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CONSIDERATIONS REGARDING THE ALIGNMENT OF THE ROMANIAN ENVIRONMENTAL LEGISLATION TO THE EUROPEAN UNION STANDARDS

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Abstract: *The perspective of economic growth, given the current conditions, without promoting an environmental protection policy, is no longer possible. Ecologic management is based on the following principle: Preventing is always better and more economic than treating. The integration of our country into the European Union required the alignment of environmental politics and practice to the EU directives. In this paper presents considerations regarding opportunity of implementation of European environmental legislation.*

Key words: *environmental legislation, environmental protection*

1. Environmental protection – an integrated part of the sustainable development concept

The XXI century took over an important issue left unsolved by the last century – environmental protection. At present, there are numerous alarm signals due to excessive pollution and exhaustion of certain natural resources. Despite all concerns on national and international level, aiming the protection of the environment and natural resources, life and ecologic diversity conservation, it is unanimously appreciated that efforts are insufficient and unequally distributed in the world. Financial support of environmental expenses depends on the economic condition of each country, thus differences between countries will mark profoundly this area too.

Ecologic reform regards tax rising for processes involving a high consumption of energy, water, raw materials, soil occupancy and simultaneously, reduction of other taxes for working people, ensuring transparency for using funds obtained from ecologic taxes and duties.

National and international debates and programs attempt to determine limitations for natural resources consumption, protection for a multitude of environmental aspects, but without stagnating progress and by providing new jobs. Certain measures are difficult to impose, by small steps policy, others are faster. At the same time, a long term vision is required, 20 - 40 years, as current pollutants have a long term effect; certain effects are not too well known, or the simultaneous presence of several pollutants does not allow a precise quantification of immediate and long term effects. That is why, besides appropriate software necessary for reducing pollutants, modern instruments of control and information on the level of pollution and environmental protection are necessary.

The issues of environmental management have been the basis for elaborating the ISO 14000 international standards. These have also been adopted in member states of the European Union. Romania has acknowledged these standards and elaborated similar ones.

In our country, ecologic management also tends to become more and more integrated in the practice of management confronted by community implication. Environmental management represents a component of the general management system, which includes organizational structure, planning activities, responsibilities, practices, procedures, processes and resources for the elaboration, implementation, achievement, analysis and maintenance of the environmental policies.

The concern of an organization regarding environmental issues should reflect upon two areas:

1. regulated area, by:
- laws, orders, governmental decisions, norms, standards;
- environmental protection agents;

- impact studies, environment balances, risk assessments, monitoring programs, conformity programs.

2. managerial area, by:

- ISO 14001, 19011;
- environmental management systems, environmental audit;
- third party certification institutions;
- environmental management guide, politics, system and operational procedures, working instructions.

The *Environmental protection* division, documented according to legal provisions, should be concerned with ensuring the organization's environmental performance. The *Environmental protection* division, documented according to ISO 14001 and integrated with the other management systems, must provide permanent improvement in this area.

The perspective of economic growth, given the current conditions, without promoting an environmental protection policy, is no longer possible. Ecologic management is based on the following principle: *Preventing is always better and more economic than treating.*

2. Aspects regarding the European environmental legislation

Environmental politics represents the statement of a public or private company, firm, enterprise, authority or institution related to its intentions and principles regarding global environmental performance which delivers the plan for action and settlement of its environmental objectives and targets [4].

A great number of international organizations, including governments, industrial associations and groups of citizens, have elaborated guiding principles which helped to define the general field of their engagement for environmental protection, providing a set of common values to the various organizations. Such principles can support the organization in the development of its politics which is unique.

Accomplishment of efficient results in the environmental politics depends on:

- organizing the monitoring of environmental factors;
- the ecologic audit;
- the development of eco-industries market;
- the environmental management.

Responsibility for determining the environmental politics belongs to the managers of companies, private companies, firms, enterprises, authorities or institutions, who aim the settlement of such politics, having to make available the data which will make possible its formulation or modification [4].

The evolution of concepts regarding the relationship between socio-economical and environmental activities, in the context of sustainable development principles, was done on two directions:

- the first direction, which has a compulsory character and requires that socio-economical agents obtain some notifications, approvals, operating permits from the institutions authorized in environmental protection. In this situation, the forms of appreciation of the ecological impact are regulated by the national environmental frame-legislation and detailed by the national secondary and tertiary legislation in the respective field;
- the second direction, which has a volunteer character, by which socio-economical agents, stimulated through certain potential advantages, engage to increase their environmental performances. In this case, the forms of appreciation of the ecological impact are regulated by the above mentioned standards (ISO 14000 and EMAS) which have an international and European acknowledgement.

The emergence of the new regulations regarding environmental protection and related to the elaboration of impact studies for the new investment objectives and of environmental balances for the objectives in exploitation, requires a large working volume.

In the European Union, the motivation of the environmental politics is characterized by economical and environmental factors [6].

✓ Economical factors:
- advantages and/or disadvantages for harmonizing the regulations and standards depending on the level of development of each community state;
- advantages and/or disadvantages for implementing the directives in community states.
✓ Environmental factors:
- cross-border pollution, dangerous imports and exports, acid rains, etc.;
- protection of the ozone layer, greenhouse effect, biodiversity protection;
- protection of rivers, streams, surface and coastal waters.

The principles of the European Union on which the environmental legislation relies are [5]:
➢ To prevent is more efficient than to remedy;
➢ The environmental impact must be considered from the investment phase;
➢ Nature exploitation which leads to ecologic lack of balance must be abandoned;
➢ The adoption of measures should be done based on a good scientific knowledge;
➢ The „polluter-payer" principle is translated by the polluter's having to bear the costs for preventing pollution and remedying the damages produced;
➢ The activities in a member state must not bring damages to the environment of another state;
➢ The environmental protection policy of member states must also consider the interests of developing countries;
➢ Member states must promote an environmental protection policy through international organizations;
➢ Environmental protection is everyone's responsibility, educational actions being necessary for this purpose;
➢ The environmental protection measures must be considered on an appropriate level, by taking into account the type of pollution, the necessary actions and the geographical area which needs to be protected. This principle is known as the "subsidiarity principle";
➢ The national programs for environmental protection must be based on an unitary long term conception and national politics must harmonize within the Community.

The implementation of these principles can be achieved through the following modalities: adoption of environmental politics harmonized with development programs; obligativity of the procedure for the assessment of environmental impact in the initial phase of projects, programs or activities; correlation of the environmental, territorial management and urbanism planning; introduction of stimulating or corrective economic key-factors; elaboration of directives and standards, their harmonization with international regulations and introduction of conformity programs; promotion of fundamental and applicative research in the field of environmental protection, etc.

The integration of our country into the European Union required the alignment of environmental politics and practice to the EU directives, according to the long term national strategy for economic development of Romania, and it is unfolded through:
- the development of sustainable management for water resources according to the provisions of the Dublin Conference (1992) and of the Rio de Janeiro Summit (1992);
- the accomplishment of the national program for sustainable management and use of soils and for the prevention of soil erosion;
- the assessment of the Romanian Natural Capital according to its current diversity and vulnerability, the development of the National Protected Areas Network;
- the introduction of rehabilitation measures for the Natural Capital in damaged areas;
- the accomplishment of the national program for the administration of urban and industrial waste, for recycling and reuse of products and materials;
- the construction of financial instruments related to the environment, for taking over the acquis, especially in the field of water exploitation, environmental protection in industry, agriculture, soil and damaged areas protection, organic protection and certification of organic products;

- the consolidation of institutional capacities and formation of competences necessary for the achievement of a partnership between the environmental institutions of Romania and those of the European Union, providing thus the administrative support necessary for the development of major opportunities and advantages provided by the European Union through the strategies and instruments destined to support our country in the process of accession to the European Union;
- the formation of a legal and institutional frame in order to facilitate and stimulate the dialogue between authorities and civil society regarding strategy, politics, programs and decisions related to the environment and the socio-economical development of the country;
- the conservation and development of human capital in the environmental field by improving the formative and informative educational system, the promotion of scientific research and of specific works.

3. Case study – The issue of environmental protection in oil derricks

For the contemporary society, environmental protection has a major importance as the economical development exists in the framework created by the environment where we exist and unfold our activity.

By definition, the environment represents the assembly, at a certain moment, of natural factors – physical, chemical, biological and social (created through human activities) which, in close interaction, influence upon the ecologic balance and determine life conditions for individuals and development conditions for society.

The issues of environmental protection have profound implications in all the organizations, irrespective of their size. A positive attitude towards the environmental protection is an essential factor in the development of each organization for an undefined period of time.

Principles and strategic elements on which environmental protection regulations rely, are [3]:

1. The principle of environmental politics integration in the other divisional politics;
2. The principle of precaution in decision making;
3. The principle of preventive action;
4. The principle of retaining pollutants to the source;
5. The principle „polluter pays”;
6. The principle of preserving biodiversity and ecosystems specific to the natural bio-geographical framework;
7. Sustainable use of natural resources;
8. Public informing and participating in decision making, as well as access to justice in environmental issues;
9. Development of international collaboration for environmental protection.

According to the legislation in force, modalities of implementing environmental protection principles and objectives are determined [3]:

a) prevention and integrated control of pollution by using the best available techniques for activities with a significant impact upon the environment;
b) adoption of development programs, according to the environmental politics;
c) correlation of the territorial management and urbanism planning to the environmental planning;
d) accomplishment of the environmental assessment before approving the plans and programs which may have a significant impact on the environment;
e) assessment of the impact on the environment in the initial phase of projects which have a significant impact on the environment;
f) introduction and use of stimulating and coercive economic key-factors and instruments;
g) solutions, by levels of competence, of environmental issues, according to their degree of importance;
h) promotion of legislative acts harmonized with the specific European and international regulations;
i) establishing and monitoring of the accomplishment of conformity programs;

j) achievement of the national system for integrated monitoring of environment quality;
k) acknowledgement of products with reduced impact on the environment, by granting the ecologic labelling;
l) maintenance and improvement of the environment quality;
m) rehabilitation of the areas affected by pollution;
n) encouraging the implementation of environmental management and audit systems;
o) promotion of fundamental and applicative research in the field of environmental protection;
p) individuals education and awareness, as well as their participation in the process of elaboration and implementation of environment related decisions;
q) developing the national network of protected areas for maintaining the favourable preserving condition of natural habitats, flora species and wild fauna as an integrated part of the European ecologic network - Nature 2000;
r) implementation of the systems for ensuring the traceability and labelling of genetically modified organisms;
s) prioritized elimination of pollutants which endanger directly and seriously individuals' health.

Extraction of hydrocarbons, as any other industrial activity, affects the environment, by unfolding the technologic processes as well as by the eventual accidents.

Although the extraction industry is not one of the most noxious, considering its extended area of inland and by sea activity, a reduction of its effects on the environment is required by promoting some less polluting technologies and some methods and techniques of de-pollution.

The specificity of the hydrocarbon extraction industry requires precise measures regarding environmental protection. The implementation of ecologic management concepts in the hydrocarbon extraction industry aims the issue of purifying contaminated soil and phreatic waters and the minimization of the amount of residues before using some expensive installations for their treatment.

The complexity of activities in the oil extraction industry leads to a large rang of polluting sources, including, besides pollution sources resulted from human activities, specific polluting sources. As the latter are the most serious, and their infestation effect has a long term negative impact, it is necessary to identify those sources, as well as possible modalities of action on the ecosystems.

The exploration and exploitation activities of hydrocarbon deposits are considered factors with a high degree of occurrence of environmental pollution phenomena. Oil extraction in derricks is done in a closed system, which should allow the avoidance or minimization of any form of pollution.

Pollution prevention means the reduction or the exhaustion of discharges or emissions into the environment and it can be cumulated with the reduction of waste generation to the source or by using, reusing or recovering the generated waste. As the rehabilitation of contaminated areas' potential is an expensive process and sometimes even impossible to achieve, we try to prevent pollution and, if it has already occurred, to limit its effect by immediate local actions. An exact analysis of each pollution source, with its specific agents, leads to making certain concrete and efficient measures in order to prevent and reduce pollution in oil derricks [2].

4. Conclusions

In order to achieve some competitive and efficient economic results in the context of economic – environmental requirements, the companies operating in oil industry must observe a number of demands listed in the sustainable development coordinates required by the integration of our country into the European Union.

Consequently, they must unfold an activity based on technical and technological innovation which should materialize in cleaner and safer technological processes, in high quality products, according to the environmental protection requirements, and which should ensure the preservation of health and safety of these companies' customers. The activity unfolded must observe the regulations in force in the energetic area regarding the environmental protection, and the standards

and principles in the field of health - safety - environmental protection must be aligned to those in force on an international level.

The development strategy of the oil industry in Romania between 2001-2010, which makes the object of the Governmental Decision H.G. no.655/June 2001, establishes as a medium and long term strategic objective, the necessity of aligning the quality of oil products to the level of the European Union's requirements.

The decisional process must include both economic decisions and environmental or ecological decisions. The adoption of ecologic decisions implies a good knowledge of the issues to be solved as well as informing, documenting, determining and processing of the information and decision making.

All these activities require the presence of an environment specialist and the accomplishment of an IT system which will include data sources, methods of investigating and collecting internal and external information of the company, as well as information from its environment.

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PENITENTIARY – PENAL AND EDUCATIONAL INSTITUTION

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Abstract: *The purpose of this paper is to highlight the penitentiary, the profile of delinquents that have committed offences against society. The subject of this paper considers persons deprived of liberty being in the custody of Romanian penitentiary*.

Key words*: law transgression, penitentiary, persons deprived of liberty, sanction, punishment*

In order to apply the sanctions decided by the law courts, the State most often turns to imprisonment, considering that the deprivation of liberty will have not only recovering effects upon the imprisoned person, but also security effects upon the other members of the society.
The sanction must first intimidate, so most of the members of the community, knowing its consequences, may willingly comply with these rules, from the moment the penology rules come into force.

The Romanian language Explanatory dictionary defines sanction as a punishment decided by law for those who have infringed on its provisions. Punishment is a repression and constraint measure against the one who has committed a divergence from the law.
The aim of the punishment is to caution against the perpetration of new infractions. The execution of the punishment wishes to form a better attitude towards work, the right order and towards the social cohabitation rules.
After the perpetration of an infraction, when the punishment is effectively applied, it fulfils a complex of functions:

- way to redress the transgressors and to prevent them from harming (morally or physically, by temporary isolation or definitive elimination);
- useful for the re-entry of the judicial order in relation with the victim and the social group, while through the direct application of the punishment one will give satisfaction to the victim and as well as to the community, avoiding the disorder that could arise, if the victim or the social group react alone;
- it consolidates the intimidation force that the sanctions should exert on the recipients of the penology rules, while through its effective application the punishment becomes an example for all those who would be tempted to commit antisocial acts[1].

The functions that tend to prevent the transgressor from repeating the wrong behaviour in the future serve the special warning and the functions that intend to prevent the disturbance of the judicial order by other persons than the transgressor serve the general warning.

The categories and the general limits of the punishments are indicated in the 3rd Title, Punishments, of the Romanian Penal Code. Article 53 indicates three types of punishments: main, complementary and accessory punishments.

The main punishments are:
a) confinement for life;
b) imprisonment from 15 days to 30 years;
c) fine from 100 lei to 50.000 lei.

The complementary punishments are:
a) forbiddance of some rights from one to 10 years;
b) military degradation.

The accessory punishment of forbiddance of some right consists of the forbiddance of some of the following rights:

[1] apud E. Stănişor, 2003, p. 20

a) the right to elect and to be elected within the public authorities or in public elective functions;

b) the right to occupy a function implying the exercise of the state authority;

c) the right to occupy a function or to exert a profession or to carry on an activity of the kind of that the convicted used in order to commit the infraction;

d) parental rights;

e) the right to be a tutor or a custodian.

The forbiddance of the right to occupy a function implying the exercise of the state authority can not be pronounced except together with the forbiddance of the right to elect or be elected within the public authorities or in public elective functions, unless the law decides so.

Out of these punishments the confinement for life and imprisonment from 15 days to 30 years presumes the individual's deprivation of liberty, while all other punishments do not presume the deprivation of liberty. Here we add the sanction of obligation of the offender to carry out an activity for the use of the community, indicated by Law no. 82/1999.

There is a greater and greater anxiety of the public in front of criminality. It seems to conquer new spaces on the vertical and horizontal line of the social structure. Each day newspapers manage to bring proves in this sense and to produce a generalized state of apathy. The attitude "come what may, I may not be exactly the one who has to confront himself with it" expresses for most of us a real philosophy of life, when they go out on the street or get in a car.[2]

Out of the array of concerning data existing in the archives of the specialized institutions we observe the following aspects:

- the criminality increase from 202 at 100.000 inhabitants in 1989 to over 1.000 at 100.000 inhabitants, the number of infractions increasing with over 5 times in comparison with 1989; remarkable is the explosion of robbery (over 9 times bigger);

- increase of the number of persons from the penitentiaries, to 26440 confined persons (31st of December 2008), convicted for graver and graver infractions (infractions against persons and patrimony);

-increase of the number of persons from the penitentiaries, who have no high education, for infractions of false or at working place or related to their working place (558 persons);

- the enormous increase of the juvenile delinquency, getting to a number of 1390 persons sent to penitentiaries (2,88 % from the total number of the persons from the penitentiary), this becoming a major problem for the present and the future due to the infractions with a high level of social danger (robbery, crime, drugs consume and trading);

-in economy, the fictional created companies that carried out underground economic activities, unauthorized bankruptcy, tax evasion, false, use of false, fraud proliferate;

-corruption starts from the administrative level of the country – ministries, the main financial-banking institutions;

-proliferation of the games type „Caritas", supported by the politic power of the country;

-proliferation of the casinos and the games of chance, true "washing machines" and/or machines for screwing money;

- proliferation of the contraband, of the traffic with drugs, guns and radioactive materials;

-surmounting the contemporary slavery – especially the traffic with "flesh" – women and children fed into the prostitution industry;

-organized crime, even though not admitted at the beginning, has become so evident, that it was registered on the list of priority dangers for the state, after terrorism;

-phenomenology of the Satanic groups.

Of course, the Penal Code usually indicates punishments for the persons who commit these infractions. The judges balance them out so they can be useful: to get better the one who violated the law, but also to efficiently protect the community of free people.

[2] Florian, G. 2003, p. 15

The penitentiary is an institution that renders a distinct social service, its main aim being to serve the community, on one hand by defending its members from those who transgress the rules admitted by the society and, on the other hand, by encouraging and offering support to the delinquents, in order to become pacific citizens by exerting a reasonable, absolute and human control over them.

The influx of alcohol addicts, drug addicts, victims of the unemployment and mental patients into the penitentiaries have made the specialists affirm that this tend to be, more and more obviously, one of the relevant factors showing the incapacity of the society to integrate as many people as possible. The „excluding machine", the „hospital with no medical care", the „social garbage can", prison becomes, day after day, a huge deposit destined to isolate the persons with no value, categories that already are in a precarious social situation and not only those who are punished for their delinquencies by the law.

The penitentiary compasses a function of the justice that determines the increase of the quality of the life of the communities that it serves. The main principle that sustains the organization of these institutions is the fact that the best way to protect the society is to help the prisoners socially reintegrate and to reduce to minimum the relapse risk.

As a result, the two main functions of the penitentiary is to safely and under human conditions watch those who serve their sentence that deprives them of liberty and the stimulation of their participation in adequate programs that, in time, could allow them to socially readjust and reintegrate as citizens that observe the laws.

This means that the role of the penitentiary and of the people working there does not end with the infliction of the punishment, but they should also contribute to the orientation and support of the delinquents to change their behaviour.

The administration of the penitentiary places at the disposal of the delinquents, through different programs and treatments, the support they need and that will influence their criminal behaviour, changing it according to the normative exigencies of the society.

All the activities carried on in the penitentiary are a sign of respect for the dignity of the individuals, for their rights and trust in their potential of development as human beings.

We understand the human rights, as the sum of the elementary conditions considered indispensable for the harmonious development of each individual; people need to live in a certain way; they need to be secured especially from the power. During the last years, when analyzing the regime of the penitentiary, one must take into consideration if and how the human rights of the prisoner are respected. The present context that is to be found in our country, a real policy of social defence and conformation to the fundamental rights, requests special efforts. Of course, a part of it will be intended for a quick improvement of the living conditions of the persons deprived of liberty.

In this sense, the unifying role of the European Council, related to the standards of the prisoners' lives is obvious. The Recommendation no. R (87) 3 concerning the European Rules of the Penitentiary represent the basis of the progress of the penitentiary administration, being a real deontological code for all the categories of personnel working with the prisoners. As a result, more and more voices ask for the transformation of the European Rules for Penitentiaries in a constraint instrument for the member states of the European Convention for Human Rights. This thing is explained by the need of some more adequate forms of defence for the two categories of rights less protected by the Convention, and namely, the general rights and the special ones of the prisoners that come from their own country, admitting their particular situation and the risk they are subjected to because of the penal measures that condition their existence everyday.

A series of rights are injured by coming in the penitentiary: freedom of movement, the free development of the personality, participation in the economic and social life, the right to sexual satisfaction and family life, the right to work, the right to properties (the ability to administrate your own goods), and the right to self-determination.

When starting and carrying on the activities from the penitentiary one should take into account the fact that most of the delinquents have to serve a punishment of imprisonment with a set period and, subsequently, they will go back in the community. Except for a relative small number of

prisoners that have to serve a punishment of imprisonment for life, the reclusion offers the population only a temporary protection. So, the best way to secure the safety of the population is to apply a strategy that could favour and support the efforts made by the prisoner in order to reintegrate in the society as a peaceful citizen. All along the delinquent's serving period, the workers from the penitentiary intervene weighing the encouragement, support and control measures, always having in mind the prisoner's returning in the society and the protection of the public.

At a European level, the places destined for the execution of the punishments and for the penal measures are different from one state to another in terms of type, size and number of institutions.

The places destined for detention may be classified according to more criteria:

-according to the safety degree, most of the European penitentiary administrations have institutions of maximum safety, closed, semi-opened and opened, with different denominations;

-according to the category of persons imprisoned in the penal institutions, all the penitentiary administrations have places for preventive detention, for persons that are definitive convicted, institutions for young people and adults, for men and women;

According to the serving period, there are penal institutions for shorter and longer punishments[3].

Beside these, there are also: transit penitentiaries, work colonies, re-education centres for minors and young people, private penitentiaries, institutions for social therapy, judicial psychiatric hospitals, and probation institutions.

Regarding the number of penitentiaries, this varies between the limit of 2 in Andorra and 564 in Turkey.

The capacity of the penitentiary institutions differs from one country to another according to the type of the place. Finland and Slovakia have penal institutions with 20 places, Denmark has 270 places in opened penitentiaries and 180 places in the closed ones, the Irish penitentiaries have 590 places and those from Austria have at most 990 places. We find penitentiaries with over 1.000 places in Turkey (2.500), Romania (2.300), Bulgaria (2.100), Lithuania (1.900), Czech Republic (1.500) and Latvia (1.200).

The prosecution and the control committees of the Parliament execute the control over the penitentiary system. Judges (Portugal, Macedonia, and Italy) or organs of the local authorities make the judicial control. Moreover, the international non-governmental organizations and mass media can make inspections in the penitentiaries.

In Romania, the penitentiaries are subordinated to the Ministry of Justice. It administers them with the help of an autonomous body, the National Administration of the Penitentiaries. It has 43 units under it, including a penitentiary for women (Târgşor) and 2 penitentiary for minors and young people (Craiova, Tichileşti). We also have 3 re-education centers for minors (Găeşti, Buziaş, Târgu-Ocna), 6 penitentiary-hospitals (2 in Bucharest, Colibaşi, Dej, Poarta-Albă, Târgu-Ocna).

There are penitentiaries in the most counties of the country, except for Buzău, Covasna, Caraş-Severin, Dâmbovița, Neamț, Olt, Sălaj, Suceava, Teleorman, Vâlcea, that are served by the penitentiaries from the bordering counties.

According to the provisions of Law no. 275 from 2006, the penitentiary provides the custody of the persons being convicted to imprisonment by the law courts, as well as of the persons being preventively arrested.

The Application Regulation of Law 275/2006 sets the following attributes for the penitentiaries:

-apply the legal provisions related to the profiling of the detention places and separation of the persons deprived of liberty;

-guard and security of the detention places and the work points, escort and surveillance of the persons deprived of liberty;

-differentially applying the detention regime;

-maintenance of order and discipline among the persons deprived of liberty;

[3] European Penitentiary Administrations, 2002, p. 134

-giving the rights indicated by law for the persons deprived of liberty;

-presentation of the persons deprived of liberty in front of the law courts and penal suit organs;

-nominal evidence of the condemned persons;

-carry on activities meant to help the social reintegration of the persons deprived of liberty.

The pathological dimension of the detention universe is explained with the help of some specific elements: the affective and moral support coming from the immediate social relations is minimum; during the first experiences in the penitentiary one gets a resignation that becomes an invariant of the prisoner's personality; losing control over the environment frequently generates depressions; for most of the prisoners the personal efficiency feeling is annulled out of an acute lack of possibilities to bring to light own skills and to be successful.

The continue stress during the investigation period, entering a new community, the rigorous control of the behaviour, the dependence on the personnel, the over-agglomeration, the loss of intimacy favours the occurrence and development of a specific pathology.

The relations between the prisoners are sometimes based on manipulation and control. A prisoner says that you have to be strong, wide-awake, trickster and not to care about the others: „in prison you first tell stories, then you lie and then you start thinking". They tend to exaggerate the gravity of the transgression in order to impose themselves in front of the others, this being a surviving strategy in prison.

The space for movement is very small, this leading to the occurrence of the territoriality phenomenon. The individual defends what belongs to him, his own space where he lives. This phenomenon often appears in the over-agglomerated places and leads to a great aggressiveness.

Life in detention may lead to the occurrence of the penitentiary neurosis. It takes shape in apathy, repression of the personal enterprise, lack of interest in one's own goods, in people and events, in making plans, fatalism and installation of an affective anaesthesia.

In the penitentiary the equilibrium of the personality is disturbed based on a triple reduction: the living space, the personal time (suspension of the future, relativization of the past) and the social behaviour (isolation, abandon). The absence of a refuge, the lack of an intimate space, the emaciation of the discussion topics with the cell-mates and monotony often lead to affective breakdowns, degradation of the self-esteem and pathology.

In order to deal with the living conditions from prison, the persons deprived of liberty need to adapt to a new lifestyle. So, some of them adopt a "philosophical" attitude, avoiding to solve the inconvenient problems. Even the individuals with a robust personality before the detention, during the execution of the punishment develop sensitivity to the environment and an emotional intolerance, accentuated by the impossibility to change the situation. Here are other characteristics regarding the accommodation methods in the penitentiary of the persons deprived of liberty. For instance, the inhibition of the territorial instinct because of the impossibility to delimitate the allotted space, addiction, manipulation of information, sharing the food packets with another person that can offer protection etc.

Especially the supervising agents that insist upon the observance of the rules regarding the hierarchy and impose its keeping repress the aggressive tendencies.

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A NEW POWER STRUCTURE OF THE WORLD

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Abstract: *Since old times, the source of power policy was represented by inequality between states. Throughout almost the entire history there have been states which imposed themselves more than others and not few times in detriment of others. In the past one would talk about empires and great empires. Empires are inherently politically unstable because the subordinated parts prefer almost all the time greater autonomy and the elites of the mentioned parts act almost all the time to acquire greater autonomy. Thus, empires do not collapse but rather disintegrate, usually very slow but sometimes extremely fast.*

Key words: *Power, tendency in the evolution, history*

"Mica enciclopedie de politologie" defines **power** as "a social fundamental phenomenon which consists in the capacity of taking decisions and of securing their achievement by using different means of persuasion and constraint; power is expressed in an asymmetrical relation (ruling – subjection and/or domination – subordination) between the factors at whose level it takes place."[1]

The players on the political scene apply power in relationship with the others in two ways: first, "by using power directly in order to impose change in the competitor's behaviour", which means using military force, and the second way of applying power is the indirect one, which uses cultural and institutional attraction of a player to the other, in order to change the latter's behaviour.[2]

Since old times, the source of power policy was represented by inequality between states. Throughout almost the entire history there have been states which imposed themselves more than others and not few times in detriment of others. In the past one would talk about empires and great empires. Empires are inherently politically unstable because the subordinated parts prefer almost all the time greater autonomy and the elites of the mentioned parts act almost all the time to acquire greater autonomy. Thus, empires do not collapse but rather disintegrate, usually very slow but sometimes extremely fast.

In modern times, especially in the 20th century and in the present, they speak of *great powers*, whose main characteristic consists of military, economical and ideological domination or all of them together.

It is known that the end of the Second World War brought from a geopolitical point of view the division of the world in two big areas: the free and democratic world (the West Block) and the closed and undemocratic world (the East Bock), each of them having a pillar, namely the United States of America and respectively the Soviet Union. A bipolar world which will resist for almost half of century, meanwhile each of the two great powers striving to extend the sphere of influence and not few times resorting to armed force, in extremely violent conflicts, such as the ones in Vietnam, Afghanistan, Somalia, Iraq and so on.[3]

The events which took place in the last decade of the 20th century led to the transformation of the bipolar world (the USA and its allies – the Soviet Union and the communist camp) in a unipolar world, with a single *superpower*, the USA, many times called "the world policeman". In this uni-polar system the USA was considered "a new empire"; succeeding in putting together the

[1] *** *„Mică enciclopedie de politologie",* Ed. Ştiinţifică şi Enciclopedică, Bucureşti, 1977, p. 373
[2] S. Neguţ, *„Geopolitica. Universul puterii",* Ed. Meteor Pres, Bucureşti, 2008, p. 49
[3] S. Neguţ, op.cit., p. 363

political capacities with the military and economical ones as well as with the cultural influence in a way which makes it stand out compared to other international centres.

Surely the United States of America will remain in the humanity history as the last great power. But this does not mean that it will put an end to the fight of acquiring the world supremacy yet it is hard to believe that another state will be able to gain such a huge power, taking into account that the number of players increased and power becomes more and more diffuse.

The present is represented by the architectural reconfiguration of power relations from a bipolar global system, in which existed only the USSR and the USA as superpowers, to a system uni-polar, represented by the USA, or multi-polar. We are confronted with two fundamental models, multi-polarity and bipolarity to which was added another one after the collapse of the Soviet Union – uni-polarity. The first is usually defined by the presence of at least four important players, whose capabilities are compatible. According to K.N. Waltz, a system composed of three great powers could automatically become a bipolar one, by eliminating one of them. Although Randall Schweller tried to legitimate the existence of a distinct three-pole system, starting from the reality of the interwar world, his initiative comes up against obvious methodological and conceptual difficulties. In the first situation of reconfiguration of power relationships in the international security environment there is a single superpower, the USA, which is capable and has to respond to the challenges at the beginning of the millennium and even to the defiance and sometimes to the objections manifested by the regional powers, in progress at present.

Uni-polarity is the most complicated international system, first because of its rarity. Usually the appearance of a hegemonic tends to be counteracted by the other players but it is not impossible, because a structural theory (uni-polarity) can only indicate tendencies, not concrete results, which depend on the players' interactions. The respective system is difficult to define. The possible hegemonic has to be compared to every player separately, or to all of them. Starting from the same figures, from the first situation would result the existence of uni-polarity, whereas in the second we would have to do with a multi-polar system.

The second tendency in the evolution of global security background can be represented by the development of capacities and interests of certain regional powers which include state or non-state players on two continents, Europe and Asia.

The existence of several power poles imparts certain tendencies to the international relationships, in the neorealist view. Alliances are flexible and of short duration but the forming of coalitions represent an essential way to ensure security.

Taking into account the systemic factors, it is hard to say whether uni-polarity is more stable in comparison with bipolarity and multi-polarity. Conflicts can be overcome, especially if an involvement of the superpower is anticipated. On a long term, the inner balancing would change the international order but the dominant power can decide to preventively isolate and to weaken the potential rivals. If it does not succeed, forming a counterbalancing coalition is also possible.[4]

Among the regional players in the international security environment we mention the European Union, China, Russia, Japan, Pakistan, India, and Israel and so on and so forth.

The disappearance of the communist states generated the possibility to reacquire the national identity by the states in the centre and the south-east of Europe. This new reality included the appearance of certain conflict situations, some of which developed and determined the break out of armed conflicts with dramatic consequences.

The states in transition towards democracy and market economy are players whose main characteristics are represented by a weak political and economical life which can constitute sources of instability in the international environment.

The major political events at the beginning of the third millennium are marked by the NATO and the European Union enlargement, the break out of the "war against terrorism", all these

[4] Zbigniew Brzezinski, *„The Eurostrategic Trial – Lining with China Europa and Rusia",* The Center for Strategic and International Studies Press, Washington D.C., 2001.

constituting fundamental coordinates in the process of change and manifestation of the actual security environment.

Both NATO and European Union member states go through positive changes in the political, economical, military, social and financial fields, which lead to international détente and cooperation, as major factors in ensuring the construction of the new security structure.

The current power distribution within the international security environment made it possible to remove the danger of armed confrontations of huge proportions but despite this fact a series of new and unprecedented challenges and threats appear and generate new tensions and crises.

The United States have held the dominant position in the international system, enjoying significant advantages at military, economical and demographical levels. The basis of its armed forces is still represented by its advanced technology, nuclear arsenal and Naval and Air Forces.

In their turns, the middle powers invested in developing the inner power resources but without achieving major leaps. The Russian Federation massively invested in its armed forces which however register major deficiencies, especially at conventional level. China continued its economical development, allowing itself to follow a military modernization program, as well as India. The European Union has not succeeded yet in reaching the necessary political unity so as to play a major role in the international relationships, an often declared objective, but presently without significant practical consequences.

Within the international security environment, the European environment represent something different compared to other regions in the world. The uniqueness of the European security environment consists in the possibility to demonstrate and secure the achievement of political and economical integration on short and medium term, by assuming certain common ideals and values.

At the opposite pole of the European environment there are certain regions and zones of the "third world" which rise very serious problems for the international community: demographic explosion, poverty, starvation, terrorism, civil wars and so on.

At the beginning of the 21st century, the globally important players in realizing the international security environment are the United States and Europe.

According to Zbigniew Brzezinski[5], the basis in realizing the new security structure of the world resides in the relationships between the USA and Eurasia (which includes besides Europe and Russia, China and Japan).

The specialists in the field identified two triangles of Eurasian power:

- USA, Europe, Russia;
- USA, China, Japan.

In each of the two triangles, one of the powers, respectively Europe and Japan, relies on the idea of security and stability in the international life, whereas one of the other powers in turn, respectively China and Russia, remain open and interested in the possible geopolitical changes.

Romania's action on the global and regional plan in order to promote its security interests requires the clear understanding of the global security implications in the national security.

The new approaches regarding national, regional and global security show that there is a close connection between globalization and security.

In the international environment different risks appear – among which terrorism, corrupted governments, ethnic tensions, insufficient resources, geopolitical rivalries, drug traffic, organized murder, traffic in weapons and the tendency to proliferate mass destruction weapons – which find a favourable place to affirm in this region.

[5] Zbigniew Brzezinski, *op. cit.* Born in 1928 (in Poland), American political analyst, researcher in the field of politics and geostrategy, professor of foreign policy at Johns Hopkins University (Baltimore, USA), former National Security Advisor during Jimmy Carter administration from 1977 to 1981 and member of the Center for Strategic and International Studies' board (CSIS).

The democratic world "tends to become, paradoxically, more and more exclusivist and interventionist" which supposes a resizing of fundamental values, such as independence and sovereignty, which will have to be promoted in a context which in the classical meaning tends to deny them.

The international environment of the 21st century is characterized by substantial changes which need the adaptation of classical criteria of analyzing international security. The new challenges to security generated by the superposition of certain events such as globalization and fragmentation come in addition to certain classical forms of regional risks and vulnerabilities. Traditional centres of tensions still exist but their way of development is influenced in an intrinsic way by the appearance of some cross-border and unconventional risks, such as terrorism, organized crime and proliferation of mass destruction weapons.

In the light of the above mentioned, an issue made public many times comes back to the world attention, namely the *New World Order*. Many people believe that the new world order will be polycentric: China will remain essentially a regional power, Japan will manifest more nationalistically, the European Union will have no influence beyond its boundaries, India will develop to the point of rivalling with China, Russia will rise and an Islamic caliphate will become a geopolitical force.[6] To the same effect, Henry Kissinger remarked that "the international system of the 21st century… will include at least six great powers – the United States, Europe, China, Japan, Russia and probably India – together with many small and middle countries."[7]

But all these presumptions ignore the reality that the USA, the European Union and China already hold the biggest part of the world power and will do whatever they can to stop the others to undermine it. Russia, Japan and India cannot assert themselves globally from a military or other point of view because they are not superpowers but rather acrobats whose support or lack of support can facilitate or delay the domination of the three superpowers, without entirely deterring it.[8]

As for Islam, it lacks any diplomatic coherence, lying on vast regions influenced by the gravitation of the main superpowers, instead of converging towards a whole. Islam is considered a source of instability in the world for it has no dominant centre. The states aspiring to rule Islam – the Saudi Arabia, Iran, Pakistan, Turkey and possibly Indonesia – are competing for the influence in the Muslim world; none of these states has a powerful enough position to mediate the conflicts within Islam and also none of them is capable of acting with a high hand in the name of Islam in order to solve the conflicts between the Muslim and non-Muslim groups.[9]

In the next two or three decades the International Community will experience a profound reorganization and will become a multi-polar and regionalized world. On the strength of the actual tendencies of globalizing life, international events, analyses and programs, *possible progresses* which will change the world structure can be highlighted:

- The formation of a three-pole system: North America, Europe and South-East Asia. A series of under-state groupings will develop simultaneously with the three existing world poles of power; they will be structured according to ethnic-religious criteria and they will be dominated by Mafia clans which will incline to take hold of the economic-financial key factors and to replace the official powers. Globalization will facilitate the changing of these structures into over-state and transnational groupings.

- The Asian pole will have the most fulminatory evolution and China will probably become its leader. Taiwan, Singapore, Hong Kong, Korea and Vietnam will gather around this country which will acquire a status of great power.

- Several regional powers will be able to develop at the junction of the contact zones between the controlled areas and the three power poles, and these regional powers will also become

[6] Parag Khanna, *„Lumea a doua. Imperii şi influenţă în noua ordine globală"*, Ed. Polirom, Iaşi, 2008, p. 17
[7] Henry Kissinger, *„Diplomaţia",* Ed. All, Bucureşti, 2007, p. 21
[8] Parag Khanna, op. cit., p. 17
[9] Samuel Huntington, *„Ciocnirea civilizaţiilor şi refacerea ordinii mondiale",* Ed. Samizdat, p. 242

the expansion target of the three "great" countries; Russia will move towards such a status and a recovery of its economy on medium and long term is envisaged.

- The USA will remain the main world model of democracy and development but a decrease of its influence and presence in Europe is possible, under the circumstances of an increased manifestation of the European Union as a factor of progress and civilization.

- The growing without precedent of terrorism and organized crime will determine a new philosophy of approaching the risks and threats against stability and security. Under these circumstances, the International Community will try to bring all the forces and states responsible, including Russia and China, in the fight against terrorism, in order to protect human and universal values, democracy and human rights.

- Romania, Central European country, situated from a geostrategic point of view in "the buffer zone" between Western Europe, the Russian Federation and the Balkans, will distinguish itself in the influence sphere of the European power pole. Even if Romania will become part of the European and Euro Atlantic political, economical and security structures, due to its position it will constitute a link with Russia, with its zone of interest, as well as with the critical area in the Balkans. Under these circumstances, the European and American interests in Romania will blend with the Russian ones, even if the latter will not be contradictory but concurrent with the former.

Last but not least we mention the *cross-border character* of the problems with which mankind is confronted today and which makes numerous states to be affected and in consequence these problems cannot be solved in an individual, unilateral manner. No state or superpower can approach global problems on its own, so decisions concerning foreign policy and global security present an increased complexity, requiring an international way of organization which regards the defence of the major humanity values – peace, stability, welfare and human rights.

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THE LEGISLATIVE FRAMEWORK FOR THE EU STATES IN THE CONTEXT OF ECONOMIC AND MONETARY INTEGRATION

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Abstract: *The process of globalization, creating ever closer interdependence among the economies of countries around the world, and also technological revolution of the 90's, including the Internet and the new informational and communication technologies, has also led to the revolution of the European economy and of daily lives of European citizens. European countries, members of the European Union, on accession, met the accession criteria set by the European Council in Copenhagen in 1983, and reaffirmed by the European Council in Madrid in 1995. These criteria are: policy - stable institutions guaranteeing democracy, rule of law, human rights and respect for minority protection, economic - a functioning market economy and ability to compete, the ability to assume obligations of membership including adherence to the aims of political, economic and monetary union, adoption of the community acquis.*

Key words: *economic integration, monetary integration, common market, economic and monetary union, and community acquis.*

1. Economic and monetary union

Economic integration

Starting from the idea of Pelkmans[1] (2003) that considers integration as "a process of gradual elimination of borders of any kind among two or more independent states, designed to enable those countries to operate as a single entity", we can say that economic integration is process by which nations until then willing and able to lead independently domestic and foreign policy, they are trying to take with certain decisions or to delegate the decision making process of central agencies, namely the process whereby political actors from several different states are persuaded to change their expectations and political activities to a new centre.

Most analysts perceive integration primarily as an economic phenomenon, in the literature being distinguished several stages of economic integration[2], as:

1. Economic collaboration:
   - Which can be regional or global;
   - Includes all economic relations among states, including both bilateral and multilateral ones.
2. Economic cooperation:
   - Form of cooperation among several countries, which participate jointly in achieving a specific economic objective.
3. Preferential trade club:
   - Which is an association among two or more states, which cut their import levy for goods, leaving their level unchanged in regard to third party (e.g. CEFTA)

[1] Drăgan Gabriela ,Curs on-line ASE Bucureşti ,*Uniunea Europeană între federalism şi interguvernamentalism. Politici comune ale UE*. Capitolul 1, p. 1
http://www.biblioteca digitala.ase.ro
[2] Tofan Mihaela , *Integrarea României în structurile Uniunii Monetare Europene,*Ed. C.h. Beck.Bucureşti 2008, p. 179

4. Free trade zone is a more advanced form of integration:

- Customs duties and quotas are abolished for imports among Member States of the region;
- Member States keep their own customs tariff (and quota system) to third countries.

Weaknesses: products from third countries tend to enter free trade zone by a member country with the lowest level of external customs tariff, a country may belong simultaneously in several free trades zones; the lack of common border of one or more countries from the rest of the free trade zone constitutes a brake on integration.

5. Customs union:

- Elimination of discrimination among Member States on goods market (not necessarily of services);
- Existence of a common customs tariff against third parties, customs legislation is standardizing.
- Countries from customs union cannot participate individually in other economic groups.

6. Common market:

- Integration formula superior to customs union, which eliminates all restrictions on free movement of production factors (capital and labour)

Customs union and Common Market next to Free trade zone does not require positive integration[3], key features being found in the GATT / WTO[4].

7. Economic and monetary union is the complete form of economic integration carried out into practice until now:

- Single market with a degree of harmonization of national economic policies, aimed at reducing discrimination in the common market.
- Monetary union implies a relatively stable currency and a single currency

Features: it requires positive integration, but at a vague level.

Its operation is subject to availability of harmonized fiscal and monetary policies, because otherwise governments may influence the amount of money in the territory in which they exercise their authority.

8. Full economic integration - last stage of integration:

- Unification of monetary, fiscal, social and cyclical policies;
- Creation of a supranational authority whose decisions are mandatory for Member States supported by a common law and a common budget

Features: a vision specific for a unitary state, central; the concept of supra-nationality is introduced[5].

Economic integration is influenced by political factors; the relationship between economic integration and political integration was evident early in the process of European economic integration. In this way, economic integration is not ever seen as a scope in itself, but as economic relations become closer, the idea of political integration[6] is more frequently, the two forms of integration potentate one another.

The process of economic integration includes two mutually reinforcing processes: the process of market integration and the integration of economic policies. The essence of economic integration is market integration, which materializes in a significant cross-border movement of goods, services,

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[3] *Negative integration* - elimination of discrimination in economic and political regulation plan under the supervision of joint institutions

Positive integration- transfer to common institutions of certain powers and competences

[4] GATT/OMC – World Trade Organization

replaces on 1.01.1995 the former General Agreement on Tariffs and Trade (GATT) – it is an international organization which oversees a large number of agreements defining „trade rules" between Member States and operates in the direction of reducing and abolishing international trade barriers.

GATT - included a series of commercial treaties concluded at the end of World War II, in order to facilitate free trade

[5] S*upranational* - which belongs to a body, a power placed over each nation's government; supranational, transnational. (DEX)

[6] *Political integration*- can be defined as the process by which political leaders and citizens of different states wish to establish a common set of institutions which must have transferred certain powers, which until then were specific only to national institutions.

capital and labour. The degree of price convergence may be the standard by which the degree of economic integration can be measured.

Monetary integration

The idea of **cumulative integration** is emphasized, basically a natural extension of economic integration which leads to **monetary integration**, that is the application of some policies that are valid for all economic space formed on the common market.

Membership of a country to the single currency requires the fulfilment of the economic convergence criteria, which is the existence of strong market structure, embodied in price stability and a healthy fiscality. In this way, even Member States non-participating to Euro should respect the terms for stability conditions and growth to ensure sustainability of economic and monetary convergence including the liberalization of movements of capital.

Monetary integration is the name of the process of formation of a monetary zone, an area in which the currencies of several countries are in one of two situations:

a) Irrevocably linked between them, or each currency is irrevocably bound by a currency "anchor" on a specific report;

b) National currencies are replaced with a single currency, which will be used throughout the area.

In both cases, we face a process of monetary unification.

A monetary union formed in this way must correspond to an optimal currency area, meaning an economic space that can follow the same monetary policy: respective countries renounce their own monetary policy, to the use of instruments of monetary policy, especially to the currency instrument, in the favour of a common monetary and exchange rate policies.

Conditions for monetary integration in accordance with Optimal Currency Areas[7]:

- Economies' convergence

The macroeconomic indicators are taken into account in assessing the degree of convergence:

1. The size of the annual inflation rate;
2. The changes of exchange rates;
3. Allowable size of public governmental or budgetary deficit
4. Total public debt (including domestic, foreign, governmental, local)

- Insurance of the "four freedoms": freedom of movements of goods, capital, services and people;
- Diversified exports;
- High degree of openness of economies
- Renouncement to National Central Bank (NCB) by the participating countries

Regarding **economic and monetary integration** the following aspects are directed:

- How to apply policies that are valid for all economic space formed on the common market;
- Monetary integration should consider cooperation among Member States on economic and monetary policy, especially through a coordination of exchange and interest rates, and also solving problems related to a balance of prices.
- Single currency ensures greater transparency of costs and prices that, becoming comparable to the whole community, give a new impulse to competition.
- Single currency has the great advantage for the travellers, tourists or business people that do not bear costs of transactions that they make each time, changing currencies.
- A monetary union implies full convertibility of the currencies of Member States and the complete liberalization of movements of capital. This eliminates any margin of currencies fluctuation around the official rate (curs pivot) and introduces fixed exchange rates of an irrevocably manner, implying a high degree of convergence of economic and monetary policies of Member States, and also the transfer of decisional powers from these states to a community economic and monetary authority.

[7] Cerna Silviu , *Teoria zonelor monetare optime,* Editura Univesității de Vest , Timişoara ,2006 , p. 22

- It must be underlined the fact that a common currency saves for the enterprise expenses for hedging exchange risks, which are currently spent to protect themselves from currency fluctuations.
- Enterprises carrying out business transactions in several Member States would need to be helped to eliminate administrative costs related to currency exchanges, including the waste of time.

2. Community acquis

Community acquis represents all the legal rules governing the activity of EU institutions, community actions and policies, and consists of:

- Content, principles and political objectives contained in the original Treaties of the European Communities and the later ones (the Single European Act, Maastricht Treaty and the Treaty of Amsterdam);
- Legislation adopted by EU institutions to implement the provisions of the Treaties (regulations, directives, decisions, opinions and recommendations);
- Jurisprudence of the Court of Justice of European Communities;
- Declarations and resolutions adopted within the European Union;
- Joint actions, common positions, signed conventions, resolutions, declarations and other documents adopted within the Common Foreign and Security Policy (CFSP) and cooperation on Justice and Home Affairs (JHA);
- International agreements to which the EC is a party, and the agreements among EU Member States regarding its activities.

Acquis communautaire means everything that was decided and agreed from the establishment of the EU to date.

It is a complex construction, which developed within 50 years. The word means "what has been attained".

Annually, its volume has increased by about 5000 pages in the Official Journal of EU (reaching, with more than 100,000 pages), for which the Community institutions have proposed, for the future, to reduce the amount of community papers and documents, which is in the composition of the acquis.

Acquis communautaire has a direct application affect, its rules should not be ratified, they either are transposed into national law, such as directives, or they are applied directly, such as regulations. To be known, these provisions must be in the national language of the Member State (for Romania, about 83,000 page were translated, from which about 69,300 pages remained in force).

3. Treaty of Lisbon and Europe

Heads of State and Government, reunited in March 2000 at European Council in Lisbon, adopted the **Lisbon Agenda (or Lisbon Strategy)**, designed to transform, till 2010, European Union in "*the most competitive and dynamic economy in the world based on knowledge, capable of sustainable economic growth, generating new and better jobs, and characterized by a greater social cohesion"*.

The Lisbon Strategy has set a goal of achieving economic growth of 3% per year and creating 20 million new jobs by 2010. Also, the Lisbon Agenda set several specific objectives in areas such as innovation, enterprises, liberalization of various markets and environmental protection.

The targets set in 2000 were ambitious and covered a whole range of areas. In terms of employment, an employment rate of 70% and increase the number of women and the elderly to active labour market were pursued. To encourage innovation, the aim was to increase the number of households that would have an Internet access, and also to increase spending on research and development. In the business area, Member States must take several steps to help small businesses, including reducing bureaucracy they face in their activity. Furthermore, it sought to increase competition in the telecommunications market and the liberalization of gas and electricity markets. Environmental protection objectives included the reduction of greenhouse gas emissions. Midway

through the implementation of the Lisbon Strategy, in some European countries economic and social situation seemed to worsen rather than to improve.

On December 13, 2007, European Union's leaders signed the Treaty of Lisbon, thus ending many years of negotiations on the theme of institutional aspects.

Treaty of Lisbon amends the Treaty on European Union (TEU) and the EC Treaty in force, without replacing them. This treaty will provide the Union the legal framework and legal instruments necessary to meet future challenges and citizens' expectations.

1. A more democratic and transparent Europe, in which the European Parliament and National Parliaments have an enhanced role, where citizens are more likely to be heard, and which defines more clearly what must be done at European and national level and by whom.

2. A more efficient Europe, with simplified working methods and voting rules, with modern and effective institutions for a European Union of 27 members, able to act better in areas of high priority for the today Union.

3. A Europe of rights, values, freedom, solidarity and security, which promotes the values of the Union, introduces the *Charter of Fundamental Rights* in European primary law, provides new mechanisms of solidarity, and ensures better protection for European citizens.

4. Europe as an actor on international scene - the foreign policy instruments available to Europe will be grouped both in terms of developing and adapting new policies. Treaty of Lisbon will give Europe a clear voice with its partners worldwide. It will use the power gained by Europe in the economic, humanitarian, political and diplomatic domain to promote European interests and values worldwide, respecting the specific interests of Member States in foreign affairs.

In the renewed Lisbon Strategy for growth and jobs, Commission adopted, in December 2007, a proposal for a community program in Lisbon (2008-2010) to establish the ten key objectives and political actions corresponding at community level.

According to the Lisbon Strategy, the *Commission's Strategic Report* presented to the Council on 13-14 of March 2008, believes that, for the next cycle of three years, reforms must continue to be carried out at national and Community level. It also establishes a series of new political initiatives in priority areas identified during the years 2006, 2007 and 2008:

- Research
- Development and Innovation
- Business environment
- Employability
- Integrated policy regarding energy and infrastructures
- Environmental policy

European Council, in spring 2008, launched the second phase of the renewed Lisbon Strategy, which will end in 2010.

In the current economic slowdown, the Commission proposed a **European economic recovery plan**[8], which was approved in **December 2008** by European Council. This plan provides coordinated measures to support the budget, in the *Stability and Growth Pact (SGP)*, to encourage demand and restore confidence, taking into account the starting positions of Member States and the efforts already made in response to economic difficulties.

Recovery Plan requires that budget support to be accompanied with an acceleration of structural reforms started under the Lisbon Strategy to boost the economy and support long-term growth potential of the Union, especially by promoting the transition to an economy with low carbon emissions and based on knowledge.

Recovery Plan approved by the European Council invited Member States to submit updated stability or convergence programs, which the Commission has assessed taking into account the need to counter the fiscal deterioration, improving budgetary policy-making process and ensuring sustainability on long term of public finances.

[8]http://ec.europa.eu/growthandjobs/pdf/european-dimension-200812-annual-progress-report/200812-annual-report_ro.pdf

On January 28, 2009, a paper with number COM (2009) 34[9] was published, developed by the European Communities Commission called "Council recommendation on updating in 2009 of the broad economic policy guidelines of the Member States and of the Community, and on the application of employment policies of the Member States", in which specific recommendations for each country is found.

These recommendations have been updated taking into account the principles stated in the *Recovery Plan,* and the accomplished progresses in carrying out them in the period since their adoption. These reforms should be carried out in the shortest time. The Commission helps, in this respect, within the Lisbon partnership, and it will monitor and it will submit reports regarding recorded progresses.

To carry fully out the *Lisbon Strategy for economic growth and employment*, this recommendation also contains specific recommendations to Member States from Euro Area.

Recommendations for Member States from EURO Area

- Coherent and on time application of all new EU legislation adopted in banking domain;
- Should adopt appropriate measures for sustainability of public finances as a result of fiscal stimulus injected during the current economic crisis;
- To strive for improving quality of public finances by reviewing public expenditures and taxation
- To implement common EU principles of flexicurity[10];
- To adopt promoting measures for labour mobility across borders, inter-regional, inter-sector and inter-professional.

To maximize the synergies among policies, which are stronger in a monetary union and to increase the implication in reforms of political factors, Member States from Euro Area should further strengthen coordination of policies, in the context of the Euro group, and enhance the effectiveness of extension measures[11].

Recommendations for Member States from of non-EURO Area

- To apply necessary measures to ensure a sustainable reduction of public deficit and of public debt proportion, acting more on the side of expenditures;
- To continue the reform of public administration and of health, pension and education systems, to ensure long term fiscal sustainability and to improve economic efficiency;
- To continue to improve level of skills by increasing adult participation in learning process throughout life, to improve the adaptability capacity for the education and training system to the needs of labour market;
- To develop an integrated flexicurity approach, by carrying out a strategy for active aging, especially for under-privileged groups;
- To accelerate investments in energy and transport infrastructure by simplifying and rationalizing procedures regarding structural funds and their efficient use.

Perspectives

The process that led to the adoption of the Treaty of Lisbon lasted six years and it was marked by many moments of blockage. Treaty of Lisbon, on which European leaders agreed after a series of concessions made to Poland and Italy, it is mainly intended for the effective functioning of the enlarged European Union and for the formulation of common policies in a greater number of areas.

Entry into force of the Treaty is subject to ratification by 27 signatory countries.

European Reform Treaty approved on December 13, 2007, in Lisbon, threatens current transatlantic relationship, the United States on the one hand, institutions and European states, on the other hand, some American analysts believe, supported by a report from the House of Commons of London. Treaty contains the seeds of construction of "United States of Europe" by cession by national states

[9] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0034:FIN:RO:PDF

[10] *Flexicurity* is a word formed by joining the words flexibility and security.
The concept, used in relation to employment, summarizes a trend of current policies in this area, namely flexible labor market while enhancing security.

[11] Gabriela Bologa, Uniunea Economicasi Monetara, Proiect Jean Monnet, EdituraUniversitatii Agora, Oradea, 2009

to Brussels, of powers such as defence, security and energy. Brussels acquires legal personality and it will sign treaties on behalf of all European Union states, which directly affect the bilateral relations among Washington and other states.

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CONSIDERATIONS ON INDIVIDUAL CRIMINAL RESPONSIBILITY FOR HUMAN RIGHTS ABUSES

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Abstract: *The emergence of the Universal Declaration of Human Rights adopted by UN General Assembly 10/12/1948 marks the "beginning of a new progressive era in the international protection of human rights and freedoms.*

Crimes in international law are committed by people and not by abstract entities. Just punishing these authors can give effect to the provisions of international law.

Key words: *human rights, responsibility, international criminal court, civil rights, punishment, protection.*

"All human beings are born free and equal in rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." [1]

First should be noted that human rights issues became a major concern for most of the countries, regardless of ideological differences, cultural, economic or social, proven by their accession at the two international pacts drafted by UNO, namely: International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

There is evidence that there were concerns regarding the protection of humans from ancient times, but the concept itself of "human rights" appeared in the run up to the bourgeois revolutions in Europe and America and the history of human rights begins in Britain once the Magna Charta of Libertatum in 1215, during the reign of King John of England, which sought to restrict the king's power, reducing abuses monarch and is the first document in which a number projected to guarantee rights for citizens..

The emergence of the Universal Declaration of Human Rights adopted by UN General Assembly 10/12/1948 marks the "beginning of a new progressive era in the international protection of human rights and freedoms".

We consider it is very important to present the meaning of the term "liability" in terms of linguistics usage.

Thus, the linguistic awareness of responsibility is the personality of its debt to the company, a community of people, understanding the meaning and significance of his behaviour.

The Explanatory Dictionary of Romanian Language explains the term's responsibility as the possibility of requiring a person accountable for his actions.

In law this term has taken on another meaning, different from that in common language namely highlights the negative consequences arising for committing illegal acts by an individual or a legal person. Liability itself includes only the consequences of violations of law, which is expressed in the emergence of new bonds or other obligations arising from the report how the existing law.

Considering the need for legal liability as a constraint that arises because of violation of legislation by natural or legal person may be deemed liability is complex related rights and obligations which, by law, are born as following the committing of illegal acts, constitutes the realization of state coercion through legal penalties to ensure the stability of social relations in society and guide the spirit of respecting the rule of law.

[1] „Declarația Universală a Drepturilor Omului"

Social life could not take place under appropriate conditions without the existence of rules of conduct and rules established. These rules or conduct rules determine which subjects to be taken between the relations between them.

Failure to conduct a pre-established rules inconsistent with each other, entails social responsibility, the guilty are forced to bear the consequences of his actions.

Depending on the political, moral, legal, religious, etc, of the violated rules and liability trained will be a corollary, that a political, moral, legal, religious, etc.

Legal liability is defined as that form of social responsibility established by the state following breaches of law by a wrongful act and determines the appropriate consequences of the assumption of the guilty, including the use of coercive force to restore order to rule of law harmed. Are crucial elements of legal liability of committing illegal acts, violation of legal rules by the commission of that offense and intervention by state institutions after strictly limited procedures.

Violation of any law of rights deemed to be class in basic human rights, and criminal violation is punishable by criminal law and to each individual state, (murders, rape, bodily harm, etc.) Entail individual criminal responsibility. As the subject of criminal liability, the principle of subjectivity and individualization of punishment imposed in general, individual sole subject of such crimes possible, even if they are covered by international conventions.[2]

It was not easy to achieve acceptance of the idea that an international criminal judicial body, independent and impartial, could intervene to correct or to replace the exercise of criminal jurisdiction by State authorities for committing very serious criminal offenses, skilled in international law as crimes against humanity.

Rating of "crimes against humanity" is determined by gravity and scale wool, countries, damage items the victims, considering that gravity is affected by the very humanity, as a whole is jeopardized international peace and security, crime, which due their seriousness, are not subject to the exclusive exercise of criminal jurisdiction of a particular state, murder determining the international community to consider entitled to request and to exercise its own, tracking, criminalization and physical punishment of the responsible persons for committing such acts in the framework of international intergovernmental bodies with jurisdiction.

UNO General Assembly Resolution 174 of 1950 enshrined the principles on which they were organized and operated International Military Tribunals at Nuremberg and Tokyo, established after the end of the Second World War, which tried and convicted a number of personalities in the army and the governments of Germany and Japan, for crimes against peace and war crimes committed between 1939 - 1945, principles that form today, "hard core" of international criminal law, namely ":

- Individual criminal responsibility of individuals, international courts,
- Identification of material competence of such courts, the crime of aggression, war crimes and crimes against humanity,
- Exclusion of any immunity that might invoke the offenders
- Ordinal superior liability does not exclude, but may be a mitigating factor,
- Criminalizing complicity, location within any of the acts complained of states engaged in war.

““Crimes in international law are committed by people and not by abstract entities. Just punishing these authors can give effect to the provisions of international law.”[3]

The famous statement of the International Tribunal of Nuremberg shows the will of the Allies to move beyond the state responsibility to reach the individuals acting on their behalf. Resolution of Nurnberg introduced a double innovation, namely:

1. in terms of international responsibility, the formation of a split individual body appear as classical rules of state responsibility, because in principle the infringing activities of state agent acting as such remain attributable to the State on whose behalf he held office. However, that these

[2] Bogdan Aurescu, *„Sistemul jurisdicţiilor internaţionale*”, Ed All Beck, Bucureşti, 2005, p. 123-138

[3] Pierre-Marie Dupuy, „*Droit international public*, Ed.a5-a, Dalloz, 2000, p. 483-485.

individuals-bodies are declared not exempt the responsible person concerned of their responsibility in international law,

2. From the point of view of international criminal law, the London Agreement of August 8, 1945 introduced another major innovation. Until then, international criminal law relate only to crimes committed by individuals privately and not as agents of the state crime committed.

It is necessary also to refer and ad hoc international criminal tribunals created after 1990. They are organized international criminal court, usually by the UNO Security Council resolutions, as a result of internal or international conflict, with very violent character. These courts are competent to judge only individuals for serious violations of human rights which constitute war crimes, crimes against peace, and crimes against humanity.

We mention here:

1. International Criminal Tribunal for former Yugoslavia (ICTY), based in The Hague, which was created by resolution adopted by the UN Security Council no. 827 of May 25, 1992, while having limited jurisdiction, namely, acts committed since 1991, in space, acts committed in the territory of former Yugoslavia, the material competence of referring to serious violations of humanitarian international law.

2. International Criminal Tribunal for Rwanda (TPIR), based in Arusha (Tanzania). TPIR was established by UN Security Council resolution no. 955 of November 8, 1994, for "prosecuting persons presumed responsible for acts of genocide or other serious violations of international law committed in the territory of Rwanda humanitarian and Rwandese citizens deemed responsible for committing such acts in the territory of neighbouring states, between January 1 and 31 December 1994 "Jurisdiction and the time indicated by the title of the resolution and physical power - genocide and other serious violations of international humanitarian law.

International Criminal Court (ICC)

Even if the provision of international criminal court, together with developing a code of crimes against peace and humanity were badly needed, it took the Cold War experience, the dramatic ethnic conflicts that took place in Somalia, Yugoslavia or Rwanda, to adopt a multilateral treaty of the International Criminal Court statute permanent. Treaty establishing the ICC "Rome Statute" was adopted on July 1, 1998 in Rome, in an Intergovernmental Conference, by 120 States, with 7 votes against and 20 abstentions and entered into force on July 1, 2002.

Material competence of the Court indicated in the preamble of the treaty constituting the "most serious crimes affecting the international community as a whole" and the Articles Staff are called genocide, crimes against humanity, war crimes and aggression, and the Court has personal jurisdiction the only individuals who have committed directly or documentary material within the jurisdiction of the Court or who have ordered or have facilitated the commission of such acts, attempts, being, and it criminal.

So we end with a very significant quote from Vaclav Havel.

"Human rights and universal civil rights will be respected with only one condition. We have to become aware that man is responsible for the whole world".

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THE ESSENCE AND PROBATION TERM PERIOD IN THE CASE OF GRANTING THE CONVICTION WITH CONDITIONAL SUSPENSION OF SANCTION EXECUTION APPLIED TO MINORS PEOPLE IN ROMANIA

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Abstract: *The determination of probation term in relation with the concrete applied sanction, realizes an individualization of the measurement of sanction execution suspension in the connection with the obtained result in sanction individualization. Also, the test that the convict is subjected to in probation term, concerns only the good behaviour in the sense of not committing new crimes, proving that he/she can abstain from a dangerous behaviour. Giving the conditioned suspension of penalty execution, the judge believes that, in the future, the convicted will not make any penalties not only in the probation term. These elements will be systematically analyzed in the contents of this paper.*

Key words: *Conditional suspension of sanction execution, minors*

The determination of probation term in relation with the concrete applied sanction, realizes an individualization of the measurement of sanction execution suspension in the connection with the obtained result in sanction individualization. Also, the test that the convict is subjected to in probation term, concerns only the good behaviour in the sense of not committing new crimes, proving that he/she can abstain from a dangerous behaviour. Giving the conditioned suspension of penalty execution, the judge believes that, in the future, the convicted will not make any penalties not only in the probation term. Even though in the specialized literature there has been remained the term to be called *testing*, in the law there are not provided special behaviour obligations for the minor convict during this term, and the obligation not to make any crimes is for any addressee of criminal law, not only to that convicted to sanction execution suspension. Certain special obligations can be seen for the convict towards there have been taken safety measurements or there have been put certain civil obligations.[1] Though there are not connected to conditional suspension but can be imposed to any convict no matter if there have been applied or not this measurement of suspension.

The duration of the probation term is established by the law and cannot be modified by the court.

Beside the 6 months and 2 years period, in the probation term is included the penalty period applied by the court. If the court applied penalty was reduced following the convict's preventive arrest deduction, this does not influence the probation term period, does not reduce the probation term.[2]

But when the applied prison penalty has been reduced following the incidence of an unconditioned partial grace, the probation term period will be included in what has been left after the grace application plus the 6 month-2 years period that is provided by the law in the minors' case. So, the probation term is reduced by the punishment part that has been graced.

When the grace is total and unconditioned, the probation term is reduced to the 6 month-2 years period.

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[1] St. Danes, V. Papadopol, *Judiciary Individualization of Penalties Execution*, The Scientific and Encyclopedic Publishing, Bucharest, 1985, p. 250

[2] T.S. d. no. 2615/1973 through which has decided that "in the sense of the art. 82 Penal Code through applied penalty one can understand the whole penalty, like it was appreciated by the court, and not the unfulfilled rest after deduction preventive arrest".

In the judiciary practice has been decided that (point of view that we agree with) in the case of partial conditioned grace, the probation term is not automatic reduced but only when the fixed duration will expire in the clemency act will expire and if the predicted condition in the grace act has been respected.

Really, the grace not being definitive until fulfilling the condition, it cannot produce effects previous its finalization. The probation term of conditional suspension and conditional grace's finalization term go parallel.

If first the grace definition term is to be the first, the grace produces its *ex tunc* effects (from the granting date) and thereby the probation term of the conditioned suspension is reduced by the penalty duration that has been totally or partially grace, and if, like that, the attempt conditional suspension term is done, its final effects are produced- the fairly rehabilitation of the convict (art. 86 Romanian Penal Code).

If the attempt conditional suspension term is done first, its final effects are produced- the fairly rehabilitation, and the conditioned grace remains without its cause.

We mention the fact that the above presented solution is valis, in what concerns the effects, on the assumption conditional grace o matter if this is total or partial.[3]

The High Court of Cassation and Justice had another opinion, expressed in a 2005[4] decision in which it established that the effects of penalties conditional grace of which performance is conditional suspended, consisting in reducing the probation term provided in art. 82 Romanian Penal Code, with pardoned sentence, are produced immediately and not when the condition term provided by the grace law to which is exclusive referred to executable penalties is fulfilled. When this reduced probation term is accomplished, the convict is fairly rehabilitated if the provided conditions on art. 86 Penal Code are fulfilled.

If in the conditional suspension probation term, disposed for a resulted penalty in a crime contest, occurs the grace for one or more penalties that have been merged, the grace produces its effects provided by the art.120 alin.2 Romanian Penal Code, that means that the probation term period is reduced by the penalty that has been graced, but taking into consideration grace particularity in compared with the applied penalty in a crime contest.

Thereby, the grace is about established competitive penalties and, in consequence, the penalties will be seen in their particularity and one will observe if after the grace has been applied there has left to be executed only the hardest penalty, the probation term is reduced with the penalty gain that has eventually been added to the hardest penalty, because the gain is not any longer justified.

But when after applying the competitive crimes punishment grace – penalties that have been separated – there have been left al least two that have not been graced, the penalty gain cannot be but partial justified, an d the court can appreciate it again once the penalties that have not been graced are merged, and if this has been reduced, this reduction will go over the probation term also.[5]

We appreciate that after the definite conviction penalty decision by penalty execution conditional suspension, the probation term may be reduced in the case of mandatory applying a more favourable penal law (art. 14 Romanian Penal Code) which would provide a penalty with more reduce limits than that applied and suspended or another penalty species (fine) or a smaller probation term.

We consider that the penalty period applied to the minor by definitive court order will not be reduced on the assumption that a new penal law will appear, in the conditions of art. 15 Romanian Penal Code, on optional application of a more favourable penal law about definitive judged crimes. In this case, for conditional suspended penalty, the court cannot appreciate the accomplishment of

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[3] Dobrin Clocotici, *The Effects of Conditional Grace on Freedom Privative Penalties of which Performance Was Conditional Suspended, Romanian Law Magazine*, no. 6/1982, p. 62 and the following.

[4] I.C.C.J. – united sections, the Decision no. XIV dated 25th of November 2005, published in Monitorul Oficial no. 284 dated 29th of March 2006

[5] Ludovic Biro, *Considerations with Respect to Judiciary Effects of Grace on Penalty Execution Conditional Suspension in Romanian Law* Magazine no. 10/1972, p. 103 and the following.

law provided conditions towards convict's behaviour during penalty execution and by the time has been left from it, because the penalty execution has been suspended.

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MINORS OBLIGATIONS DURING THE PROBATION TERM AND THE IMPORTANCE FOR FULFILLING THEM IN THE PENAL JURIDICIAL SYTEM IN MOLDOVA REPUBLIC

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Abstract: *As it results from the institution's name itself, the penalty execution suspension is conditioned, that means that the court establishes certain conditions, which usually look like some concrete obligations, respecting them is uncertain because penalty execution established by the court through a conviction sentence. The essence of this institution is that conditional suspension of penalty execution consists in having faith in the convict. On the other hand, this institution has a very powerful coercive, prohibitive character because the convict is not just release from penalty execution because through his/her attitude must prove that he/she deserve the given "favour". These elements will be analyzed in the contents of this work paper.*

Key words: *Minors obligations, penal juridical system, Moldova Republic*

As it results from the institution's name itself, the penalty execution suspension is conditioned, that means that the court establishes certain conditions, which usually look like some concrete obligations, respecting them is uncertain because penalty execution established by the court through a conviction sentence. The essence of this institution is that conditional suspension of penalty execution consists in having faith in the convict. On the other hand, this institution has a very powerful coercive, prohibitive character because the convict is not just release from penalty execution because through his/her attitude must prove that he/she deserve the given "favour". That is why the court may establish, during the probation period, certain *obligations* for the convict, provided in art. 90, align. 6, Moldova Republic Penal Code. From drafting the law text mentioned above, we observe that the disposal of these obligations represents a *power* and not a court's obligation by inserting the expression "it can oblige the convict".

Likewise, the legislator provides that these obligations do not have a definitive character, the court, during the probation period, on the proposal of the authority that executes the control on convict's behaviour with penalty execution conditional suspension, has the right to partially or totally cancel the obligations established before, or can bring new ones. [1] These obligations that can devolve upon as well as the minor convicts as well as the adults' ones are the following:

a) Not to change the address without the agreement of the competent authority;
b) Not to attend certain places;
c) To follow a treatment in case of alcoholism, drug addiction, addiction or STD;
d) To offer a material support to victim's family;
e) To repair the caused damages in the term established by the court.

Analyzing the above obligations, that can be applied to the minor convict with penalty execution conditional suspension, we draw the following *conclusions*.

The court may dispose two obligation categories:

1. *To do something*, that means to have a certain behaviour, a certain active attitude – *committee* (to follow a treatment in case of alcoholism, drug addiction, addiction or STD, to repair the caused damages in the term established by the court, to offer a material support to victim's family);

[1] Art. No. 90 align. 7 Romanian Penal Code: "During the probation term , the court, on the proposal of the authority that controls convict's behavior with penalty's execution conditional suspension, may cancel, totally or partially, convict's previous "established obligations or bring new ones".

2. *Not to do anything – omitted attitude*, to abstain from certain actions (not to change the address without the agreement of the competent authority, not to attend certain places).

As we presented, the obligations disposal provided at the art. 90, align. 6 Moldova Republic Penal Code remains on court's disposal. The decision of applying or not of the obligations is decided taking into consideration case's circumstances and, specially, taking into consideration minor's behaviour and personality.

There are as well in the Moldavian doctrine, but, especially, in the Russian one, opinions according to which the legislator should include in the legal disposals *the obligation* and not the power, for the court, to dispose these obligations. So, the Russian scientist I. A. Burlakova considers that the legislator should agree with the obligation and not the court discretion to impose to penalty execution conditional suspension convict certain obligations, because the lack of obligations in the probation term reduces the educational importance of the institution in cause, it limits its purposes, because the convict cannot stand this kind of restrictions, except one – not to commit any new crimes.

These opinions may be, as we think, at most interesting, but in no case may be taken into consideration as "ferenda" law to contribute to legislation modification in this sense.

To sustain our opinion, we bring the conclusions of a poll performed by Martin Daniel, in 2007, during the period he was PhD at Moldova Republic State University. He requested an answer to the question: "What do you think about the court to apply in all cases the convict's supplementary obligations, or in a different way taking into consideration each case?

For this poll contributed 43 judges and 34 prosecutors. 30 of the 43 judges mentioned that convicts' supplementary obligations appliance with penalty execution conditional suspension is necessary taking into consideration each case. Only 10 judges pointed the necessity of applying obligations in all cases, and 3 of these could not answer to that question.

All most the same thing happened with the prosecutors: 23 pointed that supplementary obligations will be established taking into consideration each case and only 8 prosecutors saw that these must be required for all conviction cases with penalty execution conditional suspension; 3 prosecutors that took part to this poll did not answer to the question.

Drawing the conclusions out of this poll we notice that most of the magistrates (prosecutors or judges) do not feel the need to apply the supplementary obligations in all cases.

We share the same opinion in minors' case the more in their case the regime that sanctions is, usually, more gentle.

The promoters of opposite solution sustain the court should, in all cases, establish certain obligations for the penalty execution conditional suspension convict because, this way, it would underline the coercive character of the measure concerned and it would exclude its interpretation as an unjustified grace of the guilty person of committing the crime.

We think that this opinion is wrong taking into consideration the nowadays settlement module to be the correct one because the court decision can be much more objective this way. The judge can appreciate taking into consideration each case if he applies or not any of the obligations. Obligatory applications have another "deficiency", as we see it that is not specified if the judge must apply one or all the obligations. If one considers that all obligations must be applied, then, we can meet in practice cases that will not accept for this measurement to be applied on. For example, if a crime has no damages then the letter e obligation will not be applied. Also, one or more obligation appliance assumes fulfilling actual dispositions, because on art. 90, let. F we have the disposition:" to fulfil other obligations that may contribute to his improvement" without specifying which are these.

Certainly, as in minors' case the correct solution cannot e other than the one enounced by us and the Moldavian legislator.

The present regulation of art. 90, align.6 Moldova Republic Penal Code contradicts the art. No. 395 align. 1Romanian Criminal Procedure Code is wrong because it sustains that in sentence's device, obligatory, must be shown the obligations for the penalty execution conditional suspension

convict. Reading the legal disposal mentioned above, we notice that the legislator included this provision only for the situations in which the judge decides imposing such obligations.

What we consider that can be brought for discussion is if present settlements of the art, no. 90 align. 6 of Moldova Republic Penal Code that does not contains an exhaustive obligations list is or not the best one, the one that is able to run the best fulfilling of the act of justice. It is to be mentioned that according to Russian Federation Penal Code, the court may establish for the convict other obligations besides the ones in penal law. This decision of the Russian legislator has been criticized by certain Russian theorists. This way V. F. Scepelkov considers that, except these obligations are some legal – criminal measurements, it would not be fair to let their list open because it would get to a violation of the equality principle. A. N. Tarasov agrees with this opinion and tells that the obligations not mentioned in the penal Code can be established in convict's task. O. Knijenko criticizes legislator's position and shows that this kind of situation may generate fraud and more than that, the obligations that limit the convicts' rights and liberties must have a precise determination.

