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EMPLOYEES PARTICIPATION RIGHTS - THE TRANSPOSITION OF THE ARTICLE 16 OF DIRECTIVE 2005/56/CE ON CROSS-BORDER MERGER IN THE MEMBER STATES

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ABSTRACT

The participation right of employees to the administration and supervision of companies is an aspect that may have a significant influence on the profile of a cross-border merger. In European Law, this right is protected through article no. 16 of the Directive 2005/56/EC on cross-border mergers, completed with Regulation(EC) 2157/2001 in the Statute for a European company and with Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employee. The current study aims to offer an analysis of the transposition of the Article 16 of Directive 2005/56/CE on cross-border merger in the national laws of some Member States and to underline the differences between the legal regimes in these legal systems. The research is of interest in the domain, whereas the level of employee participation in different states and a comparative perspective are criteria taken into consideration in the make-decision process regarding the country where the resulting company from a cross-border merger shall set up its headquarter.

KEYWORDS: employee participation rights, cross-border merger, special negotiating body, management and supervision bodies, agreements on employees involvement, employee influence.

INTRODUCTION.

Company reorganization through cross-border merger has legal effects on the employee rights. The most well-known rights are those regarding the safeguarding of the employee rights established in their individual and collective labor contracts, which benefit of a special legal protection through the Directive 2001/23/EC, transposed into national legal system by the Member States[1].

Other rights that may be affected by such reorganization are less addressed in our juridical literature[2] and refers to the employee participation rights in the administration and

[1] Regarding the employee protection in the case of company transfer through merger, see I.T. Stefanescu, *Theoretical and practical treaty*, Bucharest, Universul Juridic Publishing House, 2012, p 466-474; O. Tinca, Critical observation to Law 67/2006 regarding the employees' rights protection in the event of transfer of undertakings, businesses, or part of undertakings or businesses, Law Review, no 2/2007, pp 62-73, A.Uluitu, *The employee rights in case of transfers of undertakings, businesses or parts of undertakings*, Romanian Journal for Labor Law number 1/2006, pp 28-35 F. Bejan *Mergers' implication for employees under Romanian law* , AGORA International Journal of Juridical Sciences, no. 3/2013, p.6-13.F.Bejan, *Legal aspects of the transposition of the Directive 2001/23/EC regarding the safeguarding of employees rights in the event of transfer in the Romanian Law*, Lex Scientia Lesij, Number XX, volume 1/2013, pp 16-23.

[2] Regarding the employee participation rights, see B. Keller, *The European Company statute-employee involvement-and beyond*, "Industrial Relations Journal", Vol. 33, *pp*. 424-445; F.Bejan, *European Union Rules on employee participation right within the framework of cross-bordee merger* , Advances in fiscal, poiitical and

supervision of companies. This one does not have a special European legal framework, separated from those stipulated in the general regulation provided by the Directive 2005/56/EC on cross-border merger, under the article 16, entitled "Employee participation".[3] In the absence of a special and detailed regulation in this respect, there are Member States that consider the participation right a very important one and Member States that did not allow the employees to take part to the companies' make-decision process. The present legal framework generates at the same time diversity and differences, advantages and disadvantages for subjects to law involved in a cross-border merger, employers and employees. The study of various regimes concerning the participation rights in the Member States is a compulsory step that can contribute to the adoption of the best possible decision regarding the Member State where the resulting company from the cross-border merger will be established.

I. EMPLOYEES PARTICIPATION RIGHTS IN THE MEMBER STATES

1. Germany.

Employee participation right is considered as being a very important one in German juridical system.

The employee representatives in companies established in Germany, parties of cross border mergers, exercise their participation rights at the supervisory board level, in which they are assigned in regard to their total number of employees. If in those companies having more than 500 employees, their representatives take up a third of the supervisory board's seats, than in a company with over 2000 employees, their representatives' number equals the number of shareholder representatives.

Given the fact that employee representatives are provided full rights in the supervisory board, including the right to vote, their influence in the adoption of decision in the company resulting from the merger is considerable. The decision-making power of the employee representatives is, to some extent, counterbalanced by the rule of the supervisory council president's casting vote, which is appointed by the shareholders' representatives.

The legal rules stipulated under Article 16 of the cross-border merger Directive 2005/56/EC have been implemented into the German legislation through Employee Participation Act, entered into force on December 29th, 2006. [4]

In accordance with the Article 4 of the Act, the employee participation in companies resulting from a cross-border merger shall be governed by the law of the member state in which

the resulting company establishes its social headquarters. As a consequence, all resulting companies with headquarters in Germany are bound to apply the German participation system.

The only exceptions are those stipulated under the Article 16(2) of the cross-border merger Directive. Regarding these situations, the dispositions of art 5 of Employee Participation Act provides that it is compulsory to constitute a special body representing the employees having the role of negotiating the legal term of the co-determination regime with the employers' representative.

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law sciences, Proceedings of the 2nd International Conference on Economics, Political and Law Science (EPLS '13), pp 43-49.

[3] Published in the OJ L 310/1 of November 25, 2005.

[4] Legea *Gesetz zur Umsetzung der Regelungen über die Mitbestimmung der Arbeitnehmer bei einer Verschmelzung von Kapitalgesellschaften aus verschiedenen Mitgliedstaaten* , din 21. decembrie 2006, publicată în "Bundesgesetzblatt Jahrgang 2006 Teil I" , Bonn , nr. 65, 28. december 2006, p. 332. The Act is available online at: http://www.bmas.de.

Appointment of German members of the negotiation body is done by an election committee, consisting of at most 40 people that are members of work councils of the participating companies.

Regarding the designation of such employee representatives within German companies with partake in the SNB, in accordance with Article 8 from The Law of Employee Participation in Cross-Border Mergers, the election committee must respect the following requirements:

- election committee members are directly chosen by an employee meeting, in case in which there are no work councils;

- male and female German members of the special negotiation body, are appointed proportionally to the number of male and female employees;

-members of the special negotiation body may be employees of German companies which take part in the merger and syndicate members;

-in case in which the social negotiation body contains at least two German members which are employees, each third member must be a representative of the syndicate;

-in case in which the social negotiation body contains more than six German members which are employees, each seventh member must be a senior executive.

Both the social negotiation body members and employee representatives within the supervisory board are under equal protection. The benefit of this right implies that, in particular, protection against dismissal, protection during meetings within the special negotiation body or the supervisory board, including protection regarding preserving wage employee rights while those in question are exercising their duties, according to Article 32 from The Law of Employee Participation in Cross-Border Mergers.

The German participation model is considered the most complete and powerful within the European Union. Direct participation of employee representatives in administration of the employer's activity and the proportion of their vote in the decision-making process give the participation right consistency. Strict regulation of German SNB members' election and the content of the concession rights ensure the preservation of German employee influence of which employers are engaged in a cross-border merger process within the new legal body.

2. Austria.

In contrast to the German legislator, which encourages a large participation of the employees in the employer's mechanisms of decision, the Austrian lawmaker has a reserved approach concerning the employees' oportunities to influence the organisation and the activity of the companies resulting from an operation of cross-border merger.

The dispositions of the cross-border merger Directive concerning the employee participation has been transposed in Austria by Section 258 and the next ones of the Labour Constitutional Law which enterd into force on 15th of December 2007.

According to the Austrian law, the right of participation is granted by letting the employees designate one third of the members of the supervisory board.

Within the special negotiation body there are elected work council members or those of the corresponding sindicates in accordance with the procedure established through the provisions stipulated in the Labour Constitutional Law, sections 217 and 218.

The special negotating body can decide to negotiatiate and conclude a written agreement concerning the participation of the employees or it may choose not to start the negotation or cancel the negotation which has already been started. In the latter, it the Austrian legislation on the employees participation will be applied. More specifically, the employees will designate one third of the members of the supervisory board.

If the parties do not get to an accord within six months or one year or if the competent bodies of the participating companies decide to not initiate negotations, the standard rules of participation shall be applied.[5]

According to these rules, the number of members of the supervisory board nominated by the employees is based on the highest level of participation in the involved companies and the election of the Austrian members and the allocation of the places in the council is made by the decision of the special negotiating body.

In case in which the management decides not to start negotations regarding the employee participation rights, the law establishes the obligation of notifing the employee representatives regarding this decision. A special nominated group consisting of employees, whose competences are equal to the special negotiating body in similar situations.

Whatever the structure in which they carry out their activities, the employee representatives enjoy the right of being protected, especially against dismissal and discrimination.

As a general feature, the Austrian model of employee participation preserves the permissive nature of the directive. However, unlike the directive which establishes the obligation of protecting the employees for a period of three years after the date of entry into force of cross-border merger, the transposal legislation extends the period of protection from three to five years. It is the only Austrian national disposition more restrictive than the directive concerning the protection of participation rights.

3. The Netherlands.

In the Netherlands' law system, the provisions of the Article 16(1) of the Directive 2005/56/CE have not been transposed.

The legislator considered such an approach unnecessary, because it is obvious that the Dutch law as a social headquarters law is applicable in case that the company resulting from the cross-border merger establishes in The Netherlands and has limited itself to introducing within its national law provisions regarding the exception stipulated by Article 16(2) of the Directive.

On the other hand, it is important mention that the community rules regarding the participation laid down by the Regulation SE and the Directive 2011/86/CE have been transposed through special provisions included in the Dutch Civil Code.[6]

The employee participation system in the Dutch law is known as "the regime of structure" and it is regulated by the Article 2:152 and Article 2:262 of the Civil Code.

In essence, what characterizes the regime of structure is the fact that the participation rights' influence is exercised through a work council formed by the employee representatives.

The work council, toghether with the general meeting, has the right to nominate the candidates for a place in the supervisory board of the company and, independently, to make recommendations concerning one third of the members.

The Dutch law regulates the types of the companies and the conditions under which the applicability of the regime of structure by these entities is imperative.

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[5] The standard rules and the legal rules regarding the employees' rights are only applied in the two hypothesis regulated by the Article 16(3) of the Directive 2005/56/EC regarding cross-border merger, corroborated with the Article 7 (2) (b) din Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees , and transposed in Austria through the Labour Constitutional Act.

[6] Dutch Civil Code, act available online at: www.dutchcivillaw.com. In Dutcth Law, the Directive on cross-border merger has been transposed in Dutch Cicil Code in 2008 through a normative act , named, *Wet van 27 iuni 2008 tot wijziging von boek 2 van het Burgerlijk Wetboek in verband met de implementatie van richtlijn nr. 2006/56/EG van het Europese Parlement en de Raad van de Europese Unie betreffende grensoverschrijdende fusies van kapitaalvennootschappen (PbEU L 310*), publicat în "*Staatsblad"* .

So, besides the exceptions provided for by law, the joint stock companies and the limited liability companies have the obligation to apply the regime of structure if in the last three years before the merger the following conditions are cumulatively met:

-the value of the capital and company's reserves is minimum 16 million euros;

-the company or an entity depending on it have in their internal structure, according to the statutory provisions, a work council and

-the company, including the entity that depends on it, as the case may be, has minimum 100 employees in Holland

Nothing stops the companies that do not meet the provisions of the Dutch Civil Code regarding the participation to agree upon creating a work council and adopt the regime of structure.

According to Article 2:333k(2) from the Dutch Civil Code, the applicability rule of the social headquarters law is unnecessary and negotiations have to be initiated in order to establish an employee participation system in one of the following situations :

- any of the merging companies has a number of over 500 employees and applies an employee participation system;

- any of the merging companies applies an employee participation system and the company resulted from the cross-border merger which establishes in Holland does not fulfil the conditions in order to become subject of the regime of structure.

From the interpretation of the cited provisions regarding the negotiation's mandatory nature are emerging some interesting conclusions.

First of all, what is important to underline is that in the Dutch law system, the negotiation of the participation rights is compulsory including the case in which at the merge is participating a dutch company that applies the structure regime. In other words, the negotiation can be mandatory even for dutch participant companies that have minimum 500 employees and apply the regime of structure.

Second of all, the same obligation of negotiation it is necessary in cases in which the Dutch company resulted from the merge does not fulfill the conditions provided by the Civil Code regarding the applicability of the structure regime, but another participant company has known a system of participation.

If we take into consideration that negotiations are delaying the merger procedure and they are consuming resources, and at the end of the negotiation there is the chance that the regime of participation is other than the one of structure, the question that arises is what determined the transposal in such a manner of art. 16(2) of the Directive 2005/56/CE.

In our opinion, the Dutch legislator has opted for this legal solution to respect the spirit of the communitary law and not only its letter. It is the only reason for which the principle of mentaining the employee participation rights has been applied, as an alternative to the legislation which favoured the Dutch companies participanting at the merger operation .

We believe that the absence of the transposal of art 16 (2)(b) of Directive 2005/56/CE, which would have been senseless, given that the regime of structure applied to the company resulting from the cross-border merger assures a participation of the employees at the highest level, has to be interpreted in the same way.

Regarding the establishment and the atributions of the special negotiations body, the negotiation of the participation means, the conditions of the reference provisions applicability and their content, the national Dutch provisions create a balance between the community legislation and the specificities of the national rules from this area.

The employee protection system is shielded for a period of three years after the entry into force of the cross-border merger.

4. France.

The transposal of the Directive 2005/56/Ec in the French law has been made through the Law nr 2008-649 from the 3rd of July 2008 and through the Decrees 2008-1116 and 2008-

1117 from the 3rd of October 2008 which have modified the new French labour code by art. L 2371-1 and the foll. , D 2371-1 and the foll. And R 2371-5 and the foll.

The new Labour Code[7] establishes the legal framework regarding the creation and functioning of the special negotiating body and the content of the participation agreement.

In the absence of an agreement, the same legislative act provides the creation of a committee of the company resulting from the cross-border merger.[8]

The dispositions of the Labour Code that transpose the directive apply to :

- the absorbing companies or the ones created by the cross-border merger and which establish their social headquarters in France;
- the companies participating in the cross-border merger, having their social headquarters established in France,
- the subsidiaries and branches established in France of a company resulting from the cross-border merger, the social headquarters' center being situated in another member state.

Additional to the regulation in the field of applicability, art. L 2371-2 from the new Labour Code stipulates that "the company resulted from a cross-border merger is not obligated to create rules concerning the participation of the employees if, at the date of the registration, none of the participating companies at the merger wasn't managed according to these rules".

Such a provision only summarises the dispositions of the art 16(1) from the Directive 2005/56/CE in a clearer manner.

Although its introduction in the Labour Code may be considerated superfluous, we believe that the judgement of the French legislator was to remove the possibility of any extensive interpretation concerning the area of participation of the community rule.

In France, a participation system is applicable in the public limited companies where the state is the majority shareholder. These companies' employees have the right to request one third of the places from the council of administration or the council of supervision.

There are also legal cases of participation in the companies of which securities are admited to transactions on a regulated market and whose employees owe more than 3% from the capital.

Regarding the other companies from the private sector there are no dispositions that can regulate the requierement of the comenegement regime.

Instead, according to the art. L 2252-7 from the French Commercial Code, shareholders may add to their status an employee system of participation.

The particularity of the French law system consist of the fact that the majority of the potential participants at a cross-border merger can apply only one conventional employee participation system. As a consequence, the companies with wholy shareholding or a private majority from France may be administrated with the participation of the employees, only if the owners agree this way.

From our point of view, the regulation of the participation rights in the French law represents the expresion of the reserve that France has shown since the negotations that preceded the adoption of the Regulation SE and the Directive 2001/86/CE. The French legislator gives the investors the freedom of deciding with regard to the way they organize themselves so that the decision-making process is proportionate to their personal needs and interests.

[7] The New French Labour Code enter into force at 1st of May 2008;

[8] The competences, formation and functioning of the committee, are governed by the Articles. L.2353-3 - L.2353-27 of Labor Code. In French juridical literature, the requirement to create a committee is contested. This mechanism is considered inefficient, because , in practice, does not allow the employee participation;

II. EMPLOYEES PARTICIPATION RIGHTS IN ROMANIA.

Romania is one of the Member States that does not have a employee participation system regarding the companies' management bodies.

According to Romanian law, the establishment of employee participation modalities is not compulsory every time the company resulting from the cross-border merger is a Romanian legal person.

Law no 31/1990, under Article 251^{10} has introduced into national legal system provisions safeguarding the "before-after" principle.

