.

The procedure for the transfer of pension funds administered privately (Pilon II) is governed by the rule no. 3 / 2008 on the transfer of participants between pension funds managed privately. Thus, in the case of pension funds administered privately (Pilon II), and the voluntary pension funds (Pilon III), the transfer of funds is permitted without penalty, having gone through a period of at least 2 years after initial accession to the pension fund. If the participant wants to transfer earlier to another pension fund, the operation is possible on condition of the payment, to the initial fund, of a transfer tax of maximum 5% of the net personal assets held in that fund. In case a participant wants to transfer to another voluntary pension fund managed by the same manager, that person does not due transfer penalties to the manager.

They are not to pay penalties for transferring, participants who:

• requested the transfer due to changes in the pension scheme prospectus, if the request is made within 4 months of the amendment authorizing the prospectus;

• were engaged in missions abroad, ordered by the Romanian State and have been subject to random allocation as a result of its inability to adhere to a fund managed by private pension within the time prescribed by law and Commission rules. As a proof it is the attesting to that effect issued by the employer.

• fall in the statement referred to art. 33 of Rule no. 18/2007 concerning the accession of the original records and participants in pension funds managed privately, with subsequent amendments. Thus, people who have been subject to random assignment procedure, although they have signed a single act of individual membership during the initial accession to the pension funds managed privately, and 17 September 2007-17 January 2008, may submit to the COSPP a written complaint with copy of the instrument of accession individually signed and a copy of the notice of identity, within 6 months from the date of random allocation. If the Commission finds legal referral participant, he, together with his personal assets are transferred to the pension fund to which the

participant has signed the Act of Accession individual without a penalty charge transfer.

If the insured dies while helping to fund pays, the money is not lost, as in the case of Pillar I. Participants to compulsory private pension funds (Pillar II) arriving in the disability before they receive payment from the pension system will receive the existing funds in the private pension in full, according to rules approved by the COSPP (rule is issued in accordance with the Law no. 411/2004 on pension funds managed privately). Also, in case of death, the legal heirs of the participant will receive the amount of the mandatory private pension in the same way as a single payment. In the case of voluntary private pensions (Pillar III), secondary legislation requires all single payment in the event of disability or death. Under the act, active participant in disabled staff will continue to be administered and in the time period between the last payment of contributions to the fund participants and the payment date unique due to its rights. On the death of the participant, their personal assets continue to be administered and in the time period between the last payment of contributions to fund a participant before death and the date of transfer rights due to the beneficiaries.

At the time of retirement, a taxpayer will receive a pension both from the private administrator and the CNPAS. Each participant in the private pension funds mandatory (as well as optional) will receive at the time of his retirement a pension from the public pension system (from CNPAS) and the additional private pension system, according to the funds contributed to the (mandatory, optional, both or none). Retirement age must be different in this case. Thus, the public will be 65 years in the private system mandatory for all 65 years, but in private voluntary it will be a minimum of 60 years. The law provides that the creation of providers of pensions (annuities) when the private pension system will enter the phase of payment (the earlier, more than 6 ½ years in voluntary retirement and 20 years at the mandatory). Those suppliers pension will be calculated on the basis of actuarial value of pension and private pay. The amount of pension will depend on the amount accumulated in the personal account (which depends on the amount and duration of contributions and investment yields of private pension fund) and actuarial calculations that will be made at the retirement age for determining life expectancy.

At the time of retirement, a taxpayer will receive a pension administrator from both private and the CNPAS. The legislation on private pensions are being prepared, with the deadline for completion July 2009. For preparing the draft law has appealed to international consultancy. While the draft law on private pension payment is funded by the World Bank, the company that is to develop this project must be approved both by the Ministry of Labor and the World Bank. According to current legislation, Parliament must adopt the law for the calculation and payment of private pensions in July 2009, three years after the entry into force of the first private pension law (optional). It follows after the adoption of the mandatory private pension law in December 2006. Law of calculation and payment for private pensions will cover phase of payment (payout phase) for both systems: the compulsory and voluntary.

In principle, global practice mentions two systems of pensions' payment:

- Single amount (lump sum) - pension payment to the beneficiary of the entire value of the account or in a single tranche;
- Annuities (annuities) - the formation of viagere rents that can be paid either by the company manageming the fund, or by a specialized company. The amount of monthly annuity is determined on the basis of actuarial calculations that take into account the amount of economic parameters and data contained in biometric tables showing life expectancy for various categories of the population.

In practice, we can also meet combination of the two systems mentioned above.

Romanian legislation in force in the field of private pensions shows that a single sum payment is possible if the participant in the pension fund dies (in which case his legal heirs will receive the amounts accumulated in the account) or calls the right to a pension before the length of contribution 90 months have been reached or have accumulated the minimum required assets for the minimum optional pension. In this case, the participant or his heirs may receive "the existing account as a single payment or installment payments staggered over a period of up to 5 years, at his option." A similar provision is working in case the participant is receiving invalidity pension for illnesses which do not allow the resumption of activity (defined according to Law no. 19/2000 on the public system of pensions and other social security, with subsequent amendments)

International experience has shown that the entire collection of values of the economies in a single block is not indicated. The statistics proving that most of those who have proceeded in this way have spent that amounts for purposes other than pension (facing difficulties from the low level of state pension). Taking into account that, in this context, the purpose of social protection system of private pensions is not reached, representatives of the Romanian surveillance in the area have expressed, on several occasions, the view that they will support the adoption of a system of pension payment through annuities.