Against these theorists' opinion we say that the obligations list established by the legislator does not have to be a limitative one (exhaustive) but an indicative one, with examples.

To sustain our opinion is another poll made by the same Moldavian PhD Martin Daniel who requested judges' and prosecutors' opinion concerning the same aspect. Most of the judges saw that obligations list does not have to be exhaustive and the court must have the possibility to apply taking into consideration each case other obligations provided by the law, too. Only 11 questioned judges though that the list should be exhaustive, 2 judges mentioned that, in general, in the penal law does not have to be established supplementary obligations for penalty execution conditional suspension convicts.

Among the prosecutors there was another opinion, this way 12 of the poll participants prosecutors considered that the court should have the possibility not to apply the obligations that are not provided by the penal law, while 22 consider that the obligations list should be exhaustive.

Besides, analyzing the opinions from the doctrine and the court practice we tell that only the court after the cause pertinent analyze, may determine what kind of supplementary obligations can be applied to the convict, the more if he/she is a minor one. The determination of the obligations, taking into consideration cause's concrete circumstances and convict's personality, takes to a better and more efficient individualization.

That is why, federal law, we propose reintroducing letter f in its initial form: "to fulfil other obligations that can contribute to his/her improvement". This legislative modification would be a good one in minors' case of penalty execution conditional suspension appliance because it would allow the court to individualize more reasonable the applied penalty and to decide what supplementary measurements are considered to be imposed for the minor's social reintegration imperative to be achieved.

Besides, in its initial editorial, art. No. 90 align. 6 in Moldova Republic Penal Code included letter f, also. Through the Law for Modification and Fulfilling Moldavian Republic Penal Code no. 211 – VX dated 29th of May 2003, this provision has been put out. The Moldavian legislator wanted this way to transform the settlement in an exhaustive one and to limit (we say this is an unjustified way) court's right to impose other obligations than the ones in the Code.

It is imposed to verify and, eventually, correct another legislative disparity occurred after the appearance of the Law for modification and completion some legislative papers no. 184- XVI dated 29th of July 2006[2], according to which as an obligation during the probation term period of the penalty execution conditional suspension convict, may be applied unpaid work in community use (not in the minors' case).

As long as in case obligation is not inserted in by the legislator in art. No. 90 align. 6 Moldova Republic Penal Code and the legislative provision do not stipulate the possibility of

[2] Moldova Republic Law to modify and completion some legislative papers, no. 184-XVI dated 20th of July 2006, in Moldova Republic's Official Monitor no. 126-130/599 dated 11th of August 2006.

appliance other obligations too, we consider that the courts will avoid the appeal to art. No. 63 align. 2 Moldova Republic Penal Code. Here is another argument for in a future provision to be stipulated court's right to dispose other obligations than in art. No. 90 align. 6 Moldova Republic Penal Code.

Minor's Obligations during Probation Term and the Importance of Fulfilling them in Romanian Criminal Justice System.

Once the court's decision to conditional suspension is definitive, its effects start to appear. After effects' situation in time, these separate one to each other starting, also, from the obligations that incumbent the convict in immediate effects (temporary) and definite effects (final).

The immediate effects are produced when the conditional suspension decision is definite and consist in net executing the penalty.

The effects are temporary because during the probation term period are conditioned by minor convict's good behaviour that must not provoke a situation that would determine the recalling for penalty execution conditional suspension.

As an immediate effect of conditional suspension, as we showed above, penalty's execution will not be effectively realized.

After the prison penalty, the penalty suspension convict is not imprisoned any more to execute the penalty, and, if he was preventive arrested, he will be released as soon as the penalty's execution conditional suspension has been pronounced without waiting for the decision to remain definitive. This will not happen as a consequence of penalty's execution suspension decision, which because is not definitive, cannot be performed, as a logical consequence that results from court's appreciation about minor convict, that he may improve himself without executing the penalty, and keeping him/her from now on is not founded, it comes in contradiction with pronounced suspension decision.

This setting free, before the decision to be definitive does not restrict judiciary control court decision to decide in another way, to dispose penalty's effective execution.

Through the accordance of the accept penalty's execution suspension it is suspended the main penalty as well as complementary ones that have been applied next to the main one, even if the law does not provide anything.

Besides, in judiciary practice was brought to discussion that next to a prison penalty, of which execution was suspended, it can be applied the complementary penalty of forbidding some rights when its appliance is compulsory according to art. No. 65 Romanian Penal Code and it was correctly decided in the sense that through conditional suspension appliance is not put away courts mandatory to apply complementary penalty when this appliance is obligatory.[3]

One more argument represents the fact that the court, first applies the main penalty and the complementary one only if it is mandatory or if appreciates that this is necessary and after that disposes penalty's execution conditional suspension. Consequently, the appliance of complementary penalty is not restricted by the way it follows to decide towards suspension or execution the main penalty.

If the complementary penalties application is not restricted by the penalty's execution, the complementary penalty's execution – that takes place after the execution of the main penalty, after total grace or the rest of the penalty, or after its prescription – is influenced by main penalty execution fate. This way, as an effect of fulfilling the probation term, without interfering a recalling cause or a suspension measurement revocation, it comes up convict's rehabilitation, and complementary penalty is groundless, is not justified because the rehabilitation makes the bans to stop, the inabilities, the decays that result from a conviction.

In connection with the accessory penalties' situation, when it is disposed execution conditional suspension, the problem was solved by the legislator through Law no. 278/2006 provisions that modified the provision in art. No. 71 Romanian Penal Code that concerns the contents and the way the accessory penalty is executed this way, in accordance with the provisions

[3] C.S.J. s.p.d.no. 2855/2nd of July 1999, law no. 7/2000,p. 167-168.

on art. No. 71 align. 4 Romanian Penal Code" during prison penalty's execution conditional suspension or under surveillance suspension of prison penalty's execution, it is suspended the accessory penalty execution".

When the court applies prison penalty, it must do a complete individualization, not only for the main penalty but as well as for complementary penalties and to mention the accessory penalty, then it will decide if the penalty is to be executed or suspended. Of course, the main penalty being suspended, the accessory penalty execution is suspended, too.[4]

A limitation of conditional suspension effects was provided through the provisions of the art. No. 81 align. 5 Romanian Penal Code: "Penalty's execution conditional suspension does not attract safety measures suspension and that for civil obligations provided by the conviction decision".

We consider that the legislator adopted is the right one because the purpose of the safety measures (putting away a danger state and prevention committing new facts provided by the penal law) is not incompatible with the followed target through penalty's execution conditional suspension – convict's improvement without penalty's execution- these being able to be independent or tide together.

Immediate effects lay the whole period of the probation term and if there was no annulment or revocation cause of penalty's execution suspension, these will be substituted by the final effects, the definitive ones.

The definitive effects for penalty's execution conditional suspension interfere in probation term fulfilment, period during which the convict proved through his/her behaviour that he improved himself/herself.

As a notion, as it is underlined in the penal doctrine :"penalty's execution conditional suspension are those consequences that when the probation term is fulfilled come out, according to the law, of suspension working and which, despite temporary effects, definitively solves convict's criminal liability problems inside this institution".[5]

Through the provisions in art. No. 86 Romanian Penal Code there have been established penalty's execution conditional suspension measure definitive effects. If the convict has not committed another crime during the probation term and it had not been pronounced penalty's execution conditional suspension revocation according to art. No. 83 and 84 Romanian Penal Code, he/her is fairly rehabilitated".

This way, according to nowadays regulation, to penalty's execution conditional suspension to fulfil its final effects – convict's fairly rehabilitation - it is necessary that three conditions to date in a cumulative way:

a) The probation term to be finished;

b) The convict has not committed a new crime during the probation term;

c) Not to have been pronounced suspension cancellation or revocation for any of the motifs provided by the law.

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THE LEGAL LIABILITY, MALPRAXIS AND THE DEONTOLOGICAL LIABILITY IN THE MEDICAL PRACTICE

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Abstract: *The authors start their study giving the definition of legal liability, deontological liability and malpraxis. After that they define the notions that result from it: accident, incident, fault, error. In the end, the authors show the objectivity of a forensic medical expertise that can confirm or, by case, infirm, the presence of a malpraxis.*

Key words: *malpraxis, legal liability, deontological liability, forensic doctor, damages*

The medical activity is a very complex activity that involves not only a serious preparation, information and continuous improvement, and also a correct application of the acquired knowledge, but also liability for the activity that was done.

In this debate, we try to mark the limits between the deontological liability, malpraxis and the legal medical liability, starting from the information presented above.

For a better understanding, we thing that it is helpful to answer to some questions such as: What is the medical ethic? What is the medical deontology? What is the medical liability? What is the malpraxis? When do we have medical error? When do we have culpability? What is the civil liability in the medical field? What about the penal one? What point can we extend the deontological liability to and where does the legal liability of a doctor start from?

We are beginning by defining the **ethic** as being the science that studies the theoretical and practical matters of moral. The term **deontology,** being the moral of a profession, was first introduced in this field by the British philosopher I. Bentham.

The moral-behaviour rules have existed in the medical field from the ancient times and they have become **medical deontology** in time. This fair practice is used in the patient - doctor relation and also in the doctor-society relation.

The definition regarding the **liability** can be defined as being a reaction to a social deed that the society condemns. **The medical liability** results from the peculiarities of the medical profession and also from the unforeseeable and irreversible development of the medical act.

It is of great importance to mark the differences between the moral (deontological) liability and the penal one in the medical practice.

The public opinion and the professional conscience are going to sanction the moral deviation of the doctor. The Medical Board is the one that usually analyses such deviation, solving the problem according the rules of this institution. This institution only sanctions the deviations that have broken the moral medical rules; the legal deviations are being sanctioned by the competent institutions (Police, Prosecutor's Department). When according to the law there is the possibility of using the constraint of the state we deal with the legal medical liability.

According to the legal standard that has been broken, the legal liability can be:

1. Administrative liability (involves disciplinary and civil penalties)

2. Civil liability (is sanctioned by the Civil Code and in general it refers to the patrimony assets – goods, money). This term concurs with the medical malpraxis term.

3. Criminal liability (it is sanctioned by the Penal Code and it is formed out of serious antisocial deeds named perpetration).

The difference between error and medical culpability is of great importance for determining the medical liability as being a moral or a criminal liability. For a better understanding of the two terms it is necessary to understand the term of malpraxis.

The b. letter of the 642 article of the 95/2006 Law stipulates: malpraxis is the professional error committed during the medical act or medico-pharmaceutical act, error that causes damages to the patient, involving the civil liability of the medical staff, of the provider of medical, sanitary and pharmaceutical facilities and products. The definition tells us that in order to have a malpraxis situation there must be proved that an error happened during the medical act. What is and what can be considered to be a medical error? The answer is not an easy one.

The error can be defined as being an unpredictable failure of a normal medical behaviour. The error is related to the knowledge field, tiredness, the lack of the doctor's psychological balance, the lack of the medical experience. It is an accepted possibility and it does not draw the doctor's criminal liability.

The medical errors are divided in two categories: objective and subjective.

The objective error is the result of imperfection (exhaustive acknowledge) of a medical aria. The medical aria can be an etiological agent, peculiarities of the illness, a certain reaction of the patient, applied treatment, complications that may occur during the evolution, etc. No matter how well prepared a physician is, in such a situation they would all commit an error reacting the same way. This situation is legally considered to be de facto error, and the situation caused by it does not draw the criminal liability, but the civil liability. Nevertheless, the patient can consider the restoration of damage if he had suffered damages and accuse the doctor or the system of an error. Certain technological imperfections or limits of the medical devices needed for clinical and preclinical tests are part of the objective error category. In this situation the physician cannot be held countable for the error, but the institution (hospital) that bought the device can be held countable.

The subjective errors are committed because of the poor professional preparation which leads to a false representation of the medical situation. For the same reason (poor professional preparation) the technical methods and specialty manoeuvres can be wrongfully used. These refer to: surgeries, drug treatment, manoeuvres need for tests, the technique of taking care of the ill person, etc. In the same given conditions a different physician, a well prepared one could avoid causing damage to the patient , damages that could be caused by inability, superficial appreciation of the case, inaptness or omisiva doubt, etc. These are all part of the diagnosis errors field and they are based on improper examination, symptoms improperly interpreted, unawareness of the patient's antecedents, not sending the patient for interdisciplinary checkups. The subjective errors draw the medical liability that can have civil or criminal consequences.

Making the difference between the subjective and objective errors is not easy, but it can be done if the real work conditions that the medical staff had at hand are being analyzed. "Medical staff" is defined by the latter a, first point, article 262 from the 95/2006 Law: "the medical staff/ personnel is formed out of the doctor, dentist, pharmacist, nurse and midwife that offer medical services." In order to mark the difference between the objective and subjective error committed by a doctor, it must be analyzed weather it was done everything possible in the given conditions to set a good diagnosis and choose the best treatment method or not, and if the doctor used all his knowledge and professional experience. If the doctor's professional attitude was irreproachable, but still there was an inconsistency between the diagnosis and the real situation, then the objective error might be caused by the improper work conditions that happen during running a high quality medical act. In the given conditions a different doctor would have ended in the same situation committing an objective error. Also, we can consider objective error when there is an inconsistency between the

clinical diagnosis and the objective reality in the cases, given by the unusual symptomatology generated by a certain reaction of the patient or by different agents that influences the evolution of the disease. The doctor is going to be charge of committing a subjective error if the diagnosis' inconsistency is given by the doctor's lack of professional information or by using the information without diligence.

That is way it is good to present the text from the 642 and 642 articles part of the 95/2006Law.

Article 642- (2) The medical staff has civil liability for personal acts that produced damages caused by errors, which include negligence, imprudence or insufficient medical information that happened during practicing the prevention, diagnosis and treatment procedure.

(3) The medical staff has civil liabilities in case of damages that are caused by the disobedience of the stated regulation regarding the confidentiality, informed agreement and the obligation of giving medical assistance.

(4) The medical staff has civil liabilities in case of damages caused while practicing the profession, even when the limits of their competence are exceeded; exceptions are made when the appropriate medical staff is not available in a case of an emergency.

(5) If the act that caused the damage is according to the law a crime then the civil liability does not remove the criminal liability.

Article 643- (1) All persons involved in the medical act are proportionally liable to their own level of guilt.

(2) The medical staff is not liable for the damages and torts caused during practicing the profession when: a. they are caused by the work conditions, insufficient diagnosis and treatment equipment, nosocomial infections, side effects, risks and complications generally accepted, investigation and treatment methods, hidden flaws of the sanitary materials, equipments and medical devices, used medical and sanitary substances; b. in case of emergency they act with good faith according their competence.

The malpraxis can be part of the following categories:

1. Civil malpraxis – is the consequence of breaking some basic rules that can be classified the following order:

- the responsibility of treating and answering to emergencies
- applying some standards of caring (maximum and minimum)
- to make the best judgment
- the duty of care practice
- the duty of constant improvement
- the duty of obtaining the patient's agreement
- the appliance of proper diagnosis procedures
- the abandon of the treatment
- confidentiality
- the superior's liability (every negligence committed by the employees equally involve the superiors – the chief doctor)
- the trust relation between the doctor and the patient

2. Criminal malpraxis – the acts in this category can be fraud, documents alteration, illegal use of medication, illegal or criminal treatments (to induce an abortion), breaking the oaths, causing body

injuries, infirmities or invalidities. When the death of the patient is a consequence of one of the above, the guilty one can be charged with murder.

3. Ethical malpraxis – the medical staff is acting following the ethical and conduct standards and also a mandatory conduct code for all those participating at the medical act: doctors, dentists, pharmacists, nurses and midwives. The rules of this code are part of the Code of medical faire practice. Disobeying these rules can indirectly affect the doctor-patient relation by lowering the quality of the medical act; the problems are analyzed and solved by the board that has the medical authority (Medical Board).

In real life the most frequent malpraxis situation is the one that has civil consequences. That is why there are the malpraxis insurances. According to law, each doctor must be insured at an insurance company. The insurance company pays the patient's damages, if a trial or a decision of the newly formed judging commission proves that the objective reality complies with the malpraxis situation.

Medical **fault** represents the breaking of a minimum of attention and prudence professional liability. It is considered that it wasn't fulfilled a liability or an act that had to be fulfilled and that there was an abnormal conduct that in similar conditions a different doctor with the same preparation would have not used.

To consider as fault a medical mistake, it must reach some conditions:

1. it must be obvious, material, proven
2. it must exist beyond any doubt
3. it must be the consequence of the lack of professionalism
4. it must be considered mistake by other competent doctors

In order to judicially charge a medical fault there must be a physical or psychological harm guilefully done and there must be causality connection between the deed and the damage. In conclusion, the definition of medical fault contains:

1. the existence of a professional duty
2. guilefully unfulfilling that duty
3. a damage caused by an action or inaction
4. the prove of the causality connection between the medical act and damage.

In order to delimit the medical deontological liability of the legal liability, the Court must resort to the medico-legal report Commissions. The medico-legal appreciation of a fact as being a medical fault is done according to the real circumstances and conditions at the moment of the doctor's contact with the patient.

These conditions and circumstances are:

1. the professional fault through ignorance (incompetence, inability, lack of knowledge) is present in the diagnosis or in applying the treatment if the doctor performs the medical activity without having the needed information or having a false information.

Generally it is accepted that ignorance is the doctor's important mistake. It can be criminal in emergency cases, being fatal for the patient.

2. the fault through improvidence (imprudence) – means committing a positive medical activity without foreseeing that illicit consequences might appear , even though it could have and it must have been foreseeable.

Every professional, when performing normal professional provisions, must make the proper decision for each situation according to the real possibilities of provision that he is specialised in and according to the professional experience.

3. the fault through negligence (inattention) – the legal conditions of charging the negligence include :

- not acting as any reasonable person in same working conditions and in the same situations
- not avoiding a professional act that any other good faith professional would have in the same conditions

The forms of manifesting the negligence are: haste, superficiality, fulfilling the right duties unconscientiously.

The following acts can be considered negligence: taking incorrectly the case history (the lack of dialogue with the patient), an inaccurate clinical test (a patient that is checked with the clothes on), not performing some preclinical routine tests, not taking some asepsis measures before the surgery.

4. the fault through indifference (carelessness)has the following conditions:

- the author of a certain action or inaction, knows that all the measures of protection were not taken, but hopes to avoid the unfavourable result of his activity.

- the negative results cause the patient a damage that is related to the doctor's indifference.

Methods of the indifference are: under appreciation of the risk of the medical action or over appreciation of the means of action.

In order to exclude a medical fault and to take in consideration the unhappy case the forensic expert and the Court must prove that:

-the good faith of the doctor that tried to do everything that was possible for the good of the patient.

- all the medical means were correctly used
- all the medical conduct rules were followed related to the real work situation
- the patient agreed for all the performed manoeuvres
- an interdisciplinary consultation was done when needed.

What happens in an emergency when the life or the health of the patient is endangered? How would the doctor be held countable for such a situation?

It is good to know, that in such a situation, the success depends on the doctor's preparation, which means that the doctor must have information about cardio-respiratory resuscitation, must have information about the emergency treatment that needs to be personalised from case to case. The success also depends on the organization and transportation of the patient to the closest medical facility.

According to the 3/1978, the doctor cannot deny an emergency no matter the hour that he was solicited or the patient's address. The doctor must answer the solicitation and offer the first aid even outside the working schedule, exception are made during a force majeure case. Not answering to a patient's emergency call is charged by the law, so it represents a mistake. The refusal is considered by the law commission through omission and is punished by the Penal Code according to the grievous damage that was caused (184 article Penal Code). If the patient dies the situation is considered to be culpability murder through omission (178 article Penal Code).

For the cases presented above, the doctor is exempted by the liability (he would not be held accountable) only in circumstances outside one's control.

As a conclusion to all the above, it can be said that a good quality medical assistance clearly the level of preparation of a medical assistance system. It also shows the way the society puts price on a life and the difference between theory and practice in the medical profession.

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SOME ASPECTS CONCERNING THE E-COMMERCE FISCAL IMPLICATIONS

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Abstract: *It is affirmed that the internet has the ability to become the new global electronic market – market where every economical "argument" between the great powers of the world will take place. The internet can represent the instrument for the integration in the global economy of the 21 century.*

The organizations must generate the adoption and use of the newest technology in business, to have access to information, at the level of the most recent achievements on a global level, about production, financing, technology and to use the new marketing, supplying and sales methods through modern devices, which guarantee the access to the global electronic market, aiming to reduce costs, to increase the profit and the competitiveness rate.

The decisional factors of the society must use any opportunity to create, improve and reform the judicial and fiscal frame regarding to the matter of electronic commerce, so that this way to assure the sustainable rhythm of the economic improvement.

Key words: *the juridical and fiscal frame, e-commerce*

In our days, the competition among online retailers has become more intensive. Therefore, more and more businesses are trying to gain competitive advantages by using e-commerce to interact with customers. Development of commerce over the Internet has been rapid. It has obvious advantages from a commercial point of view, both in the extent to witch it can be automated and in the wide range of potential customers to witch it gives easy access.

A lot of companies have moved their focuses from products and sales to customer oriented marketing and understanding that customers has become more important issue of marketing because of the hard condition of competition in the market place.

The electronic market represents that virtual platform – that "virtual place in a network" – where different brokers, suppliers, buyers can meet, in order to realize the change of information, to make some transactions, etc. We observe that the mechanism of the electronic market needs the interaction between classical elements (request, offer) and institutions with regulative functions and even judicial, economical consciousness (this way for example, the virtual request proves a great importance taking into consideration the transformations caused by it upon production).

The electronic market, respectively the commerce on internet determines a "revolution" of prices (we can talk even about a higher flexibility of prices), because the technology contributes to reduction of prices and the high-level competitiveness obliges the sellers to establish their prices so that the volume of sold could increase. We must admit the great importance of electronic commerce in the complex transformational process of the traditional economy and of the development of a "new economy".

The electronic commerce is one of the most characteristic exhibition forms of the globalizing world. The spread of the internet had opened the door in front of some new methods of continuation of activities, which earlier were impossible to even think about. Among other things it made possible to sell the subject not taking into consideration its edition form.

Electronic commerce encompasses the following main areas:

- electronic networks change the paths used to transmit information in the context of traditional trade in goods and services. Rather than using traditional communication channels (providing information through catalogues and ordering by letter, telephone or fax), interaction between supplier and purchaser occurs via the Internet, while the goods and services are delivered

physically. This is expected to create a substantial potential for mail order business, mediation agencies and similar service-providers.

- computer programmes, and increasingly also music/ audio and pictures/videos, can be exchanged in digital form via the Internet, and downloaded to remote storage media. Conventional telecommunication medias such as telephone/fax, radio and television will increasingly be integrated into the Internet, and will be enlarged by new multimedia services, e.g. video conferences, Pay TV, music and video on-demand. New Internet-related products will be offered increasingly (for instance homepage designing). In so far, the whole distribution process is tied online as well as parts of the production process of the traditional economy. Another characteristic feature of such digital products is that they can be reproduced in unlimited numbers without loss of quality.
- the Internet offers a significant potential for services provided by financial intermediaries (electronic banking, trade in securities, electronic cash, insurance), for advisory services and consultants (auditors, management consultants, accountants, software programming, tele-medicine) and for transactions with public institutions.

There are some specific legal orders about the e-commerce (in our legislation as well in international legal system). We must mention the following legal rules:

- *in our country*: Law no. 365/2002 concerning e-commerce [published in Official Monitor no.483/2002.07.05 and re-published in Official Monitor no. 959/2006.11.29]; Ordinance of the Government no.130/2000 concerning legal regime of distance contracts [published in Official Monitor no.431/2000.09.02 and re-published in Official Monitor no. 177/2008.03.07]; Government Decision no. 1308/2002 for the application of Law no.365/2002 on e-commerce etc.
- *in EU–law* we mention: the Directive of the European Parliament and Council 2002/31 CE about some judicial aspects of the social services of information, especially that of the electronic commerce, on the internal market (directive about electronic commerce) establishes a constant judicial frame, subordinating the social services of information to the principles of the internal market (free traffic and establishment of freedom).

The member states must legitimate the obligatory character of the suppliers to make possible an easy, direct and permanent entrance for the users of the service and for the competent authorities at least regarding to the following information: the name of the service supplier; the geographical address where the supplier is established; the coordinates of the service supplier, even the electronic post address where the supplier can be quickly found; if the service supplier is registered to a commercial register or to a similar public register, the commercial register where the service supplier is registered and the registry number, or an equivalent registration code for identification; if the activity is an authorized one, the coordinates of the controlling authority. Further the state must assure that the suppliers which send un-required commercial communications through electronic post, consult regularly the "opt-out" [opt-out/ a key-term used in Directive - unsolicited transmission of commercial communications to a list of e-mail addresses of Internet users who have not given their explicit consent to receiving commercial messages but who have the option of withdrawing their name from the list. In this system, the consent of the Internet user is implicit] registers where those persons are registered which are not willing to get this kind of correspondence and they respect their choice.

The directive obliges the member states to eliminate any interdiction or restriction regarding to the use of electronic contacts. The member states watch that in case of misunderstandings between the service suppliers of the informational companies and the service users, the legislation won't restrain the use of the extrajudicial solution mechanisms in case of litigations, used by the internal law, even through the use of certain electronic devices. The directive foresees three types of derogation:

- some activities like notary activities or defensive activities in front of the justice;
- the clause of the original country is not applied for some special domains (e.g. authorship rights or contractual obligations related to contracts closed by consumers);

- the member states can adopt measures to limit the free traffic of services which originate from other member states for certain reasons, for example child protection, health or consumer protection.

In EU – law we mention also the Council Regulation (EC) No. 792/2002 amending temporarily Regulation (EEC) No 218/92 on administrative cooperation in the field of indirect taxation (VAT) as regards *additional measures* regarding electronic commerce.

Regarding the e-commerce taxation tendencies, along the years we could remark, that taxation – like politics – is the "art of possibilities". The customs and other kind of taxation forms, which needed economical and physical control, during the years left place for the *ad valorem* taxation, based on the value-establishment and value-control, which were acted on the turnover. The fact, that the biggest part of the individuals considered this change a positive one, can be understand as the improvement of the administrative efficiency and as the partial acceptance of some aims in the domain of taxation politics. The biggest part of the taxation theories, as they were created for a world, where only the exchange of objects was possible, are not suitable for the world of information commerce transferred in an immaterial way. This is highly true in case of those norms which require the physical presence on the territory of the taxation administration, or in case of those, which make a difference between goods and services and are based on geographical emplacement. The same situation appears in case of the price-formational rules used between the companies.

We noted that Christopher Zimmermann [C.E. McLure Jr., G. Corabi, *L'imposizione fiscale sul commercio elettronico*, IPSOA Editore, 1999] wrote in „Taxing the Superhighway, State legislature", in 1997 that: "Obviously the world of electronic commerce will be a challenge not only for the smaller traders, but even the basic theories of taxation must be renewed." The same idea is shared by two co-workers of the OECD, who are asking the following: "Are the traditional taxation theories enough to deal with such complex transaction and with such a content, or these are shocked by this attempt? Do we need new frames for reference?"

From another point of view "the regulation, which from the point of view of fiscal politics would offer a long-lasting norm, from the point of view of the existing technology could be totally inadequate (e.g. the payment in electronic money without name, or the possibility of the deployment of a server wherever you want). The most important consequence in the domain of fiscal politics of the increase of the electronic commerce could be the fact, that in the 21 century the fiscal regulations will be "ruled" by technology instead of politics."

This is not the only problem: politics wants to regulate a domain which is changing quickly. The Interactive Services Association Task Force remarked: "The ability of the States, that the taxation of an industry how and in what conditions is regulated, is restrained by the change of the nature of that industry. It is difficult to implement to the existing fiscal models, some new services, which were not taken into consideration when these models were created." Because of these it has a basic importance, that by the use of any system, this must be so flexible, that it can be changed by the future developments.

We determine, that those similar products that satisfy the same needs must be taxed in the same way – within the taxation conditions of the electronic commerce "the idea of neutrality" is the most important.

However the principle of neutrality - described usually by the notion international tax neutrality is absent not only from the international relations between the fiscal mandatory organs, but it creates difficulties for certain national fiscal law systems. The difficulties created by the absence of this principle are doubled by the phenomenon of "virtual tax competition" (the deteriorative fiscal competition is caused by the active behaviour of the state, but the possible virtual tax competition between the states can be determined even by the passive behaviour). The state stays clear of the introduction of the fiscal regulation, and so it makes possible the formation of concurrence between the states even in the domain of taxation.

Some countries are behaving like a tax heaven, while other countries are increasing the taxes or aggravate the foreign currency controls. Usually it is because the absence of a suitable regulation

or because of the moral consciousness that a country does not qualifies it miscarriage, what is considered and qualified by the international community and by the separate law systems this way. Beginning with 1992 every international organization, from the UNO to the International Standard, from the G7 to the European Community, has started to edit some documents against the harmful tax competition, against money laundering and against tax resorts. The Fiscal Committee of the OECD on 20 January 1998 accepted the Harmful Tax Competition: An Emerging Global Issue report document, which was on 9. April 1998 by the Council of the OECD approved (since the Taxation Framework Conditions were agreed in 1998, the OECD, through its Committee on Fiscal Affairs -"Committee", has pursued an ambitious work programme directed at their effective implementation. A key element of that work programme has been an international dialogue, involving not only OECD member countries but also the international business community and a number of non-member economies).

We must analyze too, whether the subject of the electronic commerce could be attached to the harmful taxation activity and whether the wrong law practice or the lack of law creation determines the injury of neutrality or of the condition of the level playing field.

Near the general problems of the harmful tax competition, we must accentuate, that until this situation persists – until there is no norm-system for the electronic commerce which can be entirely used, and most of all because of that theories which declare that this sector needs fiscal incentive, even more than it is offered by the moratorium and by the vacation impostae – it exists the case of harmful tax practices, which means the concussion of the companies into this electronic commerce. Those ideas which are sustaining the fiscal incentive of the electronic commerce could create competitive situations between those who are offering greater preferences and those who even with the use of every existing instrument for law-creation, have no "talent" in law-creation, this way they are based on own regulations in the matter of e-commerce. This situation, instead of regulating the new phenomenon, makes impossible to realize the aim of fiscal neutrality, which would need instead of declarations, some concrete measures which can assure its realization.

Finally, we mention that the Internet is the most important achievement of the last century and it influences the development of e-business and, in particular, e-commerce, so, that is the reason because of there is a lot of work to do for e-commerce legislation.

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THE EUROPEAN SECURITY

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Abstract: *Practice and theory of force went hand in hand, defining the history of Europe up to now. The effort to organize forces to discourage aggression and resistance focused on two main directions: on one hand, the domestic resource mobilization, and on the other hand, the conclusion of agreements with other states to coordinate the defense against third countries.*
Key words: security, UN Charter, relation, states, peace.

1. The balance of power policy

Security concerns have always been related to force and provide the means and conditions necessary to prevent and reject aggression.

Practice and theory of force went hand in hand, defining the history of Europe up to now. The father of the international law, Hugo Gratius, significantly naming its treaty of interstate relations norms, in 1625, *De Jure beli ad pacis* (On the right of war and peace).

The effort to organize forces to discourage aggression and resistance against it focused on two main directions: on one hand, the domestic resource mobilization, and on the other hand, the conclusion of agreements with other states to coordinate the defense against third countries.[1]

The emergence of balance of power paradigm is dated with the use of force, so that De Hume noted in his essay *The balance of power*, appeared in 1752, that elements of this principle can be found in *Demosthenes orations* for megalopolithans and got extension after the formation of the modern states.

a) One of the oldest plans in this regard is that of Maximilian Bethune, the duke of Sully, when he was minister of the king Henrich IV of France. One of these plans foresaw Europe's division into "15 equal states" managed by France.

b) Another point was the idea of forming systems for the conflict solving through arbitration and conciliation as a way of maintaining the balance of powers. The idea emerged at the beginning of the 2nd millennium and was based on the Christian ideas of the world university. As for the arbitrator, the controversy was between the followers of the Pope and those of the Emperor, and they continued until the assertion of the national principle.

Later on, another idea appeared, that of the creation of some European institutions to keep the peace. The idea was repeated in 1464 by a certain Antonie Marini, a French refugee at the court of Podiebrad, King of Bohemia, and it became "Podiebard's plan" which provided a "Congregation of Concordia", a sort of league of the sovereigns representatives for peace by arbitration.

c) Another way to keep the peace was the creation of alliances to maintain the balance, which was adopted in the fifteenth century Italy and then expanded across Europe. This system was intended to limit the two great dangers that threatened the sovereignty of the states: the extension of the Ottoman domination and increased power of the Habsburgs. Thus, to cope with the invasion of France in Italy, the King of Spain, the Pope, Venice, Milan and Emperor Maximilian I joined on March 24th in the League of Venice.

1.1. European congresses, ways of promoting the balance of power

The European Congresses were a new way to promote the balance of power in Europe.

[1] Boncu Simion*, European Security. Changes, Challenges and Solutions,* Amco Press Publishing House, Bucharest, 1999

a) The system of Westphalia was created as a result of the Thirty Years War (1618-1648) between the Protestant princes supported by the Netherlands, Denmark, Sweden, France and the Habsburgs.

The peace negotiations were held with the participation of delegates from Spain, Sweden, France, the United Provinces and Denmark, delegates of the emperor and German princes, representatives of the Republic of Venice and of Transylvania.

The treaty concluded in 1648 has sought to ensure a balance of forces to eliminate the possibility of a power to impose its domination over other countries.

b) The Congress of Vienna was determined by the hegemonic actions of France under Napoleon's leadership that led to the coalition consisting of: England, Austria, Prussia and Russia and it shows that the objective of this treaty is to establish a "real and permanent system for the balance of power in Europe".

c) "The European concert" arose as a result of the great monarchs opposition to the revolutionary trend of the French revolution which started against the ordinances of feudal Europe. [2]

The initiative belonged to Alexander I who suggested the conclusion of a "Holy Alliance" between sovereigns. The treaty was signed on 26 September 1815 between Russia, Prussia and Austria, being open „to all Christian princes". In November 1815, England also joined and imposed the secret quadripartite alliance by which the Member States could intervene in France in case of revolutionary movements and ensure collective borders.

1.2. The League of Nations and the balance of powers between the two world wars

a) The security system of the League of Nations was created on the proposal of the U.S. President W. Wilson on January 8, 1918 in "The 14 points" that lead to the international body to ensure perpetual peace as a collective force able to be " stronger than that of any other nation engaged in any alliance that no nation, no possible combination of nations can confront or resist.

The 11th Article stipulated that any war or threat of war that directly affects one of the member of the League, fully interested it and it must take appropriate measures to effectively safeguard the peace of the nations. The idea of collective actions, ranging from economic and financial boycott to the united military action, failed to find reflection in a tool which is able to implement it.

The military intervention was done on the recommendation of the Council, which was adopted by the unanimity of votes and the decision to use it was up to each state, leading to inefficiency.

b) The return to the political balance of powers was determined by the great powers which began to seek solutions, when the League was an obstacle in the promotion of their interests. The most fervent advocate of the concept was England which wanted the weakening of France and the German recovery.

The contradictions between the great powers allowed Germany to rearm and prepare a true war machine that inevitably led to the Second World War.

1.3. UN Charter and the block division of Europe

Searches for a new security system started during the war, the goal was "to protect the future generations from the scourge of war, which twice during a human life has brought unmeasured human suffering. [3]

a) The UN Security System

The UN founders also started from the power when they defined as the organization's primary goal "the maintainance of peace and security". Starting with the observation that inter-state relations are relations of force, it was considered necessary for the organization to have armed

[2] Gârz Florian, *Europe's Renaissance*, Odeon Publishing House, Bucharest, 1999

[3] Neagu Romulus, *The European Security*, Politics Publishing House, Bucharest, 1997

forces able to eliminate any threat to peace. The general concern was not the elimination of force, but the control over it. Instead of a decentralized system proposed by the League, the UN has imposed an international security system with a high degree of centralization. The Security Council is the body that finds and decides on the use of force. Decisions are taken by a majority of votes (9 votes) but they have to include the affirmative votes of the five powers: England, China, France, USA, Russia. The veto was a deliberate decision to make the Security Council unable to take action against the five permanent members. Staff Committee composed of the heads of staff of the permanent members has become inoperative because the UN armed forces were not created.

The UN Charter has provided the member countries a wide range of possibilities for a peaceful regulation of disputes: negotiation, inquiry, media, conciliation, arbitration, legal way.

b) The balance of the NATO blocks and the Warsaw Pact

In parallel with actions at the UN, the European plan was to seek a separate system of security based on the same concept: the alliance between the powers.

Since 1943, the USSR has proposed the creation of a European organization in which the USA, England and Russia were supposed to take part and another world one and the U.S. suggested a world organization.

U.S. and other major Western powers have set on April 4, 1949 the North Atlantic Treaty, and after receiving Germanyin the Alliance on May 9, 1955, in May 14, 1955, the Warsaw Pact was created. The result was increased political and economic hostilities, otherwise known as "The Cold War".

The high degree of accumulation of arms and nuclear weapons has made the "balance of powers" policy an absurdity.

2. The new security concept promoted in the Helsinki Final Act

At the beginning of the eighth decade of the twentieth century, Europe was divided into two military blocks within which the arms race continued and also the accumulation of weapons, including nuclear ones which reached alarming levels. In these conditions, a new European security system was required to be based on military disengagement, cooperation and trust between states, principles to replace the use or threat of force in the relations between the states.

The new security concept was based on the settlement of interstate relations in Europe, the politicy of the blocks will have to make place to a security organization, claiming a commitment system and concrete measures to exclude the use of force and to ensure the peaceful development of European states in an atmosphere of relaxation, understanding and cooperation.[4]

2.1.Essential elements of the new security concept

The basic factors that work together to create the new security system are the states as independent sovereign entities. All the states must undertake not to use force, threat of force and relations between them will be based on the fundamental principles of international law regarding:

- Equal rights;
- Respect for national independence and sovereignty;
- Non-interference in internal affairs;
- the right of every people to decide their own fate, not expected to create a system of principles and standards different from that of the UN Charter, but their application to the specific Europe.

The implementation of these principles and rules covering the full range of relations between states (political-legal, economic, military and cultural) requires concrete measures that states must take in their mutual relations at all levels of representation.

[4] Weaver Ole, *Security as a speech act: political analysis of a word, the center for peace and research of the conflicts,* Copenhaga, 1989

Punerea în aplicare a acestor principii şi norme care cuprind întreaga gamă a relaţiilor dintre state (politico-juridice, economice, militare şi culturale) impune măsuri concrete pe care statele să le întreprindă în raporturile lor reciproce la toate nivelurile de reprezentare.

Measures:

The military disengagement and disarmament are key points for creating favorable conditions for the principles, which involve:

- Withdrawal of all foreign troops from the territory of other states;
- Dissolution of foreign bases;
- Dissolution of military blocks;
- Outlawing and destruction of stockpiles of weapons of mass destruction;
- Reduction of military forces starting with the heavily armed big states. On a lasting settlement and development of economic cooperation and exchange of cultural and material values for a mutual benefit is a further measure to implement the principles.

Guarantees:

Establishing principles and procedures to transpose them into practice is one of the guarantees that each state, irrespectively of its economic, political and social system, can freely develop without any dangerer of interference or aggression.

Disputes of any kind or character must be solved peacefully within the system.

The new security system must have a general European character and apply to all European states, as independent states and with equal rights, overcoming the division of the continent in military blocs and opening the gates for connecting with the world states.

The European security system must be part of the global security system, having a great place and role given by the number of inhabitants, the economic production, the trade, the historical traditions and the European civilization.[5]

The new security system should be done gradually over time and it involves actions aimed at:

- liquidating of sequels of the Second World War and the “cold war”;
- reducing the balance of powers from the highest to the lowest levels, for the relations between data;
- the dissolution of military blocks;
- the collective security.

The principles and rules underlying the new security system fed the preparation and conduct of the Conference on Security and Cooperation in Europe, which was prefaced by the Bucharest Declaration of July 6, 1966 signed by the heads of state of Bulgaria, Czechoslovakia, RD Germany, Poland, Romania, Hungary and the USSR.

2.2. The European security at the turn of the millennium

The events produced in Europe in the last decades of the twentieth century (the fall of the Berlin Wall, the German unification, the dissolution the Warsaw Pact, the collapse of the communist block and of the USSR) have led to the reconsideration of the European security.

After dissolution of the Warsaw Pact, the "balance of power strategy” in achieving security no longer functions and, as such, the European security system must be reconstructed in line with the new realities.

The trends regarding the reorganization of the European security are diverse and contradictory, each player (state, group of states, organizations) wishing to occupy a better place as to be able to promote and, if necessary, defend their own interests.

2.3 Trends and current guidelines

[5] Zbigniev Brezinski*, Central and Eastern Europe in the Transition Cyclone*, Diogene Publishing House, Bucharest, 1995

Among the current trends and guidelines in implementing the new European security system there might be seen:

- the tendency to organize the global security architecture based on the unipolar criterion, on one hand and the tendency, on the other hand, based on the multipolarity criterion organization;
- the tendency of some security organizations to take over the security of components belonging to national states (sovereignty) and their opposition;
- the primacy of decisions of international bodies in different areas to those of the Member States;
- the tendency of some political-military organization of circumventing the provisions of the UN Charter and acting outside the areas of responsibility and outside the areas of competence;
- combining the principle of cooperation between states and international organizations, with penalties, including the use of force;
- achieving the European security through conflict prevention actions at national and regional levels;
- making of areas (Euroregion, autonomous regions) that overlap in several countries and encourage the development of cross-border relations;
- making of zonal security organizations under the auspices of the Western security structures;
- imposing specific rules of the Western civilization: the rule of law, the market economy, the democracy, the human rights.

Analyzing these trends shows that European security is in reconstruction and that it prevails the idea that Europe must be of the Europeans and, therefore, European security must be made by the Europeans. [6]

The European security system comprises a set of principles and rules of action relating to security arrangements, as well as the institutions and instruments to verify and enforce them in Europe.

The principles and rules are comprised in the international documents to which states have joined, including:

The UN Charter and other documents;
The Documents of the Organization for Security and Cooperation in Europe;
The recommendations and resolutions of the Council of Europe;
The treaties and bilateral agreements between states;
The partnerships between the States and the international organizations;
The status of "invited" or "associate" in various international organizations;
The provisions of documents of regional security organizations.
The European security organizations.
Organizations operating across Europe:

- The United Nations - with global vocation;
- The Organization for Security and Cooperation in Europe;
- The Council of Europe;
- The European Union;
- The North Atlantic Organization.

These organizations add the regional security organizations and the states as the subject of the international law.

2.4. Relations between NATO and EU in the security and defense field

Despite the U.S. opposition and the reluctance of some European countries, the German-French tandem had an upward trend of the phenomenon of crystallization of a European security and defense entitiy by which the Europeans should be able to solve their own problems.

[6] Zamfirescu Dan, *The Third Europe*, Roza Vânturilor Publishing House, Bucharest, 1997

Although there are many ambiguities in the legislative framework and the position taking regarding the European Security and Defense Identity, both from the U.S. and the European opart, we can state that there are cooperation relations between the EU and NATO and not of subordination.

The independent character of the EU towards NATO is given the following:

- Security and defense policy objectives of the EU are set by the EU and aim to defend the common interests of the member countries;
- EU institutional system;
- EU's own legal system;
- Military command structures and implementation are under the EU decision makers.

Between the EU and NATO, collaboration is based on:

- At management level, the EU and NATO General Secretary assists the ministerial meetings of the two structures;
- NATO recognizes and supports the development of the European Security and Defense Identity within NATO, providing its capabilities for EU-led operations;
- NATO is in the EU view, the concept of collective security and remains the key forum for consultation among allies;
- Membership of a member state of EU and NATO is compatible with the European security and defense policy;
- Complementarity and transparency in the mutual relations between the EU and NATO
- Development of military capabilities separable but not separate to be used by EU or NATO;
- EU and NATO acting in line with the UN Charter principles and aiming at the security and defense of their members;
- Both structures promote the Western values of democracy, the human rights, the rule of law and the market economy.

2.5. Relations between EU and the Russian Federation

In the carried out analyses, the Europeans concluded that Europe's economic integration can not lack the security and defense to be made by Europe for the Europeans. In the new context, the role of the Russian Federation in the European security and defense system that is built, is impossible to ignore. It has the potential economic, demographic, cultural, military and geostrategic potential, as well as the repercussions a state of instability in the Russian area upon the European security and defense construction would have. [7]

The relations between the EU and the Russian Federation, as part of the new security architecture of Europe are recent, advance with caution and take shape, as the result of some exclusively European initiatives and efforts.

Although the sequela of the „cold war" have not disappeared, although there are suspicions in the foreign policy of the Russian Federation, it shows a cooperative attitude with the EU which no one considers to be a hostile organization to endanger its security.

The Western political and military analysts agree that Russia, on the consolidation of democracy and market economy, should take its place in Europe.

The cooperation in the economic field that are mainly oriented towards integration builds new relationships between the EU and the Russian Federation.

The Security Strategy of the European Union and its relations with Russia have reached the level of vital interest by creating collective cooperation structures (committees, commissions, partnership, standing meetings).

In military terms, between the EU and the Russian Federation ongoing programs are aimed at a number of strategic areas such as:

[7] Zbigniev Brezinski, *The Geostrategic Triad. Living with China, Europe and Asia*, Historia Publishing House, Bucharest, 2006

- satellite research;
- high capacity and long distance air transportation;
- missile defense systems;
- nuclear technology.

The powers and duties in the EU defense and security field belong to the institutional system and are composed of:

- the European Parliament;
- the European Council;
- the European Commission.

3. The Treaty of Nice

The Nice Summit within the European Council discussed at the level of Heads of State held between 7-11 December 2000, along with other major problems (the EU enlargement, the Charter of Fundamental Rights, the improvement of the decision, economic, social, cultural, sports, or health and safety of consumers issues, the maritime security, the environment, the external relations) and issues of European security policy and defense policy.[8]

The fundamental objective in common defense was that by 2003, European countries, working on a voluntary basis, can take place within 60 days and sustain for at least a year, a force of 60,000 men.

In the civilian aspects of crisis management, it was tried to ensure that, at the same time, states of the continent be able to provide a force of up to 5,000 police officers for international missions and be able to develop within 30 days, up to 1,000 policemen.

The importance for European security and defense results from the new EU Treaty formula known since December 2000, the Treaty of Nice, which states: "The text approved by the Nice European Council on European Security and Defense (Presidency report and its annexes), the European Union's objective is to be quickly operational. Such a decision was taken by the European Council during 2001, under the provisions of the Treaty "(Treaty of Nice, art. 25).

The report of the President on the European Security and Defense, presented at Nice, had as annexes:

- Statement of employment of military capabilities - document issued at the Conference of employment of military capabilities held in Brussels (20-21 November 2000);
- Strengthening capacities of the European Union in the civilian aspects of crisis management;
- Political and Security Committee;
- European Union Military Committee;
- Organization of Staff of the European Union;
- Arrangements for European NATO member states that are not part of the EU and other EU candidate countries;
- Permanent reasons regarding consultation and cooperation between the EU and NATO.

The report stressed that the development presented the European Security and Defense Policy to respect the UN Charter, and contributed to the strengthening of security and peace in Europe, the primary responsibility in peacekeeping and international security belongs to the UN Security Council.

The EU cooperates with the UN, OSCE and the Council of Europe in matters of security and peacekeeping.[9]

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[8] Boncu Simion*, European Security. Changes, Challenges and Solutions,* Amco Press Publishing House, Bucharest, 1999

[9] Zbigniev Brezinski, *The Geostrategic Triad. Living with China, Europe and Asia*, Historia Publishing House, Bucharest, 2006

The progress made by the European Council meeting in Helsinki (December 1999) are the stages of a planning and evaluation process that will continue to support the involvement of experts from "HTF" and "HTF plus" groups. "HTF (Headlire Goal Paskal Force) is a group under the responsibility of the EU's interim military body consisting of experts seconded from EU countries and capitals and of officers belonging to the core of the future EU Military Staff, which led under the responsibility of the Presidency, the study on capacity . When this group is reinforced by experts from NATO, it is called "HTF plus".

"HTF" has the following tasks:

- Identify the objectives of the EU capacity for crisis management. The original objectives, set by the European Council in Helsinki will be evaluated and revised whenever necessary and by the same institution;
- Monitor the achievement under the direct leadership of the EU Military Committee, the "Catalogue" of forces and capabilities. It will be done through the preparation and review of the planning assumptions and scenarios by working groups comprising "HTF" and "HTF plus" experts;
- Identify and harmonize the national contributions on the required capabilities. National contributions will be assessed and harmonized in light of the revisions and agreed needs;
- Review the quantitative and qualitative progress towards the achievement of the agreed national commitments, including the needs for interoperability of C3 forces (management, control, communication), exercises, training, equipping, and rules on the availability of forces. It will be made by the EU Military Committee on the details of the "HTF"expert group.

The EU Military Committee should identify any deficiencies and make recommendations to the Political and Security Committee regarding the measures to allow:

- the matching of the commitments made by the Member States with the existing needs;
- the modification, where necessary, of the national commitments.

The contribution of non-EU NATO states and candidate countries to the EU will be treated as additional contributions, meant to improve the European military capabilities.

At Nice new information was brought, it is comprised in the Annexes of the Presidency's report about the organization and operation of the Political and Security Committee, EU Military Committee and EU Military Staff, bodies whose establishment was decided by the European Council in 1999 .

The Political and Security Committee (PSC) with its headquarters in Brussels, comprising senior representatives or ambassadors, will handle all aspects of foreign and security policy (CFSP), including those relating to the European security and defense. It has a central role in defining and monitoring the EU response to crises. The General Secretary may chair the CFSP, especially during a crisis.[10]

The Political and Security Committee (PSC) has the following tasks:

- to monitor the international situation in the relevant field of the CFSP;
- to contribute to the policy by giving "advice" at the request of the Council or on its own initiative and to supervise the practical application of the agreed policies;
- to give guidelines on relevant topics for the CFSP to the other committees;
- to be the privileged interlocutor of the General Secretary / EU High Representative for CFSP and the special representatives;
- to give directives to the Military Committee and to receive its opinions and recommendations;
- to receive information, advice and opinions from the Committee for Civilian Aspects of management and to give it directives in connection with the topics relevant to the CFSP;
- to coordinate, supervise and control the work of the CFSP of the various working groups, to which it might give directives and consider the reports;
- to lead a political dialogue to its level and in the positions which appear in the Treaty;

[10] Zbigniev Brezinski, *The Geostrategic Triad. Living with China, Europe and Asia*, Historia Publishing House, Bucharest, 2006

- to be a privileged instance for dialogue on European security and defense policy with the 15 EU members and 6 non-EU NATO countries and NATO, according to the made arrangements;

- to assume the responsibility of the Council's political leadership development of military capabilities, given the nature of the crisis which the EU intends to respond.

On the basis of their PSC works, the General Secretary/the High Representative guide the activities of the Situation Center. This one supports the PSC and provides pieces of information in appropriate circumstances of crisis management.

PSC exercises "political control and strategic direction" of the EU's military response to the crisis. For this, it assesses on the basis of opinions and recommendations of the Military Committee, the essential elements (strategic military options including the chain of command, design and operation plan) to be submitted to the Council. For the prospect of launching an PSC operation, the Council addresses a recommendation supported by the opinion of the Military Committee. On this basis, the Council decides to launch the joint operation. This joint action determines in accordance with Articles 18 and 26 of the EU Treaty, the role of General Secretary / the High Representative to implement the relevant measures for "political control and strategic direction" exercised by the PSC.

Assuming that a new Council decision would be considered as appropriate, may appeal to the simplified written procedure (art.l2.4/The Inside Rule of the Council). During these operation the Council will receive the PSC reports presented by the General Secretary/the High Representative, as chairman of that committee.

The European Union Military Committee (EUMC) created in the Council is made up of the heads of the army staff, represented by their military delegates. EUMC meets, as needed, the Chiefs of Staff. This committee will submit to the PSC some military advice and recommendations on any military matter within the EU and give military directives to the EU Military Staff.[11]

The EUMC president attends the Council meetings when decisions with defense implications must be taken.

EUMC leads any military activities within the EU. The military advice they give is issued based on consensus.

EU Military Committee is, therefore, place of consultation and military cooperation between EU Member States in the conflict prevention and crisis management field.

Opinions and recommendations for the PSC are given the military at its request or on its own initiative, especially for what falls under:

- developing the general concept of crisis management in its military aspects;

- the military aspects of political control and strategic management of operations and crisis management situations, the assessment of potential risks of a potential crisis;

- the military dimension of a crisis and its management implications;

- the development, evaluation and review of objectives in terms of military capabilities;

- EU military relations with non-EU NATO states, with other countries and organizations, including NATO;

- financial calculation of operations and exercises, etc..

In situations of crisis management at the request of the PSC, the EUMC gives an initial directive to the General Director of the EU Military Staff to define and present strategic military options. The same body assesses the strategic military options developed by the EU Military Staff and forward them to the PSC, accompanying it by its evaluation and military advice. With military option adopted by the Council, it authorizes the development of a directive by the commander of the operation. Based on the evaluation made by the EU Military Staff (EUMS), the EU Military Committee submits opinions and recommendations to the PSC:

- the design of the operation (CONOPS) perfected by the Operation Commander;

[11] Boncu Simion, *European Security. Changes, Challenges and Solutions,* Amco Press Publishing House, Bucharest, 1999

- the draft operations plan (OPLAN) drawn up by the operation commander. Simultaneously, the PSC submits a notice to finish the transaction.

During the operation, the EUMC monitors and pursues the proper execution of military operations conducted under the responsibility of the Operation Commander.

The president of the EUMC (PCMUE) is a 4 star general appointed by the Council, preferably a chief of staff in a country.

The EU Military Staff (EUMS) has expertise in the European Security and Defense Policy, directing military operations waged by the EU in crisis management. Its mission is to ensure the alarm warning, the situation assessment and strategic planning for Petersberg tasks including the identification of European national and multinational forces and application of the EU Military Committee directives.

EUMS is the source of military expertise for the EU, providing the link between EUMC, on one hand and the military resources to the EU, on the other hand, providing its military expertise to the EU bodies as directed by the EUMC. Meanwhile, the EUMS:

- Ensures a rapid alarm capability, plans, evaluates and makes recommendations regarding the concept of crisis management and general military strategy;
- Applies the decisions and directives of the EUMC;
- Assists the EUMC regarding the situation assessment and strategic planning, as well as its military aspects;
- contributes to the making, evaluation and review of the objectives in terms of capacity and provides the correlation with the process of establishing the NATO defense plans (DPP) and the PART process of the Peace Partnership. [12]

The EU Military Staff is responsible for monitoring, evaluating and making recommendations on the forces and means that Member States make available to the EU, which is part of the training, exercises and interoperability.

Strategic planning involves: assessing the situation, the definition of the political-military framework and the strategic option development.

In perspective, it is expected that the common security and defense policy will move towards increasing the transfer of sovereignty to the EU institutions, the national defense becoming a European subsidiary. The EU security and defense policy will be developed after the adoption of the European Constitution project by the Member States.

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THE EUROPEAN UNION (EU)

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Abstract:*The European Union is an old concept that evolved in line with the overall development of civilization on the European continent with the purpose of hegemony, the beginning and later setting up a Community union based on democratic principles.*

Key words: *European Union, community, objectives, organization, system, Parliament, documents, powers, law.*

1. A Short History of the European Union

The European Union was founded by the Treaty of Rome signed on March 25, 1957 by Belgium, Germany, France, Italy, Luxembourg, The Netherlands and, in 1973, Ireland, Great Britain and Denmark also joined in, Greece , in 1981 and Spain and Portugal, in 1986.[1]

Austria, Finland and Sweden have become members of the European Union on January 1st, 1995, as a consequence of referendums, events that took place in June, October and November 1994, respectively. The Czech Republic, Cyprus, Estonia, Latvia, Lithuania, Malta, Hungary, Poland, Slovakia, Slovenia have become members of the European Union on the 1st of May 2004 and Romania and Bulgaria on the 1st of January 2007.

The European Community (E.C.) was born after the fusion between the European Coal and Steel Community (founded on the 18th of April 1951) and the European Atomic Energy Community (EURATOM), both being created in 1957 on the basis of the Treaty of Rome.

The E.E.C. signed individual agreement (pratially preferential) with other 29 states. In 1973, the E.E.C. confered Romania with the system of generalized, reciprocal and non-discriminating preferences applied for the import of finite and semi-finite products in the developing countries.

63 countries in Africa, the Caribbeans and the Pacific are associate members which signed the Lome Convention in 1979.

On the 17th of February 1986, the Unique European Document was signed and it came into force on the 1st of January 1987. It forsaw the creation of the single market starting with 1993.

The Treaty of Maastricht was signed on the 7th of February 1992. The Schengen Agreement is enforced on the 26th of March 1995 and it allowed the open borders without passport control as well as the cooperation of the law and police forces in the member states.

The Amsterdam Treaty (2nd of October 1997) was meant to consolidate the European integration. The Nisa Treaty was signed on the 11th of December 2000 and it allowed the EU extension and on the 1st of January 2000 the Euro banknotes and coins are in circulation. The European Constitution was signed in Rome on the 29th of October 2004. On the 20th of February 2005, Spain is the first EU member to ratify the European Constitution by referendum. This one will be rejected in France (May 29th, 2005) and The Netherlands (June 1st, 2005).

On the 9th and 10th of December 1991 at the Maastricht reunion of the European Council, the state and government leaders of the Community have adopted a treaty of political, economic and monetary union which form the Treaty of the European Union. This treaty came into force of the 1st of November 1993 after being ratified by all the parties, thus allowing the creation of new structures and procedures. This way, the former European Commmunity was absorbed by the European Union. This Union has three pillars: the first one, the European one, based on the Paris and Rome Treaties, modified be the single European Document in 1986 which refers to intergovernmental

[1] John Pinder, *The European Union. A short Introduction,* BIC ALL Publishing House, Bucharest, 2005

cooperation ; the second pillar which is the Common Foreign and Security Policy; the third pillar referring to the law aspects which govern the Union functioning.

2.The purpose, objectives and principles of the EU

The EU was established by the Treaty of Maastricht signed on the 7th of February 1992 which established the mission, objectives, principles and community institutions until the adopting of the Constitution for Europe by the European Convention on the 13thof June and 10th of July 2003.[2]

The **purpose** of the European Union is to promote peace, its values and the well-being of its people.

The **objectives** of the EU:

-to establish an area of freedom, security and justice for its citizens, as well as a single market where competition is free and un-distorted;

-Europe's long-lasting development, based on a balanced economic growth, on a competitive market social economy aiming at the full employment and the social progress and a high level of protection and improvement of the environmental quality, the promotion of the technical and scientific progress;

-to abolish the social exclusion and the discriminations and to promote social justice and protection, equality between men and women, solidarity among generations and the protection of the children's rights;

-to promote the economic, social and territorial solidarity;

-to respect the cultural and linguistic diversity and to watch over the preservation and development of the European cultural patrimony;

-to assert and promote its values and interests with the rest of the world;

-to contribute to the peace, security and long-lasting development of the planet, to the solidarity and mutual respect of the people, the free and righteous commerce, the elimination of poverty, the protection of the human rights, to strictly respect the international law, especially the UN Chart.

The **values** of the EU:

-to respect the human dignity, the freedom, democracy, equality of the states and human rights;

-are achieved by pluralism, tolerance, justice, solidarity and non-discrimination.

The **jurisdiction** of the EU:

Fundamental principles:

-delimitation of the EU jurisdiction is based on the principle of allocation;
-the exertion of the jurisdiction is based on the subsidiary and proportional principles;
-the jurisdiction is assigned by Constitution, the others belonging to the member states;
-based on the subsidiarity in the fields which do not belong to its exclusive jurisdiction, the Union interferes only if the objectives of the actions can be better attained at the Union level;
-the institutions of the Union apply the principle of subsidiarity and proportionality which is an annex to the Constitution;
-the Constitution and the right followed by the Union take precedence to the right of the member states**.**

Exclusive jurisdiction:

- Establish competition rules necessary for the market operation;
- Monetary policy for Member States which adopted the Euro;
- Common commercial policy;

[2] Bărbulescu I. Gh, *The European Union form national to federal*, Tritonic Publishing House, Bucharest, 2005

- Customs Union;
- Conservation of marine biological resources under the common fisheries policy;
- International agreements where conclusion is contained in a legislative act of the Union.

Common jurisdiction fields:
- Internal market;
- Area of freedom, security and justice;
- Agriculture and fisheries, excluding the conservation of marine biological resources;
- Transport and trans
- European networks;
- Energy;
- Social policy;
- Economic, social and territorial cohesion;
- Environment;
- Consumer Protection;
- Public health security.

Common Foreign and Security Policy

The Union shall cover all areas of foreign policy and all questions relating to security of the Union, including the progressive framing of a common defense policy which might lead to a common defense.[3]

3. The organization and functioning of the EU

The member states shall actively and unreservedly support the common foreign and security policy and comply with the provisions adopted by the Unionand they will be obtained from any action contrary to the interests of the Union.

EU Institutions.

The institutional framework aims to:
- Pursuing EU objectives;
- Promotion of the Union values;
- Serving the interests of Union, of the citizens and of the Member States;
- Ensure coherence, effectiveness and continuity of policies and actions to achieve its interests.

The institutional frame
- EU Council (Council of Ministers)
- European Parliament;
- European Commission;
- Court of Justice;
- Court of Auditors and other community facilities.

3.1. Other institutions

The European Council

It gives the necessary impulses for the EU development and defines its general political directions and priorities. It is the ordinary legislator in the Community, it adopts the visas and ensures the conditions necessary to achieve the objectives set by the Treaty and as provided therein. Exercising the right to vote is by four ways:

1. the simple majority (50 +1) to adopt Rules of borderline cases, the application of studies and proposals, providing advice, etc.;

[3] Bărbulescu I.Gh., *The European Union from economics to politics*, Tritonic Publishing House, Bucharest, 2005

2. qualified majority (2 / 3) calculated from the weight set (between 4 votes for Luxembourg and - 29 votes for France), the decision is made with a favorable vote of at least 14 states (out of 27) and at least 62% of the population of the member countries (the figures are those proposed by the Treaty of Nice, in February 26, 2001);

3. unanimity that gives veto power to each Member State, more rarely practiced, for finding infringement of the principles of the Treaty, the suspension of voting rights, the adopting positions and common actions in foreign policy and external security;

4. deliberation (the debate) leading to a common point of view.

The EU Council has auxiliary working bodies: The General Secretariat; The Member States' Permanent Representatives Committee (COREPER); the group of experts appointed by the Member States and the European Commission; The special committees for agriculture, monetary policy, visas, etc.. It is also assisted by the counties for employment, energy, scientific and technical research, education and cooperation agreements.[4]

It does not exercise legislative functions, being composed of Heads of State or Government of the Member States and its President and the Commission one. The Foreign Minister of the Union participates at the works.

Every trimester he/she meets its chairman.

Its members may be assisted by a minister or commissioner. He/she acts by consensus, unless the constitution provides otherwise.

The Council is a central organ of the European Union and aims to ensure the objectives set by the Treaty on European Union, as follows:

• it ensures coordination of economic policies of the member states;

• it has a decision power;

• it gives the Commission the documents it adopted and the implementing rules which are laid down (art.145).

Acting unanimously, the Council sets tasks based on the Commission proposal and on the advice of the European Parliament. It shall adopt its rules of procedure and adopts, after the Commission's advice, the committee status stipulated in the Treaty.

The Council Organization

The Council is composed of one representative at ministerial level of each Member State empowered to engage the state government. It actually works in several "councils": agriculture, economics and finance, external affairs, trade etc. Each government is represented by its minister in that sector.

The Council is chaired in turn by each Member State for a period of six months in the order decided by the Council acting unanimously. Without an authority plan towards its colleagues, the President of the Council, however, has different capacities to influence the works of the institution (at the time of a debate, when the word is given and even insistence that seeks an understanding between participants).

The General Secretariat is composed of about two thousand officers and is headed by a General Secretary, assisted by a Deputy General Secretary, appointed by the Council which shall act unanimously. It is installed in Brussels and serves to assist the Council.

The Committee of Permanent Representatives of the Member States is responsible for preparing the Council's works. This is an alternate body which is composed of delegates of Member States (with the rank of ambassador) each of them ensuring a continuous linking between its State and the Community.[5]

The dialogue between the Member States starts at this level, thus giving the opportunity to know beforehand the points of agreement and disagreement, and any foreseeable solutions.

[4] Bibere Octav, *The European Union between reality and virtuality* , ALL Publishing House, Bucharest, 1999

[5] Bărbulescu I.Gh., *The European Union. Study and Extension. From the European Communities to the European Union* , Trei Publishing House, Bucharest, 2000

The Committee may adopt procedural decisions in the cases provided by internal rules of procedure of the Council.

The voting system of the Council

The Council shall meet as convened by the president or at its own initiative, or at one of the members' or the Commission's initiative.

The Council deliberations, except as otherwise provided in the Treaty, are completed by a majority vote of its component members.

For acts of the Council requiring a qualified majority, the votes of the members are affected by the following ratio: 5 for Belgium, 3 for Denmark, 29 for Germany, 5 for Greece, 8 for Spain, 22 for France, 3 for Ireland, 29 for Italy, 2 for Luxembourg, 5 for The Netherlands, 4 for Austria, 5 for Portugal, 3 for Finland, 4 for Sweden, 29 for The United Kingdom, 14 for Romania.

The acts are adopted when there have been at least:

• 62 votes when, under this Treaty, it is adopted by the Commission's proposals;
• 62 votes expressing the vote of at least ten members in other cases;
• the votes should represent 62% of the Union population;
• 14 Member States should agree.

The abstentions of the present or represented members shall not prevent the adoption of the Council acts which require unanimity. With a varied voting system, over time and with enough purchase policy, the Council appears as "a place of bargaining", "a machine for compromises," a place of mediation between the private interests of the Members and the Community.

The jurisdiction of the Council

The Council holds the essence of legislative powers; it is the institution where it is decided (regulations, directives, decisions) and set the community life.

The Council decisions are binding. The international agreements have been negotiated by the Commission and are completed throughout the Council.

As a conclusion, the Council is the institution towards which national and community interests converge and harmonize.

3.2. The European Parliament (headquarters in Strasbourg)

- Together with the Council of Ministers it shall exercise legislative and budgetary functions and functions of political control and consultation. It chooses the European Commission President;[6]

- It is elected by direct universal suffrage by the European citizens through universal, free and secret elections, for a term of 5 years. Each state has at least four members and shall elect its chairman and officers from its members.

The European Parliament has the following powers:

- it ensures the overall political control, it participates in developing a cooperative (legislative) Community law, it adopts the budget of the community, participating in external relations;

- it has supervisory powers only on the European Commission;

- it decides the access of new member countries into the EU as well as the association with some non-member countries.

According to the Treaty of Nice (February 26, 2001), after the elections of 10-14 June 2004, after the Romanian and Bulgarian adhesion in 2007, the number of the MEPs in January 2009 is of 785, they are elected by universal suffrage, by the citizens of Europe directly, proportionally with the number of citizens of the member countries, as it follows: 5 for Malta, 24 for Belgium, 24 for Portugal, 78 for France, 14 for Denmark, 99 for Germany, 24 for Greece, 54 for Spain, 78 for Italy, 6 for Luxembourg, 27 for The Netherlands, 18 for Austria, 14 for Finland, 19 for Sweden, 78 for

[6] Jinga Ion, *The European Union. Realities and Perspectives*, Lumina Lex Publishing House, Bucharest, 1999

England, 35 for Romania, 6 for Estonia, 13 for Ireland, 6 for Cyprus, 9 for Latvia, 13 for Lithuania, 24 for Hungary, 54 for Poland, 24 for Portugal, 7 for Slovenia, 14 for Slovakia and 24 for the Czech Republic.

In 2009 there were elections for a new mandate for the European Parliament.

The European Parliament has functioning institutions: an office (president, vice presidents, Quaestors), the Conference of the Presidents (political groups); temporary and mixed Parliamentary Committees (MPs from the candidate and associated countries), political groups (European People's Party, Party of European Socialists, Party of the European Liberals, Democrats and Reformers, the Confederal Group of the United Left, the Group of the Greens /The EFA, The Union for the Nations Europe, the Democrats for Europe group differences, the Group of the Un-registered). The political groups have their own resources foreseen in the budget of the parliament, they have their own secretariat, they actively participate in the preparation of the agenda, they contribute to debates, they have their own activities, they have specialized administrators in addition to permanent committees contributing to the preparation of the committees.

The European Parliament is a mobile institution having its headquarters in Strasbourg, Brussels and Luxembourg and it rules by an absolute majority.

It shall establish its status following the opinion and approval of the Council acting unanimously. The European Parliament carries out its public works; its papers are usually published in the Official Journal of the European Community.

The Parliament meets every month during a week (except for August).

The sessions are held in Strasbourg, the Palace of Europe, and the discussions are translated simultaneously in all official EU languages. The parliamentary work is conducted as follows: the committees receive requests for advice to the council and appoint a rapporteur (a deputy) for each subject and this one will submit his report to his fellow Europeans.[7]

The Parliament may meet in annual, special or solemn sessions.

The annual session takes place on the second Tuesday of March when the public meeting discusses the annual report submitted to it by the committee.

The extraordinary sessions are held at the request of the majority members of the Council or of the Commission.

The solemn sessions are held to the rostrum of the Parliament, the heads of member or extra-community states address to the representatives of the Member States people.

The president is a member of the Parliament proposed a parliamentary group and elected by an absolute majority of votes, for a period of two years and a half. Its role is to chair the meetings, to oversee the work of the institution and to represent it in relation to other partners.

The office of the parliament is composed of a president and 14 vice- presidents elected by an absolute majority.

The parliament commissions resemble the national parliaments and they can be: permanent, temporary and of investigation.

The permanent commissions (20-60 members) have the main role and are specialized in different fields: foreign affairs and security, budget, public health, human rights, etc. They prepare the works of the Parliament and may take meetings in public.

The temporary commissions (up to 15 members) are created when there is a subject of European interest, which requires a particular and profound examination. The duration of these commissions is of one year, it can be extended and permanent.

The commissions of inquiry (up to 15 members) are formed when the Parliament considers that there are infringements of the Community law or when some aspects of European security are considered to be harmful. They last nine months and may become permanent.

The parliamentary delegations are created in order to have relations with other parliaments and important international organizations.

[7] John Pinder, *The European Union. A short Introduction,* BIC ALL Publishing House, Bucharest, 2005

The parliamentary groups are created on ideological grounds and not on the membership of the national delegations. They are of a socialist, liberal, Christian-democratic orientation, etc. and have a transnational character.

The opportunities of the European political groups are: the appointment of vice-presidents, the right to initiate discussions on hot topics, the right to send representatives to the inter-parliamentary delegations, etc., by which the groups can come into the decision process.

The European Parliament's legislative power

The national parliaments have legislative role. The same can be said about the European Parliament which, in order not to violate the sovereignty of the Member States, has some advisory capacities in the regulatory and co-decisional process.

The European Parliament shares with the Council - an intergovernmental body – the powers in budgetary matters, the participation in the legislative process (consultation, advice, cooperation, co-decision) and has some control over the Commission's capacity.

The European Parliament's budgetary powers

Authority in budgetary matters is shared between the Council and the Parliament, a situation which reflects the intergovernmental and supranational correlation.

In order to delineate the powers of the Parliament from that of the Council on the Community budget it is required to submit two types of Community expenditure: a) compulsory expenditure - 70% of the budget (external commitments, etc..) and b) non-compulsory - 30% of the budget (structural funds, industrial strategies, research, etc.). [8]

The budgetary procedure has the following route: the commission proposes a pre-budget to the Council which supports the intervention of the latter and after that it is sent to the Parliament; it proposes or approves changes for the mandatory expenditure; for the non-compulsory one, the Parliament has the last word, its amendments being crucial. Returned to the Council, the draft budget is decided for mandatory expenditure and it is possibly re-changed for the non-compulsory one. The last stage of the competition is for the Parliament to approve or reject the budget.

In broad terms, only the Council is able to decide the compulsory expenditure (it may disregard the position of the Parliament); the Parliament has the final word on non-compulsory expenditure and may reject the whole budget if it has substantial grounds.

In order to avoid such surprises, the meeting of the presidents of the Commission, the Council and the Parliament was institutionalized.

The Parliament's powers in the legislative process for adopting normative acts: the Commission presents the proposal to the Parliament and the Council. Acting by a qualified majority and on the advice of the European Parliament, the Council adopts a common position. This common position is forwarded to the European Parliament which is informed on the reasons to adopt the common position. The Commission shall in turn inform the European Parliament about its position. If within three months after passing this information, the European Parliament:

-approves the common position, the Council shall definitively adopt the act in question, according to the common position;

-did not act, the Council shall adopt the act in question according to the common position;

-indicates, in an absolute majority, that it intended to reject the common position, it shall immediately inform the Council of its intention. The Council may convene the Conciliation Committee to inform about its position. Then, the European Parliament confirms the rejection of the common position, in which case the proposal for the act shall not be taken, or it proposes amendments;

-proposes, in an absolute majority, the amendment to the common position, thus, the amended text is forwarded to the Council and Commission to give a notice on these amendments.

[8] Bibere Octav, *The European Union between reality and virtuality* , ALL Publishing House, Bucharest, 1999

If within three months after sending the amendments to the European Parliament, the Council acting by a qualified majority approves all the amendments, changes the common position and adopts the act in question. If the Commission's notice is negative, the Council shall act unanimously on the amendment. If Council does not adopt the act in question, the President of the Council, in agreement with the European Parliament convenes the Conciliation Committee.

Supervisory powers of the European Parliament

In comparison with the other EU institutions, the European Parliament has information and control tools: written and oral questions, statements of the President and the motion of censure on the Commission. A motion of censure may be initiated by a parliamentary group and goes with only two thirds of the votes having as an effect the collective resignation of the Commission. Among the control capabilities of the Parliament, there also may be included the right to refer the Court of Justice if it considers that, by abstaining, the Council and the Commission are in conflict with the constitutive treaties.[9]

The European Council has the ordinary legal power in the Community; it adopts the visas and decides the insurance of the conditions necessary to achieve the objectives set by the Treaty. It has one representative of each Member State at ministerial level, authorized to commit the government of that State.

The European Council President:

- is elected by EC by a qualified majority for a period of 2-5 years, and it is renewable only once;
- Chairs and drives out the works of the EC;
- Submits a report to the European Parliament at the end of each meeting;
- Represents the EU on issues concerning its common foreign and security policy;
- Can not hold a national mandate.

The Council of Ministers

- Exercises together with the European Parliament the legislative and budgetary functions and that of politics making and coordination;
- Consists of one representative appointed by each Member State at ministerial level for each of its formations. It is the only authorized to bind the State which he represents;
- acts by a qualified majority, with the exceptions of the Constitution.

The Council of Ministers Formations

The Legislative Council and the General Affairs Council shall ensure consistency in the works of the Ministers.

As the General Affairs Council, it prepares the meetings of the European Council and ensures continuity in cooperation with the Commission.

In exercising its legislative function, it discusses and decides together with the European Parliament on the European laws and European framework laws. Each Member State is represented by 1-2 representatives of ministerial rank whose skills match the agenda.

The Foreign Affairs Council develops policies along the lines of EC policy and ensures consistency of its actions chaired by the Minister of Foreign Affairs.

The Presidency shall rotate during at least one year.

A qualified majority requires a majority of Member States representing at least 3 / 5 of its population.

3.3.The European Commission

[9] Bărbulescu I.Gh., *The European Union. Study and Extension. From the European Communities to the European Union* , Trei Publishing House, Bucharest, 2000

- promotes the general European interest;
- ensures the application of the Constitution provisions;
- supervises the application of the Union law;
- implements the budget and manages programs;
- exercises coordinating, implementation and management functions;
- ensures the external representation of the Union except the foreign and security policy;
- proposes draft legislation.