The project of cross-border merger shall include "where applicable, informations concerning the mechanisms of involvement of the employees in defining their rights of participation at the activity sustained by the absorbing or newly created company", as it's stipulated under the Article 251^{13}(4) of Law no. 31/1990 regarding trade companies.

The acting judge has the competence to verify, if necessary, "the characteristics of the employees involvement mechanisms in the activity of the absorbing or newly created company", as Article 251^{13}(4) of Law no. 31/1990 stipulates.

From the interpretation of the paragraph (1) and (2) of art. 251 of Law nr. 31/1990 it results that the absence of a participation regulation leads to the following consequences regarding the area of applicability of the "before-after" principle :

-the absorbing or newly created company with the statutory headquarters in Romania resulting from the cross-border merger does not have the obligation to establish a mechanism of participation if the employees did not previously benefit of the right of participation in none of the participating companies;

-the absorbing or newly created company with the statutory headquarters in Romania resulting from the cross-border merger has the obligation to create a participation system in case if at least one of the participating companies have applied such a regime before the merge.

In conclusion, if the absorbing or newly created company with the statutory headquarters in Romania resulting from the cross-border merger or at least one of the companies that merge has a mechanism of employee involvement in the activity of the company, the participating companies' managers have the imperative obligation to introduce employee participation mechanisms.

The establishment of the employee participation rights is achieved according to the dispositions of Article 251 of the Law 31/1990 corroborated with the ones belonging to the Government Decision no 187 /2007 concerning the procedures of information, consultation and other modalities of employees involvement in the activity of the European company. The provisions to which the Law nr 31 /1990 refers are those applicable for the European companies registered in Romania.

According to the community regulations, the legal regime of participation in the company resulted from the cross-border merger is more flexible than the form of participation from an European company.

Concerning the European company resulted from the cross-border merger, paragraph 1 of Article 251 of the Law no 31/1990, it demands to fully apply the conditions of the Government Decision no 187/2007.

For those cases in which the company resulted from the cross-border merger is a Romanian legal person, paragraph 2 of art 251 of the law makes reference to Article 3 paragraph (1) and (2), Article 4-7, art 10 paragraph (1) and (2) letter a), g), and h), Article 11-24, 27 and 28 of the Government Decision nr 187/2007, which contain the rules applicable to the special group of negotiation, to the agreement, to the duration of the negotation and to the standard rules.

The cited dispositions shall be supplemented with the ones from paragraph (3)-(6) of Law nr 31/1990 which, according to the dispositions of Article 16(2) and the following from the Directive 2005/56/CE, regulate special legal aspects for cases where the company

resulting from the cross-border merger is a Romanian legal person, which derogates from the rules applicable European company..

Therefore, in accordance with the national legislation, the employee participation mechanisms regarding the company's activity can be determined through negotiation or by applying the standard reference provisions. The decision of applying the standard provisions may be made by each one of the parts, as follows :

a) the special negotiating body may decide not to start the negotiation or to stop them if they have been already initiated. If, after previous negotiations, the standard rules are applied, it is allowed to limitate the ratio of the employee representatives by the general meeting of the shareholders, with reducing the ratio of participation at minimum one third;

b) the management bodies of the participant companies may decide without a previous negotiation to apply the reference provisions or to respect them, from the date of registration in the trade register of the absorbing or newly created company modifier legislation.

An issue that may arise in this case is the fact that it has to be clarified why the Romanian legislator has chosen to distinguish between the hypothesis in which the manegement bodies obey the standard rules and that in which they understand to respect them from the time the cross-border merger enters into force.

Beyond the differences regarding the way of expressing the will to apply the standard rules, a possible reasoning of the legislator could be the that of covering the situations in which the applicability of the participation system could be invoked after cross-border registration.

Such a case could be the one of the" empty" companies, which at the time of the merger entry into force they do not have any employees. Regarding this hypothesis, the management bodies' possible decision to obey the reference provisions would be devoid of purpose in the absence of the employees and furthemore, in the absence of participation rights that should have been respected.

This is why we condition that the Romanian legislator has imagined the solution to an agreement of respecting the standard rules, on condition that the object of regulated protection exists, and that it may produce legal effects in the future, at the moment of the condition completion. Certainly, from this point on another set of questions arises.

For exemple, if we may consider the suspensive condition fulfilled in case in which the resulting company hires only Romanian citizens or it is necessary to also hire employees from other Member States, whose legislation governed the participant companies and provides participation mechanisms. Regardless of our opinion on these aspects, our questions emphasise the necessity of *de lege ferenda* legal rules on these aspects at European and national level.

The transposal of the provisions of Article 16 on cross-broder merger in the Romanian law is, in general terms, precise. However, in our law, the hypothesis in which at least one of the companies that participate to the merge has an average of over 500 employees for a period of six months before publishing the project of cross-border merger and is managed by an employee participation regime, is not regulated.

We may consider that the Romanian legislator regarded such a regulation as unnecessary, taking into consideration that the law of the legal seat cannot be applied on resulting companies establishing ther headquarters in Romania since this law does not provide participation formulas and the applicability of the "before-after" principle is guaranteed regardless if the number of employees who have previously benefited of participation rights is smaller or bigger than the average of 500.

Still, from our point of view, the situation in which an European company with the headquarters in Romania participates to a cross-border merger, that, excepting the case in which it is registered as an empty entity, it applies a mechanism of participation and can enter in the area of applicability of the analysed community provision has been ignored .

For identity of reason, we believe that the Romanian legal person who applies a participation system and who later participates to a cross-border merger, and the resulted company establish the headquarters in Romania may also be circumscribed to the same area.

Thus, we underline the perfectibility of this legal framework of the Romanian law, proposing that *de lege ferenda* a judicial transposition of the analysed European provision should be done by national legislator

CONCLUSIONS.

The study of legal regime of employees' participation rights on the board of directors or supervisory board in companies resulting from a cross-border merger into various Member States revealed two important aspects of this legal issue.

On the one hand, as a rule, the participation rights is not highly implemented in the Member States. There is an exception, German law, which contains special legal rules in domanin, including even provisions having as purpose to protect against discrimination related to the exercise of participation right. In most Membres States, there are fewer rules or none. Consequently, the establishment of participation rights may be mandatory or non-compulsory, the forms of involvement vary from one Member State to another, the duration of negotiations is not harmonised with the necessity of merger efficiencies.

On the other hand, having as legal basis Article no. 16 of the Directive 2005/56/EC on cross-border mergers, completed with Regulation(EC) 2157/2001 in the Statute for a European company and with Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employee, legislative framework of Member States guarantees the application of „before and after" principle. In essence, this principle ensured that the highest level of participation known before the cross-border merger in at least one of the participating companies is maintained in the company resulting from the reorganization.

In our opinion, *de lege lata,* taking into consideration these two aspects, in practice, participating companies have the possibility to choose as headquarter of resulting company from a cross-border merger those where the participating rights are more or less protected, depending on their own interests. *De lege ferenda,* for the purpose of raising the stability of employees participating level, we consider that the European legislator has to introduce more clear and comprehensive rules concerning employees' involvement and general function of the whole mechanism, by enacting a special Directive having as its object the employees' participation rights.

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THE BASIC ELEMENTS OF THE TESTAMENT IN THE ENGLISH LEGISLATION

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ABSTRACT

Common Law represents the second biggest contemporary judicial system. Immanent to a historical process which led to the creation of a community, common law represents a form of social solidarity. It is not the result of any social consent to obey a law as much as it is the participation of the society, through its exceptions, to the process of elaborating the law by which it functions. So, society itself is through a sort of syncretism the common law.
One the elementary concepts of common law is the doctrine of precedent which functions in parallel with organic laws in order to enhance both the results of judicial cases and the efficiency of the cases. In the English law, the testament is a representation of the wishes of a defunct person and the declaration of that persons wishes in relation to the belongings he wished to pass on after his death.

KEYWORDS: common law, precedent doctrine, will, judicial system, testacy, legatees.

INTRODUCTION.

Publius Iuventius Celsus, one of the most influential jurists of his time, said: "Law is technical but also art, the art of good and equity" (*jus est ars boni et aequi*)[1].

Law is nothing more than a set of rules established and guaranteed by the state that aim to organize and "discipline" human behavior in the relations of society, in an environment that offers the protection of fundamental rights and freedoms.

These rules need to be known and accessible to everyone.

Mircea Djuvara stated that the historical past of a society „*with all its institutions and its entire mentality*" stands „*at the basis of the whole right*".

„The legal consciousness of the society, which ultimately explains the whole of its right, in all its branches and manifestations, cannot be known in such a way as to claim scientific rigor".

[1] Publius Iuventius Celsius, *Digesta 111, Digesta (legal works)*

He considered that „sociology is, as a foundation, the basis of law, for without it we cannot understand it”[2].

BRIEF DESCRIPTION OF THE ENGLISH LAW – COMMON LAW -

Between the structure of the English law – common law – and that of continental law, there are considerable differences.

Common law is the second largest legal system.

„For centuries, the development of legal systems has taken place in parallel, on the European continent, on one hand, and in the British Isles, on the other hand, without too frequent mutual contacts, and especially without any of these systems exerting a real influence on other. Thus two different legal environments were created, two closed legal worlds - the continental and the island - which ignored each other”[3].

Law professor Rene David, an important and representative specialist of comparative law in the second half of the 20th century, showed how gravely influenced the ignorance of English law upon the economic life of France.

„The price with which French traders paid the indifference, lack of interest to their lawyers cannot be measured. It can be said that this price was high: it was only bearable because its burden was ultimately borne by the mass of consumers”.

Given that England has dominated the world trade for more than a century, it was inevitable that it would impose both the types of contracts in the practice of commercial relations and the jurisdiction of the English arbitration courts, even if the parties had other nationalities.

The technical elements of the common-law system have laid the foundations for international economic cooperation, and English and American contractual techniques are the basis for the whole international trade law.

„Common law appears as a form of legal experience that is related to the practice of law. ... Common-law announces a particular form of dealing with social issues perceived in their legalization, a tacit treatment (in the etymological sense of "ordination"), that is, an own government”[4].

„ When, by contrast, the tradition of common law claims to have knowledge of society, what does it refer to?

By contrast, the tradition of the common law system claims certain knowledge about society, but what are they? Basically, there are two elements that constitute the knowledge society, both equally important. The first element is the mastery with which a judge expresses a rule, this practice both in theory and practice demonstrates that adjudication is the best method of solving private problems. The second element is the knowledge of the judicial past in the form of the precedent; this form contains the wisdom of the best methods of government.

The government does not need a plan or should not operate based on a rigid plan, but the precedent is a good indicator of how new particular situations can be resolved based on

[2] M. Djuvara, *Teoria generală a dreptului. Enciclopedia Juridică: Drept Raţional. Izvoare şi Drept Pozitiv*, Bucharest: ALL, 1995, p. 300.
[3] Zlătescu V.D., *Drept privat comparat*, Bucharest, Oscar Print Publishing House, 1997, p. 245;
[4] Pierre Legrand, *Dreptul comparat*, Bucharest, Lumina Lex Publishing House, 2001, p. 43;

particular situations in the past. Experience has legitimized this judicial practice both in a normative and an intellectual, philosophical way, within the framework of jurisprudence"[5].

DOCTRINE OF THE PRECEDENT IN THE COMMON LAW SYSTEM (COMMON LAW SYSTEM)

The doctrine of the preceding is a professional use that began in the nineteenth century and became one of the most important sources of law in the English legal system. It dictates the use of some of the legal reports that are drafted by various sources (private or public) as common law in similar cases.

In principle, this procedure seems very simple, but it is a big problem in the democratic legislative system where all the laws are voted by the Parliament.

The fact that some people can impose laws without them being elected by the population may sound worrying, but surprisingly, this practice has helped develop a system that is currently effective and relatively quick.

This system operates on the basis of strict rules and on the basis of the power balance between the legislative and judicial branches. A first rule is the hierarchical one, only the Supreme Court of Great Britain, the Court of Appeal of England and Wales and the House of Lords have cases whose reports are common law.

This first rule hampers the number of cases that have a legislative role.

A second rule is that of different opinions that requires a judgment to have a unanimous verdict not a majority one. Either of these 3 courts have an odd number of judges ranging from 3 to 11 to avoid the possibility of a verdict with 2 equal parts in number and opposite.

By this rule, the system regains the cases again, but more importantly, ensures the certainty of cases with a legislative role.

One element is the balance between the legislative and the judiciary.

The parliament may declare an irrelevant judgment, even if the court decision remains valid, and this will not have a legislative role.

Another element that helped to modernize the legal system is the Constitutional Reform Act 2005, which brought a major change to the legislative system by introducing a Supreme Court.

Until 2005, the House of Lords, which is one of the two Chambers of Parliament, played the role of the Supreme Court, this function was traditionally owned by the House of Lords, but with the evolution of society the question of the separation of powers emerged, Parliament had both a legislative function as well as a judicial function, which is unacceptable in a democratic society because of the violation of the principle of the separation of powers in the state.

For this reason, it can be seen that most of the cases having a legislative function have reached the House of Lords. These rules provide for the limitation of cases that have an impact on the future of British jurisprudence.

The main elements of a common law are: ratio decidendi and obiter dictum.

[5] W.T.Murphy, *The Oldest Social Science? The Epistemic Properties of the Common Law Tradition*, Modern Law Review, 1991, p. 198

Ratio decidendi is the Latin expression used to express the concept of reason behind a decision, this component of cases being more important of the two because it is the part of the case.

The second part is *obiter dictum* meaning an adjacent statement.

This element consists of minor details of the case such as the quotes of some judges, cases brought before the court to prove the precedent, comments of a social nature brought by the court, and any other elements that might be convincing before the court.

These elements are not clearly differentiated because of their interdependence.

In some exceptional cases, the doctrine of the preceding can be avoided by two methods, the first is called distinction and the second is called dissolution.

Even though names seem to explain themselves, they need to be explained in more detail:

Dissolution is the procedure by which the Parliament or the Supreme Court cancels the effects of a precedent, this decision having an effect on the cases currently being judged, those which will be judged in the future, and the most important aspect is that it has retroactive effect.

Because of this, it is a rare method. The logic behind the retroactivity of this procedure lies in the judge's role. When we analyze the traditional doctrine of British jurisprudence, it considers the judge not as a law creator, but as a discoverer of the law.

The moment when a court decided the outcome of a case and it became a law was not considered a new law, but a law discovered.

This conception is based on the naturalist theory that the law originates in divine commands or in collective morality, so judges discover laws that have already existed.

John Finnis, a basic theorist of this theory, proposes a form of naturalistic theory that can exist in the absence of religion, considering that the role of the law is to protect the individual values that make life beautiful (life, religion, knowledge, etc.) ensuring a harmonious social life.

Currently, the retroactive nature of the dissolution begins to disappear due to the popularization of the concept of legal positivism from the mid-twentieth century.

Legal positivism is a theory that proposes the separation of morality from the law, considering the law as a social construction in order to preserve the order of society that can coincide with moral values but does not depend on them.

One of the great thinkers of this trend is H.L.A Hart, professor of jurisprudence at Oxford University who is considered the father of legal positivism.

Distinction is the most common procedure that avoids the observance of the previous doctrine of careful analysis of cases in order to find meaningful differences.

This can be a very useful method for lawyers, who usually suggest to judges cases that might serve as law.

Even if it is just a professional use, the doctrine of the precedent is followed with holiness by the British courts.

THE BASIC ELEMENTS OF THE TESTAMENT IN THE ENGLISH LEGISLATION

As in the Romanian law, in the English law, the will is the will of the deceased. That is why there is "will", which refers to desire and "testament," which is the expression of desire in a form that produces legal effects, hence the concept of testamentary form.

In English law, we meet the definition of will and codicil.

„ The testament is the declaration of a person's wishes about the "possessions" that he wants to pass on”[6].

The codicil is similar to the testament with regard to the purpose and legal formalities, but generally it is additional to the testament and is considered as an annex to the testament previously made, being drafted in order to add, vary or revoke testamentary provisions.

However, a codicil may exist independently of a will, that is, the revocation of a will, or part of a will, does not necessarily have the effect of revoking a codicil.

The word "testament", which is usually used to describe one of the instruments that express the will-intentions at a global level, is the formal expression referring to the desires of a deceased person.