The contribution of a participant in a voluntary pension fund is converted into units of the fund in a participant account and pension fund manager invests the money in the voluntary financial instruments according to its policy of investment, defined in the prospectus voluntary pension fund. The amount accumulated in the participant account (equal to the number of units held responsible for it and multiplied by the value of a day of fund units) represents personal assets. The participants own personal assets from this acccount. The account can not be subject to any enforcement measures, it may not be pleged or licensed, it can not be used for providing loans or guarantee loans.

Almost one million of the 4.3 million participants in mandatory private pension funds (Pillar II) may wish to check any private pension, by accessing an Internet site made available by the company managing the fund. Until now, only four of the 14 mandatory pension funds offer this service, but the list will enlarge. Even so, over 68% of the clients of the mandatory private pension can always see their personal private pension (a list of these Internet sites, where you can check private pension, in order of launching the service in question is as follows: ALLIANZ - Tiriac, ING, BT Aegon, INTERAMERICAN).

Nearly 68% of participants to the optional pensions (Pillar III) enjoy this benefit as part of salary package, the employer contributing to a pension fund as such. Thus, in 68% of cases, the employer pays the optional pension contribution of the employee respectively, whether or not the employee contributes in its own name. This is segmental "corporate" market. On the other side there are participants that pay their own contribution to the optional pension system, without any employer's contributions. In this case we may find 32% of

participants (end-March of 2008) to the optional pension funds that represent "retail" market.

A compulsory private pension fund can not go bankrupt whereas all administrators of private pension contribute to the Guarantee Fund of the pension system, administered by the Committee of Private Pension. In accordance with the provisions of Law no. 411/2004, COSPP authorizes, endorses, controls and monitors all private pension funds. The regulation, coordination, supervision and control of activities of private pensions are the main coordinates of COSPP according to which they operate and protect the interests of participants and beneficiaries. One of the main objectives of the institution is ensuring the effective functioning of the private pension system and the necessary information.

In the first six months of 2008, COSPP approved and launched in the public debate over 15 acts, studies and analysis of the private pension system, participated in special events and meetings, both held in the country and abroad, also granted penalties for breaching the laws in the field.

The growing of insurance markets and private pensions in Romania is inevitable, but nobody can say how much they will increase.

Although there are enough insurance companies to be concerned by the increasing market share, what is realy important is the tendency to look to the final outcome. It notes the increasing importance of quality service to policyholders. A key role in developing the insurance will have the education of population, while we witness an increase of the purchasing power.

Pillar II private pension is, alongside the introduction of the flat tax, one of the most significant achievements of the current legislature in terms of developing economic environment. Private pensions market, either optional or compulsory, is at the top of the road.

For 2009, COSPP has ambitious plans, intending to promote another bill that would make corrections and changes in November to the Law no. 411/2004 on compulsory private pension funds, as well as to the Law no. 204/2006 on optional private pensions. The new law would introduce a series of new concepts, and a liberalization of the pension funds market. The project is still in

an early stage, many issues are still being discussed within the COSPP. Among the most important changes there are:

• introduction multifond: pension companies will be able (Pillar II) or will be forced (Pillar III) to administer at least 2 and 3 respectively pension funds, at different risk investment, so that participants can change options during the period of accumulation of contributions, according to the risk and the period of contribution that we still have to go;

• Average accepted yield calculation will be done differently by groups of risk investment;

• relaxation (Pillar II), or even elimination (Pillar III) of quantitative limits on imposed percentage for the investment of pension funds.

Also, COSPP intends to continue in 2009 lobbying to increase the deducitility on optional pensions, to accelerate contributions to the required pension funds.

Current legislation ensures the functioning of pension funds, without any risk, through numerous controlling ways, guarantees establishing the existence of the depositary and audits of companies authorized by CSSPP. The legislation will not be but never complete, there will always be processing in the light of market developments, the problems reported by operators and supervisory bodies. The practice is to say, certainly, the final word.

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COMPUTER-RELATED CRIMES

Abstract

The rapid growth and globalization of information technologies has dramatically changed the way people communicate. Millions of people pay bills, consulte professionals, conducte research and make connections with family and friends in cyberspace. As cyberspace continues to become an integral part of life, cybercrime or computer crime poses new challenges to the criminal justice system. The global nature of cybercrime raises difficult legislative problems of jurisdiction as criminals use offshore servers and Internet sites to avoid domestic regulations. Crime in cyberspace, such as cyberterrorism, cyber-money-laundering, cybergambling, Internet fraud and cyberstalking, can occur instantaneously, and offenders targete victims in other countries where the offence is not easily detected.

The seriousness of cybercrime is reflected in the fact that cyberspace has become the target of terrorists and organized crime groups.

Fifteen years ago, cartoonist Peter Steiner drew two dogs sitting in front of a computer, one saying to the other, "On the Internet, nobody knows you're a dog." This iconic adage, cute in its day, is now a warning.

Cybercrime is estimated to be a $600 billion market and looks set to grow in 2009 as the complexity of cybercrimes intensifies. The year 2008 concluded to be a year of an exponential increase in the activities of cyber criminals. Every day, criminals are invading countless homes and offices across the world – not by breaking down windows and doors, but by breaking into laptops, personal computers, and wireless devices via hacks and bits of malicious code.

Billions of dollars are lost every year repairing systems hit by such attacks. Some take down vital systems, disrupting and sometimes disabling the work of hospitals, banks, and 9-1-1 services around the world.