The Commission consists of a college (president, EU foreign minister / vice president and 13 European Commissioners) and a number of commissioners without voting rights in other Member States appointed by the President.[10]

It is the principal owner of the right of legislative initiative called "The High Authority" and it is composed of members appointed by each Member State, except for France, Italy, Germany, Britain, Spain with 2, each term lasting 5 years .

Within the commission structure there are committees and services: The Legal Office, The Humanitarian Aid Office, The Group of Polical Counsellors, The Translation Service, The United Interpretation and Conference Service, The Internal Audit Service. The European Commission makes recommendations and / or opinions and has the power of decision and participates in preparing proposals for acts of the Council and Parliament, it exercises the powers conferred by the European Council.

By virtue of its role of "guardian of treaties" it may initiate legal proceedings to establish obligations of the Treaty, it may monitor a state upon how the performance of the obligations of the Treaty, it administrates funds and programs in communities and can sue those guilty of failure to apply the Community rules.

The Commission is an EU institution with political and administrative character which aims at ensuring the functioning and development of such common market:

• it ensures the application of this Treaty as well as the measures taken by the institutions under it;

• it makes recommendations or opinions on matters covered by the treaty, if this one explicitly foresees it or if the Commission considers it necessary;

• it has the power to decide their own instruments and participates in formulating the documents of the Council and of the European Parliament;

• it exercises the powers which are conferred by the Council for the enforcement of the rules laid down by it (Art.155).

The Commission is a supranational body that publishes each year, with at least one month before the opening of Parliament, a general report on the activities of the Community.

The Organizing of the Committee

The Commission consists of 20 (27) members (Commissioners) elected on the basis of their general competence and offering guarantees of independence. The number of members may be changed by the Council acting unanimously.

The Commission must include at least one citizen of each Member State, without the members having the same nationality to be greater than two.

The Members of the Commission (Commissioners) shall function in full independence in the general interest of the Community, they do not accept instructions from any government or body and they are appointed for a period of five years with an option to cancel the renewed mandate.

The Commission President is appointed by the governments of the Member States, after having consulted the European Parliament.

The Member State governments in agreement with the elected President designate the other personalities they intend to appoint as members of the Commission.[11]

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[10] John Pinder, *The European Union. A short Introduction,* BIC ALL Publishing House, Bucharest, 2005

[11] Bărbulescu I.Gh., *The European Union from economics to politics*, Tritonic Publishing House, Bucharest, 2005

The president and the other members of the Commission are subject to a vote of approval of the European Parliament, after which the President and other members of the Commission are appointed by the Governments of the Member States.

The Commission headquarters is in Brussels where there is an administration of about 20 000 officers, divided into 23 general directorates, directorates specialized in different sectors (foreign relations, budget, competition, fisheries, energy, etc.). The Vice Presidents are appointed by the Commission.

The Commission shall draw up the rules of procedure in order for them to be published.

The Commission voting system

The Commission is a collegial body, the tasks deriving from the treaties are divided between commissioners, each conducting one sector.

The Commission President coordinates the Commission as a whole and represents the institution in its external relations, participating to the works of the Council at the G.8 leading meetings, thus personifiying the European Community.

The Commission meetings are held once a week (on Wednesday) when the number of members set by the rules is present.

The Committee deliberations are completed by a majority vote.

The Powers of the Commission

The governmental organization of the Commission allows it to fulfill the tasks deriving from treaties and determined by the Council.

The Commission has a monopoly upon the legislative initiatives; its projects are submitted to the Council which can not act in the absence of the Commissioners' initiative. This mechanism establishes an interdependence between the two EU institutions, the Commission having the fundamental function of legislative initiative.

These initiatives are directly related to the Council, and through it, to the Member States. The bad timing between "the general interest of the community" and the participants in the process can cause serious seizures that may hamper the integration process.

The Commission is the guardian of the Treaties, it will ensure the correct application of the Treaties and EU rules by Member States. The Council decisions are implemented by the Commission which also has its own powers, besides the powers delegated by the Council. It uses various commonpolicies, the unified market, the budget, the structural funds; these imply common rules and procedures, administrative and financial sanctions, etc..

In the extra-community relations, the Commission has the function of representation. The international agreements, the various other actions in the international bodies, the community extension problems are negotiated by the Commission.

The future of the Commission may be compared to a government in a federal Europe or a secretariat under the tutelage of the Council in an inter-governmental Europe.

The Foreign Minister

The EC, in agreement with the Commission President and by a qualified majority, shall appoint the person to lead foreign and common security policy.

The President of the European Commission[12]

The European Council, by qualified majority, proposes to the European Parliament a candidate for president and this one is elected by the European Parliament by a majority of votes.

On the basis of the equal rotation, each Member State shall establish a list of 3 persons for the function of European commissioner. The president elects one person, thus designating the 13 European Commissioners. The Commission's mandate is of 5 years.

Tasks:

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[12] John Pinder, *The European Union. A short Introduction,* BIC ALL Publishing House, Bucharest, 2005

- It lays down guidelines within which the Commission is to work;
- It determines the internal organization;
- It appoints vice-presidents.

3.4. The Court of Justice

The Court of Justice has its headquarters in Luxembourg.
It includes:

- the European Court of Justice;
- the Regional Court;
- the specialized courts.

The European Court of Justice shall consist of one judge per Member State and is assisted by Advocates-General.

The judges are appointed for a period of five years. They are chosen from persons who offer every guarantee of independence and are eligible to practice in their countries to the highest judicial functions or who are lawyers with notorious expertise.
The Court aims to ensure respect for law in the interpretation and application of the European Union Treaty.

It can be addressed both by the states and the Community institutions and also individuals and its decisions are binding.

The organization and functioning of the Court of Justice

The Court of Justice is composed of 15 judges and is assisted by 9 general attorneys. It is appointed in a plenary session and can have chambers made of three, five or seven Judges, either to undertake certain preparatory inquiries or to judge on particular categories of cases, as provided by rules of procedure.

The Court of Justice shall meet in plenary session when a Member State or a Community institution that is a party in the trial requests that. The number of judges and lawyers may be increased at the request of the Court of Justice by the Council which unanimously takes a decision.

The judges and general attorneys, elected from among personalities in the field, are appointed by mutual agreement for six years by Member States governments with the possibility of a–three-year-renewal.

The president of the Court of Justice is appointed for three years.
The Registrar is appointed by the Court of Justice and has a statute developed by the institution.

The Court of First Instance is responsible for judging in the first instance, subject to appeal to the Court of Justice on points of law under the conditions set by statute, of certain categories of appeal.

Members of the Court of First Instance shall be chosen from persons who offer every guarantee of independence and have the ability required for appointment to the judicial office, being appointed by agreement for six years by the EU governments.[13]

The Court of First Instance shall establish its rules of procedure in agreement with the Court of Justice which should be approved by the Council.

The tasks and powers of the Court of Justice

Broadly speaking, the tasks of the Court of Justice are:

• to ensure the balance between the powers delegated to the Community institutions and the remaining states.

• to consistently interpret Community law;

• to protect the states and individuals from any natural or legal abuses.

It may:

• judge the legality of the Commission and Council documents. It may be noticed by the Member States, the Commission - against the documents of the Council, the Council, against the

[13] Bibere Octav, *The European Union between reality and virtuality* , ALL Publishing House, Bucharest, 1999

Commission documents, by the directly affected natural or legal persons. It can totally or partially cancel these documents;

• the court just determines "the gaps" when a state fails to fulfill certain Community obligations.

The above issues can be offset by establishing the rule of law (regulations, directives and decisions) before the internal laws of the states.

The development of the Court of Justice is dependent on the choices of the Member States, the future European Union is the question of an intergovernmental or federal union type.

The Court of Auditors

The Court of Auditors with the headquarters in Luxembourg has 15 members elected from among personalities who work or worked for their country in the external audit institutions and have a special expertise and offer every guarantee of independence.

The Court of Auditors aims at ensuring financial and accounting control. It is composed of 15 members elected from among the qualified ones and offers every guarantees of independence.

The Organization of the Court of Auditors

The Members are appointed for six years by the Council, acting unanimously after consulting the European Parliament with a renewable appointment.

The President of the Court of Auditors is appointed by its members for three years and the mandate can be renewed.

For reasons of efficiency within the Court, there is a division of tasks between its members which make up control reports in the received fields of activity, they will be discussed and analyzed in the plenary of the Court and the decisions will be taken by a majority of the votes.

The powers of the Court of Auditors

The Court independently operates under according to the following powers:

• it examines the management of all incomes and expenses, by providing to the European Parliament and the Council a statement of assurance regarding the reliability of the accounts as well as the legality and fairness of the related operations, which is published in the Official Journal of the European Union;

• it examines the legality and fairness of all incomes and expenses and ensures the financial management;

• it may use the necessary documents and information they obtain, upon request from the other institutions of the Community and the national control institutions;

• it prepares an annual report to be sent to the other Community institutions which is published in the Official Journal of the European Union, together with the replies of the institutions mentioned in the observations of the Court of Auditors;

• it adopts the annual reports, special reports or opinions with the majority of the members which make it

• it assists the European Parliament and the Council in exercising control of the budget execution;

• it controls the incomes and expenses of the Community managed by the European Bank.

In order to fulfill their mission, the EU institutions (the Parliament, the Council and the Commission) adopt regulations and directives, take decisions and make recommendations and notices. [14]

The regulation has general application. It is binding and directly applicable to all Member States.

The directive requires every Member States result to be achieved, leaving to the national courts the powers relating to the form and methods used for this purpose.

The decision is entirely binding to the designated recipient.

Recommendations and opinions are not binding.

[14] Crăcană Mihaela, Căpățână Marcel, *The European Union, "My Europe" Series, The Free Circulation of the persons, goods, services and money*, TRITONIC Publishing House, Bucharest, 2007

3.5. Other institutions

The European Investment Bank (EIB) supports the balanced development, the economic integration and the increased social cohesion within the EU.

The European Investment Bank is to contribute to the balanced and continuous development of the common market for the interest of the community. For this purpose, the Bank facilitates the provision of loans and guarantees, without seeking a profit, for the funding of the lowest projects in the economical field.

• projects regarding the enhancement of the less developed regions;

• projects aiming at modernizing or converting enterprises or creating new activities which occurred through the progressive establishment of the common market; their size or nature cannot be fully covered by the various means of financing in each of the Member States;

• projects of common interest to several Member States; their size or nature cannot be fully covered by various means of financing in each of the Member States.

The supreme court of this bank is the Governors' Council, an authority made up of representatives of the Member States (at ministerial level) which meet once a year and establish the bank policy. The Board of Directors comes next and it is made up of four members (three for France, Germany, Italy and the United Kingdom and one for other states).

The European Investment Bank makes three types of operations:

• financing operations directly managed by the bank, that borrows on international financial markets - loans facilitated by its reputation - then re-borrows to those concerned;

• Administrative operations of the Commission, which does almost the same thing, but its operations are addressed to the steel industry;

• "The new Community instrument" created by the Council and Commission to strengthen the Community system, the Commission is empowered by the Council to borrow from financial markets "in the name and the risk of the Commission, the amounts being managed by the EIB.[15]

The **European Central Bank** and the national central banks constitute the European System of Central Banks and they lead the monetary policy.

The bank powers are:

- To define and implement the monetary policy of the community;
- to conduct foreign exchange operations;
- to maintain and manage the official foreign reserves of the Member States;
- to promote the well-functioning of the payment systems.

The Economic and Social Committee shall consist of representatives of the employers' organizations and other representatives of the civil society.

The Economic and Social Committee aims to represent various categories of economic and social institutions having an advisory feature.

The number of members is established as it follows: 12 for Belgium, 9 for Denmark, 24 for Germany, 12 for Greece, 21 for Spain, 24 for France, 9 for Ireland, 24 for Italy, 6 for Luxembourg, 12 for The Netherlands, 12 for Austria, 12 for Portugal, 9 for Finland, 12 for Sweden, 24 for the United Kingdom and 14 for Romania.

They are appointed for a period of four years by the unanimously acting Council. The States address the Council their double choice of candidates to the number of the awarded ones. The Council shall consult the Commission and ask for opinion of representative European organizations, for different economic and social sectors interested in the work of the Community. The Committee shall appoint its chairman and officers for a period of two years and establish rules which include sections for the main areas of activity.

The committee is consulted by the Council or the Commission in all the appropriate cases. It can take the initiative to issue an opinion which is advisory to the Council or the Commission.

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[15] John Pinder, *The European Union. A short Introduction,* BIC ALL Publishing House, Bucharest, 2005

The ECSC Consultative Committee is advisory and has no legal personality and can issue reports, opinions and recommendations.

The Committee of Regions is made up of representatives of regional and local communities, which is holding an electoral mandate within a corporate or regional community or political leaders of a chosen assembly.

It is only advisory and consists of representatives of regional and local communities. The number of members is set as for the Economic and Social Committee.

The Committee of Regions is appointed by the Council for a period of four years and, for a period of two years, it elects a president and office members and operates independently based on a regulation. It can be consulted by the Council and the Commission in local and regional issues.[16]

Just like the Advisory Committee, the two committees apply the same principles, the same rules, meaning that they are only advisory, they have no legal personality, they only issue the reports, opinions, recommendations, at the request of the Community institutions or at their own initiative.

The legal acts of the Union are:

- the European law
- the European framework law;
- the EU regulation;
- the European decision;
- the recommendations and opinions.

The European Law (a law) is general and binding in its entirety and directly applicable to all Member States.

The European framework law demands to all Member States for the results to be achieved, the national authorities having jurisdiction over the choice of form and methods.

The European Regulation is a non-legislative act of the general implementing of the legislative acts. It is mandatory for the Member States.

The European decision is a non-legislative act, which is binding in its entirety.

The recommendations and opinions are not binding.

The laws and framework laws are signed by the European Parliament President and the President of the Council of Ministers and it is published in the Official Journal of the European Union and shall come into force on the date specified in them or on the 20th day of publication.

The regulations and the decisions, when they do not specify the recipients, are published in the Official Journal of the EU.

Under the provisions of the new European Constitution, as amended by the Brussels European Council of 17-18 June 2004, subject to public debate, to be voted by the citizens of its EU member countries for the recognition of the common European identity, the following symbols are established: the European passport , the European hymn (Ode to Joy - Extract from the Ninth Symphony composed by L. Beethoven); the flag: the circle of 12 golden stars on a blue background, the 1996 model European driving license, the euro (in circulation since 2002), the EU headquarters in the French province of Alsace, Strasbourg city.

The coming into force of the single currency Member States must meet the following criteria of convergence:

- Pricing so that the average inflation rate does not exceed 1.5% of the average of 3 states with the lowest inflation;
- Long-term interest rate should not exceed 2% of the best result obtained in 3 Member States;
- Exchange rate in the last 2 years should not exceed the limits of the fluctuations due to EMS (± 2.5%);

[16] Crăcană Mihaela, Căpățână Marcel, *The European Union, "My Europe" Series, The Free Circulation of the persons, goods, services and money*, TRITONIC Publishing House, Bucharest, 2007

- the public deficit must not exceed 3% of the GDP;
- the public debt should not exceed 60% of the GDP;

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TRENDS IN THE INTERGOVERNMENTAL FISCAL RELATIONS IN THE EUROPEAN UNION

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Abstract: *The study aims to present the different interpretations of the fiscal federalism and its connection with the regional policy of the EU – a field which has unfortunately remained relatively neglected in the legal literature so far. Within the framework of fiscal federalism we are doing research on the concerning disposal of the Treaty of Lisbon, the main recent preparatory acts and other documents. With the knowledge of the theory of fiscal federalism we could create a special systematic, coherent scheme to analyze the regional policy of the European Union.*

Key words: *Fiscal federalism, intergovernmental fiscal relations, regional policy, financial framework, Treaty of Lisbon, territorial cohesion, Territorial Agenda, Green Paper of the Commission, progress reports on economic and social cohesion*

The intergovernmental relations and multi-level governance are a popular topic both in the European and Hungarian researches, mainly in the political and economic studies. One of the special parts of this field is the system of intergovernmental fiscal relations (or fiscal federalism) – a field which has unfortunately remained relatively neglected in Hungarian legal literature so far. In a nutshell, the theory of fiscal federalism focuses primarily on *the various functions of state finances* (like allocation, redistribution and stabilization), *the roles and governmental levels* on which these functions can be accomplished the most effectively, and finally, the *fiscal resources and tools* necessary to successful achievement.[1]

In *the early stage of the researches concerning the fiscal federalism* focused only on the federal systems and claimed that the distribution and stabilization branches of public fiscal department must perform their functions primarily at the central-government level. In contrast, in the allocation branch local government as well as the central government, has important responsibilities in the provision of needed public goods and services.[2]

One of the recent tendencies of fiscal federalism is fiscal decentralisation, examining the system of financial relations between the various governmental levels in the framework of the European Union – extending thus the scope of research from intergovernmental fiscal relations of federal states to the *various financial decentralisation processes and instruments (e.g. taxes, aids, dues) of the member states*.[3] This aspect of fiscal federalism has already been discussed in numerous dissertations related to the *topical research of international organisations*.[4] With the acceptance of the European Charter of Local Self-Government, the Council of Europe committed itself to the research of financing the modernization of exercising public services. In Strasbourg,

[1] The connection literature for example: Musgrave, R. A.–Musgrave, P.B. (1973). *Public Finance in Theory an*d *Practice*. New York: McGraw-Hill. Oates, W. (1972) *Fiscal federalism*. New York: Harcourt Brace Jovanich. Oates, W. (1991*) Studies in Fiscal Federalism.* Aldershot, Hants, England; Brookfield, Vt., USA: E. Elgar.

[2] Oates, W. (1968) *The Theory of Public Finance in a Federal System*. Canadian Journal of Economic (February 1968), p. 54.

[3] The connection literature for example: Bosch, N–Durán, J.M. (2008) *Fiscal Federalism and Political Decentralization*. Cheltenham, UK; Northampton, MA, USA: E. Elgar. Fossati, A.–Panella, G. (1999) *Fiscal Fedaralism in the European Union*. London: Routledge. Rattso, J. (ed.) (1998) *Fiscal federalism and state-local finance: the Scandinavian perspective*. Cheltenham, UK; Northampton, MA, USA: E. Elgar.

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under the guidance of the European Committee on Local and Regional Democracy of the Council of Europe, the dedicated Committee of Experts on Governance and Resources deal with, among others, issues related to and challenges resulting from the modernization of financing local governments.[5] Besides, in 2003 the OECD established a network of professionals dealing with the operation of fiscal relations across governmental levels. Further the European Union (experts from the EU member states) treats the issue of financing local authorities and local fiscal autonomy within the framework of the Paris seminar held in December 2008.

The *most recent studies of fiscal federalism* (a topic I am also preoccupied with currently) inspect the realization of intergovernmental fiscal relations in the framework of the European economic field. In other words, this approach is engaged in finding out how the new, special governmental level of the European Union affects the traditional level of member states, which functions of public sector can be ensured by the EU and what consequences does this new level carries in itself.[6] These researches emphasise the importance of the monetary and regional policy of the Union. In my opinion the functions of public finance are realised in a characteristic way in view of the EU and the member states. The provision of allocation function (take into consideration the most important and traditional governmental expenditures as public health, education and social system, which fall within the competence of the member states) is not typically performed in the level of the EU. Nevertheless the redistribution branch is provided by the support policy of the EU, preliminary by the regional policy.[7] The stabilization function is – although in a limited way – rather guaranteed by the monetary policy of the EU instead the fiscal policy of it. According to the Treaty of Lisbon Article 3.b the limits of Union competences are governed by the principle of conferral. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the member states in the Treaties. The use of competences is governed by the principles of subsidiary and proportionality. Hereby we can claim that, although the role and the competence of the European Union is expanding, but because of the limitation of competences and the dependant on the authorization given by the member states, it results *a special, inverse federation system*.

It is to be noted that we should make *differences between the intergovernmental and intergovernmental relations* in the EU and its member states. If we approach the EU as a traditional international organisation, the Union has only limited and external effect on the different governmental levels of member states. In this case we have to use the intergovernmental phrasing. But if we accept the recognition as the EU is a supranational organisation – a special but still not entirely developed community – we should deal with the intergovernmental term (as I did). In the aim of avoidance the misunderstanding, I assign the same semantic content to these two terms in this study.

Hereinafter we deal with the fiscal tendencies according to the European regional policy, which accomplishes most of all the distribution branch.

In the European Union the regional policy is changing, at least a new financial framework is passed. It was so at the latter budget, at the time of acceptance the 2007-2013 financial framework.[8] But more questions have arisen: Are these changes significant? Are there any underlying essence? What kind of problems exists in the recent system? What can be expected in 2007-2014?

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[5] Csupa, M.-Vigvari A. (2009) *International experience concerning the development of local finance*. In: Public Finance Quarterly, 2009/2-3. number p. 466.

[6] See Vaneecloo, C.–Badriotti, A.–Fornassini, M. (2006) *Fiscal Federalism in the European Union and Its Countries.* Brussels, P.I. E. Peter Lang. Baimbridge, M.–Whyman, P. (2004) *Fiscal Federalism and European Economic Integration*. London: Routledge.

[7] In my opinion the agricultural policy – through the increasing part of the rural development – has some redistributive attribute, too.

[8] Further details in Csürös, G. (2007) *The changing subvention policy in the aspect of the 2007-2013 budget, and the effect of changes on the financing of local government*. In: Horváth, M. T. (ed.) Views and appearances. *Decentralization in the aspect of financing.* Budapest: KSzK. 2007. pp. 101-144.

The Treaty of Lisbon, among others, modified the rules of the budget (art. 270/a, 272.) and dispose about the territorial cohesion (art. 2. point 3.). It is one of the aims of the EU. The territorial cohesion is increasingly important within the union. In Leipzig, 2007 on the 24-25th of May, the Territorial Agenda was passed by the ministries of the territorial development, and they asked the European Commission to prepare the Green Paper on Territorial Cohesion.
In October 2008, the European Commission adopted a Green Paper on "Territorial Cohesion"[9] launching a broad public debate on territorial cohesion and its policy implications. The Commission was pleased to receive 391 responses[10]. The Green Paper and the connecting opinions are important, because they focus the dilemmas of the regional policy.

The first general conclusion which can be drawn from the discussion is the recognition by stakeholders of the important role cohesion policy plays in the construction of the European Union and the support for continuation of that policy. *Any attempt to re-nationalise the policy is almost unanimously rejected.*[11]

All contributions agree that the main objective of cohesion policy is the reduction of economic and social disparities between the levels of development of European regions. Lagging regions must thus remain the focus of the policy. Yet, a majority of contributions – along with the European Parliament – argues that the policy should cover the whole territory of the EU,[12] to say the territorial cohesion policy should support the developed regions too. The emphasize of this is not gratuitous. The financial priorities of the EU were questioned by the changes of the heads of the 2007-2013 financial framework. The agricultural expenditure (371 344 million euro /pro 7 years) was the first title, but from 2007 it has become the second head. The "winner" was the structural policy (308 139 million euro /pro 7 years). So we could see, that not the structural policy takes it all! The first title, the sustainable development contains another, new head: the support of the competitiveness (74 098 /pro seven years). The connection and a more unified handle of these two policies is also supported by the forth progress report on economic and social cohesion.[13] This aim could have two kinds of meaning. Firstly if the resources of the regional policy expand, it could strengthen the redistribution function among the EU and the member states. But the expenditures subsidize the competitiveness have an opposite effect, it can reduce the redistribution character.
A significant majority of stakeholders (concerning the Green Paper of the Commission) calls for further *clarification in the allocation of responsibilities between the different institutional levels* (Commission, Member State, regions and other players). Many stakeholders, particularly at the regional and local level, would appreciate further *decentralisation of responsibilities.*[14]

The majority of contributions underline the importance of *coordinating* national and regional strategies, regulations and funding.[15] This opinion concerns coordination between cohesion policy, other Community policies, and national policies.
And what kind of financing suggestions have arisen?
Another important matter frequently mentioned concerns the coordination among the European Regional Development Fund, the European Social Fund and the Cohesion Fund. Besides the principle of the "one fund one program" – adopted from 2007 – make the accomplishment of the regional policy more difficult. Therefore some contributions call for the integration of the three fund into *a single fund* for the sake of a more coherent strategic development.
A number of contributions insist on further exploring the use of means of *financing other than grants* such as *bank loans, micro-credits, risk capital instruments or public-private partnership instruments.*

[9] COM(2008) 616 final
[10] http://ec.europa.eu/regional_policy/consultation/terco/consultation_en.htm
[11] COM(2008) 371 final p. 4.
[12] COM(2008) 371 final p. 4.
[13] COM(2006) 281 final
[14] COM(2008) 371 final p. 7.
[15] COM(2009) 295 final p. 13.

The problem is that the traditional public authorities dealing with the allocation of regional subsidies are neither concerned nor competent to authorize and decide upon repayable assistances. However the EU supports the use of these indirect financial assets, the legislation, decision making organ and the applicant prefer to avoid them. It would worth to take into consideration the German example. The Bank für Wiederbau is an institution under state control the state, but operating as a profit-orientated, financial business unit.

And actually, the opinions seem to be divided regarding the *opportunity to use cohesion policy as an instrument to react immediately to asymmetric shocks* or important crises triggered by processes of restructuring: while some advocate more flexibility, others point out that cohesion policy is first and foremost a structural policy characterised by strategic planning with a medium and long-term perspective.

In the Opinion of the European Economic and Social Committee (EESC) on the Green Paper the *(re)establishment of Community initiative programmes* was emphasized.[16]
The subsidiary and the proportionality are fundamental principal in the Union, and fiscal data covering recent decades for a large number of countries indicate a growth on the budgets of decentralized levels of government relative to that of the national authority.[17] But in the same time the European Community brings the centralization of a number of economic functions (agriculture, rural development, regional policy, customs policy etc.). New levels of government and new forms of public agencies are coming into being in a process of fiscal evolution and the actions of various levels of government interacting with one another.[18] These changes give reason to research the intergovernmental fiscal relations in the European Union.

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[16] 2009/C 228/24 point 3.9.1
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ECONOMIC LIABILITY OF EMPLOYERS, IN THE EMPLOYMENT RELATIONS, FOR MORAL DAMAGE MADE TO EMPLOYEES

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Abstract: *In the paper work "Economic liability of employers, in the employment relations, for moral damage made to employees" we expose the main aspects regarding the economic liability of employers for moral damages made to employees.*

The law 237/2007 put an end to doctrinal disputes about the moral prejudice done to employees, thereby the jurisprudence gained a unitary character.

But problems arise concerning moral damages quantification. The court must consider the negative consequences suffered by the claimant on the physical and psychological standards, the importance of harmed values, the extent to which these values have been damaged and the intensity with which they were perceived, the degree of impairment of his / her family situation, the professional and social consequences.

Key words: *moral damage, the employer, liability heritage.*

The liability of employee-employer, employer-employee is done in two-way, thereby, not only workers respond to the employer assuming that they produce a loss, but the employer is responsible also towards the employees in such a situation.

Sometimes the employer's liability is specifically provided in the provisions of law, such as:

- the obligation to pay a compensation in case of dismissal cancellation;
- compensation due in the event of criminal innocence of the person suspended from service/office;
- the obligation to pay a compensation for moral damage;

By the law no. 237/2007 from July 2007 the article 269 paragraph 1 of the Labour Code has been changed, in the sense that it granted employees also the compensation for moral damage.
Before changing it, the High Court of Cassation and Justice gave a sentence regarding the pecuniary liability of employers for material damage produced to employees.

Moral damage consists of the harm brought to the human personality: his existence, body integrity and health, physical or mental sensitivity, his feelings, honesty, honour, professional reputation, non patrimonial elements entering the contents of copyright or inventor.

From many situations in which employers may be liable for material damage produced, we remind as significant the following:

- ✓ the disciplinary sanctioning;
- ✓ the demotion or suspension from office;
- ✓ the change in position or movement to another job;
- ✓ the wage reduction;
- ✓ the promotion refusal.

According to the High Court of Cassation and Justice, in labour disputes, in what concerns the economic liability of employers, according to article 269 paragraph 1 of the Labour Code, moral

damages may be awarded to employees only if the law, the collective labour agreement or the individual employment contract contain clauses expressly for this purpose.

The HCCJ (High Court of Cassation and Justice) found that there are two guidelines in courts' practice regarding the application of article 269 paragraph 1 of the Labour Code in the settlement of work litigations where employees request to be awarded moral damages.

Some courts have held that the moral damages award in the labour dispute is admissible because the stipulations of articles 998 and 999 of the Civil Code, relating to tort liability for damage caused which has the character of general law in relation to provisions of the Labour Code, compliment these.

Other courts, by contrast, have held that the moral damages award in the labour dispute is admissible only to the extent in which the contents of the collective labour agreement or individual employment contract contain clauses expressly for this purpose.

The decision of the HCCJ confirmed that "the latter court correctly interpreted and applied the provisions of the law".

At that time HCCJ specified that in the content of the third chapter of the Labour Code, title XI, the pecuniary liability is governed by the employer and employee, establishing the principles that generate it and also concrete ways of recovering damages.

In this regulatory framework, in article 269 paragraph 1 of the Labour Code, it was provided that "the employer is compelled under the rules and principles of contractual liability, to compensate the employee if he has suffered a material injury from the fault of the employer, during the accomplishment of work obligations or in connection with the work".

Correspondingly, by article 270 paragraph 1 from the same code which covers the material responsibility of workers, has provided that "employees have patrimonial responsibility under the rules and principles of contractual liability, for the damage produced to the employer's property, by the employees fault and in relation to their work".

The HCCJ stated that "in the provisions of the two texts of law arises unequivocal intention of the legislature, that pecuniary liability of the employer and employee, can be established solely for property damage and not for moral damage".

At the same time the HCCJ noted that article 295 paragraph 1 of the Labour Code provided that " this code is complete with the other provisions of the labour law and, if they are incompatible with the specificity of employment under this code, with civil law".

HCCJ stated that " in order to complete the specific provisions of the Labour Code with those of the Civil Code it was necessary, as shown in the mentioned text , that the particular situation should not be covered by a provision of the Labour Code and, there should not be any incompatibility determined by the nature of employment reports as long as they are based on a collective or individual employment contract".

HCCJ stated that these two conditions could not be considered fulfilled, in order to justify the application of article 269 paragraph 1 of the Labour Code in conjunction with articles 998 and 999 of the Civil Code as the legal basis for the moral damage repair inside of employment legal relationships, as long as mutual pecuniary liability of the parties in such a report can only result according to employment contract, based on the principles of contractual liability.

HCCJ considered that, as long as the legal nature of patrimonial responsibility, governed by the Labour Code, is a variety of contractual liability, with certain features stated within the employment relationship, among which we can mention the one set derogatory, by article 269 paragraph 1 and article 270 paragraph 1 that only covered property damage repair. It was obvious that under such liability no moral damages could be granted. They could be claimed according to the conditions stated in articles 998 and 999 of the Civil Code, only in tort liability, concluded HCCJ.

By deciding this, the HCCJ violated the constitutional principle of dignity, principle which states expressly "the employee is entitled to dignity at work". Such a decision also violates the European Rules of labour law, which provides employer liability for non-pecuniary moral damage produced to employees.

Before July 28, 2007, by the decision of the European Court of Human Rights (Case Ghilbuşi against Romania) [1] it has been found out that article 6 paragraph 1 of the Convention on Human Rights and Fundamental Freedoms has been infringed because it was not enforced a court order establishing the employer's obligations when he concluded the individual employment contract. Consequently, the Romanian state was obliged to pay an amount representing the material and moral damage suffered by the person concerned.

HCCJ error was repaired by the Romanian Parliament, which adopted the Law no. 237/2007, governing pecuniary liability of the employer for material moral damage produced to the employees, but the text of the law is questionable, because inside it is specified: "The employer is required under the rules and principles of contractual liability, to compensate the employee when he suffered a material or moral damage due to the fault of the employer while he was performing work obligations or in connection with the work".

The text of this regulation, badly written, leaves room for interpretation so that one may think that the legislature wanted and implemented a cumulative solution.

The employer is responsible, if need be, either for material damage or for the moral one, or, finally, both for material damage and for the moral prejudice.

So the text of the law should have been the next: "The employer is required under the rules and principles of contractual liability, to compensate the employee if he has suffered material injury and / or moral due to the fault of the employer while he was performing work obligations or in connection with the work".

This regulation has a positive side because its occurrence has effects regarding the way in which the dispute should be solved. Thus, until the occurrence of the amendment, when the employee,
based his claims on the provisions of the Civil Code in order to obtain material damage, the case could have been trailed in the court or tribunal, depending on the value of plaintiff's claims.

According to the regulations of Law 237/2007, the case shall be tried by a specialized work and social security court in a panel made up of two judges and two judicial assistants. Judicial Assistants participate at the deliberations and have an advisory vote.

The advantage is that being judged by a specialized work court, the employee's claims may be better analyzed in terms of employment report that he has with his employer and may enjoy greater protection in his relation with him.

Law 237/2007 put an end to doctrinal disputes on moral prejudices produced to employees, thus the jurisprudence got a unitary character.

But problems arise regarding moral damage quantification. The court must consider the negative consequences suffered by the claimant at the physical and psychological level, the importance of harmed values, the extent to which these values have been damaged and the intensity with which the consequences of the harm, the degree of impairment of familial, professional and social situation were perceived.
Evaluation of moral damage caused by the employer and, consequently, moral damage assessment present in individual employment relationships a difficulty level similar to other cases with the same subject.

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THE LEGAL NATURE OF THE PUBLIC FUNCTION

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Abstract: *In this paper we propose to make an analysis at the world level of the juridical norms regarding the public function and the civil servant.*
The public function is a juridical situation, that is a an unitary and interdependent complex of rights and obligations which devolve to his keeper to whom it confers his own real statute and not just a content of juridical report, formed between the civil servant and his superior or between the first and the one who is under his administration, in which the parts are distinguished only through the opposability, which can sometimes be mutual, of the rights and obligations which devolve in their quality as participants to the juridical relationship

Key words *: civil servant, public function, administration, the statute of the civil servant*

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The concept of public function has traditionally been laid down as a fundamental concept of public law, especially of administrative law, and it is bound to the concept of activity, authority, organ etc. An organ o state or a public authority, in general, as a structure, is made up of three elements: the competence, material and financial means and the personnel, and the personnel, at its turn, is structured on divisions, hierarchical positions and lines, of which only certain of them appear as public positions. The holder of a public position, in a generic approach, is called a public worker.

These ideas represent a constant o the public law doctrine or the administrative science, and that's the reason why public function appears to be one of the favourite elements of corporatists' and a criteria of measuring the statute laws of countries integrated in a political form as The European Union.

There are traditions of public function in every western country which shouldn't be mistaken by the issue of a general statute. It is stated that the first country to have adopted a general statute of the public function is Spain, through *The 1852 Law,* followed by Luxembourg, through a law issued in 1872 and Denmark, in 1899.

In Italy, the first statute of the civil servant was adopted on the 22nd of November 1908 and in the Republic of Ireland the first law related to the public function dates from 1922. Holland and Belgium adopted the first law about civil servants in 1929, and *The general regulations of the civil servants in the Kingdom* appears in 1931.

In Germany, which has traditions regarding the public function ever since Middle Ages, the first law related to the general encoding of the public function regulations was adopted by the national socialist régime in 1937, A Bavarian Code of public function has existed since the beginning of the 19th century.

In France, the first statute of the public function was adopted by the Vichy regime.

Greece adopted the first Statute o the civil servant in 1951, inspired by the French statute, the German law, but also by the English law of the public function.

In our country there is a rich tradition regarding the regulation of all aspects related to the system of the function in the state administration through a statute.

The issue of civil servants, "the high officials", has always been a major concern for the legal systems and government systems known in history, and our legislations didn't make any exception from these intercessions.

The first laws which dwelt on the problem of civil servants in a more developed and coherent form were *The Organic Regulations,* in Moldova and Muntenia.

The Constitution from 1866 had some provisions related to "public functions", but these didn't determine the adoption of some more detailed regulations in this respect, although the stipulations from article 131, paragraph 5 from the Constitution expressed the adoption of a special law "for the conditions of the admissibility and advancement to the functions of public administration".

On the doctrinarism plan, The treaty of administrative law of professor Paul Negulescu, who approached, under scientific criteria, the aspects related to the public function and the public servant.

The first unitary provision in this filed was adopted in 1923, respectively *The law of the public servants' statute* which showed the principles settled by the Constitution from 1923 and which had represented for a long period of time the common law in that respect.

In virtue of this law, in the same year, on the 3rd November, *The regulation of the law of civil servants* was adopted and it detailed many of the provisions of the law.

To those provisions others had been added, which issued in the following years and they were related to certain categories o civil servants. In this respect, we can mention *The law for administrative unification,* from 1925, which contained the provisions referring to the civil servants from the local administration and *The law from 1929 for the organization of the ministries,* which contained provisions regarding the civil servants from the central administration and the high officials.

The civil servants' statute, adopted in 1923 was applied until 1940, when *The Code of civil servants* was adopted, which, after many modifications, was abrogated immediately after 1944, adopting in 1946 *The law for the civil servants' statute,* nr. 746 from the 22nd September, which was also abolished in 1949.

The period that followed after 1949 and especially after the adoption in 1950 of the Work Code is characterized by a legal regime based on contractual report, applicable to civil servants, even if in some fields of activity, railway transport, post office, banking system communications etc special provisions have been adopted.

The political realities through which Romania had passed after Second World War, as well as other countries which were influenced by the Soviet empire, as a result o the Yalta treaty, couldn't be without effect regarding the provision o the public function. There was a theory, according to which, the civil servants, by such a statute, were a privileged class, an instrument held by the middle-class landlords to be able to exploit the workers and the peasants.

It was one of the most unfortunate time in our country, during the Stalinist period being actually physically destroyed the entire political class of the country and the entire public body of the state, from Government to the communal guard. This is how we can explain why no one of the three socialist constitutions contains provisions referring to the public function, thus accounting that the civil servant is "a workman", subjected to the same conditions of the Work Code from 1950.

Subsequently, the Work Code from 1972 came with a slight modification, raising the issue of a *General Statute of the Personnel in the State machinery.*

Until the year 1989 a general statute for the civil servants hadn't been adopted, but there had been adopted, by law, professional and disciplinary statutes, for different fields: the banking system, transports, post office and telecommunication etc.

Romanian Constitution, adopted in 1991, contains some provisions which constitute the main framework of regulating these legal institutions. As examples we can enumerate article 16, last paragraph according to which the public functions and dignities, civil and military, can be taken by people which have exclusively Romanian citizenship and residence in Romania, article 37, paragraph 3, sets up the interdiction to be member in a political party for a series of civil servants:

the magistrates of the Constitutional Court, the magistrates, active members of army and police force etc.

The Romanian Constitution, modified and completed by *The law of revision of the Romanian Constitution, nr 429/2003,* keeps a part of these provisions, but sets up others new, thus, according to art. 16, paragraph 4, "After the Romania's adhesions to the European Union, the citizens from the Union, who fulfil the requirements of the organic law have the right to elect and be elected in the authorities of the local public administration". Also, the possibility to fill a position in public offices and public dignities is no longer reserved exclusively for people with Romanian citizenship, art. 16, paragraph 3, setting up the possibility for the people who "have Romanian citizenship and Romanian residence".

Also, *The law regarding the civil servants' statute, nr. 188/199,* modified and republished in may, 2007 regulates in detail aspects related to the categories o public servants, their rights and obligations, their selection and appointment, the evaluation of their activity, their liability etc.

Regarding the regulation o the public function and the civil servants in the European Constitutions, we can outline the existence of two systems: one system is dedicated to the exclusive competence of the legislative power of Parliament, in order to settle the rules applicable to the public function and to the civil servants (ex. Denmark, Germany, Greece, Spain, Italy etc), and in another system it is also stipulated the competence of the executive, determining their competences (ex. Belgium, England, Holland, France and Norway), in all these countries there are codes or statutes, which constitute what we could call "common law" in the subject.

On the doctrinarism plan and in the dispute with the modalities of recognition in the legislative filed of the public function and of the civil servant and with the jurisprudence of these times there have been issued two fundamental concepts regarding the legal nature of the public function and implicitly of the civil servant.

One o these concepts considers that the public function is contractual, being based on the term contract-after some German authors (P. Laband), or the "administrative contract"-after some French authors (Laferiere).

After another concept, that of the legal fundament of the public function, sustained by a great part of the French specialists in the field law is put at the origin of public function, as an authority document of the state. Thus, he holder of the public function exercises the state authority, not rights and obligations assigned by the contract.

This concept was also agreed by the Romanian doctrine of that time, and, in this respect, M. Varzaru stated that "civil servants are neither the stakeholders, nor the *negotiorum gestiori*, or the commissioners o those who had appointed them. The appointing document is not a contract of civil nature, because the will and the approval of the appointed civil servant-elements which play an important role in the civil contracts-have no importance when appointing, not even afterwards, when they exercise their job. Between the reports issued within the state and its civil servants and the civil reports between two private persons there is no comparison; in the first case, the reports are related to public law, in the latter case, they are related to civil law. The civil servants have no power and no right from the authority who appointed them but their competence, both *ratione loci* and *ratione material* is held by them from the organic law of their function.

After the Work Code had entered into force in 1950, the doctrinarians of the time tried to explain public function through its regulations as well. The specialists in labour law considered the collective work agreement the only reason of the work report, inclusively that of the public function.

Basically, the supporters of this concept considered the job report as a true work report and the regulations of this report are regulations of the labour law.

The authors of administrative law had underlain their concept on the idea of the double juridical report of the public function. In this respect, Mircea Anghene thought that "the civil servant appears to be the object of two types of legal reports. Firstly, he appears as the subject of a job report which arises through the appointment or selection document. According to this document and based on it, the civil servant exerts his attributions related to that function, acting on the state's

behalf. But the civil servant appears also as the subject of the legal report where the civil servant enters with the institution which employs him, report which makes the object of the labour law".
Specialized literature (A. Iorgovan), considered that the two categories of legal reports, that of administrative law and labour law make an indissoluble dialectic entity, as the civil servant who actually exerts his job duties doesn't stop being a subject to the legal work reports, as well as the civil servant who exerts the duties of disciplinary authority towards those subordinated to him, continues to be an overauthorised subject to the administrative law.

Although the classic system where the public function is created and exerted is actually considered a system of public law, in the specialized literature, but also in practice we can speak about its exertion in a private law system as well. Such an issue arises especially related to some administrative public functions which is the case of the self-governing institutions, functions which could be exerted both in a public law system and in a private law system.

This is also the reason why in specialized literature we can speak about "privatizing the public function", mentioning that in order to exert certain public functions it is preferable a private law system, based on a negotiable work contract.
Concerning the analysis of the features o the public function, first a definition of this should be set up, and still the doctrine will have to formulate different definitions.

Thus, Paul Negulescu defines public function as "the complex of powers and skills, organized under law in order to fulfil a general interest, in order to be held, temporarily, by a titular (or by several), a person who, exerting the powers limited to their skills, is pursuing the accomplishment of the goal for which the function has been created".

A Iorgovan defines public function as being "the legal situation of the person, legally appointed, with duties in accomplishing the competence of a public authority, which consists in all the rights and obligations which make the complex legal content between that person and the organ which invested them".

Professor A Negoita says that the public function represents "the totality of the duties established by law or by legal documents, issued on the base of law and executed by it, duties which a person employed by a body o the public administration fulfils and which has the legal ability of accomplishing these duties of the public administration".
Law nr. 188/1999 as it was modified, defines public function as being the "totality of attributions and responsibilities established by the public authority or by the public institution, under the law, in order to fulfil its competences.

The public function can be defined –in the widest meaning of the concept- as representing a normatively predetermined legal situation set up from a unitary complex of rights and obligations through which accomplishment it is fulfilled, in a specific way, the competence of a state body, exerting public power, according to the duties of that certain authority.
Public functions are created under law, under a document of power, in conclusion one-sided not contractual. At the same time, public functions can be altered or their content can be changed, unilaterally, by law or by a subsequent document, without the agreement of those exerting it.

The public function is a legal situation, a unitary complex and interdependent of rights and obligations which all back on its holder, to whom it confers a really own statute, and not a simple content of a legal report, made between the civil servant and his senior or between the first and the client, in which the parts can be distinguished only through the opposed situation, sometimes mutual, of the rights and obligations which fall back on them as participants in the respective legal relationship.

If in a common legal report the rights and the obligations are closely related to the formation, amendment and cancellation of the relationship, in the case of the function the rights and the obligations pre-exist relationships themselves and their formation, amendment and cancellation after producing an act or a legal fact is just the opportunity to exercise that faculty or statutory duties which are not just the products of the exclusive will of the titular subject, limited, in its actions, not so much in their formation, but above all at their achievement. In other words, through the function contribute to triggering the law incidence to solve a given case.

They have a certain degree of specialization, a competence determined by law, within which they follow the satisfaction of a particular interest.

The public function has his own character, belonging just to the invested one into an authority to achieve his competence. In the function they could commit only certain acts and facts under the powers of that institution, which delineates within the organ, a function of other, even similar.

The public function has a continuous character or permanent in time, during the entire interval since the investment to the disinvestment of the holder which it belongs to, whether if it exists or not a term.

Also the function has a binding by the duty of exercising rights and accomplish the obligations of the content, which means that this is not a faculty or a possibility, like the subjective right conferred on individuals or entities and to which exists the opportunity to enter or not, after his own will , in juridical reports as his own interest.

Indeed, the public administrative function must be exercised in any circumstance which needs its intervention - automatically or on request- even if over a certain attribution the authority has a right of appreciation or the opportunity to choose a solution of the situation. This task of resolving or reference even against a request (not necessarily require intervention by law or a favourable settlement from the authority), operates permanently because the failure of position by the executive organs - or by failure to resolve in time, either by solving the unjustified refusal of an application relating to a recognized legal right- allow triggering of a legal proceeding that can complete with bringing to court the guilty (including for insubordination if it has a hierarchical mood), of the executive authority which it belongs to, while obligating it to take and fulfil the required measures, to pay the damages and moral damages, according to the Law on Administrative Contentious 554/2004 (in the case of the civil servant) or the justice which should solve any case that was referred (in the case of the judge- according to The Civil Code).

Another feature is that only by effectively achieve all the functions of an authority it is realized the practical exercise of the authority's competence under statutory powers set. That means that the functions must be effectively entrusted to individuals able to perform them, who have the will and energy necessary to achieve them. Of course, it can exist functions unoccupied by owners and, sometimes, even unexercised functions, but these don't affect, overall, the achievement of the organ's attributions, but only fulfil their entirety. Also, sometimes there may be delegation or replacement of functions like exceptional circumstances when the same person will ensure the effective exercise of two or more positions just to ensure the normal functioning of the institution.

In exercising the function there is a contribution to public power, either in a direct form , where incumbent executives that issuing legal acts of power or authority (usually by the head of authority or institution), or indirectly through the actions of preparation, execution and control closely related or in connection with the exercise of state authority (the inspectors, referees, etc..).

This clarification is necessary because only in this way we can distinguish between public functions and other public authority existing even within the same authorities (first returning to the holders , other subordinates superiors), on the one hand, and functions up especially in the internal functional structures- based on contract work (secretarial, registry, accounting)- designed to ensure only the proper functioning of institutions which are not related to actual exercise of public power, why they meet even in governmental administrations, non-state, the private ones, commercial companies, etc. their exercise relying on contract workers, possibly on the Civil Convention. In other words, the civil service shall reflect the essence of the activity features consisting in the exercise of public power by the authority on which integrates that function.

Exercise of public functions provides the material and financial problem of ensuring that its holder must be fitted, and pay him for the effort and activities they perform. .Making an interest of a public service, which may be of a state or local authorities, recognized as such by the state, it is understood that the public function is exercised in the interest of a person which has a legal obligation to provide material and financial means needed to carry public function. As such, the

amounts required must be provided in the state budget and, respectively, in local budgets at a level that would ensure continuous and effective exercise of the function.

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THE RELATIONSHIP BETWEEN COMPETITION POLICY AND COMPETITIVENESS

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Abstract. *The turbulent start of the new century has brought new challenges for firms, industries and countries. Success in such times is demanding new perspectives on competitiveness. Despite Romania experience of 10 years of anticompetitive practices legislation, despite of the legislation upgrading to the European standards and to the institutional convergence with the EU in the last years, despite even the positive economic dynamism in the last years, the effectiveness of competition policy implementation is rather low. This paper seeks to analyse the need and relevance of having a competition policy, its benefits, and the necessary amendments which need to be made, so as to arm the economy and the government with a competent institutional mechanism to tackle the emerging challenges*.

Key words: *competitiveness, competition policy, market distortion*

Introduction

Competitiveness is that which measures firms' ability to efficiently create useful services and products, within a globalized environment, in a way that betters the life quality level and that of employment. A steady competition with favourable positions for enterprises is a key factor in the growth of productivity and competitiveness. Competition is thus, not a purpose within itself, but a vital process of the market, which rewards enterprises with the utmost attractive prices, the best quality, or that brings new products on the market, and with that the possibility of having a wider range of products to choose from. As Neelie declares, by competitiveness we understand the situation in which some companies supply goods and services, at reasonable cost and other companies or nations wish to buy (Kroes N., 2005). The test for competitiveness is now of course the market which today means the European or global market.

The determiners of global competitiveness define the context in which companies are born and compete separately, but also in a synergic manner. This climate requires and offers the necessary resources and knowledge to fuel a certain the competitive trumps of certain sectors; the information that indicate the opportunities to be considered; the direction in which the production factors must be assigned; the objectives that must be aimed by shareholders, managers and employees and, not lastly, the pressures and threats to which companies are subject to in order to be flexible and innovative.

Companies obtain competitive advantage where the location of their activity allows for the achievement of proper actives and specializes in knowledge accumulations, where they promptly and suggestively receive information about the market's requirements, where the goals of owners, managers and workers converge into durable investments; where the macro-economical climate is more dynamic and provocative (Miron D., 2003). By the words of M. Porter, companies succeed "where the national diamond is most favourable".(Porter M., 1993)

The more complex and the more dynamic a country's economical background is, the more likely it is that some companies fail if they do not internalize and capitalize according to its requests.

The companies competitiveness relies on several factors, some controllable others not. *The external factors,* they cannot: (Dobre I.C., 2007)

- the internal rate of the inflation and its relation to other countries' inflation rates – the higher the rate the less competitive the goods;

- the real exchange rate – the higher the value in euro in relation to other currencies, the more expensive the exports, making them difficult to sell, while imports cheapen, encouraging purchase on the domestic market;
- the economical growth rate of countries where companies are resided;
- economical politics needed in order to ensure a stable economical environment;
- the power of unions and their ability to ensure higher salaries, bonuses and a shorter working week;
- the extent to which national governments and other public organizations supply assistance and support for business;
- the extent to which national governments can attract foreign direct investments;
- the quality and extension of educational measures, especially in higher education.

The internal factors that influence a business' competitiveness include:
- the stage of the research-development activity;
- the production costs and the final asked price;
- the production methods and managerial practices – for example is the company looking to produce more efficiently, with minimum losses, or are its commodity markets large enough to ensure scale economies?
- the level of productivity;
- investing in new equipment;
- the quality of the goods and their reputation;
- characteristics regarding design;
- the exactness of the delivery dates;
- the quality and extension of post-sale services;
- the structure of the goods that were produced.

A healthy competition policy supports competitiveness

As the European Union progressed, the need to ensure enterprises a frame that is favourable to their competitiveness, has intensified. If we talk about competitiveness, first and foremost, we talk about competition. As it is, competition should be the main reason for the current transformations taking place, maintaining it should also be the first demand for the success of the adjustment process. (Ignat I., 1994)

The size of a company is very important, fact known since the early 50's, when it was considered that an important premise of the European economical integration was trusting that the amalgamation of the European economies determines the birth of large and efficient companies on the market, which would allow a deduction in prices, a higher quality and more competitiveness on the external markets.

Only a dynamic domestic market would determine Europe's companies to succeed abroad. Competition does not guarantee competitiveness, but open markets definitely determine companies to be more innovative, improve on quality and maintain low prices. A strong computational policy is vital in order to ensure that Europe's companies stay amongst the world's most competitive – goal set by Europe in March of 2000, at the meeting of the European Commission in Lisbon, where governments signed a program of economic reforms, by which Europe was to become „the most dynamic and competitive economy in the world", come 2010. (Bannerman E., 2002)

The advantages of the competition also show in equal extent the risk that it offers arguments in favour of crating „national champions". There is no inconvenient regarding the fact that enterprises reach a sufficient level to maintain competition on a global level, but this must take place in a competitive environment, while respecting the policies. Competition, on a national level, helps better a company's ability to be externally competitive.

Domestic competition is at least as important as international competition, the existence of several competing companies benefitting everyone, provided there is a real competition between them and not an attitude of cooperation. The adoption of new regulations, which encourage the rise of new companies, determines the growth of competition and contributes to the maintenance of

competitive advantages. Rivalry between companies situated in the same country is favourable from several points of view:

- the competition that exists on the domestic market compels companies to reconsider their production level and that of exports, in correlation to domestic competitive pressures and the opportunities that exist on the external markets;
- domestic rivalry makes companies improve their products, continuously reinventing them, orientating themselves towards other target segments through their new products and offering them to consumers at an arresting price.
- domestic competition determines the creation of new products and services that satisfy a wider range of demands(take for example the competition between German automobile manufacturers, which lead to the manufacture of some of the best European automobiles, but also to the reorientation of some strategies that would have before been unimaginable – the launch of Mercedes's "A classe", which erased the German customary law that said Mercedes is the boss' car and the secretary can barely just afford a Volkswagen)
- besides having advantages, internal rivalry also helps avoid some failures.

Competitive policies protect and encourage competition. By determining the enterprises present in the European Union's domestic market to compete independently, it contributes to creating equal chances for everyone and encourages new market entries.

The report of the European Counsel in spring 2004, in which the Commission critiques the member states for having lacked in progress regarding the Lisbon strategy, shows a slowing down in terms of productivity growth, that being the main cause of a mediocre economical performance within Europe. The feeble growth of productivity in Europe (especially compared to the American performances) has restricted the rhythm of the economical growth. If a large number of progresses were made in regard to the integration of the markets, starting from the creation of the domestic market, a large number of European economical sectors remain fragmentary and can be characterized by low competition and high prices and are, thus, harmful to industries and consumers.

As a main supporter of innovation and productivity growth, an effective competition between enterprises on the enlarged domestic market must be considered as one of the key elements of an efficient strategy for the building of a competitive Europe and for refreshing the Lisbon strategy.

The objective of a proactive competition policy is that of sustaining the competitor's game on the domestic market and urging enterprises to adopt a dynamic behaviour that would improve productivity. It's all about determining the sectors in which development is impaired as the result of a lack of competition and which, for this reason, do not function efficiently. The instruments of the competitive politics forbid, penalize and prevent anti-competitive practices. Moreover, because competitive rules do not question the mere existence of monopoles, be they natural or otherwise, they forbid power or monopole abuse or the creation of such a position with the help of a merger. It must be avoided that such measures taken by states deter the competition, especially with the help of public help.

The main objective of rules when it comes to deals and vantages is to incite enterprises to enter the competition instead of using collusion practices. Deals and other restrictive agreements alter the resources and encourage insufficiency. The application of these rules keeps the enterprises from taking a vantage point, or making abuse through anti-competitive practices (like excluding competitors), in a way that would maintain or strengthen their stand on the market.

Mergers allow newly created entities to exert market power or, more commonly, block competition. In contrast they can also raise the enterprises' efficiency and produce cost economies, which have repercussions on the consumers.

Consequently, the control of the focuses marks the low number of focuses that prevent the maintenance of an effective competition and foresee corrective measures, necessary for maintaining competition.

Public help can be a major obstacle in the way of competition. When it are used to save the business of companies on the verge of bankruptcy, public help can alter competition and interfere with the application of fair game rules on the domestic market. It is well known that European states often subsidy industries in an ineffective manner and do not settle the markets deficiencies, e.g. in terms of research-development, shaping, innovating and capital risk. An effective check of public help, based on solid economical criteria, allows that these measures not interfere with the competition on the domestic market.

Competitive policies contribute to the opening of monopolistic sectors (such as telecommunication, energy, transport) towards the competition, which improves the consumers' position and develops investments and innovation. It encourages member states to push aside entry barriers to all regulated sectors and strengthen the consumers' power, without depriving them from the advantages of general interest services. It must also settle the problem of regular protection, like in the form of authorizations for exerting free professions.

A study on the evolution of more than 100 industries in 10 countries, shows that in all stages of development, there was a strong correlation between the steep competition within every industry and the creation and maintenance of the competitive advantage on the domestic market as well as the external market; creating a national champion with a vantage point has rarely lead to having a competitive advantage on an international level, because companies that did not have to compete on the domestic market only rarely had any success on the external market. (Porter M., 1993) The same situation was found in even in industries that registered important scale economies, from countries with small domestic markets, because this fact forced local companies to get out on external markets.

Ever since 1979, the World Economical Forum of Geneva, published the Global Report on Competitiveness, with which it tries to synthesize the competitive vantage of national economies on an international scale. Among the indicators realizes by this institution, the competitive growth indexed one of the most commonly known indices used in international economy. The competitive growth index uses three main elements: technology, public institutions and macro-economic terms. Macro-economical stability is considered to be essential for economical growth. Although most economists argue that stability in itself does not generate economical growth, the instability of macro-economical indicators can raise question marks on any potential growth.

Companies cannot take investment decisions in economical environments where there is hyper-inflation, and an excessive taxation policy can make it possible that profitable investment projects become unprofitable. Public institutions are also essential to economical growth. Although prosperity is generally created by private entities within a market economy, they are subject to public regulation and especially by their interactions with public authorities, they can be prevented in their activity. For example, a regime of propriety rights where the legal system is efficient in protecting and re-establishing those rights violated is essential for the rightful development of the economical activities. Furthermore, economical science approaches more and more often the impact of institutional organization on the macro-economical performances or different countries. The third element taken into consideration by the global index of competitiveness is technology. The growth of an economy cannot be realized on the long run if the terms of the technological process are not applied. The three elements are not independent: powerful institutions are necessary to achieve macro-economical stability, and that promotes technological innovation.

According to this index, the most competitive economy in the world in 2007 was the US, followed by Switzerland, Denmark, Sweden, Germany, Finland, Singapore, Japan, Great Britain and Holland. According to the Global Competitiveness Index 2007-2008, Romania takes position number 74 out of a total of 132 analyzed countries, with a score of 3,97 (out of a maximum of 7 points).

Conclusions

Competition between companies from the same country seemed, many times, to have had more positive effects than international competition, due to the fact that companies knew their competitors and due to the need to innovate in order to have better results than all the other

companies that were working in similar backgrounds. Even so, an open domestic market, along with the adoption of global strategies, could partially substitute the lack of domestic competitors in a small country.

With its instruments for fighting against illegal agreements, focus control, public help control and liberalization measures, competitive politics, does not always have a direct effect on competitiveness. Everything depends on the enterprises abilities in this regard, but also on more concrete measures of applying the Use's competitive policy, emphasizing the economical analysis of market structures and behaviours, allow the progress towards the Lisbon strategy, strengthening productivity and economical growth, with a direct influence over the EU's citizens' lifestyles.

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GENERAL ASPECTS CONCERNING SOCIAL POLICY

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Abstract: *Social policy at European Union level represents a fundamental and indirect aspect of the final regulation of the internal market.*

Thus, the closer it is to achieving a harmonisation at the level of European Community of certain principles such as that of non-discrimination based on any arbitrary criterion, of the principle of social welfare within labour relations, respectively of the principles governing the matter of social security, the more it contributes to fulfilling the objective of the European Union, which is to establish a single market that presupposes, among other things, the freedom of services and the free circulation of people.

The aim of the present work is to explain the level of protection ensured at present by the regulations of Community law in the matter of labour relations, of the observance of the non-discrimination principle as an essential component in increasing competitiveness, respectively the way in which social security for the insurance holders included in the social security scheme of the member states is ensured.

Key words: *the labour legal relation in Community law, the principle of non-discrimination, the social security scheme in the EU.*

1. Evolution of the Community Social Policy

Social policy did not represent, unfortunately, a preoccupation among the founders of the three European Communities in the 6th decade of the 20th century. Thus, the ECSC treaty (Treaty establishing the European Coal and Steel Community signed on 18 April 1951 in Paris), as well as the Treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community (EAEC or EURATOM), signed on 25 March 1957, did not include any provisions regarding a European social system, the speculation being, as shown by the doctrine, that economic integration would in time ensure an optimal social system[1].

Subsequently, the actions of some Member States, particularly France, whose national law is more generous as concerns workers' protection, determined the development up to a certain degree of a social policy at Community level, but an uneven one, against the background of other states' conception that either had a national law which was less protective towards workers or considered social policy as integrated part of national sovereignty and wanted to maintain it within the sphere of national competences.

In The Treaty establishing the European Community (TEC), social policy is regulated in articles 117-125 (current articles 136-148), of which the most important for the evolution of social policy is article 119 (current article 141) of TEC, which sanctions equality between men and women in the world of work, a principle that has been promoted first and foremost in order to avoid a price distortion due to differences in the costs of production.

As, after the establishment of the European Communities, France was the only member country that granted by law equal pay to workers, it insisted for the implementation of this principle among the other Member States for fear that its business environment might become more expensive than that of the other Member States.

Consequently, a deadline was established for enforcing article 119, which was prolonged until year 1964, but, as an uneven application of this principle was noticed, a directive was adopted with regard to this, namely the Council Directive no. 75/117/EEC of 10 February 1975 on the

[1] T. Ştefan, B. Andreşan-Grigoriu, *Community Law*, Publishing House C.H.BECK, Bucharest, 2007, p. 639.

approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

This directive also harmonised Community legislation with the International Labour Organisation Convention no. 100.

Subsequently, in order to ensure equality as concerns working conditions, Council Directive no. 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, was adopted.

Also, as a continuation of the Union's efforts to ensure an optimal social climate, several measures for the harmonisation of legislations and social policies were adopted, as follows: Council Recommendation regarding the 40-hour working week and 4 weeks' paid leave (1975); Recommendation regarding Retirement Age (1982); Recommendation regarding Hygiene, Safety and Health Protection in the Workplace (1987); Directive no. 77/187 of 14 February 1977 regarding the safeguarding of employees' rights in the event of transfer of undertakings; Directive no. 80/987 of 20 October 1980 on the approximation of laws of Member States relating to the protection of employees in the event of the insolvency of their employer; Council Directive no. 80/1107 of 27 November 1980 on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work; Directive no. 75/129 amended by Directive no. 92/56 of 24 June 1992 on the approximation of the laws of the Member States relating to collective redundancies; Regulation no. 1365/75 of 26 May 1975 on the creation of the European Foundation for the Improvement of Living and Working Conditions; Directive no. 91/533 of 14 October 1991 on the employer's obligation to inform the employee of the conditions applicable to the contract and employment relationship; Directive 93/104 of 23 November 1993 concerning certain aspects of the organisation of working time, replaced by European Parliament and Council Directive no. 2003/88 of 4 November 2003; Regulation no. 2062 of 18 July 1994 issued by the Council on the creation of the European Agency for Safety and Health at Work; this Regulation was replaced by Council Regulation no. 1654/2003 of 18 June 2003; Decision no. 97/16 of 10 January 1997 establishing the Employment and Labour Market Committee, for the purpose of assisting the Council in fulfilling its responsibilities in this field; this Directive was replaced by the Council Decision no. 200/98 of 24 January 2000 establishing the Employment Committee, on grounds of article 130 EC; Commission Decision no. 95/319 of 12 July 1997 setting up a Committee of Senior Labour Inspectors; Commission Decision 95/320 of 12 August 1995 setting up a Scientific Committee for Occupational Exposure Limits to Chemical Agents; Directive no. 2002/14 of the European Parliament and of the Council establishing a general framework for informing and consulting employees in the European Community; Parliament and Council Decision no. 50/2002/EC of 7 December 2001 establishing a programme of Community action to encourage cooperation between Member States to combat social exclusion; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

After the adoption of the Maastricht Treaty (MT), social policy gained a more important role as compared to previous regulations.

Thus, in its Preamble, MT emphasizes the fact that the States, by deciding to establish the European Community, confirm their attachment to the fundamental social rights and are and are determined to foster economic and social progress, as well as a high level of workforce employment.

Also, it is mentioned in article 2 of the TEC as amended by the MT, that the mission of the Union is to foster a harmonious and balanced development of economic activities in the entire Union, a sustainable and non-inflationary growth respecting the environment, a high level of workforce employment and social protection, an increase in the living standard and quality of life, economic and social cohesion and solidarity among the Member States, by establishing a common market, an economic and monetary union and by applying the common policies or actions stipulated in articles 3 and 3a (having in view the establishment of an economic policy based on the

close coordination of the economic policies of the Member States, on the internal market, and on defining the common objectives, and guided by the principle of an open market economy, in which competition is free, the elimination, among the Member States, of customs duties and of quantitative restrictions when getting the goods into or out of the country, as well as any other measures of equivalent effect, a common commercial policy, an internal market, a common policy in the fields of agriculture and fishing, a common policy in the field of transportation, the strengthening of economic and social cohesion, a policy in the environment field, the strengthening of the Union's industrial competitiveness, a policy in the field of development cooperation, encouragement of the creation and development of trans-European networks, a contribution to strengthening consumer protection, measures in the fields of energy, civil protection and tourism).

In applying these legal texts, Title XI of the 3rd Part of the Treaty presents in detail all the elements of social policy, thus giving an additional concrete regulation of such matters as education, occupational training and youth, as these are fields on which the efficiency and coherence of social policy largely depend.

It is worth noting that social policy was the object of an annexed Protocol to the Maastricht Treaty, as Great Britain did not agree to the Treaty's provisions on this matter.

This Protocol establishes, first of all, the objectives, the purpose of social policy at Union level. It also regulates the fields in which the action of the Union complements the action of the Member States, instituting the right of the Council to adopt Directives for this purpose, respectively minimal progressive prescriptions, as well as the fields in which the Union has full competence.

This Protocol reiterates the principle of equal remuneration and working conditions for men and women.

The same Maastricht Treaty introduces article 123 which stipulates that, in order to improve the possibilities of employing workers on the internal market and contribute this way to increasing the living standard, in accordance with the provisions presented as follows, a European Social Fund is established, whose aim is to foster, within the Union, employment opportunities and workers' geographic and professional mobility, as well as to facilitate their adaptation to industrial changes and to the evolution of production systems, especially through professional training and reorientation.

As the competence of the Union to take direct action against discrimination was contested through the Amsterdam Treaty, article 13 was introduced which thus allows the Union to adopt a series of measures against discrimination, stipulating as follows: "Within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation ".

The same Amsterdam Treaty reformulates articles 117-120 of TEC, which reaffirm the values established through the European Social Charter signed in Turin on 18 October 1961 and through the Community Charter of the Fundamental Social Rights of Workers , adopted in 1989, reiterating this way the purposes and measures to be taken in order to fulfil them in the field of exclusive action or of the joint action of the Member States.

The Treaty of Nice provides a new numbering of the Regulation regarding social policy, so that the former articles 117-125 are now articles 136-148, and the fields in which the Community supports and complements the action of the Member States are again specified.

This Treaty also provides the setting up of the framework necessary in order to create a Committee of social protection of a consultative nature established by the Council, after consulting the European Parliament, for the purpose of fostering cooperation in the matter of social protection among the Member States and with the Commission.

Also, a second paragraph is added to article 13, which grants competences allowing the adoption of "approximation measures" by co decision.

2. Purposes of Social Policy and Means to Achieve It

The purpose of social policy was for the first time defined through the annexed Protocol of the Maastricht Treaty and was included once again in the Treaty provisions when the Amsterdam Treaty was adopted, in article 117, current article 136 by the new numbering established according to the Treaty of Nice.

According to the above-mentioned article 136, "The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion".

To this end, according to paragraph 2 of the same article, the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.

According to paragraph 3, they believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action.

It has been rightly noticed that, in doctrine, the formulated objectives are to be fulfilled through the converging actions of the Community as a distinct entity and of the Member States taken individually, by putting into practice measures that take account of the diversity of national practices, especially in the field of contractual relations and the need to maintain the competitiveness of the Union economy[2].

In doctrine[3], several means to achieve social policy have been observed.

A first means identified this way concerns the regulations controlling the functioning of the common market themselves, as they are considered to contribute to the achievement of social policy by regulating the free circulation of workers.

With regard to this, the free forces that affect this market at the level of working conditions, that is employers' and workers' organisations and the resulting collective bargaining, as well as the pressure exerted in relation to the content of government measures in the social field, must be taken into account.

The second means of achieving the objectives under discussion has in view[4] particularly the provisions related to the economic field, such as those regarding the coordination by the Council of the general economic policies of the Member States.

Thus, through article 137 of TEC as amended by the Treaty of Nice included, it is stipulated: " With a view to achieving the objectives of article 136, the Union shall support and complement the activities of the Member States in the following fields:

(a) improvement in particular of the working environment to protect workers' health and safety;

(b) working conditions;

(c) social security and social protection of workers;

(d) protection of workers where their employment contract is terminated;

(e) the information and consultation of workers;

(f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph (5) of article 137;

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[2] O. Manolache, *Treatise on Community Law*, Publishing House C.H.Beck, 2007, p. 480.

[3] T. Ştefan, B. Andreşan-Grogoriu, in the work cited, p. 641.

[4] O. Manolache, in the work cited, p. 481.

(g) conditions of employment for third country nationals legally residing in Union territory;

(h) the integration of persons excluded from the labour market, without prejudice to article 150;

(i) equality between men and women with regard to labour market opportunities and treatment at work;

(j) the combating of social exclusion;

(k) the modernisation of social protection systems without prejudice to point (c)".

To this end, the Council is empowered, on grounds of paragraph 2 of article 137:

1) to establish measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;

2) in the fields referred to in paragraph 1 items (a) to (i), European framework laws may establish minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such European framework laws shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and mediumsized undertakings.

According to the same article on this matter, the Council decides in accordance with the procedure stipulated by article 251 of TEC after consulting the Economic and Social Committee and the Committee of the Regions, with the exception of the fields referred to in paragraph 1(c), (d), (f) and (g) of the current article, European laws or framework laws shall be adopted by the Council acting unanimously after consulting the European Parliament, the Committee of the Regions and the Economic and Social Committee.

The Council may, on a proposal from the Commission, adopt a European decision making the ordinary legislative procedure mentioned in article 251 applicable to paragraph 1 items (d), (f) and (g) of the current article. It shall act unanimously after consulting the European Parliament.

Also, a Member State may entrust the social partners, at their joint request, with the implementation of European framework laws adopted pursuant to paragraphs 2 and 3 or, where appropriate, with the implementation of European regulations or decisions adopted in accordance with the above-mentioned provisions. In this case, it shall ensure that, no later than the date on which a European framework law must be transposed, or a European regulation or decision implemented, the social partners have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary step enabling it at any time to be in a position to guarantee the results imposed by that framework law, regulation or decision.

It is also stated that the European laws and framework laws adopted pursuant to this article shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof and that they shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Constitution.

It is worth noticing that the provisions of article 135 shall not apply to pay, the right of association, the right to strike or the right to impose lockouts

With a view to achieving the objectives of article 136 and without prejudice to the other provisions of the TEC, the Commission shall, on grounds of article 140 of the TEC, encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields, acting as a factor for bringing together the Member States, particularly in matters relating to:

- employment;
- labour law and working conditions;
- basic and advanced vocational training;
- social security;
- prevention of occupational accidents and diseases;

- occupational hygiene;
- the right of association and collective bargaining between employers and workers.

To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations.

Before delivering the opinions provided for in this article, the Commission shall consult the Economic and Social Committee.

In the field of social dialogue, the Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action.

If, after such consultation, the Commission considers Community action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation. On the occasion of such consultation, management and labour may inform the Commission of their wish to initiate the process provided for in article 118b (current article 139). The duration of the procedure shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.

The procedure in article 118B refers to agreements concluded at Union level which shall be implemented either in accordance with the procedures and practices specific to the social partners and the Member States or, in matters covered by article 118, at the joint request of the signatory parties, by European regulations or decisions adopted by the Council on a proposal from the Commission.

In this case, according to the amendments made by the Treaty of Nice, the Council acts by qualified majority, except for the case where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required by virtue of article 137 paragraph (2). In such situation, the Council shall act unanimously.

The third means to achieve the objectives of social policy is represented by the approximation of the provisions laid down in this field by national laws, by regulation or administrative action.

It was appreciated that there may be differences between national laws especially in the field of social security which may cause significant distortions of competition due to financial expenses in certain economic sectors, being also liable to directly affect the stability or functioning of the common labour market through the advantages or disadvantages that certain national laws might generate.

Also, in doctrine it was pointed out that there are considerable differences in the legislation of the Member States between the regulations whose object is to ensure the safety and health of workers at work. These national regulations often complemented by technical provisions or standards set by convention may lead to the existence of different levels of protection of the workers' health and safety and may favour competition over the protection of employees.

This is the reason why the European Framework Directive 89/391/EEC of June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work was adopted with regard to this.

The Directive contains general principles for the prevention of risks in the workplace, for increased safety, for insurance of a healthy environment, the elimination of risk factors and of circumstances that may lead to the occurrence of accidents.

This Directive shall apply to all sectors of activity, including the public sector, with the exception of certain specific public service activities, such as the armed forces or the police.

As a direct and concrete application of the Framework Directive, the Council has adopted over 20 Directives regarding certain particular situations, such as: the workplace (Directive 89/654),

work equipment (Directive 89/655), personal protective equipment (Directive 89/656), Directive 94/33 on the protection of young people at work.

In the same context, of ensuring the protection of the safety and health of workers, the Union has also adopted Directive 93/104 concerning the minimum requests regarding the organisation of working time, establishing minimum standards for daily and weekly periods of rest, the annual paid leave, the number of night work hours, etc.

3. Aspects of the European Union Social Policy in the Matter of Social Protection

3.1. European Social Fund

As mentioned before, article 123 of TEC, in order to improve employment opportunities on the internal market and so help raise standards of living, regulated the setting up of a European Social Fund whose aim is to promote within the Union employment opportunities and workers' geographic and professional mobility, as well as to facilitate their adaptation to industrial changes and to the evolution of production systems, especially through professional training and reorientation.

Currently, the specific Union act regulating the concrete activity of the European Social Fund is Regulation 1081 of 5 July 1996 with effect from 1 January 2007.

According to this Regulation, the European Social Fund (ESF) is one of the EU structural funds, set up in order to reduce differences regarding the living and prosperity standards in the regions and Member States of the EU and, consequently, to enhance economic and social cohesion[5].

ESF is dedicated to promoting workforce employment in the EU. It helps the Member States to better equip European companies and workforce so as to cope with the new world challenges.

The strategy for workforce development and employment is the EU's main strategy to ensure the prosperity and welfare of Europe and of Europeans, at present and in the future. In this context, the European strategy for workforce employment results in the collaboration of 27 Member States in order to increase Europe's capacity to create better and more job openings and to endow people with the abilities required in order to occupy them. This is the strategy guiding the ESF, an institution that spends European money to achieve these objectives[6].

3.2. Education, Occupational Training and Youth

The field of education, occupational training and youth was not neglected either, becoming a preoccupation of the Union with the adoption of the Maastricht Treaty , which amended articles 126-128.

Thus, the Union contributes to the development of a high-quality education by encouraging cooperation between the Member States and, when necessary, by supporting and complementing their action, while fully respecting the responsibility of the Member States for the content of education and for the organisation of the educational system, as well as their cultural and linguistic diversity.

To this end, the action of the Community has in view:

- to develop the European dimension in education, especially through the learning and dissemination of the languages of the Member States;
- to foster the mobility of students and teachers, including by encouraging the academic recognition of diplomas and study periods;
- to promote cooperation between educational institutions;
- to develop information and experience exchange concerning problems common to the educational systems in the Member States;
- to foster the development of youth and socio-educational animators exchange;

[5] http://ec.europa.eu/employment_social/esf/discover/esf_ro.htm, consulted on 28th January 2008.

[6] http://ec.europa.eu/regional_policy/sources/docoffic/official/regulation/pdf/2007/fse/ce_1081(2006)_en.pdf, consulted on 28th January 2008.