After the testator's death, although in essence separate acts, the testament and the codicil are interpreted together as a single testamentary provision, because their legal effects are interdependent. If one of them is not valid, the other will produce legal effects.

The Essential Characteristics Of A Testament

In the English legislation, the will is designed to divide the deceased's patrimony among the heirs.

It may also be drawn up to designate bailiffs or other persons to manage or assist in the management of any part of the patrimony (for example, if the defunct leaves shares on the stock exchange/market where a person with specific knowledge is needed for divest or administer the patrimony), the appointment of guardians for minor children, the exercise of any rights relating to the patrimony, the revocation or amendment of any legal act or any other action that may produce legal effects after the death of the testator.

The essential characteristic of any testament is that it is basically a simple statement of the testator's intentions and can be "freely" revoked or modified.

By the time of death, the testator may change the will at any time, so it is "modifiable" and "no fixed effect", and "capable of producing legal effects on properties obtained after the testament”[7].

Article 719 of the Income Tax Act 2007 indicates that a "testamentary gift" can be taxed [8].

The Income Tax Act states that any transaction or action that is associated with a transfer does not matter the nature of the operation or action may be taxed by the State, so any donation, testamentary gift, inheritance, etc. will be taxed as transactions associated with the transfer of goods.

[6] Halsbury`s laws of Englad, Wills and Intestacy, vol. 102, paragraf 1, Butterworths Publishing House, London, 2008.

[7] Halsbury`s laws of Englad, Wills and Intestacy, vol. 102, paragraf 2, Butterworths Publishing House, London, 2008.

[8] Income Tax Act 2007 art.719:

(1) Any associated operation is defined as any legal action in relation to:
(a) Any good transferred;
(b) Any good associated with another transferred asset;
(c) Any income derived from transferred assets;
(d) Any revenue generated by the goods that has been accumulated prior to the transfer (and belongs to the transfer beneficiary);
(2) It does not matter when the operation was carried out in relation to the transfer.

Under the Law on Inheritance Fees of 1984, in some cases the testament may be subject to additional charges, and some legal transactions, such as rent in favor of one of the heirs, may be interpreted in such a way that they are taxed by other laws.

The English law distinguishes the testament from certain inter-vivos acts, such as:

- a donation mortis causa (that is, a donation made by a person on the deathbed) the realization of which is conditioned by the death of the author. If it does not die, the donation will no longer produce legal effects;
- a voluntary agreement with revocation power (for example, a contract in which the parties stipulate the possibility of canceling the act);
- a contract that will produce full legal effects only when the signatories perform their obligations;
- contracts that depend on future events;
- nomination of a beneficiary Testament;
- the rules of a pension scheme (i.e. pensions, food pensions and other regular payments that are made using the inheritance money).

The conclusion is that a testamentary will cannot be expressed in the form of an inter vivo contract.

Testament in the form of deed

The mere fact that a document contains the elements of a will does not mean that it is a will.

„ Specifically, when deciding the nature of acts that were signed during the testator's life, it will be analyzed whether it was intended, or even the intention of the testament itself”[9].

In the English law, if a person sells a property over which another person has real rights, those real rights become rights of possession of an amount equivalent to that real right. If this "currency exchange" has conditions or clauses that are linked to the death of one of the signatories, then this legal relationship is testamentary.

Legal issues that a testament can clarify.

„In the will, the deceased can foresee not only the way in which the patrimony will be divided among the inheritors but how it wishes other legal issues to be resolved after his death”[10].

In principle, the testator must designate the names of the executors, and if there are children to designate the names of the legal guardians.

As far as debts are concerned, the deceased may choose to be paid as provided for by the law or to choose to be paid in a different form by a testamentary clause.

It may also change the way inheritance taxes will be paid, even if the English law indicates that all costs will be covered using the patrimony to be inherited.

„ In the content of the will, there must be solutions to the emergence of perpetuity”[11]. In the English law perpetuity is a situation in which a person is guaranteed a real asset on a property for more than 20 years, such as a rent or a license to live in a place.

[9] Halsbury`s laws of Englad, Wills and Intestacy, vol. 102, paragraf 3,. Butterworths Publishing House, London, 2008.
[10] Halsbury`s laws of Englad, Wills and Intestacy, vol. 102, paragraf 4, Butterworths Publishing House, London, 2008.
[11] Idem

If the defunct did not explicitly state what the surviving spouse, the ex-spouse, the civil partner at the time of death, the former civilian partner, the children, the financial dependents, and the possible collocutors of his house, will inherited, these categories of people will have the right to request in court the modification of the testament in such a way that they can obtain what they should lawfully have had.

The person who deals with the legal aspect of the making of the will has the obligation to ensure that all the clauses are known and understood by the testator.

Also, if the person who writes the testament is the beneficiary of the testament, he must assure that he will not be influenced when writing it.

If the deceased was suffering from a mental illness, the people concerned have to prove that the person was mentally capable of writing a will.

Sometimes the testament is photographed, and this is a safety issue.

If the original testament is destroyed, a court will accept a photograph of that document if it is sufficiently clear and there is evidence that it is still valid.

The Form of the Testament

Preparing a testament professionally has unquestionable advantages.

However, the English law also accepts the form of a handwritten testament or any legal act expressing wills of will, provided that they respect the manner in which the legal inheritance is made.

It is also clear from these documents that the deceased intended to create will- rights.

„ If such an act does not fulfill the formalities of the preparation of a will, it can be accepted by a court as a preliminary form of the will”[12].

An act that shows only the intentions or early desires of the deceased will not be considered as an act of testamentary value, because, as we have shown above, for an act to be of testamentary value must contain clearly represented intentions, and only then he will be accepted as a testament.

Partially testamentary legal acts

In the English law, a legal act can have both testamentary and inter-vivos effects between the deceased (when living) and the other party.

„ A will can have clauses that produce inter-vivos effects”[13].

Conditional clauses that may have testamentary effects

A clause or legal act may have a conditional testamentary effect.

The deceased may impose certain conditions relating either to the moment of opening the will or to the conditions in which it dies.

If the conditions are closely related to the possibility of death (hospitalization, travel, etc.), these will not be considered as conditional, but will be considered as the basis for the testament.

This explanation of the nature of the conditions is important because if a condition is impossible to fulfill, there is the possibility that the patrimony may become the property of the English state. This process is called "bona vacantia”.

[12] Halsbury`s laws of Englad, Wills and Intestacy, vol. 102, paragraf 5,. Butterworths Publishing House, London, 2008.
[13] idem

Also, if at the time of writing, the deceased is in a certain danger, it will be considered a reason for the making of the will.

In examining clauses and acts of will-nature, the court will accept evidence against or in favor of acts. Due to the fact that almost any contract drawn up by the deceased during his or her life may have testamentary clauses, an analysis procedure is needed by which interested parties can challenge or may propose acts in their favor.

If one of the people mentioned in the will is not clear enough, the court may also receive evidence in the form of testimonies from interested parties or the executor of the will.

Common testament and mutual testament

The common will is a will through which two people express their desire to divide individual property or co-ownership after their death. The English law does not accept this testament as one, but only a legal act that represents the wishes of the people who have made it, the properties being treated separately in an individual way. This type of testament is rarely used.

Mutual testament is a kind of common testament.

This form of will is distinct due to the fact that there are clauses whereby the signatories leave each other rights belonging to the personal patrimony. For example, X leaves Y a sum of money if he dies first or if Y leaves X a sum of money if he dies first.

„ If there are separate wills with similar clauses, the wills will be analyzed together as a common testament”[14].

The Doctrine of the Mutual Testament is criticized as lacking in clear principles and rules, which is why the courts have some ambiguity and lack of consistency when they have to make decisions in cases where an interested person is contesting this type of testament.

One of the certitudes of the mutual testament lies in the characteristics of the formation of this type of testament, namely: the first Signatory must write a testament in which to specify what is the share of the second Signatory or other legal act that it will not amend this testament without informing the Signatory 2. Signatory 2 goes through the same process.

Delegating the power to write a will

Even if a person can seek assistance from another person in order to write his will, he cannot fully delegate the will to another person.

If a person signing a testamentary document whose content he does not know or has clauses, sentences or even words that the Signatory is unaware of, that document will either not be accepted as a valid testament or will be considered a valid testament and will produce effects without those clauses being used.

In the testament, the deceased can appoint a person who has the power to determine the patrimony.

In current English legislation the creation of such a contract is accepted as a trust, the only real need is that the will must be clear enough in this regard. So the testamentary

[14] Halsbury`s laws of Englad, Wills and Intestacy, vol. 102, paragraf 8, Butterworths Publishing House, London, 2008.

executor to receive such power lies in the clarity of the testamentary clause that specifies this method of sharing the patrimony.

If the deceased wants a part of the patrimony (clothes, real estate, money, etc.) to be passed on to a charity chosen by him or by the executor, this will be accepted without any additional conditions.

The court will not consider whether the executor has decided which charity will receive a donation specified in the will, but will be convinced that the gift is clearly defined, because if it is not clearly defined, that gift is not valid.

Due to the existing relationship between the deceased and the executor, the latter cannot have the right to inherit, because by trust, the person who has the will and the role of executor cannot have the right to inherit, one of the obligations of the relationship is to remain impartial of those who will be the beneficiaries of the will. He can not create or be the beneficiary of the will.

Validity of a testament with extraneous elements

A will is considered valid by statute and by common law.

There are elements related to cases that may be binding on certain wills, such as trust or postmortem donations, even if the will is made in a state other than England, or even if it is written in England and the patrimony is in another country. These concepts apply to both real estate and property on movable property.

There are people who leave a will but choose to apply the law to a state other than the English one. These may be people with dual citizenship or people who own property in the territories of other states and choose the laws of those countries either for practical reasons or for economic reasons.

If the desired legislation of the deceased is not specified, English legislation will be applied.

Typically, British successions do not accept wills that share a wholly foreign heritage.

The European Union allows a person to specify by will the country where the inheritance will be opened, as long as that person has the nationality of that country.

We mention the existence of a European Certificate of Succession, which is a form that allows proofing of the quality and rights of both the heirs and legatees and of the wills executors or administrators of the succession, in the succession opened from August 17, 2015.

CONCLUSION

Between the structure of the English law – common law – and that of continental law, there are considerable differences.

The doctrine of the preceding is a professional use that began in the nineteenth century and became one of the most important sources of law in the English legal system. It dictates the use of some of the legal reports that are drafted by various sources (private or public) as common law in similar cases.

In principle, this procedure seems very simple, but it is a big problem in the democratic legislative system where all the laws are voted by the Parliament.

The fact that some people can impose laws without them being elected by the population may sound worrying, but surprisingly, this practice has helped develop a system that is currently effective and relatively quick.

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HISTORY AND ORGANIZATION OF COURTS SYSTEM IN NIGERIA

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ABSTRACT

A Court is a place where justice is administered or where atrial is held. Although it may be argued that this definition is deficient in the sense that courts are sometimes distinguished from other bodies such as tribunals, which are also concerns with settling legal disputes, however, the definition conveys the meaning intended for this work. This paper seeks to discuss the brief history of court system in Nigeria, its organization, jurisdictions, functions.

KEYWORDS: Court, Jurisdiction, Procedure, Rules, Constitution.

INTRODUCTION.

Courts may simply be defined as places concerned with settling legal disputes.[1]The hierarchy of courts in Nigeria is as contained in Section6(5) of the Constitution of the Federal Republic of Nigeria(as amended).The said section specifically lists the courts which are also established under chapter VII of the constitution. These are known as the superior courts of records .In addition to the superior records , the constitution also empowers the National Assembly and state Houses of Assembly to establish courts of law, to exercise Jurisdiction,whether Original or appellate in respect of their respective legislative competences.[2]These are inferior courts of records.

I. CLASSIFICATION OF COURTS.

Under the Nigerian legal system there are large number of courts which vary from small courts with limited jurisdiction over a particular geographical area or a particular type of dispute, to courts which can hear any case about virtually any aspect of law. They can be grouped together in a number of ways. Traditionally, it has been said that the "two fundamental divisions of English courts are;

(1) Courts of records and courts not of record;
(2) Superior and Inferior courts[3]

The superior courts of records provided for under the constitution are:

(a) The Supreme Court of Nigeria
(b) The Court of Appeal
(c) The Federal High court
(d) National Industrial Court[4]

[1]AdewaleTaiwo;The Principles,Practice and Procedure of Civil Litigation in Nigeria.Ababa press Limited.2015 p.51.
[2] Section 6(5)(j) and k.see D.I Efevwerhan;Principles of Civil Procedure in Nigeria.Snaap Press Limited ,Enugu.2nd edn)p.22
[3]Walker,R.&Ward,R, Walker and Walker's English Legal system,7thed(Butterworhss London 1994)140.See Adewaletaiwo ,op.cit .p.52

(e) The high Court of Federal Capital Territory, Abuja
(f) A High Court of a State
(g) The sharia court of Appeal of the Federal Capital Territory, Abuja
(h) A sharia Court Appeal of a state
(i) The Customary Court of Appeal of the Federal Capital Territory, Abuja
(j) A customary Court of Appeal of a State.

The inferior courts of record that have been established or deemed established by the legislative bodies above are:
(a)Magistrates' courts
(b)Districts Courts
(c) Sharia courts
(d)Area Courts
(e) Customary Courts
We shall now examine each courts seriatim beginning with the superior courts.

II. SUPREME COURT OF NIGERIA

This is the apex court of the nation, Nigeria established under section 230 of the 1999 constitution. It consists of the chief justice of Nigeria who is the head of the court and such number of justices of Supreme Court, not exceeding twenty –one as may be prescribed by an act of National Assembly. The court has both original and appellate jurisdiction.[5]

III. COURT OF APPEAL

The Court of Appeal was established on 1st October, 1976.[6] The Court was established to serve as an immediate court between the high court and other subordinates courts and the Supreme Court.Under the 1999 constitution, the Court of Appeal is established under Section.237.It is headed by the president of the Court of Appeal. The Court consists of the president and such number of justices of the court of appeal, not less than forty-nine of which not less than three shall be learned in Islamic law ;and not less than three shall be learned in customary law, as may be prescribed by an Act of the National Assembly.The court of Appeal has both Original and Appellate Jurisdiction as stated in the constitution.[7]

IV. FEDERAL HIGH COURT

The Federal High Court was initially established as the Federal Revenue Court in 1973.[8] Now the Federal High Court under Section 249 of the 1999 constitution. The Court is headed by a Chief Judge of the Federal High court.The Federal High Court consists of the Chief Judge and such number of Judges of theFederal High Court as may be prescribed by an Act of the National Assembly.[9]The Jurisdiction of the Federal High Court was originally provided under Section 7 of the Federal Revenue Court Act 1973.In terms of section 251(1) of the 1999 Nigerian Constitution, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters arising from (a)to (r).

V. STATE HIGH COURT

By virtue of section 270 of the 1999 Nigerian Constitution, each of the 36 states of the Federation shall have its own high court consisting of a Chief Judge and such number of

[4] Inserted by virtue of section 2, constitution of the federal republic of Nigeria(Third Alteration)Act 2010.See D.I Efevwerhan ,op.cit. p.22
[5] Section 232 and 233 of the Constitution of the Federal Republic of Nigeria(As Amended)
[6] See the Constitution of the Federation,(the Constitution Amendment)(No.2),decree No.42.1976.
[7] Section 239 and 240 of the Constitution of the Federal Republic of Nigeria(As Amended)
[8]Section1 of the Federal Revenue Court Act 1973.
[9] S.249(2) of 1999 Constitution.see,however,s.1(2)(b) of Cap F12,LFN 2004,which prescribes 50 judges for the Federal High Court in addition to the Chief Judge.

judges as may be prescribed by a law of the house of Assembly of a state. The structure, organization and jurisdiction of the various state High Courts are generally uniform since they all derive their powers from a single source that is the constitution.