The capabilities and opportunities provided by the Internet have transformed many legitimate business activities, augmenting the speed, ease, and range with which transactions can be conducted while also lowering many of the costs. Criminals have also discovered that the Internet can provide new opportunities and multiplier benefits for illicit business. The dark side of the Internet involves not only fraud and theft, pervasive pornography and pedophile rings, but also drug trafficking and criminal organizations that are more concerned about exploitation than the kind of disruption that is the focus of the intruder community.

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Defining Cyber Crime

Cyber crime encompasses any criminal act dealing with computers and networks (called hacking). Additionally, cyber crime also includes traditional crimes conducted through the Internet. For example; hate crimes, telemarketing and Internet fraud, identity theft, and credit card account thefts are considered to be cyber crimes when the illegal activities are committed through the use of a computer and the Internet.

Cyber crime is the latest and perhaps the most complicated problem in the cyber world. "Cyber crime may be said to be those species, of which, genus is the conventional crime, and where either the computer is an object or subject of the conduct constituting crime" (13). "Any criminal activity that uses a computer either as an instrumentality, target or a means for perpetuating further crimes comes within the ambit of cyber crime"(12).

A simple yet sturdy definition of cyber crime would be "*unlawful acts wherein the computer is either a tool or a target or both*".

Reasons for cyber crime

Hart in his work " The Concept of Law" has said 'human beings are vulnerable so rule of law is required to protect them'. Applying this to the cyberspace we may say that computers are vulnerable so rule of law is required to protect and safeguard them against cyber crime. The reasons for the vulnerability of computers may be said to be:

1. *Capacity to store data in comparatively small space*

The computer has unique characteristic of storing data in a very small space. This affords to remove or derive information either through physical or virtual medium makes it much more easier.

2. *Easy to access*

The problem encountered in guarding a computer system from unauthorised access is that there is every possibility of breach not due to human error but due to the complex technology. By secretly implanted logic bomb, key loggers that can steal access codes, advanced voice recorders; retina imagers etc. that can fool

biometric systems and bypass firewalls can be utilized to get past many a security system.

3. *Complex*

The computers work on operating systems and these operating systems in turn are composed of millions of codes. Human mind is fallible and it is not possible that there might not be a lapse at any stage. The cyber criminals take advantage of these lacunas and penetrate into the computer system.

4. *Negligence*

Negligence is very closely connected with human conduct. It is therefore very probable that while protecting the computer system there might be any negligence, which in turn provides a cyber criminal to gain access and control over the computer system.

5. *Loss of evidence*

Loss of evidence is a very common & obvious problem as all the data are routinely destroyed. Further collection of data outside the territorial extent also paralyses this system of crime investigation.

Cyber criminals

Who is behind such attacks? It runs the gamut—from computer geeks looking for bragging rights…to businesses trying to gain an upper hand in the marketplace by hacking competitor websites, from rings of criminals wanting to steal your personal information and sell it on black markets…to spies and terrorists looking to rob our nation of vital information or launch cyber strikes.

The cyber criminals constitute of various groups/ category. This division may be justified on the basis of the object that they have in their mind. The following are the category of cyber criminals:

1. *Children and adolescents between the age group of 6 – 18 years*

The simple reason for this type of delinquent behaviour pattern in children is seen mostly due to the inquisitiveness to know and explore the things. Other cognate reason may be to prove themselves to be outstanding amongst other children in their group. Further the reasons may be psychological even.

2. *Organised hackers*

These kinds of hackers are mostly organised together to fulfil certain objective. The reason may be to fulfil their political bias, fundamentalism, etc. The Pakistanis are said to be one of the best quality hackers in the world. They mainly target the Indian government sites with the purpose to fulfil their political objectives. Further the NASA as well as the Microsoft sites is always under attack by the hackers.

3. *Professional hackers / crackers*

Their work is motivated by the colour of money. These kinds of hackers are mostly employed to hack the site of the rivals and get credible, reliable and valuable information. Further they are ven employed to crack the system of the employer basically as a measure to make it safer by detecting the loopholes.

4. *Discontented employees*

This group include those people who have been either sacked by their employer or are dissatisfied with their employer. To avenge they normally hack the system of their employee.

Romanian Legal Framework on Cyber crime

1. *International conventions:*

- National Convention on Cybercrime, Budapest, 23.XI.2001
- Declaration on freedom of communication on the Internet, Strasbourg, 28.05.2003

2. *Laws :*

- Provisions on preventing and fighting cybercrime (The cybercrime related provisions are incorporated in Title III of the Anticorruption law no 161/2003 published in the Official Monitor no 279 from 21 April 2003)
- Government Emergency Ordinance no. 79 of 13 June 2002, concerning the general regulatory framework for communications
- Law no.365 of 7 June 2002 on electronic commerce
- Government Ordinance no. 34 of 30 January 2002 on access to, and interconnection of, electronic communications network and associated facilities
- Government Ordinance no. 31 of 30 January 2002 on postal services
- Government Ordinance no. 20 of 24 January 2002, concerning public acquisitions by means of electronic bids

- Law no. 676 of 21 November 2001, concerning the processing of personal data and the protection of privacy in the telecommunications sector
- Law no. 455 of 18 July 2001 on Electronic Signature

3. *Guide for applying the Cyber crime law*
   www.riti-internews.ro
   www.mcti.ro

The occurrence of cyber crime has become a serious and growing threat. High priority is given at European level to tackling the problem.
The 2007 Internet Crime Report cites the top ten countries by amount of perpetrators of online crime. In descending order, the top ten list includes the United States, the United Kingdom, Nigeria, Canada, Romania, Italy, Spain, South Africa, Russia, and Ghana.Our country ,along Nigeria is considered to be a "hotspot" for cyber crime.