- to encourage the development of distance education.

For the same purpose, the EU and the Member States foster cooperation with third countries and with the competent international organisations in the field of education and, especially, with the Council of Europe.

In order to contribute to achieving the above-mentioned objectives, the Council has no possibilities to decide, only to influence, to encourage, recommending, because, as mentioned before, the legal text itself (article 149) limits the Council's action through the reduced competences granted.

Therefore, by deciding according to the procedure established in article 251 of TEC and after consulting the Economic and Social Committee and the Committee of the Regions, the Council shall adopt actions of encouragement, with the exception of any approximation of the laws and regulations of the Member States, adopting recommendations, deciding by qualified majority on the proposal of the Commission.

As regards the policy of occupational training, the Community puts into practice a policy of occupational training that supports and complements the actions of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of occupational training.

To this end, the community action has in view the following aspects:

- to facilitate adaptation to industrial transformations, especially through occupational training and reorientation;
- to improve initial occupational training and continuous training in order to facilitate occupational integration and reintegration on the workforce market;
- to facilitate access to occupational training and to promote the mobility of trainers and trainees, especially of young people;
- to stimulate cooperation in the training field between educational or professional training institutions and companies;
- to develop information and experience exchange concerning common problems within the training systems of the Member States.

Within the framework of professional training policy, the Council adopts measures that exclude any approximation of the legislative and regulamentory provisions of the Member States, which are at the same time required to foster, together with the Union, cooperation with third countries and with the competent international organisations in the field of professional training.

In exercising these prerogatives, the Council has adopted several documents that can only be considered as recommendations, such as:

- Conclusions regarding the importance and the object of the quality of professional training;
- Conclusions regarding school efficiency, principles and strategies regarding the promotion of school success;
- The White Card regarding education and training;
- The Green Card regarding education, training and research — obstacles to transnational mobility;
- Conclusions regarding the new indicators in education and training.

To conclude the presentation of professional training policy, we must mention that, according to the jurisprudence of the Court of Justice, professional training is any form of education that prepares a person in order to qualify for a certain profession, commerce or occupation or which ensures the qualifications (abilities) necessary for such a profession, commerce or occupation, regardless of the age and preparation level of pupils or students, even if the programme does include an element of general education.

3.3. The Social Protection Committee

In the matter of social protection, we must also mention the innovation made through the Treaty of Nice, which regulates in article 144, as amended, the setting up of a Social Protection

Committee, created by the Council, after consulting Parliament, having a consulting role in the field, for the purpose of fostering cooperation between the Member States and with the Commission.

This Committee's attributions are as follows:

- to observe the social situation and the evolution of social protection policies in the Member States and within the Union;
- to facilitate information, experience and best practice exchange between the Member States and with the Commission;
- without prejudice to article 207, to prepare reports, to give legal notice or undertake other activities in its fields of competence, at the Council's or the Commission's request or on its own account.

In fulfilling its mandate, the Committee establishes contact with social partners, every Member State, as well as the Commission which designates two members of the Committee.

In applying this provision, the Council established through Decision 2000/436 of 29 June 2000 a Social Protection Committee, with advisory status, whose task is to supervise the development of social protection policy in the Member States and within the Union, and, subject to article 207 of TEC, to prepare an annual report on social protection that will be submitted to the Council.

3.4. Social Security

In the field of social security as well, the Treaty establishing the European Community assigns competences in favour of Community institutions, stipulating within the content of former article 42, the Council's prerogative to adopt by co decision procedure in the field of social security the necessary measures in order to ensure the free circulation of workers, having in view the entire by allowing and maintaining the right to benefits, as well as the estimation of those benefits, of all the periods taken into account by various national laws and the payment of benefits to persons residing in the territory of the Member States[7].

However, it has been decided that it falls within the competence of the Member States to elaborate their principles and organise their own systems of social protection.

That is the reason why the Union's role is to coordinate systems applicable to workers passing from one state to another, so that they may claim in one Member State the rights acquired in the territory of another Member State.

This is also the purpose of Regulation 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families, when moving to another Member State to work, respectively its Implementing Regulation no. 547/72.

The doctrine[8] has drawn from the economy of this legislation at Union level the following principles of social security policy:

1. The unity of applicable legislation

As shown before, the Union's purpose is to coordinate national social protection schemes, therefore, the situations in which a worker is uninsured in any of the Member States or, on the contrary, is insured in several states, are to be avoided. Thus, there is a rule according to which the worker is subject to the social protection norms of the state on whose territory he/she carries out his/her activity, not of the state whose citizen he/she is or where he/she resides.

2. The principle of equal treatment

According to this principle, persons carrying out their activity in the territory of a Member State and who are subject to the social protection rules of that state shall benefit from the same conditions of application of those rules as the citizens of the state in question.

3. The principle of acquired rights preservation

[7] O. Tinca, *Community Social Law,* Publishing House Lumina Lex, 2002, Bucharest, p. 275.
[8] T. Ştefan, B. Andreşan-Grigoriu, in the work cited, p. 644.

This principle expresses the rule according to which the rights acquired within the framework of a social protection scheme may be transferred to the territory of another Member State, so that the payment of certain benefits should not be conditioned by the place of residence of the entitled person. In other words, the worker who acquired the right to a pension in the territory of another state than that whose citizen he/she is preserves that right even if he/she returns to his country of origin (with a few exceptions: for instance, in the matter of unemployment assistance).

4. The principle of the maintenance of rights in course of acquisition expresses the rule that the periods necessary in order to acquire a certain right are cumulated too even if they were obtained by carrying out one's work in the territory of another state than that whose citizen the worker is.

In this context, we must define the legal notion of "worker" in the light of Union acts and of the jurisprudence of the Court of Justice.

First of all, a worker is any person insured on grounds of a compulsory or an optional insurance for a continuous period against one or several risks covered by the branches of a social security regime applicable to employees.

Secondly, a worker is also the person with a compulsory insurance against one or several risks covered by the branches that are subject to the above-mentioned Regulation, within the framework of a social security scheme applicable to all residents or to the entire occupationally-active population, when that person is insured by a compulsory or an optional insurance for a continuous period against another risk.

Finally, the notion of "worker" also designates the person insured voluntarily against one or several risks covered by the branches that are subject to the above-mentioned Regulation within the framework of a social security scheme of a Member State, regarding employees or all residents or certain categories of residents, if that person has previously had a compulsory insurance against the same risks, within the framework of a regime for the employees of the same Member State[9].

4. Social Policy in the light of the Charter of Fundamental Rights of the European Union and of the Treaty of Lisbon

The Charter of Fundamental Rights of the European Union was proclaimed during the European Council of Nice of 7-11 December 2000 as "an essential example of the ambivalent, complex and often contradictory nature of the constitutional development of the European Union"[10].

The Preamble to the Charter makes known the fact that "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice".

The rights belong to three categories:

- civil rights: human rights and rights regarding legal procedures, as those guaranteed by the European Convention on Human Rights and established by the Council of Europe;
- political rights specific to European citizenship as established through Treaties;
- economic and social rights as stated by the Community Charter of the Fundamental Social Rights of Workers adopted in 1989.

In the Charter, the rights are divided into six chapters: Dignity, Freedoms, Equality, Solidarity, Citizen's Rights and Justice. A seventh chapter defines the general provisions[11].

Equality is a principle referring to:

- equality before the law, non-discrimination, cultural, religious and linguistic diversity,

[9] T. Ştefan, B. Andreşan-Grigoriu, in the work cited, p. 646.

[10] G de Burca, *The Drafting of the European Charter of Fundamental Rights*, European Law Review, 2001, p.126, cited by T. Ştefan, B. Andreşan-Grigoriu, in the work cited., p. 155.

[11] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0001:0016:EN:PDF, consulted on 19 January 2008.

- equality between men and women, the rights of the child, the rights of the elderly, integration of persons with disabilities.

In the matter of *solidarity*, the following rights are guaranteed: the right to information and consultation within the undertaking, the right of collective bargaining and action, the right of access to placement services, protection in the event of unjustified dismissal, fair and just working conditions, prohibition of child labour and protection of young people at work, family and professional life, social security and social assistance, health care, access to services of general economic interest, environmental protection, consumer protection).

This title regarding ”Solidarity“ also reaffirms the rights of any worker to protection against unjustified dismissal, in accordance with Union law and with national laws and practices, the right to working conditions that respect his/her health, safety and dignity, as well as the right to a limitation of the maximum working hours and to daily and weekly periods of rest, and to an annual period of paid leave.

Also, in the matter of social security, The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.

Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.

In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.

The Charter was included with a few amendments in the Treaty establishing a Constitution for Europe, and it should produce legal effects once the Constitution comes into force through the ratification of the Treaty by all Member States.

The Preamble to the Treaty establishing a Constitution for Europe, in articles 1-2 regarding the Values of the European Union specifically provides that the Union combats social exclusion and discriminations and promotes justice and social protection, equality between men and women, solidarity between generations and protection of children’s rights.

It is remarkable that the Treaty of Lisbon also provided the amendment of article 6 paragraph 1 of TEU in the sense that ”The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties“.

Therefore, despite its amendment when being adopted on 12 December 2007, the Charter of Fundamental Rights, according to article 6 paragraph 1 of TEU amended, is part of the texts of the Treaties, having the same legal value as they do.

This integration in one single document of a true ”European Declaration of Human Rights“ represents just as well the bringing together in one single legal document of the most important principles governing Union social policy included in primary treaties, respectively in the derived legislation (directives, regulations, etc.).

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ON THE FORMATION OF CONSENT IN THE CASE OF CONTRACTS CONCLUDED ON-LINE

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Abstract: *The trading offer on the Internet, which may be destined to other traders or to private persons, presents a lot of distinct features. Electronically catalogues, diffused on Internet, may be seen as such techniques in distance communication. When the trader wishes to sell his products through Internet, he has to issue an offer, which he releases on-line and which, therefore, could be accessed by whoever might be connected. The second element of the contract's conclusion is the unequivocal accept of the offer, because any modification brought to the offer constitutes itself as a counter-offer.*

Key words: *trading on Internet, electronically features, tele-communication.*

1. On the offer to contract on-line

The trading offer on the Internet, which may be destined to other traders or to private persons, presents a lot of distinct features. Firstly, it is an offer which transits through an international tele-communications' resource. There are differences from the traditional contracts, which are concluded between persons who are all present at the moment of exchanging consents. The on-line contract is kindred to the contracts negotiated from a distance.

a) The contract at a distance and the offer through Internet. According to art. 2 of the Government's Ordnance nr. 130/2000, by contract at a distance should be understood the supply contract, for products or services, concluded between, a trader and a consumer, into the frame of a sale-purchase system organized by the trader, which makes use of, exclusively, before and at the exact moment of conclusion of the respective contract, one or many techniques in distance communication. These are defined as whatever means that could be used as tools for the conclusion of a contract between the trader and the consumer, which do not require the physical presence of both sides simultaneously.

Electronically catalogues, diffused on Internet, may be seen as such techniques in distance communication. When the trader wishes to sell his products through Internet, he has to issue an offer, which he releases on-line and which, therefore, could be accessed by whoever might be connected. In this case the offer made at a distance does exist, while the possible sides of the contract do not meet. Yet trading offer released on-line presents some features of its own, related to interactivity. These features that we find into interactive telematics are, indeed, distinct from the classical sales by mail, which use the path of the paper support to spread their offer. Therefore, if on-line the simultaneous physical presence of the contractors does not exist, according to the definition itself given to the distanced sale, the net allows, though, a virtual presence, due to interactivity as a phenomenon. On-line, the offer and its acceptance are able to meet, almost simultaneously.

b) The on-line offer and the offer through T.V. broadcasts. The T.V. broadcasted advertising releases are, totally or partially, vowed to present and promote goods or services offered straight for sale. The T. V. broadcasted offer allowing the viewers to consume when watching T.V., may be considered a form of contract negotiated at a distance. The trading offer spread on-line may be seen as kindred to the T.V. broadcasted one, as both are public communications. Still, on the opposite of the multimedia offer which is interactive, the acquisition through T.V. broadcasts does not allow the purchaser to make use of the same mean of communication for issuing his own order. The viewer and purchaser who wishes to obtain a product advertised by the T.V. broadcast will not

be able to directly transmit his consent through T.V. devices, and will be obliged to make use of other means of communication.

c) Features of the on-line offer. In the electronically medium, the purchaser has various means at his disposal. So, he may choose among the public means of communication (web, chat forums) and the private ones (e-mail, other channels, etc.). The on-line offer presents the distinctive asset of providing unlimited access to all its purchasers. It is alike a public communication. Indeed, unless the cases when such an offer would be addressed by e-mail to a determined (known) person, and when it would be encrypted for the purpose of confidentiality, such an offer has the vocation of reaching an immense public. It constitutes an example of offer addressed either to all of us or to undetermined (unknown) persons. It is, though, difficult to shape a frontier between the publicity and the privacy of the offers existing on-line, because an offer, launched by e-mail towards a large number of people, might as well be considered as a public one.

Finally, the trader-consumer interactivity, allowed by the net, is an essential asset of on-line trading. In order to juridical constitute an offer, the message displayed by a web-page or sent by e-mail ought to contain all the elements required for the conclusion of the contract. The offer should be able to contribute to the contract's formation, and, for that, it would have to be: *firm, precise* and *certain*.

A problem raised by the offer coming on-line is the one of the *validity' duration* for the respective offer. Generally, the validity's duration is limited in time; yet, to be correctly evaluated, the initial moment of the offer should be known. But the issue date of an offer is pretty seldom précised on-line and its deadline as well. In this case, we might ask: which date counts indeed? Is it the moment when the offer was launched on-line, or either the moment when the on-line user found out about it? Generally, the launching date of the offer is considered as its debuting moment. But this solution is not justified, in the eyes of the consumer, who received no further information about the respective offer and who has no certitude about the offer's validity, reality and duration in time. This is why the trader ought to clearly indicate the offer's launching date and its valid duration on-line[1].

This latter might be précised under the formulations that follow:
- "offer valid till the date of ...";
- "offer valid till stock exhaustion";
- "offer valid from ... on".

Two cumulative requirements determine, practically, the offer's existence: it has to be inserted upon a server and it has to be accessible to the public. The definitive disappearance of the site containing the offer leads to its nullity, unlike its temporary disappearance, due to a technical malfunction, which causes only the suspension of the offer's existence.

The essential features of the offered goods and services ought to be clearly specified:
- their designation and assets (name, dimensions, quality, colour, peculiarities, composition, etc.);
- the offered services (object, contents, etc);
- the geographically covered zone of the offer;
- the geographically covered zone of the delivery;
- the availability of goods and services;
- modalities of use and advices about them;
- methods of delivery (a good's delivery through mail couriers or through a transportation mean, the delivery of an on-line sought good or service in real time or not);
- post-sale warranties and service;
- duration of the contract, when it concerns the delivery of a good or a service, either periodically or for a long time.

Illustrating photos which sustain the information provided by the texts are not inserted to the contract's field. If errors happen to be inserted, they could not engage the trader's liability.

[1] *E. Barbry*, op. cit., http://www. club-internet. fr/cyberlexnet.

There are opinions stating that, in the case of such offers, like for the T.V. - broadcasted ones, the risk exists of quality distortion, in regard to the offered goods and services. The main justification of this risk is precisely the use made of new technologies, which might, through appropriate adjustments, offer a denaturised image of the proposed item[2].

Thus, the quality and quantity features ought to be described precisely and unequivocally. Even if the on-line description might often be accompanied by photos, alike a paper-supported catalogue, the differences should be underlined between the photographical description of the product and its reality. The particular conditions of the sale, that are displayed on screen, do precise the aggregate of these elements: they should be studied by the consumer previously, with all the attention that would be needed. Since the norms existing in various countries could impose prohibitions or restrictions upon the products sold at a distance[3], it is to be preferred the clear precision about the geographical zones covered by the offer, as well as the delivery zones. The offer ought to contain precise information's about *the price*. They should concern as well the price of the offered good or service it, as all the other amounts of taxes which would have to be paid by the consumer. The cyber-client ought to be aware of the possible limitations of liability, the modalities of payment and delivery, the period for delivery, etc. Last but not least, the offer should contain *the identification data of its author*: name, unique identification number, address of the social siege or address of the offer's contact person, the e-mail, and the phone and fax numbers.

When a document is read on-line, the human capacity of awareness and memorizing is much smaller than for a paper-supported document. Thus, errors might appear a lot easier in the interpretation of on-line documents. Therefore, the cyber-consumer will be able, much easier, to prove that, when he clicked upon the mouse, he was not aware that he was closing a deal. For a consumer who had signed a paper-supported contract, this would not be possible. To avoid such a situation, on-line the offer ought to be much more concise and brief than for the contracts actually used.

The lecture of on-line offers should also be facilitated through a judiciously spaced presentation, the use of current words and the use bolds to underline what is really important in the offer. Further, the concerned business people should be more careful about formalities, when they conclude contracts with cyber-consumers, indicating explicitly to the possible buyers the fact that they are on the edge of ratifying a contract. They might ask for more than a simple click for the offers accept. For example, the purchaser should be asked to inscribe his name into a text-case or a dialogue-case. This action might indicate to purchasers that their own action could produce juridical consequences. The person who distributes on-line a product or a work ought to be able to demonstrate that the stipulations proposed by her contract have been pointed out clearly enough, so that the user could become aware of them the easiest way possible. Otherwise, the conclusion might be drawn that the respective external clauses or annexes through reference are not valid. The same way, references made to stipulations of common law are not valid, as long as they are not explicitly reproduced into the online contract.

2. On the accept given online

The second element of the contract's conclusion is the unequivocal accept of the offer, because any modification brought to the offer constitutes itself as a counter-offer.

Online, where the sides are acquainted only through this electronically medium, the given accept may be found under the following forms:

- most often, as a simple fact of clicking on the mouse, over a button which indicates the accept;
- through a pattern-type form, that has to be filled in and transmitted;
- by e-mail.

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[2] B. Bizeul, *Le télé-achat et le droit des contrats*, Ed. CNRS Droit, Paris, 1998, p. 97.

[3] For example, in France, the goods and services sale at distance is forbidden for the cases of: pharmaceutical products, weapons, objects serving to purposes violating public morality, or objects through which human dignity could be prejudiced, immobile estates, for which, insofar, a duly elaborated act is required from a notary's office. The sale at a distance is also restricted for: medical interventions, tobacco products, alcoholic products, alimentary products.

The contracts concluded on-line through web pages are adhesion contracts, because the stipulated conditions are, generally, compulsory. Unlike them, the contracts concluded through e-mail are, generally, negotiated contracts.

a) The accept given by clicking over a button. In this case the principle is relatively simple: once the offer has been issued upon a site, the procedure of a purchase at a distance is as well proposed. Consequently, there is a button that, if clicked, does confirm the purchase wish. Sometimes, the opposite button exists as well, which, rejecting the offer, allows by its presence to co-contractor, to really choose, to purely and simply express his own will. If this latter would wish to modify the contract's terms or would have some reserves towards the contract, he should send, by e-mail, a counter offer. Anyway, it is highly improbable that such an offer should be taken in consideration, in a commercial site, where there are millions of clients. In fact, such on-line contracts are seen more like adhesion contracts.

The problem rises: should the simple click from the mouse on an accept button from a web page be enough to express the user (acceptant's) intention, once surfing on-line, to agree upon the essential terms of the contract submitted to his attention? Since the accept is not given verbatim, neither written, the operated click could hardly be taken for an expressed accept.

Still, the made movement is the click on the accept button, having as result the transmission, towards the trader; and an active behaviour, or an unequivocal gesture, might be considered an expressed attitude of the acceptant's will[4].

On the other, hand for the valid conclusion of a contract, the user (acceptant) should be indeed aware of the fact that his gesture means the effective agreement upon the proposed adhesion contract's stipulations. This is why the offer should contain all the contract's particular data. A supplementary accept could be also imposed, in the sense that, at the click over the accept button, the screen would display a new case, allowing to confirm the given order. This new window might contain explicit information, indicating to the user the results of his gesture and proposing a new confirming request (for example: "You have ordered the item X, please confirm your order!").

Other sites do oblige the user to stroll over the whole page containing the offer, in order to reach for the accept button that is placed in its underground. This precaution might reduce the purely formal aspect of the given agreement, even through the relevant index of the screen's rolling speed.

b) The accept given through a filled-in form. There are situations when the web page offers a standard form in view of accepting, to be filled-in. Problems might raise in this case too, if the transmission modality of the respective form should not be explicitly indicated. It happens because the form might be sent straight through a connection sited on that very page (for instance, through a forwarding button) or either by e-mail or by ordinary mail. Thus, for the trader, it is advisable to expressed indicate the modality and the mean of communication which should be used by the acceptant. Taking into account the linguistic differences, if consent should be given through a foreign language, the problem of its validity might rise, Internet seldom makes use of the written agreement, but this is the only way to be certain, for the trader as well as for the consumer.

To impose the concept of implicit consent on-line would have no juridical validity for the relationship seller-client, since the mention according to which, if no answer should be communicated, the offer would be seen as accepted bears no juridical effects at all.

3. The moment of the conclusion for the on-line contract

In the case of on-line contracts, the conclusion procedure is similar to the one used for the contracts closed by telephone. The two sides are considered to be present Consequently the wills' agreement is expressed simultaneously. In this case, the same rules as for the contracts' conclusion between present sides should be applied.

For off-line contracts, the sides are not simultaneously present at the contract's conclusion. In this case, one of the two theories about the moment of concluding contracts might be chosen. If

[4] It is the case of a person who steps into a bus or a taxi cab: this gesture is considered to signify the expressed accept of the transportation contract.

the emission system is elected, the intervention's moment and place ought to be precisely determined. So, the respective moment is the one when the forwarder of the message clicks on the accept button or on the one for sending messages. So the message is launched on-line.

The problem might rise from the fact that the hour indicated into the message might be falsified (for instance, by changing the hour at the used computer). The real hour's item, as a matter of probation, might be found out through the comparison with the hour when the message has transited the server of the access' supplier. But this could happen only when forwarder and recipient are linked through a supplier, and if this latter would be a third side.

If the reciption' system is elected, the problem rising is the one of the real receipt's time. There is the opinion[5] according to which the statement of willing on-line is receipted when it arrives into the mailbox and could be accessible. For professional activities, this means during the normal duty's time. For a non-stop activity, it means at any moment. For private activities, this means the next day, because the permanent mailbox's control during the day is not compulsory.

Independently from these considerations, the principle suiting which the will statement has been accessed at the very moment when the recipient has effectively read the information remains valid, even if this might have happened in a prior moment (for example, if someone should read the information before the start of the normal duty program).

The Law nr. 365/2002 on trading online[6] has ruled on the possibility to conclude, *inter absentes*, a contract through electronically means, considered to be: "electronic equipments and networks made of cable, optical fibres, radio, satellites and kindred, used to process, to stock or to transmit information" (art. 1 item 2). The law does regulate, however, on a larger field, because it concerns electronically trading, but, in the present paper, we are concerned only by the aspects related to the enforcement of contracts concluded through electronically means.

These are a form of the contract concluded at a distance[7], which receives a regulation apart, due to the specific features of the electronically medium. This contract produces the juridical effects of whatever contract duly concluded. The sides' previous consent about the use made of electronically means is not necessary for its validity (art. 7 par. (2)). The proof of concluding such a contract is submitted to common law on the matter of probation and, as well, to the stipulations of the Law nr. 455/2001 on the signature on-line (art. 7 par. (3))[8].

The legislator has granted, in this matter too, a particular interest to the consent's protection in regard to recipients of on-line offers, through ensuring them a correct and complete information. So, the services' supplier[9] is obliged to place, at the recipient's disposal, before this latter should send the contracting offer or the accept of the firm contracting offer made by the services' supplier, a set of information that should be expressed clearly, unequivocally and into an accessible language (art. 8 par. (1)), concerning:

- the technical phases that should be followed in order to conclude the contract;
- if, after its conclusion, the contract is or not destined to be saved somewhere by the services' supplier, and would it or not be accessible?;
- the technical means provided in order to identify the possible errors which occurred when inserting data and to remedy them;
- the language into which the contract might be concluded;

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[5] R. Arnold, *Droit d'Internet*: un nouveau Droit entre le Droit communautaire et le Droit national, http://droit-internet-2000. univ-paris1. fr/dossier4/Rainer-Arnold.doc.

[6] Republished in the Off. Monit. nr. 959, of November, 29-th, 2006.

[7] The Law nr. 365/2002, by its art. 31, abrogated the art. 6 letter f) of the Ordnance nr. 130/2000 on the juridical regime of the contracts at a distance. According to this article: "The stipulations of the present Ordnance are not to be applied (...) letter f), in the case of electronical trading". These stipulations were considered to be contrary to the mentioned Law.

[8] Published in the Off. Monit. nr. 429, of July 31-st, 2001. See, especially, the Chapter II: "Juridical regime of written documents under electronical form", namely arts. 5-11 of this Law.

[9] The person that would place at the disposal of a number (determined or not) of persons a service provided into the information' society.

- the relevant behaviour codes to which the services' supplier has adhered and information about how these codes could be accessed electronically.

The services' supplier is obliged to offer to the recipient the possibility of using an adequate, efficient and accessible technical procedure, that could allow him to identify and remove the errors that happened while inserting data, prior to the offers' forwarding or to the given accept for it (art. 8 par. (2)).

The clauses and general conditions of the proposed contract should be placed at the recipient's disposal, in a way that could enable him to save them in order to reproduce them (art. 8 par. 4)).

The law states that the contract concluded by electronically means should be considered as effectively concluded at the moment when the accept given to the contract offer *has reached to the conscience of the proposer*)art. 9 par. (1). Let us notice that these legal stipulations are resembling to the ones of art. 35 Trading Code. At least at first glance, we might thus say that *the information theory* has been adopted. In the situation when, due to its nature or to the beneficiary's request, the contract should impose an immediate execution of its specific object (delivered service), it would be considered as concluded at the moment when the debtor has initiated its execution, except for the case when the supplier has previously asked for the accepts confirming (art. 9 par. (2)).

For the service' supplier, the law institutes the obligation to confirm the offer's receipt or, suiting the case, its accept, when the recipient does send, electronically, the contract offer or the firm accept given to the contract offer made by the service' supplier, in one of the following ways:
- by sending a receipt acknowledgement, online or through another equivalent mean of individual communication, at the address indicated by the recipient, in a 24 hours' delay from reception of the offer or of given accept. Let us remark the very short term into which the answer is due to come;
- the receipt' acknowledgement, or the one for the given accept, sent through a way that is equivalent to the one used for their reception, at the very moment when the service' supplier has been aware of the respective offer or accept, but this under the condition that the recipient could be able to save and reproduce this acknowledgement.

The offer, the accept and their receipt' acknowledgement, so performed, are considered as receipted when the sides to whom they are addressed could be able to access them (art. 9 par. (4)). By these stipulations *the reception's theory* becomes involved, since a legal presumption is instituted, which is quasi-twin to the one stated by it.

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THE USE MADE OF NOMINATIVE OR PERSONAL DATA ON THE INTERNET AND THEIR TRANSFER FOR TRADING PURPOSES

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Abstract: *The paper analysis the use made of nominative or personal data on the Internet and their transfer for trading purposes. The term spam does define electronically messages of trading nature, which and user could receive, in his own e-mail box, in massive quantities and with no request made for them. The cookies are local data files, passive, encrypted and personalized, which are inserted by the sites on a computer, through the surfing browser, at the moment when they would be accessed by the surfer. In recent years, the use of e-mail inside of companies has hugely amplified, this mean of communication becoming unavoidable. More and more companies place at the disposal of their employees computers with access to Internet and one or many e-mail addresses.*

Key words: *spam, cookies, internet transfer.*

1. The spamming. Definition and functioning

The term *spam* does define electronically messages of trading nature, which and user could receive, in his own e-mail box, in massive quantities and with no request made for them. They belong to the category of *unrequested messages* of whatever nature (economical, political, cultural, religious, etc.) received, with no request, in massive quantities, by an user, in his own e-mail box. In this category might be included the following types of messages:

- concatenated letters;
- pyramidal schemes;
- marketing made upon several levels;
- schemes with instructions about a quick welfare to be obtained through the network;
- offers made for pornographically sites;
- offers made for pirate software's; etc.

The sending of unrequested messages might be realized as a result of previously collecting e-mail addresses. This collection might be realized in various ways:

- due to the user's wilful registration on a certain website;
- from a list of e-mail addresses provided to the spammer by third sides;
- through automatically collection of e-mail addresses from the public space of Internet (webs, forums, etc.).

For the forwarder, the use of spam does not involve high financial investments or a lot of time to spend on it as he makes no effort in order to verify the addresses that he has collected by fraud. Generally, to launch such messages are employed automatically programs for collecting the addresses and accounts from free servers to release the messages.

There are three main modalities possibly used for sending spams:

1. to use your own e-mail servers;
2. to use servers provided by suppliers specialized in the domain of e-mail;
3. To use the e-mail servers of other Internet users, which have no protection system in this regard, or are not sufficiently protected.

Among the collecting methods, the most controversial in regard to the protection of personal data is the automatically collection of e-mail addresses from the public space of Internet. In the case of the other two methods, it is known that the user has wilfully agreed to provide his own address for registration. On the other hand, though the forwarder makes almost no investments for spamming, it might become expensive for their recipient to cope with such e-mails. So, the recipient might waste some time to erase them, either as simple messages from his e-mail box, or by following the method indicated by the message itself in order to erase his own e-mail address from the forwarder's list. The problems might not end yet, since the previously indicated erasing method

might not be efficient, therefore unable to produce the expected consequences. Further more, the recipient should have to assume the cost itself of receiving that many messages.

Methods of annihilation. In order to strive against spamming, various methods were defined. The main two methods are designated by the systems: *opt-in regime* and *opt-out regime*. Each of these two might be strengthened through complementary actions taken. The *opt-in regime* consists in forbidding the sending of advertising messages without the previous accept given by the recipients.

This formula may be realized in two ways: either the supplier should send the messages, but stating that the recipient would have the opportunity to refuse receiving unrequested advertising messages through a simple electronically message, or then the supplier should send to the recipient a previous expressed request of his agreement to receive advertising communications from him. When this condition would be satisfied, the supplier still should give an exact return address, and should accurately identify himself towards the recipient. Insofar, this second option ought to be preferred, since it could be able to cut down the advertising not requested messages' cost transfer towards their recipients.

The opt-out regime does authorize the sending of the unrequested electronically messages, in the absence of the recipients' refusal. Obviously favoured by the direct marketing companies, this type of regime requires an active role taken by the users, which might be realized by two possible ways: either under the form of an universal inclusion list, wherefrom each user should have the opportunity of refusing one or the other among the categories of electronically unrequested messages (political, cultural, trading ones, etc.), or by the opportunity, offered to the users, of withdrawing their own e-mail addresses from the forwarders' distribution lists.

Complementarily to these 2 types of regimes, in order to assure their respective efficiencies, some accessory actions might be taken. So, *an opt-in regime* might be accompanied by the obligation of correctly identifying himself for the forwarder. A penalty might be stipulated for the possible forgeries existing in the messages' headings. The *opt-out regime* might be accompanied by measures able to impose to the forwarders a previous taxonomizing of their commercial messages that should allow to the access' suppliers and to their users to select among the received messages.

Legislative evolutions. The European Directive nr. 58/2002, on the processing of personal data and on privacy's protection in the domain of electronically communications, does precise that automatically calling systems, bearing no human intervention, applied to fax and e-mail addresses, might be used for trading purposes, but only due to a previous agreement from the recipient. Similar stipulations are included to the Directive 31/2000, on the electronically trading, art. 7.

In the U.S.A. no federal law has been issued on spamming, though the first project about this matter was presented in 1997. The most recent project, entitled: *Controlling the Assault of Non-Solicited Pornography and Marketing Acts*, presented in March 2003, suggests that non-requested trading messages should be labelled as such (not necessarily through a standard method), that they should include instructions for opt-out and that they should include the forwarder's physical address. This project does forbid the use of deceitful address lines and of the forged headers for such messages[1].

Yet, in the U.S.A. most of the states have adopted an anti-spam legislation, which averagely imposes the obligation of providing *opt-out* instructions and/or the inclusion of a valid responding address[2]. In Romania, the Law nr. 365/2002 on electronically trading has forbidden commercial communications through e-mail[3], exception made of the case when the recipient had previously expressed his consent to receiving such communications (art. 6, par (1) of the Law).

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[1] http://www.spamlaws.com.

[2] Only the states of Florida, Kentucky and Oregon are deprived of such legislations

[3] According to the law, by commercial communication should be understood: "any form of communication destined to promote, directly or indirectly, the products, services, image, name or designation, firm or emblem pertaining to a trader or to a member of a liberal profession; do not constitute, by themselves, commercial communications, the following:
- information allowing direct access to the activity of an individual or moral person, especially in the cases of domains' designations or e-mail addresses;

The consent communicated through a message sent by e-mail would be enforced as valid if the following conditions should be simultaneously fulfilled:

a) the message is forwarded from the e-mail box where the forwarder (future recipient) wishes to receive the commercial communications;

b) the subject of the message is formed by the concatenation of the text: "I accept commercial communications from ...", written in capital letters, and the name, or the denomination, of the person on behalf of which the commercial communications should be transmitted[4].

2. The cookies. Use, creation, access

The cookies are local data files, passive, encrypted and personalized, which are inserted by the sites on a computer, through the surfing browser, at the moment when they would be accessed by the surfer. Two types of cookies do exist:

- *the session cookies*, which have no lapsing date and which are automatically erased at the moment when the client shuts down his browser;
- *the persistent cookies*, which are preserved upon the visitor's disk and which are not erased by the browser's shutting down.

Problems might rise about the cookies, related to:

the modalities of their creation;

- the type of information they could contain;
- the way of accessing them;

how they might be destroyed;

- their legal status.

Cookie files are created by the browser through which the user is surfing on Internet, at the command given by a site that was accessed by the user. The sites which command the creation of such files are the sites which do interact with the surfer "in real time". These sites may be servers profiled on trading, on e-mail delivery, on news and other information, etc.

The cookie files contain information with personal value for the user which accesses the respective site (name, first name, address, e-mail address, type and frequency of accessed information, etc.) and/or information about the system through which the respective site is accessed (name of the computer, name of the domain to which the computer pertains, I. P. number, type of employed browser, name of the user who opened the surfing session, etc.). The cookies' information might be accessed by:

- the user of the computer on which the cookie was created;
- the site which ordered the cookie's creation;
- any site which should command the access to the former site. Keeping into account the fact that the information from a cookie file is encrypted, suiting an algorithm, and with a key, both known only by the site who had ordered the cookie's creation, we are able to say that only the site having created the cookie has, practically, access to the cookie's information.

The legal status of cookie files. The legal status' problem of cookie files has two matters involved:

- the legal status of their creation; and
- the legal status of the use made of their contained information.

Suiting the modalities through which cookies are created, there are 3 methods for obtaining information:

1. Through a form to fill in, the user is asked about which personal data would he agree to be recorded. By inscribing the information into the form's cases and by its validation, the user gives his accept about the recording of these data. So, keeping into account the usual practice of Internet

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- communications made by a third side, independent from the concerned person, especially when made in perfect gratuity, related to an individual or moral person's products, services, image, name or trade marks".

[4] Government's Decision nr. 1308/2002 on the approval of the Methodological Application Norms for the Law nr. 365/2002 on electronical trading; the former's art. 7 par. (3)

surfing, he accepts willingly the creation of the cookie file. The user is also warned about what data he would be obliged to fill in, in order to have access to the respective site;

2. The information about the system which calls for the respective site is automatically read by it. Next the accessed site will, have the option to expressed ask for consent about recording it or not to ask for it;

3. The accessed site records information about the type of data accessed by the user, the search frequency related to these data, their downloading (total, partial, or no use made of them), with or without the warning of the user about gathering such information.

The purpose of recording data through cookie files might be:

a) to create databases of its own, to be distributed upon the computers of users, in order to ease the access to the respective site;

b) to make use of the respective information in order to improve the site's contents of information and for the purpose of advertising;

c) to make use of the respective information in order to exchange databases with other co-operating sites.

The sites which command the creation of cookie files may combine one or many methods of obtaining information, combining them next with one or many methods of using it. If the user should give his accept both about the category of information he would like to provide to the site and about how the site might make use of it, then, legally speaking, we would be entitled to say that the user's personal rights and liberties are, indeed, respected.

But, whenever data are picked up or used of without the consent of the user, following the situation's general and particular contexts, as well as the usual practice applied in such cases, the problem would rise of determining if any of the user's rights or personal liberties were (or not) infringed. The international organisms of our domain are hostile to these procedures, because they are formed without the user knowing it, and they are considered as dishonest gathering of information.

International organisms do recommend that users should be, explicitly and previously, informed about these programs' contents and duration, about how they might be refused and about the consequences of the refusal on the opportunity to visit the respective site[5].

Modalities of destroying cookie files. Starting from the premise that the user is the absolute master of his computer's resources, so, implicitly, of how its external memory should be allotted, the fact is obvious that, if the user should detain some minimal knowledge on computing systems and operational systems, then he would be able, at any moment, to erase the cookie files, definitively or temporarily, partially or totally. At the moment when the cookie files of a site are erased, the following consequences might appear:

- the access might continue to be granted, because the data from the respective files were also previously recorded into a database owned by the accessed site, but then, the cookie files destroyed by the user should be automatically re-created;
- the access might be forbidden, until the moment when the user should fill in another registration form; this situation occurs when the site has neglected to create a database of its own too, able to save data from the cookies;
- the access might continue to be granted, because the site should keep on creating cookie files, without asking for the user's consent.

Any browser allowing the surfing on the Internet is equipped to permit the realization, in regard to the modality of creating cookie files, of the chosen one among the following settings:

- not to create cookie files, at the request of the sites, without previously asking the user about that;
- to pose the question to the user, about their request of creating cookie files;
- to create automatically cookie files, at the sites' request, without asking the user about that.

[5] L. Bochurberg, *Internet et commerce électronique*, Ed. Dalloz, Paris, 2001, p. 98.

3. The persons' protection in regard to the processing of personal data and of their free circulation

Restriction brought to the processing of personal data. In view of the perspective of harmonizing the domain's legislations at the European level and following the line of the Directive issued by the European Union's Parliament and Council on the persons' protection in regard to the processing of personal data, and to their free circulation, the Romanian parliament has approved, on November, 21-st 2001, the Law nr. 677, with the purpose of guaranteeing and protecting the individuals' fundamental rights and liberties, especially the right to intimacy, to familial and private life, in regard to the processing of personal data[6].

Any processing of personal data should be performed only if the concerned person has previously given her consent in regard to this processing, expressed and unequivocally. The following restrictions were imposed:

- it is forbidden to process personal data pertaining to the person's origin, either racial or ethnical, to her political, religious, philosophical and other opinions, to her affiliation to a syndicate, as well as to her status of health or to her sex life (art. 7 par. (1)).;

- the processing of a person's numerical code or of other personal data bearing a generally applicable function of identifying her should be performed only if: a) the concerned person has given expressed her consent or b) the processing is expressed stated by a legal stipulation (art. 8);

- the processing of personal data pertaining to the perpetration of infractions by the concerned person, to penal convictions, security measures or administrative or disciplinary sanctions applied to her, may be performed only by or under the control of public authorities, within the limits of the powers granted to these letters by the law and under the conditions established by the special laws which govern these matters (art. 10).

The consent of the concerned person is not required, in the following cases:

- when processing is necessary in view of executing a contract or pre-contract of which the concerned person is a side, or in view of taking some actions, before concluding a contract, or pre-contract, at the concerned person's request;

- when processing is necessary in view of protecting the life, physical integrity or health of the concerned person, or of whatever other person might be menaced;

- when processing is necessary in view of the fulfilling of some legal obligation assumed by the operator;

- when processing is necessary in order to accomplish some measures of public interest or pertaining to exerting the prerogatives of public authority that the operator was invested with or the one of the third side to which data are revealed;

- when processing is required by the realization of a legitimate interest of the operator or of the third side to which data are revealed, under the condition that this interest should not prejudice, the concerned person's interest or her fundamental rights or liberties;

- when processing does concern data that could be obtained from documents that, suiting the law, are accessible to the public;

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[6] By personal data (art. 3) should be understood any information concerning an identified or identifiable individual person, that is to say someone who might be particularly identified directly or indirectly, by the reference made to an identification number or to one or many items that should be specific for the individual's identity. The items' nature might be: physical, physiological, psychical, economical, cultural or social. By processing of personal data should be understood any particular operation or set of operations performed upon someone's personal data, through automatical means or other, such as:

- collecting, - extraction;
- recording; - consultation;
- organizing; - making use of them;
- stockage; - juxtaposing or combining them;
- adapting; - blockage; - destruction;
- modifying; - erasure;
- revealing them to third sides through transmission dissemination or in any other way.

- when processing is made for exclusively statistical purposes, or for historical or scientifically research, and data should remain anonymous, for all the processing's duration.

Rights enforced. The law also institutes the rights of a person, pertaining to the processing of her personal data. So, in the case when the personal data would be obtained directly from the concerned person, the operator should be obliged to provide to the former the following information:

a) the identity of the operator and, if necessary, the identity of its representative;

b) the purpose for which the processing of data is done;

c) supplemental information like:

- the data's recipients or at least the category of to be recipients;

- if the supplying of all categories of data is or not compulsory, and what would be the consequences of the refusal of supplying them;

- the existence, for the concerned person, of the rights stipulated by the present law, especially of the rights of access, of intervention upon her own personal data and the right of opposition, as well as the conditions required for exerting these rights.

In the cases when data should not be obtained directly from the concerned person, the operator would be obliged, at the moment of collecting the data, or, the latest, till the moment of their first revealing to third sides, if such a revealing should be intended, to provide to the concerned person, at least, the following information, unless the concerned person is aware of it already:

a) the identity of the operator, and, if necessary, the one of its representative;

b) the purpose for which data processing should be done;

c) supplemental information, like:

- what categories of data are at stake;
- the data's recipients or these categories;
- the existence of the rights stipulated by the present law for the concerned person, especially of the rights of access, of intervention upon her own data and the opposition right, as well as the circumstances when they could be exerted[7] (art. 12).

The access right to the data[8], the intervention right upon her own data[9], as well as the opposition right[10] are rights of which any person does benefit.

In view of securing data confidentiality , the law stipulates (in its Chapter VIII – *Contraventions and sanctions)* that the following deeds do represent contraventions and would be penalized through:

- the operator's omission to notify;
- the ill-intentioned notifying;
- the illegal processing of personal data;
- the ignoring of the confidentiality obligation;
- the operator's refusal to provide information to the survey authority.

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[7] The following exceptions are allowed:
- the data processing would be performed exclusively for journalistic, literary or artistic purposes;
- the data processing would be performed for statistical purposes or for scientifical or historical research, and it should provide indications about the employed information sources;
- in any other situations where supplying such information would be impossible or would involve a too large effort in comparison with the legitimate interest that might be empeached;
- in the situations where the law expressedly states the data's recording or revealing.

[8] Any concerned person has the right to obtain from the operator, on her demand and for free, once a year, the confirmation of the fact that the data which concern her are or not processed by this latter (art. 13).

[9] Any concerned person has the right to obtain from the operator, on her demand and for free, the data's: actualizing, rectifying, blocking or erasure, especially for the mistaken or incomplete data, the data lacking conformity could also be transformed into anonymous ones (art. 14).

[10] The concerned person has, at whatever moment, due to legitimate and justified reasons related to her private situation, the right to oppose herself to the processing of data which concern her, exception is made in the case when contrary legal stipulations do exist (art. 15).

4. Nominative data, used of by the employee

In recent years, the use of e-mail inside of companies has hugely amplified, this mean of communication becoming unavoidable. More and more companies place at the disposal of their employees computers with access to Internet and one or many e-mail addresses.

But with this fact, the problem arrived of how to control the messages leaving from the respective e-mail boxes, or entering them. Since the employers have raised the control claim over these e-mail boxes, the employees came to invoke privacy's protection and its aspects. In order to eliminate these quarrels, a first solution should be that the employee should sign a form through which his employer brings to the former's knowledge the functioning statute of the e-mail system, as well as the monitoring modalities used over it.

The Appeal Court of the State of California has also decided towards this sense in the case Bourke vs. Nissan Motor Corp. During a sample session regarding the functioning modalities of e-mail exchanges between a dealer and the Nissan company, e-mails exchanged between the dealer's employees and the companies were chosen at random. Due to this sample session, the claimant, employed by Nissan, got fired. The reason of this fact was that a private e-mail was presented through this random selection, which contained personal data concerning the sex life which did not fit with the regulations of internal functioning of the e-mail system, which had been accepted by the claimant through his signature, when he was hired.

In the case when the employee did not sign for acknowledging a regulation for the e-mail's functioning and monitoring system, there are a lot of reasons standing for the employer's legal possibility of accessing electronically information forwarded or received by the employees through their professional e-mail box. Firstly the employers might argue about an exaggerated use made by their employees of the e-mail, for their own private purpose. This fact might constitute a problem, because the intense use made of e-mail could indeed become expensive, financially, for the employer.

On the other hand, the unreasonable use of e-mails might prejudice the company's public image[11]. Secondly, the employers may prove that, for an employee, the e-mail access is a necessity, insofar this latter is involved in the conclusion of contracts or establishing some relationships for the company[12]. Thirdly, it might be necessary to access the employee's e-mail box in order to preserve it from informatics viruses.

Even in the case when the employer should "promise" to the employee the confidentiality respect of the latter's e-mails, the arguments presented beyond would still enable legally the employer to access the information electronically receipted or forwarded by the subordinates through their professional e-mail addresses. The Federal Court of Pennsylvania has decided in this sense, on the case Smyth vs. Pillsbury.

The defendant "had promised" to the claimant the respect, during his employment contract, of the e-mails' confidentiality. Yet, the defendant was monitoring the e-mail server's activity as well for sending as for receiving e-mails, for the alleged reason of protecting itself from damages brought to its trading reputation.

Due to the impact of Internet and computing techniques upon all the society's activity domains, more and more employees demand to the employer the access to an e-mail box. This fact effectively leads to supplemental financial expenses for the employers. So, most of them, do elaborate real monitoring strategies in regard to professional emails, in order to:

- diminish expenses, by a rational use of this resource;
- avoid the deterioration of their trading image;
- prevent the employee's infractions, possibly perpetrated through electronically means.

[11] For example, if the employee would transmit pornographical images.

[12] For example, in the case of the employee's absence, it might be necessary to access the messages which would require urgent responses from the company.

Yet, these strategies of e-mails' monitoring ought to respect, as it should be possible, this correspondence's secret.

If the employee should wish for a safer confidentiality of his own private e-mail correspondence, he could use the services of specialized e-mail suppliers. But, even into this case, under the circumstances of the augmented phenomenon of international terrorism, the state's competent authorities might request from the e-mail suppliers a partial or total monitoring of e-mail correspondence, regarding either individuals or moral persons.

However, if an increased protection is aimed for someone's correspondence, specialized programs able to encrypt the respective messages might be used.

In Great Britain, the employers are entitled, since 2000, to open their subordinates' emails, with no necessity for an authorization previously given by the messages' forwarder or recipient[13].

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CRIMINAL LIABILITY IN THE INTERNAL LAW OF THE EUROPEAN UNION MEMBER STATES

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Abstract: *The purpose of present paper is to analyse the criminal juridical liability within the European States through a more detailed presentation of two legal systems, the French and the Romanian one.*

Key words: *Criminal, Liability, Europe.*

1. Brief History of the Juridical Liability

Such as many other juridical notions, the criminal liability during its conceptual evolution was preceded by a few theses, having initially a social meaning and therefore, a wider application range. Such concepts are the social responsibility and the liability, which taken in their vast meaning of social phenomena, can be met from the most ancient times, even from the times when the first human society appeared.

Gradually there appears a clearer delimitation between the notions of "responsibility" and "liability"; the latter does not aim the value system as much (as the former one does), but much more the normative system of the society, based on which the complex relations between the state authorities and structures, on one hand, and citizens, on the other hand, are realized.

Although the responsibility and the liability remain simultaneous and mostly similar phenomena, the liability becomes more and more individualized and separated, constituting a distinct entity founded on special external factors which manifests as an expression of compulsory requirements imposed by the State to the citizens. The final purpose is the protection and the conservation of the important social values, while its functionality is ensured by a sanctions system.

The definition of the juridical liability notion generated multiple controversies. Thus, Henri Lalou, starting from the etymological significance of the word "liability", relates the idea of liability to the obligation resulted from an infringement.

The Italian doctrine, more specifically oriented towards the criminal liability, defines the liability as the offender's obligation to bear criminal punishment. The German school, with its illustrious representatives G. Haney and Wagner, affirms that the liability is the expression of a "conduct measure required by the law".

The present definitions describe the juridical liability as the institution which comprises all the juridical norms that regulate the juridical relations born within the specific activity, carried out by the public authorities, pursuant to the law, against those who infringe or ignore the lawful order in order to ensure the observance and the promotion of the juridical order and the public welfare.

Starting from the XII century in the English criminal law, under the influence of the Roman law and the Canonical Law, there were crystallized the first points of view imposing the criminal guilt at the basis of the criminal liability.

Due to historical reasons, the English law went through a special evolution, independently of the Roman juridical system. As main consequence of this evolution, the Anglo-Saxon law does not have the classifications or the definitions that the Roman traditional law does, or the principles born from the common basis of the continental law systems. As opposed to the continental model, the basis of the English law is the jurisprudence (the common law). That is why certain principles or general applicability rules are quite difficult to distinguish, as long as the jurisprudence resumes it all to giving solution to actual cases; therefore the presentation of an English law institution is only

but a complex one. Instead of criminal law, in England there were and there are still functioning many criminal laws, which were adopted even since the XIV Century. The oldest law still functioning presently is the Law regarding the country treason of 1315.

In the French criminal law there were already modern orientations regarding the criminal guilt concept even since the XIX Century. Thus, there was brought forward the matter of determining the forms of criminal guilt. In the Second Book of the Criminal Code and Criminal Trial Code of 1810 there were provided the dispositions regarding the discharge of criminal liability in case of insanity or moral and physical constraint. Pursuant to the French Criminal Code and Criminal Trial Code, the co-participants shall be held criminally liable such as the guilty persons, except when the law stipulates otherwise. Article 61 also stipulated that any person who was aware of an offender's illicit deed or who offered refuge or gathering place shall be punished as co-participant. The provisions of the respective code also mentioned the fact that the persons who committed the deed in state of "madness" or were "forcedly imposed", should be absolved of criminal liability.

In the German criminal law the basic source was the Criminal Code of May 15, 1871, having as author the German jurist Adolf Leonar. This code of law or criminal book is the basis of the present criminal code. The book was based on Kant, Hegel, Binding, Feuerbach philosophy, taking the ideas from the criminal law classic school with its theories of psychological guilt and the freedom of will, where the criminal liability was objectively founded on the generation of damages within the lawful order and the punishment concept represented the payment for the caused damage.

2. The Criminal Liability Notion

In the specialty literature there are mentioned many distinction criteria, such as the criterion of the nature and the social importance, of the interest and the injured value, the criterion of the type of juridical sanction, the criterion of the subjects' quality etc. The classification according to the defining particularities criterion of the illicit from the infringed juridical norm point of view conduct has a special theoretical and practical importance.

The criminal liability, as distinct form of juridical liability, possesses certain defining features which distinguish it from the other forms. The consequences of the attempts to turn the juridical liability term into a concept had inevitable repercussions upon the criminal liability notion as well.

Therefore, there are widely spread opinions regarding the definition of the criminal liability: some authors sustain that it is a person's obligation to bear a criminal sanction for having committed an infraction. The definition was criticized due to the belief that it realized a confusion between liability and the sanction itself, ignoring the fact that the sanction is nothing but the instrument for achieving the juridical liability.

According to other opinions, the criminal liability should be regarded as a constraining juridical relation with a content is formed of the obligation to bear a juridical sanction and the right to apply a criminal sanction; such right belongs to the State and it is exercised by its specialized organs. However, there are reservations to this definition as well: its sustainers tried to express a notion by outlining in the most general and abstract manner the substance of the respective phenomenon and they did not trace distinctions between the content elements of the juridical relation and the juridical norm itself.

Finally, there are other authors who sustain that the criminal liability grants content and finality to the criminal juridical relation, "by determining objectively and subjectively, actively and passively, the mechanic incidence of the criminal sanctions" (I. Oancea, *Criminal Law Treaty. General Part*, ALL Juridical Publishing House).

We can exhaustively define the criminal liability as the juridical institution which comprises all the juridical norms regulating the juridical relations that form the object of the criminal law; such norms are born within the scope of the activity regarding enforcing the criminal liability upon anybody who infringes or ignores the lawful order, by committing infractions; it is an activity carried out by the public authorities pursuant to the law and governed by its own principles, in order

to protect the essential social values, confirmed by the constitutional order, in order to maintain and promote the juridical order and the public welfare.

3. Delimitation of the criminal liability from other forms of juridical liability

Each form of juridical liability has certain distinctive characteristics which cannot be found in the other forms. This is also valid in case of the criminal liability. Its specific character consists in the subject's illicit behaviour, which must have the form of an infraction. Besides this, the criminal liability is based on the concept of sanction. In most cases the criminal liability is accomplished or put into practice by determining and executing the penalty. However, the liability and the penalty are not identical notions, so by no means they should not be mistaken. A person who bears criminal liability can be exempted of penalty pursuant to and in conformity with the law. Therefore, the criminal liability is a considerably wider and ampler category then the criminal penalty. The penalty does not wear out the essence of the liability notion and it cannot exist without liability, while the liability is possible without applying the penalty.

Another qualifying sign separating the criminal liability from other forms of juridical liability is constituted from the organs convoked to determine the types of liability. The criminal liability is also distinguished by the organs which have the right to apply the sanctions: only the law courts. In case of the material liability, however, the influence measures can also be applied by the administrations of the juridical persons, while the administrative sanctions can be applied by the law courts, as well as by other specialized organs and by persons with liability functions.

Another characteristic of the criminal liability is the level of the applied sanction, as well as the fact that these sanctions do not have a specific character, such as the financial character of the sanctions in case of the civil and material liability.

Finally, the criminal liability is distinguished by the quality of the subjects. There can be subjected to the criminal liability only the physical persons who have committed, intentionally or imprudently, a socially dangerous deed stipulated by the criminal law and who has reached the age indicated by the law, who is responsible and possesses certain specific qualities stipulated by the law.

4. The principles of the criminal liability

In the criminal law system of the European States, the criminal liability, as well as all the other institutions, is governed by a series of juridical principles.

The national criminal legislations of all the states promote the fundamental principle according to which the infraction is the only ground of the criminal liability.

The obligation corresponding to a person for having infringed a criminal norm to bear a penalty for the committed infraction and the judicial organs right to apply the penalty, represent the criminal liability as a form of the juridical liability.

Inn order to enforce the criminal liability it is necessary that the deed should be committed with guilt, to present social danger and to be stipulated and punished by a criminal norm; the absence of any of these elements shall have as consequence the lack of criminal liability.

The criminal liability is personal and corresponds to the offender only; the individualization of the liability is accomplished by the fact that the penalty applied to each author or participant should correspond to the type of the infraction, to the circumstances of having committed the deeds and it should be proportional to the gravity of the deed.

The criminal liability always corresponds to the physical person and it is personal, for engaging the liability being necessary the existence of the guilt, which involves the exclusion of the collective criminal penalty and liability.

The necessity to restore the lawful order infringed by committing the offences led to the institution of the rule according to which the criminal trial shall be initiated and carried out officially (the principle of the official criminal trial). In case of the infractions with a reduced gravity or regarding the interpersonal relations or regarding personal life, the Criminal Code and other laws with criminal dispositions stipulate that the criminal action cannot be put initiated or exercised unless the damaged person has expressed the desire to bring the perpetrator to justice by introducing a previous complaint before the judicial authorities.

The previous complaint constitutes a criminal law institution, its absence representing a cause to remove the criminal liability (art.131 Criminal Code).

The institution has also a trial related reflex which has direct repercussions over the possibility to exercise the criminal action and implicitly over the criminal liability.

The main characteristics of the criminal liability have incidence in the international law as well, implicating particularities determined by the nature of the international juridical relations and the content of the specific infractions. However, the law stipulates different procedures for applying the criminal liability for certain categories of persons (foreign citizens, foreign persons enjoying diplomatic immunity (more exactly extraterritoriality and inviolability), dignitaries, juridical persons etc. the foreign citizens enjoying diplomatic immunity do not fall under the jurisdiction of the host-country (the International Convention of Vienna 1961).

Therefore, the principle of the criminal liability legality has a fundamental importance; it stipulates that the entire process of applying the criminal liability to the persons who have infringed or ignored the lawful order should be carried out only within the limits and the context determined by the legislation in force. Only the law can determine which illicit acts are considered infractions, which are the organs with the competence to examine the respective infringements of the lawful order, what sanctions can be applied, which are the conditions for enforcing and executing such sanctions, as well as the causes which remove the infraction character of the criminal act or criminal liability.

Another principle, not any less important, is the principle of the personality, also known as the principle of the individual criminal liability, which determines the strictly personal character of the liability. Its addressee can be no other than the person guilty of having committed an infraction.

The principle of unique criminal liability involves the rule according to which there can only be one criminal liability for one infraction. However it does not mean that the main criminal liabilities cannot be accompanied by complementary penalties or by an accessory penalty (certainly, under the condition that such criminal sanctions should cumulate out of different reasons and should have different functions). Besides this, the criminal liability can coexist and be accompanied by other forms of juridical liability, such as the administrative, disciplinary or civil liability.

The humanism principle involves the utilization of those instruments which do not lead to the humiliation or degradation of the human being and which do not injure the dignity of the person subjected to the criminal liability.

The finality principle involves the rule according to which, any person who has committed an infraction shall be subjected to the criminal liability and shall bear criminal sanction, regardless of the social position or the occupied position.

Very closely related to this principle is the principle regarding the equality of the persons before the law, which stipulates that everybody has the same rights and nobody should benefit of privileged treatment; this principle forbids the any kind of discriminations whatsoever during then criminal liability process.

The Member States apply in their national criminal law the “ne bis in idem” principle, pursuant to which a person who was permanently judged within a member state, cannot be prosecuted for the same deed in another member state, provided that, in case of conviction, the penalty should have been executed or in process of execution or cannot be executed any longer in conformity with the legislation of the State in which the conviction was pronounced.

In the French criminal law, the guilt is built on the basis of an ample significance, which can characterize any infraction activity. It consists of the mere volitional element, because any human activity consists of material elements, as well as of psychic elements.

The German criminal law is the one of May 15, 1871 and it was essentially modified at March 10, 1987. However, the German criminal law is not entirely coded, because other legislative acts are also applied. Following the union of the Federal Germany with the Democrat Germany at August 31, 1990, on the former Democrat Germany territory some of the dispositions of the January 12, 1968 Criminal Code are still applied.

The present criminal code of Germany instituted the formal definitions of the infractions. At §11 the terms used in this code are explained as follows: "It is considered illegal an activity which gathers the elements comprised within an infraction content which is stipulated by the criminal law." In the criminal doctrine, infraction means an illegal activity committed with guilt, having the signs and the features of one of the infractions incriminated in the legislation, being an anti-juridical one subject to the application of the criminal sanction.

The criminal code of Germany systematizes differently the infraction matter. Thus, first it is defined the perpetration and the omission infraction (§13), as well as the institution of the liability for the person who acts through another person (§ 14); further on it is regulated the guilt (§15; §18), the error regarding the circumstances of the deed (§16), the error regarding the interdiction (§17), the minority (§19), mental alienation (§20), diminished responsibility (§21), tentative (§§22-24); participation (§§25-31); self-defence (§32); state of necessity (§§33- 35) etc. Therefore, §15 of the Germany Criminal Code stipulates that only the intentional action shall be punished, if the law does not explicitly stipulates that the faulty action is punished as well.

At May 26, 1996 the new Spanish criminal code came in force; it was adopted in 1995 and it replaced the 1870 code. The inspiration source for this code was the 1978 Spanish Constitution. We can also point out the fact that within the Spanish criminal code, there are also functioning several special criminal laws.

The Spanish criminal code comprises in its regulations the definition of the intentional and faulty action and inaction. Article 10 of the code mentions as acknowledged infractions and offences those actions or inactions punished by the law and committed intentionally and imprudently.

The Italian criminal code regulates within the title regarding the infraction, the causality relation (art. 40), the participation of causes (art. 41), the guilt (art. 42-43), the punishment objective conditions (art. 44), the fortuitous case and the force majeure (art. 45), the physical constraint (art. 46), fact error (art. 47), the provoked error (art. 48), putative act (art. 49), victim's consent (art. 50), enforcing a right (art. 51), self-defence (art. 52), legal use of weapon (art. 53), state of necessity (art. 54), faulty excess (art. 55), tentative (art. 56), the infractions committed through media (art. 57-58), infraction circumstances (art. 59-70), the participation of infractions (art. 71-84). Thus, article 42 of the Italian criminal code stipulates that nobody can be punished for an action or inaction stipulated by the law as infraction, if it was not committed knowingly and willingly. Nobody can be punished for an action stipulated by the law as offence, if it was not committed intentionally, except the case expressly stipulated by the law in which the offence is committed with praeterintention or out of guilt. The law determines the cases in which the result is differently placed on a person's charge as a consequence of his action or omission.

Article 43 stipulates that the offence is intentional, if the harmful or dangerous result, which is the result of the action or the omission that the existence of the offence depend on, according to the law, is foreseen and intended by the perpetrator, as a consequence of its own action or omission: the offence is committed with praeterintention, when a more serious result than the one intended by the agent derives from an action or omission; the offence is out of guilty when the result, even if it is foreseen, is not intended by the agent and it occurred due to negligence, imprudence, ignorance, lack of skill or by not observing the law, the regulations, the orders or the discipline rules.

In 1997, in Poland appeared a new criminal code, applied at January 1, 1998, which renounced to the legislative definition of the infraction. The social danger notion of the infraction was replaced with the prejudice character. When assessing the prejudice character of the infraction, pursuant to article 115 of the Polish criminal code, the type and importance of the social value are taken in consideration, the degree of the caused prejudice or which could have been caused, the value, the circumstances, the manner and the methods of causing it, the importance, the guilt degree of the perpetrator who contributed to committing it, the reason and the type of the infringement of the safety measures, the infringement degree.

5. The criminal liability in the Romanian criminal law

The criminal liability in the Romanian law system is based on the same specific European principles previously described and constitutes the fundamental juridical institution of the criminal law, which, alongside with the infraction institution and the sanctions institution form the pillars of the criminal law system.

5.1. Replacement of the criminal liability

The replacement of the criminal liability corresponds to the criminal policy and the criminal law principles, regarding determining a concordance between the social danger degree of the committed actions and the nature of the juridical liability to the determined.

By the replacement of the criminal liability, the juridical constraint regarding the achievement of the criminal law order is diversified.

In order to decide the replacement of the criminal liability, the court should check if the legal conditions related to infraction and perpetrator are met. Thus, in order to be able to rule such measure, the punishment provided for infraction should be of at most 1 year or fine, the deed should present a reduced degree of social danger, the damage should be recovered entirely, the perpetrator should regret having committed the deed, and the court should consider that the perpetrator can correct himself without the application of a punishment. At the same time, it is imposed that the perpetrator should not have been convicted before or applied administrative character sanctions twice.

5.2. Removal of the criminal liability. Causes

There are circumstances posterior to the commitment of the infraction which lead to the conclusion that the perpetrator's criminal liability is not necessary or can no longer be applied. Such states, situations, circumstances leading to not applying the punishment to the perpetrator, acknowledged by the legislative bodies and regulated by distinct juridical institutions are causes that remove the criminal liability. Such causes are:

A. Amnesty

The amnesty is the clemency act granted by the Parliament pursuant to the law which removes the criminal liability, the execution of the penalty and the other consequences of the conviction for infractions committed up to the date when the amnesty law appeared, due to criminal politics reasons.

The effect of the amnesty is the removal of the criminal liability for the committed deed. Thus, if the criminal trial has not been initiated yet, it shall not be initiated at all; on the other hand, if the trial has already been started, it shall cease at the moment when the amnesty act is applied. There is an exception to this case, when the trial continues at the defendant's request so that he can prove his innocence. If at the finalization of the trial, the defendant is found innocent, the court shall pronounce an acquittal decision. In case the defendant's guilt is found, he shall not be convicted, applying the provisions of the amnesty deed instead.

At the same time, the effect of the amnesty is the cessation of the execution of the penalty, as well as the removal of all the consequences resulting from the conviction. This means that the respective conviction shall not be taken in account when determining the relapse state and it shall not constitute an impediment in granting the parole. Moreover, if the penalty has been enforced, the execution shall cease, but if it has not been enforced yet, it shall not begin at all.

B. Prescription. Types

A first form of the criminal prescription is the prescription of the criminal liability. Its effect is the removal of the criminal liability for the committed deed. That is why, in the criminal law, the prescription is considered to represent a sanction at the address of the judicial organs passivity, as they had the right to sanction the perpetrator. The effect of the criminal prescription is similar to the one of the pre-conviction amnesty.

The prescription operates regardless of the infraction seriousness degree, except the infractions against peace and humanity. The prescription terms are determined according to the nature and the duration of the sanction stipulated by the law for the deed to be prescribed, taking into account the special maximum duration of this penalty.

The prescription term starts elapsing as of the date when the infraction was committed (when the result occurs, in case of the infractions with result, when the action or inaction takes place, in case of the formal infractions and when the infraction wears out, in case of infractions with execution duration). In case of minors, the prescription terms are reduced to half. Therefore, in case of minors, there operates a double reduction, because the trial term is calculated according to the limits of the penalty reduced to half and then the so calculated term is also reduced to half. For example: In case of a sentence with prison from 5 to 15 years, the trial term shall be of 4 years.

The second form of the prescription is the prescription of the execution of the penalty. Its effect is that the penalty is considered as executed when a certain time interval stipulated by the law has passed.

The prescription terms, in such case, is determined according to the nature of the penalty for which the execution is prescribed, taking into account the exactly determined duration determined by the Court for such penalty.

C. Absence or withdrawal of the previous complaint

The lawsuit is usually initiated officially. However, there are exceptions when the promotion of a lawsuit is up to the harmed person. In such case, the reduced social danger of the infraction is taken into account or the fact that the development of the lawsuit could cause moral prejudices to the harmed person.

If the law stipulates that the action is initiated only following the previous complaint of the harmed person, the absence of this complaint removes the criminal liability. By exception, the lawsuit can also be initiated officially when the harmed person lacks of the exercise capacity or has a restricted exercise capacity.

D. Parties' reconciliation

It is a bilateral act by means of which the defendant and the harmed party consent to end the lawsuit, removing the criminal liability and extinguishing the lawsuit. As opposed to the withdrawal of the previous complaint which operates *ad rem*, the parties' reconciliation produces effects *in personam*, operating only between the reconciled parties. In conclusion, the active or passive solidarity does not operate.

6. The criminal liability stipulated by the French code

Pursuant to the French code, the criminal liability represents the obligation to answer for having committed the incriminated deeds and to bear the sanctions stipulated by the text of the law for the respective deed.

In democracy, the citizens have rights, but also obligations. The freedom is closely related to responsibility and involves the enforcement and the observance of certain limits in order to be correctly exercised. As opposed to the civil liability, the criminal liability involves an action from the State in order to remove any element that could influence the public order.

The criminal liability is stipulated by the French criminal code in the articles 121-122 and it should be regarded from the perspective of three essential aspects:

- The criminal participation;
- The forms of the criminal liability;
- The cases removing the criminal liability;

<u>The criminal participation</u>

Regarding the criminal liability, at article 121-1 the French code stipulates in the first place an essential principle, meaning the personal criminal liability principle according to which only the person who has committed or participated to perpetration of an infraction has to answer. Therefore, the criminal liability cannot intervene for another person's deed and it cannot be collective either or, differently put, a group cannot answer for a person's deed.

A first form of the criminal participation is being the author. The author of an infraction is the one who commits the execution deeds which represent the material element of the infraction. In case of infractions committed by omission, the author is the one who, pursuant to the dispositions of the law, had the obligation to act in a certain way but he didn't.

In the previous legislation of the criminal code, there was also stipulated the institution of the collective liability, but it disappeared when the present criminal code came in force, although the common guilt still exists within the law courts jurisprudence, especially in case of association in order to commit criminal actions. However, from the perspective of the present legislation, in case a group of persons has committed an infraction, each of them shall be liable as author according to the performed execution acts.

The second form of the participation stipulated by the French criminal code is being the co-author. The co-author is the one who participates directly to the perpetration of the infraction alongside with the main author. He is liable for the same infraction even in case the main author is later on declared irresponsible or suffering from insanity. Within the process of penalty individualization, in case of the co-author, the penalty can be diminished or increased according to extenuating or aggravating circumstances retained in charge of the defendant.

The third and the last form of the criminal participation stipulated by the French code is being the moral author. The moral author or the instigator is the one who determines another person to commit a deed stipulated by the criminal law by any means. The French law does not provide nor acknowledge independently this criminal law institution. The conviction shall be done by taking into account the complicity institution which takes the form of complicity by determination and challenge. When instituting the new criminal code, the issue of introducing an autonomous criminal liability for the moral authors of the infraction was also debated. This possibility was very rapidly abandoned by the electoral code commission. However there are a few cases stipulated by the criminal law in which the distinct sanctioning of the moral authors is do possible and the most important is the one of determining a person to commit suicide.

The French criminal code stipulates that the author is not only liable for having committed the infraction provided by the law, but in the expressly stipulated cases, he is also liable for the unsuccessful attempt to commit the infraction, that is for tentative.

In fact the tentative is defined as the attempt to commit an infraction, by enforcing the infraction resolution, an attempt which does not produce its effects due to objective reasons, independently of the perpetrator's will.

At the same time, the code defines the complicity institution as well, establishing as accomplice a person who knowingly helps or assists the perpetrator in preparing or committing the infraction. Another element characteristic to the French code is considering as accomplice the person who instigates the perpetrator to commit the infraction.

The tentative, as stipulated by the French law, should be understood from the perspective of two essential aspects:

The first aspect is the one of the material element of the tentative. Thus, the tentative is characterized by the beginning to execute the material element of the infraction. The perpetrator is no longer in the stage of the preparation acts, but he does not finish the infraction resolution either. For example, the insurance fraud tentative led to establishing a clear jurisprudence. Thus, it was considered in practice that a simple simulation of a disaster is a preparatory act which is not punished because it does not tend to nor causes to obtain the insured sum from the insurer. However, it was considered tentative and sanctioned accordingly the false declaration of a situation in order to determine the insurer to pay the insured sum.

Given the real situation, the criminal law understands to grant impunity to the perpetrator in certain situations. Thus, the voluntary relinquishment before the consummation of the infraction, determines the perpetrator's absolution of liability. The motivation for such argument was that the perpetrator, by abandoning the execution of the infraction activity, proves that he is not dangerous. At the same time, by abandonment, the perpetrator proves that his decision to commit the infraction was not irrevocable. In this way, the law encourages future perpetrators in abandoning the commitment of an infraction, in this way being exempted of liability.

In case the infraction activity is interrupted or it does not produce its effects out of reasons independent of the author's will, meaning the tentative, which according to the French criminal code is punished.

In order to benefit of impunity, the voluntary relinquishment should intervene before the consummation of the infraction. However, some special texts reward the active regret attitude posterior to the commitment of the deed, by granting impunity, such as the case of the conspiracy infraction, but still this is an exception and it is not considered by the criminal code as a posterior voluntary relinquishment, but as qualms of conscience without juridical value.

The second essential aspect is the subjective element within the tentative. Thus, the perpetrator has to commit the infraction intentionally in order to be held liable for its consequences. This element is essential. The intention to commit the infraction is the one that justifies the sanction of the tentative, regardless of the result, as it affects the public order.

A particular case of the tentative is represented by the impossible infraction. It is defined as the unconsumed criminal deed due to the objective impossibility to commit the respective infraction and not due to an error made by the perpetrator or to a fortuitous event. In case of tentative for such an infraction, the code does not stipulate any sanction, taking into account the fact that the public order is not affected.

Forms of the criminal liability

The physical persons' criminal liability

The essential rule in this matter is the one according to which nobody is liable from criminal point of view, unless for his own deed. This rule had only jurisprudential character anterior to the present criminal code.

The only exception to the rule mentioned above is the implication of a person's liability for the deeds of another person under his authority. An example in this purpose can be constituted by the liability corresponding to the manager of a company for the deeds committed by an employee in the exercise of his duty.

A special situation in case of the physical persons' criminal liability appears when the perpetrator is minor. There can be made a clear distinction between the minor perpetrator and the adult perpetrator. In case of the minor person, there appears the issue of a different assessment of the deed, special procedures and even distinct courts that is the law courts for minors.

Until 1912 there was not a special treatment in case of minors. If a decision was pronounced against a minor, the penalty was reduced to half. The criminal law adopted in 1912 determined the appearance of the law courts for minors and instituted at the same time an absolute presumption of irresponsibility for the minors under 13 years old. There was also created a special sanction: the supervised freedom which allowed the placement of the minor in a re-education institution. In such cases, following the 1945 Ordinance regarding the juvenile delinquency, the minor under 13 years old cannot be convicted, but he is not absolved of any liability either. That is why the code stipulates that the minor having power of discernment is criminally liable for the criminal acts he committed. Therefore, the minor under 10 years old proved without power of discernment benefits of absolute criminal irresponsibility, the minor under 13 years old having power of discernment bears educational measures, remaining at the appreciation of the judge to what extent, the minor between 13 and 16 years old supports educational measures and within the common law benefits of the reduction of the stipulated penalty to half, and finally, in case of the minor with age between 16 and 18 years old the regime is more complex, meaning he can benefit of minority treatment, but the same can be removed in case of relapse, according to the law.

The juridical persons' criminal liability

Pursuant to the French criminal code, the juridical persons, except the State, shall be held liable according to and only in the cases expressly stipulated by the law. The criminal liability is implied when the organs representing a juridical person commit a deed stipulated by the criminal law in its behalf.

The juridical person's liability does not constitute a cause for removing the authors or the accomplices' liability.

The juridical person's liability involves the existence of the juridical personality. In general, an infraction committed before the set up of the juridical person cannot be charged to it. At the

same time, the law institutes the principle of the specialization. Thus, the juridical persons are not held liable unless in the cases expressly stipulated by the law.

Although the law expressly stipulates that the State cannot be held liable, the local authorities can be brought before the justice for infractions committed during the exercise of activities susceptible to form the object of a convention for assigning a public service.

The juridical person's disappearance, even by merger, shall naturally determine the cessation of its criminal liability

Cases which remove the criminal liability

The objective causes are the following three:

- The authorisation by the law. This involves the existence of a contradiction between a criminal text and another legal text, whether civil, administrative or criminal. For example, the use of violence by state authorities or certain medical procedures could constitute infractions to the extent in which they would not benefit of legal circumstances.
- Self-defence. The person who commits a criminal deed against a person or an asset, by carrying out in this way a necessary, simultaneous and proportional action for the protection of the person or the asset, shall benefit of this criminal liability removal cause. The features of self-defence are the following: an unjust action against the person in self-defence; a present action and a retort concomitant with the action; a necessary retort; a retort proportional with the action.
- The state of necessity. It involves the existence of a reaction necessary and proportional to an imminent danger. Contrary to the self-defence, the state of danger involves the existence of a situation of objective danger, not necessarily related to an unjust action.
- Force Majeure. This is the unexpected, unpredictable and irremovable circumstance, which causes a person's action or inaction to produce illicit effects.
- Lawful error. Pursuant to the French criminal code, if it is established that a person actually believed he could legally perform an action as a consequence of a lawful error that could not have been avoided, that person shall not be held liable for the respective action.

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HUMAN RIGHTS PROTECTION IN THE CASE OF PERFORMING A SEARCH

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Abstract: *The search is a complex activity which involves interference with the most intimate details of private and family life, with the rights of ownership over immovable's, over lands.*
When ordering a search, the requirements of necessity and proportionality to the purpose pursued, as well as that of respect for human dignity, must be observed.

In order for this activity to be effective, the proper tactical methods of performing it, the material means required, the amount of time necessary to carry it out, the participants must be established, without losing sight of maintaining the activity, from beginning to end, within the limits determined by the law.