VI. THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY, ABUJA

The Constitution provides for the establishment of a high court of the federal Capital territory Abuja.[10]The High court of the FCT shall consist of a Chief Judge and such number of judges as may be prescribed by an Act of the National Assembly.It has jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power duty,liability,privilege,interest,obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty,forfeiture,punishment or other liability in respect of an offence committed by any person.[11]

VII. NATIONAL INDUSTRIAL COURT

Originally, the industrial court(Nic) was established in 1976 for the purpose of dealing with trade disputes and collective agreements[12].The court isnow included in the lists of courts recognized under section section 6 of the 1999 constitution of the Federal Republic of Nigeria (third Alteration) Act of 2010.[13]The Act provides for the establishment of the National Industrial Court,and states that the court shall consist of the president of National Industrial Court and such number of judges of the court as may be prescribed by an Act of the National Assembly.[14]

An examination of the provision of section 254 C (1) of the 1999Constitution (as amended) shows that the National Industrial Court enjoys a considerable Jurisdiction on a number of items relating to labour matters. There are innovations to this court .It has only one Jurisdiction and processes can be filed in one state and heard in another state.

VIII. THE SHARIA COURT OF APPEAL

The Constitution provides for the establishment of the Sharia Court of Appeal of the FederalCapital Territory,Abuja[15] and of a State[16].The Court consists of Grand kadi, and such number of Kadis as may be prescribed by the National assembly or House Assembly of a state as the case may be.[17] The sharia court of appeal is a superior court of Record which hears appeals from the sharia court and Area court in cases involving Islamic personal law.[18]

IX. THE CUSTOMARY COURT OF APPEAL

The Constitution provides for the establishment of the Customary Court of Appeal of the Federal Capital Territory,Abuja [19] and of the State.[20]The Court consists of a president, and such number of the judges of Customary Court of Appeal as may be prescribed by the National Assembly or House of Assembly of a State as the case may be.[21] The Customary Court of Appeal is a court of superior record, and shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law, or such other

[10] Section 255 of the Constitution.(As Amended).
[11] Section 257 of the Constitution(As Amended).
[12] Section 14 of the Trade Disputes Decree No.7 of 1976.See AdewaleTaiwoop.cit p.68
[13] Act No.3 of 2010.It was passed by the senate of the National Assembly on 14 December, 2010House of representatives on 15 December ,2010 the report of approvals by the states Houses of Assembly was received on 8 February,2011.The president gave assent to it on 4 March,2011, a date which Act commenced operation..
[14] Section 254A(2) of the 1999 Constitution.(As Amended).
[15]Section 260 of the Constitution.
[16]Section 275 of the Constitution.
[17] Sections 260(2)&275(2) of the Constitution.
[18]Section 262(1) & Section 277(1) of the Constitution.
[19] Section 265 of the Constitution,
[20]Section280 of the Constitution.
[21] Sections 265(2)&280(2) of the Constitution.

jurisdiction as may be conferred upon it by the National Assembly or the State house of assembly as the case may be.[22]

X. ELECTION TRIBUNALS

The 1999 Constitution(as amended) states that there shall be established for the each State of the Federation and the Federal Capital Territtory,one or more Election Tribunals to be known as National and State Houses of Assembly Election Tribunals which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether-(a)any person has been validly elected as a member of the National Assembly;(b)any person has been validly elected as a member of the House of Assembly of a state.[23]Also there shall be established in each state of the federation, one or more tribunals to be known as the Governorship Election Tribunals which shall, to the exclusion of any court or tribunal, have original Jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of the Governor or the Deputy Governor of a state.[24]

XI. MAGISTRATES COURTS AND DISTRICTS COURTS

Magistrates Courts are Courts of Summary Jurisdiction created by law of the House of Assembly of a State. They are called Courts of Summary Jurisdiction because matters are determined therein without pleadings or briefs by parties.[25]

XII. AREA COURTS, SHARIACOURTS AND CUSTOMARY COURTS

Area courts and Customarycourts areestablished essentially for the administration of customary and native law in Nigeria.The term area court is used in Northern Nigeria while the term customary law is used to denote same court in southern Nigeria. The various statesin Southern Nigeria have Customary Courts.Customary Court is constituted by president and at least, two or other four members as the case may be. The Courts are usually constituted by a judge called area court Judge sitting alone or with one or more members.[26]It should be noted that customary and Area courts have jurisdictions only to Nigerians.[27]Customary and Area courts are subject to general supervision of high court. Area and Customary courts are not empowered to issue order of mandamus, certiorari, prohibition, injunctions and quo warranto.

CONCLUSION

The paper has examined the various courts starting from the top of thehierarchy in Nigeria, thatis, theSupreme Court of Nigeria down to the lowest, which are the Area and Customary Courts. The jurisdictions and functions of these various courts were also examined.

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[22]Sections267&282 of the Constitution.
[23] See Section 9(1) of the Constitution of the Federal Republic of Nigeria(second Alteration)Act No.2,2010.
[24] Section 9 (2) of the Constitution of the Federal Republic of Nigeria (second Alteration)Act No 2.,2010.,see also section 285(2)of the Constitution.

[25] D.I Efevwerhan,op.cit, p.92
[26] See generally sec 16-20,Customary courts law(CAP33) Laws of Ondo state 1978.See Adewale Taiwo op.cit.p.82
[27] See Section 16 Customary Laws of Ondo state.

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THE *NON BIS IN IDEM PRINCIPLE* IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION - CONSISTENCY OR INCONSISTENCY?

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ABSTRACT

The non bis in idem principle was first established in the Hammurabi Code (2,500 BC), under the name of res judicata pro veritate habetur.According to the non bis in idem principle, "no one is allowed to be summoned again in court or punished in another criminal case for the same criminal offense for which he has already been convicted or acquitted under the law of a state". The non bis in idem principle has a broad field of application in the field of international judicial cooperation in criminal matters.The harmonization of Member States' laws and the abolition of borders at EU level created the premises for the widespread application of the non bis in idem principle.For this reason, the Court of Justice of the European Union has been charged with interpreting the rule, namely the non bis in idem principle, as regulated in art. 54 CISA.At the present stage of regulation, an interpretation contrary to the non bis in idem principle would be likely to erode the right and affect international judicial cooperation in criminal matters.

KEYWORDS: non bis in idem principle; the Court of Justice of the European Union; res judicata; domestic law; EU law.

I. BRIEF INTRODUCTION REGARDING THE *NON BIS IN IDEM* PRINCIPLE

In current legal geography, we are witnessing the development and consolidation of the European law, which is becoming increasingly strong, in particular through the jurisprudence of the Court of Justice in Luxembourg, as a unitary system with the role of uniformizing national legal systems.

While criminal legislation does not, in principle, fall within the scope of the Union's competences, the European legislator may impose certain conduct on the Member States in this area, and the CJEU has the competence to deal with legal issues related to criminal law and criminal procedure law, in the light of the provisions of art. 258, art. 263 and art. 267 TFEU.

One of the principles created by the provisions of art. 50 CFREU[1], art. 54 CISA[2] and art. 4 of Protocol no. 7 ECHR[3] establishes at European level the *non bis in idem* rule. At the same time, the principle of *non bis in idem* is also provided by the European special

[1]Published in OJ C 303 of 14 December 2007. See also F.Marian, *The Constitution of Romania. The European Convention on Human Rights. Charter of Fundamental Rights of the European Union*. 5th Edition, PH. Rosetti International, 2016.p.116.
[2]Convention implementing the Schengen Agreement of 14 June 1985, signed in Luxembourg, 19 June 1990, published in OJ L 239 of 22 September 2000.
[3]Ratified by Romania through Law no. 30/1994, publ. in Official Monitor (Of. M.) No.135 of 31 May 1994. Protocol no. 7 was amended by Protocol no. 11 of May 11, 1994, ratified by Romania by Law no. 79/1995, published in Of. M., no. 147 of July 13, 1995.

legislation, in art. 7 of the Convention on the Protection of the Communities' Financial Interests[4] and in art. 10 of the Convention on the Fight against Corruption[5].

The aforementioned European provisions have also been reflected in the internal regulatory framework - art. 6 Criminal Procedure Code[6]. The principle is also regulated by the provisions of art. 421 (i) and the Criminal Code, as well as the legislation on judicial cooperation in criminal matters - art. 8[7].

II. APPLYING THE *NON BIS IN IDEM* PRINCIPLE IN CORRELATION WITH EUROPEAN NORMS

Final judgments acquire judgmental authority, presuming to reflect the truth.

Prior to the entry into force of the New Code of Criminal Procedure, the *non bis in idem* principle, although not explicitly enshrined as a fundamental principle of the Romanian criminal trial, was recognized in the legal doctrine under the name of the principle of the authority of final judgment.

A. Definition

The *non bis in idem* principle was first established in the Hammurabi Code (2,500 BC), under the name of *res judicata pro veritate habetur*[8].

According to the *non bis in idem* principle, "no one is allowed to be summoned again in court or punished in another criminal case for the same criminal offense for which he has already been convicted or acquitted under the law and criminal procedure of a state."

Member States are prevented from judging a person twice for the same or the same acts or forcing a person to serve a sentence for the same deed.

In order to extract the essence of the *non bis in idem* principle, we must take into account the following key elements: the existence of a final criminal judgment on the merits of the case, the identity of persons (*eadem personae*), the identity of facts or facts that are substantially the same (*idem factum*).

The reason for which it has been inserted in the content of the European normative acts, but also in the national legislation, *non bis in idem*, which is raised in principle, derives from the necessity of legal certainty, which requires observance of the fundamental principle of *res judicata*. A criminal case, finally settled, can not be resumed indefinitely since the person judged may not be obliged to always live with the uncertainty that the criminal action may be reopened if no new evidence arises.

B. Correlation of the non bis in idem principle with European secondary law

The *non bis in idem principle* has a broad field of application in the field of international judicial cooperation in criminal matters.

A foreign court ruling may be recognized in Romania for the purpose of executing the sentence of detention of a person on the territory of Romania[9] for the enforcement of criminal

[4] Published in OJ C 316 of 27 November 1995 (Council Act of 26 July 1995).

[5]Published in OJ L 287 of 29 October 2008 (Council Decision 2008/801 / EC of 25 September 2008).

[6] Law no. 135/2010, publ. In Of. M. no. 486 of July 15, 2010, modified by Law no. 255/2013 for the implementation of the New Criminal Procedure Code and for amending and completing some normative acts containing criminal procedural provisions, published In Of. M. 515 of August 14, 2013.

[7]Law no. 302/2004 republished, on judicial cooperation in criminal matters, Of. M., Part I, no. 377 of 31 May 2011, as amended and supplemented by Law no. 236/2017, published in Of. M. no. 993 of 14 December 2017.

[8]E. Molcuţ, D. Oancea, *Romanian Law*, Publishing House and Press Şanşa SRL, Bucharest, 1993, p.28 et seq.

[9]The procedure established by art. 137-138 of Law 302/2004 as amended by Council Framework Decision 2008/909 / JHA of 27 November 2008 on the application of the principle of mutual recognition of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union European, published in OJ L series No.327 of 5 December 2008.

and administrative penalties imposed by the judicial bodies[10] in order to enforce foreign judgments of confiscation[11], and to produce effects other than punishment execution[12]. At the same time, the *non bis in idem* rule also affects other forms of judicial cooperation at European level.

Thus, the European Convention on Jurisdiction in Criminal Matters provides in art. The obligation of notification, i.e. the requested State, must inform the action taken and, where appropriate, send a copy of the sentence. If the bilateral treaties signed by the Member States exclude criminal prosecution in a State other than the State where the offense was committed in the case of non-prosecution on grounds of substantive law, the *non bis in idem* is used.

Also, the European Convention on Extradition provides in art. 9 that extradition can not be approved if the person which was being prosecuted has been finally tried, for the acts for which extradition is requested, by the competent authorities of the requested State.

The *non bis in idem* principle also applies within the framework of the European arrest warrant[13].

The *non bis in idem* rule also applies in Union law, as is clear from the case-law of the CJEU.

III. THE IMPORTANCE OF THE PRINCIPLE REFLECTED IN THE CASE-LAW OF THE CJEU

The issue of the *non bis in idem* principle stems from the fact that it is not well-established at European level[14].

Initially, the content of the *non bis in idem* ban was interpreted in two ways: a person finally convicted of a criminal act can no longer be prosecuted and punished again; the same person can no longer be convicted of the legal classification finally settled, but it could be for another legal classification.

The harmonization of Member States' laws and the abolition of borders at EU level created the premises for the widespread application of the *non bis in idem* principle[15].

It should be noted that the right under this principle has the same meaning and scope both in Union law and in the corresponding law of the ECHR.

Article 6 of the Treaty on European Union (Lisbon version) provides that the rights, freedoms and principles enshrined in the Charter of Fundamental Rights of the European Union of 7 December 2000, which have the same legal value as the Treaties, are recognized in the EU[16].

The CFREU provides in art. 50 the right of any person not to be tried or convicted twice for the same offense, namely the fact that no one can be tried or convicted for an

[10]Art. 139 of Law 302/2004.

[11]Article 140 of Law 302/2004 and Framework Decision 2006/783 / JHA of 6 October 2006 on the application of the principle of mutual recognition regarding confiscation orders, published in OJ L 328, 24.11.2006.

[12]Article 140/1 of Law 302/2004 and Council Framework Decision 2008/909 / JHA of 27 November 2008 on the application of the principle of mutual recognition of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of enforcement in the EU, in OJ L 327 of 5 December 2008.

[13]Art. 98 para. 2 (b) of Law 302/2004 and Council Framework Decision 2002/584 / JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, in OJ L 190, 18 July 2002. For details, see I. C. Morar, *International Judicial Cooperation in Criminal Matters*, Hamangiu Publishing House, 2014, p.10.

[14]F. Radu, *International Judicial Cooperation in Criminal Matters. Guide for Practitioners*, Wolters Kluwer Publishing House, Bucharest, 2009, p. 98-99.

[15]M. I. Rusu, *Judicial Assistance in Criminal Matters at European Level*, PH. Universul Juridic, Bucharest, 2015, p.30.

[16]Adopted on 12 December 2007 in Strasbourg, published in OJ C of 14 December 2007.

offense for which he has already been acquitted or convicted within the Union by a final court decision in accordance with the law.

Convention Implementing the Schengen Agreement (CISA) in art. 54-57 refers to the *non bis in idem* principle. In art. 54 rules are laid down governing this principle - it excludes a new sanction, a new prosecution for the same deed without, however, defining legally the terms used by the Convention.

For this reason, the Court of Justice of the European Union has been charged with interpreting the rule, namely the *non bis in idem* principle, as regulated in art. 54 CISA.

Following the entry into force of the Treaty of Amsterdam[17], the jurisdiction of the Court of Justice of the European Union, also deals with the issue of preliminary rulings on the validity and interpretation of normative acts issued by the Union institutions.

In the ***Gozutok***[18] and ***Brugge***[19] cases, the CJEU ruled that the *non bis in idem* principle is also applicable to criminal prosecution orders given by the prosecutor if, for example, the prosecutor has applied a pecuniary sanction executed by the accused, stating that art. 54 CISA should promote the dynamic process of European integration by creating an area of freedom and justice. In order to achieve this goal, cumulation of penalties should be avoided. The Court drew attention to the need for national prosecutor's offices to cooperate in the application of criminal law, not requiring the involvement of a court or pronouncing a sentence, by virtue of the need to respect the principle of mutual trust between states regarding their judicial systems, accept the enforcement of the criminal law in force in the other State, even if the application of its own law can lead to other solutions. Similarity of the type of sanction applied by the prosecutor in this casewith the administrative fines that could be applied under Romanian criminal procedural law[20] is also obvious[21].

In ***Miraglia***[22], the Court has stated that the *non bis in id*em principle would not prevent criminal proceedings being initiated in different countries, against the same suspect and for the same acts. When one of the actions is finalized by a final judgment, the *non bis in idem* principle will apply. Ordinances of criminal negligence, only on formal grounds, do not have the same effect, since what is essential is the content, not the fact that a criminal sentence or a resolution of non-prosecution has been pronounced. If the accused has already been prosecuted and the decision has a content comparable to that of a lawful ruling, the *non bis in idem* barrier will be dissolved.

In ***Gasparini and others***[23]and ***Van Straaten***[24], the Court held that an acquittal decision prevents a further prosecution if it is due to lack of evidence and also a decision closing the proceedings as a result of interference, in both situations the non bis in idem principle is to be applied.