Operating as a full member of the European Union since January 2007 requires new solutions – compared to the existing methods – to tackle the phenomenon of cyber crime. Due to the complexity of the issue, which recently has more and more serious consequences (e.g. cyber terrorism, attacks on financial and banking data bases etc.) and to the fact that it has no border limits, proper measures have to be taken at national level to ensure that the law enforcement personnel have the necessary tools to counteract cyber criminality.

In matters related to cyber crime, Romania applies the provisions of Law no. 161/2003 regarding certain measures to ensure the transparency and the exercise of public dignities, public functions and business environment, preventing and sanctioning corruption and of Law no. 39/2003 on organized crime. The Council of Europe Convention on cyber crime was also ratified by Romania through Law no. 64/2004. Effective measures to counter organized crime, including cyber crime were set out by the National Strategy on Fighting Organized Crime and its action plan, approved by GD no. 1171 from September 2005.

To step further in addressing in an efficient manner the countering of the cyber crime, assistance is longer needed to identify the possible gaps of the existing legislation in the field, set out a methodology and working procedures for dealing with such cases, to prepare the professionals (prosecutors and police

officers) in advance investigation techniques of the cyber crime and provide them with the necessary software applications to support such tasks.

Frequently Used Cyber Crimes

1. *Unauthorized access to computer systems or networks*

Unauthorized access to computer systems or networks means any person who secures access or attempts to secure access to a protected system.
This activity is commonly referred to as hacking. The Romanian law has however given a different connotation to the term hacking, so we will not use the term "unauthorized access" interchangeably with the term "hacking".

2. *Theft of information contained in electronic form*

This includes information stored in computer hard disks, removable storage media etc.

3. *Email bombing*

Email bombing refers to sending a large number of emails to the victim resulting in the victim's email account (in case of an individual) or mail servers (in case of a company or an email service provider) crashing

4. *Data diddling*

This kind of an attack involves altering raw data just before it is processed by a computer and then changing it back after the processing is completed. Electricity Boards in Romania have been victims to data diddling programs inserted when private parties were computerizing their systems.

5. *Salami attacks*

These attacks are used for the commission of financial crimes. The key here is to make the alteration so insignificant that in a single case it would go completely
unnoticed. E.g. a bank employee inserts a program, into the bank's servers, that deducts a small amount of money (say Rs. 5 a month) from the account of every customer. No account holder will probably notice this unauthorized debit, but the bank employee will make a sizable amount of money every month.

To cite an example, an employee of a bank in USA was dismissed from his job. Disgruntled at having been supposedly mistreated by his employers the man first introduced a logic bomb into the bank's systems.

Logic bombs are programmes, which are activated on the occurrence of a particular predefined event. The logic bomb was programmed to take ten cents from all the accounts in the bank and put them into the account of the person whose name was alphabetically the last in the bank's rosters. Then he went and opened an account in the name of Ziegler. The amount being withdrawn from each of the accounts in the bank was so insignificant that neither any of the account holders nor the bank officials noticed the fault.

It was brought to their notice when a person by the name of Zygler opened his account in that bank. He was surprised to find a sizable amount of money being transferred into his account every Saturday.

6. *Denial of Service attack*

This involves flooding a computer resource with more requests than it can handle. This causes the resource (e.g. a web server) to crash thereby denying authorized users the service offered by the resource. Another variation to a typical denial of service attack is known as a Distributed Denial of Service (DDoS) attack wherein the perpetrators are many and are geographically widespread. It is very difficult to control such attacks. The attack is initiated by sending excessive demands to the victim's computer(s), exceeding the limit that the victim's servers can support and making the servers crash. Denial-of-service attacks have had an impressive history having, in the past, brought down websites like Amazon, CNN, Yahoo and eBay!

7. *Virus / worm attacks*

Viruses are programs that attach themselves to a computer or a file and then circulate themselves to other files and to other computers on a network. They usually affect the data on a computer, either by altering or deleting it. Worms, unlike viruses do not need the host to attach themselves to. They merely make functional copies of themselves and do this repeatedly till they eat up all the available space on a computer's memory. 170 The VBS_LOVELETTER virus (better known as the Love Bug or the ILOVEYOU virus) was reportedly written by a Filipino undergraduate.

In May 2000, this deadly virus beat the Melissa virus hollow - it became the world's most prevalent virus. It struck one in every five personal computers in the world. When the virus was brought under check the true magnitude of the losses was incomprehensible. Losses incurred during this virus attack were pegged at US $ 10 billion.

The original VBS_LOVELETTER utilized the addresses in Microsoft Outlook and emailed itself to those addresses. The e-mail, which was sent out, had "ILOVEYOU" in its subject line. The attachment file was named "LOVE-LETTER-FORYOU. TXT.vbs". The subject line and those who had some knowledge of viruses, did not notice the tiny .vbs extension and believed the file to be a text file conquered people wary of opening e-mail attachments. The message in the e-mail was "kindly check the attached LOVELETTER coming from me".