Searches may be performed on a group of people, in which case measures for the surveillance and prevention of violent acts are necessary, in the hypotheses of searching for persons (either sequestered or trying to elude criminal proceedings), of searching for certain objects (such as: searches in order to find narcotics, art objects, weapons and explosives, secret writings). According to the provisions of article 100 of the Romanian Criminal Procedure Code, the search may be: search of premises or body search.

Key words: *search, human rights, investigation.*

I. General Considerations. The search is a tactical activity carried out by judiciary bodies in order to find and take away objects, documents or various valuables that are important to the case under investigation, and also in order to find persons that are trying to elude criminal liability, when the person who was asked to deliver those objects, documents or valuables denies their existence or the fact of possessing them[1].

According to article 100 of the Criminal Procedure Code, the search may be: search of premises or body search. In the speciality literature, there are numerous classifications regarding searches. These classifications are based on various criteria, among which:

a) according to the place of performance of the searches: body searches, searches of the private premises, searches of the place of employment, searches of locations open to the public[2];

b) according to the time of performance, they may be: daytime searches, nighttimes searches;

c) according to the participating persons: searches in which only the bodies entitled to pursue criminal procedure take part, searches in which other experts take part too;

d) according to the number of persons on which they are performed: searches performed on just one person, searches performed on the private premises of several persons.

Other classifications make reference to the search of persons, which may be: that of clothing and body search, search of the place, of buildings and open locations respectively. Regardless of its type, the search is performed by applying the same tactical rules.

[1] I. Mircea, in the work cited, p. 298; I. Sima and collaborators, *Forensics Dictionary,* The Scientific and Encyclopaedic Publishing House, Bucharest, 1984, p. 148.
[2] C. Aioanițoaie, I. Botoc, collectively, *Forensic Tactics,* M.I., S.E.C., Bucharest, 1989, p. 175, I.Mircea, in the work cited, p. 298; C. Aioanițoaie, V. Bercheşan, I. Botoc, in *Forensic Tactics Treatise,* 2nd edition, revised and amended, Publishing House Carpați, p. 208.

It must be carried out in accordance with the legal provisions, the bodies entitled to pursue criminal procedure paying attention not to restrain the person's rights and liberties more than necessary, while still having an obligation to observe the rules of forensic tactics.

With a view to this, they have the duty of ensuring the presence of the persons established by law in the place being searched, of taking measures so that the facts and the circumstances of the private life of the person on whom the search is performed and which are not related to the fact under investigation should not become public matters[3].

II. Performance of the Search. In achieving the purpose of the search, an important role is that of observation, the capacity of the body entitled to pursue criminal procedure to act appropriately as reported to the variety of the situations it has to deal with, to grasp, select and give the correct interpretation to the most insignificant emotional reactions of the person being searched. The exact psychological interpretation of the situation also presupposes a clear distinction between the psychology of the person performing the search and that of the person being searched.

The body entitled to pursue criminal procedure must show self-possession, patience, perseverance, mobility of thought, attention, in order to reach the goal of the tactical activity, a quick intuition, a capacity to analyze and synthesize[4].

In the case of searches of longer duration, especially, the judiciary body must be orderly, display a lot of composure and even some physical endurance[5].

While performing the search, it must pay attention to grasping such psycho-behavioural manifestations as: body and hand trembling, agitated breathing, modifications of the voice and of speech, of the facial expression or complexion.

Also, the body entitled to pursue the criminal procedure must distinguish the reactions occurring in relation to the searching activity from reactions due to other causes; the affectogenic factor liable to explain feelings of anxiety, trouble, discontentment, or indignation, concern for valuable objects or objects of an emotional value, but which do not belong to the category of feelings of interest for the case.

The lack of preparation or the shallowness in performing the search has negative consequences on the case, such as the loss of material evidence necessary in order to find the truth or it may even cause the impossibility to perform the search.

The possibilities of concealing the goods, the valuables and the documents that are the object of the search, the places to be examined, the specific methods of searching and the technical means appropriate for carrying out such activities are established according to the data obtained in reference to the person being searched, to the place undergoing the search, to the goods, valuables and documents that make up the object of the search.

The tactical rules to be applied when carrying out the search itself are as follows:

- it is performed minutely, methodically and systematically;
- the behaviour of the person being searched will be permanently under observation;
- it will be performed in strict observance of the legal provisions[6].

In order for the search of the premises to be legal, it must only be ordered by the judge, through a motivated ruling, during the criminal proceedings, at the prosecutor's request or during the trial.

During the criminal proceedings, the search of premises is ordered by the judge of the court that would be entitled to hear and determine at first instance or of a court of a corresponding degree in the jurisdiction of which are the headquarters of the prosecution department to which belongs the prosecutor that carries out or supervises the criminal proceedings.

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[3] E.A. Mihuț, *Forensics. Forensic Technique and Tactics,* University of Oradea Publishing House, 2006, pp. 235-236.

[4] T. Bogdan, *Judicial Psychology Course,* Educational Printing House, Bucharest, 1957, pp. 381-383; E.A. Mihuț, in the work cited; p. 236.

[5] E. Stancu, *A Treatise on Forensic Science*, 3rd edition revised and amended, Publishing House Universul juridic, Bucharest, 2004, p. 455.

[6] Idem, in the work cited, pp. 461-462.

The body search ordered during the criminal proceedings is carried out by the prosecutor or by the body entitled to pursue the criminal proceedings, accompanied, as the case may be, by operative workers.

The taking away of objects and documents, as well as the search of premises, can only be performed between 6:00 and 20:00, and within other time intervals only in case of flagrant offences or when the search is to be performed in a public location. If the search began within the interval 6:00 – 20:00, it may be continued during the night.

The judiciary body that is to perform the search is obliged to prove its identity and, in the cases established by law, to produce the authorization released by the judge.

The taking away of objects and documents, as well as the search of the private premises are done in the presence of the person whose objects or documents are taken away or whose premises are searched and, if he/she is absent, in the presence of a representative, of a member of the family or a neighbour endowed with legal capacity.

This condition will be fulfilled even when the person on whom the search is performed is detained or arrested and cannot be brought over to the search place.

The search is a particularly complex and difficult activity, no other activity involves such interference with the most intimate details of private and family life, with the rights of ownership over immovable's, over lands.

Before taking a decision about ordering the performance of the search, the judiciary body must possess enough data regarding the characteristics of the objects, of the valuables or of the documents searched for, the characteristics of the persons who are the object of the criminal proceedings, or about the person who owns them and about the place where they might be.

On the other hand, the order to perform the search will have to take into account the observance of the requirements of necessity and proportionality to the purpose pursued, as well as that of respect for human dignity.

In order for this activity to be effective, the proper tactical methods of performance must be established, as well as the necessary material means, the amount of time required, the participating persons, without losing sight of maintaining the entire activity, from beginning to end, within the limits determined by law.

The body search is performed by searching the person's clothing and/or body, for the purpose of finding traces of the deed committed, of the objects, valuables, documents that may be used as means of evidence, injuries received while struggling with the victim, objects illegally held.

As a rule, a body search is performed on a person caught in the act on the occasion of establishing the committing of the offence, on the person caught after being followed by the authorities, on the person whose private premises are being searched and on the person who is to be arrested.

A special regulation regarding the body search is also present in article 55, alignment 1, item (c) of Law no. 257/2006 regarding the execution of punishments and of the measures ordered by the judiciary bodies during the criminal trial, and in article 62, alignment 1, item (c) of The Law Implementing Regulation[7].

Persons deprived of liberty are obliged to allow a body search to be performed on them upon arriving at the first place of detention, as well as throughout their period of deprivation of liberty, whenever necessary. In the sense of the above-mentioned regulation, the search is the action by which a thorough check is done on persons deprived of liberty, on equipments, luggage, storerooms and all places these persons have access to, in order to prevent unusual events, risk situations, and it is also the action of taking away prohibited objects.

This type of search is only carried out by persons of the same gender as the searched person and in the presence of assisting witnesses. If the situation imposes an intimate search too, this may only be performed by a doctor or a by a qualified nurse, while still respecting the person's dignity[8].

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[7] Approved through Government Decision no. 1897/2006.

[8] M. Udroiu, O. Predescu, *Human Rights Proetction and The Romanian Criminal Trial. A Treatise,* Publishing House C.H. Beck, Bucharest, 2008, p. 350.

The prohibited goods and sums of money found on persons liable to be deprived of liberty as a result of the search are subject to seizure.

The body search does not include collecting biological evidence with a view to performing a DNA expertise[9].

Once the person to be searched has been immobilized and traces or substances that might constitute means of attack have been taken away, a thorough examination of his/her clothing follows.

Each portion of clothing will be carefully examined, such as: linings, seams, shoulder cushions, buttons, coat and shirt collars, trouser turn-ups and belongings.

If there are specific objects or valuables that need to be found, before searching the person in question, he/she is asked to hand them over. If he/she refuses to do so or pretends not to have them about himself/herself, the search begins.

The search of the private premises presupposes, in its unfolding, the following of several successive stages: going to the spot, blocking it off, entering the premises that are to be searched and performing the search itself.

The way of going to the spot is conditioned by the concrete circumstances under which action is taken and it is done by a means of transportation, which will be parked in a place that cannot be spotted from the premises that are to be searched.

The first measures taken on the search scene are as follows:

- a quick investigation of the whole place that is to be searched;
- taking the measures necessary in order to counteract any violent action;
- gathering all the persons found on the search scene in the same room;
- a careful study of and familiarization with the place that is to be searched;
- organizing the search itself[10].

Entering the premises that are to be searched represents the beginning of the search of premises and is done by taking advantage of various favourable circumstances meant to prevent the actions of the searched person that might result in the destruction of compromising objects, documents and valuables.

After entering the premises of the searched person, the head of the team proves his/her identity and passes on to identifying the person to be searched and, in the cases established by law, he/she must produce an authorization released by the judge.

The body entitled to pursue criminal action will ask the searched person for information regarding the space he/she inhabits, exclusively and jointly[11] and, in case the building has undergone changes, measurements will be made to determine whether the interior dimensions correspond to the exterior ones, including to establish whether or not the breadth of walls is uniform.

In the case of a search of premises, the judiciary body has the right to open the rooms or other means of preservation in which the objects or documents searched for might be, if the person entitled to open them refuses to do so.

The judiciary body will only take away objects and documents related to the investigated fact and, in case that, on the occasion of performing a search, objects or documents whose circulation or possession is prohibited are found, they will be taken away.

As a consequence of the search, there is the possibility that facts and circumstances of the private life of the person on whom the search is performed become known by other people. Therefore, it is necessary that the judiciary body take measures so that such facts and circumstances, which are not related to the case, should not become public knowledge.

In the case of a computer search, the judiciary body will take the measure of preserving informatics data or the data regarding informational traffic, which presupposes preserving the

[9] Idem, p. 351.
[10] E. Stancu, in the work cited, p. 460.
[11] C. Aioanițoaie, V. Berchesan, I. Botoc, in the work cited, p. 226.

already existing data, obtained by means of an information system and recorded on a particular material carrier, in order to avoid the alteration, degradation or erasure of those data[12].

According to article 54, alignment 5, of Law no. 161/2003, if several service suppliers possess data regarding informational traffic, the service supplier is obliged to provide the body entitled to pursue criminal proceedings or the court of justice with the amount of information necessary in order to identify the other service suppliers, with a view to rendering the authorities aware of all the elements of the communication chain used.

After performing the search and taking away the objects and the documents, a record of proceedings is drawn up. The record of proceedings must bear on every page and at the end the signature of the person who has drawn it up, as well as those of the assisting witnesses and of the persons mentioned in it, having to include: surname, first name and capacity of the person who has drawn it up; surname, first name, occupation and address of assisting witnesses, when there are any; a thorough description of the findings, as well as the measures adopted; surname, first name, occupation and address of the persons who are the object of the record of proceedings, their objections and justifications; the mentions established by law for special cases; the place where and the conditions under which the documents and the objects were found and taken away, with their minute enumeration, so that they can be recognized; mentions regarding objects that were not taken away, as well as those left for their owner to keep.

Searches can also be performed on a group of persons, in which case it is necessary to take measures of surveillance and for the prevention of violent actions, in the hypotheses of searching for persons (either sequestered or trying to elude criminal proceedings) or for certain objects (such as: searches in order to find narcotics, art objects, weapons and explosives, secret writings).

In such cases, the searches are performed by qualified personnel that must assist with the control at border checkpoints. In order to detect stupefacient substances, beside chemical reagents always present in the special forensic kits, dogs especially trained for this purpose are used.

[12] M. Udroiu, O. Predescu, in the work cited, p. 859.

FACTS ON THE LIABILITY OF COMMERCIAL UNITS' EUROPEAN MANAGERS

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Abstract: *Civil liability (contractual or tort) company manager may be committed, in principle, against third parties as the Law 31/1990 on trading companies limited liability actions against directors of social creditors only if the company bankruptcy, which means that where the company operates under normal conditions, creditors can sue for recovery of their rights only the trading company debt payment. It is that managers, as organs of society, engage directly committed acts or legal acts society. Responsibility manager in each of the three forms, is a direct, this means to act on its own. The legal acts carried out as agent of the company, the manager undertakes civil liability (contractual or tort) of the Company in legal relationships with third parties. So the rule is that the administrator, whether individual or company is not responsible to third parties.*

Key words: *Civil liability, commercial units' responsibility, liability management, legal relationships, legal liability.*

Legal liability is a set of legal rules report formed between the author of the infringement of legal rules and state agencies represented by an authority, which may be the courts, state officials or other servants of public power.

The content of the legal relationship is complex, but basically consists of: state law, as representative of the company to apply the sanctions provided for legal persons who violate rules and laws that persons subject to legal sanctions, to restore the rule of law.

The forms of liability: in the area of each branch of law were outlined specific forms of legal liability:

- Criminal liability - is subject to the criminal liability for breaking of the law
- Civil liability - classified in civil law:

. Civil crime liability: this liability has the content required to repair the damage caused civilian of crime. It says a civil penalty of the obligation to repair the damage caused by wrongful act, without dictating the same time and a penalty. For example, the wrongful act causing injury may constitute both a crime and without the combination of the two penalties to lead to the loss of their individuality or to change the legal nature of each of the penalties.

. Contractual liability: liability to have a special character, depart. Unlike civil crime liability the obligation breached is a general legal obligation that is all (to not damage the rights of others by illegal acts), for contractual liability, obligation breached is a specific requirement, established by an existing contract, valid between the harm and breached its contractual obligations.

- Liability offense - is drawn for committing a contravention. Offense is an act which endangers social lower than the offense, which is explicitly provided by law or other legislation and is committed to guilt. The legal regime of contraventions is linked and the activity of the government as the organization of imposing and enforcing laws and other laws require the existence of sanctions they can impose and enforce these organs of executive government in their work. Liability offense should not be confused with administrative responsibility, the penalties for contravention applies both to public authorities and the courts.
- Liability of material - is the obligation to compensate any employee within the limits prescribed by law and caused damage to the unit of fault in connection with his work. Material liability is an institution's own labour law.

- Disciplinary responsibility - consists of a set of legal rules, punish acts of infringement relating to guilt by any person falling, regardless of position or place it occupies, the obligations assumed by contract. These acts constitute misconduct and may attract disciplinary sanctions such as reprimand, warning, reduced salary, termination of employment.

The liability conditions

For legal liability the following conditions must be met:

- **To be unlawful conduct** unlawful conduct consists of an action or inaction, contrary to legal norms
- **The action** - requires the commission by a person, a concrete action, which violates legal standards
- **Inaction** - may be considered unlawful only when that person had a legal duty to act in a certain way and it did not act as such
- **There is a causal link between unlawful conduct and outcome of product** in all cases where liability is necessary for attracting and producing illicit consequences, should be considered the causal link between the wrongful act and the result produced. Establishing this connection is difficult and requires careful analysis of each case.
- **To be guilty** of the matter that caused the unlawful act is guilty of breaches of legal subjectivity. Any human action or inaction is characterized not only by material characteristics; it is also a manifestation of conscience and will.
- **There are no circumstances or causes which removes the principle liability,** the circumstances or causes which remove the liability provided by law and varies from one industry to another law
- **To have a deleterious result of that unlawful conduct (damage to property, personal health, etc.)**

The result of unlawful conduct, causing damage to society or an individual violates the values protected by law. This result allows in most cases to assess the social danger of illegal acts. The importance of unlawful conduct outcome may be different in different branches of law. Thus:

- In civil law - liability is attracted only when damage or injury occurred.
- Criminal law - are under legal liability case where the result of unlawful conduct did not produce damage, but the danger was created production. In criminal law, from such illegal acts which do not produce concrete results harmful part attempt.

Legal relations between manager and company have a dual nature: the contractual and legal, as relates to liabilities arising from mandates or obligations of the administrator under the law. Double legal liability of managers is evident both from society and to third parties. This liability is a contractual liability, especially when the resulting company to breach the mandate or the articles of association or the law relating to appointments of, and tort, the breach relates to other mandatory provisions of law (especially compared to others).

We acknowledge that our legal system, liability is determined by the source nature of the obligation breached or unfulfilled. In some cases it will be a contractual liability for damage caused in the representation contract and the other will be a tort liability for damage caused by work done as legal representative of the company.

For example, the French legal system administrators consider that the liability is contractual relations tort in society and relationships with third parties.

Practical benefits of establishing the legal nature of the liability of directors residing in the sample and the extent of liability. If tort liability, fault manager is presumed that the contractual liability, but must be established with all other terms of tort liability under the Civil Code and described above. Instead, the contract responsibility system is evidence of presumed fault (the administrator will have to remove the presumption of guilt and to prove innocence). In any case, irrespective of liability under it is fault manager, suspected or, where appropriate, established.

Forms of liability manager

Liability Manager was classified specialist in theory and practice in three categories:

- Liability ordinary (normal) to the company and associates

- exceptional liability to third parties.
- Aggravated liability in case of bankruptcy of the company.

There are however exceptions stipulated by the Law. 31/1990, article 148. 2, comes the assumption of liability and sanction the managers to act another. Thus, the analysis of the regulatory provisions follows that all administrators, and accountable to the Steering Committee to the provisions of company executives or staff framed when the damage would not have occurred if they had exercised supervision duties imposed by their office.

But this special event liability for the tort of another is a liability only to the company and not the face of the partners or against third parties. Also, another exception to this rule is the assumption that the company is in insolvency proceedings when, in cases stipulated by Article exhaustively. 138 of Law no. 85/2006 of insolvency, members of the Company or its management may be forced to pay some of the bankrupt debtor liabilities.

Under the Company Law republished (73), managers are responsible for:

- Reality of payments made by the partners
- real existence of dividends paid
- the existence of records required by law and correct their young
- the exact fulfilment of decisions of general meetings strictly carrying out the duties which the law imposes association.

Jurisprudence has rejected claims which called for training managers with responsibility for factual grounds, for example:

- Failure to submit due diligence to bring assets to the debtor's assets
- failure to register in debt to the budget accounting, mismanagement
- abuse of a further loss-making; not following the collection of their claims
- the exercise of office administrator and other legal person, failure to submit reports to finance public non budgetary claims.

Also, courts have rejected claims in situations which proved that insolvency had other causes:

- The deuce to develop a profitable business;
- Interruption of the production activity of the fault, non-recovery of their claims, failure to pay current debts, the non-value goods exported;
- Reduce market demand and lower prices.

The action on liability managers

Law 31/1990, republished specifies that liability actions against the founders, managers, directors, members of the directorate and supervisory board, as well as-their auditors or statutory auditors, for damages society by violating their duties by them towards the company belongs to the general meeting which will decide by majority vote. The analysis of the regulatory provisions that result in system companies, which constitute the common law liability of directors, but the company may pursue action in injured liability managers.

According to Law no. 85/2006, exercise action responsibility belongs to judicial administrators or managers, as applicable, the liquidator. According to the paragraph (1) of Art. 138, syndic judge may be invested by the judicial manager, liquidator or the creditors committee.[1]

In what concerns the creditors committee, legal empowerment is conditioned by the prior authorization of the syndic judge, and the application for authorization is conditioned, in turn, at least one of the following circumstances:

1. the judicial manager or liquidator failed to indicate in its report on the insolvency cases, persons guilty of insolvency of the debtor's assets juridical person;
2. the judicial manager or liquidator, although indicated for persons guilty, failed to make the action under par. (1) of Art. 138, and in the latter situation, action to establish liability to persons threatened to be prescribed.

[1] Cărpenaru, S, David S., Predoiu C, Piperea Gh., *Legea societăţilor comerciale. Comentariu pe articole*, ed. a 3-a, C. H. Beck, Bucureşti, 2006

The action taken against managers is a social action, representing a prerogative of the general shareholders meeting, according to art. 155 paragraph 1. This conclusion resides in the principle that the general meeting of shareholders is the company itself. Introducing the action taken is mandatory for the company because it is the only way to determine how the abandonment of the working poor or fraudulent managers.

The decision on introduction of a liability action may be taken, whether or not this issue listed on the agenda, according to art. 155 paragraph 2 of Law no. 31/1990.O solution should be also because the agenda is established, usually by administrators, and they would never on the agenda include the introduction in court of the action taken.

The shareholders will decide on the introduction of the action taken in terms of majority the law provides for the Ordinary General Assembly in the art. 112, even if this vote is required in an extraordinary shareholder meeting.

If the general meeting decides trigger action taken against managers, they are considered removed from office, the General Assembly having to proceed to their replacement, possibly even within the same sessions. (Art. 155 paragraph 4).

The termination of the mandate as directors in terms of art. 155 paragraphs 4 of Law no. 31/1990, has legal nature of a sanction imposed by the General Assembly created the administrators presumed to damage society.[2]

The action exercise responsibility for work managers often practice courts was fragmented in the assessment of cases given the multitude of situations which may be encountered in practice regarding the administration and management of a company by the attorney to fulfil.

Last legislative changes but tend to limit the subjective factor in assessing liability cases drive manager and take into account the dynamics of current activities they carry out companies.

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THE CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS WITHIN THE EUROPEAN LEGAL AREA

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Abstract : *This article analyses the concept of corporate social responsibility and the role of profit-oriented businesses in the European legal area. The subject is viewed in the optic of the regional initiative of respecting human rights standards in European Union. The European legal area is a dynamic institutional frame that consents a constant institutional evolution using different juridical instruments. In this area we examine the European Union's approach to corporate social responsibility. This approach is at a crucial stage of development, given the globalized operations and the transnational dimension of European corporations. The main conclusion is that the regional approach of European Union represents a positive towards the regulation of corporate entities, but a more oriented approach on the role of Courts and the derivate law is preferred.*

Key words: *transnational, corporations, responsibility, globalization, European law*

The European legal area indicates the union of juridical orders determined with the constitution of European Union in 1992. This particular „order of orders" is composed by the juridical order of the European Communities, integrated by the politics and the forms of cooperation instituted by the European Union Treaty and by the juridical orders of the Member states. The subjects of the Unions` order are the States, the European people and the Member States citizens that have not only the national citizenship but also the European one. (art. 17, c. 1, TCE).

The European legal area is one of the main juridical connotation of the EU and it represents the constitutional innovations of the Treaty of Maastricht. In this occasion it was establish the principle of coexistence of European Communities and the Member States and the intergovernmental cooperation, with flexible procedures.

Recent economic globalization and trade liberalization have given multinational enterprises considerable economic power that often surpasses that of states. While states are subject to various international and internal mechanisms designed to prevent them from abusing their powers, multinational enterprises are traditionally bound by national laws of limited geographical scope. In the global market, where legislation tends to vary considerably from one country to another, little exists in terms of universal standards applicable to multinational corporations.

In this framework of globalization the law acquires a "transnational language"[1] that refers to all the legislation of the transnational relations. It is important to note that transnational doesn't mean international. The international dimension is that of states, while the transnational space is that of mobile subjects, such as transnational corporations, that are continuously present within this dimension.

In Europe there are more than 100 multinational corporations and the most efficient international human rights mechanism in the world - the European Court of Human Rights - found in 2000 over 400 violations of the European Convention on Human Rights, legally binding upon its signatories. The scope of this mechanism is, however, limited to violations committed by state

[1] M. R. Ferrarese, *Il diritto al presente. Globalizzazione e tempo delle istituzioni*, Il Mulino Saggi, 2002

actors. Victims of violations committed by private entities such as multinational enterprises cannot seek remedy before the court unless some kind of state involvement is implicated.

Economic globalization and the rise of transnational corporate power have created a favourable climate for corporate human rights abusers, which are governed principally by the codes of supply and demand and show genuine loyalty only to their stockholders.

As globalization has increased in the past decade or two, so has the criticisms. Whether it is concerns at profits over people as the driving factor, or violations of human rights, or large scale tax avoidance by some companies, some large multinationals operating in developing countries in particular have certainly had many questions to answer.

The European Union is a unique forum within which to evaluate the corporate social responsibility because it unites the large European economy with Europe's commitment to human rights and social values. Although the initial goal of European integration was to create a common market, the European Court of Justice stressed that respect for human rights forms an integral part of the general principles of Community law. As a result, the EU does not see the creation of common markets and enhanced protection of human rights as mutually exclusive. Rather, the EU believes that one cannot be achieved without the other. "Economic freedoms are not absolute, but must be viewed in relation to their social function and with due regard for human rights. Economic efficiency must be pursued together with democratic legitimacy and social justice."[2] The EU is therefore not only concerned with the promotion of human rights by their inclusion in the creation of common markets but also with the added value human rights provide to economic and social welfare. Even if the EU dimension is well-defined, we can find here a transnational spirit that surpasses the states.

Another issue is that of human rights that cannot by collocated in a territorial juridical framework, such as one of states. Human rights have the characteristic of a de-territorialisation, with the objective to become universal, or at least regional. Transnational corporations have an enormous economic power supplied by the capacity of de-territorialisation. They are transnational subjects with a great capacity of mobility and they have the power to condition even the states. In recent years there has been increasing concern about the behaviour of corporate entities in relation to human rights. As a consequence, corporations are encountering greater scrutiny of their activities on a global level and the idea of encouraging or even requiring companies to adhere to minimum standards of behaviour has become enshrined within a concept known as corporate social responsibility.

The protection of human rights is not traditionally considered a responsibility of corporations. The domestic laws of many states fail to impose adequate human rights duties on corporations, while it is unlikely that there are any direct duties imposed by international law. Yet corporations, especially multinational corporations, are very powerful entities in the current world order. Their impact on the wellbeing of communities and individuals, including in terms of human rights, is evident wherever they operate. While there is considerable scope for that impact to be positive, corporate activity is often perceived to have a detrimental impact on human rights protection.

The transnational corporations are economic and non juridical subjects that have a continuous need of juridical assistance in order to achieve their goal of profit. The law has the central role in the enterprises' strategies and the corporations delegate the juridical task to the experts of corporate law.

Many corporations, like states, have the resources and power both to perpetrate and to escape responsibility for abuse. The subject is one that benefits from a huge and expanding literature, including scholarly legal writing, governmental and intergovernmental outputs, as well as the work of campaigning groups such as Amnesty International and Human Rights Watch.

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[2] Pall A. Davidsson., *Legal enforcement of corporate social responsibility within the EU*, LL.M. Columbia University School of Law, 2002

Multinational corporations are accused both of direct human rights abuses and of colluding in various ways with repressive states. Because of the normative implications of this task many writers have drawn on complicity, a notion widely recognized in systems of criminal law. It is not so much the marriage of criminal law principles and international law but the adoption of the corporation as a fully accepted member of the 'legally responsible' family that presents the greatest obstacle here. National jurisdictions are either reluctant to or encounter difficulty in applying criminal sanctions to corporations.

Some authors[3] point out the complex plurality of actors involved in business regulation, the power of the nation state, the growth of international organizations and the importance of epistemic communities.

Corporations owe their status in law to law. From this it follows that they should be challengeable in law, through revocation of their status, through claims for false advertising or actions against individual directors. So new legal principles of attributing actions to the corporate entity are necessary, together with rules reflecting the reality of state and corporate structures of decision-making.

Considering the theory of the three generations of human rights, the responsibilities in the context of first-generation human rights are an integral part of the dimension of good management practices. Although one could find evidence that illegitimate practices have a positive impact on doing business in a country with deficits in good governance, companies competing with integrity will not put first generation rights in the negotiation basket with economic goods. On the contrary, as far as these rights are concerned, a company must do all in its power to ensure that there are no violations within its own sphere of influence and that it also does not benefit from human rights abuses by other parties. This implies the obligation to strive for all relevant knowledge in this respect as far as is reasonably possible. As far as second-generation human rights are concerned, the normal business operations of a company form the main corporate contribution to the preservation of these rights: it is the basic social function of companies to produce products and services in a legal way and to sell these on the market. To this end, they hire employees of an adult age who work of their own volition in exchange for pay as defined in legally binding contracts or collective bargaining agreements. In addition, companies pay contributions into the social security system. In this way, they enable their employees to secure their own economic human rights. Companies purchase goods and services, pay market prices for them, and thereby engender economic linkage effects. Last but not least, companies make a financial contribution towards the community through taxes and duty. This enables the state to fulfil its tasks.[4]

The European Union has been relatively slow to embrace the concept of corporate social responsibility, despite the long European tradition of "socially responsible initiatives by entrepreneurs."[5]

The Green Paper[6] is part of a wider framework of a Commission proposal on a European strategy on sustainable development, which was endorsed by the conclusions of the Gothenburg European Council in June 2001. According to this strategy, long-term economic growth, social cohesion and environmental protection must "go hand in hand".

The Gothenburg Summit in June 2001 specifically considered the role of companies within society and within the context of a "sustainable development strategy" for Europe. The stated aim of this initiative was to stimulate debate about corporate social responsibility within the European context rather than "making concrete proposals for action." In other words, actors selected a clear "soft law" approach. The Green Paper asks several key questions including: (1) What is the role of

[3] J. Braithwaite, P. Drahos, *Global Business Regulation*, 2000

[4] http://www.unglobalcompact.org/docs/Klaus M. Leisinger

[5] Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, at 5, COM (2002) 347 final (July 2, 2002)

[6] European Commission, *Green Paper on Promoting a European Framework for Corporate Social Responsibility*, at 3, COM (2001) 366 final (July 18, 2001), available at http://europa.eu. int /comm/employment_social /soc-dial /csr/greenpaper_en.pdf

the E.U. in the development of corporate social responsibility?(2) What is the role of corporate social responsibility in corporate business strategies? (3) What is the role of other stakeholders? (4) How should corporate social responsibility strategies be monitored and evaluated? (5) What mechanisms are most appropriate for developing corporate social responsibility, and at what level?
In the Green Paper, the Commission states that there has recently been much attention given to the way in which companies deal with and interact with their employees when managing large-scale redundancies. The Commission therefore stresses that responsible "downsizing" must include the involvement and participation of those workers affected, by means of information and consultation, the safeguarding of employees' rights and vocational retraining where necessary.

The Green Paper argues that corporate social responsibility also means the relationship between companies and their environments, at local, national, European and worldwide level. It states that good relations with local settings are important for companies as this is where they recruit the majority of their staff. It is also important for companies to develop networks and create links to other businesses.[7]

While there is a strong tradition of corporate social responsibility at local level by small and medium-sized enterprises, corporate social responsibility has a growing international dimension due to the increasingly global nature of company supply chains. The Paper notes that a growing number of firms are adopting codes of conduct covering a variety of social issues such as working conditions, human rights and environmental aspects. However, the Commission makes it clear that these codes should serve to complement, rather than replace, national and international laws. It adds that their effectiveness depends on proper implementation.

The Green Paper notes that successful corporate social responsibility means including it fully in the culture of the business and being seen to do so. It states further that although many multinational companies already publish reports on corporate social responsibility, "less attention is paid to areas such as human resource management, information and consultation, child labour and human rights." The Commission therefore states that there should be greater consensus on the type of information disclosed and more comprehensive coverage in social accounting, reporting and auditing.

The Commission goes on to say that "socially responsible investing" (SRI), under which funds are directed towards companies which comply with specific social criteria, has been gaining in popularity. However, it adds that in order to prove more useful and to provide potential investors with a clear picture, greater harmonization of evaluation tools for SRI is needed.

There were 261 responses to the Green Paper[8], with only nine out of fifteen Member States responding (Belgium, Germany, Finland, France, Ireland, Netherlands, Austria, Sweden, U.K.).

Unfortunately, the Green Paper constricts the debate by relying on a very limited, and business-oriented, definition of corporate social responsibility, describing it as a "concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis."[9]

In the responses to the E.U.'s Green Paper, there is a remarkable homogeneity between individual corporate responses and the responses of industry representatives. The responses emphasize self-regulation, while demonstrating a lack of enthusiasm for enforcement mechanisms, temporization of implementation requirements, the voluntary nature of corporate social responsibility, and good practice. The responses also displayed a general abhorrence of a "one-size fits all" approach to corporate social responsibility. Published in July 2002, the European Commission's response to the Green Paper is both disappointing and heartening in equal respects. Entitled the "Communication from the Commission concerning Corporate Social Responsibility: a business contribution to Sustainable Development," it clearly adheres to the business case.

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[7] Cfr. Pall A. Davidsson.
[8] See European Commission, Responses to the Consultation on the Green Paper on corporate social responsibility, http://europa.eu.int/comm/employment_social/soc-dial/csr/csr_responses.htm
[9] Cfr. Supra notes

This Green Paper can be seen as an important step in stimulating debate in an area where there has been a significant amount of interest and corporate activity in recent years. Corporate social responsibility is potentially a very broad area, encompassing both how companies treat their own staff and suppliers – in terms of both stable employment situations and restructuring programs – and how companies interact with their environment, both in relation to the physical environment and the treatment of people in their surrounding location.

In an increasingly globalized world, more businesses are operating transnational "in a way that exceeds the regulatory capacities of any one national system."[10] While a regional approach is one way to achieve compliance with corporate social responsibility norms, an international tactic would be a superior choice.

Some authors[11] consider that a new type of law is emerging, the one based on *lex mercatoria* that is alimented by the law conflict of different states. This occurs because these corporations and even some nations seek out places where poor labour regulations can be taken advantage of in an unfair way, or by not supporting—or even opposing—international or national bodies and policies that could help to ensure fairness. The multinational organizations search for the "normative gap" so in a transnational dimension we can say that corporations main rule is the lex mercatoria, which gives them a measure of variable territoriality putting the States in a minority condition.

The gaps in legislation facilitate the unlawful conduct of some of the multinational corporations, while the response of states continues to be silence and inaction. In this transnational scenario the institutional role of the multinational corporations acquires an even more relevant characteristic. In the globalized society they contribute to the determination of life-stiles, conditions and even new identities.

It is important to note that global law doesn't have to be identified with a procedure, but with a process[12] so the only way of issuing the problem of corporate responsibility is that of strengthening the importance of courts rather than that of the written legislation. The international community should insist on robust enforcement by states of their duty to respect, protect and fulfil human rights norms through the regulation of private actors. However, this needs to go beyond merely providing for "after the fact" judicial determinations of liability once violations have already occurred. The boundaries of current doctrine determining when the actions of transnational corporations can be treated as state action and when states can be held complicit in corporate abuses should also be further explored.

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CRIMINAL LIABILITY OF THE CIVIL SERVANTS AND OTHER PERSONS THAT HAVE IMPORTANT FUNCTIONS, IN ROMANIA AND SOME OTHER COUNTRIES THAR ARE MEMBERS OF THE EUROPEAN UNION

Viorica Marincas

Abstract: *Legal liability in the science and practice of law, is a central area, since it is essentially a guarantee of achieving law and its concrete manifestations, as a fundamental component of the system of law, is an amount of specialized forms of liability are governed by separate legal institution. Legal liability is a form of social responsibility established by the State in breach of rules of law by a wrongful act entailing bearing the consequences appropriate to the guilty, including the use of coercive force to restore order to rule of law infringed.*

***Key words**: legal liability, sanction, illicit action, criminal liability, civil servant*

The legal liability is a very important part of the science and law practice as it guarantees the right. In its manifestations it represents a sum of specialized liabilities that are governed by different legal institutions.

As the legal system is concerned, the legal liability represents the negative consequences that arise from doing something illegal.

The legal liability is a form of social liability imposed by the state as a result of breaking the law norms by an action that brings some consequences including the use of force by the state in order to re-establish the law.

In prof. Ion Oancea's opinion "the legal liability is a complex of rights and obligations". Other writers define the legal liability as being the judicial action of constraint that leads to judicial sanction.

The liability will result in a sanction due to some illicit action. The legal liability is the result that a person that broke the legal norms established by the state reaches. This result is a sanction of the law.

The legal liability is the fundamental judicial institution of the criminal law that together with the crime and the sanction institutions represent the most important parts of the criminal law [1]
As a form of legal liability, the criminal liability is a consequence of breaking the criminal legal norm by a person or a legal entity.

In order to establish the law order in general and the criminal law order, all persons that are part of a state need to behave in the limits of the laws of that state so that the social relations would develop normally.

Those who do not behave according to the previsions of the criminal norms and commit illicit actions are constraint by a criminal legal report of conflict in order to re-establish the order.
In the criminal doctrine the criminal liability is defined as being "the criminal legal report of constraint issued from the breaking of the law; the state on one side and the criminal on the other side. This is a complex report whose content is represented by the right of the state as representative of the society to punish the criminal, to sanction him according to his actions and to constrain him to fulfil the sanction as well as the criminal obligation to answer for his action, to obey the sanction given in order to re-establish the order and the authority of the law"[2].

As the criminal liability is solely based on committing a criminal act in the criminal legal report of conflict, it must be established:

- The existence of the action that gives rise to the criminal liability, the forbidden action

[1] I. Oancea – *Theorethical explanations of the Romanian Criminal Code*, vol. I, p. 99
[2] C. Bulai – *Criminal Law*, vol. III, p. 14 - 17

- The guilt named by law, in committing that action
- The suited punishment that is to be applied to the criminal and executed by him[3].

As the importance of the experience research in other European countries, the well-known lawyer Marc Anseille noted that "the research of foreign experience allows the lawyer to see new horizons, to better understand the law of his country, as the specific characteristics of this law is even more highlighted in comparison to other systems. The comparisons will endow the lawyer with ideas and arguments that can not be reached otherwise, even if he has an excellent knowledge of the law of his country"

We want to discuss the norms that refer to the criminal acts that can be committed by the civil servants or other persons that have important functions. We have noted that many criminal codes of the European countries deal with groups of norms that refer to such criminal acts and the liability of their achievement.

In Germany the criminal acts that may be committed by such persons are dealt with in the chapter "Criminal acts related to service". The system of these criminal acts contains:

- Receiving undeserved goods,
- Taking bribe,
- Giving undeserved goods,
- bribe,
- giving an illegitimate decision,
- causing body injuries to others by use of title
- compelling others to testify,
- to take proceedings against an innocent person,
- to carry out a sentence against an innocent person,
- incorrect official statements,
- illegitimate collection of taxes,
- illegitimate collection of taxes that are not mentioned,
- minimizing the payments,
- violation of trust during the diplomatic service,
- violation of the service secret and of the special obligation of keeping the secret,
- illegal publicity of the trials,
- violation of the means of connection by mail or phone,
- violation of fiscal secret,
- the representation of both parties in the same trial by the same lawyer.

This detailed list of the criminal acts allows us to note that the above named chapter of the German Criminal Code includes criminal acts that can be attributed to common law persons as well as criminal acts specific to criminal trials or caring out the sentence, the criminal act of civil servants and sometimes even by lawyers.

The subject of the mentioned criminal acts, when talking about some criminal acts as "receiving undeserved goods" or "taking bribe" is "the person that fulfils public duties".

In the German Criminal Code, the person with a liable function is defined as being "the person who, according to the German law:

a) is a civil servant or judge,

b) is closely related to accomplishing the state attributions,

c) carries out the state administrative attributions in the state power institutions or other establishments."

The person liable for the accomplishing public duties is "the person that has no liable function and acts:

a) in a state organ or institution that fulfils state orders or

[3] Idem p. 12

b) in an organization, factory or company that fulfils state administrative functions in the state power organisms or other institution

- activates for them and is compelled by law to conscientiously accomplish his duties".

The French criminal code, passed in 1992, came into force in 1994, contains 4 books. In the fourth book "Criminal acts and misdemeanours against the nation, state and public order", in the third title "Assaults against the state power" the second chapter is "Assaults against the administrative organizations of the state by civil servants". The name of the chapter denotes their characteristics of this group of criminal acts from the point of view of the generic objective and the subjectivity of criminal acts.

The criminal acts performed by persons that have liable functions are grouped in three sections:

-power abuse against the administrative organs

-power abuse against private persons

-honour violation.

The first group includes criminal acts as taking some measures in order to meet the law, the exercise of attributions by a person that was previously officially informed on the decision and the facts that led to his/ her dismissal.

The second group includes the assault of the civil servant against the personal freedom, the discrimination against persons or legal persons, the assault against the secret of mail, etc

The third group refers to taking bribe, use of influence, receiving undeserved goods, the infringement of the free access and equality between those who take activate on the goods and services' market for the organizations of the state, the illegal appropriation and embezzlement of goods.

Besides this, the chapter " Fraud", included in the title" Assaults to the trust of society" deals with the forgery in documents issued by a state organism, by a person that represents the state power and works in one of the state organisms, if the criminal act was committed during the service hours.

The law of 13th July 1983, concerning the right and responsibilities of the public servants, has a big importance in defining the responsibility of the persons that work in the public law (persons that have liable functions) when talking about abuses.

The French Criminal Code does not give a general definition of the public law persons. According to the French criminal code these criminal acts may be committed by:

- representatives of the state power (important persons);
- people that activate in the state service (employees of four hierarchical groups, each of them including more rankings of the civil servants);
- People who have a public mandate

Among these, in some chapters and articles of the crime code, the following persons can also be liable for criminal acts: the person that have state power, the person that fulfils the duty of a civil servant, the person that was elected, the person that has a state function, the employee of a state institution, the employee of a nationalized factory, the employee of a mix economic institution where the state or the state organization hold more than 50 percents of the share capital, the employee of the state post office, the state accountant, and so on.

The Spanish criminal code includes specific norms that refer to the liability of the civil servant for the criminal acts related to work or function. Title XIX of the criminal code is "Criminal acts against the state power" and includes the following chapters:

- „Criminal acts performed by civil servants and others"
- „Refusing to investigate crimes"
- „Insubordination and refusal to help others"
- „Treachery in keeping the papers and breaking the secrets"
- „Bribe"
- „Influence"
- „Peculation"

- „Fraud and illegal taxes”
- „Forbidding the transactions and the activity of the public servant, excess of power during the mandate”.

The Spanish code does not include the definition of the liable person, but art. 25 the second alignment defines the civil servant: “the person that has state function by law, as a result of elections or who was named”.

A chapter, named “Criminal acts committed by liable persons” can be met in the title “Criminal acts against judges or magistrate, lawyers, public prosecutors or representatives of the prosecution, members of the instance, secretary of the court, etc.

The Italian code, according to Law 86 of 1990, considers that the subject of the service infringement are the persons that have responsibilities and those who have obligation that are specific to liable persons. The liable person is the person that has legislative, judiciary or administrative function. The state function is the function that is defined by the norms of the public law and by decisions of the state power organisms. It is characterized by the forming and the expression of the will of public administration and has power attributions. The persons that have a function of public necessity are also liable for the criminal acts committed at work. These persons are the person that practice law, persons that work in the health system or any other person whose profession requires the special permission from the part of the state organisms.

The following criminal acts can be committed by liable persons:

- illegal assigning
- taking bribe,
- bribery,
- incitement to bribery,
- power excess,
- use of inventions and discoveries acknowledged due to the function,
- use of service secret,
- incitement to neglecting or bantering the state institutions, laws or normative papers,
- refuse to carry out the obligations imposed by the job,
- interruption of the public service or public necessity service.

In the Romanian Criminal Code, title IV ”Criminal acts that harm activities of public interest or other activities defined by law”, the first Chapter includes „ the service infringements or the criminal acts related to work”:

- service abuse against the interest of people,
- service abuse by limiting some rights,
- service abuse against the public interests,
- qualified service abuse,
- service negligence,
- abusive behaviour,
- negligence in keeping the state secret
- taking bribe,
- bribery,
- receiving undeserved goods,
- traffic of influence,
- actions committed by other public servants.

In the Romanian Criminal Code the public servants, the servants are liable for service infringement or related to work. In the case of taking bribe the action is even worse if it was committed by an employee that has leading functions.

When taking into consideration the criminal law, “the public servant” is the person that has permanent or temporary duties in the service of a public unit, regardless of the means of investment. According to the criminal law the word “public” refers to “everything that concerns the public authorities, institutions or other legal persons of public interest, the administration, use or exploitation of goods of public property, public interest services ...”

The latest Criminal Code contains the Fifth Title "Service and corruption infringements" that has two different chapters: "Corruption infringements" and "service infringements"

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INNOVATION ABOUT THE MEDICO-LEGAL PSYCHIATRICALLY REPORT: THE REPORT REQUESTED BY PERSONS THAT INTEND TO PURSUE ACTS THAT HAVE AN ALIENATION VALUE

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Abstract: *The medico-legal psychiatrically report is the medico-legal examination that determines whether a person has a mental illness or not, or if in that illness the patient has discernment, in other words legal competence of performing. This type of report is usually performed at the solicitation of the Police, Prosecutor's Department or Court, through an ordinance. There are situations when the medico-legal psychiatrically report is performed at the request of a person that wants to perform acts that have an alienation value. In the present work, the authors present the methodology and peculiarities of this type of report that is requested medico-legal psychiatrically report.*

Key words: *requested medico-legal psychiatrically report, discernment, legal competence of performance.*

In general the acts that have an alienation value are notarial acts such as testaments, selling and buying contracts, donations, and maintenance contracts etc. They are all based on a transfer of ownership. Most often, those properties have a low or medium value, but in some situations we can have considerable fortunes (houses, lands, important amount of money, etc.).

Most often, the person that intends to pursue such acts is an elder, a widow or widower that has to decide about the goods for their lifetime, and especially what would happen after one's death. For eliminating doubts regarding the legal competence of performing or the discernment, a person that has to conduct such an act of alienation can request a medico-legal psychiatrically report that would answer to that objective. For a better understanding of the medico-legal psychiatrically report, it is important to present a few legislative and methodological aspects. The medico-legal psychiatrically report is included in the reports category, reports that are being performed only if they are officially requested through an ordinance, by one of the three state institutions: Police, Prosecutor's Department and Court. This kind of reports are requested for criminal cases when it is examined a person that has committed a crime sanctioned by the Penal Code. Other medico-legal reports are requested for civil cases such as divorces, entrusting the minor children etc. Also, there are situations when a medico-legal psychiatrically report is solicited in the case of a deceased person that during its lifetime has performed acts of alienation that were soon after disputed because of the lack of discernment of the person, due to a disease. This is the case of the medico-legal psychiatrically report on documents. As we already stated, to these three types of reports it is added the requested medico-legal psychiatrically report, that is used on live persons that solicit to be examined so they can prove that they have discernment when performing an act of alienation. In other words, these persons want to "protect" the notarial act with a medico-legal document that would attest during lifetime and also after death that the person had discernment when the act was performed and signed.

Methodologically, this act is called "health condition certificate" because it is not officially requested by the Police, Prosecutor's Office or Court of law, but its content is identical to a medico-legal psychiatrically report and is performed according to the rules that guide this kind of report. The commission is formed by one forensic expert, two psychiatrists and a psychologist that performs the psychological exam, also other doctors according to the diseases that the examined person presents. All these doctors are written on the medico-legal document that is given to the examined person. This health condition certificate, a genuine expertise, is performed only after the person requesting it, writes a petition to the Medico-Legal Department, motivating its request of the document.

This kind of medico-legal report was rarely requested before 1990. In a district like ours, there were no more than 10 requests in a year. Nowadays, things have changed because the term of private property is truly respected, and even mentioned in the country's Constitutions. Nevertheless, not only that it is respected by the law, but people's mentality regarding the private property, has changed; it has to be constituted, preserved and ceded so that it would create malfunctions neither for the owner, nor for the one receiving it.

The number of these kinds of reports has grown within every year; one of the contributing factors is the growing number of owners.

These days, there is an emancipation of the population juridical speaking, mainly because people understand that a smaller or bigger fortune, achieved through hard work and sacrifice, must be respected during lifetime, and after death transmitted to family members or state institutions that deserve it. Arguments arise between potential successors when real values are involved, and those that feel left out dispute in any way the most common notarial act, motivating that the person that performed and signed the act had a lack of discernment due to an illness. As we stated, the dynamic of this kind of report has been impressive during the past 20 years. There was a slow growth of this type of report at the beginning of the 1990's, but starting with the year 2000 the number has increased tending to equalise the number of the reports officially solicited in penal and civil cases.

Compared to the other types of medico-legal psychiatrically reports, the requested medico-legal psychiatrically report has some peculiarities. First of all, the correct term that we have to refer to, is not the discernment, but the legal competence of performing. It is preferable to use the term discernment or the lack of discernment only for medico-legal psychiatrically reports in penal cases. In these cases, we have to assess the discernment strictly referring to the moment of the crime for which the person is investigated. The legal competence of performing is part of the global psychic competence, which has connections with the extensive term of discernment. In practice, the persons that have a lost discernment are considered to have neither psychic competence, nor legal competence of performing. Nevertheless, there are exceptions: a person that has a serious mental illness like schizophrenia, does not have discernment, but under treatment, on a level of improvement might have legal competence of performing. Most often, the persons that have diminished discernment because of a mental illness don't have legal competence of performing. The psychological tests and examinations that are done on people that solicit this kind of report must show the physiological deterioration value. Because we work with old or very old people (over 70 or 80 years), it must be taken in consideration the multiple chronicle affections that they present, and that can directly or indirectly influence their legal competence of performing. Such situations could be: diabetes and its complications (cecity, diabetic arteriopathia, etc.), neurological conditions like vascular cerebral stroke, Parkinson or Alzheimer disease, ophthalmological conditions with sight disorders, the otolaryngology conditions (deafness). Through their symptomatology, all these conditions and especially their consequences, that is often invalidity, can influence a person's legal competence of performing. All of the above state that it is very difficult, but extremely important to perform a medico-legal psychiatrically report on one of these persons.

We realised the utility of these acts when performing medico-legal psychiatrically reports on documents for which we received large files filled with this kind of acts. They talked about the situation when some of the potential successors contest the notarial act performed by the deceased, motivating the lack of discernment or the lack of legal competence of performing of the one that

performed the act. The successors argue and try to prove with medical entries that the deceased was too sick to have discernment at the time the notarial act was performed. Most often are presented hospital release records, copies of clinical observation charts, prescriptions, medical records, invalidity certificates, labour ability decisions. From these acts we remember that the person was suffering of cancer and had metastasis, or was paralysed, not talking, was an alcohol consumer or any other clinical condition. There are very few medical records to truly result from, that the discernment was affected because of the person's severe mental disorders. The great difficulty of such a report is that the person cannot be psychiatrically examined because is dead for some time. The report can be easily performed by just repeating the conclusions if found in the person's file a requested medico-legal psychiatrically report that was done directly on the person while still alive, report that shows that at the time of examination the person had legal competence of performing. The notary public has an important role for the performance of the report. Being solicited by elderly persons to perform alienation acts, they are the first that might have doubts regarding the legal competence of performance of that person. Before performing the notarial act, a good faith notary would suggest the client to have a medico-legal psychiatrically report performed. Knowing the legal importance and as a conclusion to all the above, we plead for the growth of the number of this medico-legal psychiatrically report. Within legal boundaries the reports can be better performed, for example it can be subject to the law that each person that has a mental disorder or has over 70 years must go thru a medico-legal psychiatrically report before performing an alienation value notarial act. Through laws that allow the preservation and the transfer of ownership, our legislation would be line up with the legislation in many European countries that respect the private property.

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METHODOLOGY OF THE ROBBERY OFFENCE INVESTIGATION

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Abstract: *In the first part of the article, I have presented the legal content of the criminal offence of robbery as established by the present-day Romanian Criminal Code, by the new Romanian Criminal Code published in 2009 and by the Hungarian Criminal Code.*
Keeping in mind the fact that the criminal offence of robbery is a complex offence and also the fact that the social values violated by committing this deed are very important, such as life, bodily integrity, health, patrimonial values, in the second part of the article I have presented several cases of judiciary practice that show particularities of the offence investigation and of its legal classification.

Key words: *investigation, criminal offence, robbery, judiciary practice.*

I. General considerations. Robbery is defined as "the theft committed by use of violence or threat or by placing the victim in a state of unconsciousness or incapacity of defending himself/herself, as well as the theft followed by the use of such means in order to retain the stolen good or to remove the traces of the criminal offence or so that the doer can ensure his/her escape"[1].

When the content of the criminal offence includes, as an element or as an aggravating circumstance, an action or an inaction that constitutes by itself a deed established by the criminal law, we are facing a complex criminal offence, for instance , the offence of robbery, which has a complex juridical object made of two or several juridical objects, of which one is principal and the other is adjacent.

A) Robbery in its simple form

The main juridical object consists of the patrimonial social relations regarding the maintenance of the physical position of the goods, while the secondary juridical object includes the social relations regarding the life, health, integrity of the body and freedom of the person[2].

The material object is represented by a movable good possessed or detained by someone else, on which the action of taking away is exerted, as well as the body of the person against whom the deed of the wrongdoer is directed[3].

The objective side is characterised by two components, each of them including several aspects[4].

a) the act of committing the robbery includes two conjunct actions:

1. the action of coercion, as a means – action, is committed in order to prevent or suppress the resistance of the victim, it is a means to commit the theft, to keep the stolen good, to remove the traces of the criminal offence or to allow the wrongdoer to escape. It can be achieved through:

- use of violence or threats;
- getting the victim into a state of unconsciousness or incapacity of defending himself/herself.

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[1] According to the provisions of article 211 of the Romanian Criminal Code.
[2] See Al. Boroi, *Criminal Law. The Special Part,* Publishing House C.H.Beck, Bucharest, 2006, p. 212; Gh. Nistoreanu, V. Dobrinoiu and their contributors, *Criminal Law. The Special Part,* Publishing House Continent XXI, Bucharest, 1995
[3] V. Dongoroz, in *Theoretical Explanations of the Romanian Criminal Code. The Special Part,*Vol. III, Publishing House of the Academy, Bucharest, 1971, p. 485
[4] See R.Bodea, *Criminal Law. The Special Part,* Ed. Treira, 2003, p.236-237; O.A.Stoica*, Drept penal. Partea special, Ed.* Didactică şi Pedagogică, Bucureşti, 1976, *p. 158*

For the objective side of the robbery to exist, the acts of violence must be exerted directly on the victim.

Getting the victim in a state of unconsciousness consists in the use of narcotic substances or other substances that can induce unconsciousness on a victim, while bringing the victim into a state of incapacity of defending himself/herself means making him/her unable to use defence possibilities, because of the action of immobilization[5].

2. the action of theft, as a goal-action, consists in taking the movable good away from the possession or custody of another, by forcing him/her not to resist[6].

This action is accomplished even in the case when the doer coerces the victim to deliver in person the goods that the doer intends to appropriate[7].

b) the specific result. For the criminal offence of robbery to exist it is necessary that the deed should produce a specific result, still having a complex character, i.e. a damage of the personal or private estate as the main result and a damage to the liberty, integrity of the body or health of the person on whom the action of coercion was committed as a secondary result.

The consumption of the criminal offence of robbery takes place the moment that the main result was produced.

Preliminary acts are possible both as reported to the main action as to the adjacent one, they can be of a material or a moral nature.

The attempt is possible and sanctionable[8]. In the case of robbery, perfect attempt is not possible, only interrupted attempt, improper attempt or relatively improper attempt[9].

The subjective side of robbery consists in committing the deed with a direct intention, the doer conceives and wishes the committing of the deed of taking a good away by coercion, in all its complexity, for the purpose of unjustly appropriating the good. This special intention regards the completion of the act of taking, as well as of the acts of coercion.

The active subject of the criminal offence of robbery can be any person. With the aggravating forms of robbery that resulted in a wound of the body or the death of the victim, there is, as a form of guilt, the criminal praeterintention, which is possible both in the case of joint authors and in the case of instigators and accomplices.

The passive subject or the victim of the robbery can be any person.

The sanction is imprisonment between 3 and 18 years.

B. Robbery in the aggravated forms

Robbery is aggravated if it was committed under the following circumstances:

a) by a person that was masked or disguised as his/her own sex or as the opposite sex;
b) during the night;
c) in a public place or in a means of transport[10].

In such cases the punishment is imprisonment between 5 and 20 years.

Also, the criminal offence of robbery is aggravated if it is committed under the following circumstances:

a) by two or several persons together;
b) by a person carrying a weapon, a narcotic or a paralyzing substance;
c) in a dwelling or in its outbuildings;
d) during a calamity;
e) if it had any of the consequences mentioned in article 182 of the Criminal Code[11].

[5] Al. Boroi, in the work cited, p.216.
[6] See A. Stoica, in the work cited, p. 160
[7] See R. Bodea, in the work cited, p.238-240; O.A.Stoica, in the work cited, p.160.
[8] According to the provisions of article 222 of the Romanian Criminal Code.
[9] Al. Boroi, in the work cited, p. 218.
[10] According to the provisions of article 211 alignment 2 (2) of the Romanian Criminal Code.
[11] According to the provisions of article 211 alignment 2 (3) of the Romanian Criminal Code.

In such situations, the punishment is imprisonment between 7 and 20 years, and if it has produced particularly serious consequences or has had as a consequence the death of the victim, the punishment is imprisonment between 15 and 25 years and denial of certain rights[12].

The new Criminal Code[13] establishes that the criminal offence of robbery is ”the theft committed by resorting to violence or threats, or by rendering the victim unconscious or unable to defend himself/herself, as well as the theft followed by the use of such means in order to keep the stolen good or to remove the traces of the offence, or in order for the perpetrator to ensure his/her escape, and is punished by imprisonment from 2 to 7 years and denial of the exercise of certain rights“[14].

Also, alignment 1 establishes as aggravated robbery ”the robbery committed under the following circumstances:

a) by use of a weapon or of explosive, narcotic or paralyzing substances;
b) by simulating official ranks;
c) by a person that was masked or disguised as his/her own sex or as the opposite sex;
d) during the night;
e) in or on a means of transportation;
f) by violation of domicile or of place of employment,

is punished by imprisonment from 3 to 10 years and denial of the exercise of certain rights.

When the robbery is committed under the conditions[15] of article 229, alignment 3, it is punished by imprisonment from 5 to 12 years, and when the robbery has resulted in a bodily injury, the same punishment is applied.

The Hungarian Criminal Code, in article 321, establishes the criminal offence of robbery as having the following content: in alignment 1, ”any person who abstracts with a view to illicitly appropriating a good that he/she is not entitled to belonging to another person, against the will of the latter, by resorting to violence or to the immediate threat against his/her life and bodily integrity, or by putting another person in a state of helplessness, either by making him/her lose consciousness or by rendering him/her unable to defend himself/herself, is guilty of a criminal offence that may be punished by imprisonment from two to eight years“.

In alignment 2, ”when a thief caught in the act resorts to force or to the immediate threat against the life or bodily integrity of another person in order to keep the stolen good for himself/herself, this too constitutes the criminal offence of robbery“.

Within the framework of the complex system of robbery classification, the gravest punishment is that of imprisonment for 15 years[16].

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[12] According to the provisions of article 211 alignment 3 of the Romanian Criminal Code.

[13] Law no. 286/2009 regarding The Criminal Code was published in The Official Gazette of Romania, Part I, no. 510 of 24th July 2009.

[14] According to the provisions of article 233 of the new Romanian Criminal Code.

[15] The theft regarding the following categories of goods:

a) crude oil, gasolene, condensed oil, liquide ethane, petrol, diesel oil, other oil products or natural gases from pipes, reservoirs, tanks pr tank waggons;

b) components of the irrigation systems;

c) components of the electric networks;

d) a device or a system of signalisation, alarming or alerting in case of fire or other situations of public emergency;

e) a means of transportation or any other means of intervention in case of fire, railway accidents, car accidents, shipwrecks or airplane crashes, or in case of a disaster;

f) equipment for the safety and directing of the traffic on railroads, roads, naval and air traffic, and the components of that equipment, as well as components of the corresponding means of transportation;

g) goods by the appropriation of which the safety of the traffic and of the persons on public roads is endangered;

h) cables, wires, equipment and installations of telecommunications, radiocommunications, as well as components of communications.

II. Particularities of the Investigation of the Robbery Offence

The investigation of the crime scene will be carried out by taking into account the specific character of the criminal offence, the concrete conditions under which the deed was committed, the means used by the perpetrator.

The traces found at the crime scene will vary according to the social values that were violated by committing the deed. Thus, we may refer to two types of traces, with their categories:

- traces created when violating social values such as: a person's life, bodily integrity and health (e.g., traces reproducing hands, feet, etc., biological traces: of blood, in the form of hairs, of human tissue, etc.);

- traces created when impairing the patrimony (e.g., foot traces, traces left by means of transportation, traces left by sharp, cutting objects , etc.).

Throughout the crime scene investigation, the constituted research team will observe the general principles of forensic science that must be applied in any investigation at the crime scene, taking into account the particularities of the traces, the internal and external factors that contribute to trace preservation, the number of participants, the place and time conditions in which these traces were formed.

Useful pieces of information will also be obtained by hearing the categories of persons involved in the case: witnesses, victim, defendant or indictee[17]. These categories will be heard primarily, as well as repeatedly, or by confrontation, if that may be the case.

Also, if the case requires it, the following operations may be performed: medical-legal expertises, technical-scientific findings reports or forensic expertises, polygraph testing, taking objects away and searches, appearing for person recognition.

In order to illustrate the theory exposed above, we are presenting as follows several cases from judiciary practice that unravel the particularities of the investigation of robbery offences, respectively the legal classification of certain deeds.

1. The trial court has recorded the following[18]:

At the proposition of defendant I.I., the other defendants came by train to the municipality S.M. looking for a workplace. Towards evening they arrived at the station where they met L.I. and K.C. On this occasion, the defendant H.O. suggested to the other defendants that they should go to the house of some elderly people and steal a few objects, asking K.C. and L.I. if they agree to come and stay on the watch, promising them to give them a part of what they are going to steal. They all agreed to the proposition made and went together to the dwelling that they were going to break into. Arriving in front of the house, the defendant H.O. told the defendants K.C. and L.I. to stay in the street, and if someone came, to immediately let them know. As the door of the dwelling was locked, at the proposition of defendant I.I., the defendants decided to break into the house through the roof. Once inside the house they started searching the place finding jewellery and the money that the defendant H.A. took hold of.

In a room of the dwelling, the injured party and the victim S.V.,who had both legs amputated, were sleeping.

Because the victim woke up and started to scream, the defendants H.O. and H.A. hit him in the head and chest. They then tied his mouth and nose by using a pullover they found in the room, and then tied his hands above his head with a rope.

In the meanwhile the injured party started crying and yelling, fact because of which the defendants H.A. and H.J. went to the couch on which she was sleeping, hit her several times in the face and tied her mouth and legs.

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[18]Dr. hab. Bela Blasko, *Comprehensive Characterization of the Crimes against Property Regulated by the Hungarian Criminal Code* in *Studies Regarding Criminality in the Economic Field in the Romanian and Hungarian Legislations,* Publishing House T.K.K. Debrecen, 2008, p. 321;

[17] For further details, see Elena-Ana Mihuț, *Forensics, Forensic Technique and Tactics,* University Publishing House, Oradea, 2006, p. 112-178.

[18] File no. 2850/35/R/2006, from the practice of the Appeals Court of Oradea, the Criminal Section for Issues involving minors.

The defendants took away from the injured party the earrings, the necklace and two gold rings, after which they continued searching the room.

The five defendants sold the jewellery and then they shared all the money.

The defendant K.C. learned from the press the following day that at the house where they had operated, the victim S.V. had been found dead.

From the forensic report of autopsy it results that the death of the victim S.V. was violent and owed to the mechanic asphyxia following the strangulation of the neck with a soft object and the suffocation of the respiratory orifices with soft textile objects. The wounds resulted from violence at the level of the head and of the thorax could have been produced through repeated hitting by hard bodies, applied a little before the suffocation.

Also, from the autopsy report it resulted that the injured party S.M. underwent lesions that required a period of 12-14 days of medical care in order to heal and didn't endanger the victim's life.

From the report of technical-scientific finding drawn up by the Laboratory of detection of simulated behaviour it results that"in the answers of the defendant H.A. to all relevant questions of the cases, in the polygraph bio diagrams there were revealed significant psycho-physiological modifications characteristic to the emotional reactivity, that lead to the conclusion of having detected a simulated behaviour of the subject".

The deeds of the defendants gather the constituent elements of the criminal offence of robbery followed by the death of the victim *(article 211 alignment 2, alignment 2/1 letters a and c and alignment 3 of the Criminal Code with the application of article 75 letter a of the Criminal Code)*, the criminal offence of aggravated robbery *(article 211 alignment 2 letter b, alignment 2/1 letters a and c of the Criminal Code with the application of article 75 letter a of the Criminal Code),* the criminal offence of illegal deprivation of liberty *(article 189 alignment 6 with the application of article 75 letter a of the Criminal Code).*

In the case of robbery, which is a complex criminal offence, a joint author is also the person who commits only a component act of the objective side of the criminal offence, for instance he/she exerts only the violent act or the taking away of the good.

2. The trial court has recorded the following[19]:

The victims G.E. and G.I. kept in the house a great amount of money. At the time when the victim G.I. sold a horse to the cousin of the defendant S.N. and received money for it, in the house there was present also the defendant R.T. who lived nearby and saw where he kept his money.

The two defendants went to the bar in their village where they had a talk and at a given moment the defendant S.N. suggested to R.T. that they should go to the victims' dwelling, knowing that they had a lot of money, and steal it, as it was a late hour of night, and use violence in order to get the money.

The defendant R.T. accepted the proposition, and, after taking an axe, they went to the victims' house.

As the door was locked, the defendant S.N. called to the victim G.I., asking him to come out. As he awoke, the victim came out, at which moment the defendant S.N. hit him with a piece of wood in his head. As the victim was trying to resist, the defendant told the other defendant R.T. to hit him too, because he couldn't hold him anymore. As a result, the defendant R.T. hit him a few more times in the head area, until he deceased.

Getting inside the house, they also found victim G.I. she asked them not or enter the dwelling, but the defendants rushed at her applying several blows, until she deceased, after which they took the money and left.

From the forensic autopsy report it results that the deaths of G.I. and G.H. were violent, the traumatic lesions could be the product of repeated active hitting by hard bodies.

[19] File no. 3636/35/P/2006. From the practice of the Appeals Court of Oradea, The Criminal Section for issues involving minors.

The psychiatric medical-legal expertises made show that the defendant R.T. suffered from a personality disorder of an unstable type, his discrimination being preserved as regards the charges against him, and the defendant S.N. suffered from a personality disorder of a dissociating type, but preserving his discrimination as regards the charges brought against him.

The deeds of the defendants meet the constituent elements of the criminal offence of robbery *(art. 211 alignment 2 letter b reported to art. 211 alignment 2 index 1 letters a and c and alignment 3 of the Criminal Code),* the criminal offence of aggravated murder *(article 174 reported to article 176 letters a and d of the Criminal Code),* the criminal offence of domicile violation *(article 192 alignment 2 of the Criminal Code).*

Against this decision, the defendants brought an appeal asking for the change of the juridical qualification of the deed to a single criminal offence of robbery.

In response to the appeal, the court changed the juridical qualification from the above mentioned criminal offences to the offence of robbery *(specified and punished by art. 211 alignment 2 letter b reported to art. 211align. 2/1 letters a and c of the Penal Code),* offence of aggravated murder *(art. 174 reported to art. 176 letters a and d of the Penal Code).*

The criminal offence of domicile violation is included as a circumstantial element of the offence of theft and absorbed by the more serious and complex offence of robbery, committed in a dwelling.

The acts of violence were committed with the intention of killing the victims in order to steal money, the purpose being achieved.

3. The trial court has recorded the following[20]:

The defendant L.A., in the daytime, finding himself in a street of the town S.M., after noticing that the lessee of the nearby building A.J., the husband of the injured party A.R. has left the dwelling, climbed over the fence and penetrated the yard of the building. He entered the house, the door being unlocked and from a room he stole a wristwatch and a stone ring. Being caught in the act by the injured party, the defendant took a kitchen knife, which he used to threaten her and hit her with the handle of the knife in the area of the ear, causing her lesions that required medical care taking 3-4 days to heal.

As the injured party was trying to fight back, the defendant immobilized her on a chair, tying her hands and legs by using two neckties found in the dwelling. Threatened by the defendant, the injured party pointed out where she kept the money, so the defendant took from her handbag 20 millions lei, and from the dwelling two mobile phones.

The deed of the defendant meets the constituent elements of the criminal offence of robbery *(art. 211 align. 2 letter c and align. 2/1 letter a of the Criminal Code).*

Against this decision an appeal was brought, within the legal time period, the Persecution department of the trial court demanding the conviction of the defendant also for the offence of deprivation of liberty, as, reported to the way of committing the deed, namely the immobilization of the victim by tying her hands and feet and leaving her in the dwelling in this state meets the elements constituent of the offence of deprivation of liberty.

The appeal court appreciated that the trial court had correctly considered that the case did not meet the constituent elements of the criminal offence of illegal deprivation of liberty specified by art. 189 of the Criminal Code, the activity of the defendant materialized in threats against the injured party, followed by hitting and immobilizing her, meets the elements of the complex criminal offence of robbery.

[20] File no. 254/2005, the Appeal Court of Oradea, The Criminal Section for Issues concerning Minors.

SOME CONSIDERATIONS REGARDING THE OFFENCES STIPULATED BY ACCOUNTING LAW

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Abstract: *The republished Law regarding the accountancy no. 82 from 24th of December 1991, which has been modified by the Law no. 259 from 19th of July 2007, stipulates in chapter 6 contraventions and offences in this domain.*

The creation, the administration, the perform and the control of the state's, administrative-areas institutions' and the public institutions' financial resources are regulated through the law.

The obligation of organizing and of having there own bookkeeping, meaning the financial and the administration bookkeeping accommodated with each ones activity is the duty of the companies, national companies, autonomic administrations, the national research and development institutes, co-operative companies and of the other lucrative conventional person.

Any economics-financial done operation it is being written down, when it is carried on, on a document that represents the basis of the bookkeeping registrations, getting, in this way, into a justifying document.

The justifying documents that represent the basis of the bookkeeping registrations hire the responsibility of the persons that created, endorsed and approved it, as well as of those that have registered them in the bookkeeping.

Kew words: *economics-financial, document, companies, law*.

I. Romania's economics is a market economics, based on free initiative and competition. The creation, the administration, the perform and the control of the state's, administrative-areas institutions' and the public institutions' financial resources are regulated through the law[1].

The national public budget consists of the state's budget, the state social assurance budget and the communes', cities' and counties' local budgets.

The Government yearly elaborates the plan of the state's budget and the one of the state social assurance budget that has to pass, separately, through the approval of the Parliament.

The obligation of organizing and of having there own bookkeeping, meaning the financial and the administration bookkeeping accommodated with each ones activity is the duty of the companies, national companies, autonomic administrations, the national research and development institutes, co-operative companies and of the other lucrative conventional person.

Any economics-financial done operation it is being written down, when it is carried on, on a document that represents the basis of the bookkeeping registrations, getting, in this way, into a justifying document.

The justifying documents that represent the basis of the bookkeeping registrations hire the responsibility of the persons that created, endorsed and approved it, as well as of those that have registered them in the bookkeeping.

[1] The Constitution of Romania, Title IV- there are stipulated regulations regarding the Economics and the public finances in art. 135-141.

The administration person, the chief accountant or other person that have the obligation to administrate the patrimony has the responsibility for organizing the accountancy and for the bookkeeping.

II. The republished Law regarding the accountancy no. 82 from 24th of December 1991[2], which has been modified by the Law no. 259 from 19th of July 2007[3], stipulates in chapter 6 contraventions and offences in this domain. As a result, according to these law regulations there are:

A. Contraventions the following actions if they weren't perpetrated in such conditions in which, according to the law, to be considerate as offences:

1. having, with any title, material goods, valuable titles, cash and other rights and obligations, as well as making economics operations, without being registered in the bookkeeping. These contraventions are being sanctioned with a fine from 1.000 to 10.000 lei.

2. not respecting the regulations issued by the Minister of Public Finances regarding :

a) using and having the accountancy books;

b) making and using justifying and accountancy documents for all the done operations, entering them into accountancy in the referring period, keeping and recording them, as well as remaking the lost, steeled or destroyed documents;

c) doing the inventorying;

d) making and auditing the yearly situations;

d^1) handing in the yearly financial situations at the areas institutions of the Minister of Economics and Finances[4];

e) making and handing in, at the areas institutions of the Minister of Economics and Finances, the periodical financial situations or the bookkeeping reports established according to the law;

f) not handing in the declarations from which to result that the kind of persons that are stipulated in art.1 haven't carried an activity in;

g) publishing the yearly financial situations, according to the law[5].

The contraventions stipulated at this point are being sanctioned as follows:

- the ones stipulated at letters c), d) and d1) are being sanctioned with a fine from 400 to 5.000 lei;

- the one stipulated at point 6 are being sanctioned with a fine from 10.000 to 30.000 lei;

- the ones stipulated at letters a) and b) are being sanctioned with a fine from 300 to 4.000 lei;

– the one stipulated at letter e) is being sanctioned with a fine from 500 to 1.500 lei. Regarding this contravention the fine is from 1.000 to 3.000 lei, if the period of being late for making and handing in the periodic situations is between 15 and 30 working days.

- the one stipulated at letter f) is being sanctioned with a fine from 100 to 200 lei;

– the one stipulated at letter g) it is being sanctioned with a fine from 2.000 to 30.000 lei

3. handing in the financial situations that contain wrong or not correlated information, including regarding the reported person identification.

The contravention from this point it is sanctioned with a fine from 200 to 1.000 lei.

4. not respecting the regulations regarding making the declarations stipulated in art. 30 and 30, line 1. It is sanctioned with a fine from 400 to 5.000 lei.

5. not respecting the regulations regarding the obligation of the administration, managing and supervising bodies' members to make and publish the yearly financial situations. It is sanctioned with a fine from 400 to 5.000 lei.

6. not respecting the regulations regarding the obligation of the administration, managing and supervising bodies' members from the mother-company to make and publish the yearly financial consolidated situations[6].

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[2] Published in the Of. M. of Romania no. 629 from 27th August 2002, republished in the Of. M. of Romania, I Part, no. 48 from 14th of January 2005.

[3] Published in the Of. M. of Romania no. 506 from 27th of July 2005.

[4] Action stipulated through Law no. 259/2007 for modifying and supplementing Law no. 81/1991.

[5] According to the regulations from art. 41, Law no. 81/1991.

[6] Points 4, 5 and 6 were introduced through Law no. 259/2007 for modifying and supplementing the Law no. 81/1991.

The criteria on which the fine level it is established, it is correlated with the business quote level, for each case.

The Romanian Government, if the Minister of Economics and Finances asks, can modify the fine's level stipulated in art. 41, line 1 from Law no. 81/1991 according to the inflation quote.

Finding the contraventions and applying the fines are being done by the persons that have financial inspection prerogatives and by the Financial Guard's inspectors.

Regarding the owners associations, finding the contraventions and applying the fines are being done by persons that have control prerogatives inside the local councils of the cities, towns, communes and of the sectors of Bucharest and by other person that have a mandate from the counties' councils, or by the General Council of Bucharest[7].

B. False high brow is an offence when there are being done, on purpose, inaccurately recordings, as well as the omission on purpose of the bookkeeping registers, and having as a consequence the defalcation of the incomes, expenses, the financial results, as well as of the active and passive elements that regards to the balance sheet.

The Romanian Criminal Code – the special part stipulates in Title VII – the offences of false that are structured in 3 chapters, as follows: chapter I falsifying coins, stamps and other values; chapter II falsifying the autentification or marking tools and chapter III false in writing.

The content of chapter III, art. 289 shows us the legal content of the false high brow offence. So, falsifying an official writing when it was made, by a clerk during his work prerogatives, by certifying some actions or unreal circumstances or by the omission on purpose of inserting some information or circumstances, is a false high brow offence.