In ***Turansky***[25], the Court has stated that in order to be able to find that a person has been the subject of a final judgment in respect of the facts imputed to him, the criminal

[17]Signed on 2 October 1997, in force since 1 May 1999.
[18]Case 187/01, judgment of 11 February 2003.
[19]Case 385/01, judgment of 11 February 2003.
[20]Art.91 (c) of the Criminal Code of 1969 and Article 10 (b)/1 Criminal Procedure Code of 1968 or art.318 Criminal Procedure Code, prior to the modifications made by art. II pt.82 of GEO no.18 / 2016 for amending and completing the Law no.286 / 2009 on the Criminal Code, Law no. 135/2010 on the Criminal Procedure Code, as well as for completing the art.31 paragraph 1 of the Law no.304 / 2004 on the judicial organization, published in Of. M. No.389 of May 23, 2016.
[21]D. I. Bugnariu, *Aspects regarding the application of the non bis in idem principle in the criminal law practice of the European Court of Justice*, European Legal Affairs Magazine no.2 / 2013, http://iaduer.ro/?p=1915, consulted on 27 December 2017, 13:00.
[22]Case 469/03, judgment of 10 March 2005. See also K. Ulrike et al., *Judicial Cooperation in Criminal Matters*, Phare Project 2005 / IBH / JH / 03, 2005. p.183.
[23]Case 467/04, judgment of 28 September 2006.
[24]Case 150/05, judgment of 28 September 2006.
[25]Case 491/07, judgment of 22 December 2008.

proceedings must have ceased, otherwise there is no impediment in a Member State to initiate or continue the criminal proceedings for the same offense against the same person.

In case ***M***[26], the Court held that art. 54 CISA must be interpreted as meaning that an order for non-adjudication in the Member State in which a new prosecution for the same acts was committed against the person to whom the ordinance was given, unless new evidence against that person is found, must be regarded as a final judgment which prevents a new prosecution against the same person and for the same acts in another Member State. As regards the case of new evidence, the European Court of Justice stated that, taking into account the need to verify the genuineness of the elements relied on to justify a reopening, any new proceedings, against the same person and for the same acts, can be initiated only in the State where that ordinance was pronounced.

In ***Van Esbroeck***[27], the CJEU has established that a divergent legal classification of the same facts in two Member States can not prevent the application of art. 54 CISA and the *non bis in idem* principle, since the only relevant criteria is that of the identity of material acts, understood as the existence of a set of concrete circumstances indissolubly linked together, in time, in space, and by their object.

Regarding concurrent offenses, the CJEU decided in the ***Kraaijenbrink***[28] case that in the situation where drug trafficking is being committed in one country and money laundering in another country, the *non bis in idem* principle does not apply, not being "the same facts". The Court considers that the different facts consisting, firstly, in the possession of money from narcotics trafficking in a State and, on the other, in the conversion of sums of money from drug trafficking to foreign exchange offices located in another Member State need not indicate the same fact in the sense of the provisions of art. 54 CISA only through the view of the fact that the competent national court finds that those facts are linked by the same criminal offense. In the Court's view, it is for the national court to assess whether the degree of identity and the connection between all the actual circumstances that have to be compared is of such a manner as to make it possible to establish that the same facts are involved.

In the case of ***Akerberg Fransson***[29], the CJEU ruled that the *non bis in idem* principle stated in art. 50 of the Charter of Fundamental Rights of the European Union does not preclude a Member State from imposing, for the same acts of non-compliance with its declaratory obligations in the field of value added tax, a tax penalty and a criminal sanction in so far as the first sanction does not have a criminal character, which must be verified by the national court. However, European Union law precludes a judicial practice which makes the national court obliged to disapply any provision contrary to a fundamental right guaranteed by the Charter, provided that this contradiction is clearly reflected in the Charter or the relevant case-law since it refuses the national court the power to fully appreciate the compatibility of that provision with the same Charter. National authorities and courts are therefore free to apply national standards for the protection of fundamental rights, provided that this application does not compromise the level of protection provided by the Charter, nor the supremacy, unity and effectiveness of Union law.

In ***Menci Luca***[30], the Advocate General argued that, in order for Art. 50 CFREU, there must be **identity of material facts, irrespective of their legal classification**, which serves as a basis for the application of fiscal and criminal sanctions. The *non bis in idem* principle is infringed in the case of the opening of a criminal procedure or the imposition of a criminal penalty on a person to whom a penalty for the same offense has been definitively

[26]Case 398/12, judgment of 5 June 2014.
[27]Case 436/04, judgment of 9 March 2006.
[28]Case 367/05, Judgment of 18 July 2007.
[29]Case 617/10, judgment of 26 February 2013. See also G. Tudor, *Criminal Law. Harmonizing European legislation. Jurisprudence CJUE*, PH. Universul Juridic, Bucharest, 2017, p.228.
[30]Case 524/15, judgment of 16 September 2015. Procedure reopened in January 2017 following the judgment of the ECHR of 15 November 2016 in the case concerning A and B c/a Norway. At the time of the consultation, only the Advocate General's conclusions were set out.

imposed beforehand when it, despite its name, has a criminal character. These matters are to be verified by the court, taking into account the objective of the provision, its addressees and the legal interest protected - as well as the nature and severity of the sanction.

In ***Massimo Orsi andLuciano Baldetti***[31], the CJEU stated that art. 50 CFREU is not applicable where, in the case of administrative and criminal proceedings, administrative penalties and criminal penalties are applied for the same acts, tax penalties apply to a legal person and the criminal proceedings are brought against a natural person, even if he is the legal representative of the company (legally separate persons).

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Article 4 of Protocol 7 to the ECHR guarantees that the *non bis in idem* principle is respected within the jurisdiction of the same State.

As an element of distinction, art. 54 CISA guarantees compliance with the *non bis in idem* principle only when the first proceedings were conducted in a State other than that in which the second proceeding is conducted.

For courts in the Member States, this bipartite system often leads to practical difficulties, as beyond the relatively different wording of the art. 4 of Protocol 7 ECHR and art. 54 CISA, the CJEU had different approaches to the interpretation of the *idem* element and the *bis* element[32] to the ECHR. From a strictly theoretical point of view, it is possible that a criminal procedure is final according to the case-law of the Luxembourg Court, which makes the *non bis in idem* principle an incident, but a similar criminal procedure under national law is not judged definitively in Strasbourg, which excludes the application of the *non bis in idem* rule.

With regard to the term "final judgment", the CJEU has ruled that *the decision must be final and binding within the meaning of the national law of the contracting State whose authorities has adopted it, and to ensure that that decision confers protection in that State on the non bis in idem principle (case-law* ***Turansky****).*

With respect to element *bis*, the CJEU raised the following issues:

- if a first administrative sanction can be invoked in a subsequent criminal proceeding to make the *non bis in idem* rule applicable;
- if a first criminal proceeding is resolved with a non-adjudication solution ordered by the prosecutor, is the *non bis in idem* principle in the second criminal procedure applicable to the same offense?

The CJEU considered that the *non bis in idem* rule is also applicable to administrative sanctions with certain nuances. Thus, regarding the cumulation of administrative and criminal penalties, the Court has held that art. 50 ECHR does not preclude a Member State from imposing, for the same acts of non-compliance with VAT declarations, a combination of tax and criminal penalties (***Fransson's*** case).

In order to determine whether the sanction is criminal or administrative, the Court referred to the Engel criteria (criteria used by the ECHR in the non bis in idem principle) and refers to:

- Legal classification of the offense in domestic law;
- The very nature of the offense;
- The nature and degree of severity of the sanction that a person is likely to endure.

Regarding these criteria, it is necessary to say that the Constitutional Court has excluded from the application in the field of administrative sanctions the characteristic

[31]Cases 217/15 and 350/15, Judgment of 5 April 2017.

[32]P. Craig, G. de Burca, *European Union Law. Comments. Jurisprudence and Doctrine*, PH. Hamangiu, 4th Edition, 2009, p.532-534.

guarantees of the "criminal charge", taking into account that the presumption of innocence is strictly for the criminal process, and, as regards the contraventional liability, applies civil guarantees[33].

According to judicial practice, prior to the entry into force of the New Code of Criminal Procedure, the non bis in idem principle and the abandoning of criminal charges apply[34].

The CJEU has stated that the *non bis in idem* rule is also applicable to those procedures whereby the Public Prosecutor, without the intervention of a court, renounces further prosecution and imposes certain obligations on the accused (***Gozutok and Brugge*** case-law).

Regarding the *idem* element, CJEU considered that the only relevant criteria is the identity of the material acts, understood as the existence of a set of concrete circumstances, inextricably linked to each other, the divergent legal framing of the facts, and can not prevent the application of the *non bis in idem*[35] principle. (***Kraaijenbrink*** case-law).

IV. ISSUES ON *NON BIS IN IDEM*, BY REFERENCE TO THE COURT'S CONSISTENCY OR INCONSISTENCY

A) Problems regarding prescription

The case of ***Gasparinii and others***, in which the European Court finds that the *non bis in idem* principle is applicable when there is a final court judgment finding intervention on **the limitation of criminal liability** which prevents the initiation of proceedings in that Member State.

Analyzed from the perspective of our national law, we are talking about a decision to terminate the criminal proceedings for the intervention of criminal liability.

The conclusion of Court in ***Gasparinii***, is seen in the European doctrine as a first inconsistency of the Court, since the same day the Court contradicted itself with the judgment in ***Van Straaten***.

The criticism of the ***Gasparinii*** judgment is primarily about how the European cooperation instruments will work: knowing that they can benefit from this form of protection, a person, will try to use *forum shopping*; go to a state whose competence can to be activated by applying criminal law in space, knowing that the prescription has shorter deadlines in that state. For example, a romanian citizen who committed an offense in Romania (where prescription terms are extremely high) would flee to Italy (where prescription terms are mild), where they would activate the prescription regime.

Secondly, the nature of prescription must be analyzed. In some Member States (Belgium, France, etc.), the prescription is regulated as a procedural institution. In our national law, the prescription is not a procedural institution, it is not an exception, it is an institution of substantial law, and under these aspects, in our national law, ***Gasparinii***, is not an inconsistency, fitting the material right, the court being no longer obliged to investigate the case when it finds the incidence of prescription, the case being settled by a solution for the termination of the criminal proceedings.

Regarding the institution of prescription at the Union level, the solutions given by the CJEU in cases ***Taricco*** (C-105/14) and ***MAS & MB*** (C-42/17), we can conclude that the Luxembourg Court regards the prescription institution as a procedural institution, in which case, we can see an inconsistency.

[33]Decision 208 of 15 February 2011, published in Of. M. no. 218 of 30 March 2011 and Decision 652 of 17 May 2011, published in Of. M. no. 480 of 7 July 2011.

[34]Decision no. 632 of 23 August 2011 of the Oradea Court of Appeal, published in the Court of Appeal Bulletin no. 11/2011.

[35]See also Sergey Zolotukhin c/a Russia in this regard, judgment of 10 February 2009.

B) Problems on prosecutor's papers

In joined cases ***Gözütok and Brügge***, the CJEU stated that art. 54 CISA also applies to actions for the extinction of criminal proceedings, such as those in the main proceedings, whereby the Public Ministry of a Member State ends, without the intervention of a court, the criminal proceedings commenced in that State.

In the case of ***Miraglia***, the CJEU stated that article 54 CISA does not apply to a decision by the judicial authorities of a Member State declaring the closure of a case after the prosecutor has decided not to continue the criminal proceedings for the sole ground that criminal proceedings have been initiated in another Member State against the same accused and for the same acts, in the absence of any substantive assessment.

In the ***Turansky*** case, the Luxembourg Court ruled that art. 54 CISA is not applicable to a decision whereby, after examination of the substance of the case, an authority of a Member State orders the cessation of criminal proceedings at a stage prior to the bringing of the criminal proceedings against a suspected person of committing an offense, if that decision of termination, under the national law of that State, does not definitively cease the criminal proceedings and does not therefore constitute an impediment to a new criminal prosecution for the same acts in that State.

In the ***Kossowski*** case, the Court held that a decision of the prosecutor's office to definitively cease the prosecution, subject to its reopening or cancellation without penalty, can not be qualified as a definitive decision within the meaning of those articles if, it is clear from that decision that the criminal proceedings in question were closed without a thorough criminal investigation being carried out, the absence of a hearing of the victim and of a possible witness indicating the lack of such an in-depth investigation.

From the above judgments we can see that an ordinance of the prosecutor who definitively quashes the criminal action after the ground's analysis takes the form of a final decision and can activate the *non bis in idem* principle even without any control by the court.

The Court has been consistent in all cases in which it defined the term of the judgment, namely the acts of the court and subject to certain conditions, the prosecutor's orders (even adopted without the involvement of a court).

In recent doctrine and practice, two camps were formed that contradict the fulfillment of the "final judgment" condition as it results from art. 6 Criminal Procedure Code, with regard to the prosecutor's orders. On one hand, it has been argued that any ordinance to classify or waive prosecution must be a final judgment and enter into force of judgment. On the other hand, the Supreme Court refuses to take account of Union practice and CJEU's rulings in the application of the principle, considering that the prosecutor's orders are not final judgments and thus can not lead to judicial authority[36].

As far as we are concerned, we consider things to be nuanced, and in situations of this kind, we have to balance all the elements without pushing to the extremes. Thus, neither of the above opinions represent ideal solutions and are not sheltered by criticism, the more the Supreme Court's optics, which is also a source of conviction of Romania at the ECHR. Probably, the solution we propose, such as, in the sense of art. 6 Criminal Procedure Code, it is true that the prosecutor's orders are not per se final decisions, but it is no less true that, by exercising control over these ordinances, they would have been invested with "judgmental authority" , does not represent the "absolute ideal", and may lead likewise the other two opinions to delicate situations. Taking into account all the possible situations and issues, we still consider it to be the most balanced and necessary solution in our system.

[36]Decision no. 147 / RC dated April 3, 2017, pronounced by the Criminal Section of the Supreme Court.

V. APPLICATIONS OF THE NON BIS IN IDEM PRINCIPLE IN DOMESTIC LAW. CONSEQUENCES OF CJEU RULINGS

In the doctrine (M. Udroiu, O. Predescu) it was appreciated that enjoy the res judicata: the resolutions or ordinances of the prosecutor of non-adjudication or non-adjudication in court ordered under art. 278/1 (1) Criminal Procedure Code of 1968[37].

The Supreme Court considered that a resolution of the Public Ministry's Office had come under the authority of a court of law because it was maintained by the courts in the procedure provided for in article 278/1 (1) Criminal procedure Code of 1968 968 (Decision no. 354/ 2010 of 1 February 2010; Decision no. 215/2015 of 10 June 2015 and Decision no. 3903/2010 of 3 November 2010)[38].

Court of Appeal of Cluj, in its decision 108 / R / 11 of February 2008, stated that offenses such as embezzlement under article 215/1 of the Criminal Code of 1969 and use in bad faith of the credit of the company under article 272 (2) of Law no. 31/90, can not be sanctioned as concurrent offenses, since it violates the *non bis in idem* principle[39].

Decision no. 73/2011[40] of the Romanian Constitutional Court, stating that, in order for the *non bis in idem* principle to be applied, the person concerned must have been convicted, discharged or ordered to stop the prosecution for the deed which is again being prosecuted or judged. In the case of concurrent offenses, however, the offender shall be subject to a principal sentence, without thereby infringing in any way the provisions of art. 4 para. 1 of Protocol no. 7 to the Convention.

Decision no. 16/2016[41], establishes that the money laundering offense is an autonomous offense and is not conditional upon the existence of a conviction for the offense from which the goods originate, and also not violating the *non bis in idem* principle in the case of the person's conviction for theft.

In recent doctrine, Prof. Gh. Mateuţ, said that, according to the Criminal Code of Procedure, the *non bis in idem principle* is also incident in the situation where the previous judgment is a final decision rejecting the complaint against the solution the prosecutor to classify or waive prosecution against the same person and for the same deed. Being the case of an appeal in annulment provided by art. 426 (i) Criminal Procedure Code, and when a subsequent judgment ordered the conviction, the waiver of the punishment or deferment of the punishment of a person for the same act for which the preliminary chamber judge had previously ordered the rejection of the complaint against the solution of the prosecutor for non-adjudication[42].

Thus, we can note that Court of Appeal of Oradea in the criminal decision no. 460 / A / 25 July 2017 (unpublished), found that the principle of *non bis in idem* is incident:

- ✓ **There is a final judgment on the grounds of the case** in a Member State;
- ✓ **The new criminal trial has turned against the same person** (*eadem personae*);
- ✓ The new **criminal proceedings concern identical facts or facts that are substantially the same** (*idem factum*).