Since the initial outbreak over thirty variants of the virus have been developed many of them following the original by just a few weeks. In addition, the Love Bug also uses the Internet Relay Chat (IRC) for its propagation. It e-mails itself to users in the same channel as the infected user. Unlike the Melissa virus this virus does have a destructive effect. Whereas the Melissa, once installed, merely inserts some text into the affected documents at a particular instant during the day, VBS_LOVELETTER first selects certain files and then inserts its own code in lieu of the original data contained in the file. This way it creates ever-increasing versions of itself. Probably the world's most famous worm was the Internet worm let loose on the Internet by Robert Morris sometime in 1988. The Internet was, then, still in its developing years and this worm, which affected thousands of computers, almost brought its development to a complete halt. It took a team of experts almost three days to get rid of the worm and in the meantime many of the computers had to be disconnected from the network.

8. *Logic bombs*

These are event dependent programs. This implies that these programs are created to do something only when a certain event (known as a trigger event) occurs. E.g. even some viruses may be termed logic bombs because they lie dormant all through the year and become active only on a particular date (like the Chernobyl virus).

9. *Trojan attacks*

This term has its origin in the word 'Trojan horse'. In software field this means an unauthorized programme, which passively gains control over another's system by representing itself as an authorised programme. The most common form of installing a Trojan is through e-mail. E.g. a Trojan was installed in the computer of a lady film director in the U.S. while chatting. The cyber criminal through the web cam installed in the computer obtained her nude photographs. He further harassed this lady.

10. *Internet time thefts*

Normally in these kinds of thefts the Internet surfing hours of the victim are used up by another person. This is done by gaining access to the login ID and the password.

11. *Web jacking*

This term is derived from the term hi jacking. In these kinds of offences the hacker gains access and control over the web site of another. He may even mutilate or change the information on the site. This may be done for fulfilling political objectives or for money.

Combating cyber crimes

A prerequisite for combating computer-related crimes is to criminalize acts of computer wrongdoing.

The next crucial element of any international effort against cybercrime is to facilitate technology transfer and engage in capacity-building. Legal and technology experts need to cooperate closely without any barriers whatsoever. The digital divide between the legal and technical matters need to be closed at the national, regional and global levels to effectively put up a fight against what is essentially a global crime wave. Crime has grown so fast in the "bottomless world of cyberspace" that legal and law enforcement bodies should "step up to the plate",

In order to control cybercrime, it is important to strive for harmonization in criminal law to develop a seamless mutual assistance framework. Technology

will continue to grow and, as it did, new criminal opportunities would be created.

the worldwide proliferation of new information and communication technologies has given rise to more forms of computer-related crime, which pose threats not only to the confidentiality, integrity or availability of computer systems, but also to the security of critical infrastructure. Technological innovation gives rise to distinct patters of criminal innovation.

When combating such crimes, a number of forensic problems challenge investigators, prosecutors and judges. Effective investigation and prosecution of computer-related crime often require tracing criminal activity through a variety of Internet service providers or companies, sometimes across national borders, which may result in difficult questions of jurisdiction and sovereignty. Computer-related crime, therefore, necessitates international cooperation, which requires countries to be equipped with the necessary legal, procedural and regulatory tools. A number of regional and interregional efforts have been undertaken in recent years, leading to several significant accomplishments. In order to bring those efforts to fruition, it is necessary to support a wide range of research on the various aspects involved in combating computer-related crime to foster an active partnership between government and the private sector.

Computer-related crime includes theft of telecommunications services or computer services by using hacking techniques. Servers and websites could be targets of denial-of-service attacks, viruses and worms. Computers were also used as instruments to commit crime, such as modification of data, electronic vandalism, forgery and counterfeiting, information piracy, industrial espionage and copyright infringement. There were many types of computer-related crime involving attacks on banks or financial systems, as well as fraud involving transfer of electronic funds. Other problems involve telemarketing and "phishing" or spoofing spam. Existing offences such as extortion and harassment are also carried out online. In recent years, increasing attention has been devoted to the relation between terrorism and the Internet, as the Internet was being used to facilitate terrorist financing and as a logistics tool for planning terrorist acts.

Conclusions

Undeterred by the prospect of arrest or prosecution, cyber criminals around the world lurk on the Net as an omnipresent menace to the financial health of businesses, to the trust of their customers, and as an emerging threat to nations' security. Headlines of cyber attacks command our attention with increasing frequency. According to the Computer Emergency Response Team Coordination Center (CERT/CC), the number of reported incidences of security breaches in the first three quarters of 2008 has risen by 54 percent over the total number of reported incidences in 2007. Moreover, countless instances of illegal access and damage around the world remain unreported, as victims fear the exposure of vulnerabilities, the potential for copycat crimes, and the loss of public confidence.

Cyber crimes—harmful acts committed from or against a computer or network—differ from most terrestrial crimes in four ways. They are easy to learn how to commit; they require few resources relative to the potential damage caused; they can be committed in a jurisdiction without being physically present in it; and they are often not clearly illegal

The laws of most countries do not clearly prohibit cyber crimes. Existing terrestrial laws against physical acts of trespass or breaking and entering often do not cover their "virtual" counterparts. Web pages such as the e-commerce sites recently hit by widespread, distributed denial of service attacks may not be covered by outdated laws as protected forms of property. New kinds of crimes can fall between the cracks, as the Philippines learned when it attempted to prosecute the perpetrator of the Love Bug virus, which caused billions of dollars of damage worldwide.

Effective law enforcement is complicated by the transnational nature of cyberspace. Mechanisms of cooperation across national borders to solve and prosecute crimes are complex and slow. Cyber criminals can defy the conventional jurisdictional realms of sovereign nations, originating an attack from almost any computer in the world, passing it across multiple national boundaries, or designing attacks that appear to be originating from foreign sources. Such techniques dramatically increase both the technical and legal complexities of investigating and prosecuting cyber crimes.