In some specialized paper works it is shown that the offence stipulated in art. 43 from the Law no. 81/1991, republished, is an offence that is different by the one from art. 289 Romanian Criminal Code and that the delivery it is done only regarding the punishment[8].

The false high brow it is perpetrated by a clerk and always against an official writing. The author considers, that the writing made by the administrator or the employee of a private company that has limited responsibility it is not „an official writing", in the way shown by art. 150, line 2[9], meaning it can not be the false high brow offence, but the false in writing with private signature offence, stipulated by art. 290, Romanian Criminal Code.

In another opinion it is sustained that regarding the private companies, whatever these are, falsifying the monetary and the evidence monetary register does not represent the offence from the art. 43 from Law no. 81/1991, the companies with private capital can not issue official writings because they don't correspond with art. 150, line 2 and art. 145 from the Romanian Criminal Code[10].

The offence stipulated in art. 43 from Law no. 82/1991 is a self standing offence[11] different from the one stipulated in art. 289 Romanian Criminal Law Code, between them there are some differences. So:

- the material object of the offence stipulated in art. 289 Romanian Criminal Code is an official writing, when in the offence stipulated in art. 43 from Law no. 81/1991 there are described the bookkeeping documents;

- the objective part: On a hand, the material element of the offence, from art. 289 Romanian Criminal Code, consists in falsifying an official writing that can be done through two alternative

[7] According to art. 42, line 4^1 from Law no. 81/1991.

[8] To look in Gh. Voinea, *False in bookkeeping and false high brow*, article published in „Dreptul" Magazine, no. 3/1999, pg. 100

[9] „Official writing" is any writing that issues from an institution from those that art. 145 refers to or which belongs to this kind of institution (through out „public" we understand everything that regards the public authorities, public institutions, institutions or other conventional persons of public interest, administration, using or exploiting the goods that are in the public property, the public interest services, as well as all kinds of goods, that according to the law, are of public interest).

[10] In this way, to look in A. Boroi, *Criminal Law. Special part*, C.H. Beck Publishing House, Bucharest, 2006, pg. 508-509; B. Diamant, V. Luncean, *Regarding to the false high brow offence*, R.D.P., no. 1/1999, pg. 139.

[11] To look in, A. Boroi, *Criminal Law. Special part*, C.H. Beck Publishing House, Bucharest, 2006, pg. 510-511.

ways: either by certifying some actions or unreal circumstances, or through the omission, on purpose, of inserting some information or circumstances (meaning that concerns every actions or circumstances), and on the other hand, art. 43 from the Bookkeeping Law regards to the activity of recording, on purpose or to the omission on purpose of the bookkeeping recordings.

- the immediate consequence consists, regarding art. 289 from the Romanian Criminal Code, in creating a danger situation for the social value protected by the law, any official false writing, and in art. 43 from the Bookkeeping Law refers to the false accountancy balance sheet.

The active subject in art. 289 from the Romanian Criminal Code is every clerk during his work prerogatives, when regarding the offence stipulated in the Bookkeeping Law can be any natural person mandated to keep the company's accountancy.

We must take into consideration the regulations from art. 288, line 3 from the Romanian Criminal Code, that consists of the material false in the official writing offence and that stipulates that are assimilated with the official writings the tickets, or any other printed papers that produce judicial consequences.

Regarding other constituent elements regarding the offence from Law no. 82/1991, we have the following:

- the special judicial object in art. 43 from the Bookkeeping law, it is formed by the social relations that assure the authenticity and the trust that have to exist regarding the content of the official bookkeeping documents.

The objective part. The material element it is done through the action of doing, on purpose, of inexact registrations or the inaction of omission, on purpose, of the registrations in the bookkeeping.

Doing inexact registrations calls for writing in a given official accountancy document and unreal actions, totally or partially.

The omission of accountancy registration calls for the action of not registering a paper in the book keepings or not to certify in a primary paper a real action.

Through misrepresentation we understand the deliberated changing of the character's meaning or the meaning of the actions' content that must be reflected in the accountancy balance sheet[12].

The immediate consequence consists of the consequence of misrepresentation the incomes, the expenses, the financial results and the patrimony's elements, that are reflected in the accountancy balance sheet.

The causality link between the action and the consequence it is not presumed by the law.

- the subjective part. The guilty form through which this offence is being perpetrated is the direct or indirect intention[13].

The high brow false is being sanctioned with the prison punishment from 6 months to 5 years. The attempt is being punished. There is attempt when the falsifying action has started, but it has been interrupted or the effect hasn't been made from reasons that are independent from the perpetrator's will. The high brow false through omission can not be perpetrated just through a consumed form.

Specific proceedings aspects. The criminal law action is started ex officio.

In the Romanian judicial literature some authors show that the text from art. 43 does not contain an incriminatory criminal rule, this being limited to mentioning some professional behaviours against the law and to announce that these behaviours are the high brow false offence, sanctioned according the Romanian Criminal Code[14].

[12] C. Voicu, Alex. Boroi, F. Sandu, I. Molnar, *The businesses' Criminal Law*, Rosetti Publishing House, Bucharest, 2002, pg. 167

[13] The law-maker uses the expression „on purpose".

[14] G. Diaconescu, *The offences in special laws and in out-criminal laws*, Sirius Publishing House, 1994, pg. 274.

SOME CONSIDERATIONS UPON THE GENERAL THEORY OF THE LAW'S REALIZATION

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Abstract: *In this paper work are exposed some considerations upon the general theory of the law's realization, starting from the definition of the concept of law's realization and from its forms.*
Also, it is especially important to underline the fact that, in regard to their respective appearances, the similarities between state and law are obvious and it was stated that the law is an intrinsic dimension of human existence.
Key words: *The law, juridical norms, general theory*

In order to approach the present topics, we should start from the definition of the concept of law's realization and from its forms[1].

A first imperative precision concerns the link between law and society. Briefly, this connection may be expressed through the following lines:

a) the society is one of the structures of the international relationships;

b)the law constitutes the bone' skeleton of this structure (of society);

c) the law is the instrument through which is made the attempt to create a certain type of society. This fact leads to some consequences:

- the law is a normative value, because it enunciates what ought to be, not what exists;
- the law is not a purpose by itself, it is an instrumental reality, vowed to the realization of a purpose;
- with the modification of the aimed social purpose comes the modification of the law;

d) the law is an instrument of inter-subjective coordination able to ensure the co-existence of inter-related liberties[2];

e) the individual person has to respect the other's liberty[3];

f) the law has to obtain wilful recognition from its subjects[4];

g) through its influence upon the education of individuals, the law exerts a disciplining function;

h) the law presents itself as a rational standard for the individuals' behaviour towards the others;

i) the positive norm makes use of a middle standard, due to the various cultural levels of individuals; the standard's value should increase with the individuals' cultural level;

j) the state intervenes, especially through the functions of prevention, stimulation and repression, within the law's realisation.

We think it is especially important to underline the fact that, in regard to their respective appearances, the similarities between state and law are obvious. As in the law's case the appearance

[1] For developments, see: Nicolae Popa, *Teoria generală a dreptului*, Editura All Beck, 2002, p. 159 and allowing; Idem, op. cit., 2002, p. 220-236; I. Dogaru, D.C. Dănişor, Gh. Dănişor, *Teoria generală a dreptului*, Editura Ştiinţifică, Bucureşti, 1999, p. 345-378; Gh. Dănişor, *Teoria generală a dreptului*, Editura Themis, Craiova, ., p. 189-233; I. Dogaru, *Drept civil român*, Editura Europa, Craiova, 1999, p. 213-225; Collective (coord. I. Dogaru), *Ideea curgerii timpului şi consecinţele ei juridice,* Editura All Beck, Bucureşti, 2002, p. 36-75.

[2] Respectively, to obtain the highest possible level of freedom in a certain context, in the relationship with the others, that is to say within a certain type of society.

[3] As he wishes for himself that his own freedom should be respected.

[4] In other words, they have to educate themselves, because the law's finality, consisting in attending the highest level of freedom within relationships, may be reached especially through the individual's education.

of the state is determined by the changements that occurred within the primitive commune' system, which rendered obsolete the ancient forms of settlement and organization. A new form imposed itself, the one of state and politics[5]. Here is a new connection between law and society.

As a conclusion it was stated[6] that the law is an intrinsic dimension of human existence. More, it was said that, into the system of human relationships - that is as complex as the law - in a continuous process of extension, a special signification is carried by the regulation, through juridical norms, of the most important social relationships[7]. Therefore the quoted authors do consider that: "The law is determined by the purposes imposed to the action"[8].

The law, the juridical norms, are created in order to be respected and applied, thereby to be realized. The realization of law is a hard and difficult task, but it is as important as the process of the law's creation (elaboration).

It is a process through which the general and "abstract norms are shaped within a certain type of society through the conformity of its subjects' behaviour to their prescriptions and through a framework of state's actions vowed to ensure their application in view of the common good (welfare)"[9].

The realization of law is also defined as the process of "implementing the stipulations of juridical norms into social life, through their respect and execution by the members of society and by their application through the competent state organs"[10].

Nicolae Popa defines the realization of law as "the process of transposing into life the contents of juridical norms in the frame of which the people, seen as subjects of law, do respect and execute normative dispositions, while the state's organs do apply the law, on the ground of their competence"[11].

Ultimately "a law is stated due to the wish of bearing an influence, in a certain sense, upon the human behaviour. Its appearance is legitimated by the necessity to juridical rule certain behaviour in social relations, either because such relations have known, for the first time ever, a certain evolution asking for a juridical regulation, or due to the fact that the dynamics of these relations has led to transformations which impose a new regulation"[12].

Being made in order to be applied, the law ought to be applied correctly, because if badly applied, a good law does not fulfil its purpose[13], a fact which means that the realization of law, as a deed, turns off from the principle of equity and by its nature, does not support the order provided by the law[14].

From this definition, to which we agree, some defining ideas rise:

- as a general and abstract rule, the juridical norm has to cross from universality to particularity, from abstraction to concreteness, through its respect by the law subjects or by its application through means of state's authority;

- the positive law is an instrument, able to achieve a concrete, particular purpose;

- the realization of law is a complex achievement, which supposes the passage from prescribed behaviour to real behaviour;

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[5] Nicolae Popa, *Teoria generală a dreptului*, Ediția a 3-a, Editura C. H. Beck, Bucureşti, 2008, p. 74.

[6] Nicolae Popa, Mihai Constantin Eremia, Simona Cristea, op. cit., p. 202; "A complex product of society, law presents itself as an indefeasible dimension of the human existence, within determined social and historical circumstances".

[7] Idem, op. cit., loc. cit: "The significance of the regulation through juridical norms of the most important social relationships is strongly underlined by the unprecedented amplitude of intra-social contacts, through the processes of production, allotment and exchange of activities among people".

[8] Ibidem, op. cit., loc. cit.

[9] Ion Dogaru, D. C. Dănişor, Gh. Dănişor, op. cit., 1999, p. 347

[10] D. Mazilu, *Teoria generală a dreptului*, Ediția II, Edituta All Beck, Bucureşti, 2002, p. 264.

[11] N. Popa, op. cit., p. 222; N. Popa, M. C. Eremia, S. Cristea, *Teoria generală a dreptului*. ed. II, Editura All Beck, Bucureşti, 2005, p. 204

[12] For details see I. Dogaru, S. Cercel, *Drept civil. Partea generală*, Editura C. H. Beck, Bucureşti, p. 32-40

[13] Idem, op. cit., loc. cit.

[14] See I. Dogaru, *Drept civil român*, 2000, p. 53.

- the realization of law has an unbreakable connection with the individuals' education and supposes the increase of the ratio of understanding the norm and conforming to it;

- the realization of positive law involves as well the individual action according to the normative prescription and the state's action creating a hierarchy of social values and increasing, for the individuals, their level of understanding and education.

The forms of realization of the law are another highly important matter for the approach of this theme.

The law's realization supposes "the transformation of the lawful order - as a theoretical concept - in real social relations"[15], this achievement taking two forms:

a) the realization of law through the activity of executing and respecting the laws and;

b) the realization of law through the juridical norms' application by the state's organs.

We share the opinion that the realization of law through its natural respect (the natural execution of the law's stipulations as the first form of this achievement) pertains to generality through this very important process.

In recent Romanian juridical literature[16] the application of law was defined as the process of elaboration and realization by the state of a system of actions aiming to transpose into practice the dispositions and sanctions stated by the law's norms; in foreign juridical literature, according to P. Pescatore[17] the concept of law's application contains all the actions, performed by the state, necessary for ensuring the practical protection of subjective rights.

In the sense of the second definition, this concept points to the second form of law's realization, the one involving the action of a state's organ.

The definitions we mentioned, seen together, give rise to the following ideas[18]:

a) the effective application of law, of the norms which constitute the juridical order, is a fundamental problem for any organized society;

b) the juridical order supposes that the state should elaborate the juridical norms and effectively take them into action;

c) The application of the law implies, from its organs, two categories of actions: repressive and simulative ones;

d) the application of juridical norms by the organs of the state represents the second form of law's realization which involves the intervention of a state's organ, within the limits of its stipulated competence, in order to determine subjects to comply with the normative disposition, the first one being the respect and execution of juridical norms with no intervention from the state's authority;

e) the deed of law's application implies the passage from the general view (the juridical norm) to the concrete act of the organ /the particularity);

f) the application of law through the involvement of the state's authority takes place according to the principle of power' separation within the state.

As a conclusion to what we have noticed let us state that two causes lead to the realization of law through the respect and execution of normative prescriptions:

a) the degree insofar positive law is the expression and effective action of the collective "self". This "self" is seized by the individual person as being her own nature;

b) the fear not to suffer some applied constraint. The given definitions demonstrate two forms taken by the application of law:

a) the respect and execution of juridical norms' stipulations with no intervention from the state's organs;

b) the application of juridical norms due to the action of the state's authority.

About the phases of the law's application, some previous precisions are imperative:

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[15] D. C. Dănişor, *Drept constituţional şi instituţii politice*, vol. I, Editura Ştiinţifică, Bucureşti, 1997

[16] N. Popa, op. cit., 1992, p. 164; Idem, op. cit., 2008, p. 185-189.

[17] Op. cit., 296

[18] See I. Dogaru, S. Cercel, op. cit., 2007, *Partea generală*, p. 32 and following; I. Dogaru, *Drept civil român*, p. 53 and following; I. Dogaru, N. Popa, D. C. Dănişor, S. Cercel, B*azele dreptului civil. Tratat*, vol. I, *Teoria generală*, Editura C. H., Beck, Bucureşti, 2008, p. 153-157 and 256-262.

a) the application acts of the law are issued either from the administration or from the courts of justice;

b) in both cases the application of law is carried out through the same phases;

c) as a principle, administrative acts are submitted to juridical control[19].

In the process of applying the law matters of fact do appear[20], as well as matters of law[21]:

- the matters of fact are the reality of facts and the evidence standing for them, as they are called;

- the spotting of the applicable juridical norm and its sense's elucidation do constitute the matters of law, as they are called.

From many points of view, it is important to distinguish between the matters of fact and the ones of law;

a) the judge could no more revise the matters of fact, but he may do that upon the matters of law;

b) it is a matter of law to qualify the facts[22];

c) finally, the question of evidence concerns as well mainly the facts, but sometimes the law's norm, too especially in the cases of customary law, of autonomous norms and of the rules of foreign law.

The correspondence between the juridical norm and the facts is worthy for the application of the norm to the respective facts; the major premise is the juridical rule, while the minor one is the matter of fact; the solution of the case is the conclusion.

Through the juridical fiction given by the principle *nemo censetur ignorare legem*, a fiction which is so necessary for the system's functioning, the theoretical equality of people in respect to the law is accomplished[23].

It is just that, under an almost unlimited dynamics of the normative system, it seems, rather impossible to be aware of the whole of it. This is why the knowledge of laws exceeds the limits of a presumption in that matter even, for specialists. The *nemo censetur ignorare legem* model to be followed is, therefore, valid not only for the citizen, but for the legislation too, which finds itself obliged to ensure the knowledge of the law[24].

The juridical act issued as an unilateral manifestation of will from the state organ is the conclusion of the syllogistic reasoning concerning the facts' reality and their qualification.

The consequence of the emission of an act applying the law does not necessarily mean the exertion of a physical constraint. The state will be justified to apply by force the respective act, that is to say through the institutionalised way, only if there would be no voluntary conforming to it.

The last phase of applying the juridical norms is the execution of the application act. In this regard, we have to distinguish the following situations:

- in most of cases, the application act is wilfully executed by the respective subjects. Only if the voluntary obedience should lack, the state would proceed to forcefully apply the act, calling for the support of the lawfully institutionalised violence.

The main features of the law's application do concern:

a) the establishing of the applicable rule;

b) the lacunae of the law;

c) the law's obscurity;

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[19] It results that the judge is the one who, ultimately, controls the process of the law's application

[20] *Quaestio facti*

[21] *Quaestio iuris*

[22] See I. Dogaru, D. C. Dănişor. Gh. Dănişor, op. cit., p. 353.

[23] "If this principle could, until now, produce effects without too much hurting, the common sense insofar expresses «the belief into the knowledge of a law that is accessible for all» today would tend more and more towards the description of a «science-fiction» status" (Jean Pierre Henry, *Vers la fin de L'etat de droit?* in Revue de droit public, 1978, p. 1211-1212)

[24] For developments, see I. Dogaru, S. Cercel, op. cit, 2007, *Partea generală*, p. 32 and fallowing; I. Dogaru, op. cit., 2000, p. 53 and fallowing; I. Dogaru, N. Popa, D.C. Dănişor, S. Cercel, *Bazele dreptului civil. Tratat*, vol. I, *Teoria generală*, Editura C. H. Beck, Bucureşti, 2008, p. 153-157, 256-262.

d) the determining of the application area for the law's rules and

e) the jurisprudential creation of law is taken as a premise.

It would be too presumptuous and it would bear no scientific stamina to dare stating that laws have no lacunae, so they would be containing all.

A lacuna means: "the omission, by the law, to solve a problem that should necessarily be solved"[25].

This definition gives rise to some ideas, either straight or implicitly:

a) an overall regulation for all the inter-subjective relationships that should be ruled in the name of law is rendered impossible by the variety of needs in society and by the multiple concerns of people;

b) there are a lot of details which escape from the sight or the deed of juridical regulation. Once formally issued, the laws are enforced for the future, wherefrom we may notice that no matter how piercing our prevision might be, it still would not be overall containing;

c) the evolution of society, of things going by human experience and, generally, by all that means social diachronic provide evidence for the fact that often, the regulation gaps (the lacunae) are pointed out after the respective law's enforcement;

d) in the field of juridical regulation, the omission has to be understood in its largest sense:

- the total lack of regulation for a problem and
- its precarious regulation;

e) not every lack of the law represents a lacuna[26];

f) it would be too much and even abusive to state that there are no lacunae (in the word's proper sense) because they would all be remediated through interpretation[27] the use made of logical procedures, to which these authors refer, in respect to the legislator's will, is constructive, as the lacuna is the expression of this will itself.

The lacuna's causes[28]. According to the cited author and to the discourse he refers to, the causes of the lacuna's appearance in the legislative system are:

a) the legislator's disregard about regulating a problem, with no distinction made about the causes of such disregard;

b) the law's contradictions, encountered when the law's stipulations are reciprocally annulling themselves, leaving by this some space unrolled;

c) the legislator's will to leave certain questions to the latitude of the applying organ;

d) a problem might not yet exist, about certain relationships, at the very moment of the law's issue, but it might yet appear afterwards.

The Romanian Civil Code contains two texts regarding the resolution of the problem of law's lacunae:

- the stipulations of art. 3 which precise that the judge cannot refuse to judge, under the pretext that the law is either silent or obscure; to do otherwise would be a denial of justice;
- the stipulations of art. 4 which forbid to the judge to pronounce general stipulations or regulations.

The study of these two texts points out that:

a) the respective norms do raise the problem of the lacunae's inner features;

b) these texts do limit the judge's creative possibilities;

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[25] I. Dogaru, D.C. Dănişor, Gh. Dănişor, op. cit., 1999, p. 357.

[26] So, for instance the law's imperfection does not stand as its lacuna, because, while the imperfection is of a moral, social or economical nature, the lacuna is the result of the lack of logical coherence shown by the positive juridical system (see, to this purpose P. Pescatore, op. cit., p. 300 and following).

[27] So has argued Huc, *Commentaire du Code civil,* 1892-1903, t. I, p. 165. See also Valette, *Cours de droit civil*, Paris, 1872, t. I, p. 35 quoted by I. Dogaru, D. C. Dănişor, Gh. Dănişor, op. cit., p. 357

[28] See, to this purpose Lacré, *Legislation civile commercial et criminelle ou commentaire et complément des codes français*, t. I, p. 156 and 160, concerning the preliminary discourse at the French Civil Code

c) the reunited study of the two texts leads us to the conclusion that only lacunae could be completed by the interpreter, the other imperfections being exempted from the benefit of this kind of treatment;

d) spotting and completing the lacunae, the solution given by the judge does not yet have the value of a juridical norm. It bears only the value of the judged matter, which is relative;

e) the judge's solution about the lacuna's spotting and completion is compulsory only for the sides (inter *parts*).

Through the texts noted above, the Romanian Civil Code does institute the following two principles:

a) only the laws may present lacunae, but not the juridical system itself;

b) the juridical decisions that could be opposed *erga omnes* are forbidden, this means that:

- this second principle flows from the one of power' separation within the state;
- this principle forbids to the judge to create the law.

There are two kinds of lacunae for a law:

a) the lacunae in the proper sense, the one concerning an absolutely new situation, one that the legislator could not foresee at the regulation's very moment;

b) the lacunae resulted from an inadequate conception of the law's text.

In order to fill in the lacunae of the law, the judge is able to make use of the following two methods:

a) to prolongate (by reasoning) the existing juridical system through the procedures of systematically interpretation, analogy and induction;

b) to point out the existing differences between the unregulated situations and the already ruled ones, through the *a contrario* argument.

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THE STATE OF LAW. A FEW ACCENTS

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Abstract: *In time, a series of these were shaped regarding the connection between state and law. The representatives of its doctrines are rather inclined to admit the existence of an antagonism between state and law, considering that the law's ground lies beyond its creation by the state, which means that law itself is something that signifies more than the positive law. On the other hand, for totalitarian states, the state is a transcendent, supreme and exclusive reality, which denies the existence of the rights that are intrinsic to the inner self of the individual, which even denies individuality as an autonomous reality, reserving to the individual only a role of social atom, to whom the state magnanimously concedes rights*.

Key words: *The state of law, philosophical perspective, law and positive law.*

The question was asked and it always could be repeated: is there or not an antagonism between state and law? To be able to answer to such a question is as delicate as it could be, since an eventual answer depends on the philosophical perspective through which is analysed the notion of law and on the way its finality and foundation are understood. The diverse answers of the various schools of juridical philosophy, generally standing on two opposite positions as we will see next, have this explanation.

Philosophical theories and streams were formed, which from divergent positions explain the importance "of the state, the role it holds in defending the social interest of groups or of the society as a whole"[1].

In time, a series of these were shaped regarding the connection between state and law. One of them is the jusnaturalistic opinion.

The representatives of its doctrines are rather inclined to admit the existence of an antagonism between state and law, considering that the law's ground lies beyond its creation by the state, which means that law itself is something that signifies more than the positive law. Thus the conclusion according to which the state should be limited in its legislative action, an attitude indicating an antagonism between the two entities - the state and the law. This adversity presents itself as: "the reflected image of the antagonism between authority and liberty at the moment when each of them tends to become absolute"[2]. Into this context, it has been said that the state and the law present one to the other as a necessary evil[3].

The positivistic attempts to eliminate the antagonism between state and law, by reducing the latter only to the legislation created by the state, and thereby consolidating the state itself. But it failed, because it stated that there is no law, prior and superior to the state's organization able to limit the state's legislative action and that state was, by itself, able to self-limit and border its own normative process.

[1] Nicolae Popa, *Teoria generală a dreptului*, Third Edition 3, Ed. C.H. Beck, Bucureşti, 2008, pag. 74; See also: Nicolae Popa, Ion Dogaru, Gheorghe Dănişor, Dan Claudiu Dănişor, *Filosofia dreptului*, Ed. All Beck, Bucureşti, 2002, for the parts which present the juridical vein of the great streams.

[2] Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 100.

[3] "Natural law is the limit till which could be extended the society's stateship. It is limited, on one side, by the civil society's impulsion towards chaos and, on the other side, by the state's propension towards an inflexible order. State and society mutually see themselves as necessary evils" (Idem, *op. cit*., loc. cit.).

Finally, a last thesis presents the state as a realization (embodiment) of the idea of law. State and law respectively belong to different spheres: the state, to the sphere of facts, while the law, to the one of concepts. Therefore, here is their antagonism[4].

The state as such exists only as long as it expresses the concept of law, as long as its political constitution does express, as a reflected image, the existing social status[5].

On the other hand, such an antagonism exists even between the concept of law and the positive law[6].

After these brief preliminary considerations, let us continue by sketching some ideas about the state of law. It is a notion both ambiguous and frequently used.

In itself, the concept of a state of law is a notion which does not require demonstration, even if it was understood as a postulate[7] and even if its significance comes to be overloaded[8].

A judgement of this kind is wrong, because this way the myth of the state of law is transformed into its opposite, so that: "through it, the state acquires a legitimacy which, before, was unconceivable; to make use of it without discernment would mean to leave this new legitimacy with no control at all"[9].

The accent placed upon the state of law coincides, in some way, with a kind of reflux suffered by the democratically logics[10]. A concept like the state of law creates, under these circumstances, a reaction of legitimacy granted causing grave consequences[11].

About the contents of the concept "state of law", some preoccupation exists about the fact that, at its appearance, as a type of state, the state of law benefits from the initial pre-supposition that it is a reality which includes and overwhelms the state understood as a police force[12].

Consequently "The state of law represents precisely the state where its own power is limited, through a triple and simultaneous phenomenon the protection granted to individual liberties; the recognized supremacy of nature; the diminishing of the state's competencies"[13].

Undoubtedly the state of law is the type of state to which the fidelity is constituted by the liberty of the individuals, the state of law itself being considered as a perspective upon limited liberties within power itself "a conception of democracy and of the minimal role of the state"[14], possibly realized through the jurisdiction control of the respect shown to hierarchy, and where the constitutional control exerted upon the laws is not rigid, but a much larger one, that would concern, apart from the discussed constitutional text, the principles which, philosophically and politically, are supporting the state in its grounds.

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[4] See: G. Burdeau, *Droit constitutionel et institutions politiques,* L.G.D.Y., Paris, 1966, p. 34 and fol: "In reality, the state is a form of Power, and the Power is not a force that is a stranger to the law", cited by Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 101.

[5] Respectively, as long as it expresses the moral conscience of justice, as it is represented in society.

[6] "... It is true for us to state that the law limits the state, in this limiting we should not see a barrier which, edified once and for ever, would oppose to any initiative from the state. It results from the fact that governing authorities could only meet welcoming it the concept of law which is valid at the group's. Level but it does not at all forbid them to make use of their prestige or wisdom in order to elevate the governing people towards a more fruitful understanding of the necessities of political life" (G. Burdeau, *op. cit*., p. 37).

[7] Like an axioma

[8] See, to this purpose, Jacques Chevallier, *L'Etat de droit*, în Revue du droit public, Tome cent quatre, p. 314.

[9] Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 101.

[10] See: R. de Lacharrière, *Opinion dissidente*, Pouvoir, n^0 13, 2-end edition, 1986, p. 157.

[11] "What the citizen would never have allowed to people, it (the state, our note) accepts under the normative form. The normative technique is the opium of freedom" (Walter Leisner, *L'Etat de droit - une contradiction?* în *Recueil d'études en hommage à Charles Eisemnann*, Editions Cüjas, 1974, p. 69).

[12] "The political state is the one where the administrative authority might, following its own will and with a more or less complete freedom of its decisions, be able to apply any measures it thinks useful to be taken by itself, in order to strive against circumstances and to attend, at any moment, the purposes it has chosen" (Carré de Malberg, *Contribution à la théorié générale de l'Etat de droit*, Sirey, Paris, 1920, reed. *Curs,* 1962, p. 488, cited by Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 102).

[13] Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 102.

[14] Idem, *op. cit*., p. 103.

The basis of the state of law is the particularistic way of designing the individual's own relationship with the state. This means that the state of law is relying upon the statement of the individual's primordially within society. The state itself remains only the instrument through which the individual is accomplishing himself in reality. In the centre of this edifice, an organized entity, are placed the human rights, because the purpose of the social organization is not the order only, but primordially the defence of the individual's natural and imprescriptibly rights.

A control exerted upon the moralized norm is the mean through which is instituted a certain form of reciprocity between the state and the individual.

The concept of the state of law is, indeed, seen as a perspective upon the use and status of liberties. In its contents, democracy is understood as a consensus, the state being the "juridical perfection" of the Nation that is to say it is translating its will in juridical terms.

But the nation is no more one of the state's constitutive elements, it is now the purpose itself of the state's existence.

The constitutional norm is superior to the other norms because it expresses much more clearly the nation's will than these.

This signifies the proclaiming of the autonomous will of individuals and the superiority of the nation's will over the one of the state. As a conclusion, the essential nature of democracy is consisting in its consensuality. About the perspective upon the role held by the state, some precisions are imperative concerning the distinction of the state from the civil society.

This is the distinctive asset of the state of law through which is established the limit, for the state, of its power to rule over society. So, the individuals' freedom, and the one of the groups, is defended, by reserving to the state minimal possibilities of intervention upon social activities. Therefore, the asset of liberalism for the state of law, which is founded upon two principles: liberty and equality.

We believe that we could discuss about the cult vowed to law only if we would recognize to the state the feature of being a power phenomenon.

The action of a power is done in virtue of an existing title and, in the state of law, the power's limiting is due to pass through the juridical norm[15]. Yet, the state continues to be a power phenomenon.

But the state of law distinguishes itself from a totalitarian state through its preoccupation about the contents of the juridical order. While the totalitarian state is concerned only by the form of the juridical order, the state of law preoccupies itself also about the contents of the structured juridical order.

On the other hand, according to M. Prélot[16] for totalitarian states, the state is a transcendent, supreme and exclusive reality, which denies the existence of the rights that are intrinsic to the inner self of the individual, which even denies individuality as an autonomous reality, reserving to the individual only a role of social atom, to whom the state magnanimously concedes rights.

Two tendencies were present about the understanding of the connection between state and law:

- the dualism state-law admits the superiority of law, either because the state is self-limited, or because of its hetero-limiting;

- the unitary tendency for state and law.

Therefore exists the necessity of briefly presenting the dualist doctrine of state and law.

Essentially, this doctrine holds that state and law are distinct entities, the relationship between them having to by explained in regard to priority. This raises the following questions:

- is the state prior and superior to the law or is the law prior and superior to the state?

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[15] "In the state of law, the limiting of power passes through the juridical norm, it is precisely through their transformation into subjective rights that individual liberties will be preserved, it is precisely through proclaiming the national sovereignty that the democratical principle will be guaranteed, it is precisely through the essor of trading and industry that civil society will be protected from the risks of the state's intrusion. So, the state of law involves an absolute trust vowed to the law" (J. Chevallier,*L'Etat de droit, Montchrestien*.,Paris,1999 p. 369).

[16] In: *La théorie de l'Etat dans le droit fasciste*, Mélanges Carré de Malberg, 1933, reed - 1977, p. 435 and fol, cited by Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 106.

- and if the law is created by the state the natural question is raised: could the state obey to the law?

limitation's amplitude is variable, according to the source of the law: either inside of the state or outside of it[17]. In the first case, the limit results from a process of becoming objectively real through which the law goes, and out of its separation from the sovereign will. In the second case, the limiting results from the state's incapacity of mastering the profound mechanisms through which is formed the sentiment that the juridical obligation has to be assumed.

The following question had imperatively to be asked: could the sovereign state be limited? That is to say: could the submission of the state to the law be conciliated with the state' sovereignty understood as a principle? To it are given various answers:

- sovereignty does exclude the submission of the state to the law; or
- to make the state obedient signifies to render obsolete the state' sovereignty[18].

The these opinions, the answer was that "Both perspectives are extremist ones". Sovereignty should not be exacerbated since the state is only a mean but not a purpose, but yet should not be denied, because the respective mean would become, this way totally deprived of efficiency[19]. Sovereignty, however, has its objective limits which are created by the state's own nature, finality and mission[20].

As a conclusion describing reality, state and law are not into an absolute relationship of subordination one to the other, but they only "mutually recognize each other"[21], the state of law presenting itself as an often fragile and unstable equilibrium between these two realities, which are distinct, but complementary to each other[22].

The auto-limitation theories, totally opposite to the one of the state of law, do elucidate the relationship between state and law by raising the question of priority, considering that the state is prior to the law. This self-limiting of the sovereign state through the law it creates was considered to be achievable by two ways:

a) **the German doctrine**, issued from Hegel's philosophy, is sustained by high representatives like Ihering[23], Laband[24] and Jellinek[25].

This doctrine relies upon the concept of the **German unity**. The unique source of law reside in the fact that the state is the only owner of the constraint force, that the state's power has no limits as the state is the only entity able to establish the limits of its power's exertion, wherefrom the possibility of the state to modify the juridical norms. Despite all these, the law comes to be a real constraint for the state because:

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[17] "This limiting has a variable amplitude, following the place where is sited the source of law: inside of the state or outside of it. In the first case, the limit could only result from a process of objectivizing the law. Though created by the supreme will, law acquires a consistency of its own and by it, comes to empeach the state. In the second case, the limiting is issued from the fact that the state, even when it searches to appropriate the law and by this to become its exclusive author, it still does not master the profound mechanisms through which is formed the sentiment of the juridical obligation" (J. Chevallier, *op. cit*., p. 347-348).

[18] F. Geny, *Science et technique en droit privé positif*, 1914-1925, Leon Duguit, *Traité de droit constitutionel*, 1927-1930, cited by Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 108.

[19] Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 108.

[20] "There are objective limits for the state' sovereignty, limits which derive, like sovereignty itself, from the state's nature, from its finality, from its mission. It is precisely the aggregate of these limits which from the law to which the state is submitted" (J. Dabin, *Doctrine générale de l'Etat*, Bruxelles, 1939, p. 128).

[21] Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., loc. cit.: "The error of those who see an irreconciliable contradiction between sovereignty and the state's submission to law is of conceiving the state and the law as two realities absolutely external one to the other, when, in fact, they are mutually recognizing themselves; the state is the expression of the concept of law agreed at that moment, and it acquires legitimacy only in regard to this quality, while it is only through the state that law gains its full efficiency"

[22] " The state of law is only an unstable equilibrium, often fragile, between two forces which struggle for power in the society and the element of ideality which is constituted by the law" (François Rigaux, *Introduction à la science du droit*, Editions Vie Ouvrière, Bruxelles, 1974, p. 40).

[23] *L'evolution du droit*, translation in French, Paris, 1901

[24] *Droit public de l'Empire allemand*, translation in French, Paris, 1901

[25] *L'Etat moderne et son droit*, translation in French, Paris, 1911.

- the state could not suppress the juridical order itself;

- the state is obliged to act upon the ground of a juridical title;

- the social pressure exerted on behalf of the concept of law which sustains the system of pertaining to a state is, ultimately, another constraint.

Obviously, all happens within the self-limiting theory, so the barriers placed in front of the state's power are very fragile.

The concept of the state of law pre-supposes a certain contents for the structured order, and a certain level of trusting to the stability of this order. Through these, it differentiates from the self-limiting theory, which reserves to the structured order the features of being indifferent on one hand and fluctuating on the other hand;

b) **the French doctrine**. Its outstanding representative, Carré de Malberg, comes to the conclusion that there is no power, beyond the sovereign state, able to limit it juridical; the characterization of the state-law relationship ought to start from this postulated datum.

On the other hand, he considers that the state is the unique source of law, rejecting any conception that could find to the law another ground. For this thinker, the state of law results from the fact that any power which creates and makes use of a juridical rule in order to be born and to subsist is, compulsorily, a power limited through the law[26].

The same perspective considers the juridical order as being absolutely necessary to the state and having to fulfil a series of requirements: to be stable, coherent and hierarchies.

The hetero-limitation's theories are the ones which conceive the law as an extrinsically mean of limiting the state's power[27] so proclaiming the existence of a ground for the law situated outside of the state[28] wherefrom the law finds itself to be as well prior and superior to the state.

Thus, the source of law springs from outside of the state itself, so the state could only be the law's interpreter, but might never institute the law's grounds[29].

About the objective law's theory, we may state that, step by step, it is taking possession of the place held by the natural law's theories. Leon Duguit considered that the autonomization's theories are crippled because, as long as the state is able to modify, whenever it wants, the juridical order, it could not be, itself, submitted to the law. Therefore, the relationship between the law and the sovereignty of the state is functioning for the benefit of the state, because sovereignty makes of the state the absolute master of legislation.

According to Duguit, the solution resides in the sovereignty's denial: it does not exist. What really exists is only the belief vowed to sovereignty, a belief which is contrary to the creation of the state of law[30]. Duguit states that this concept is relying upon two fictions: the moral personality owned by the state and the fiction of subjective rights[31]. So, the ground of limiting the powers of the governing officials resides, according to Duguit, in the objective law, understood as an external limit for the state, since this law's origin is the social reality, and thus it is understood as a social fact. Therefore, the conclusion rises that this kind of law is spontaneously formed within the

[26] În *op. cit*., p. 209.

[27] See, to this purpose, Jacques Chevallier, *op. cit*., p. 352.

[28] Excepting its creation through the state itself

[29] God, Nature, Society.

[30] "If the grounds of the law could not be established outside of its creation through the state, then we should proclaim, like a postulate, the existence of a law which is prior and superior to the state"(L. Duguit, *op. cit*., p. 2).

[31] "This dangerous perspective relies, for Duguit upon two fictions: the one of the state's moral personality and the one of the subjective rights. The former makes of the state an entity which is distinct from its members, who have a will of their own, when the reality is that collective persons do not have a juridical existence that would be independent from the one of their constitutive elements. The state is only an abstract entity, placed behind the persons who are governing, so that the impersonated constraint could by made use of. The alleged subjective right of the state, held over the public power, is, by itself, void of any contents" (Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 100).

people's conscience[32]. The state does not create the rule, it only transcribes it, expressing it's normatively[33].

Unexpectedly, it is precisely these theories which lead to the state's reinforcement and provide to it a new type of legitimacy[34]. This means that the state becomes intrinsically legitimate, instead of being legitimated by an outside ground.

As a conclusion, the extremism wowed to the sovereignty's denial produces an effect which is contrary to the initial purpose.

Let us mention the normativistic theory too. According to it, we might speak of an identity between state and law. In time, the necessity naturally appears of overcoming the dualism between state and law. It ultimately made of them two distinct realities. Another trend is to identify the state with its juridical order, reaching to the conclusion that: "the essence of the state is normativity" and that: "the state of law is represented by the application norms, it is the frame which someone establishes and the other fulfils, into a conjuncture which does not mean the partition of Power, but its elimination".

As a theory, normatively is placed between two hypostases to choose between:

a) to state that the Constitution's ground is an extra-juridical element; or

b) to state that the fundamental norm is only a hypothesis, an indifferent postulate.

The first possibility brings normatively to the situation of denying itself, while by the second possibility, stating that the fundamental norm is only a hypothesis, normatively proves itself to be as well inadequate and dangerous.

We might conclude that the normative theory of state and law is false because it distorts the two concepts, it alters the notion of juridical order, it does not take into account the real nature of the state, it contradicts the logics of the democratically organization and is unable to contribute to the constitution of the state of law and to its motivation.

The matter of the structure for the state of law, starting from the question of the human rights - which is the central axis of the construction itself of the state of law[35] raises the problems of the juridical order's structure and of the jurisdiction's control. To this aim, the requirements are: the structuring of the juridical order and the jurisdiction control.

Thus, any juridical norm needs to be supported, in its existence and validity, by a superior norm. This way conceived, the juridical order is hierarchies, through the institution of vertically superposed levels, placed in a relationship of subordination, descending from the Constitution and the constitutional laws towards the other hierarchy's laws and normative acts. This edifice is created for the purpose of limiting the usage of power.

In this context, we may easily deduce that the state of law: "requires that the state itself and the public communities should be, under the same title as the private persons, submitted to the positive law"[36]. The hierarchization itself would be, this way, completed by the jurisdiction's control.

This latter should be realized through the independent mechanism created to be able to withdraw from the juridical order the uncomforting norms. These mechanisms suppose the

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[32] See L. Duguit. *op. cit*., p. 128.

[33] The constitutive rules draw their compulsory force not from the fact that they are issued by the state, but from the objective norm which is their support" (Jacques Chevallier, *op. cit*., p. 355).

[34] "Paradoxically, the hetero-limiting theories lead to the state' strengthening and provide to it a new legitimacy: they indeed try to present a state which is held as bounded by the law and, by this fact, sheltered from any contestation possible; the cult of the norm, through its projection extends itself to the state, which is considered to be the norm's faithful and obedient transcriber". (Idem, *op. cit*., loc. cit.).

[35] "It barely matters if the human rights should have as ground the theory of natural rights or that they might be placed at the level of the first rank among the superior norms of the positive juridical apparatus. The essential thing is that they should be effective" (Jean Louis Quermonne, *Les regimes politiques occidentaux*, Editions du Seuil, 1986, p. 11, cited by Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 113)

[36] Idem, *op. cit*., 1999, p. 113.

existence of independent and irremovable spreaders of justice[37], with the precision that, in the totalitarian states, oppression finds itself supported by the juridical norms. Into this context, we may state that, in this respect, the state of law is the state which: "might appear in front of its own tribunals like any other private person"[38] having undressed its former asset of being a sovereign power.

The jurisdiction control is realized as well for the administrative acts and for the laws. Two systems ensure the jurisdiction control for the administrative act: the ordinary courts and the administrative ones.

On the other hand, the jurisdiction control of the law's constitutionality underlies the subordination of the laws and of the other normative acts to the Constitution, so being ensured their conformity to it[39].

But what is the degree into which the state of law does indeed provide the fulfilment of the *desiderata* which motivate its substance and its existence? The acute necessity of norming everything, the expansion of the state's power, the transition from the norm -behaviour to the norm as a frame, the distortions created by the media, all these lead to a new questioning of the state of law's grounds, concerning its capacity to respond or not to the *desiderata* expected from it.

Next, we will try to outline a possible reconfiguration of the state of law, enabling it to respond to the new realities.

Naturally, the question rises: how the state of law should react in regard to the expansion of power?

According to W. Leisner[40], the state of law does limit the power through normativity, so becoming a sort of juridical perfectionism. It is necessary to see if the extension of normativity is or not facilitating the extension of power, since law itself is the expression of power[41]. As a conclusion, in spite of all its limiting effects, the state of law does not totally eliminate the phenomenon of expansion.

Another question raising is: if the state of law does render the law sacred does it not, through this, stigmatise freedom? The juridical norm is not just a rule of behaviour it is, simultaneously, the instrument used for its own. Legitimacy, thus, in our days, the state's power does intervene into domains that were forbidden to its action until recently. So is rendered possible the passage from the minimal state (the state of law) to the state of totality[42].

The law becoming sacred, the state, by the same hand switch, also renders sacred the power, which makes the state of law "to ape its own grounds, to become its own opposite"[43]. The remedy to this trend would be: "a re - staining of individualism which might restore, for this system, loaded with internal contradictions, it's initially owned logics"[44].

The matter of the juridical inflation[45] is raised about the galloping evolution of the social life, which legislatively, has a dynamic effect upon the law[46]. The legislator is tempted by the

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[37] "Only a judge that would be independent and irremovable could satisfy to these requirements. Without the jurisdictional sanction, the norms' hierarchy is void" (Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., loc. cit.).

[38] Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 114.

[39] In the absence of this control the instituted power is no more limited, about the state of law we might under these circumstances, state that it no longer exist.

[40] Leisner W,L'etat de droit-une contradiction, in Recueil d'etudes en hommage a Charles Eisenmann, Editions Cujas, Paris,1974,pag. 69 .

[41] "Its extension (of the power our note) on behalf of a more and more complete, more and more exhaustive state, does mask a sort of expansion of power, grasping to master the social life" (J. Chevallier,. *L'etat de droit-une*,Montchrestien, Paris,1974,pag 69 p. 375).

[42] So is denied the liberal principle of this matter, a fact which: "made us consider freedom as a source of inequality and insecurity" (Jean-Pierre Henry, *Vers la fin de l'Etat de droit?*, in Revue de droit public, 1978, p. 1209; See also Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., 1999, p. 116).

[43] Idem, *op. cit*., 1999, loc. cit.

[44] Ibidem, *op. cit*., loc. cit.

[45] Legislative inflation signifies a lack of equilibrium between quantity and quality (value). This disbalance is created by the uncontrolled growth of the number of normative acts, in conjunction with the lowering of their quality level (to be evaluated through their applicability, their degree of social acknowledgement and by their usefulness).

phenomenon of juridical inflation, because legislation is a profitable show for politicians. The issued law becomes "some kind of electoral attitude, which tends to solve nothing, except for the image problems of its promoter"[47].

For theoretically, assuring equality in front of the law, the tradition has created a juridical fiction that was needed: this is the principle: *nemo censetur ignorare legem*[48].

This principle is now discussed in a tight concern about the galloping velocity of normative activity. The debate points out two new realities: *the proliferation of new rules of law* and *the effective impossibility of acknowledging the whole corpus of the law*. Due to the revision of the Constitution in 2003, when a term was established until the law's enforcement, this principle was slightly taken into consideration, a fact which hardens, for the subjects of law, their obligation and responsibility of being duly aware of the law's contents.

These two trends grow more and more hardened. Their concrete consequences are:

a) distortions do appear in the application of the rules of law;

b) lacks of equilibrium do appear between the contents of norms and the means used for their application; and

c) the multiplying of tolerances within the oeuvre of law's application.

Among the causes of juridical inflation, we might identify:

a) the political show above mentioned, with its whole retinue of consequences; and

b) the aging of the social corpus which asks for the multiplying of juridical rules, causing the considerable amount of application means, leading to the exaggerated development of administration. The juridical inflation ultimately creates an inflation of administrative organs.

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[46] "Normativism produces, ultimately, one result only: it transports onto the legislative field the adaptative dynamism of the Law: otherwise, this dynamism would have caused the state to act by the administrative way. On the whole, there will be no more on less changes, following the nature of the state where we might find ourselves: a state of law or an «arbitrary» one: the difference lies only in the state's organs that would be obliged to provide justice in these cases. The *rechtsstaat* (the state of law) does not, in its essence, have to guarantee its predictability through a normative stillness. What the citizen might gain in front of a tightly bounded administration, he might as easily loose with a legislator «unleashed through its norms. The more accentuated predictability would be at the basis, weaker odds we should have to find it at the top. (W. Leisner, *op. cit*., p. 71, cited by Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 116).

[47] Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., 1999, p. 117.

[48] Nobody could rely upon not being aware of the law.

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THE IDEAL LAW, THE JURIDICAL SYSTEM AND THE LAW'S FINALITIES

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Abstract: *The paper tries to define the distinct questions of which both the General Theory of Law and the Philosophy of Law are deeply preoccupied the origin in the historical sense (the appearance); the aggregate of public behaviour rules, general and abstract and the origin of law in the sense of its substance, respectively the totality of the existing objective and permanent conditions.*

Key words: *Law' origin, juridical system, ideal law.*

Here are some distinct questions of which both the General Theory of Law and the Philosophy of Law are deeply preoccupied:

a) the origin in the historical sense (the appearance); the aggregate of public behaviour rules, general and abstract, founded upon the cohesion of the social group and, averagely, comporting sanctions - which, structuring the ensemble of inter-subjective relationships, do ensure the co-existence of liberties within an organized society. This is the definition of the concept of law seized as a phenomenon[1]. The idea of law[2] is tightly connected with the law's origin, this latter words being accountable for two meanings;

b) the origin of law in the sense of its substance, respectively the totality of the existing objective and permanent conditions.

Hegel rigorously separates the historical beginnings of the phenomenon "law" from what might be called the "existential provenience" and, of course, from the origin of law in the sense of objective and permanent conditions[3].

What proves itself to be important about the origin of law "is not the determining of the law's historical beginning, but its essence, the aggregate of the objective and permanent conditions which determine its existence and constitute its essence"[4].

Hypothetically, if the concrete and perpetual circumstances with a determining role in the law's formation and maintaining would disappear, the law's existence should no more be justified, would have no more ground, which means that the law's origin should be sought for "not in the past, but in the actual law, because the origin principle does exist as long as the object itself exists; yet the object exists for as long as the principle does"[5].

The essence of law is constituted by the need for rules that would be external to the individual conscience, rules of inter-subjective relationing, with no distinction made about their forms taken, rules to be created by a social group[6].

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[1] Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *Teoria generală a dreptului*, Ed. All Beck, Bucureşti, 2002.

[2] For details, see: vezi Ion Dogaru, D.C. Dănişor, Gh. Dănişor, op. cit., p. 42-70; D.C. Dănişor*, Drept constituţional şi instituţii politice*, Editura Ştiinţifică, Bucureşti, 1997; Gh. Dănişor, Metafizica devenirii, Editura Ştiinţifică, Bucureşti, 1992; Idem, *Metafizica prezenţei*, Editura Ştiinţifică, Bucureşti, 1998; P. Pescatore, op. cit., p. 360 şi urm.; Ion Dogaru, D.C. Dănişor, *Drepturile omului şi libertăţile publice*, Editura Zamolxe, Chişinău, 1998, p. 111 and fol.; Georges Burdeau, Traité de science politique, Tome I, p. 29 and fol.; E. Durkheim, *Regulile metodei sociologice*, Editura Ştiinţifică, Bucureşti, 1974, p. 47 and fol.; Nicolae Titulescu, Reflecţii, Editura Albatros, Bucureşti, 1985, p. 2 and fol.; G. W. Hegel, *Principiile filosofiei dreptului*, Editura Academiei, Bucureşti, 1969, p. 279 and fol.; Mircea Djuvara, *Drept constituţional*, partea I, 1924-1925, p. 124 and fol; J.J. Rousseau, *Contractul social*, Editura Ştiinţifică, Bucureşti, 1957, p. 99 and fol; Nicolae Popa, *Teoria generală a dreptului*, Editura Actami, Bucureşti, 1966, p. 121 and fol.

[3] See Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 42-43.

[4] Idem

[5] Ibidem.

[6] "The self-insufficiency, the loss of self-conscience as self-certitude determines the appearance of social structures, which tend to realize this self-conscience instead of the individual. These structures do not bring benefit to the individual person, but to the whole group, seen as a distinct entity. So the foundation of the group is not ensured by the

Thus, what enables the law to exist is exactly the individual's lack of capacity to establish rules without inevitably letting the other people aside of the process, to design these rules not only suiting himself, but also suiting his fellows people, to create optimum social relationships without the requirement of an existing structure able to direct them.

The systemically design of law ensures the unity of juridical norms and their settlement in independent parts, seen today as subsystems of the greatest one, that is to say in juridical branches and institutions[7].

For the theme we wish to approach, it is important to briefly precise the features of the juridical system.

To approach them does not lack complexity and difficulty.

This latter comes from the existence of concepts which often are ambiguous, understood either through equivalence or through antinomy .

It is this equivocal expression which hardens for us to define the essence of the juridical system through its own features.

These are in our context clarity, coherence, consistency and completude.

All these features are able to underline the variation existing between the idea of law, the juridical system and the law's finalities.

Firstly, the juridical system's clarity flows from its logics, involving the respect of the following principles[8]:

- the postulation of a finite number of terms or notions called prime terms or prime notions, and of the rules necessary to define the other terms (derived terms or derived notions);

- the postulation of a number of sentences (axiom) and the deduction rules for the other derived sentences (terms); and

- the law is formalized, an intuitive thought process is substituted by a purely formal one.

Since what matters is the social importance of the law's effects, there should be a solid reason for which the rules of law and the facts they are applied to would be determined that exact respective way they are.

From this we can easily deduce that the law system should be formalized, which means, simultaneously, that any real contents should be abstractionized and that all processes should go on in a purely formal way.

But yet we can easily deduce that, into law, what prevails is the material criterion, not the formal one.

Next, we can state that the finality of the law's application is justice, and that law ought to be a system of that kind.

Secondly, the coherence of the juridical system is one of its important features[9].

Its unity is given by its components' coherence, systemizing and hierarchy. The law's homogeneity lies under the risk of being altered, due to the multiple antagonic concepts we might meet into law; yet antinomies are often seen, they are rather inevitable.

Thirdly, the juridical system is characterized by its consistency.

A system is consistent insofar all its deductions are correct, the law is a system. The law' system owns consistent zones, but also inconsistent ones, issued from its linguistic fund or from the more and more diverse life to which it has to correspond.

Sometimes, concepts lacking precision are used, perhaps willingly non-precise, so juridical notions are not always rigorous, thus certain legal stipulations become elastic, for example infringing, into penal law, the principle *nullum crimen sine lege*[10].

«human nature», but by some sort of «human de-naturation». The basis of law is not the human reason, but the reason of the structure" (Ion Dogaru, D.C. Dănişor, Gh. Dănişor. op. cit., p. 43).

[7] See, to this purpose: Ion Dogaru, *Elemente de teorie generală a dreptului*, Ed. Oltenia, Craiova, 1994, pag 205.See also Ion Dogaru, Sevastian Cercel, Drept civil. Partea generală, Ed. Ch. Beck, Bucureşti,2007,pag. 6-7.

[8] For details, see Ion Dogaru, D.C. Dănişor, Gh. Dănişor. *op. cit*., p. 45 and fol.

[9] In this regard, see: Ion Dogaru, Sevastian Cercel, op. cit.,2007,pag. 6.

[10] To this purpose, see: Ion Dogaru, D.C. Dănişor, *Drepturile omului şi libertăţile publice.*

It is just that this kind of "flexibility" ("elasticity") still has its role in the development of law, in achieving the texts' synchronization for circumstances that are difficult to foresee at the law's issuing moment, this progress can be reached through the law's creative interpretation by the persons who apply the law.

Finally, fourthly, the juridical system is characterized by its completude.

We may say that "a juridical system is complete because it does not contain lacunae and, through the aggregate of its elements, it could determine the juridical statute of every deed"[11], this statement is confirmed by the principle instituted by the Synthesis Civil Law according to which the judge that should refuse to make a judgement allegation that there is no law or that the law is obscure will be held as liable for denial of justice[12]; in this kind of cases, the obstacle will be removed by appealing to the law's general principles, which are, often, themselves the oeuvre of judicial practice.

The connection between the idea of law, the juridical system and the finalities of law is strongly underlined by the fact that law is a self-organized system, its force, can be characterized as follows:

- the juridical system is self-determining by it own, according to its intrinsic nature, therefore, in the process of its founding and application, through this oeuvre itself, the system is submitted to natural mobility[13];

- the juridical system is interacting with the environment, even tending to create this environment "absorbing the external facts through its retro-action upon the causes"[14];

- though receptive to the environment seen as an information source, the juridical system is normatively closed. We are in the real presence of a normative confinement but of a cognitive affirmation.

The social trouble-causing frame which the juridical system, as a self-organized structure, has to regulate, does determine this latter's development, unless the major changes configured by a revolution should initiate the modification of the form taken by the juridical system itself.

The law, as a creation of the social organism once constituted, comes to rebuild this latter's structure and finality. A creation of the social corpus, the law comes to create its creators, respectively it creates the social corpus and its purpose, through a double mediation: the one of the social bodies and the one the of intrinsic purpose of the juridical system.

On the social co-existence as a finality of the law, the following precision are imperative:

a) "social co-existence does not equalize to society", because for that "to the fact of co-existence (ought) to be superposed another phenomenon, the one of a psychological nature this time, that should give to the group the definitive asset of being a society"[15], this asset consists in the transfer of thought from the individual person to the group.

The society presents itself as an inter-conditioned existence of individuals "an existence through the relationship as related to the relationship itself, an inter-human existence"[16].

As a conclusion, co-existence represents the automatically association of two objective components - space and time. The society involves the autonomous existence of what connects and of what is connected. This is what we might call the relationship's "inner self".

Law is "an external structure of behaviour rules ..."[17]. It was justified to sustain that the social juridical phenomenon is complex and that "this phenomenon determines an intensified effort

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[11] Ion Dogaru, D.C. Dănişor, Gh. Dănişor. *op. cit*., p. 47.

[12] In other words, if the particulae norm might have lacunae, the law as a system could not have then.

[13] For developments, see: Ion Dogaru, Nicolae Popa, Dan Claudiu Dănişor, Sevastian Cercel,*Bazele dreptului civil,* Tratat, vol I,Teoria Generală,pag. 152.

[14] See, to this purpose: D.C. Dănişor, *Drept constituţional şi instituţii politice*, Editura Ştiinţifică, Bucureşti, 1997.

[15] Georges Burdeau, *Traité des sciences politiques,* Tome I, Le pouvoir politique, Paris, 1949, p. 29 and fol.

[16] Ion Dogaru, D.C. Dănişor, Gh. Dănişor. op. cit., p. 49. See also Nicolae Popa, *Teoria generală a dreptului*, Ed. Actami,Bucureşti,1966 pag 121.

[17] Ion Dogaru, Sevastian Cercel, *Drept civil*,parte generală.

of research upon it, a partition of roles, aiming to necessarily revaluate the correlated sides of this phenomenon[18].

Through its origin, society is a psychological phenomenon, a fact of human spirituality, but, in its turn, it creates its own psychology. Therefore, the psychology of the social being, of the objective inter-human existence[19].

Thinkers were preoccupied, since the most ancient times, by the question of primacy:

- the society or the individual? Aristotle stated that the state is prior to the individual[20]. From his statement is deduced the fundamental principle of the whole priority and also that the cause of this reunion is the individual's self-insufficiency. It also results that, for the human being, there is no pre-social state, which means that Aristotle has in sight the social individual, not the human being by itself:

- the individual is created by the society[21];

- in the relationship society-individual, the latter is primordial, so that[22], "All which contributes to promoting, feeding and developing the social life of humanity ... supposes an activity of the individuals, who should elevate themselves to self-consciousness in order to better accomplish their roles and better achieve their missions[23]. This opinion was rejected by the individualist society;

- the society and the individual "are two phenomena equally primitive and necessary"[24];

- the society is an entity. It does not effectively create the individual but, like any entity, by tending to state its identity and preserve its being it enters in a sort of contradiction with the individual-solved at the level of this latter's conscience by the idea of security and of easier satisfaction of his needs - and, tending to preserve its own embodiment, represented conceptually, it imposes to the individual a path of thought that would correspond to the needs of the social body. Society creates the individual, in the sense that it creates his psychology, the topics of his thoughts, imposing him certain solutions"[25]. As a conclusion "the purpose of law is social co-existence ... this social finality of the law means the predominance, by constraint if it should be needed, of the society's primacy over the individual, the former being an autonomous structure of inter-subjective relations"[26].

Another finality is represented by the fulfilling of the common good, known as the "social purpose" of society.

Celsus was sustaining, in the Antiquity, that the law is the art of goodness and justice (ius est ars boni et aequi), a statement supported by two ethical categories: the good and the justice. This definition was taking into account the reality of these times: law was not yet emancipated from the aegis of morality, thus its purpose was still to achieve moral goodness"[27].

According to E. Durkheim[28], it is necessary to understand the nature of society, in order to have an exact image of how it represents itself and the world which surrounds it, and not the nature of particular individuals.

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[18] Nicolae Popa, *Teoria Generală a dreptului*, Ediția 3, Ed. Ch. Beck, Bucureşti, 2008, pag 4.

[19] Idem. Ion Dogaru, D.C. Dănişor, Gh. Dănişor. op. cit. p 49.

[20] "Therefore, it is clear that, by its nature, the state is prior to the individual, because since the latter is not sufficient to himself, he is to the state like the members of a body to this body while, on the other hand if he could not or would not need, because of his sufficiency to himself, to search for companionship in society then he might not be a member of the state, but would be either a beast or a god" (In: Politica, I, I, p. 12).

[21] See, to this purpose: J. de Maistre; See also Bonald, *Théorie du pouvoir. Oeuvres*, Tome XIII, p. 9.

[22] "The originary social ground is the individual" (J.P. Haesaert, *Sociologie générale*, 1956, p. 72).

[23] F. Geny, *Science et technique*, Tome I, 1914, p. 69.

[24] J.S. Mill. *La liberté*, Biblioteque des sciences morales et politiques, preface by Dupont White, p. 20.

[25] Ion Dogaru, D.C. Dănişor, Gh. Dănişor. *op. cit*., p. 52

[26] Idem, *op. cit*., p. 53.

[27] Nicolae Popa op. cit, 2008, pag 70

[28] *În regulile metodei sociologice*, Editura Ştiințifică, Bucureşti, 1974, p. 47. "The representations which do not express the same subject, nor the same objects, could not depend on the same causes. In order to understand the way through which the society represents itself and the world which surrounds it we ought to look at the society's own nature, not at the one of the individual persons".

So, the common good might be understood as a vision of society about itself. This means that the search for the outline of common good ought to start from the essence of society, not from the one of the various individuals.

Recent juridical literature[29] promoted as the most adequate words, for the reasons noticed by the authors "social purpose" instead of "common good".

The question was also raised[30] if this social purpose is either individual or does it represent the aim of a trans-individual entity? The provided answer was that: "the social purpose is the purpose of society, not the one of the individuals who are its components, though it starts from their own interests and it is valued as their own; the structure, by itself, expresses through social purposes, and even through individual spirituality, its will only. But, above all, we should retain that individualism does not mean the superficial attitude which ostensibly states that the human being is everything, while it counts for almost nothing; it means an attempt to reconstitute the human self, with an appropriate choice of the premises we are obliged to start from"[31].

The recognition of the spirit's identity within a multitude of subjects does remain the prototype and the pre-supposed feature of any concrete and contingent relationship of social co-existence; it is the asset of historical life in its generality[32]; It is an action imposed by the existence of the humanity's thought, acting through each particular spirit, to the individual person, it is not an action of the individual that could pass through the experience of alterity.

It is rather through the individualization of the general finality, of an inter-human structural existence[33] that the social concrete finality is outlined, and not conversely (the edifying of the universal finality is not achieved by the generalization of precise individual purposes).

Thus, the general interest is: "a result, mediated by individuality, of the particularization of a pre-existing form, the existence of which could not be questioned by the individual[34] it is not a resulting vector of all the particular interests".

The formal elements of the social purpose are the ones of the common good. Their feature of being formal should be seized in a double sense:

- as formal elements which constitute the common good; and
- as structural elements composing the existing form[35].

These two are: the order and the justice.

According to G. Burdeau[36], the order "... might be easily seen as a given formal constant responding to the essential exigency of any society, which is stability; the ethical value of this order is not questioned, for this moment, it is only its existence, deprived of any significance, which matters for the common good, when only its formal value is considered".

For the society, order is not related to some ethical dimension; only the contents of the common good is ethical, the form having no contents of its own. Therefore, in regard to it, the individual is an abstraction. The predominance of the form is a consequence of the law's separation from morality[37].

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[29] " We have preferred to make use of the term «social purpose» instead of «common good», because the latter syntagma is less ambiguous. «Common good seems to suggest that this would be about a good pertaining to a heterogeneous crowd, and even more, a good pertaining to the individuals of whom this crowd is made of, a good commonly shared by many individuals. Yet, in fact, things do not stand this way. The common good is the society seen as a trans-individual entity, it is the purpose towards which tends this entity. This is why we preferred to name it «social purpose»" (Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 57).

[30] Idem, *op. cit*., loc. cit.

[31] Ibidem, *op. cit*., p. 59.

[32] See, to this purpose: Georgio Del Vechio, *Justiția*, introduction to the preface of: Mircea Djuvara, p. 74, cited by Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 62.

[33] That is to say the society.

[34] Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 61.

[35] Lacking, by themselves, of a concrete contents

[36] In *op. cit*., p. 104 and fol, cited by Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 62.

[37] Idem, *op. cit*., loc. cit.

In certain circumstances, the order is characterized by neutrality, resulted from a misrepresentation of its normal sense, thus revealing the structure's general propension of becoming independent[38].

But when the order acquires the asset of normality, it could no more be thought of as outside of the ethical dimension, and it would suppose the re-settlement of law upon other grounds[39].

The term of "justice" signifies either identity with the concept of "law", or a concept meant to be superior and distinct from the law. According to Giorgio del Vechio[40] justice consists in the conformity to a law, while the law has to be in conformity with justice. Thus the law is considered to be a separating criterion for just and in just.

So, it has been said that: "Justice is a principle which, ultimately, depends in no way of the positive law and, as a consequence of this fact, neither of some concrete social order"[41].

The action of justice should be orientated towards an individuality's real moral elevation, towards naturally ensuring the others' liberty, with no need for some external rule to be imposed[42].

In the analysis of the relationship between form and contents, we should start from the relation of morals with law. Morals is considered to be a subjective ethics, while the law appears like an objective ethics characterized by alterity, or otherwise said an inter-subjective ethics.

Law operates only with social matters, though its finality should be to influence the individual; for the law, this latter could never be a perfect entity: what could be perfectible is the relationship only, or susceptible to be optimized. "For the law, only the other's freedom is origin; my own freedom is only a consequence of this free alterity"[43].

In this context, it results that the law defends only the relationship, which is seen to be free and autonomous, while the individual freedom is purely formal.

The individual is free within the relationship, not by himself, he is free for the society, which means that the individual appears as "a simple form which might have whatever abstraction of a contents"[44].

The following elements do institute the connections between the individual's freedom, the structural existence and the law[45]:

a) being conceived in the objective sense, the law has the features of being general and independent. Thus it presents itself as a logical form, with an objective structure;

b) in this quality, the law could not be influenced by individual reflections because, for the individual the freedom means duty, respectively his own adaptation to the existing order;

c) the adaptation to the order could be obtained either through education, or through constraint;

d) both the way of education and the one of constraint aim to ensure the coincidence of each individual will with the others' will;

e) into this context, freedom could be understood as the fulfilment of duty, respectively the foundation of law;

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[38] Of becoming a purpose by itself.

[39] See also: Nicolae Popa, op. cit ., 1998, pag 70, where the juridical system of modern peoples is said to be of a new kind, one of a realistic nature, one which opposes to the ancient, metaphysical type of system.

[40] *Op. cit*., p. 33: "If there are numerous and significant debates around the notion of law, doubts and differends around the notion of justice do grow even larger. This latter is, sometimes, considered an equivalent or a synonym for law. Otherwise, it is seen as a superior and distinct element in regard to the former. Under a certain aspect, justice consists in the conformity to a law. Yet, on the other side, it is said that it is the law that has to be in conformity to justice. Recognized, on one side as an adequate criterion through which just might be distinguished from injust, the law itself might be submitted to a judgement of the same type appearing, due to this, more like a fact pertaining to the empirical order. In the name of justice itself comes to be postulated a highest criterion of ideality, which transcends all the positive juridical determinings and the ground of which ought to be placed elsewhere"

[41] See: Vezi Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 63.

[42] Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit.*

[43] Ibidem, *op. cit*., p. 64.

[44] Ibidem

[45] See, for details: Nicolae Popa, op. cit.,2008, the developments from pages 96-104

f) freedom might be conceived either from the perspective of the individual or from the perspective of the structure; these are two different things;

g) considered philosophically, freedom represents the human equation itself, with the struggles inside of the human being, with the need he has for the other so that he could be free;

h) juridical, the freedom is related to the bordering of human behaviour, seen as a "social actor"; it is a freedom-relationship, concerning only the maximal amount of prerogatives left to the individual's personal choice;

i) from this last point of view, freedom is conceived in the following two ways: as totally autonomous and as participation;

j) the freedom-autonomy is not unconstrained by society, it is not a complete compulsion over the human being, but yet it means something: a kind of interdiction, imposed to the governments, to trespass certain limits, to "penetrate" into the sphere reserved to the individual. Therefore, the freedom-autonomy is a freedom-relationship, which concerns not the individual by himself but the individual in his relationship with the public power. The freedom-autonomy results from the state's avoidance to intervene upon certain behaviours, so it presents itself as an obstructing freedom. Of course, being conceived this way, the freedom-autonomy is limited, it is partial, since the individual prerogatives are limited too. In spite of its limitations, the freedom-autonomy (beyond its partiality) is the ground of public liberties, because these could not exist in the absence of an individual autonomy. Ultimately, the right and only way to understand the freedom-autonomy is to see it as being in a perpetual contradiction with the existing public power;

k) the freedom-participation presents itself to be the way through which the individual person assumes the exertion, the instauration, but also the preserving of public power, because the individual could not preserve his own freedom unless he could master the instruments which might oppose to ("border") this freedom; and

l) finally, into this context, it is understood that the law's concept and finality can be seized only insofar they are related to the social purpose, the finality of the social existence, a connection which is unavoidably necessary for their explanation.

The maintaining of one's own existence is to be discussed in straight connection with the relationship: law for oneself - law for the individual person. To preserve their own existence is the purpose of social structures, meaning the conservation of the structure's logical coherence. Law itself is a logical structure; so consequently, the order would become forced without the imperative perfection of the individual. Therefore, the constraining side of order and the human side of the justice's equilibrium[46].

The law presents itself as inferior to morals[47] because it has no faith in human perfectibility and it has no flexibility. In the moral's case, this latter allows; for the human being, to be considered just as an individual. In other words, the law lacks the faith into human justice[48].

The following elements are important about the relationship education-coercion:

a)though juridical norms have no moral contents, this contents ought to increase, in order to diminish the law's inferiority in regard to morals[49];

b) the revigoration of natural law is to be desired, accompanied by a reinsertion of morals, aiming to bring together these two domains[50]. Through these, the imperfect individual might be allowed to become just;

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[46] See, to this purpose: Ion Dogaru, Sevastian Cercel, op. cit, (parte generală) 2007, pag 6.

[47] "The moral obligation starts from a special conception about the human being, a vision which is not the one provided by the law. Morals considers the human being under a perfectibility angle which is totally stranger to the law. An inferiority of law in regard to morals is not contestable" (Nicolae Titulescu, *Reflecţii*, Editura Albatros, Bucureşti, 1985, p. 2).

[48] " ... the law has in sight the common of mortals, and its rules do not have always the assent of morals, because what it has to realize is the order within companionship, not the perfection within life" (Idem, *op. cit*., p. 2).

[49] "Let me address to the law this wish: should all juridical obligations be executed with the scrupulous attention given to the execution of the morals' obligations by the people who feel that they are bound by them" (Ibidem, *op. cit*., loc. cit).

[50] See: Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 68

c) this way, by perfecting itself, law might create juridical obligations bearing the nature and the force owned today by moral obligations; so, juridical obligations would be "sanctioned by the satisfaction of conscience"[51];

d) it is thought which imperatively requires restoration - in its principle. The restoration might concern at first the cause, enabling us to discuss over it. Then would be the turn of the social relationship - because, in virtue of his own thought, the human being is social[52]. People are the ones who matter[53]. Consequently, the categorical precepts of conscience hold a special importance[54];

e) Logically following, before being a social reality, law should be a rational reality, able to perfect the spirit first and then only to run for the material purpose; and

f) we might conclude that law signifies something more than positive law; the separation of law from force depends on, how positive law is humanized; the efficiency of a law does not depend exclusively on force[55].

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[51] Nicolae Titulescu, *op. cit*., loc. cit.

[52] The law's ground was sought for in social solidarity (see: L. Duguit, *Manuel de droit constitutionel*, E. de Boccard, Paris, 1918), cited by Ion Dogaru, D.C. Dănişor, Gh. Dănişor, *op. cit*., p. 69.

[53] " ... under the abstraction of laws, people are moving on" (Nicolae Titulescu, *op. cit*., p. 3).

[54] " ... beyond the strict limits of the law, the categorical precepts of the conscience are to be found" (Idem, *op. cit*., p. 5).

[55] " ... The effectiveness of the law whatever it would be and wherever we might get it from, is not exclusively relying upon its sanction by force" (Ibidem, *op. cit*., p. 5); See also Mircea Djuvara, *Curs de drept constituţional*, partea I, 1924-1925, p. 40, where, speaking of the fact that a law could not be imposed by force, no matter how rational it might be in itself, it is stated that the state only appears as: "a form of authority based upon its justification".

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IS THE GENERAL THEORY OF LAW A SCIENCE OF ESSENTIALIZING?

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Abstract: *This paper work tries to answer the question if Is the General Theory of Law a science of essentialzing? The General Theory of Law studies concepts, categories, principles and basic notions regarding law. The curricula of the profiled faculties constantly places the discipline General Theory of Law in the I-st year of study, for the last 60 years, starting from the premise that, indeed, a glance upon the whole perspective of the juridical science' system and of the branch disciplines that students have to go through is needed, even if there were voices saying that its place would be more adequate in the last year of study when such disciplines are already studied and assimilated.*

Key words: *General theory of law, law concepts, law theories, principles.*

The curricula of the profiled faculties constantly places the discipline General Theory of Law in the I-st year of study, for the last 60 years, starting from the premise that, indeed, a glance upon the whole perspective of the juridical science' system and of the branch disciplines that students have to go through is needed, even if there were voices saying that its place would be more adequate in the last year of study when such disciplines are already studied and assimilated.

The General Theory of Law copes with a specific object: it follows "its logical organization within the explicative process it coordinates, it systemizes knowledge, tightly cooperating with the specific language of branch sciences"[1].

The General Theory of Law studies concepts, categories, principles and basic notions regarding law. It is the "laboratory where are created: "the essential instruments through which the law, as an aggregate, is elaborated"[2] and it studies its elementary formal structure, the system's joints; its method consists in generalization, grounded upon the study of the juridical phenomenon, being the effective expression of the branches' synthesis[3].

The General Theory of Law has elaborated essential instruments to think the law with, into specialized literature[4]. Among them are concepts like: "the law (its essence, contents and form), the juridical norm, the source of law, the juridical relationship, the juridical technique, etc." categories and notions expressing realities and contained as such by it.

We might say that the finality of the General Theory of Law is to analyse the law's structural elements and to expose the principles of its basis in their essence. The fact that it is also named "Introduction to law" is to be explained by the general informative purpose that this discipline fulfils for the law as an ensemble. The General Theory of Law deals with its, wholeness, with its determining, its joints and inner features, its components and structure, providing for it the expression of fundamental concepts. It is built on the ground of the whole Law, not upon some whatever side of it. Thus, the General Theory of Law is not a branch of it, but a juridical matter "of large generality and principality"[5].

Its specific asset consist in the fact that it elaborates fundamental concepts, studying the genre of law (as a whole), not the species (whatever branch of it), expressing the determining core

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[1] Nicolae Popa, Mihail-Constantin Eremia, Simona Cristea, *Teoria generală a dreptului*, Ediția 2, Editura All Beck, Bucureşti, 2005, p.7

[2] Nicolae Popa, *Teoria generală a dreptului*, Editura All Beck, Bucureşti, 2002, p. 8

[3] See, to this purpose: Ion Dogaru, Dan Claudiu Dănişor and Gheorghe Dănişor, *Teoria generală a dreptului*, Editura Ştiințifică, Bucureşti, 1999, p. 6.

[4] See: N. Popa, op, cit., p. 8; see R. Nițoiu, Al. Şorop, *Teoria generală a dreptului*, university manual, Ed. a 3-a Editura C.H. Beck, 2008, Bucureşti, p. 2.

[5] Ion Dogaru, *Elemente de teoria generală a dreptului*. Ed. Oltenia, Craiova, 1994, p. 32

of the whole, not some side of it, thereby functioning as a science of essentializing[6], even if some law sciences, like Civil law, do "provide" more elements able to preserve the substance of the General Theory of Law than other sciences[7].

The purpose of this matter is to analyse , discover and underline what exactly is the law as an aggregate, what determines it, how it is connected to other sciences, how it is structured and of what, how the joints hold between its parts. It defines law as an external structure of behaviour rules, functioning as a reductive or constraining order, relying on the ground of human ego-centrism, issued from his insufficient self[8]. It is a systemic aggregate, and this features its internal elements, through coherence, as well as a formal hierarchy within which whatever norm (except for the constitutional ones)[9] is supported by another above it.

The coherence of the law's norms and the logics of their functioning as a system is mostly assured by the coherence obtained through the analysis performed by the General Theory of Law[10]. It also has components represented by the general theories of the main branches of the law[11].