[37]M. Udroiu, O. Predescu, *European Protection of Human Rights and the Romanian Criminal Procedure*, PH. C.H.Beck, 2008, p. 941.

[38]N. Volonciu and others, *The Code of Criminal Procedure commented. Third Edition*, Hamangiu Publishing House 2017 p. 24, cited from Bulletin of the Romanian Judicial Network in Criminal Matters, II / 2013 Hamangiu Publishing House, 2014.p. 3-7.

[39]www.legalis.ro

[40]Decision no. 73/2011 of 27 January 2011, published.

[41]Published in Of. M., Part I no. 654 of 25/08/2016.

[42]Gh. Mateuţ, *The appeal in annulment, between the past and the present in the regulation of the Criminal Procedure Code in force*, in Universul Journal nr.2 / 2016.

CONCLUSIONS: CONSISTENCY OR INCONSISTENCY OF THE CJEU IN THE CURRENT CASES OF LAW

The *non bis in idem* principle is one of the most important, on which the international judicial co-operation in criminal matters is based, which is the result of the consequences of its interpretation and application.

Although the principle is recognized in all Member States' legislation, the European level is not well-established (although the abolition of borders and the approximation of EU Member States' legislation has created the premise of the widespread application of the principle).

That is why, on this segment, the Court of Justice of the Union has developed a rich jurisprudence.

The content of the *non bis in idem* ban was interpreted in two ways by the CJEU, that is, the same person can no longer be convicted of the legal classification given to a deed, but could be for another legal frame and, at the moment, the convicted from a case, can no longer be prosecuted and punished again for the same deed (on this segment, the Court was initially inconsistent). The Court of Justice of the European Union has pointed out that it is for the national courts to assess whether the degree of identity and the connection between all the actual circumstances to be compared is such as to make it possible to find that the same facts are involved and, if so, to apply the *non bis in idem* principle.

If initially the CJEU ruled that only a judgment on the grounds of the case would make the *non bis in idem* principle applicable, afterwards, the Court overturned its position, arguing that the non-adjudicatory orders given by the prosecutors allowed the application of that principle. The Luxembourg Court gave a positive answer also to a decision of the prosecutor to suspend on grounds of opportunity (waiving of prosecution), stating that it had the effect of a new prosecution.

Currently, the CJEU has consistent jurisprudence in the sense that any final settlement of a case - as a result of a material content check - given by a court or a prosecutor's office, applies the *non bis in idem* principle.

In the field of taxation, according to the recent case-law of the Court, a distinction is made between an administrative and a criminal act, the national courts being obliged to consider only one relevant criterion, that of the identity of the material acts, understood as the existence of an ensemble concrete circumstances inextricably linked to each other, in time and space, and by their object.

The Court practice is in full agreement with the ECHR, as evidenced by **Sergey Zolotukhin** v. Russia (judgment of 10 February 2009) and **Butnaru and Bejan-Piser v. Romania** (judgment of 23 June 2015).

At the present stage of regulation, an interpretation contrary to the non bis in idem principle would be likely to erode the right and affect international judicial cooperation in criminal matters.

We appreciate that, in the common judicial area, the European legislator should intervene by adopting regulations that would prevent any Member State from making use of the possibility of obtaining information involving international aid in order to institute criminal proceedings in abroad. A tolerance and acceptance by the Member States, based strictly on the principle of mutual recognition and mutual trust, is hard to understand, but if it were to take the form of a European regulation would create major benefits.

Until a legislative intervention has been made in the above-mentioned sense, in order to continue the process of European integration, the national courts in the Member States must comply with the provisions of Art. 50 of the Charter of Fundamental Rights of the European Union, by virtue of the principle of the primacy of Union law.

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INTERNATIONAL TAX ISSUES UNDER THE NIGERIAN TAX LEGISLATION

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ABSTRACT

The drive for global economic integration has necessitated the development and adoption of certain international standards to guarantee increased certainty in business environment across nations and reduce levels of risks in the market. Considering the prominence of tax legislation as a major index or infrastructural component of an enabling environment necessary for optimum investments and business growth, this paper attempts to give an overview of issues relevant to international taxation and examines their level of conformity to global standards.

1. BRIEF INTRODUCTION REGARDING THE *NON BIS IN IDEM* PRINCIPLE

The goal of globalization to deliver increased economic integration, collective prosperity and better welfare for all admits the centrality of such economic policies as removal of trade barriers and imposition of tax as tools for its attainment. However, while removal of trade barriers seems central to internationalization of economic activities, taxation has been employed at the national level to stimulate economic activities and raise revenue for financing affairs of government. This apparent contradiction in substance and strategy of governance at the various levels makes it imperative that some attempts be made to reconcile them. Accordingly, this paper highlights issues that are relevant to international taxation under the Nigerian legislation to determine whether their treatment is consistent with the ultimate philosophy of globalization and how well it strikes a balance between the apparently contradictory strategies. The paper finds that despite its lack of express reference to deliberate policy to uphold the objective of globalization, Nigerian tax legislation carefully applies its provisions to imposition and collection of tax purely to provide direction for national economy and source revenue for running of government but not wrongly to erect barriers against foreign participation. The principal issue of concern to international taxation is the possibility of double taxation as examined in the next section.

2. DOUBLE TAXATION

Double taxation is a matter of serious concern to governments and their subjects across the world. It occurs when more than one jurisdiction exercises authority to levy tax on one and the same tax payer as a result of conflicting and sometimes overlapping tax jurisdictional claims of two or more countries. It is basically wrong for one country to exercise tax control within the tax jurisdiction of another.

The problem of double taxation is traceable to two main conflict factors: first, conflict of residence against source of income whereby one country levies tax on the global income of a tax payer on account of his residence in that country while another country taxes the same person for sourcing his income from within her territory[1].

The second factor relates to the criteria used in defining residence. To some countries, domicile determines residence, but to others the determinant is nationality of the tax payer. In effect, a tax payer may thereby become concurrently fully liable to pay tax to two different countries at the same time[2]. What then are the regimes of double taxation in Nigeria legal environment? Our approach to this question would be from the angle of specific provisions, under which persons are charged to tax in Nigeria.

3. LIABILITY TO TAX

In Nigeria, tax liability is imposed on two categories of persons: natural persons or individuals and artificial persons particularly companies. Firstly, the Personal Income Tax Act, 1993[3] identifies taxable persons and determines their assessable incomes by reference to the residence of tax payers and source of origin of their incomes respectively[4].

The law charges the incomes of every taxable person from a source inside or outside Nigeria including:

a. gains or profits from any trade, business, profession, or vocation;
b. salary, wage, fees, allowances, or other gain or profit from an employment including gratuities, compensations, bonuses, premiums, benefits, or other perquisites allowed, given or granted to an employee (*other than reimbursable expenses*);
c. gain or profit including premiums from the grant of rights for the use or occupation of any property;
d. dividend[5], interest or discount;
e. any pension, charge or annuity; or
f. any profit or gain or other payments not mentioned in the above categories[6].

These provisions enable the income of an individual from any of the above source to be assessed to tax if it arises in Nigeria or wherever it has been made, whether or not it is brought in or received in Nigeria[7]. Liability to tax will not arise where duties are performed on behalf of an employer who is in a country other than Nigeria, or the employer is not in Nigeria, for 183 days or more in a year of assessment, and the remuneration of the employee is liable to tax in that country[8]. It has been said that this rule is convenient for foreigners who can beat the 183 days requirement[9], but this will not be the case where the duties of an employment are mainly performed in Nigeria as the employee may still be chargeable to the extent that his duties are performed in Nigeria[10].

Secondly, liability of incomes arising from businesses of a company is addressed under the Company Income Tax Act[11] while that arising from investment in petroleum

[1] S. Bagaria, "The Nature and Purposes of Double Taxation Agreements and the Issues to which Interpretation of Such Agreements may Give Rise," available at SSRN: http://ssrn.com/abstract=2018859, last visited on 21st March, 2015.
[2] J. E. Gregory & J. Weather, "UK/US Tax Issues for Internationally Mobile Executives," Business Law International, vol. 13. No. 3, (2012): 247-327;
[3] No. 104 of 1993 consolidated under CAP P8 Laws of Federation of Nigeria, 2004, paragraph 1 Schedule 1;
[4] Ibid, SCHEDULE 1 Paragraph 1;
[5] For treatment foreign income including dividend paid outside Nigeria, see section 13, ibid;
[6] Ibid S.3;
[7] I .A. Ayua, The Nigeria Tax Law, (Spectrum Books, Ibadan, 1996), p.66;
[8] Personal Income Tax Act 1993, Section 10(5);
[9] B. B. Kanyip, Taxation Issues in Foreign Investment, Modern Practice Journal of Finance and Investment Law vol. 2 (1998), p. 112;
[10] Cap P8, 2004, Section.10 (a) (i), footnote 3.
[11] CAP C21 LFN 2004;

industry is governed by the provisions of Petroleum Profits Act[12]. A company is defined as any company or corporation (other than a corporation sole) established by or under any law in force in Nigeria or elsewhere[13] and companies are generally classified into two categories namely Nigerian companies and foreign companies[14]. A Nigeria company is any company incorporated under the Companies and Allied Matter Act, or any enactment replaced by that Act. A foreign company, on the other hand, refers to any company or corporation (other than a corporation sole) established by or under any law in force in any territory or country outside Nigeria[15].

The importance of the above distinction is underscored by the tax treatment of the income or profit of various categories of companies. The profits of a Nigerian company are deemed to accrue in Nigeria wherever they have arisen and whether or not they have been brought into Nigeria[16].

Accordingly, a Nigerian company is liable to pay company income tax in respect of all its profits wherever they arise. As for a foreign company, its profits from any trade or business is deemed derived in Nigeria to the extent to which such profits are attributable to any part of the operations of the company carried on within Nigeria. Thus, the profits of a foreign company are taxed to the extent that they derived from sources within Nigeria

Apart from the difference attributable to taxation of the two categories of companies based on the source of income, there is no distinction leading to preferential treatment (or otherwise) in favour of either a Nigerian company or a foreign company in respect of liability to companies income tax on their profits deemed to be derived from Nigeria[17]. However, special tax treatment applies to two categories of company by reference to the nature of their business. First, the full profit or loss arising from the carriage of passengers, mail, livestock, or goods shipped or loaded into an aircraft in Nigeria to the benefit of a non-Nigerian company carrying on the business of transport by sea or air is deemed to have been derived from Nigeria[18]. But the rule does not apply to profits or loss arising in respect of passengers, mail, livestock or goods which are brought into Nigeria solely for transshipment or for transfer from one aircraft to another or in another direction between an aircraft and a ship[19]. In the same vein, a non-Nigerian company which carries on the business of the transmission of messages by cable or any form of wireless apparatus is assessable to tax as though it operates ships or aircrafts and to be treated in like manner for the purpose of computation of its profits deemed to be derived from Nigeria[20].

The second category is the insurance company which has been subdivided into two types namely, non-life insurance companies and life insurance companies.

3.1.Non-Life insurance Companies

The taxable profit of a non-life insurance company is determined by computing the gross premium with interest and other income receivable in Nigeria less reinsurance, and deducting from the balance so arrived at, a reserve for unexpired risks using the percentage consistently adopted by the company in relation to its operation at the end of the accounting year.[21] The amount arrived at is added to a reserved similarly calculated for unexpired risks

[12] CAP P13 LFN 2004;
[13] Ibid, Section 105;
[14] Ibid;
[15] CAP C21 LFN 2004, Section 84, see also section 11;
[16] Ibid, S. 13;
[17] See for example Offshore International S. A. vs. FBIR Unreported Suit No. FRC/36/75;
[18] CAP C21 LFN 2004, S. 14;
[19] Ibid, Section 14 (2);
[20] Ibid, Section 14 (3);
[21] A limitation is imposed on the percentage deductable as reserve from premium: 45 percent is allowed in respect of unexpired risk of the total premium in case of general insurance business and 25 percent of the total premium in case of marine insurance business., while an amount equal to 25 percent is allowed as deduction for other reserves. See footnote 18 at Section 16 (8).

outstanding at the commencement of the accounting period deducting there from the actual losses in Nigeria.[22] In addition, deductions are allowed in respect of agency expenses in Nigeria and a fair proportion of the head office expenses.

3.2. Life insurance companies

The taxable profit of a foreign life insurance company is its investment income less management expenses including commission.[23] For this purpose, investment income has been defined to include "any premiums or any amount ensuing from actuarial revaluation of any unexpired risks transferred by a life insurance company to its profit and loss account.[24]

Where, however, the profit accrues in part outside Nigeria, the profits shall be the proportion of the total investment income of the company as the premium earned whether received or receivable, less the agency expenses of the head office of the company but where the insurance company has its head office outside Nigeria, the Federal Board of Inland Revenue may however substitute another basis for ascertaining the required proportion of the total investment income.[25] It has been observed that this is essential as it is difficult to assess the liability of the total global investment income of the foreign company and in any case it might be difficult even getting the required information.[26]

3.3. Nigerian General Insurance Companies

It does not seem that any substantial distinction exists between a Nigerian Company carrying on non-life insurance business and its counterpart dealing in life insurance, but different tax treatments apply in respect of a Nigerian company engaged in general insurance business and another one dealing in life insurance.[27]

Whereas the taxable profit of a general Nigerian Insurance Company is ascertained in accordance with the provisions of Section 16 (1) as though the whole investment and premium income of the company were derived from Nigeria. Thus, the profits of Nigerian life insurance company is ascertained in accordance with the provisions of subsections (2), (3) and (4) of Section 16 as though the whole investments and other incomes were received in Nigeria and all expenses and other outgoing of the company were incurred in Nigeria.

According to the Act, any amount distributed in any form as dividend from an actuarial revaluation of unexpired risks or from any other revaluation is deemed to be part of the total profits of the company.[28] Thus, the company is required to provide the Board with full particulars of the revaluation carried out including a copy of the actuary's revaluation certificate not more than three months after an actuarial revaluation of unexpired risks or any other revaluation has taken place.[29] Apart from the special tax treatment of the foregoing categories of companies, certain general principles have been laid down in respect of taxation of ordinary business of companies as discussed below.

3.4. Rate of Tax and Chargeable Income of Companies

The rates of tax payable by a company doing business in Nigeria are as set out in the Act[30] with assessment of liability targeting profits of any company accruing in, derived from, brought into or received in Nigeria. In effect, the profits of a Nigerian company is assessed to income tax wherever they have been made if they are derived from, brought into, or received in Nigeria. It is immaterial whether or not all or any part of such profits have been brought

[22] See ibid, Section 16(1).
[23] See ibid, Section 16(2) (a).
[24] See ibid, Section 16(3).
[25] See ibid Section 14(b).
[26] B. B Kanyip, footnote 9, at 114.
[27] See footnote 18 at Section 16 (5).
[28] See ibid, Section 16 (3).
[29] Ibid, Section 16(4).
[30] See ibid, Section 40 (1) & (2).

into or received in Nigeria; they shall be deemed to accrue in Nigeria and accordingly will be taxable.[31] To facilitate the ascertainment of the taxable income of companies, categories of their income are contained in the Act as examined in the next section.

3.5. Categories of Companies' income

The following categories of income have been provided for the purpose of measuring the taxable income of companies:

1. Gains or profits from a trade or business
2. Rents or premiums arising from a trade or business
3. Dividends, interest, royalties, discounts, charges or annuities
4. Any source of annual profit or gains not falling within the preceding categories. This is a sweep-up clause to catch any transaction from which a company has derived profits which appears not to be included in the above categories.
5. Benefits from pension or provident funds treated as income under the income Management Act.
6. Fees, due and allowances (wherever paid) to services rendered.[32]

Thus, a company can only escape tax under the Companies Income Tax Act, by showing that it has got no profits or gains[33] accruing in or derived from Nigeria[34] in respect of any of the above categories of income.

The obvious implication of the above discussion, in relation to the treatment of distinction between Nigerian Companies and foreign companies and chargeability of income to tax, is that income from abroad (of both categories of company) is liable to double taxation since it is highly probable that the corresponding foreign government (whether qualifies as the source of income or home of taxable person) would also impose global tax on the income of its citizens and tax on income of foreigners derived from its land.[35] It is in this regard that some have suggested that double taxation agreements where concluded between jurisdictions (countries) would go a long way in resolving such problems.[36] It is therefore important to examine the nature of double taxation agreements and attitude of Nigerian legislation to the treatment of same.