The growing danger from crimes committed against computers, or against information on computers, is beginning to claim attention in national capitals. In most countries around the world, however, existing laws are likely to be unenforceable against such crimes. This lack of legal protection means that businesses and governments must rely solely on technical measures to protect themselves from those who would steal, deny access to, or destroy valuable information.

Self-protection, while essential, is not sufficient to make cyberspace a safe place to conduct business. The rule of law must also be enforced. Countries where legal protections are inadequate will become increasingly less able to compete in the new economy. As cyber crime increasingly breaches national borders, nations perceived as havens run the risk of having their electronic messages blocked by the network. National governments should examine their current statutes to determine whether they are sufficient to combat this kinds of crimes . Where gaps exist, governments should draw on best practices from other countries and work closely with industry to enact enforceable legal protections against these new crimes.

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THE JURIDICAL STATUS OF ADOPTION BY SAME-SEX COUPLES

Adoption represents – beyond doubt – one of the most actual and much disputed phenomena of the contemporary Law.

Seldom met in traditional societies, the institution of adoption has a spectacular development in almost all the countries, especially after the Second World War.

As a complex sociological and juridical phenomenon, adoption is on one hand a means of solving the child's family problems but on the other hand it can be a source of family problems, if the rights of those implied in adoption and, especially the fundamental rights and the child's interested are trespassed.

One can easily state that adoption "has won", in the sense that it has become an international phenomenon, which has called not only the national parliament's attention but also that of the international organisms.

Unfortunately, the noble purpose of the international adoption is often associated to mercantile interests. The juridical adoption terminology is doubled by a terminology with negative connotations, such as: "child trade", "demand", "offer", "exporting" and "importing" countries, "intermediaries" who facilitate the international children adoption.

The affirmation that adoption can be a means of child protection, this one missing his family environment in his native country, risks to be translated by the idea that the international adoption is a means for the families in developed countries to adopt children from the countries with economic and political problems.

Far from being, in practice, such a noble institution as it may seem at first look, adoption and, especially the international adoption, offers a complex scene.

The generosity and the altruism of the internal and international regulations in favor of adoption express, at the same time, great concern for the children's rights which are often trespassed, in the guise that the international adoption happens in the interest of the adopted.

Thus, the legislation concerning adoption cannot be but a series of rules determined on one side by the "sympathy" for this institution and on the other side by the society's "intolerance" against facts that distort adoption from its

noble purpose to offer the child a family that will educate and offer him adequate conditions for a harmonious development.

In keeping with family tradition, religious concepts, customs and even history, different national legislations reflect different attitudes towards adoption.

There are legislations that ignore or even forbid adoption and legislations that regulate and encourage this institution.

In the first category there are legislations from Vietnam, some countries from South America, that don't regulate adoption; this also happens in the Muslim countries where the Koran forbids adoption – except for Tunis.

What is remarkable is that most of the law systems regulate adoption as an institution which allows establishing family relationships between the adopted and the adopter and devote the principle according to which adoption is realized in the child's interest, as his protection measure.

The legislative activity in every country must inevitably consider other countries' experience, the way they have solved some problems of legislative politics. When the political isolation of the countries belongs to the past and when cooperation involves relationship at all levels (economic, political, cultural, etc), the compared law became an essential orientation element for the legislative activity in every country, certainly adapted to each of it, but also adapted to the common realities of more countries.[1]

Studying and using the comparative law is not an action against the principle of national suzerainty, because taking over other countries' legislative rules is itself a suzerainty act that the state does only if it considers they serve the interests of the national political legislation.

As shown in a reference book on comparative law, "The law history shows that law has always wanted to go beyond the national condition and achieve universality. The Roman law is the best example, as it has been applied to a great number of people, not only **rationae imperii** but also **imperio rationis,** due to its logic and equity valences.[2]

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[1] See, for the development, René David, Camille Jauffret – Spinosi, Les grands systèmes de droit contemporain, 11-e édition, Ed. Dlloz, Paris, 2002, pages 4 and the following ; Pierre Legrand, Dreptul comparat, Ed. Lumina Lex, Bucarest, 2001, pages 15 and the following

[2] Victor Dan Zlătescu, Compared private law, page 11

The Romanian authors Constanţa Călinoiu, Victor Duculescu and Georgeta Duculescu, in "Treaty of constitutional compared law" - fourth edition – prove that the compared law fulfills more functions, that is: to know the own law concerning the reference to other states' legislations: **the normative function**, to improve the national legislation and, the last but not the least, a scientific function. This involves a better knowledge and a more thorough investigation of the law science in order to identify some constants, some values that should be promoted by every legislation, to keep in touch with the world wide transformations, the new elements that the law science must know and promote"[1].

The authors mentioned above quote a Romanian famous compatriot who lived in France, Leontin- Jean Constatinesco: "Indeed, the comparison allows not only a conscious inner view of another juridical world, but also to take some distance from your own regime that appears differently. First of all, this allows discovering, in your own juridical rules new aspects, good and bad qualities that had been hidden. Comparison may bring into light that, for example, some elements that characterize some national juridical institutions have less importance than they are given by the national jurists; one may discover that a juridical institution considered essential, because it was giving a necessary answer to some permanent problems, is nothing but the result of some accident or happening. Comparison may reveal that in other juridical regimes there are simpler or closer institutions that may solve the same problem. It may show why and how some national institutions are old-fashioned and overfulfilled…[2] "

The adoption institution has a long history, and "borrowing" preventions from other legislations has always been a frequent practice.