As a juridical matter, the general theory of law, studying its essence, contents and form, does not limit itself just to underline a branch's degree of generality; it has to reach for the aggregate it self's perspective.

The General Theory of Law does not re strain the application of the concepts it has elaborated to one or another among the law branches, but draws out what is common for and defines the entire ensemble, essentializing the meaning of these concepts for each of the branches. This asset also results from the fact that such a discipline is cardinal for all the juridical sciences, the same way as the Philosophy of Law is the science explaining the law[12]. If the General Theory of Law stands as a referential discipline for the science of law, this happens firstly because it is qualified to be the science in search for the law's essences, and secondly because such a science is necessary, imperatively imposed, as well by theoretical and practical requirements.

Then, the General Theory of Law embraces the purposes to enrich and amplify the knowledge of law, both in science and in practice. So, the General Theory of Law, as a referential discipline for the science of law, through the area of its investigations, generalizing through essentialization the most important asset of every branch, contributes to harmonize the mechanisms of branch disciplines and to achieve, for the law system, the purpose of inner unity[13].

The specialized literature in regard to these elements[14] issued the following definition: "The General Theory of Law presents itself to be the juridical discipline which studies the ensemble of law, more exactly its determining, its joints and essences, its structure and inner components, a matter inside of which are elaborated the instruments through which law - as an ensemble - is thought of, instruments like the concepts of «law» (seen through its essence, contents and form) «juridical norm», «source of law», «juridical relationship», «juridical technique» etc."[15].

This denomination General Theory of Law - is rather recent[16]. In-between the two World Wars, the matter was named: "juridical encyclopaedia", "law's encyclopaedia".

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[6] Ibidem, p. 32-33

[7] Ibidem, *Elemente de teorie generală a dreptului*, Ed. Oltenia, Craiova, 1994, p. 19-23

[8] Ion Dogaru, D.C. Dănişor, Gh. Dănişor, op. cit . p. 44

[9] Ibidem, pag 45-48, part where the features of the juridical system are analiyed.

[10] For details, see: Ion Dogaru, Sevastian Cercel, Op. cit, 2007, p. 6-7.

[11] See, to this purpose: Ion Dogaru, Sevastian Cercel, Op.cit,2007, p. 28

[12] For details, see: N.Popa, M.C. Eremia, S. Criste, op. cit., p 8-9

[13] See, to this purpose, Ion Dogaru, Sevastian Cercel, *Drept civil*. Partea generală, university course, Editura C.H.Beck,Bucureşti,2007,pag 12-15. In the same line,Ion Dogaru, Nicolae Popa,Dan Claudiu Dănişor

[14] Ion Dogaru, *op. cit*., 1994, p. 32

[15] See also: M. I. Manolescu, *Ştiinţa dreptului şi actele juridice*, Editura Continent, XXI, Bucureşti, 1993, p.27, concerning the general concept of juridical science: "Under the general concept of juridical science, we will have first the theory of law, which ought not to be mistaken for the philosophy of law or for the encyclopaedia of law. The theory of law is the discipline which vows itself to discriminate what we will call the science of law from what we will call the practice of law and from the general components of the juridical science".

[16] See: Ion Dogaru, Dan Claudiu Dănişor, Gheorghe Dănişor, *op. cit*., p. 5.

The first ever attempt to analyse law encyclopaedically is made by Wilhelm Durantis, in his work "*Specullum juris*" in the second half of the XIII-th century[17].

Adolf Markel[18], Edmond Picard, John Austin, Victor Cousin, E. R. Bierling and a lot of other authors kad the purpose of "substituting the Philosophy of Law and the Natural Law, which had orientated the juridical thought, until that time, on a purely speculative path"[19].

In the second half of the XIX-th century, the discipline receives the name of "law's encyclopaedia" and its finality consisted in realizing a study that could point out the most general considerations upon the law.

According to Edmond Picard, the encyclopaedically study of law is defined by six directions to go towards[20]: a) the Universal Encyclopaedia of Law; b) the vulgar encyclopaedia (the profanes' initiation to law); c) the preliminary encyclopaedia (considered to be a kind of introduction to the law); d) the complementary encyclopaedia (the study of particular law, completed with general notions); e) the national encyclopaedia; and f) the formal encyclopaedia (the highest and purest law, concerned about the study of juridical permanent values).

In our country, thinkers like Mircea Djuvara and Eugeniu Speranția do greatly contribute to the consolidation of this matter's statute.

The juridical normative system is a living organism, which goes along with the human individual life, seen as an universe of its own, since birth and even earlier till death, and even afterwards, in respect to its consequences as a juridical event[21] , but which also chaperons the entities that it has created[22]. Human beings are concerned by such entities and their consequences either in their quality of physical individuals[23] or insofar they have constituted moral persons[24].

This perpetual movement of the juridical normative system aims to smooth down the way for the development of individual social life this movement constitutes the rule (the law's diachronic) while the exception is constituted by its relative stability (the law's synchrony). This relationship has been well outlined by the work of Nicolae Titulescu[25].

During the periods marked by revolutions or by (deep and abrupt) reforms, juridical regulations "get refreshed", enhancing the process of transition towards a new physiognomy. This involves a series of absolutely necessary measures able to ensure, for the law, the relationship between "diachronic and synchrony", so would be preserved, in such times as well, the principle of

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[17] See Nicolae Popa, *Teoria generală a dreptului*, T.U.B., 1982, p. 10.

[18] Into the work: *Juristische Enzyklopëdie*

[19] Nicolae Popa, *op. cit.*, 1982, p. 10; See also Gheorghe Dănişor, *Teoria generală a dreptului*, Editura Themis, Craiova, 2001, p. 5-6.

[20] Into the work *Le droit pur*

[21] "The entire human life, since birth or concerning this moment until death but also into what concerns this latter event, in respect to the successional legacy, is ruled, in its essential aspects, by the norms of the civil law" (Ion Dogaru, *Contractul, consideraţii teoretice şi practice,* Editura Scrisul românesc, Craiova, 1983, p.5).

[22] "Some juridical institutions, pertaining to this branch of law, deeply participate in the regulation of the moral person's life, since its founding or relatively to this process till its ceasing through reorganizing or dissolution, and even about the consequences issued from these taken actions". (Idem, *op.cit., loc.cit.*)

[23] About the individual (physical) person seen as a law' subject for rights and obligations, see: Ion Dogaru, Sevastian Cercel, *Drept civil*,Persoanele, Editura C.H. Beck, Bucureşti, 2007, pag 43-263

[24] About the moral persons, see: Ion Dogaru, Sevastian Cercel, *Drept civil*, 2007, pag 267

[25] "Few people do know that Titulescu's lectures, the courses he held in class, were constructed under the vivid light of the law's philosophy and of the general theory of law. As evidence supporting this statement stands the genial application he has found to do, in the generality of law and, especially, into civil law, of the philosophical categories of "synchrony" and "diachrony". According to his vision, as well for the generality of law as for, especially, the civil law, diachrony is the rule, because the normative juridical system is permanenty submitted to improvement, including through the changes it goes through. Thus, the law's mobility (diachrony) is the rule, and its synchrony constitutes exception, but the relative stability appears mostly in the domains of its rules, principles, constants. It is only this way, in Titulescu's conception, that the law could step along arm in arm with the evolution of society, supporting it "(Ion Dogaru, *Pretext şi profundă datorie morală,* în Academica, Revistă de ştiinţă cultură şi artă, editată de Academia Română, nr. 36, martie 2005, p.47).

unbroken unity for our national law system. In our country, the recent specialized literature[26] has analysed this aspect in regard to Civil Law regulations.

So, the idea was present that[27] it ought to be remarked how extensively and abundantly are applied today some texts from the Civil Code that were shyly and scarcely used of from 1947 to 1989. This because new regulations are "tied up" with the ancient ones. Some of them might, possibly, be maintained, while others might be abrogated.

About the law's mobility, Titulescu concentrated his own vision into an aesthetical formulation: "Peace through order, law into a perpetual becoming and into a perpetual connection with the inconstant stroll of life, the human soul into its continuous striving to achieve itself through the concrete forms of an incessantly rising through and generosity, here are the conditions required for escaping from chaos and for the organized life towards which all people are hankering".

The Romanian Neo-kantian philosopher. M. Djuvara expressed his vision too: "The force should become a tool of the law and not the law to become a tool of force"[28] (means agitat *molem*). At the end of his six tomes, the author comes to the conclusion that the concept of law is a rational one, and an independent one, while the juridical discipline is a science[29], having "one of the most beautiful and high destinations"[30], as the role of the jurist is to substitute "through a complex and delicate operation, this empirical knowledge by a scientifically one ... establishing a rational order, which is the skeleton itself of the social order"[31].. This because the law "is the representative of a

[26] "The juridical regulations pertaining to Civil Law come from various sources: many of the norms from 1864's Romanian Civil Code are still into force; from 1947 to 1989 a series of normative acts were emitted, them too being, most of them, still into force, the post-December legislator ruled, through the Constitution but also through a lot of other law's proving a special interest for the social realities in-becoming towards a new physiognomy. Such a desideratum concerning the social relationships, which request an adequate juridical regulation, imposes new coordinates to the legislative activity, but also to the law's theory and practice on behalf of the relationship «diachrony - synchrony into the law», relationship in virtue of which the mobility of law ought to prevail, since it constitutes the rule, in regard to the exception (its relative stability)". (Ion Dogaru, *Drept civil român. Tratat*, vol. I Editura Omnia Uni S. A. S. T., Braşov, 1998, p.7).

[27] Idem, op. cit. 1998, pag 78: "Into this context, there are some aspects pertaining to the principle of preserving the unity of the national law system. Therefore, the legislator, the practice and theory of law ought to be careful about:
a) the degree into which some texts of the Civil Code of Romania from 1864 which, from 1947 to 1989 were shyly and scarcely applied, have become in our days the juridical ground for the resolution of an explosive jurisprudence;
b) the degree into which the new civil legislation "ties up" with the one previous to 1989;
c) the degree into which, due to the general evolution of the legislative phenomenon and especially to the one from the domain of civil law, some normative acts, emitted from 1947 to 1989 and still intoforce now, are or not eligible to be maintained or either are to be renounced at, and substituted by newly issued juridical norms;
d) the degree into which, in its contents and its form the, juridical physiognomy of highly important juridical institutions is rebuilt, such as the juridical institution of the ownership right as the prototype of real rights, bearing direct consequences upon the juridical assets of these latters;
e) the degree into which, in the context of the new juridical realities, some of the civil law's juridical institutions do present a peculiar interest and a distinct significance for other juridical institutions pertaining to the same law branch, or for some juridical institutions pertaining to the field of private law. There is more: we do not think it is an exageration to state that some juridical institutions pertaining to civil law do present interest and significance for a series of institutions pertaining to the branches sited in the field of public law. N. Titulescu confessed that the institution of the contract, as he had found it within civil law, really helped him to understand the international treaties, to seize and operate with what, in international public law is called "consensus";
f) the degree into which some juridical norms, obsolete from 1947 to 1989 are starting to act again;
g) if, and at what extent, the regulative process of the general theory of law, and especially of civil law, might be supported, in order to give the best answers possible, both to the general and fundamental interests of the entity organized as a state and to the citizen's interests, rights and liberties" (Idem, *op.cit., loc.cit.* p.7-8).

[28] In *Teoria generală a dreptului* (*Enciclopedia*), vol.6, Editura Librăriei S.O.C.E.C. & Co. S.A., Bucureşti, 1930, p.258.

[29] Idem, *op.cit.*: "The general conclusion of this essay (the six tomes [our note], was that the idea of law is a rational and autonomous concept, and therefore, that the juridical discipline is a science and has an object and a method of its own".

[30] Ibidem

[31] Ibidem

sacred ideal, it is the carrier of the highest aspiration that a society might nourish, the one towards justice and morality"[32].

The author's conclusion is that the juridical phenomenon only appears as a reaction against natural events and that the juridical appreciation is opposing to force and could not be mistaken for "it"[33].

A battle is going on between spirit and matter, where "the former does not let itself to be enslaved, on the contrary, it is vowing to subordinate the latter"[34].

Due to the fact that it is a system of norms, bearing the power to impose itself, it also is a disciplinarian factor by its inner features. It is made by the people, that is to say vowed to design their behaviour in their reciprocal relationships and in the ones between them and society. Justinian said that: to ignore the persons for whom the law itself was created[35] is to recognize to it only a petty value, respectively to think of it as rather worthless. It is easy to understand that the human person is the purpose of law, an idea highly cherished by the Romans, which determined Ulpianus[36] to state three capital principles: to live honestly, to do no harm to other people and to give to each person hi own due.

It is just that law has to be constructed and "maintained", so that it could be able to help the people and the entities they have created.

We may, undoubtedly, say that an irrational law bears certain costs to be paid. In his study *Reflection from Latin America*[37], Claudio Salvator Lembo precises that "The legislation, irrationally elaborated, leads to catastrophe, of which a lot of economically grounded plans stand as evidence[38]. His conclusion is that a law, elaborated according to the constitutional principles, should not be promulgated without a previous analysis of its ricochets upon the already existing legal system and of its costs for the society. Speaking of Brazil, the author considered that: "A law is not a magical device. It has to integrate to an economical infrastructure. We have to understand that, in regard to human, necessities, resources are always limited. There from the impossibility of creating expectations without previously being aware of the effectively available resources consumptible and not always easily renewable in regard to the economical conjecture"[39].

Otherwise, two costs might appear after the law's promulgation: the direct price, consisting in the law's impact upon the relationships' field; the latter is "the price of shadows", accountable as time passes. The author points out to the irrationally elaborated legislation: "a Brazilian feature. It leads to catastrophe, exemplified through a lot of plans in economy and through a bitter scenario, for the whole of Brazil, for our own days"[40]

The object of the General Theory of Law is to precise and explain the elementary notions of the juridical science and to outline the image of law as an unitary phenomenon. M. Djuvara[41] considered that: "The encyclopaedia of law has a formal object, not a material one ... it studies the form only, no matter of the juridical relation's contents by itself".

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[32] Ibidem
[33] Ibidem
[34] Ibidem, *op,cit., loc.cit*
[35] In Inst. Iust. I.2.12. *„Ac prius de persones videamus. Nam parum est ius nosse si personae, quarum causa statum est ignorentur"*("First let's preoccupy ourselves about the persons. Indeed, it would be a worthless thing to know the law, if the persons should be ignored, the ones for whom the law itself was created"). This way, Justinianus aimed to identify what might have been called the *Grundorum*, this concept being a kind of fundamental norm that ought to be respected into every branch of the law.
[36] *„Juris precepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere*" ("The law's precepts are these: to liwe honestly, not to harm the others, give to everyone what is due to him"): D.1.1.10.1.Ulp.1 reg.
[37] Published in: Ad honorem, Ion Dogaru, *Studii juridice alese,* Editura All Beck, Bucureşti, 2005, p.70-76.
[38] Claudio Salvator Lembo, *op.cit.,* p.70.
[39] Idem, *op.cit.* p.71.
[40] Ibidem, *op.cit., loc.cit*
[41] In *Teoria generală a dreptului*, Socec & co., S.A. Bucureşti, 1930, p. 23.

The general theory of law focuses upon the form taken by the law's contents, upon the law's structure, upon the positive elementary formal organisation of the law and upon the joints of the law seen as an ensemble.

This juridical discipline searches for and explains the law's elements and principles.

The observation and research of juridical grounds consist in the study of the law's basic notions, principles, concepts and categories. As a science, it tends to globalist, to knowledge through conceptualisation: "through the inclusion of particular phenomena and their essentializing into highly general categories, instruments of thought with a propension to expand themselves"[42].

So, we might rightfully say that: "The General Theory of Law, through the analysis of its specific object, aims to organize it logically; it coordinates and systemizes knowledge, in the frame provided by the specific language of each branch's juridical sciences, structural disciplines as they are defined because they are particular sciences which study relatively closed domains"[43].

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[43] Ion Dogaru, *op. cit*., p. 34; See also Nicolae Popa, *op. cit*., 1982, p. 8: "The general theory of law, as a general juridical theory, provides the set of concepts through which the science of law judges and explains the juridical reality. It searches to seize the inner and permanent features of the juridical phenomenon, in order to define and outline the space it holds within the social and historical system to which it belongs. The General Theory of Law assumes in proper as well the philosophical perspective of the research upon the juridical phenomenon - the study of the law's necessity and possibility, in principle - as the straightly scientific perspective - the study of concrete causes, of the determining historical way through which the juridical phenomenon (the juridical reality) appears and of its forms of action".

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CIVIL LIABILITY IN THE INTERNAL LAW OF THE EUROPEAN UNION MEMBER STATES

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Abstract: *The present paper presents the notion of civil liability within the internal law of some European Union Member States. The paper starts from the Romanian law, presenting the general notion of civil liability, its governing principles, its finality, as well as its two important subdivisions: contractual civil liability and delinquent civil liability. Starting from the Romanian law, the paper presents comparatively the civil liability in France, Belgium and Italy, the definition of the notion according to the legal norms of these states, the types of civil liability, the legislative bodies' goal.*

Key-words: *civil liability, compared law, member states.*

Within the juridical liability, the civil liability represents one of the most important braches. The civil liability is a form of juridical liability which consists in an obligations relation based on which a person has the obligation to repair the prejudice caused to another person by his deed, or in certain cases stipulated by the law, the prejudice he is responsible for. One of the main functions of the civil liability is the reparatory one, having as purpose the removal of all the negative consequences of the illicit deed, covering the suffered prejudice and restoring the patrimony of the prejudiced person in the previous condition.

The civil liability is based on two fundamental principles:

- The principle of repairing the prejudice in kind, meaning the repair by natural, adequate means, such as the restoration of the asset, its replacement with a similar one, the technical repair of the asset etc.

and

- The principle of the integral repair of the prejudice, representing the illicit deed author's obligation to remove all the consequences of his deed in order to cover the prejudice and restoring the victim in the condition previous to the commitment of the deed.

The Romanian Law

In the Romanian law, the civil liability has two forms: the contractual civil liability and the delinquent civil liability. The Romanian Civil Code subjects the two forms of the civil liability to slightly different juridical regimes. The contractual civil liability is the duty corresponding to the debtor of a contractual obligation to repair the prejudice caused to its creditor by not executing the owed performance. The delinquent liability is a person's obligation to repair the prejudice caused to another person by an extra-contractual illicit deed.

Although they are subject to different juridical regimes, there are no fundamental differences between the two forms of civil liability, both of them being implied if the following conditions are cumulatively met:

- A prejudice caused to another person;
- An illicit deed (contractual or extra-contractual);
- The deed author's guilt or fault;
- A causality relation between the illicit deed and the caused prejudice;
- Pursuant o the legal provisions in force, there are three types of delinquent civil liability:
- Liability for one's own deed;

- Liability for a third party's deed;
- Liability for the prejudices caused by things, animals or building ruin;
- According to its foundation criterion, there are three types of liability:
- Subjective delinquent liability, founded on the idea of guilt;
- Objective delinquent liability, founded on the idea of guarantee or risk;
- Within the subjective delinquent liability, the Civil Code regulates three categories of liability:
- Delinquent liability for one's own deed;
- Parents' liability for the prejudices caused by their minor children;
- Institutors or craftsmen liability for the prejudices caused by the pupils or apprentices under their supervision;

Within the objective delinquent liability, the Civil Code regulates three categories of liability:

Liability for the prejudices caused by things;

Liability for the prejudices caused by animals.

Therefore, we distinguish the liability based on an illicit juridical deed from the liability for infringing a predetermined existing obligation. There are also different forms of liability within the content of these relations. Thus, within the liability for an illicit deed, the subject having an illicit behaviour is not under any kind of previous juridical relation with the subject or the subjects whose rights he infringed. In such case, a lawful norm is directly infringed, a norm provided in order to protect absolute subjective interests and rights.

Regarding the liability, in order to infringe the rights and the obligations within an existing juridical relation, the illegal behaviour is reduced to the infringement of a relative right, to a deviation of the real behaviour from the model established by a juridical relation. In the civil juridical literature this distinction gets the expression of delimiting the contractual and delinquent civil liability.

The contractual civil liability is the duty corresponding to the debtor of an obligation born from a contract to repair the prejudice caused to his creditor by not executing in general the owed performance, meaning the delayed execution, inadequate execution or total or partial failure to execute.

The delinquent civil liability is a person's obligation to repair the prejudice caused to another person by an extra-contractual illicit deed or, if the case may be, the prejudice for which he has to answer by the law. The matter regarding defect products stipulates that, since the acquired good endangered the consumer's life, health and assets, the delinquent liability shall be applied, however, in case of a defect good by itself, which due to certain reasons cannot be used according to its destination, the contractual liability can be engaged.

The aim of the liability measures is to modify the parties' rights and obligations so that, in the final result, the initial goal should be obtained, while the losses and the prejudice caused by infringing the obligation should be repaired by the guilty person. Establishing the criminal clause or repairing the prejudice in case of not executing the contractual obligation under the conditions in which this execution is real, have as purpose obtaining the exact result.

Therefore, the liability for the infringement of the obligations within a juridical report has a goal to conform the real behaviour to the standard behaviour within a juridical behaviour.

Regarding the relation between the two forms of the civil liability, we mention that the delinquent civil liability constitutes the common law of the civil liability, while the contractual liability is a special character liability, derogating. Whenever the contractual civil liability is not the case, then the rules regarding the delinquent civil liability shall be applied.

The specialty literature gave birth to several theories regarding the juridical nature of these two forms of the civil liability, taking into account that they have common elements as much as they have different elements. Thus, many debates took place in the attempt to solve the respective issue; the answer was different and the result was two theories: the theory of dual civil liability and

the theory of unitary civil liability. Given the fact that these theories are analysed in detail in the specialty literature, we shall not linger upon their description in this context.

In the present stage, the theory of unitary civil liability seems to be much more sustained by the theoreticians, as well as by the practitioners, being invoked even the hypothesis that the contractual guilt has the same nature as the delinquent one and it consists of the psychical attitude towards the illicit deed. This theory was more emphasized in the French specialty literature of the last years which sustained the abrogation of all the differences between the contractual victim and a third party's situation.

It is well known the fact that one of the characteristic principles of the contractual relations is the relativity principle, meaning that along the same line, the contractual liability regarding the products can be only invoked by the contractual parties. The third parties cannot invoke the contractual liability for the prejudice suffered following the failure to execute or the inadequate execution of a contract. In order to cover the suffered prejudices, the third parties can appeal to the delinquent civil liability, to the extent in which all the conditions for such liability are met.

However, the line of differences between the contractual liability and the delinquent one allows us to say that they exist within the unity of the civil liability.

The manner in which the legislative body chooses the liability form takes into account the functional specific of the contractual and delinquent liability, and that is why such situation shall be considered when improving the legislation regarding the consumers' protection.

When examining the juridical-civil liability as a manner to protect the consumers' rights, we have to specify its functions in order to establish the limits of the effective application and to accomplish the aimed objectives.

The functions are:

- The preventive function;
- The compensation function;

One of the functions can prevail to the other depending on the domains of the civil law. For example, in the case of the conclusion of the services performance contract, the preventive function prevails, because such contract is meant to provide a complete and multilateral satisfaction of the material and cultural needs of the citizens. But if we refer to the repair of the prejudice caused to the consumer's life, health or property by a dangerous and defect product, then the compensation function will prevail.

In the specialty literature the issue of the plurality of the contractual liability and the delinquent liability is very much debated. Of course, this issue can be debated only when there is a validly executed contract between the author of the prejudice and the harmed person and the non execution of the respective contract represents the prejudice.

The French and Belgian Law

In the French law, the civil liability represents the obligation to repair the prejudice caused to another party. The civil liability includes two forms: the contractual liability resulting from the failure to execute certain contractual obligations and the delinquent liability (or extra-contractual) which is not based on the existence of a juridical relation.

The civil liability is engaged if the following conditions are met:

- A prejudice caused to another person;
- An illicit deed (contractual or extra-contractual);
- The deed author's guilt or fault;
- A causality relation between the illicit deed and the caused prejudice.

The exoneration of liability requires the demonstration of the existence of a force majeure case, another person's deed or the deed of the victim himself/herself representing the cause of the prejudice.

The prejudice can be repaired by the equivalent in kind, but the repair always has to be integral.

The two types of liability exclude each other. As long as there is a contractual relation, the delinquent liability between the signing parties cannot be invoked. On the other hand, the relativity

principle regarding the effects of the contract prevents third parties from requesting the delinquent civil liability as long as they are not parties of the contract. Unlike the French law, in Belgium a person can ask the delinquent civil liability upon his/her contractual partner, but under certain circumstances.

The contractual liability intervenes whenever a contractual obligation is infringed by one of the signing parties. The delinquent liability intervenes in all the other cases.

The delinquent liability engages the deed author's obligation to repair the produced damage entirely. The victim shall also obtain damages for the material and moral prejudice suffered following the author's deed.

The delinquent civil liability is engaged if the following conditions are met:

- A prejudice caused to another person;
- An illicit deed (contractual or extra-contractual);
- The deed author's guilt or fault;

A causality relation between the illicit deed and the caused prejudice.

There are many types of delinquent civil liability in the French law:

- The liability for one's own deed;
- The liability for deeds;

The liability for a third party's deed meaning: an official in charge, a child or another person the liability is engaged upon;

The Italian Law

In the Italian law, within the general category of civil liability we can identify two distinct categories: the contractual liability and the delinquent liability. In order to define the application domain of the two types of liability, we only have to observe that, while the first type is based on the failure to fulfil the existing duty, the second type is engaged when a person causes a prejudice without a justified reason, without an existing contractual report.

Beside the two forms of civil liability, in the Italian law and in the doctrine there is a debate regarding the pre-contractual civil liability. Some authors integrate it in the vast category of the delinquent civil liability, while others in the contractual liability.

Thus, the conclusion of the contract can be preceded by different types and kinds of obligations during the negotiation and execution of the contract. The general rule is that the parties have the obligation to act in good faith regarding each other during the negotiations and during any other moment previous to the conclusion of the contract. They also have to exchange information, so that the negotiation should be transparent. The infringement of these rules shall imply the pre-contractual liability.

The first difference between the contractual liability and the delinquent liability refers to the test duty. In order to engage the delinquent civil liability, the test duty is covered by the victim, who has to demonstrate the existence of the illicit deed in all its elements:

- The suffered prejudice;
- The existence of the illicit deed;
- The deed author's guilt or fault;
- A causality relation between the illicit deed and the caused prejudice;

In case of the contractual civil liability, the test duty is inversed: in any case of failure to fulfil the contractual obligations, there is the presumption of guilt regarding the author which spares the complainer of the test duty. This is certainly a simple presumption which can be cancelled and the debtor can be exempted of any liability if he proves his lack of guilt and that it is impossible for him to fulfil his obligations due to causes independent of his will.

From the damages assessment point of view, there are supplementary differences between the two forms. In case of the delinquent liability, the victim has to be compensated for all the damages, whether predictable or unpredictable. In case of the contractual liability, there is the obligation to cover the predictable damages in the moment when the debt occurred.

Another difference refers to the default institution. Thus, on contractual background, the obligation debtor is rightfully in default.

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CIVIL LIABILITY FOR THE LEGAL PERSON'S OWN ACT

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Abstract: *In order to offer a better protection to the victim, the legislator established besides the natural person's responsibility also the responsibility of the legal person. This article presents in general, the elements of the civil liability with reference to some points of differentiation from the legislation of the other European countries and in particular, the civil liability of the legal person in terms of Romanian law.*

Because of the increased number of the illegal acts committed by people who end in causing damages to the others, the civil tort liability is very often seen in the juridical practice. Therefore, anyone who commits an act that causes to another person a damage is obligated to repair that damage. This is also the obligation of the legal person, which through its authorities may cause prejudices to other persons. Every victim has the right to faire compensation, as the judge considers in each particular case.

Key words: *civil tort liability, legal person, illegal act, damages*

Civil liability for the legal person's own act

The legal liability is a historical, alive institution which has been formed in civil societies along time. Though juridical, it is far away from the total separation of the moral influence, since at its foundation lies the idea of guilt (mistake). The word liability has a total different meaning in the jurisprudence than in the every day language, that is: it emphasizes the negative consequences occurred after committing illegal acts by a natural or a legal person.

The civil liability institution has a historical feature and despite the use of the same notion it has been given by different societies, its content is different from one society to the other, the final form it has today is the result of an evolution, of a continuous change, labelled by qualitative changes. Thus, from the primitive stage of the private liability has been reached, through a long evolution, at the nowadays meaning, which is characterized by a general rule and not by an enumeration of cases as it has been in the past.

To the form it shows today, the idea and the institution of the liability have known several stages of development: from the idea of revenge, private revenge to the right of the state to apply the penalty. By case, the state applied injury or pecuniary penalties and at the request of the victim, it provided compensation for the damage caused. This evolution is known in the Roman law (The law of the XIII trays) as well as in the Athenian legislation.[354]

In the Roman law, the evolution went from the collective, objective, criminal liability to the individual, subjective, civil one. The family solidarity has been removed, the focus has been put on intention rather than on the material causal and the repair has been separated from the penalty of the guilty.

This evolution has continued in the old French civil law and it has been expressed in the Napoleon Code from 1804. At the end of the feudal organization "The law of Caragea" (September 1st, 1818) and "Calimach Code" (1817) are revelled in the Roman law, real legal monuments that settle, such as the legislation of the western Europe, the general principle of the civil liability. The main source of inspiration of the Calimach Code is the Austrian civil Code and it consecrates a whole chapter to civil and contractual liability. Here we can find for the first time the idea of liability for one's own act.

Along the historical evolution we reach the Civil Code from 1864, which establishes the civil liability in chapter V "About crimes and cvasicrimes" (art. 998-1003), from which art.998 and

[354] Constantin Statescu, *The civil liability for the act of another person*, Scientific and Encyclopedic Editing House, 1984, p.11

art.999 represents the legal basis of the liability for one's own act. The liability is all the time legal, no one can make himself justice. That is why the liability is a legal one.

Romania, as well as France, German and Russia, whose legal system had as a foundation the roman legal traditions, being a written law and having a fundamental law – the Constitution- a hierarchical system of sources and rules, sanctions the person who caused an illegal act and provoked damages according to the legal regulations. Unlike these countries whose main source is the law, the Anglo-Saxon countries solve a civil conflict using the judicial precedent. The country in which this system has been born and developed is England.

Trying to define the civil liability, we may say that it is that form of the legal liability which consists in the duty of any person who caused a damage to another person to repair it. Its main aim is to bring the injured person's assets to its previous stage, eliminating all the bad consequences of the illegal act.

Allied to other form of liability (criminal, administrative**,** internal law) through what it follows and, in a certain extent, through the means it uses, the civil liability distinguishes itself from the other kinds of liability, making at the same time distinguish between the agreement liability and the tort liability.

The agreement liability is the duty of the debtor of an obligation from the convention to repair the damage he caused to the creditor because of the non-performance, the improper performance or with delay of a certain labour conscription.

The civil tort liability is the duty of a person to repair the damage he caused to another person by an illegal and non-conventional act. Regarding the connection between the two types of civil liability, we mention that the civil tort liability forms the common law of the civil liability, while the agreement liability has a special, depart nature. Every time there are no indicators for applying the agreement liability, the rules of the civil tort liability are to be applied.[355]

The legal liability operates directly only to the guilty person who made the illegal act, and the extent of the legal liability is established according to the personal circumstances of the guilty person. Because of this principle, the rule is that only the person who violated the law is subject of the penalty, and for a single illegal act only one penalty may be applied and only once. From this principle, there are some exceptions, and these are: joint responsibility with another, responsibility for the act of another one.

From the Civil Code results that, some conditions must be respected in order to apply the civil tort liability. These conditions are:[356]

- The existence of damage
- The existence of an illegal act
- The causal report between the damage and the illegal act
- The guilt of the one who caused the damage

Once these four conditions are accomplished, the one who suffered damage may call the civil responsibility of the one who caused it. Before we go on analyzing when the legal person is responsible for the damages it causes, a breath presentation of each of those conditions is going to be made.

The damage, as an element of the tort liability**,** consists in the result, the negative effect suffered by a person, as a result of an illegal act made by another person.[357] In the judicial practice the duty to compensate the injured person has been accepted, even when the loss suffered was because of the violation of a simple interest. Even though, all this time there have been controversial discussions related to the moral compensation and whether these should be given to the injured person or not. Nowadays, this problem is no more a subject of dispute. As an example, we may give the Law nr. 29/1990 of the contentious administrative matters which says that, when

[355] Constantin Statescu, Constantin Barsan, *Civil Law. The general theory of obligations*, 7th edition, Allbeck Editing House, 2002,pp.145-151
[356] Ibidem,p.154
[357] Ibidem, p.155

the annulment application of the administrative document or the admission of a violated right is admitted, the court decides both upon the material damages and the moral ones, required by the injured person. Furthermore, Law nr. 11/1991 regarding the prevention of the unfair competition requires that, if the unfair competition acts cause material or moral damages, the injured person has the right to ask his justice into the court. At the same time, several authors[358] have argued the possibility of according pecuniary compensation for the moral damages suffered by the juridical person, for example following an illegal strike. Consequently, the compensation that is given in case of civil tort liability can be both pecuniary and moral one, named "moral damage". The rule is to offer a pecuniary compensation, by a compensation in nature of the damage or giving the equivalent amount of money for the damage. If the damage caused to a person can be valuable in money, it is a pecuniary loss. The damage caused by deteriorating or destroying a good or the damage caused to a person who has lost totally or partially the work capacity are typical examples. If the prejudice is not suitable of pecuniary evaluation, it is a moral prejudice.

The pecuniary/patrimonial prejudice has two components:

- actual loss suffered
- the unfulfilled benefit

One of the principles of the reparation of the prejudice is the full compensation of it. The actual loss suffered consists in diminishing the active value of the consumer's goods, while the unfulfilled benefit is the lack of the assets' active of increase which would have occurred if the illegal act wouldn't have been committed. In other respects, the real damage consists of those expenses, which the victim, whose rights are violated, has suffered or is going to suffer them in order to come to the initial stage, before the violation of rights or the destruction of the goods. The unfulfilled benefit includes the incomes, that the victim would have received taking part normally to the civil legal relation, if his/ her rights wouldn't have been violated. Concerning the juridical persons, the unfulfilled benefit which gives the right to compensation can take place as "the snowball" by rolling, taking into consideration that the meaning of the trade consists in a continuous investment of the benefit.[359]

Also, the harm of a person and his health may cause, besides the costs of the medical care also the loss of total or partial work capacity, and the prejudice as an unfulfilled income represents the income the victim should have received during the entire period in which he was incapable of working.

Another principle is that of compensation in nature, which can be done by equivalent when it is not possible otherwise, by means of compensations. The compensation by equivalent can be done by offering a global amount of money or by offering regular benefits with temporary nature.[360] The court is the one which chooses the way of compensation, in nature or the pecuniary one, analyzing the concrete facts of the case.

In order to obtain the reparation of the prejudice, it must be certain, that is certain both regarding its existence and its possibility of evaluation and it mustn't have been repaired yet, because it is not possible to repair twice the same prejudice and by the same person. The one who has to repair the prejudice is the person who committed the illegal act, but there are some exceptions such as: when the damage is paid by the Social Insurance, by the Insurance Company or by a third person who doesn't have the duty of paying the prejudice. When the prejudice is paid by the Social Insurance or the Insurance Company, the victim has the possibility to ask to the guilty person only the difference that hasn't been paid by one of those. When the third person paid only because he wanted to help the victim, this one has the right to pretend the entire compensation from the guilty person, as well.

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[358] S.Beligradeanu, *Is it proper to repair the moral damage caused to company in case of a strike that is declared and continued illegally?* Law, nr. 2/1993

[359] Gabriel Ungureanu, *The European Law of Competition*, 2nd edition, Cermaprint Editing House, Bucharest, 2009, p.198

[360] Constantin Statescu, Constantin Barsan, *Civil Law. The general theory of obligations*, 7th edition, Allbeck Editing House, 2002,p.170

In terms of reparation the prejudice, parties may agree by mutual consent, over the compensation and the ways of repairing it. Only when, there is no consent, the victim may start proceedings against the person who created the damage.

The illegal act represents the objective condition of legal liability. The civil laws establish different ways of behaviour for the participants to the civil law, as well as for the economic agents (companies) and the consumers. The illegal act, as a component of the civil tort liability is defined as being any act, through which damages to the subjective right of a person are caused, by violating the objective right. When we examine the illegal act, as component of the civil tort liability, we understand the objectivity, the external behaviour of a person who is conscious of his/her act. The illegal act consists of actions and omissions. Therefore, the omission refers to the lack of an activity or not taking measures, when they should have been accomplished by a person, according to the law.

The legislator has thought also about the situations and circumstances when the person is in such a condition that he/she is incapable of acting as the law requires. As a result, there are some cases which remove the illegal nature of the act, these are: self-defence, state of necessity, the performance of activities required or permitted by law or the order of the superior, the performance of a subjective right, victim's consent.

The causal relation between the prejudice and the illegal act. In order to hold somebody responsible the simple existence of a prejudice suffered by somebody and an illegal act is not enough, it is necessary that between the act and the prejudice to be a causal link; in the sense that, that illegal act caused that prejudice.[361]

In the doctrine and in the legal practice from the Western countries, there have been some criteria suggested for the determination of the causality report. Such a system is *the equivalency of conditions system*, according to which, if the cause of the prejudice can't be precisely established, equal causal value will be attributed to all facts and events which preceded that prejudice. *The proximal cause system* considers the last action as the cause, the action which is immediately prior to the effect. But, from a practical point of view, this system can lead to an excessive and arbitrary limitation of the circle of persons that would be held responsible for the prejudice, leaving out the person who should, objectively, be held responsible. A latter system is that of the *adequate cause*, according to which, in the determination of the causality report, only the antecedents which embody the "sine qua non" quality of condition will be kept, antecedents that are typical, that are ordinarily liable to produce such an effect.[362] Each of these systems has been criticized in one way or another, as the Romanian law partakes in the indivisibility of the cause with the conditions thesis, according to which the external conditions which have contributed to the realization of the damaging or socially dangerous effect, form together with the causal circumstance, an indivisible unity, in which this kind of conditions gain, through interaction with the cause, a causal character.[363]

Guilt represents the psychological attitude the culprit had at the moment of perpetration of the illegal action, more exactly, at the moment immediately prior to its perpetration, towards the action and its consequences. Guilt always implies a certain degree of knowledge, of perception of the social significance of the actions and their eventual consequences. Thus, responsibility implies perpetrating the illegal action feeling guilt. The lack of guilt eliminates responsibility, even if the action was perpetrated and, through it, a prejudice was caused.[364]

Guilt presents itself in two forms: intention and fault. The intention can be direct or indirect, and the fault can be with or without prevision. We must remember that the civil delinquent responsibility mainly operates for the easiest fault, and that, no matter the weight of the guilt, the

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[361] Ibidem,p.193

[362] Constantin Statescu, Constantin Barsan, *Civil Law. The general theory of obligations*, 7th edition, Allbeck Editing House, 2002 ,p.197-200

[363] M.Eliescu, *Civil tort liability*, .Academiei Editing House, Bucharest, 1972,p.131

[364] Constantin Statescu, Constantin Barsan, *Civil Law. The general theory of obligations*, 7th edition, Allbeck Editing House, ,2002,p.207

prejudice must be fully repaired, because the quantum of the recovery does not depend on the degree of guilt.

The guilty person can be held responsible only if he/she has a clear judgement, that is, a delinquent capacity. More exactly, we refer to the intelligential factor of guilt, to the mental ability of the person in understanding the significance of the action, to discern between what is legal and what is illegal. Moreover, judgement underlies the delinquent capacity, meaning that, sometimes, its presence determines the presence of "the ability of the person to be aware of the illegal character of the action he/she is committing and its legal consequences, the capacity to discern between legal and illegal".[365] Therefore, only a responsible person can be charged with committing an action and the negative consequences on legal order, because a person who lacks judgement doesn't have, when committing an illegal action, "a will which is so much guided by reason, so as to be able to tell between, to discern between social and antisocial, good and evil."[366]

Guilt can be determined on a natural person, as well as on a legal person. The guilt of a legal person is looked at in terms of his collaborators' guilt in the process of enforcement of their duty obligations by virtue of the job they have or of the speciality of the work they do. If the legal person is a debtor, the actions of the workers of the debtor in point of enforcement of his/her obligations are considered actions of the debtor. For example, a mobile phone company which in the manufacturing of a new model has used inadequate components, more so, of a clear low-quality. Also, the responsible persons are guilty too, those who accepted the production and didn't take the necessary measures to avert this kind of situation. In the end, the rights of the consumer are violated.

In the judicial literature, as well as in the judicial practice, some causes that remove guilt have been determined: the action of the victim; the action of a third party, for which the perpetrator is not held responsible; the stricto sensu act of God; the major force case.

The member countries of the European Union, by transposing in their internal legislations the no. 374/1985 Directive regarding the responsibility for the damaged products, have established the principle of responsibility of the manufacturer in case of a prejudice caused through the defect of a product and the removal of any differences between victims. As a matter of fact, the directive stipulates limiting exoneration causes. The project of the new civil code of the Republic of Moldova stipulates in the same way the responsibility of the manufacturer for the defective products, no matter his/her fault.

Making a better analysis of the legislation of the states which provided as a basis of the delinquent responsibility the responsibility for the products (Germany, France, Holland), we can mention that the problem of responsibility exoneration is treated differently.

In the civil legislations of the mentioned countries, there are other bases for exoneration of responsibility of the manufacturer, namely:

• the product will not be brought into commerce

• according to the circumstances, it can be considered that the product did not have the defect which caused the prejudice at the time the manufacturer brought it into commerce

• the defect consists of the fact that the product, at the time the manufacturer brought in into commerce, corresponded to some legal required conditions

• the defect, in report with the level of science and of technology at the time the manufacturer brought in into commerce, could not be established

The delinquent responsibility for the legal person's own action brings forward the bodies of the legal person as his/her inherent parts. Thus, there aren't two judicial independent entities – the legal person and his/her bodies, but a single entity – the legal person – which expresses himself/ herself through his/her bodies. This fact is stated in article no. 35 from the 31/1954 Decree which represents the foundation of this idea because "the judicial actions made by the bodies of the legal

[365] V. Beliş, *Mental capacity –Discernment – Antisocial potential*, Anals of University of Oradea, Medicine, nr.2, Oradea, 1996, p. 40-48.

[366] M.Eliescu, *Civil tort liability*, .Academiei Editing House, Bucharest, 1972,p.224

person, within the powers they have been given, are the actions of the legal person" (paragraph 2), and "the illegal or legal actions of the bodies compel the legal person, if the actions were made by exerting their function" (paragraph 3). Consequently, the civil tort liability of the legal person will be employed every time his/her bodies, in the practice of their function, will commit an illegal action which causes prejudices.

The civil patrimonial responsibility of the legal person can be either an agreement responsibility, or a delinquent responsibility. The delinquent civil responsibility can also be a responsibility for an inherent action (art.998-999 Civil Code), a responsibility for someone else's action (art. 1000 Civil Code) or a responsibility for the prejudices caused by the possessed things, structures or animals (art. 1000, paragraph 1, art. 1001, art. 1002 Civil Code). Here, we will focus on the civil tort liability for an inherent action.

The regulations of the 31/1954 Decree must be correlated with the texts regarding the activity of the autonomous administrations and of the companies, namely Law no. 15/1990 regarding the organisation of the economic state units as autonomous administrations and companies, Law no. 31/1990 regarding the companies, Law no. 36/1991 regarding agricultural companies and other forms of association in agriculture and Enactment no. 26/2000 regarding organisations and trust companies.

There has to be taken into consideration that, the representatives of the legal persons who commit an illegal act while executing the duties they are entrusted with, will suffer the consequences for their act and also the legal person is responsible for the acts of the others.

At the same time, the illegal act has to be committed by the authorities of the legal person while they are in duty, the act has to be in connection with that job, even though the legal limits were exceeded. Still, the illegal act, even abusive, committed by the authorities of the legal person, has to be related to the legal person's own interests. If the act has been committed abusing of their position, having in view personal intentions or of the others, only that person will respond for her/ his act, even though that person is part of the authorities of the legal person.

The principle of the special capacity of use of the legal person, established by article 34 from Decree 31/1954 specifies something. In this decree the limits of validity of the juridical documents are specified, but exceeding these limits by committing illegal acts by the authorities of the legal person, the author of the prejudice will be responsible.

Regarding the proof of the liability's elements, the general rule is applied, according to which, the one who has to prove the existence of the prejudice, the illegal act, the causal relation and the guilt of the authorities of the legal person is the victim.

The legislator, in order to protect the victim established also the responsibility of the legal person, but this doesn't eliminate the responsibility of the persons are part of the authorities of the legal person. On the contrary, these persons have a personal responsibility for the acts that caused prejudices, a responsibility both for the victim and for the legal person. Article no. 35 from Decree no. 31/1954 mentions that the illegal acts of the authorities of the legal person "involve the personal responsibility of the one who committed them, both for the legal person and for the third one". As a consequence, the victim of the prejudice has the following possibilities: to sue only the legal person, or only the natural person, or both the legal person and the natural person.

When only the legal person is sued and after it pays the damages to the victim, it has the right to pretend to the person who committed the illegal act to return everything it paid, because the guilty person is the one who has to pay for the damages. This legal remedy has its basis in art. 1108 (3) Civil Code "The subrogation is done directly by law in the benefit of the one who, being obligated for the others or with others to pay the debt, is interested in fulfilling it." Applying the article to this situation, we realise that the legal person subrogates itself in the victim's rights when it pays the compensation, in order to recover what it has paid.

With reference to the law of companies, in its content it speaks also about the responsibility of the general partnership and the limited partnership**.** The general partnership is responsible with its own patrimony for the non-observance of the obligations assumed. Responsible are also the partners, who will pay with their mobile and immobile, present and future goods. There has to be

mentioned that, the partners responsibility is auxiliary, the creditor of the company can sue them only when the company doesn't have the possibility to pay.

Like in the case of the general partnership, mainly the company and auxiliary the partners have the responsibility for the obligations of the limited partnership. There are some elements of differentiation, such as: the creditors may sue only the general partners, whose responsibility is unlimited and joint, and not also the dormant partners, whose responsibility is limited to their financial contribution in the company. Taking into consideration that the value of the dormant partners' contribution is absorbed in the social assets, they don't have a personal responsibility to the company's creditors, like the general partners.[367]

The radical changes that have occurred on the political, economical and social stage in central and Eastern Europe have included also a fundamental reform of the legal system in each of these countries. The development of the global economy drew to the formation of an adequate setting for the accomplished of the legal procedures regarding the elimination of the bankrupt companies which together with an anti-trust legislation and the elimination of the state monopoly lead finally to a free and more secure economy.

All in all, the rule according to which no one, natural person or legal person, has the right to violate the rights of another person, causing through their actions or inactions damages, thought in terms of civil law says that: anyone who commits an act that causes to another person a damage is obligated to repair that damage; the same obligation of compensation has the person who doesn't accomplish or fulfils his/ her obligation with delay under an agreement.

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[367] Stanciu D. Carpanaru, *The Romanian commercial law*, 7th edition, Universul Juridic Editing House, Bucharest, 2007, p.318

ASPECTS REGARDING THE LIMITATION OF THE RIGHT OF ACCES TO JUSTICE, BY THE INSTITUTION OF CERTAIN SUSPENDED JUDICIAL STAMP DUTIES

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Abstract*: In a democratic society, having a solid economy, legal relationships according to substantive law are usually achieved without the intervention of public authorities, justice being resorted to only when the parties cannot amiably solve their differences.*

One of the principles lying at the foundation of justice organization in Romania constitutes free access to justice, regulated by art. 21 of the Constitution and by certain international documents.

The State must regulate the right of access to justice so that it corresponds to the requirements imposed by art. 6 point 1 of the European Convention on Human Rights.

Free access to justice can first be assured by instituting reasonable judicial stamp duties, as the establishment of exaggerated stamp duties, inaccessible to litigants, leads to the limitation of free access to justice and implicitly to the violation of the provisions of art. 6 point 1 of the European Convention on Human Rights.

Key words: *free access to justice, judicial stamp duties, right to a fair trial*.

1. Terminological preliminaries regarding free access to justice

Usually, in a democratic society with a stable economy, legal relationships according to substantive law (civil law, labour law, family law etc.) are achieved without the intervention of public authorities.

There are, however, situations when subjective rights are not taken into account, they are violated. The differences arisen concerning the achievement of legal relationships can however be solved by the parties in an amiable manner. Sometimes, the parties to the legal relationship, for different reasons, do not have the necessary patience, or wisdom, to solve the arisen differences in an amiable manner, and they resort to justice.

In modern states, "justice is a fundamental function of the state, and its administration represents one of the essential attributes of the sovereign power"[1]. One of the principles lying at the foundation of the organization of justice is that of free access to justice.

In Romania, free access to justice is provisioned by art. 21 of the Constitution, which regulates, as part of the common provisions regarding fundamental rights, liberties, and duties, free access to justice as a fundamental right. According to the provisions of the above-mentioned article, "any person can address justice for the protection of their rights, liberties, and legitimate interests." No law can limit the exertion of this right.

From the quoted constitutional provisions it results that the fundamental law establishes every citizen's fundamental right to address justice in the event that their legitimate rights and interests have been violated, the exertion of this right not being limitable by any law. The right of access to justice is also established by certain international documents.

Thus, free access to justice is also established by article 10 of the Universal Declaration of Human Rights adopted on December 10, 1948, by the General Assembly of the United Nations, as

[1] Ioan Leş. *Principii şi instituţii de drept procesual civil (Principles and Institutions of Civil Procedure)*. Editura Lumina Lex, 1998, p.9;

well as by art. 14 point 1 of the International Pact of Civil and Political Rights adopted on December 16, 1966, by the General Assembly of the U.N.[2].

The right of access to justice is also regulated by art. 6 point 1 of the European Convention on Human Rights (ECHR), further referred to as the Convention.

Romania ratified the Convention and its additional protocols no. 1, 4, 6, 7, 9, 10 by Law no. 30 of May 18, 1994, published in the Official Gazette of Romania, Part I, no. 135 of May 31, 1994, in force since 20.06.1994.

The procedural means that Romanian citizens may use in order to access justice are provisioned in the Code of Civil Procedure and in the Penal Procedure Code. Thus, the code of civil procedure comprises clear regulations regarding the request to call to justice (art. 109-114) and extraordinary ways of bringing action against court orders, the appeal (art. 282-298), the supervisory appeal (art. 299-316), the appeal for annulments (art. 317-321), the revision (art. 322-328).

The procedural means provisioned by the code of civil procedure and by the penal procedure code provide access to justice to those who are interested, whose competences are mentioned according to the provisions of paragraph 2 of article 126 of the revised Constitution, only by law.
Article 6 of the Convention does not expressly provision for the procedural means of access to justice, which means that they can be established by member states. As a guarantee of the observance of human rights, the Convention regulates in art. 6 point 1 every person's right to an equitable trial.

According to the provisions of this article "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The quoted provisions entail that the right to an equitable trial has the following components:

- free access to justice;
- the examination of the case by an independent and impartial court established by law;
- the examination of the case within a reasonable time;
- the examination of the case in a public manner, which also involves the publicity of the pronouncement of the court order.

As we have already emphasized, every member state has the freedom to establish the manner in which it understands to perform its duty to guarantee free access to justice, which cannot be an absolute right, as it can be subject to certain limitations that do not go against the provisions of art. 6 of the Convention, if they are reasonable and proportional to the pursued goal.

2. The free-of-charge character of justice

The free-of-charge character of justice constitutes one of the principles governing civil trial and it consists of the fact that the parties to the court litigation do not have the obligation of assuring the payment for the judges solving the case, nor for the district attorneys, assistant magistrates, or court clerks.

These persons service justice, which constitutes a public service of the state, being paid wages by it. Money given by the litigants to these persons constitutes the competence of penal law. Although justice is provided free of charge in the above-mentioned sense, the solving of civil cases also entails certain expenses that the parties in the legal relationship subjected to judgment must

[2] Romania signed the International Pact of Civil and Political Rights, as well as the Pact on Economic, Social, and Cultural Rights, known as the Human Rights Pacts on June 27, 1968, and ratified them by State Council Decree no. 212/1974;

have: judicial stamp duties, lawyer and expert fees, travel expenses to tribunals and expenses necessary to the administration of evidence etc.

One issue that has generated discussions was that regarding the establishment of reasonable judicial stamp duties, in order to maintain free access to justice unrestrained, as it is a known fact that the establishment of large judicial stamp duties place those with small material income, and so much more those with no income, in the impossibility of resorting to justice.

As such, judicial stamp duties should not be established in an exaggerated quantum, because otherwise access to justice no longer holds practical applicability, being merely a theoretical right.

Next we will succinctly refer to the mode of regulating judicial stamp duties in Romania and to possible limitations of the right of access to justice by the establishment of those duties.

3. Considerations regarding the assurance of free access to justice as a consequence of the modification of judicial stamp duties by Law no. 276/2009

The modifications brought to Law no. 146/1997 regarding judicial stamp duties by Law no. 276/2009[3] regarding the approval of Government Emergency Ordinance no. 212/2008 for the modification and completion of Law no. 146/1997 generated certain discussions regarding the effect produced by the raise of the rate of these duties[4].

By means of Law no. 276/2009, the lawmaker provisioned new tax thresholds for actions and petitions that can be evaluated in currency. The normative document established the following duties for the mentioned actions:

a) with a value of up to 50 lei - 6 lei;
b) between 51 lei and 500 lei - 6 lei +10% for the amount exceeding 50 lei;
c) between 501 lei and 5.000 lei - 51 lei + 8% for the amount exceeding 500 lei;
d) between 5.001 lei and 25.000 lei - 411 lei + 6% for the amount exceeding 5.000 lei;
e) between 25.001 lei and 50.000 lei - 1611 lei + 4% for the amount exceeding 25.000 lei;
f) between 50.001 lei and 250.000 lei - 2611 lei + 2% for the amount exceeding 50.000 lei;
g) over 250.000 lei - 6.611 lei + 1% for the amount exceeding 250.000 lei.

These provisions are applied correspondingly also to petitions regarding the nullity, annulment, resolution, or termination of a patrimonial legal document, as well as to petitions regarding the determination of the existence or non-existence of a patrimonial right. Up to the time of its modification by means of the quoted normative document, Law no. 146/1997 provisioned smaller duties for the petitions and actions assessable in currency introduced at court orders, which assured free access to justice for litigants with small income. By law no. 276/2009 judicial stamp duties for heirs have been increased substantially (in our belief). Thus:

- for the establishment of the quality of an heir – 50 lei/ heir;
- for the establishment of the bequest – 3% of the value of the bequest;
- for petitions for reports – 3% of the value of the goods on which a report is being requested;
- for petitions of reduction on the freely disposable portions of the estate – 3% of the value of the reserve to be completed by reduction on the freely disposable portions of the estate;
- for partition requests – 3% of the value of the sharable estate.

Apart from this duty, in the case that the parties dispute the goods to be shared, their value, or rights or the dimension of the rights of the co-owners in the context of the above-mentioned requests, judicial stamp duty is due by the applicant for the disputed value.

Law no. 276/2009 also provisions a facility for the litigant, stipulating at point 9 that "in the event that before the first day of hearing the parties conclude the transaction or waive judgment, the

[3] Published in the Official Gazette of Romania, Part I no. 482/13.07.2009;

[4] An ample analysis of these effects was performed by attorney Floriana Marin Vlădulescu and attorney Elena Monica Livescu in the article "Violations of the right of access to justice and of the right to property by Law no. 276/2009 modifying judicial stamp duties" ("Încălcări aduse dreptului de acces la justiție şi dreptului de proprietate prin Legea nr. 276/2009 de modificare a taxelor judiciare de timbru"), presented at the Symposium organized on October 3, 2009, by the Vâlcea Bar Association at Băile Olăneşti;

amount paid as judicial stamp duty is fully resituated, and in the case that the transaction or the waiver to judgment intervenes subsequent to the first day of hearing, up to half of it is resituated, taking into account the court actions already fulfilled."

We believe that this facility is welcome, but it is not able to facilitate free access to justice for the litigants, as they must pay in advance the judicial stamp duty, according to the legal provisions on this issue, and given that the interested person does not dispose of the necessary amounts for the payment of the duty in advance, they will not be able to place a claim at the tribunal, even if their legitimate rights or interests were harmed. Furthermore, for the restitution of the duty other petitions must be formulated, whose solving is lasting.

As a consequence, we appreciate that through its provisions regarding the establishment of the rate of judicial stamp duties, Law no. 246/2007 limits free access to justice, and in an economic crisis situation, such as the present one, the increase in duties, irrespective of their nature, does not constitute a solution.

The duties established prior to the modification regarding inheritance by Law 146/1997 were reasonable, being accessible to any litigant, due to their reduced value, being set by the lawmaker at a fixed duty of 19 lei and a judicial stamp of 5 lei. The cases were applied stamp duties according to the disputed value only in the event that such a dispute existed.

In the exposition of reasons that justify the need for the adoption of Law 276/2009, the following arguments are brought, among other things:

- the grant of facilities for the payment of judicial stamp duties not only to physical persons, but also to legal persons ;
- the adoption of measures adequate to the mode of payment of judicial stamp duties;
- the existence of a non-uniform practice regarding the modality for establishing the stamp duty for certain types of actions;

The need for the increase of the rate of these duties is however not justified. The issue under discussion is whether the modification of legislation referring to the judicial stamp duty (by increasing duties) infringes on the right of access to justice provisioned by art. 21 paragraph 1 of the Constitution and by art. 6 point 1 of the Convention, considering that according to art. 20 paragraph 1 of Law no. 146/1997, "judicial stamp duties are paid in advance" and, according to paragraph 3 of the same article, "not fulfilling this obligation of payment up to the set due date is sanctioned by the annulment of the action or petition".

The provisions of the law establishing judicial stamp duties imply that these are calculated as a percentage of the value of the object of the trial. We appreciate that, in establishing these duties, note should however be taken of the economic reality and of the plaintiff's income, so that the right of access to justice is not affected by the imposition of taxes that exceed their material availabilities.

By Decision no. 87 of January 20, 2009, published in the Official Gazette no. 86 of February 12, 2009, and Decision no. 808 of May 19, 2009, published in the Official Gazette no. 428 of June 23, 2009, the Constitutional Court understood that "free access to justice established by article 21 of the Constitution is not free of charge. There is no constitutional provision that prohibits the establishment of stamp duties, being a justifiable fact that the person addressing the legal authority should contribute to the coverage of expenses caused by the achievement of the action in court.

The claims of the Constitutional Court are justified, but, as we have already emphasized, the rate of the judicial duty to be paid should not be exaggerated, as many litigants cannot access justice.

It could be upheld that the establishment of high duties is aimed at diminishing the number of requests for abusive calling to judgment, as well as at fund raising for the budget of the department of justice. We believe that the establishment of high judicial stamp duties does not automatically limit the number of abusive petitions addressed to tribunals, but it first of all leads to the decrease of the rate of collected duties, as it is natural that the litigant who does not have material possibilities does not address justice.

We emphasize that according to art. 19 of Law 146/1997, judicial stamp duties are paid into the account of the local budget of the administrative-territorial unit in whose area the litigant has their residence or, as the case may be, the registered office, and as a consequence, these duties do not become a part the budget of the department of justice.

We must however also mention the fact that the state must observe its obligation to regulate the right of access to justice in a manner that corresponds to the requirements provisioned by art. 6 point 1 of the Convention, and by instituting exaggerated duties the right to an equitable trial is violated. As a consequence, free access to justice can only be assured by establishing reasonable duties, accessible to all litigants.

In ECHR practice it has been settled that if the rate of the duty is very high, the right of access to justice is violated. In this respect, of particular relevance are the decisions given in the cases: Weissman vs. Romania of 24.05.2006, Iosif et al. vs. Romania of 20.12.2007.[5]

4. CONCLUSIONS

Taking into account the income rates in Romania, where the minimum wage amounts to 600 lei, as well as the present economic situation, in the majority of cases the litigants find themselves in the situation where they cannot pay in advance judicial stamp duties, as the lawmaker establishes, which entails the annulment of the action or of the petition addressed to the court.

The measures decided by means of Government Emergency Ordinance no. 51/2008[6] regarding public judicial assistance in civil matters does not constitute sufficient guarantee for the assurance of access to justice, as they are left to the appreciation of the court. Moreover, the facilities provisioned by this normative document are only awardable, according to the provisions of art. 8 of the ordinance, to those whose monthly average income per family member over the two months immediately prior to the formulation of the petition is situated below 500 lei, the amounts that constitute public assistance being advanced by the state.

In the case of those whose income is situated below 800 lei per family member, the values are advanced by the state to a proportion of 50%. As a consequence, these facilities are not available to persons who achieve higher incomes, but who do not assure the payment of suspended duties.

The lawmaker leaves unregulated those situations in which the litigant achieves income above 800 lei per family member, and the judicial stamp duty that they must pay exceeds their material availabilities.

Also emphasis should be placed on the fact that by formulating petitions for the granting of the judicial public assistance, law courts are made even busier and the duration for solving cases is prolonged, so that they can no longer be judged within a reasonable term, as is provided by art. 6 point 1 of the Convention.

As a consequence of the matters discussed, we believe that judicial stamp duties established by Law no. 276/2009 are much too high in comparison with the income achieved by the Romanian litigant, which entails that they do not have the possibility to capitalize their claims or to prove the lack of firmness concerning the opponent's claims within a trial.

As such, we believe that the law under discussion limits free access to discussion, it violates the provisions of art. 6 paragraph 2 of the Constitution and art. 6 of the Convention, so that a recalculation of these duties is imposed, according to the present economic situation of the country, also considering the minimum income and the gross average income within the economy in establishing the duty.

[5] The Official Gazette No. 561 of 24.07.2008; See also the case Larco et al. vs. Romania of October 11, 2007, The Official Gazette no. 546/2009

[6] Published in the Official Gazette of Romania, Part I no. 327 of Aril 25, 2008

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THE PRIOR COMPLAINT - CONDITION OF PENAL LIABILITY FOR INSULT AND CALUMNY CRIMES

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Abstract: *Beyond limits of expression we find ourselves in the area of penal illicit and this fact leads to incrimination of insult and calumny crimes committed in press.*

The starting point in triggering journalist's liability is injured person's notice of appeal for the prior complaint. Media activity involves coordinated contribution of all those who collaborate to provide a material, but this collaboration does not turn into partaking.

After apprising the judicial bodies regarding commitment of the crime, the injured party manifests expressed will that crime be proceeded against and sentenced, so that person's dignity to be protected. By incriminating the acts of insult, the dignity is protected from both points of view: subjectively, as well as objectively. In case of calumny, in completion to these acts comes the care for public image enjoyed by one person.

Keywords: *dignity, expression, intention, social danger, reputation.*

Journalists' liability is one of the most controversial subjects of debates regarding the legislative reform. During the last years, many draft bills and legislative proposals were issued, providing exaggerated increase in quantum of the punishment for the violations of law performed in press until the total discharge for those violations.

The most severe type of legal liability is the penal liability. The only ground for this liability is the violation of law and only the law can provide under which conditions a person can be held responsible for penal liability. In most situations, committing an infraction instantly entails criminal liability on the perpetrator, respectively on the participants. But there are also infractions less severe, case when starting the penal action, including penal accountability, are conditional upon a prior complaint made by the person who is considered injured. [1]

The constitutional regulations, through art. 30, paragraphs 6 and 7, set the limit of the freedom of expression. Beyond this limits we find ourselves in the area of civil or penal illicit, depending on the situation.

According to the fundamental law, the freedom of expression cannot harm the dignity, integrity, private life of a person or the right to personal image. It is forbidden by law to defame the country, the nation, to instigate to aggression war, national hatred, racial hatred, class or religious hatred. It is also forbidden to instigate to discrimination, territorial separatism or public violence, as well as obscene display, contrary to morality.

The criminal law defends human dignity by incriminating the acts of offence (Criminal Code, art. 205) and calumny (Criminal Code, art. 206), by forbidding under the threat of penalty, any action that harms a person's integrity or respect on behalf of other people. [2]

The calumny and the insult are of penal nature also in France and Italy, but the European Union tries to standardize the legislation for all its countries.

In our country, as well as within the European Union, was put into question if incriminating the insult and calumny as infractions against personal dignity do not touch the freedom of expression, particularly in the field of media. The Constitutional Court, as well as the European

[1] Cercelescu Carmen Monica, *Regimul juridic al presei*, Editura Teora, Bucureşti, 2002, p.171
[2] Ilie Paşcu, Mirela Gorunescu, *Drept Penal-Partea Specială, Ediția a 2-a*, Editura Hamangiu, Bucureşti, 2009, p. 220

Court for Human Rights set out some limitations to this liberty (freedom) and that each State has the sovereign right of settling these limits.[3] The Constitutional Court issued, repeatedly, decisions of denial to the constitutional exceptions laid down against the Penal Code provisions from art. no. 205 and 206. This fact leaded, in the end, to some incompatibility between the principle of freedom of expression and the incrimination of offence and calumny. As a result it was suggested that the reactivation of these infractions by the Constitutional Court's Decision no. 62/ 2007.

In establishing journalist's liability, specific aspects must be taken into consideration and this involves a thorough analysis of each case. At the same time, especially in democratic societies, under the rule of law, considering the principle of legality of penal liability, as well as the principle of inevitability of penal liability, journalist's activity cannot escape their incidence, to the extent that it is a socially dangerous act, committed with guilt and referred by the penal law.

To the commitment of press crime may attend more than one person, starting with the author of the incriminated material, all way up until the chief editor and even persons who do not belong to the Editorial Office (the person who gave the interview, instigators or accomplices). These persons' contribution to committing the infraction may consist of acts of direct and immediate execution (the author), material and moral support (the accomplice) or acts of persuading to commit acts of crime (the instigator). All these types of involvement are possible as a matter of press crime. Therefore all participants bear penal liability when committing such an infraction and the type and amount of penalty is determined by the court, depending on the specific contribution of each participant.

The criminal proceedings for insult and calumny, in press and general, has as starting point injured person's notice of appeal for the prior complaint.

Prior complaint differs from the complaint or denunciation, as the prior complaint is a necessary condition for initiation and continuation of criminal proceedings.

According to the Penal Code (art. 279) and regulations of crimes against human dignity, starting the criminal action procedure "takes place only based on injured person's prior complaint", the active subject of crime.

The active subject of crimes against human dignity may be any person who directly commits with guilt a deed that harms the integrity and reputation of another person[4], and passive subject of crime against human dignity is an individual who's dignity was harmed by committing the infraction. It is necessary to emphasize that the crimes against human dignity may be committed by more then one person, people who concur in consummation of the crime as co-authors, instigators or accomplices, having in the end several active subjects. [5]

The press work involves the coordinated contribution of all people working in a newsroom, but their cooperation never turn into taking part to committing the crime of calumny or insult. The only variation in this respect may be the editor's responsibility together with the author of the material, as accomplice.

The institution of prior complaint includes a dual manifestation of will from the injured person: apprising the judicial bodies regarding commitment of crime against dignity and the expressed will that crime be proceeded against or sentenced, raising the impediment which precludes the activity of criminal procedure. That will must be expressed within 2 (two) months from the day the injured party knew who the perpetrator was.[6]

The insult is incriminated by art. 205 from the Penal Code in two ways: the standard version (the deed of the one who harms the integrity and reputation of another person through words, gestures or any other way, or exposes the victim to ridicule) and the assimilated version (when a defect, disease or infirmity is attributed to a person, which should not be revealed even if they were true). Thus, the constituents of this infraction are gathered for case when the defendant stated, in two of his articles, that the injured party is "plagiarist, he has legal thinking gained from intellectual

[3] Vasile Dobrinoiu, Norel Neagu, *Drept Penal- Partea Specială, Teoria şi practică judiciară*, Editura Wolters Kluwer, Bucureşti, 2008, p. 245
[4] Corneliu Turianu, *Insulta şi calomnia prin presă*, Editura All Beck, Bucureşti, 2000, p. 17
[5] Ibidem, p. 18
[6] Vasile Păvăleanu, *Drept Penal General, Ediția a 3-a*, Editura Lumina Lex, Bucureşti, 2007, p. 263

theft and the students can learn from him only scientific quackery, intellectual theft, wooden language and ambiguous legal thinking." The court considered that in this situation, through certain words and ideas repeated blatantly, which are clearly and unambiguously insulting, the defendant went beyond the right to freedom of expression and he was aware that his action produced such a result. [7]

By incriminating the deed of insult is protected with priority the dignity from the subjective point of view, in terms of sense of honour that everyone has to himself and secondly, indirectly, it is protected the person's dignity from the objective point of view, i.e. in terms of moral appreciation enjoyed by the passive subject and which is evident by the reputation and respect of his fellows. [8]
The crime of insulting is part of the category of crimes with alternative content and, in order to exist, it is enough to achieve any of the aspects laid down in the art. 205 from the Penal Code: any harm to person's integrity or reputation or attribution of a defect, disease or infirmity to a person.
For the existence of this crime it's not necessary for the victim to be present or even indicated by name, it is enough the perpetrator to act with direct or indirect intention and refer to an issue that allows an accurate determination of that person.

For the crime of insult, advertising is only a circumstance element that may cause aggravation of the court sentence, as the advertising element is essential in just evaluation of the deed – it's also possible to make the content of the crime of calumny.[9]

Art. 206 from the Penal Code provides that crime of calumny is the assertion or imputation in public, by any means, of a certain fact regarding a person who, if it were true, it would expose that person to a penal crime, administrative or disciplinary crime, or to public scorn. As regarding the means of achieving slander, as news crime, they may consist of written words, graphic signs (e.g. cartoons), reprography of images, photos or videos and, generally speaking, any form of expression which can reproduce a certain fact. [10]

As a first difference we can notice when speaking of insult that the offensive action may be confined only to the assertion of an indeterminate fact, while when speaking of calumny, the action of assertion or imputation refers to a specific fact, so that is likely to create the appearance of plausibility in assessing public opinion.

In terms of severity of the immediate consequence of two offenses against dignity, when speaking of insult it can be noticed a shift between the own sense of integrity to an opposite state of mind, and in case of calumny it is created a state opposite to the reputation enjoyed by a person. Indeed unlike his own sense of integrity, reputation is acquired by a person through his/ her own constant efforts, so that when he/ she loses esteem, consideration and respect of his/ her fellows, they can be recovered only with the cost of persistent efforts.

the existence of the crime of calumny "because public assertion or imputation facilitates its resonance in the public sphere". [11]

When speaking of insult, the direct active subject (author, creator, journalist) and the indirect active subject (instigator, accomplice), as well as the passive subject (injured person) are not detailed by any special quality or specific requirement.[12]

Opposed to insult, when speaking of the crime of calumny the material element is achieved only by committing the crime, i.e. the assertion or imputation of facts related to a specific individual. The assertion often takes the appearance of sincerity, but by this mean they aim to break a person's reputation. The penal law considers and punishes malicious endeavour of the perpetrator who tries to create the appearance of authenticity. Imputation, unlike the assertion, is a matter of accusation and requires precise information regarding the details of the fact which attributed to the accused person.

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[7] Ibidem, p. 244
[8] Corneliu Turianu,op. cit., p. 37
[9] Corneliu Turianu, *op.cit.*, p. 48
[10] Cercelescu Carmen Monica, *op.cit.*, p.176
[11] Ibidem, p. 55
[12] Ibidem, p. 55

The penal law also punishes the one who makes assertions or imputations referring to real facts, unless it is proved that the assertion or imputation was made to defend a legitimate interest, when it is admitted the evidence of the asserted or imputed facts as being real (art. 207 from the Penal Code). To qualify for this special clause which discards the criminal nature of the deed is necessary for the perpetrator to prove that his/ her assertions or imputations are truthful.[13] It does not matter if the defamatory assertion or imputation refers to the public or private life or activity of the injured party, as the penal law protects the human dignity either from private or public point of view. The requirement of the law will be fully abided whenever a precise act attributed to someone would lead the injured party to a penal, administrative or disciplinary penalty.

In case of libel, there is advertising whenever the written material was communicated to two or more persons or it was distributed, sold or displayed in public places.[14] The calumny committed through press complies with advertising conditions in two phases: first is the journalistic material in an editorial that after receiving "imprimatur" is multiplied in thousands of copies, becoming known to a large number of people who become aware of its contents. The second phase, of advertising, occurs when the newspaper came into the hands of readers, who can learn the defamatory statement. This kind of press defamation may also be seen in other situations of calumny, committed through other media means, without having a heavier penalty.

The calumny crime is committed with guilt in both situations, directly or indirectly. By their profession, the journalists have the duty to inform the readers regarding all aspects of interest for the public, but this information must be correct (art. 21 from the Constitution, paragraph 4). When a person who works in the media inserts in a newspaper or broadcasts an audio-visual material that contains statements about a person's life and work and some information is beyond the limits of correct information, then his deed is likely to fall under art. no. 206 from the Penal Code. The journalist acts intentionally because he anticipates the advertising gained by the denigrating statement and he/ she is aware the statement is outside the limits of proper exercise of the media attributions. In all situations the penal nature of the deed is discarded if proved to have been committed in order to protect a legitimate interest.[15] As in case of no prior complaint, withdrawal of the complaint, when penal action is set in motion based on the prior complaint of the injured party, is a reason that discards criminal liability.[16]

However it is possible for the journalist to make erroneous statements or reports under the fast pace of the press activity and, in such cases, it is allowed to invoke good faith i.e. the error, which excludes guilt from intention.[17] For it is possible the journalist to had been misinformed, he/ she had not been sufficiently vigilant in recording facts or checking the information, being the victim of informers who have misled him/ her.

Regarding press calumny, the motive may have an important role in decoding the true psychical position of the journalist, which sometimes is able to reveal the previous impulse that made the journalist to deviate from his/ her duty of correctly informing the readers. Such a motive, relevant for an existent intent, might be some interests of the newspaper, which would be likely to explain the deviation from objectivity or some bias. Another motive could be the personal relationship between the journalist and the injured person whom was attributed the denigrating fact, but the journalist is not allowed to pursue personal resentment in his/ her statements.

With proper notice of both infractions, giving the injured party the initiative to transform the interpersonal conflict in a conflict of criminal law, as well as the possibility to quash the litigation amicably by conciliation with the perpetrator, they were inspired by the wise thought that "the noblest revenge is to forgive suffered injuries". [18]

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[13] Corneliu Turianu, *op. cit.*, p. 61
[14] Ibidem, p. 74
[15] Ilie Paşcu, Mirela Gorunescu, *op. cit*, p. 222
[16] Vasile Păvăleanu, *op. cit*, p. 267
[17] Corneliu Turianu, *op. cit.*, p. 87
[18] Gheorghe Diaconescu, Constantin Duvac, *Tratat de Drept Penal- Partea Specială*, Editura CH Beck, Bucureşti, 2009, p.236

Individually, human dignity is a good belonging to the person, collectively, it has social value, it's a must to social coexistence and, therefore, worth to being legally protected.

Any action conducted by a person, that would offend the sense of dignity of another person harms the moral personality of that person. Such actions are not allowed as they would lead to endless conflicts and would make social coexistence impossible. There should be respect and appreciation for each member of the community.

Freedom, and generally the freedom of speech, is a temptation that can make some journalists exceed the limits of correct practice and can lead them to addressing some immoral issues, written in a vulgar or indecent language.

The crimes of insult and calumny committed by the media, which take place in various circumstances and situations, embed to the facts a certain degree of social danger such as to justify their incrimination as infractions. Incrimination of these infractions is closely related to the condition that the person whose dignity has been harmed should give notice of appeal for a prior complaint.

Media plays a key role in a democratic society. It shouldn't pass certain limits pertaining to protection of the reputation and rights of others and, if it does, then it goes beyond the limits of freedom of expression. As long as there will be public statements and imputations which determine transition from one's own sense of honour to a contrary state or to a state contrary to the reputation enjoyed by a person, the penal law will always ensure the protection of human dignity for both, public and private life.

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THE CHARACTERISTICS OF THE EUROPEAN PUBLIC JOB

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Abstract: *The most important European institutions are: the European Parliament, the Council of Ministers (known as the Council of the European Union), the European Commission, the Court of Justice, the Economical and Social Committee, the European Court of Auditors, the European Bank of Investments and three organisms sated up under Commission and they are: the European Publications Office, the European Centre for the Development of Vocational Training and the European Foundation for improving life and labour conditions.*
Each of these organisms has its own personnel politics, grafted on a common status to all European civil servants. The most numerous effective belongs to the European Commission with 23 directions.
Each of the community institutions has its own personnel.
From its foundation till today, the number of the agents was in a continuous growth, registering considerable percents.