4. DOUBLE TAXATION AGREEMENT

The main focus of double taxation agreement is the elimination of double taxation on income and on capital and is also for the prevention of fiscal evasion. They protect taxpayers against double taxation, thereby encouraging a free flow of international trade and investment and the transfer of technology. Double taxation agreement also prevents discrimination between taxpayers and provides some degree of fiscal certainty for international operations. They often contain clauses on the exchange of information between tax authorities of countries entering into the agreement thereby enhancing cooperation in carrying out their duties.[37] The history of double taxation can be traced to 1899 when the League of Nations acting through its financial committee entrusted a team of four economists (from Italy,

[31] Ayuha, footnote 6 at 167.

[32] See footnote 10, Section 15.
[33] Ibid, Section.9.
[34] Ibid
[35] See for instance, United Kingdom, Income and Corporation Taxes Act, 1988, Section 16(2) and Section 11(1).
[36] B. B Kanyip, footnote 9.
[37] Jeffrey Owens and Mary Bernnet, "OECD Model Tax conventions," OECD Observer, available at www.oecdobserver.org, last seen on 24/4/2015.

Holland, United Kingdom and the USA) with the task of preparing the study on the economic aspect of international double taxation.[38]

However, two different models of Double Taxation Agreements have been variously developed by the United Nations and Organisation for Economic Cooperation and Development (OECD) to serve as guides in the negotiation of such agreement between member countries.[39] Whereas the OECD model is primarily set up for the benefit of member countries as to how their government might claim their rightful taxation from growing international businesses why not leaving corporations wronged for being unfairly taxed across the different jurisdictions in which they operate.[40] The UN model[41] seeks to encourage equity in negotiation between developed and developing countries.

4.1. Double Taxation of Subjects in Nigeria

Section 38 (1) of PITA 1993 provides that a double taxation agreement has prior legislative importance over the provisions of the Act and indeed over "anything in any enactment". The provision upholds the sanctity of international agreement. This provision seems inconsistent with the supremacy of the Constitution of the Federal Republic of Nigeria and particularly the provision of section 12 thereof to the effect that any treaty concluded between the country and another would not come into force until ratified or domesticated by the National Assembly. However, a better approach is where the Minister is empowered to give effect to such arrangement by order or subsidiary legislation.[42] Similarly, Section 38 (2) of the Act allows the breach of any obligation as to secrecy in so far as its disclosure is required to an authorized officer of the government with which the arrangements are made.

4.2. Nigeria Double Taxation Agreements

Nigeria's double taxation agreement with other countries is patterned after the UN model which guides the country in negotiating tax treaties with other countries. The model contains clauses on treatment of issues of interest including income from immovable property, business profits, dividends, royalties, interests, capital gains, fees for services, pensions and gratuities and other income[43]

Nigeria is currently a party to a number of double taxation treaties including agreements involving the kingdom of Belgium, French Republic, Canada, Romania, and Kingdom of Netherlands.[44] Most agreements concluded with Nigeria are comprehensive except such as concluded with Italy which covers air and shipping matters only.[45] It is important to note that prior to 1978, Nigeria had double taxation agreement with several countries but in 1978 the Federal Government terminated all such agreements and ordered them to be renegotiated.[46]

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[38] Klaus Vogel, "Double Tax Treaties and their interpretation," International Tax and Busineess Law, vol. 1 Issue. 4 (1986), p. 1-84 also available online at; http://scholarship.law.berkeleyedu.edu/bjl/vol.4/iscl/1 retrieved 15th May, 2015.

[39] Ibid.

[40] J. Owens & M. Bernnet , footnote 37.

[41] It is titled United Nations Model Double Taxation Convention between Developed and Developing Countries, available at www.un.org/esa/ffd/tax, last seen on 20th April, 2015.

[42] See CITA 2011 Section 45.

[43] See UN Model Double Taxation Convention.

[44] Federal Republic of Nigeria, Company Income Tax Act, Cap C21, Subsidiary legislation 1-5, Laws of the Federation of Nigeria, volume 3, 2011.

[45] Delloite, "Improved Double Taxation agreement in Nigeria: Any Reason for Delay?" Inside tax, available online at www.delloite.com/ng. accessed on 13th March, 2015. It has also been reported that agreements between Nigeria and Mauritius; and South Korea are yet to be ratified thereby giving room for uncertainty among treaty stakeholders and could affect inflows of certain foreign direct investment into Nigeria.

[46] Paul Brundage & Adam Starchild, Tax Planning for Foreign Investors in the United States, (Springer Science & Business Media: New York, 1983), p. 121.

5. ANTI AVOIDANCE PROVISIONS

The term tax avoidance is not precisely used in Nigeria tax legislation, hence its definition cannot be found in any of the definition sections of the taxing statutes. The legislative failure to define the term is either due to an assumption that its meaning can be readily understood or a reflection of the difficulties of framing an exhaustive definition of term.[47] However, in the absence of any statutory definition, reliance is often placed on judicial definitions derived from case law analysis of complaints against contravention of anti-avoidance provisions. Opportunity for judicial interpretation usually arises from cases coming before the court on grounds of contravention of sections in the laws usually referred to as anti avoidance provision. Even at that, there is no common judicial definitions of the phrase 'tax avoidance' but it suffices to say that the different attitude of courts to its definition point to one fact that may in the meantime be regarded as the definition of the term.

It is defined as an exploitation of provision or lack in a taxing statute by means through which they legally reduce a previous tax liability, have the appearance of being artificial and of being entered into solely or predominantly for the purpose of reducing tax liability. The means adopted are not those by which one would expect normal business or family dealings to be carried out.[48]

Artificial avoidance of tax is a problem that faces every tax system and is likely to continue to do so when rates of tax are believed to be high since the burden of tax is seen to have a major influence upon the affairs of businesses and upon every aspect of social and personal life.[49] It is this problem which is at the centre of some of the most serious difficulties confronting the Nigerian tax system. Income tax avoidance possibilities are much more limited in respect of employment incomes than in relation to incomes from business or from capital. Although the normal rates are, if anything, more favourable to income from employment than from other sources, the effective outcome is the reverse. The practical consequence has been that differences in employment incomes are not source of major irregularities in wealth distribution as results overwhelmingly from differential incidence of inheritance, capital gains, corrupt patronage and indeed general corruption in government with collaboration of foreign businesses.[50]

While it may be correct to state that tax avoidance is a problem common to all tax system, the case of Nigeria seems unique having regard to the scale of corrupt practices, absence of skilled tax personnel and comprehensive anti-avoidance and anti-evasion tax legislation to curb the problem.[51] The magnitude of the problem could be illustrated by briefly examining counter-measures prescribed against tax avoidance activities by multinationals or similar companies.

The Nigeria tax legislation contains some provisions intended to plug holes engaged by taxable persons to minimize or escape tax liability. These include that which is applied to deem certain sums of money as income for tax purposes and other measures to strike down settlements and trusts designed to avoid tax or other family arrangements meant to escape tax.

However, the most serious concern about tax avoidance arises from the nature of a limited liability company and this can manifest in several forms. First, the structure of a limited liability company can be used as a device to give a person or group of persons (other than formal owners thereof) the control or enjoyment of income of a company. In this way the person or persons, especially those in the middle and upper income groups, can mitigate their

[47] I.S.L. Agboola, "Company Taxation in Nigeria, with Special Reference to the Anti-Avoidance Provisions and to the Investment Incentives." An unpublished PhD thesis submitted to the University of London (1967-1968); see also M.T. Abdulrasaq, Judicial and Legislation Approaches to Tax Evasion and Avoidance in Nigeria, Journal of African Law, vol. 29 (1985), pp. 59-71.

[48] M. T. AbulRasaq, Principles and Practice of Nigeria Tax Planning and Management (Batay Law Publications, Ilonn, Nigeria, 1993), p.33.

[49] See Ayuha, footnote 6, p.245; See also AbdulRasaq Ibid, p. 35.

[50] AbdulRasaq, ibid, p. 36.

[51] Ibid.

liability to higher rates of tax even escape tax completely. To curb this, the Act contains a measure which covers all companies in few hands by providing that:

where it appears to the Board that a Nigeria company which is under the control of five persons or less and has failed to distribute to its shareholders as dividend, profits made in any accounting periods with a view to reducing the aggregate of tax chargeable in Nigeria on the profit of the company the Board is empowered to direct that any such undistributed profit or income be treated as distributed to its shareholders.[52]

This is however subject to a condition that only such profits that could have been distributed without detriment to the company's business as it existed at the end of that period that can be deemed distributed as aforesaid. Thus the test to be applied is whether the retention of profits in the business is required for the maintenance and development or expansion of the company's trade or business. It is believed that such will constitute a good commercial justification for leaving the profit undistributed since it is not intended to use the profits as a device for saving personal tax.[53] In any event, any amount of profits treated as distributed should be deemed to be profits on income from a dividend accruing to those who are shareholders in the company in proportion to their shares in its ordinary share capital and the amount of such profits or income is now taxable as personal income in the hands of each shareholder.[54] It is to be noted that a company in respect of which any such direction is made has a right of appeal in the like manner as though it were an assessment under Part X of the Act.[55]

Secondly, liability under Companies Income Tax Act can be mitigated by companies especially those under the control of shareholders who are directors for example, fixing very high remuneration for the director since this can rank as deductible expenses for tax purposes. Although this particular device was not originally addressed by legislation, director's remuneration and allowances have now been statutorily subjected to a limit for tax purposes.[56] It has also been observed that a company can circumvent that measure by capitalizing profits through the issuance of new shares to the existing shareholders so that the capital paid on the new shares will be made out of profits thereby depleting the taxable income of a company.[57]

Thirdly, many transactions undertaken by multinationals such as sale of goods, provision of services, licensing of patents and know-how and granting of loans usually take place between members of the same group. It is an open secret that tax is a factor for consideration in prices charged for such transfers which are usually not at arm's length. The multinational or transnational corporation adopts transfer prices which are not arms length prices in order to minimize tax. This can be done for example, either by selling goods to subsidiary in a tax haven at less than arm's length prices or by a parent company overpricing its exports to foreign subsidiary so that by inflating the cost of imports of the final product or raw materials, a corporation can increase the margin of profit which will be concealed for tax purposes.

This leads to artificially lower profits and therefore lower tax collection in the taxing country. Thus, by shifting profits from one company to another company in the group, the tax liability of the relevant company is consequently distorted. This manipulation can have adverse effect on market and industrial structures as well as the balance of payments. Indeed it is likely to affect economic development generally and in particular domestic capital formation and tax revenues of a developing country like Nigeria.

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[52] Federal Republic of Nigeria, CITA, section 21.
[53] Ayua footnote 6 at 251.
[54] CITA 2004, Section 17(2).
[55] CITA 2004, Section 21 (6).
[56] CITA 2004, Section 24 (c) (deleted by No. 11 of 2007, Section 6 (a)).
[57] Ayua footnote 6, p. 254.

However, the nefarious tax avoidance activities of multinational companies or related-companies continued unabated due to apparent lack of will on the part of the Nigeria courts to strike down the schemes through the application of the time-honoured doctrine of "lifting the veil of incorporation" to expose the relationship between companies belonging within the same group.[58] To remove the anomaly, a number of studied amendment have since been made to the law to take care of the problems relating to dues and allowances for services rendered in Nigeria and interest payment.

First, any company entering into an agreement in respect of fees, dues and allowances (wherever paid) for service rendered in Nigeria must make a full disclosure of the terms of such agreement to the Board in writing. Presently, interest is deemed to be derived in Nigeria if there is liability to payment of the interest by a Nigerian company or a company in Nigeria regardless of where or in what form the payment is made or regardless of whichever way the interest may have accrued.[59] This is against the previous arrangement whereby interest was taxable in the hands of the recipient thereby creating a possibility of an agreement for payment of interest abroad.[60]

A similar measure is provided against the use of management fees, technical fees and related arrangements by which profits are transferred abroad in order to minimise tax liability. The arrangement whereby such payments were regarded as deductible expenses has since altered to make them taxable as profits.[61] In fact, the law now contains specific prohibition against treating head office expenses incurred for and on behalf of any company in Nigeria as allowable deductions.

Finally, it remains to be stated that just as the avoidance schemes stated above are not by any means exhaustive, the anti avoidance provisions considered are similarly not comprehensive. Besides, more schemes of avoidance are likely to emerge considering the growing sophistication of the time. Accordingly, it is provided by law that where the Board is of the opinion that any disposition is not in fact given effect to or that any transaction which reduces or would reduce the amount of any tax payable is artificial, it may disregard any such disposition or direct that such adjustment be made as to counteract the avoidance or reduction of tax.[62] The term 'disposition' is given an extensive statutory definition to include any trust, grant, covenant, agreement, or even the word arrangement which has a very wide meaning thereby embracing whole range of activities and thus considerably extends the meaning of disposition. However, the term refers only to transactions involving persons one of whom either has control over the other or related to each other or, in the case of individuals, who are related to each other or between persons both of whom are controlled by some other person. The point is that such transactions are regarded as artificial or fictitious particularly where the Board is of the opinion that those transactions have not been made on terms which might fairly have been expected to have been made by persons engaged in the same or similar activities dealing with one another at arm's length. The provision seems general in scope and can pass for an omnibus clause which if employed to the maximum could make a considerable difference.

6. TAX INCENTIVES

[58] Rasis & Co (Nig.) Ltd V. FBIR Suit No. FRC/LIA/76. See also Aluminium Industies Aktien Geselichaf V. FBIR (1971) NMLR 339.

[59] See footnote 11, Section 9 (2)(a & b) (2004 LFN).

[60] See for instance Section 17 of the Company Income Tax Act, 1961 which provided that tax was payable on interest in Nigeria where there was right to pay the interest in Nigeria. The application of that provision was demonstrated in the case of Aluminum Industries Aktien Gesellschaff v. FIBR (1971) NMLR, 339.

[61] See Company Income Tax act, 1961, Section 61A.

[62] See footnote 11, Section 22.

Nations have devised different economic methods to stimulate economic growth and to mobilize foreign capital for the realization of deserving specific national policy objectives. One of the many ways by which this is done is by the grant of tax incentives to investors. The word "incentive" may be defined as a reduction in the effective tax burden on the favoured activity as against that currently imposed upon it in the hope that the reduction in government revenue (due to tax foregone) will be compensated by an expected expansion of the national economy and ultimately by resulting increase in total tax revenue from such broadened economic basis. Following is an overview of statutory incentives having international connotation and their effectiveness in Nigeria.

6.1. Pioneer Industries Relief of Tax Exemption

Nigeria's pioneer companies' relief was first introduced through the promulgation of the "Aid to Pioneer Industries Ordinance, 1952",[63] which was repealed by the Industrial Development (Income Tax Relief) Act 1958.[64] The Act liberated and extended the former aid to pioneer industries and provided that the establishment and development of industrial and commercial enterprises might be encouraged by way of income tax relief.

The industrial development (Income Tax Relief) Act 1958 was in turn repealed by the Industrial Development (Income Tax Relief) Act, 1971.[65] It re-enacted its predecessor though with certain major changes. It provides that the Federal Executive Council may under certain conditions direct in the Gazette a list of pioneer industries and products and upon such publication application may be made for the issue of a pioneer certificate to any company in respect of any such industry or product. The law was later variously consolidated in the Industrial Development (Income Tax Relief) Act.[66]

The current law grants tax relief for 3 years subject to the power of the President to extend the period to a maximum of 5 years where he is satisfied as to the volume of investment, rate of utilization of the local content, expansion, efficiency and the utilization of raw materials. The two years may start with one year and followed with another year. This tax relief is available to both foreign and indigenous industries, although the required initial investment for a foreign company is =N=150,000 and =N= 50,000 for indigenous company. However, a pioneer company is not entitled to carry on any trade or business other than its pioneer enterprise during its tax relief period.[67] Where it earns profits from any activities other than its pioneer enterprise it will be liable to tax in respect of those profits,[68] otherwise the profits of a pioneer company are exempted from tax.[69] Furthermore, a pioneer company is entitled to claim the benefit of capital allowances at the end of its tax relief period thereby extending a tax-free period of five years by another period during which a pioneer company pays no tax.