In what concerns adoptions, the compared law authors revealed that many preventions from the Roman legislation had been inspired by the Greek legislation. According to some authors, the Law of the XII Tables itself has some elements from Ancient Greek (Solon from Athens' Laws)[3].

But, of course, only the juridical systems may decide the taking over of some comparative law elements. There are still a lot of differences between state

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[1] Constanţa Călinoiu, Victor Duculescu, Georgeta Duculescu, Drept constituţional comparat. Treaty, IVth edition, vol. I, Ed. Lumina Lex, Bucarest, 2007, pages 55-56
[2] Leontin-Jean Constantinesco, Tratat de Drept Comparat, vol. I, Introducere în dreptul comparat, Ed. All, Bucarest, 1997, pages 311-312
[3] Constantin Călinoiu, Victor Duculescu, Georgeta Duculescu, op. cit., vol. I, pag. 46

legislations, their juridical systems, so that the taking over of some "undesirable" elements from other legislations could make confusions and even dysfunctions in the judicial system. But beyond the essential appreciative national elements, one can clearly distinguish the main law principles, validated by practice and acknowledged in many international documents, as it is, for example in adoptions, the interest of the adopted.

The adoptions by same-sex couples or single persons having a homosexual orientation have known a gradual development.

First rejected, as the sexual minorities didn't have any legal protection, this issue has started to develop when homosexuals and lesbians have become more and more present in social life and have started to claim equal rights with all the others citizens. Consequently, legislation has evaluated, some states allowing adoption by same-sex couples, while others decline this right.

A close examination of the solutions known in the comparative law offers a variety of solutions.

In the United States of America, same-sex couples can adopt in the states of California, Massachusetts, New Jersey, New Mexico, New York, Ohio, Vermont and Wisconsin, and in the federal capital Washington DC. Florida is the only state where adoption by same-sex couples is completely forbidden. In Mississippi, Colorado and Utah, this kind of adoption is simply impossible, because only married couples can adopt, and marriage between same-sex persons is not recognized.

Another problem raised by the decision organisms and jurists in the USA was the possibility of same-sex couples to adopt a child[1]. As we already know, adoption by same-sex couples is possible in a few states, including the USA (California, Connecticut, Massachusetts, New Jersey, etc).

A tribunal in Oklahoma has recently declared as illegal some legislative provisions which forbade adoptions by same-sex couples. In Colorado, we are going to vote in favor of adoption by same-sex couples. Mention should be made that until now, in this state, homosexuals and lesbians had the right to adopt children, but not as couples recognized as such.

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[1] LGBT adoption, http://en.wikipedia.org. "Single parent adoption by lesbian, gay, and bisexual individuals is legal in every state except Florida. Additionally, Utah prohibits adoption by a person who is cohabiting in a relationship that is not a legally valid and binding marriage."

In Canada, adoption is within provincial/territorial jurisdiction. Adoption by same-sex couples is legal in every province and territory except for New Brunswick, Prince Edward, Island and Nunavut, although same-sex couples may marry all over the country. In Alberta, stepchild adoption is allowed. In Yukon, the law regarding adoption is ambiguous.

In Romania and the Republic of Moldavia adoption by same-sex couples is not allowed. However, worldwide, there are jurisdictions that allow this thing. Adoption by same-sex couples is legal in Andorra, Belgium, Iceland (since June 2006), the Netherlands, Great Britain, Sweden, South America and Spain. Not all these countries recognize marriage between same-sex persons; adoption can be made by same-sex couples which are not married, that are involved in a de facto relation or a civil partnership. In Denmark, France (since February 2006), Germany and Norway "stepchild-adoption" is permitted, so that the partner in a civil union can adopt the natural child of his or her partner. In some countries like the Republic of Ireland, individual persons, whether heterosexual or homosexual, cohabiting or single may apply for adoption.

An important document is the he Declaration of Montreal on Lesbian, Gay, Bisexual, and Transgender Human Rights (LGBT). This document identifies several areas in which action needs to be taken:

- freedom to engage in consensual same-sex sexual activity
- government action against crimes and hate, and support for those who plead for LGBT rights
- end of restrictions based on morality and discouraging the LGBT implication against AIDS
- right to asylum for those fleeing persecution based on sexual orientation or gender identity
- Consultative state for ILGA and other organizations for LGBT rights, to the UN Human Rights Council
- Cooperation and coordination in a worldwide information campaign, in developed and developing countries (called in the declaration "the global north" and the "global south")
- Marriage between same-sex persons and adoption right for the LGBT persons
- funding for sex reassignment surgery for the transgender or transsexual persons

Throughout the existence of the European Court of Human Rights, the issue of the adoption of a child by a homosexual person was largely debated in

the **Phillipe Freté versus the State of France** case which will be examined as follows.

The Phillipe Fretté versus the State of France case (request 36515/2002, court ruling of February 26 2002)

Regarding this matter, CEDO's Third Section decided with four votes in favor and three against, which having refused to agree with the adoption of a child by an unmarried homosexual does not represent the breaking of the European Convention on Human Rights, art. 14 and 8, given the fact the refusal had a legitimate purpose, the one of protecting the child's health and rights considered by the adoption procedure, thus the motivations the French Government presented were considered to be rational and unbiased.

The circumstances of the matter were the following: in October 1991, Phillipe Fretté requested a preliminary agreement in order to adopt a child. The Social Action Office in Paris rejected his request on May 3rd 1993, also rejecting the appeal on October 15 1993.

A social report from Mars 2nd 1993 stated that "Mr. Feretté has strong human and educational qualities. The question that follows is that of the uncertainty weather he should be or should not be given the right to adopt a child, taking into account his features: male, unmarried, homosexual".

On January 25 1995, The Administrative Court of Paris cancelled the decision through which Phillipe Fretté had been refused the agreement, yet this decision was itself annulled in October 1996 by the State Council. The decision of the State Council refers to the rejection of the agreement, which took notice of the fact that if "the solicitor's choice of life should be respected, the receiving conditions that he ought to have provided the child with could have presented important risks while bringing up this child". Following this refusal, Phillipe Fretté addressed to the European Court on Human Rights, complaining that the criticized decisions led to the refusal of the adoption, mainly on the grounds of his homosexuality, which stood as an arbitrary interference in his private and family life, thus stated in art. 8 of the Convention. The Court, through its Third Section decision released on February 26 2002, avoided a direct approach to the right of homosexuals to adopt children, and only stated that the refusal of the agreement had been based only on the solicitor's sexual orientation.

ECHR's decision gave way to the critical statement of Prof. Christine Courtin, statement that can be found in the "Curierul Judiciar" Magazine, no.6/ 2006.

Although the Strasbourg Court admitted that the case was treated differently regarding the right to adopt, it has however hesitated to affirm as to weather the difference was discriminating or not.

The decision stresses upon the fact that "the interest of the possible adopted children demands that no adopting parents' category should be excluded on other grounds than the ones referring to educational and human qualities". On one hand, concerning democratic societies, there is no agreement regarding the necessity of preventing homosexual unmarried men from adopting. The French Government stated that, on the contrary, even if the refusal of the adoption is mainly based on the solicitor's sexuality, there is no reason for one to see it as a discriminating matter, for the only interest is the one of the child that is to be adopted. The difference of treatment thus finds its reason in "the lack of an agreement regarding the right of a homosexual person to adopt a child". For the Court of Strasbourg, decisions of rejecting the adoption request aim at a legitimate purpose, for they seek to protect the rights and health of children that could undergo an adoption procedure. In this case, the unfavorable difference of treatment for the unmarried persons that chose to come out is or is not disproportional and unreasonable with regard to the aimed at purpose, which is the best interest of the child who claims a family profile that will best suit his growing up? French Judge Costa considers that the actions of the European judges are mainly based on precaution. The European Court on Human Rights admits that, given the right of an unmarried homosexual to adopt a child, each member state should be invested with the freedom of choice, considering the fact that this is a matter of dispute in the Council of Europe, in a moment that appears to be one of transition for the European Law. This is why, through the February 26 2002 decision, it considered that French national authorities "reasonably and legitimately found that the right to adopt the solicitor referred to, according to art. 343-1 of the Civil Code, was in fact limited by the interest of the children that are to be adopted, in spite of the legitimate desires of the solicitor and without bringing into discussion his personal choices and that the difference in treatment is not discriminating, as stated in art. 14 of the Convention"[1].

It should be noted that French judiciary procedure offers an array of solutions regarding the homosexual paternity. Therefore, in 1991, The Court of Pau, confronted with the situation of trusting the child to the mother, who lived

[1] "Curierul judiciar", year LIV New series, no. 6, June 2003

an ambiguous life and the outed father, which had a long term commitment with another man, considering the option and the interest of the child, who felt better while being with his father, gave custody to the father.

On the other hand, Rennes Court of Appeal considered that a father who has immoral homosexual relations is incompatible with the concept of parenthood. The First Section of French Supreme Court considered, back in 1998, that taking into account the father's sexuality, spending their holydays with him would be unsafe for the children's moral and mental health, thus refusing this right.

In 1994, the same Court granted a homosexual male the paternity of a child born by the insemination of a mother, she also being involved in a lesbian relationship.

It appears that, in the above case, the judge acknowledged the homosexuality concept, while also acknowledging the incapacity of the given person regarding parenthood, thus considering the child's interest and the risks these circumstances may bring by.

It should also be noted that, on February 24 2000, in a similar case, Besançon Administrative Court, having received the annulment request of the refusal of an adoption, stated that the reasons based on one hand on the absence of a father figure or symbol that was to contribute to harmoniously bringing up the child and on the other hand on the priority of the mother's girlfriend in the child's life, are not in any position to justify the refusal opposed to the lesbian solicitor. However, this decision was censored by Nancy Administrative Supreme Court through the decision of December 21 2001, confirmed by the European Court on Human Right from February 26 2002, by refusing an unmarried homosexual.

We would also like to stress upon that, during the presidential campaign in France in 2007, one of the candidates, François Bayrou came in favor of the adoption possibility for homosexual couples, while in many states of the world this kind of adoptions are already allowed (certain states of the United States, certain states of Canada, certain states of the Australian Federation, Spain, Holland and Sweden).

Regarding our country, this matter has not been considered as a legislative regulation. However, we believe that a future amendment to the 273/2004 Law regarding the juridical scheme of adoptions should consider the ones already issued by the European Court on Human Rights. After all, in our opinion, the essential in this matter, as it has been very well stressed upon by the

international case law, is not the sexual orientation of the ones willing to adopt, but "the best interest of the child" that is stipulated in the 237/ 2004 Law and that is a core element in this matter.