7. CONCLUSION

Developments in trans-border trade have assumed such exponential proportion that a nation can no longer afford to restrict its legislative consideration to the interests only of her citizens at the expense of citizens of other nations who may have beneficial investment interests in the former. The approach has been shown by this paper that Nigerian tax legislations pay considerable attention to issues of international concern particularly to

[63] No. 10 of 1952.
[64] No. 8 of 1958.
[65] No. 21 of 1971.
[66] See Laws of the federation of Nigeria, Cap. 179 of 1990; Cap. I7 of 2004 which was later revised in 2010/2011
[67] See Section 12 (1) of cap. I7, 2004 revised edition.
[68] See Ibid, section 12(2).
[69] O.J. Akinyemi & R.M. Akinyemi, The Pioneer IncomeTax Relief as an Investment Income in Nigeria, International Journal of Development and Management, vol.6, No.1, (2011)., available online @ www.ajol..info.php/ijdmarticle., retrieved on 3rd March, 2015.

address the delicate challenge of double taxation. Every investor is keen on maximizing profit and avoiding overtax that is capable of lessening his trade expectations. As shown under the discussion of tax liability and taxable profits, the approach whereby tax is imposed on the global profits or income of a subject raises serious double taxation concern. The approach adopted by the law to address these concerns has also been highlighted in addition to other incentives which may be tapped upon by foreign investors.

Thus, it may be safely observed that the Nigerian tax legislation is replete with measures to ensure fair fiscal treatment of issues of international concern. However, it is apt to maintain that by the nature of tax and the sovereignty of the imposing authority, every nation is free to device measures to encourage flow of international capital just as it can impose measures to stifle tax evasion and avoidance.

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EUROPEAN UNION LEGAL PROVISIONS ON THE ADMISSION OF THIRD-COUNTRY NATIONALS FOR THE PURPOSE OF EMPLOYMENTAS SEASONAL WORKERS

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ABSTRACT

”The global approach in matters of migration and mobility”, adopted by the Commission in 2011, sets out a general framework for the relations of the European Union with the third countries in matters of migration. This approach is based on four pillars: legal immigration and mobility, illegal immigration and human trafficking, international protection and asylum policy, as well as maximization of the impact of migration and of mobility on development.

On 13th May 2015, the Commission presented”The European Agenda on migration” proposing immediate measures and actions to perform in the following years for a better management of migration under all its aspects. Within it, the Commission proposes orientations in four directions: reduction of factors encouraging clandestine migration; a border management aiming at lifesaving and border security; development of a sounder asylum common policy; and establishment of a new policy in matter of legal migration by modernising and revising the ”blue card” regime, by establishing some new priorities of the integration policies and by optimising the advantages of the migration policy for the aimed persons and the countries of origin. In September 2018, the Commission published a report on the progress made in the implementation of the European Agenda on migration, examining the progress and deficiencies in its implementation.

KEY WORDS

seasonal workers, admission, employer, short-stay visa, long-stay visa, worker permit

1. INTRODUCTION

Pursuant to art.79 para.1 of TFEU (*Treaty on the Functioning of European Union*) ‘’The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings”.

The adequate management of migration flows involves the guarantee of a fair treatment of third-country nationals lawfully residing in Member States, so, the European Union, by regulating some secondary union rules, aims at establishing a uniform level of rights and obligations for legal immigrants, similar to that of EU citizens.

The Lisbon Treaty also stated that the Union shares the competences in this field with the Member States, especially regarding the number of immigrants who are allowed the right to enter the territory of a Member State in order to seek work [article 79 para. (5) of TFEU]. Lastly, the European Court of Justice holds full jurisdiction on immigration and asylum at present.

As for enforcement, at the European Union level, The Lisbon Treaty introduced the ordinary legislative procedure and the qualified majority voting, applying both to policies on clandestine migration and on legal immigration, granting the Parliament the statute of co-lawmaker in this field, on equal level with the Council. Nevertheless, the text of article 78 para. (3) of TFEU regulates an exception, thus, in case of a sudden inflow of nationals of third countries, the provisional measures are to be adopted only by the Council, but after consulting the European Parliament. The Union decision-making forum concluded, following the difficulties occurred in adopting a general disposition to fully cover the immigration of work labour into the EU, that the current approach consists in adopting some sectorial legislative rules for each category of immigrants in order to make a policy on legal migration within EU.

2. PROVISIONS INCLUDED IN DIRECTIVE 2014/36/EU ON THE STATUTE OF THIRD-COUNTRY NATIONALS WHO ARE ON THE TERRITORYOF THE EUROPEAN UNIONFOR THE PURPOSE OF EMPLOYMENT AS SEASONAL WORKERS[1]

Since 2008, they adopted a series of important directives on immigration, among which, Directive 2009/50/EC on the conditions of entry and residence of the third-country nationals in order to seek highly qualified jobs which is now under a revision process in the European Parliament and in the Council[2]; Directive (2011/98/EU) on the single residence permit, Directive 2014/36/EU on the conditions of entry and residence for the third-country nationals who want to work as seasonal workers, Directive 2014/66/EU on the conditions of entry and residence of the third-country nationals for a transfer within the same company, Directive (EU) 2016/801 on the conditions of entry and residence of the third-country nationals for research, studies, vocational training, voluntary services, student exchange programmes or educational projects and au-pair work, Directive 2003/109/EC of the Council, amended in 2011, on the statute of third-country nationals who are long-term residents in the European Union. At the above legal instruments, we can add Directive 2003/86/EC on the right to family reunification.

The Commission published in April 2014 a communication offering the Member States instructions on how to apply the EU competence about their integration. In July 2011, the Commission adopted the European Agenda on the integration of third-country nationals. More recently, in June 2016, the Commission presented an action plan including a policy framework and concrete measures to help Member States to integrate the approximately 20 million third-country nationals, legal residents within the Union.

The Union regulation established as a bench the efficient management of themigration flows for the specific category ofseasonal temporary migration and ensuring decent life and work conditionsfor seasonal workers, by establishing some correct and transparent rules on admission and stay, and by definingthe rights of seasonal workers, at the same time

[1]OG (government ordinance) no.25/2016 of amendment and addition of OG no.25/2014 on amendment and addition ofsome laws regarding the foreigners' regime in Romania, and OG no.194/2002 regarding the foreigners' regime in Romania, as republished with further amendments and additions, transposes the provisions of Directive 2014/36/EUon the conditions of entryand residence of third-country nationals for the purpose of employment as seasonal workers.

[2]Directive 2009/50/EC introduced the "European blue card", a rapid procedure to issue a special residence and work permit for a period betweenone and four years. The blue card offers more attractive conditions tothird-country nationals in order to allow them the access to a highly qualified job within the Member States. The first reportregarding the application of this directive was published on22 may2014 and it identified a series of deficiencies. In June 2016, the Commission proposed a revision of the system, with less strict admission criteria, compulsory requirements concerning a minimum salary threshold/ a minimum duration of the labour agreement, improvement of the provisions regarding family reunification and elimination of parallel national systems.

offeringincentives and guarantees to avoid exceeding the allowed period of temporary stay or to transform the temporarystay into long-term stay.
Actually, the directive analysed sets out the conditions of entry and residence of the third-country nationals for the purpose of employment as seasonal workers, at the same time defining their rights. Within this directive, the following definitions apply:

a) ”third country national” means any person who is not a citizen of the Union within the meaning of Article 20(1) TFEU;
b) ”seasonal worker” means a third-country national who retains his or her principal place of residence in a third country and stays legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between that third-country national and the employer established in that Member State;
c) ”activity dependent on the passing of the seasons” means an activity that is tied to a certain time of the year by a recurring event or pattern of events linked to seasonal conditions during which required labour levels are significantly above those necessary for usually ongoing operations;
d) ”single application procedure” means a procedure leading, on the basis of one application for the authorisation of a third-country national’s stay and work in the territory of a Member State, to a decision on the application for a seasonal worker permit;
e) ” short-stay visa” means an authorisation issued by a Member State as provided for in point (2)(a) of Article 2 of the Visa Code or issued in accordance with the national law of a Member State not applying the Schengen acquis in full;
f) ” long-stay visa” means an authorisation issued by a Member State as provided for in Article 18 of the Schengen Implementing Convention or issued in accordance with the national law of a Member State not applying the Schengen acquis in full.

Specificities of work relationships.

The work relationships are established directly between third-country nationals and employers. However, where the national law of a Member State allows the admission of third-country nationals as seasonal workers through employment or temporary work agencies established on its territory and which have a direct agreement with the seasonal worker, such agencies should not be excluded from the scope of this directive.

Classes of admissions.

We identify two classes of admissions, *those not exceeding 90 days requiring short-term visas, and admissions exceeding 90 days requiring long-term visas*.

The Union rule, by its directives, offers certain flexibility to Member States regarding the *authorisations to be issued for admission* (entry, stay and work) to seasonal workers. Through national regulations of transposing this directive, Member States ensures the easy access for applicants to the information concerning all justifying documents necessary to the application and the information concerning the entry and stay, including the rights and obligations and procedural guarantees of the seasonal worker.
Actually, *for a stay not exceeding 90 days*, Member States can choose to issue:

- a short-stay visa,
- a short-stay visa accompanied by a work permit in case the third-country national requests a visa pursuant to Regulation (EC) no. 539/2001.

Any admission application into a Member State, both for a stay not exceeding 90 days and for a stay exceeding 90 days, should be accompanied by:

a. a valid labour contract or, if otherwise provided for by national law or national administrative regulations, a binding job offer as a seasonal worker in the Member State concerned, from an employer established in that Member State, specifying: the place and type of work, the duration of employment; the remuneration; the working hours per week or month; the amount of any paid leave; the date of commencement of employment.
b. evidence of having or, if provided for by national law, having applied for, sickness insurance for all the risks normally covered for nationals of the Member State concerned.
c. evidence that the seasonal worker will have adequate accommodation or that adequate accommodation will be provided. In this regard, Article 20 of the Directive provides that Member States should make sure that seasonal workers benefit from accommodation that ensures an adequate standard of living. When accommodation is arranged by or through the employer, the rent should not be excessive compared to the seasonal worker's net remuneration and to the quality of such accommodation; the seasonal worker's rent should not be automatically deducted from the seasonal worker's wages; the employer should provide the seasonal worker with a rental agreement or an equivalent document specifying the rental conditions of the accommodation, and the employer should make sure that such accommodation meets the general health and safety standards in force in the Member State concerned.

For *stays exceeding 90 days*, member States can enforce by the implementation regulations, if any, the issue of one of the following authorisations:

- a long-term visa,
- a seasonal worker permit,
- a seasonal worker permit accompanied by a long-term visa, if the long-term visa is necessary to enter the territory pursuant to the national law.

In case a seasonal worker was admitted for a stay not exceeding 90 days and in case the Member State decided to extend the stay more than 90 days, the short-stay visa is replaced either by a long-stay visa or by a seasonal worker permit.

The third-country nationals who own a valid travel document and an authorisation in order to seek seasonal work, issued based on this directive by a Member State applying the Schengen acquis in full, are allowed to enter the territory of the Member State applying the Schengen acquis in full and to move freely on such territory, a period up to 90 days during any period of 180 days, in accordance with the Schengen Border Code and with article 21 of Convention of enforcement of the Schengen Agreement on 14th June 1985 between the governments of the states from the Benelux Economic Union, of the Federal Republic of Germany and of the French Republic, on the gradual elimination of the controls at the common borders (Convention of enforcement of Schengen agreement).

Also, Member Statescan impose thefollowing requirements:

1. the period of validity to exceed the intended duration of stay by a maximum of three months;
2. the travel document to have been issued within the last 10 years; and
3. the travel document to contain at least two blank pages.

Pursuant to art.8, the Member States shall reject, if any, an application for authorisation for the purpose of seasonal work where:

- the documents presented for employment were fraudulently acquired, or falsified, or tampered with;

- if the vacancy in question could be occupied by the nationals of the Member State concerned or by other Union citizens, or by other third-country nationals lawfullyresiding in that Member State;
- the employer has been sanctioned in accordance with national law for undeclared work and/or illegal employment
- the employer's business is being or has been wound up under national insolvency laws or no economic activity is taking place;
- the employer has failed to meet its legal obligations regarding social security, taxation, labour rights, working conditions or terms of employment, as provided for in applicable law and/or collective agreements
- within the 12 months immediately preceding the date of the application, the employer has abolished a full-time position in order to create the vacancy that the employer is trying to fill by use of this Directive;
- the third-country national has not fulfilled his or her obligations coming from a prior decision on admission as a seasonal worker.

Duration and extension of duration of stay.

Article 14 states that Member States, by the implementation regulations, shall determine a maximum period of stay for seasonal workers which shall be not less than five months and not more than nine months in any 12-month period. After the expiry of that period, the third-country national shall leave the territory of the Member State unless:

i. the Member State concerned has issued a residence permit under national or Union law for purposes other than seasonal work.
ii. the seasonal workers extend their agreement with the same employer.
iii. the seasonal workers are to be employed by another employer.

Refuseto extend the stay.

The Member States can refuse the extension of the stay or the renewal of the authorisation for the purpose of seasonal work where:

a) the vacancy in question could be occupied by third-country nationals of the member State concerned or by other Union citizens;
b) the vacancy could be occupied by third-country nationals lawfully residing in that Member State;
c) the maximum duration of stay has been reached;
d) if the third-country national applies for international protection under Directive 2011/95/EU or if the third-country national applies for protection in accordance with national law, international obligations or practice of the Member State concerned

Facilitation of re-entry.

Article 16 from the Union regulation states that the Member States shall facilitate re-entry of third-country nationals who were admitted to that Member State as seasonal workers at least once within the previous five years, and who fully respected the conditions applicable to seasonal workers under this Directive during each of their stay

I. The facilitation referred above may include one or more measures such as:the issuing of several seasonal worker permits in a single administrative act;
II. an accelerated procedure leading to a decision on the application for a seasonal worker permit or a long-stay visa;
III. priority in examining applications for admission as a seasonal worker, including taking into account previous admissions when deciding on applications with regard to the exhaustion of volumes of admission.

Sanctions against employers. The Member States provide sanctions against employers who have not fulfilled their obligations under this Directive. Thus, in case of invoking some reasons attributable to the employer, and therefore the authorisation for the purpose of seasonal work is withdrawn, the employer shall be liable to pay compensation to the seasonal worker in accordance with procedures under national law[3]. Any liability shall cover any outstanding obligations which the employer would have to respect if the authorisation for the purpose of seasonal work had not been withdrawn.

Limitations in recognizing the rights of seasonal workers.

As for the temporary character of the stay of the seasonal workers, we consider that Member States can exclude from enforcement some aspects aiming at family reunification, family benefits and unemployment benefits, from the right to an equal treatment of seasonal workers with the nationals of the Member States concerned and can restrict the right to an equal treatment regarding education and vocational training, as well as fiscal benefits.

Also, this directive shall not grant more rights than those already granted by the existing European Union legislation in case of third-country nationals having cross-border interests between the Member States.

CONCLUSIONS

We consider that maintaining a coherent Union policy on immigration is imposed, that should make available the opportunities created by the phenomenon of legal immigration, and, at the same time, should solve the problems caused by illegal immigration. This policy should take into account the priorities and need of each Member State and encourage the integration of the citizens coming from outside the European Union into the communities receiving them.

Also, we have to mention that the European Union endeavours to create partnerships with the countries of origin and with transited countries in order to organize more efficiently the legal immigration and to fight the illegal one, to improve the ratio between migration and development, to consolidate the rightful state and to promote the compliance with the fundamental rights in such these countries.

The seasonal workers coming from outside the European Union fall into the category of third-country nationals who are lawfully residing within it. However, the temporary character of their stay does not grant them the social rights fully recognised for the outside-the-EU nationals who are on the territory of the Union under other conditions than those regulated by this directive. We cannot help noticing that, by this regulation, the Union lawmaker ”took care” of the recognition and guarantee of a minimal sets of rights offering decent living conditions, protection against employers’ abuses.

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Regulation (EC) no. 810/2009 of the European Parliament and of the Councilon13 July 2009 establishing a Community Codeon Visas (Visa Code);

[3]art.17 para.2

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