Key words: *European public job, community institutions*

1.GENERAL ASPECTS REGARDING THE PUBLIC COMUNITARY JOB

In the European Community's organisms unfolds their activity agents subjected to some special norms, which represents the law of the European public job. The principles that shapes this law are also found in the Public Job Status (approved in 1949 as a status of the European community personnel) and in the regime applicable to other agents.

The organism are formed both of elements taken from the national regimes of the public job, many with a constant value, and from the special aspects, typical only for the European public job.
An example from the first category is represented by the communication to the civil servant of the decisions taken that regards him. In France, the rule of communicating the file was instituted through the Law from April 22nd, 1905, Article 65. The article imposed several disciplinary sanctions for the civil servants, obliging them to justify and make it public, by means of Article 18 of the Law from July 13th, 1983.

Also, in the labour legislation it is being impose, regarding disciplinary responsibility, the obligation that the decision should be communicate to the employee.

Developing this rule, applicable mostly regarding the responsibility of the civil servant (employee), Paragraph 2 of Article 25 from the Status stipulates that all the decisions taken for the appliance of the Status should be communicated to the interested part, meaning the civil servant. The decisions should, also, be motivated, the written form being imposed form the next reasons:

To constitute a form of probation

To ensure the *judicial security*, respectively the foundation on judicial reasons of some taken measure, forestalling the arbitrary.

A compulsory character has, as we said before, the motivation, of which reasons are imposed in the next circumstances:

It is made the de facto and de iure foundation of the decision, to the civil servant are given justification elements of the taken decision.

It is being ensured the transparency of the authority's action, the problem of the transparency being one of the most debated issues in the national and community administrations.

It is being eased the jurisdictional control of the qualified authority.

It is being found here the classic principle of the labour law, according to the employer has full powers and full rights in sanctioning. The authority given with the power of naming in a European public job has full discretionary power to do so.

In this sense, the European Court of Justice stipulated in the decision given in the File No. 280/1980 that "*it belongs to the administration the right to name the selection criteria, in the virtue*

of its sanctioning power and having in count the exactingnesses of the organization and the reasoning of the services".

In the European public job's law there are some disposals which recognize to the community organism the capacity of using its discretionary power regarding its own civil servants.

In the same time, there are a large number of disposals, which pursues that the freedom in the community administration's decisions should be limited by the following of the procedures and the form and the character's conditions, which will accomplish two main objectives:

On one hand, the correct character of the decision, from an objective point of view.

On the other hand, the accomplishment of a natural, necessary balance between individual interests and the administration's needs.

Regarding all that was said before we can express some of the aspects that are characteristic for the European public job:

The re-foundation of the general principles, taken from the national legislations regarding the employee and the civil servants' regime;

The existence of some specific aspects, particular for the European public job's regime;

The existence of a balance situation between the capacity of the community organism to decide the faith its civil servant and the necessity that the decisions should be reported to the legal limits.

The preoccupation of ensuring a more objective balance between the individual interest and the administration's needs.

The Court of Justice emphasized in many times, and mostly in the cases with more spectacular aspects that it pursues, regarding to the European public job's law *the respect of the discretionary power limits and that it opposes to the illicit practice*. The difference known in the German doctrine and the freedom percent has no role in the European public job's law, characterized by the freedom of decision of the authority invested with the power of naming, decision limited by the law.

We can give a definition to the European public job as being the ensemble of the norms that governs the European public job's regime, concluded from the community stipulations and completed with the jurisprudential principles of the European Court of Justice.

In the occidental, contemporary literature, mostly in the community one, are placed in connection to the European civil servants two issues:

First, which is their place and part in the Community's life?

Related to the first aspect, in what way are they involved in achieving the European politics?

Because the debated issues are in an obvious dependence, two answer variants may be considered:

A first answer variant is to recognize for the community civil servants just an executive part; they have only the quality of the effective realization of the decisions which were marked by the political community business.

A second answer variant is the recognition of an effective part in influencing the Union politics. From this perspective, the European civil servant does not limit himself just to execute decisions, he effectively involves in the elaboration of them.

Through public job we understand the ensemble of all the rights and obligations established for a natural person (chosen or named) for the accomplishment of one public authority, public institution or administration's competence, with the purpose of continuous satisfaction of a public interest.

The road is not simple at all. The difficulty of finding the best solution results, among others, from the fact that the European Union is being built of a conglomerate of states, each one with different traditions regarding the public job. These traditions naturally influence different community experiences, without establishing the transformation of the public job in one of French, German or English type.

The most important European institutions are: the European Parliament, the Council of Ministers (known as the Council of the European Union), the European Commission, the Court of Justice, the Economical and Social Committee, the European Court of Auditors, the European Bank

of Investments and three organisms sated up under Commission and they are: the European Publications Office, the European Centre for the Development of Vocational Training and the European Foundation for improving life and labour conditions.

Each of these organisms has its own personnel politics, grafted on a common status to all European civil servants. The most numerous effective belongs to the European Commission with 23 directions.

Each of the community institutions has its own personnel.

From its foundation till today, the number of the agents was in a continuous growth, registering considerable percents.

2. THE FOUNDATION OF THE NOTIONS

In the European Community's organisms unfold their activity agents subjected to some special norms that are the European public job's law.

The present status of the European civil servants replaced the status of the civil servants and the regime applicable to other agents of the European Economic Community and of the European Atomic Energy Community, edited by the Council, based on Article 212 of the E.E.C and the EURATOM, which contained provisions, departed from the Status of the EURATOM personnel from January 28th 1956.

The regime difference between civil servants of the three Communities visas several aspects that are:

The different hierarchy of the degrees.

The ensemble level of salaries, which was smaller by 3%.

The pensions' regime which was less liberal.

Before the Fusion Treaty, the community institutions' personnel was subjected, on one hand, to some protocols regarding the applicable privileges and immunities, and, on the other hand, to a regime first conventional and then statuary, proper to each community.

The fact that the three communities were not founded in the same time, determined, in a first phase, a juxtaposition of the three organisms of agents subjected to different regimes. Thus, European Coal and Steel Community (E.C.S.C) knew until July 1st, 1956 when it was approved a status of it's the civil servants, a period in which the civil servants were recruited based on a public law contract.

The same system was used also by the E.E.C and by the EURATOM in the pre-state period (1958-1962).

The fusion of the communities was to stimulate the unification, in the same measure, of the status and the privilege and immunity regime.

By Article 24 of the Fusion Treaty form April 8th, 1965 it was imposed *the establishment of a regulation of the personnel common to all community institutions*. This unification was made through the E.E.C, E.C.S.C and EURATOM, no. 259 from February 29th, 1968, published in the Official Journal of the European Community no. L 56 from March 4th, 1968, modified several times.

This regulation subjected to many modifications, together with other texts, is reunited in a Community's internal document named "*Status*", having as a subtitle "*Regulations and stipulations applicable to civil servants and to other agents of the European Communities*".

The "status" notion has the next meaning: "*it indicates the nature of the civil servants' status. It also, supposes a more restricted signification, which designates texts that contain the main disposals applicable to all civil servants or to the ensemble of the civil servants from an area or compartment*."

The adoption of a status influenced the general regime of the community public job because, as it is well sustained about the national civil servants status, the confession is valid also regarding the community ones, "*the general status is a global frame in which are integrated civil servants' bodies or frames*".

Therewith, the status has the vocation of grouping the main problems that are supposed by the judicial condition of the employee. There are, beside this unique status, some special stipulations regarding the civil servants in the scientific and technical compartments.

This status is divided into four parts:

The first part is dedicated to the Status of the European civil servants and has eleven annexes.

The second part is dedicated to the regime applicable to other European agents' categories.

The third part contains other stipulations applicable to the European Communities' civil servants and agents.

The last part contains the stipulations taken in common agreement by the European Communities' institutions and applicable to the civil servants and to the community agents.

The intervention of a stipulation with the value of a status has not remained without any consequences regarding the regime of the public job.

Its effect was the fact that "*it placed the community public job in the category of the public jobs so-called closed*." This system "*is similar to the French or German public job in which the real civil servants are holders of their jobs and have vocation to a career*."

In the French system is sustained the fact that defining the public job requires the revelation of two characteristic elements: the permanence of the job and the integration in an administrative hierarchy.

The issue that always preoccupied the doctrine from the country, as all the national doctrines, is that "*the judicial nature of the civil servants' situation is one of public law or a private law one?*" Further, "*if the civil servant is in a legal and settled situation or he is in a subjective situation deduced from a contract*." To these main issues the French authors found consequent answers in the sense that "*the situation of the civil servant is legal and settled and not subjective*."

The European civil servants' regime borough some of the dimensions of the public job's national regimes, over which overlapped the elements deduced from the fact that it unfolds its activity in a space which the community doctrine names it community territory.

The understanding of this collocation imposes a certain attention because "*in the absence of a definition of the territorial area of application of the European Union's Treaty we should prudently refer to the community territory notion…*"

The European Court itself often uses the concept "*community territory*", which "*appears as a functional territory with a variable geometry, based on certain community competences*".

The community public job gathers "more thousands of civil servants and agents", over 26.000 in the community institutions' services and in different organisms which are found in the community structure or that is found at its outskirts (for instance, the European Foundation for improving life and labour conditions, the European Centre for the Development of Vocational Training, the European University Institute).

3. THE DEFINITION OF THE COMMUNITY'S CIVIL SERVANT NOTION

Is to be found in the Article 1 of the Status, according to which "*it is the Communities' civil servant, in the sense of the present Status, any person who was named in the conditions of the named Status, in a permanent function in one of the institutions of the Community, through a written document of the authority, which was given the power to name in this institution*".

This definition is the distinction between community civil servants, on one hand, and, on the other hand, the category of agents, hired in the contractual regime.

This category of personnel, hired based on a contract, temporarily, in most cases 5 years with the possibility of renewing; it is being stipulated by the Regulation no. 2615 from 1976.

Getting the community's civil servant status is it being determined by the existence of a naming document given by the competent authority.

Thus, "*the civil servants are being recruited through a one-sided document of the competent authority and they are subjected exclusively to the community law*".

The competence of naming an international civil servant can only result from an international document, which stipulating the existence of the civil servant, also establishes the

authority which will have to name him, or respectively, chose him. The naming document will have to mention, according to Article 3 from the Status, also, the date from which the naming will *produce effects*. This date cannot be, for any reason, previous to the one when the named person has started to work.

The stipulation of the judicial situation of the civil servants through a Status determines the conclusion that they are subjected to a legal and regulation situation, which means that they are integrally subjected to the community law contained by the Status. Through a regulation of the Council, it has been established that their judicial situation can be unilateral modified.

The authority that will exert "*the naming power*" will be designated by each organism of the Community.

As a rule, the president of each institution represents, for that institution, the authority with the naming power.

Paragraph 2, Article 1 of the Status assimilates the Economic and Social Committee, the Region Committee and the Unions Mediator, applying the stipulations of the Status, except for the situations in which there are contrary disposals.

These organisms will establish, through their interior regulation, the authority that will receive "the naming powers".

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GENERAL ASPECTS REGARDING OF THE EUROPOL CONVENTION IN ROMANIA

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Abstract: *Romania joined the EUROPOL with the entry into force of the Europol Convention, on 01 August 2007, after adoption and publication in the Official Gazette of the European Union, of the Decision adopted by the EU regarding the accession of Romania and Bulgaria to EUROPOL.*
According to Art 3 Para 3 of the Act of Accession of Romania and the adjustments to the Treaties on which the European Union is founded, which is an integral part of the Accession Treaty, ratified by Law no. 157/2005, Romania joined, officially, on 01 August 2007, the conventions and protocols listed in Annex I, and therefore, has taken the necessary measures to ensure the implementation of the conventions and protocols to which it is part, in this case the Convention on the establishment of a European Police Office and the Protocols thereto.
Key words: *EUROPOL, Convention*

1. Entry into force of the EUROPOL Convention in Romania

Entry into force of the EUROPOL Convention in Romania was done on 01 August 2007, with the issuance and publication of the European Union Council's decision in the Official Gazette of the EU, according to Art. 3 Para 3 of the Act of Accession, which is an integral part of the Accession Treaty.

For Romania, the publication of this Decision of the Council of the European Union is a natural continuation of the responsibilities assumed by signing on 25 November 2003 of the Agreement on Cooperation between Romania and the European Police Office – EUROPOL, legal instrument governing the cooperation with Europol.

Terms and conditions of the cooperation between the Romanian authorities and Europol are specified in this agreement.

Thus, as follows from Article 2 of Law no. 197/2004 the purpose of the agreement is to enhance the cooperation between EU Member States, acting through Europol and Romania to combat serious forms of international crime, in particular through the exchange of information and regular contacts between Europol and Romania, at all appropriate levels.

Article 3 of the same law specifies the areas of crime to which the agreement applies.

According to the article above mentioned, the cooperation will cover, according to the interest of cooperation of the Contracting Parties in special situations, all areas of crime included in the mandate of Europol on the date of entry into force of the Agreement as well as the related offenses.

Related offenses represents crime committed in order to obtain the means to commit acts in all areas of crime included in the mandate of Europol, crimes committed in order to facilitate or commit such acts and crimes committed to circumvention liability for such acts.

If the mandate of Europol is changed in any way, Europol may propose, in writing, from the date at the changes in the mandate of Europol entered into force, the implementation of the agreement under the new mandate.

In this respect, Romania will inform Europol on all relevant aspects of the change of the mandate.

The agreement will expand over the new mandate from the date on which Europol receives the written acceptance of the proposal from Romania, in accordance with its internal procedures.

Europol will advise Romania when definition of crime is developed, amended or completed.

The new definition of a crime area will become part of the agreement from the date on which Europol receives the written acceptance of Romania in connection with the definition.

Any amendment to the document referred to in the definition will be considered, also, an amendment thereof.

2. The cooperation ROMANIA - EUROPOL

Cooperation may involve - in addition to exchange of information - all the other tasks of Europol, in particular the exchange of expertise, reports on the overview, information on investigative procedures, information on methods of crime prevention, participation in training activities, such as and providing advice and support in individual criminal investigations.

Duties of the Europol may include:

a) The collection, storage, processing and analysis of information and exchange of information forwarded particularly by the Member States or third countries or authorities;

b) Coordinating, organizing and carrying out actions of investigative and operational character, conducted together with the competent authorities of the Member States or under joint investigation teams and, where appropriate, in cooperation with EUROJUST.

Any action of operational character of Europol must be carried out in cooperation with the state or states whose territory is concerned and with their agreement.

Implementation of measures of coercion is the sole responsibility of the competent national authorities[1].

Romania designates the "National Focal Point" of the Ministry of Administration and Interior, which act as national contact point between Europol and other Romanian competent authorities.

High-level meetings between Europol and the Romania competent authorities will be conducted at least once a year and whenever necessary to discuss issues relating to the agreement and cooperation in general.

3. Romanian authorities responsible for implementing the provisions of the Europol Convention

Law enforcement authorities in Romania, responsible under national law, for preventing and combating crimes covered by the agreement of cooperation are[2]:

✯ **Ministry of Administration and Interior**:

- General Inspectorate of Romanian Police
- General Inspectorate of Romanian Border Police
- General Directorate for Intelligence & Internal Protection
- General Inspectorate of the Romanian Gendarmerie

✯ **Ministry of Public Finance**:

- The National Customs Authority

✯ **Romanian Intelligence Service**:

- General Directorate for Combating Terrorism

✯ **Public Ministry**:

- Prosecutors

4. Processing data on the relationship EUROPOL - Romania

4.1 Information exchange and use of personal data

In Art 7 of Law no. 197/2004, is stated that information exchange of information will take place between Europol and the "National Focal Point".

Israel - represented by the Minister of Interior and Administrative Reform - and the European Police Office will take the necessary measures to ensure that the exchange of information takes place at all times.

Romania will ensure the existence of a direct link between the "National Focal Point" and the competent authorities to prevent and combat crime.

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[1] Reform Treaty in Lisbon in December 2007, Section 5, Article III-177

[2] Annex 1 of Law no. 197/2004 for the ratification of the Agreement on cooperation between Romania and the European Police Office.

Europol will provide to Romania only information obtained, stored and transmitted in accordance with the provisions of the Convention and rules of application.
Europol will provide only information that were obtained, stored and transmitted in accordance with the national legislation.

In this context, Europol will be based on Art 4, Para 4 of Council's Decision of 3 November 1998, which sets rules on receipt of information by Europol.

Individuals will have access to information concerning them, transmitted based on the agreement, or will be able to verify this information, to correct or remove them, in accordance with the Romanian national law or applicable provisions of the Convention.

If this right is exercised, the transmitters will be consulted before taking a final decision regarding this request.

All communications between Romania and Europol will be made in English.

Article 8 of Law no. 197/2004 refers to providing information by Romania, such that Para 1 of this article states that "Romania will notify Europol, together with providing information or before, the purpose for which it was provided that information and any restrictions on the use, removal or destruction of it, including possible access restrictions, in general or specific terms. If the need for such restrictions becomes obvious after the supply of information, Romania will further inform Europol in connection with such restrictions"[3].

After receipt, Europol shall determine immediately but in any event within 6 months of receipt, if and to what extent personal data that were presented may be included in the databases of Europol, according to the purpose for which they were provided by Romania.
Europol will notify Romania as soon as possible after it was decided that personal data would not be included.

Personal data, which are transmitted, will be removed, destroyed or returned if these data are not or no longer needed for the tasks of Europol or where not taken any decision on their inclusion in the databases of Europol within 6 months of receiving them[4].

Europol will be responsible for providing access to personal data, before their inclusion in the databases of Europol, for a Europol official duly authorized, in order to decide whether such personal data may or may not be included in Europol databases.

Where personal data are transmitted at the request of Romania, they can be used only for the purposes of accompanying the request[5].

Where personal data are transmitted without a specific request, when transmitting the information on or before this time will be indicated the purpose for which these were transmitted, and any restriction on the use, removal or destruction, including any restrictions access in general or specific terms. If the need for such restrictions becomes obvious after the supply, Europol will then inform Romania about these restrictions.

For all transmissions of personal data by Europol, Romania should fulfil the following conditions[6]:

- after receipt, Romania will establish without delay, always when will be possible within 3 months of receipt, if and to what extent personal data that were provided are necessary for the purpose for which they were supplied;
- Personal data will not be submitted by Romania to third countries or bodies;
- Personal data will be provided only to the "National Focal Point";

3 Art 8, Para 1 of Law no. 197/2004 for the ratification of the Agreement on cooperation between Romania and the European Police Office.

4 Article 8, Para 2 of Law no. 197/2004 for the ratification of the Agreement on cooperation between Romania and the European Police Office

5 Article 8, Para 3 of Law no. 197/2004 for the ratification of the Agreement on cooperation between Romania and the European Police Office

6 Article 9, Para 2 of Law no. 197/2004 for the ratification of the Agreement on cooperation between Romania and the European Police Office

Further transmission of personal data by the recipient will initially be restricted to the competent authorities and will take place under the same conditions as those applicable to the initial transmission.

If personal data have been communicated to Europol by a Member State of the Union, they can be sent to Romania only with the consent of that State.

Any conditions of use of personal data specified by Europol must be respected if data were communicated to Europol by a Member State of the Union, which stipulated conditions of use of such data, these conditions must be met.

Where personal data are provided on request, the request for information must be the specific guidance on the purpose and reason for request, the personal data may be used only for the purpose for which it was communicated; personal data will be deleted when no longer necessary for the purpose for which they were transmitted.

Romania, in accordance with its national legislation, will ensure that personal data received from Europol are protected by technical and organizational measures.

Europol will keep track of all transmissions of personal data carried out, and the justifications for these transmissions.

Keeping personal data transmitted by Europol will not exceed 3 years.

Each transmission of information to Europol must be accompanied by an indication of the exact source and accuracy of the information.

In addition, Romania, when it provides information, should indicate as precisely as possible, the source of information and its reliability.

4.2 The relationship between EUROPOL – "National Focal Point"

The "National Focal Point: will inform Europol when information transmitted to Europol is corrected or deleted.

The "National Focal Point" also, shall inform Europol, as far as possible, when there are grounds to assume that the information provided is not accurate or is no longer current[7].

When the "National Focal Point" informs Europol that it has corrected or deleted information the transmitted to it, Europol will correct or delete such information. Europol may decide not to delete the information if, based on more comprehensive information than that held by Romania, it still needs it to process that information. Europol shall inform the "National Focal Point" about the fact that the information that is still stored.

If Europol has reason to assume that the information provided is not accurate or is no longer current shall inform the "National Focal Point".

The "National Focal Point" will check the data and inform Europol on the outcome of those inquiries.

Where the information is corrected or deleted by Europol, it will inform the "National Focal Point" on the correction or cancelation[8].

4.3 Privacy of information

Regarding the confidentiality of the information, Art 12 of Law no. 197/2004 surprises this aspect.

All information processed by or through Europol, except information marked expressly or clearly recognizable as public information, is the subject to a primary level of security within the organization Europol and EU Member States.

Information requiring additional security measures is subject to a security level in Romania and Europol, which is indicated by a specific bookmark.

To the information are assigned a security level only if it is strictly necessary and only for the necessary period.

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[7] Article 11, Para 1 of Law no. 197/2004 for the ratification of the Agreement on cooperation between Romania and the European Police Office

[8] Article 11, Para 2-3 of Law no. 197/2004 for the ratification of the Agreement on cooperation between Romania and the European Police Office.

Romania will ensure that permits access and protect the marked information to be respected by all competent authorities to whom it could be transmitted in accordance with the agreement[9].
To achieve a more fruitful cooperation, Europol and Romania have agreed to each delegate and liaison officers[10].

Romania will be responsible, under its national legislation, for any damage caused to individuals, resulting from errors of law or fact in the information exchanged with Europol[11].

Romania will not rely, for the purpose of exemption from liability to the injured party, according to the national legislation, that Europol has sent incorrect information.

If these errors of law or fact occurred as a result of data erroneously communicated or failure of the obligations undertaken by Europol or one of the EU Member States or another third party, Europol will be bound to repay, on request, amounts paid as compensation only if the information were used in breach of the agreement.

Where Europol is obliged to reimburse the Member States of the European Union or a third party the amounts given to an injured party as compensation for damages, the damages being caused by the fact that Romania has not fulfilled its obligations under the Agreement, Romania will be obliged to reimburse, on request, the amounts that Europol had paid a European Union's Member State or a third party for covering the amounts paid as compensation by it.

The Contracting Parties shall not require payment of reciprocal compensation for the damages mentioned above, if the compensation of damages was imposed with a punitive character, was increased or refer to damage that cannot be compensated.

Any dispute between Contracting Parties concerning the interpretation or application of the agreement, or any other matter affecting the relationship between the contracting parties, which is not settled amicably, shall be subject to a final settlement by a court composed of 3 arbitrators, at the request of any of the Contracting Parties.

Each Contracting Party shall appoint one arbitrator.

The first two arbitrators will choose the third arbitrator, who will be chairperson of the court[12].

Any party contracting with a notice of 6 months may denounce the agreement on cooperation between Romania and the European Police Office, signed at Bucharest on 25 November 2003 in writing.

In the case of denunciation, the Contracting Parties will agree to preserve and use the information already transmitted between them.

If a consensus is not reached, either of the Contracting Parties may require the destruction of information that was sent.

[9] Article 12, Para 5 of Law no. 197/2004 for the ratification of the Agreement on cooperation between Romania and the European Police Office.
[10] Article 14-15 of Law no. 197/2004 for the ratification of the Agreement on cooperation between Romania and the European Police Office.
[11] Article 16 of Law no. 197/2004 for the ratification of the Agreement on cooperation between Romania and the European Police Office.
[12] Article 17 Para 1 of Law no. 197/2004 for the ratification of the Agreement on cooperation between Romania and the European Police Office.

THE INFLUENCE OF ATTENUATING CIRCUMSTANCES ON THE PENAL LIABILITY OF THE DELIQUENT

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Abstract: *In art. 72 of Romanian Penal Code we encounter among general criteria of appropriation, circumstances that are attenuating or aggravating the penal liability, criteria that refers to the cluster of circumstances, situations, qualities or states that can influence the penal liability. These circumstances are placed outside the essential content of the offence, representing the so-called circumstantial content and only by chance they can accompany the preparation, the commitment or the consequences of the deed.*
These circumstances, if they exists, can sometimes determine a real change of the juridical treatment foresee by the law for the committed deed, according to the measurement and the conditions prefigured by the dispositions that regulates these modification reasons of the penalty.
Key words: *penal liability, attenuating circumstances*

In art. 72 of Romanian Penal Code we encounter among general criteria of appropriation, circumstances that are attenuating or aggravating the penal liability, criteria that refers to the cluster of circumstances, situations, qualities or states that can influence the penal liability. These circumstances are placed outside the essential content of the offence, representing the so-called circumstantial content and only by chance they can accompany the preparation, the commitment or the consequences of the deed.

These circumstances, if they exists, can sometimes determine a real change of the juridical treatment foresee by the law for the committed deed, according to the measurement and the conditions prefigured by the dispositions that regulates these modification reasons of the penalty.

Any human demeanour manifests itself in a extremely complex ambiance consisting on many conditionality's that can determine a person to take action in some ways, in which this person should abstain itself from committing a chain of infractions by controlling those tendencies that are pushing it to brake the law.

If a person breaks the law, it is important to apply a penalty to this person as a consequence of its aberrant option of that person, regarding who it bears the whole responsibility. For a penalty to be efficient it must be directly proportional to the gravity of the offence, not to clement, not to harsh, but just right.

Considering these aspects, the penal legislation developed the necessity of applying suitable penalties according the nature, the duration, the delinquent and the gravity of the offences committed. This is possible only by individualizing the penalty, an extremely complex operation.

According to the Penal Code, one of the criteria the court has to take into account regarding this appropriation of the penalty beside dispositions of the general part of the Penal Code, penalty limits provided in the special part or in special laws, gravity of the offence committed, delinquent's personality and the circumstances that aggravates the penal liability are the circumstances that are attenuating the penal liability.

Any offence can be committed in presence of these kind of circumstances, circumstances that have to be taken into account by the court as mandatory legal or judicial (permissive). In case these offences are ascertained, the court will have to attenuate the penal liability.

If these offences were missing, the penal liability would be less harsh.

Beside the fact that the attenuating circumstances contribute on applying some penalties that should reflect as real as possible the degree of social danger of the offence and of the delinquent, the influence indirectly through the quantum of the implemented penalty a series of other institutions stipulated in the Penal Code: relapse, release on parole, etc.

By ″circumstances that attenuate or aggravate the liability″, art. 72 of the Penal Code, we can understand that the Code is talking about different qualities, states, situations or other facts of the reality that, although are not part of the constituent content of the offence have bear upon the deed, the delinquent (influence the degree of concrete social danger of the fact and the dangerousness of the delinquent) and determines the diminution of the penalty under the special minimum or the aggravation of the penalty with possibility of exceeding the special maximum[1].

They have an important role in the individualisation of the liability and of the penalties, but the only ones that count are those that draw upon them a reduction or an enhancement of the degree of concrete danger[2].

The circumstances have a casual character because they doesn't accompany and doesn't characterize any concrete penal deed and are not bounded to the personality of any concrete delinquent, but, when they are retained, they determine a change of the penal liability and of the concrete juridical treatment of the perpetrator[3].

These circumstances are situated outside the essential content of the offence, they compile the so-called circumstantial content of the offence. Those circumstances accompany the preparation, the perpetration or the consequences of the deed (for example circumstances regarding the place, time or the manner of committing the crime, extrinsic deed that prepared, facilitated or fulfilled the offence, the situation or victim's state) or connected with the delinquent (age, sex, his quality, premeditation, the reason, psycho-physic condition at that moment). These circumstances do not have the character of particular circumstances of a certain kind of offences because compared to the same type of law-breaking activity they can be present or absent sometimes[4].

The attenuating circumstances are outside the content of the offence and have a random character, meaning that they do not accompany any offence and do not regard any criminal[5].

The circumstances presented in art. 73 of the Penal Code are legal (mandatory) whereas the ones presented in art. 74 of the Penal Code are judicial (can be considered by the court as attenuating). Therefore, beside circumstances which the law consider as attenuating circumstances there are many circumstances that can constitute attenuating circumstances but were left uncharacterised by the legislator due either to their ambivalent character or the fact that their influence upon the degree of social danger of the deed isn't always decisive for the promulgation of the penalty, this influence being always conditioned by the concrete deed[6]. We can conclude that the aeffectual Penal Code prefigured only a few of the fact as attenuating circumstances leaving the court to characterize the facts as being attenuating, although these facts have not always this character.

The attenuating circumstances prefigured in the Penal Code have general application and are possible when any crime is committed therefore when the court ascertains their presence, must use them, their purpose being determining in a concrete manner the penalty applied for a certain offence and for a certain delinquent.

Unlike the legal attenuating circumstances enumerated by the law and detained by the courts of law, the judicial attenuating circumstances are covered by the rules of the legislator only as an

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[1] A. Boroi, *Penal Law. General Part,* C.H. Beck Publishing House, Bucharest, 2006, p. 320

[2] M. Basarab, *Penal Law. General Part,* Vol. II, Lumina Lex Publishing House, 1999, p. 178

[3] M. Basarab, V. Pasca, G. Mateut, C. Butiuc, *Commented Penal Code*, Vol. I, Hamangiu Publishing House, 2007, p. 406

[4] V. Dongoroz, S. Kahana, I. Oancea, R. Stănoiu, I. Fodor, N. Iliescu, C. Bulai, V. Roşca, *Theoretical explanations of the Romanian Penal Code. Special Part,* Vol. III, Academia Romana Publishing House, ALL Beck Publishing House, Bucharest, 2003, P. 129

[5] C. Mitrache, *Romanian Penal Law. General Part*, Juridical Universe Publishing House, Bucharest, 2006, p. 379

[6] V. Dongoroz, S. Kahana, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, quote, p. 133

example, this time the court will decide if they are going to retain them or not when giving the verdict.

No matter what attenuating circumstances, it must be specified the fact that once retained by the court, these circumstances have a very important role in the appropriation of the penalty process, because can determine either the reduction or the substitution of the penalty. It must be taken into account a very important fact: if when we talked about the judicial attenuating circumstances mentioning that their cutting down is facultative, the court has only the obligation of minimizing the penalty, but in case of the legal attenuating circumstances, the court has two obligations: retaining them when they were ascertained and reducing the penalty according to legal provisions. In case the court breaks any of these liabilities, the penalty that will be applied wasn't going to be legal.

If an attenuating circumstance exists, it means that the crime and the criminal presents a minor degree of danger and his rehabilitation can be made by applying a rather small penalty or even replacing it totally[7].

The attenuating circumstances, once they are ascertained, attract always the mandatory reduction of the main penalty under its minimum special limit or a replacement of the penalty, no matter if they are legal or judicial, reaching new special limits[8], because they say that the existence of a new attenuating circumstance implies in any circumstances a less dangerous state of the criminal and the possibility of his rehabilitation by giving him a reduced penalty (time, quantum).

The existence of many more attenuating circumstances do not lead to so many
Penalty reductions and can't justify the lowering of the penalty under the minimum limit prefigured by the law for the ipothesis of ascertaining attenuating circumstances; all the detained attenuating circumstances will determine only one reduction of the penalty, between the new special limits, but the presence of a multiplicity of such circumstances can attract a more accentuated relief of penal liability[9].

When the law prefigures alternative penalties for the crime, the court must focus first on one of these penalties and only after will establish the effects of the attenuating circumstances comparing them to the penalty set, abstractedly from the existence of the others.

The measure in which the penalty can be reduced and the cases in which the penalty can be replaced are established by disposals of art. 76 of the Penal Code.
Therefore, according to disposals from art. 76, the attenuating circumstances are efficient mainly on main penalties (custody and fine).

- The custody

By disposals of art. 76, character a-d is regulated the measure in which the custody penalty can be obsolete without replacing it with a fine:

- when the special minimum of the custody penalty is 10 years or more, the penalty drops under the special minimum, but not less than 3 years;
- when the special minimum of the custody penalty is 5 years or more, the penalty drops under the special minimum, but not less than 1 year;
- when the special minimum of the custody penalty is 3 years or more, the penalty drops under the special minimum, but not less than 3 months;
- when the special minimum of the custody penalty is an year or more, the penalty drops under this special minimum, until the general minimum[10]

By the disposals of art. 76, character e, is regulated the measure which can reduce the custody penalty or can replace it with a fine:

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[7] E. Crisan, *Attenuating Circumstances*, Sfera Juridica Publishing House, Cluj-Napoca, 2008, p.144
[8] M. Basarab, quote, p. 203
[9] S. Danes, V. Papadopol, *The juridical appropriation of the penalties*, Scientific and Encyclopedic Publishing House, Bucharest, p. 173
[10] Art. 76 of the Romanian Penal Code

- when the special minimum of custody penalty is 3 months or more, the penalty drops under this minimum, until the general minimum, or is applied a fine that can not be under 250 lei, and when the special minimum is under 3 months is applied a penalty that can not be under 200 lei.

The substitution of the custody penalty with a fine is facultative for the court if the special minimum of the custody penalty is 3 months or more and the substitution of the custody with a fine is mandatory for the court when the special minimum of the penalty is under 3 months, situation when the criminal is liable for a fine that can't be less than 200 lei. In this case, the court can not pick between custody and fine, but will apply mandatory, the fine.

At paragraph 2, art. 76 we encounter some cases in which the effects of the attenuating circumstances are more limited: „in case of crimes against the state, against peace and humanity, homicide, crimes that has as a result the killing of a persona, or crimes with extremely grave consequences, the custody penalty can be reduced to let's say a third of the special minimum". In these cases the penalty will be reduced to a third of the special minimum.

- The fine

In case which the penalty is the fine and attenuating circumstances are abstained, the procedure is as follows:

- when the penalty is the fine, this can be lowered under its special minimum, up to 150 lei when its special minimum is 500 lei or more, or until the general minimum when its special minimum is under 500 lei.

The attenuating circumstances have repercussions even in the case of penalties implemented on legal person.

According to article 76, paragraph 4 of the Penal Code, when exists attenuating circumstances the fine for a juridical person is set as it follows:

- when the special minimum of the fine is 10.000 lei or more, the fine drops under this minimum, but not less then a fourth;
- when the special minimum of the fine is 5.000 lei or more, the fine drops under this minimum limit, but not less then a third.

The technique used by the legislator is different of that used in case of private individual. If in case of a private individual the legislator indicated the maximum limit by which can drop under the special minimum, in case of juridical persona the legislator indicates how much one can lower the limit under the special minimum, the maximum limit by which the fine can be reduced being deduced by reporting the fine's special minimum limit to the quotation of a fourth or a third by which a limit can be dropped under that minimum[11].

- The penalty of life imprisonment

According to art. 77 of the Penal Code, „for that kind of crime the law prefigures the penalty of life imprisonment; if there are any attenuating circumstances is applied a sentence of imprisonment of 10 to 25 years".

- The complementary penalties

According to art. 76 paragraph 3 of the Penal Code, when there are attenuating circumstances, the complementary penalty of abridgement of rights for the offence committed can be averted.

[11] M. Basarab, V. Pasca, G. Mateut, G. Butiuc, quote, p. 438

[1]PENAL LIABILITY OF THE PARTICIPANTS IN CASE OF INFANTICIDE

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Abstract: *The emergence of the Universal Declaration of Human Rights adopted by UN General Assembly 10/12/1948 marks the "beginning of a new progressive era in the international protection of human rights and freedoms.*

Crimes in international law are committed by people and not by abstract entities. Just punishing these authors can give effect to the provisions of international law.

Key words: *human rights, responsibility, international criminal court, civil rights, punishment, protection.*

Protection of the persona by means of the penal (criminal) law is placed among the major goals of the penal (criminal) law, the persona being fully protected: physically, morally and intellectually. The situation is identical even if we are talking about a newborn infant.
In this case we have two different situations:

- the murder of the newborn infant by any other individual, excepting the mother
- the murder of the newborn infant by his own mother
- the murder of the newborn infant by the mother, due to extreme emotional disturbance caused by the process of giving birth. This is the situation that we are interested in for better particularize this article, because there are some psycho-physiological states caused by birth, states that synonymous with a state of unconsciousness, so, without excluding the guilt, this state can explain in a certain measure the murder of the newborn infant by his mother, no matter if we are talking about a child born within or outside a marriage.

Admitting the possibility that these kinds of states can occur, the legislator sanction less harsh the author of this offence (the mother of the newborn infant) in comparison with other individuals that participated.

The infanticide is in fact an act of manslaughter incriminated by the Romanian legislation in Title I of the special part of the Penal code, Chapter I, „Offences against life, physical integrity and health", Section I, Manslaughter.

Generally, the infanticide committed by the living parentage is incriminated in almost all criminal legislations of all times as an acute form of manslaughter, known also as infanticide[1].
The aggravating occurrence ensues from the victim's quality as descendent of the criminal and for how we assume that the criminal has strong feelings of affection.

The infanticide appears as a special form of manslaughter being incriminated by the penal legislations of all states as an attenuated form of manslaughter, an attenuated form of infanticide. This happens because the infanticide consists in murdering a newborn child, act perpetrated by the mother immediately after giving birth in a moment of disturbance caused by giving birth.

In this case, we are not talking about a homicide committed by any degree of parentage, but a homicide committed by the mother herself, case in which the homicide is determined by certain psycho-physiological states caused by the process of giving birth, states that are not synonymous with a state of unconsciousness but can explain in a certain measure the killing of the newborn child by his mother.

This offence is possible only if the infanticide was a consequence of the disturbance caused by giving birth. A neuro-psychic element (disturbance caused by giving birth) introduced in the

[1] R. Bodea, *Criminal Law. Special part*, West Printing Office Publishing House , Oradea, 1999, p. 122

enunciation has a unique feature that can justify the assignment of a slightly reduced degree of social danger to this kind of offence who still manages to situates itself in the category of homicide occurrences.

Hence, it appears like a special type of homicide, that has its own denomination and in a certain way we can even talk about an attenuated homicide or an act of murder lightly sanctioned, due to special circumstances imposed by the actions of the active subject of the offence[2] taking into account the fact (absolutely mandatory) that the mother must act with unexpected intention and not with premeditation (case in which it assumes that the mother took the decision before giving birth, moment that she used only for carrying out her criminal intention). In this situation we can talk about another penal conviction terribly grave and sanctioned as such: qualified murder perpetrated deliberately against a close relative that can't defend herself. Therefore, mother quality is a personal circumstance that can entail upon either an aggravation or an attenuation of the homicide.

If the mother kills her child under these circumstances prefigured in the art. 177 of The Penal Code, the circumstance is justified determining the application of the sanction prefigured in this text, otherwise the state applies the sanction prefigured in the art. 175 of the Penal Code. Because we are talking about a personal circumstance, it has no influence upon either of the participants.

Direct active subject (author) of the infanticide offence can only be the mother that gave birth and afterwards killed her own child. Thence, the author of this offence is certainly a qualified active subject [3].

The co-authorship when we are talking about this kind of offence is not possible under any circumstances.

Other subjects can participate when committing a crime, subjects that will be prosecuted for homicide (art. 174).

This is the decision of the majority according to which the infanticide is an aggravated form of homicide, therefore when the mother commits the deed as an accomplice she must answer for infanticide and the others participants for qualified homicide[4], opinion shared by the judicial practice.

In this doctrine was expressed even the point of view[5] according to which the infanticide is considered an autonomous action, very distinct of the homicide, the juridical framing of the participants being done separately of the deed of the author, hence it results a disagreement with the principle of infraction unity that can't accept the co-existence in the same unity of more than one contents of offences and the fact that all participants should answer for their deeds according to art. 177 of the Criminal Law.

Affirming that subject of this offence can't be other than child's biological mother, the Penal Code considers the other participants as accomplices because the co-authorship could not be possible otherwise[6].

According to this point of view, circumstances such as mother condition and the state of psychical agitation of the mother are relevant as constituent element and reverberates on gravidity and on the qualification of the deed as an infanticide offence, therefore the deeds have consequences upon other participants (instigators, accomplices) if those people knew the deeds or foresaw them[7].

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[2] G. Antoniu, *Commented and Annotated Criminal Law. Special Part*, vol. I, Scientific and Encyclopedic Publishing House, Bucharest, 1975, p. 101

[3] V. Dongoroz, S. Kahana, I. Oancea, R. Stănoiu, I. Fodor, N. Iliescu, C. Bulai, V. Roşca, *Theoretical explanations of the Romanian Criminal Law. Special Part*, Vol. III, Publishing House of the Romanian Academy, ALL Beck Publishing House, Bucharest, 2003, p. 192

[4] T. Toader, Romanian *Criminal Law. Special Part*, Hamangiu Publishing House, Bucharest, 2007, p. 55

[5] I. Dobrinescu, *The offence of infanticide,* in Romanian Law Magazine, no. 11/1971, p. 41

[6] I. Dobrinescu, quote p. 58

[7] N. Rodeanu, *Complicity – secondary form of criminal participation*, L.P. no. 9/1960, p. 29

We must take into account the fact that when we are talking about the juridical framing of other participants deeds we are speaking not only about mother condition but especially of that state of agitation caused by giving birth, state which has a strictly personal character and can't reverberate upon other participants, their deed being qualified in all other cases as interest in the act of homicide.

This state of agitation comprise all the normal psycho-physiological states, psycho-pathological, which follow the birth and can be provoked (in the postpartum or puerperal period) by some noxious factors that have various natures and origins (infections, auto-intoxications, psychological traumas, anaemia's, episodic endocrinological deficiencies, etc.) that operates through their effects on the state of imputability (on the capacity of understanding what is they want) of the woman lately confined which they diminish because the control of the conscience over the personal conduct has to be reduced to the limit of irresponsibility[8].

In this situation when the disturbing element is so special, with repercussions on the intellect and will, in such measure that the mother can't understand the meaning of her deeds and can't control them anymore intercedes the cause of irresponsibility and in this cases, even the deed is qualified as „infanticide" does not operate penal liability even if attenuated.

Under this aspect of the subjective side, the difference between qualified homicide offence and that of infanticide is the psychological state that intervenes during birth, caused determined by it and scientifically confirmed only after a legal examination[9].

Therefore, not any state of being agitated can justify the infanticide offence, but only the state that occurs during birth or immediately after it.

Those emotional/affective displays determined by situations unfit to the mother, such as being abandoned by the man she had sexual intercourse with or fear she resents to her parents can not be taken into account[10].

It is mandatory a medical expertise that can show that under concrete circumstances when the act was accomplished the mother acted under the impulse of the state of agitation caused by birth.

The act of homicide has to be determined by the state of agitation caused by giving birth.

This act is in fact a process with a double cause:

- birth who caused the state of agitation
- the state of agitation that drove to the homicide[11].

No matter how important or grave was that state of agitation of the mother who killed her child, if this state is not caused by the process of giving birth, the act is not going to be considered homicide. In certain situations one has to use the psychological expertise.

The state of agitation has a major impact over a woman's conscience and will, modifying them and influencing her to commit the act of homicide. That's why it comes to medical expertise to establish in what kind of conditions and when these states of agitation occur, the existence, the intensity and their length. Once established the terms, the role of the penal law is to restrain and give the juridical effects destined to these kinds of situations[12].

Therefore, we can observe clearly the tight connection between the act of infanticide and the act of homicide. It is enough for one of the two conditions of the premise or the two essentials claims to be absent for the fact to constitute the infringement of homicide.

The deduction in this case is that when the mother executes the act of infanticide against her biological child alone or with accomplices, she is liable for the punishment prefigured in art. 177 of the Penal Code and the other participants answer in front of the law under the accusation of qualified homicide. We can ask the question of what happens if it is not the mother how commits the murder but determines or helps another person to commit it.

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[8] T. S. Dec., no. 3865/1971, in C.D. 197, p. 297-300

[9] I.C.CJ., Criminal Section, Dec. no. 4956/2004, published in The Law no. 11/2005, p. 275

[10] I.C.CJ., Criminal Section, Dec. no. 4956/2004, published in The Law no. 11/2005, p. 275

[11] I.C.CJ., Criminal Section, Dec. no. 4956/2004, published in The Law no. 11/2005, p. 275

[12] I.C.CJ., Criminal Section, Dec. no. 4956/2004, published in The Law no. 11/2005, p. 275

According to some authors, defenders of the infanticide thesis as a autonomous offence consider that the mother should not be convicted for infanticide but for an offence prefigured in art. 174 of the Penal Code, because the deed is classified according to the author of the offence, therefore it will result another offence, that of homicide and not infanticide.

Others[13] affirm that in reality, the psychological state of the mother intervenes when she commits the gravest act, the execution of the offence in her mother quality and when she instigates or helps others to commit homicide against her biological child. As a conclusion, in this particular case, we are dealing with homicide but regarding one of the participants (in our case the mother), taking into account her psycho-physical state, she is liable for a diminished penalty according to art. 177 of the Criminal Law.

The infanticide is therefore a very special type of homicide, first of all because of the way that is accomplished and because its author has a special quality (motherly) and second because the sentence given to the criminal mother who committed this crime is slightly indulgent due to a strong alteration caused by birth.

[13] M. Basarab, *Participation in case of special subject offences*, Studia Universitatis Publishing House, Babes Bolyai, Jurisprudentia series, Cluj, 1965, p. 147

E-LEARNING AND HUMAN CAPITAL DEVELOPMENT IN ORGANIZATIONS

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Abstract: *In 2000 the European Union founded knowledge economy setting the goal of making Europe the most competitive and dynamic knowledge based economy in the world. The development of a modern knowledge economy reflects a larger transition from an economy based on land, labour and capital to one in which the main components of production are information and knowledge. Because of that, the most effective modern economies will be those that produce the most information and knowledge and make that information and knowledge easily accessible to the greatest number of individuals and enterprises.*

Key-word: *human capital development; general training and specialised training; E-learning; employment.*

The potential for individuals, organizations and countries to benefit from this emerging knowledge economy depends largely on their education, skills, talents and abilities, that is, their human capital. As a result, governments are increasingly concerned with raising levels of human capital, chiefly through education and training, which today are seen as ever more critical to fuelling economic growth.

However, formal education is only one part of forming human capital. In many ways it is more useful to think of human capital formation as a life long learning process rather than as education.

From an economic and employment perspective, this human potential for life long learning is assuming ever greater importance. Meanwhile, fast changing technologies are creating new jobs unheard of only recently or radically altering what workers need to know to perform their existing jobs. Consequently, people now need to continue developing their skills and abilities throughout their working lives.

This policy looks at the concept of human capital, its increasing importance to economic growth, and how governments and societies can work to develop it during early childhood, the years of formal education and adulthood.

The idea of human capital can be traced back at least as far as the work of the 18th century economist Adam Smith, but it was only in the late 1950s and 1960s that it began to emerge as an important economic concept. At that time, economists such as Theodore Schultz and Gary Becker began using the "capital", a economic concept, to explain the role of education and expertise in generating prosperity and economic growth. (BECKER G., 1962, 1964; SCHULTZ T.W. 1960, 1961).

They argued that people invest in their education and training to build up a stock of skills and abilities, a capital that can bring a long-term return. This investment can also benefit the companies were they work and the national economies and help fuel economic growth.

Typically, then, human capital is broadly defined as a combination of individuals' own innate talents and abilities and the skills and learning they acquire through education and training. It is worth noting that the business world, which has eagerly embraced the concept of human capital, tends to define it more narrowly as workforce skills and talents directly relevant to the success of a company or specific industry.

In the last years human capital is associated with a wide range of both economic and non-economic benefits; these include improved health, longer life spans and a greater likelihood of involvement in community life.

Economically, the returns to human capital can be understood in terms of the prosperity of the individual's, the organizations and of the national economy. At the individual level, earnings

tend to increase quite sharply as an individual's level of education rises. In some OECD countries earnings for workers with a university education are about 25% higher than for those who only finished secondary school. In others, this differential is even more noticeable, and rises to as much as 120%.

1. The benefits of the investments in human capital on the organization

The economy knowledge has changed the world of work over the past couple of decades. The knowledge workers are increasingly pivotal to economic success in developed countries. The benefits on organizations gains by using an effective training strategy to develop the human capital need to analyze both in terms of the importance of the level of training of the employees at the point in which they join the organisation and the level they reach once they are already within the organisation.

1.1. The benefits of general training and specialised training

A. Barrett (2001) by means of certain empirical studies undertaken on various countries has examined the links existing between the benefits obtained both by the workers and by the companies in which they work through either general or specialised training. General training, which may be adopted by all companies, has positive, but not outstanding, effects, both on productivity and on the salaries of the workers, but has a smaller impact on company performance. It can, then, create significant advantages for the individual and society in general. On the other hand, specialised training has a greater impact on the company, as it increases the productivity of the worker within the company investing in human resource training through training activities which are specific to their own particular needs. In all cases, there remain significant differences in the perception of the value of training between the individual, the firm investing in the training and society as a whole (HASSON B., JOHNANSON U., LETNER K.H., 2004).

Generally speaking, there are no studies available which link the remuneration rates for workers directly with company performance. The most widely-shared hypothesis is the one assumed by the classic theory of human capital, and subsequent interpretations, which maintains that at greater levels of education, a higher productivity is achieved by the worker concerned, which will be reflected in economic growth or in other forms of improved results for the individual company or organisation.

In addition to the main, purely economic literature, there are studies on the management of human resources which show the results of the impact of human resource training on the performance of organisations. These essentially redress the divide between the analyses of workers' remuneration rates and the studies on a macroeconomic level. These studies confirm that companies which employ managers, professionals and other highly qualified personnel generally achieve better market results.

That the employee is a fundamental element of an organisation's competitive advantage now seems to be a conviction which is shared by all scholars (PFEFFER J, 1994; WRIGHT P.M., MCMAHAN G.C., MCWILLIAMS A. 1996). It then follows, furthermore, that the quality of human resource management can be considered as a determining factor in the performance of an organisation, recognising the differentiated value to the role performed by the managers and various other human resources.

1.2. The central nature of the managers' role

In the literature mainly produced in English, an argument emerges which is of great importance for the management of human resources and organisations, the central nature of the managers' role. It is generally accepted that the management capacity of the administrative bodies within an organisation represents a fundamental element in determining the sustainable growth rate, to the same degree as the organisation's size and market power. Consequently, the consideration scholars give to the level and nature of qualifications held by employees is important, particularly in relation to higher positions (BROADBERRY S.N., WAGNER K, 2006)

Empirical models generally relate the performance of the organisation directly to the qualifications held by the employees belonging to that organisation, with their skills and abilities and other variables which may influence a company's results.

Of significant importance is the issue relating to the use of qualifications as indicators of the quality of employees or of managers in so far as it is acknowledged by scholars that education and training provide individuals with the necessary knowledge and skills for them to improve their productivity in their position of employment. It can therefore be deduced that it is certainly possible to assume, and only in certain empirically verifiable cases, the existence of a direct relationship between the result of an organisation in economic terms and the qualifications of its employees, even if it must be taken into account that the actual abilities or quality of skills possessed by an employee do not always correspond to the qualifications held.

A further issue involves the relationship between leadership and the results of an organisation. There are various stances on the impact of leadership on organisations. Some maintain that the growth of formal and informal organisational structures in large organisations occurs by itself, thus limiting the influence of single individuals, including that of the chief executive, and that, in fact, situational and organisational factors are what are important in leadership. Others, however, maintain that leadership is a determining factor in times of growth and development and crisis, but that it is negligible when the organisation more or less maintains its status quo. Others in turn emphasise the fact that, whilst the leader figure is nonetheless essential, the person effectively selected for that role can be entirely secondary

1.3 Development and training strategies within the company

For some years, in issues relating to the training of human resources and organisations, particularly those with a commercial purpose, the focus has been placed on the relationships between strategies and performance (CEDEFOP, 1998; TESSARING M., 2001).

Within this field of research emerges the relationship between the culture of research and development at management level and the organisation's ability and willingness to innovate. From a study undertaken in the United Kingdom on several hundred manufacturing organisations (BOSWORTH D.L., WILSON R., TAYLOR P., 1992), direct and indirect links, through innovation, are evident between qualifications and the company's market results. In fact, in spite of the levels of education of the managers, the ability to innovate proves to be relatively low, redirecting the phenomenon to the typology of the studies of the resources themselves. The research, based on the amount of new technology introduced into companies, has shown a positive correlation between the likelihood of innovation and the existence of graduates within the workforce. In general, organisations which adopt advanced technologies perform better than other, more conventional organisations. In particular, they know how to optimise their potential and show a higher increase in production and in market shares. Nevertheless, a consequence of their ability to operate to their maximum potential and to be more dynamic is the tendency of organisations to turn their attention towards the limited number of qualified employees.

The conclusion of the research has highlighted the positive relationship between the presence of graduates and the economic performance of the organisation as well as the existence of a more direct relationship between graduates generally and company performance with respect to the results which can be obtained by making use of a specific type of degree.

Other studies have shown a link between the level of performance, in terms of profit, and the qualifications of the management staff. Of particular interest is the connection found between the manufacturing companies managed by chief executives with a degree and/or higher education qualifications, and a more frequent achievement of higher levels of profitability (WOOD W.J. 1992). These studies focus on the management staff, making the distinction between executive and non-executive; others, however, simply refer to management in general (BARRY R., LEE J.W., 2001).

Whilst there seems to be no theoretical stance capable of demonstrating that a specific level of education for management can make a great difference to the organisation's level of results, it is possible to acknowledge the essential role of qualifications with regard to the results of

organisations, taking into account the fact that organisations run by qualified managers tend to perform better than those with less qualified managers.

Consequently, a significant outcome of the research concerns the contribution of the cultural training of management, in that organisations run by managers with a non-technical background, achieve better results.

A fundamental issue is the definition of an indicator for measuring the organisation's performance. Some of the literature mentions the belief that growth may be a reliable indicator; this stance does not, however, seem to be confirmed by empirical proof. Moreover, it seems that the traditional theoretical models do not retain the human resource training variable capable of influencing the growth of an organisation.

Other theoretical stances focus on the organisation's profits, although the theory of private remuneration rates does not seem appropriate, considering that it is founded on the principle that individuals are rewarded on the basis of their marginal productivity. Whatever the case, the logical grounds seem to respect the current trend in the employment market, according to which the more qualified workers receive more attractive offers of employment as they are capable of producing an extremely high profitability for the benefit of the organisation in terms of profits, and of the workers in terms of remuneration.

1.4 Investments in training and company performance: analysis

Analysis of relationships between investments in training and company performance has been produced over the last twenty years. Of significant importance is the methodology applied in the research, which consists of drawing international empirical comparisons of productivity and of the relevant investments made in education and training by several European countries: Germany, France, Netherlands, United Kingdom and others.

The importance of this research lies in the fact that it uses data relating to professional training, together with the more commonly adopted measures relating to the years of education. The focus is not so much on the statistical impact of one additional year of education and training on productivity, but rather on the results of investments made in human resources of varying type and quality.

Of interest in this regard is the work undertaken by the English academic S. J. Prais, who in 1995 compared the national statistics on the workforce of several EU countries between 1988 and 1991 (PRAIS S.J., 1995). From the data analysed, marked differences emerge in the professional qualifications at an intermediate level between the EU countries taken into consideration. By way of example it must be remembered that during those years in the United Kingdom only 25% of the entire economically active population gained professional qualifications, in France 40% and in Germany 63%. The greatest divide has been identified in the training for small businesses with respect to that for the technical area: around 64% of the workforce in the United Kingdom achieved no professional training qualification, in France 53% and in Germany only 26%. From his analysis Prais concludes that the United Kingdom was anomalous in the relatively low proportion of the workforce who had benefited from formal professional training and who had gained professional qualifications as a result of examinations.

Although in the years following the period studied the investments in professional training in all of the Member States have experienced variations, the differences between the Countries continue to create differences in the productivity of resources and thus in the results of the organisations.

There have been many studies carried out by researchers at NIESR (National Institute of Economic and Social Research) in the UK. With a view to identifying a model to demonstrate the link between a more educated and better trained workforce and the increase in production achieved per worker. These studies do not relate exclusively to British organisations but also to those of other EU countries, although the sectors concerned are identified as those relating to the metal, textile and food industries, as well as certain organisations in the service sector in general. These have been able to maintain that acquiring skills in the workforce is a fundamental factor for increasing productivity, measured in terms of production per individual worker.

Studies have been undertaken in various sectors, including banking (MASON G., KELTNER B., WAGNER K., 1999) and ceramic tableware industries (JARVIS V., O'MAHONY M., WESSELS H. 2002), from which it can be deduced that in Germany, France and the Netherlands, where the percentage of professional training qualifications was higher, the productivity of the worker was higher in comparison with workers in the same sectors in the United Kingdom.

Even more recent is the comparison between the apprenticeship training systems in various European countries produced by H. Steedman, from which he has identified connections in the productivity of the individual. The study (STEEDMAN H., 2001) has shown significant shortcomings in the British approach, and these have led to an inferior quality of professional training for young workers.

Another study (O'MAHONY M., DE BOER W., 2002) in this regard confirms that the United Kingdom continues to remain behind in comparison with Germany and France in terms of work productivity, and this divide can be mainly explained by the different levels of investment, particularly in training. This study, predominantly statistical, compares work productivity not only with respect to the economy as a whole, but also in relation to around 10 general industrial sectors. It uses education and training statistics, divided into different levels, in order to quantify the relative abilities of the workforce in the different countries. The study has, furthermore, identified a significant relationship between work productivity and the measured abilities of the workers in the various industrial sectors of the countries concerned.

2. The contribute of e-learning on the human capital development of the small and medium sized-companies

Over the past year, e-learning has been variously described as the solution for all corporate learning problems or as a vast disappointment. With the human capital as the organization's renewable resource, the primary goal for all learning within an organization is the development of all its human capital. The fundamental element in this investment and nurturing process is making sure that employees' personal goals are aligned with the organization's goals; no organization will realize its full potential if employee goals and corporate goals are misaligned.

Research carried out in different European and national studies and in projects shows that e-learning is used mainly in big companies and less in small and medium sized-companies. The main reason is the lack of resources and time to develop training by e-learning and the new goal of the research is to help small and medium sized-companies to build participative suitable models of training based on e-learning. Some years ago, the introduction and use of e-learning in small and medium sized companies has been seen as unproblematic and, in fact, as a royal path to answering training needs in help small and medium sized-companies. It was assumed that managers of small and medium sized-companies would recognize the problem of meeting adequately the continuous training needs of their staff for innovation and that the updating of professional knowledge and skills could be supported by e-learning, as cheap, just in time training taking place on-line and/or at the working place.

Research carried out in different European and national studies (ATTWELL ET AL., 2003) and in projects (BEER ET AL., 2006) show that e-learning is used ever since mainly in big companies and that help small and medium sized-companies use internet and e-learning predominantly for product advertising, particularly through web sites, and only 7% for human resources training.

Training culture within small and medium sized-companies which is often dependent on trainer and conventional training methods; skills needed for a more independent approach and the use of new media for learning are missing. There is a lack of long-term vocational strategies for the staff based on deep analysis of their qualification needs, one of this is the "learning by doing".

Often the managers have not enough knowledge or are not convinced of the effectiveness of e-learning and the staff has a lack of time and motivation to test new learning methods.

Appropriate software and contents for small and medium sized-companies are missing. The major part of commercial e-learning software is modelled on the requirements of big enterprises or higher education and small and medium sized-companies can not afford to pay tailor-made ones.

The existing training offers in supporting specific business needs of small and medium sized-companies are often inadequate and/or unattractive. A continuous cooperation between e-learning developers, providers and small and medium sized-companies which could improve this situation is missing.

For future development it is necessary to strengthen cooperation with other small and medium sized-companies, with large enterprises, with training providers and public institutions like for example Chambers of Commerce or University centres. One suitable solution for small and medium sized-companies is to build communities of practice (PALLOFF ET AL., 1999; JOHNSON 2001; WENGER ET AL., 2002) to share knowledge, to apply best practices in technology-enhanced learning and to develop business-oriented models of e-learning for them. Such forms of co-operation could stimulate new experiments, new actions and new directions for learning.

The European Commission and almost all European Member States provide support in some form or other to the fostering of e-learning in small and medium sized-companies, but in many countries education and training are fragmented with responsibilities in different policy areas and agencies. As a result there is a lack of integrated support services for small and medium sized-companies in which learning, and in particular e-learning, is a key component in the portfolio.

European small and medium sized-companies in partnership started projects with the aim to improve the e-learning use as training strategy by participative development of sustainable e-learning based training strategies and models for introducing e-learning to be followed by the companies introducing new media and training concepts to involve only minimal changes in the structures and processes of the company for the acceptance by trainers and the staff of the new tools and learning methods.

Usually a strategy of cultural change includes a review of the organisation, its infrastructure, learning culture and business strategy as appropriate to the new learning objectives, concepts and methods. The advantages of e-learning should be known by managers and staff and evaluation procedures should be carried up regularly for the e-learning programmes. The introduction of e-learning should be integrated into the whole qualification programme of the company and supported by technical and organisational measures and knowledge about e-learning market and cooperation with an e-learning provider to develop a community of practice (HARGADON, S., 2006; BUSSE ET AL., 2007).

3. Conclusions

E-learning should be approached via a new paradigm, one where instruction and information are involved in a recursive process, an approach which counters the concept of linearity. New ways of thinking about how people and organizations learn and new technologies favour the emergence of principles of e-learning that deliver both business and individual opportunities.

Faced with the growing demand for life-long learning, whether in business or in formal education, it is becoming imperative to revalue the educational environment and to propose resources and tools which respect the diversity in learning styles to define the link between e-learning and knowledge management However, e-learning is not just online training. The new approaches to e-learning include not only the instructional strategy but also the informational strategy, because people learn in many different ways so that access to information is as essential for learning as is instruction. He recognizes that, because the online information is not always well structured, it is necessary to work in an area that has come to be known as knowledge management. Like e-learning, knowledge management is facilitated by technology, but it is primarily about people, working together and about communication. This is what the new approaches confirm in relation to the applications of knowledge management in the organizations and companies. It is not only a means to resolve technology and information management problems, but also a socio-organizational and cultural process allowing the promotion of learning, creation and innovation. Thus, we can argue that the knowledge management can be understood as an information system which codifies the knowledge, but also as a dynamic process in which knowledge capital is created

through learning. It does not mean that the initial function of the knowledge management should be abandoned, but that the human element with own capital and its cognitive properties has to be integrated (ALLIX 2003).

Just like knowledge management, e-learning originates from a strategy that is both informative, informational strategy, and instructional, learning, but also from cognition. In addition the human element enters on the scene and interacts with all other elements in a complex process. The challenge is to propose a new way of thinking, to propose a paradigm, on which any scientific method is based, which has the principle of recognizing the interactions that our minds should distinguish, but not consider in isolation (MORIN, 1990).

In order to work efficiently in new upcoming contexts to develop the human capital of their organization the small-medium size companies are required to improve their learning strategies and e-learning can contribute to the achievement of needed knowledge, competences and abilities. It is important, to help small-medium size companies to design, implement and evaluate suitable models of training for them based on e-learning, within communities of practice because many companies have not always the resources and knowledge to do this alone.

The last important aspects to be considered are re-examination of small-medium size companies current position and business goals, development of solutions to improve their situation, a professional establishment of vocational training needs of the staff in this context and to include e-learning as a part of the company training plan that addresses and resources infrastructure, development, media and a didactic approach. Assess the benefits gained for organisations through the utilisation of an effective training strategy.

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TRAINING TO EMPLOYMENT AND LABOUR MARKET

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Abstract: *In the Economic European Community vocational training has not origin by cultural reasons, as could be those to improve the training standard of the Member State people, but by social and economic reasons; these are identify in the demands of the industrial process, firm organization and productive process.*

In analogy the training aims are not the raising of the educational standards of each individual but the promotion of job skills to became part of labour market.

These causes and aims are indicated in the Treaty of Rome jet that established the European Community and are finding out in all the documents and legislation until the Treaty of Maastricht of the 1992.

Key-word: *labour market, employment, education and training systems*

1. The meaning of training in Treaty of Rome

In Rome in 1957 six countries (Belgium, France, Italy, Luxembourg, The Netherlands and West Germany) believing that it was important to trade freely and make it easier for goods and services to move between Member States, signed a agreements including one called the Treaty of Rome. This Treaty, sets out in detail the aims of the European Community.

This meant doing away with customs duties, which not only put up the prices of goods but also delayed their transportation. They wanted to break down trading barriers so that manufacturers or producers in one EU country could easily sell their goods and services within any one of the others.

It wasn't only goods and services that the six felt should be allowed to move freely but people too. It would mean that they would be able to share ideas and expertise and have a greater choice of jobs and more opportunities for work. Above all, the founder members of the "Common Market" wanted their governments to have common policies so that they would all plan things in similar ways. They believed that this was particularly important in key areas of the economy, such as agriculture, industry and trade with the rest of the world.

By signing the Treaty of Rome each of the fifteen countries agreed that they would work together to make a common set of trading laws. Instead of having fifteen separate national rules or standards they agreed to harmonise to create a common united market. In some instances this has meant changing some of our national laws and some decisions, which affect our lives, are made between the EU countries, but we have to compromise to share in the benefits of belonging to the EU. To bring out a new law, or to change an existing one, always takes time.

The Treaty set up between the Member State a *European Economic Community* with the task "*to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated rising of the standard of living and closer relations between the States belonging to it.*" (article 2) and "*For the purposes set out in Article 2"* with the same Treaty was established that *"the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein (...) i) the creation of the European Social Found in order to improve employment opportunities for workers and to contribute to the raising of their standard of living;"*.

The aims of the vocational training in the Economic European Community are confirmed and are more evident in the article 118 In the *Title III Social policy,* in the Chapter 1, Social Provision that affirm "*… the Commission shall have the task of promoting close cooperation between Member States in the social field, particularly in matters relating to (...) basic and advanced vocational training"* These origins and aims are confirmed also in article 123 of the Chapter 2 where was set up the European Social Fund with the explicit functions we are discuss. This affirm that "*In order to improve employment opportunities for workers in the internal market and to contribute thereby to*

raising the standard of living a European Social Fund is hereby established"(...) "*to render the employment of workers easier and to increase their geographical and occupational mobility within the Community."* The creation of a specific financial instrument like the ESF in the set up of Economic European Community is an important element that confirm the real reasons and the purpose of the Member State.
The ideas is confirmed also in the article 125 of the Treaty, where is affirm that "*The Fund shall, …., meet 50% of the expenditure incurred after the entry into force of this Treaty by that State or by a body governed by public law for the purposes of: ... ensuring productive re-employment of workers by means of: ... vocational retraining ... ",* so in conclusion the main task of the Community is to entrust to vocational training the social and economic development and the introduction of the Member States people in the labour market with the best opportunity.

2. The European Social Fund: instrument for investing in people.

Already set up by Treaty of Rome, in 1957, the European Social Fund (ESF) is the Community financial instrument for investing in people; its the longest established Structural Fund which has invested, in partnership with the Member States, in programmes to develop people's skills and their potential for work.
The ESF has used a joint-funding principle to add to what Member States do to improve people's job prospects and help develop their skills.
The European Social Fund channels European money into helping Member States meet the goals they have agreed together to create more and better jobs.
Its mission is to help prevent and fight unemployment, to make Europe's workforce and companies better-equipped to face new challenges, and to prevent people losing touch with the labour market, by:

- helping develop the skills of people, especially those who face particular difficulties in finding a job, staying in work, or returning to work after an absence;
- supporting Member States in their efforts to put new active policies and systems in place to fight the underlying causes of unemployment and to improve skills;
- supporting to the specific requirements of regions facing particular problems.

The ESF is the main financial tool through which the European Common Community translates its strategic employment policy aims into action.

2.1. Evolution of the ESF from 1957 to 1988

The ESF has naturally undergone many changes since its establishment with the evolution of the social and economic situation, the changing nature of Community policies, the progressive enlargement of the Union from six to fifteen Member States and not least through the periodical reviews of the effectiveness and suitability of its role, management and impact.
All the action in the years agrees on a series of guidelines for action under four main headings:

- employability: helping people develop the right skills;
- entrepreneurship: making it easier to start and run a business, and to employ people in it;
- adaptability: developing new flexible ways of working in a fast-changing world;
- equal opportunity for women and men: equal access to jobs for everyone, equal treatment at work.

All this acts and documents was created to increase the effective of the ESF in its purpose to promote the development and the training standard of European citizen.
All Member States work towards these goals within their own yearly employment action plans. With the Commission, they review the progress they and their partners have made over the year.
The management of the ESF was entrusted to the Commission, assisted by the Social Fund Committee, consisting of representatives of governments, trade unions and employers.

2.2 The Initial Phase (1957-1971)

The original rules, established by the article 125 of the Treaty, provided for grants reimbursing public authorities in the Member States half (50%) the cost of vocational training and resettlement

allowances and grants to workers suffering a temporary drop in wages during restructuring operations in their enterprises.
In the case of the conversion of an enterprise, aid was granted only when the government concerned had obtained prior approval from the Commission to the plan and the workers were fully employed again within six months.
The objective was to assist workers moving from one region to another in search of work and those needing to acquire new skills in sectors undergoing modernisation or conversion of production methods. Training for the public sector and for self-employment were specifically excluded.
In those early years, unemployment was nothing like the problem it was later to become and to the extent that it did exist, it was thought that it could be largely contained by a policy of support for the training and mobility of workers exercising their right of freedom of movement within the Community. Economic growth was expected to solve unemployment problems by itself without the active social and labour market policies that were to become indispensable as conditions worsened in later years.
In this phase the Fund was financed by direct contributions from the Member States. It was agreed that some Member States would contribute relatively more to the ESF and others less. As Italy, although among the countries paying relatively less, was expected to be the major beneficiary, this arrangement reflected an intention to give the ESF a redistributive role. This proved to be the case to a certain extent in the earlier years, but from 1967 onwards the most prosperous Member State, Germany, became the major beneficiary.
The other main problem was the fact that the system of retrospective grants precluded any Community influence on national labour market and vocational training policies.
These two weaknesses were the main drawbacks of the Fund at the time of its first review. The timing of the review was fixed in the Treaty as the end of the twelve-year transitional period for the establishment of the Common Market. The Council was empowered (Article 126) to make, at this stage, the changes in the operational system of the ESF necessary for the most effective attainment of its objectives.
Only after the 1969 the Community budget based on “own resources” was introduced.

2.3. *The 1971 reform*

The new Fund which emerged, adopted in 1971, with effect from 1 May 1972, had substantially greater resources, exceeding in its first two years the total budget for the twelve years of the previous Fund.
The new structure was a compromise between Member States advocating a focus on specific categories of workers and those favouring an emphasis on structural unemployment in the less developed regions. This feature was to re-emerge in the subsequent reviews of the ESF up to the adoption in 1988 of the principles underlying the present-day structure. The system of retroactive funding was replaced, in the 1971 review, by new rules providing for applications to be submitted prior to the beginning of operations.
Actually the earlier ideas about counteracting unemployment were being questioned, and there was a growing realisation that part of the unemployment problem was due to the impact of community policy, particularly in the economic field. In some regions, employment was hampered by structural factors. The expectations of a single European labour market failed to materialise.
The aim was to extend and strengthen the Fund as an instrument responding to Community rather than purely national objectives, while introducing greater efficiency and flexibility in its management.
A further innovation was the opening up of ESF aid to the private sector. For the first time, private bodies became eligible for ESF grants to the extent that a public authority guaranteeing the scheme was also contributing.
Provision was also made, for the first time, for pilot actions to promote innovation in training.
The new rules of continued support for training and re-settlement together, with allowances for the training of instructors and trainees. Most of the resources (90%) went, in practice, to vocational training.

2.4. The 1977 and 1978 amendments

Although the next major review of the ESF was not foreseen until the early eighties, the serious deterioration in the unemployment situation, especially for young people and in the least developed regions, led to other amendments in the intervening years.

The eligible categories under Article 4 were enlarged in 1977 to include:

- migrant workers and their families;
- women over 25, unemployed, or wishing to return to work after a long period out of the labour market;
- unemployed young people under 25 especially first job seekers.

Reflecting the increasing attention to regional disparities, which led to the establishment of the European Regional Development Fund (ERDF) in 1975, the Council adopted a Regulation[9] on 20 December 1977 applying a higher grant rate of 55% to Greenland, the French Overseas Departments, Ireland, Northern Ireland and the Italian Mezzogiorno. The naming of these regions in a Council text (subsequently termed the absolute priority regions, a precursor to today's Objective 1 regions) gave considerable authority and impetus to the role which the Commission increasingly envisaged for the ESF as a support for regional development.

With concern growing over unemployment, the European Council of 6/7 July 1978 at Bremen called for additional action by the ESF in this field. This led to the introduction of a new type of aid for job creation, applicable from 1979, in a Fund hitherto limited to supporting vocational training and mobility. The ESF was empowered to contribute up to ECU 30 per week for a maximum of twelve months for young job-seekers under 25 in additional jobs which either provided experience likely to equip them for recruitment to permanent employment or related to projects fulfilling a public need.

2.5. *The 1983 Revision: Combating Youth Unemployment*

The worsening unemployment situation, especially among young people, was a major influence on the 1982 review of the Fund. In that year the total number of unemployed in the Community had reached 10.5 million, of whom 42% were under 25. Many young people lacked the basic schooling and training to get them on the employment pathway. Conventional qualifications, moreover, even at graduate level, were often ill-adapted to the needs of the job market. Programmes for young people accounted for 44% of ESF beneficiaries in 1982 but Member States were drawing up new education-to-work schemes and demand was growing for the ESF to help more.

The Commission reported to the Council that the structure of the Fund had proved too rigid and complicated to cope with changing needs and proposed a new scheme concentrating on the fight against youth unemployment. The Commission's objective was 'to provide support for the implementation of a training guarantee for all young people and to promote a dynamic response to the problem of youth unemployment.

This new regime, which came into force in 1984, stipulated that young people must make up at least 75% of the total beneficiaries of the Fund.

The priorities for youth schemes subsequently defined in the Commission's guidelines for the management of the Fund comprised:

- schemes for the under 18s combining vocational training and work experience which offered employment prospects;
- vocational training for young people (18-25) with inadequate qualifications for jobs involving new technology;
- job premium schemes in the absolute priority regions.

The new decision required 40% of the budget to be allocated to Greece, Greenland, the French Overseas Departments, Ireland, the Mezzogiorno and Northern Ireland. This was increased to 44.5% in 1985 when the list was extended to include Portugal and some Spanish regions. The remaining appropriations were to be concentrated on similar actions assisting operations carried out within the framework of national labour market policies in areas affected by high long-term unemployment or industrial restructuring. These areas were defined by the Commission in the guidelines for the management of the Fund through a statistical method based on unemployment

and GDP. They coincided to a large extent, as was to be expected, with the regions eligible for assistance from the ERDF.

The guidelines, which set the selection criteria, gave priority to projects forming part of integrated operations involving other Community instruments, transnational projects and innovatory approaches, especially those concerned with aligning national practice and Community policy.

The guidelines also reflected the regional mission of the Fund; in 1982, nearly 42% of the ESF budget was allocated to projects in the absolute priority regions (to which Greece had been added); little more than 10% of the ESF went outside the less developed regions.

Other changes introduced new facilities for grants for training aimed at the modernisation of small and medium-sized enterprises (SMEs), assistance for the training of instructors, vocational guidance and placement experts and development agents for local initiatives. The proportion of resources for innovatory actions to combat unemployment and the validation of the effectiveness of schemes aided by the Fund was increased to 5%.

The new system with overlapping and sometimes conflicting “quotas” for underdeveloped regions and beneficiaries under 25 proved complex to manage, both for the Commission and the Member States. This was compounded by the growth in the volume of demand on the Fund. With rising unemployment, budgetary resources, though reaching ECU 237 million in 1986 compared to ECU 155.6 million in 1982, remained seriously inadequate in meeting applications fulfilling the priority criteria. The Commission had little option but to operate a linear reduction system to deal with this problem; in the absence of national quotas there was no incentive for Member States to limit applications.

Serious disadvantages were also arising for project promoters in the face of uncertainties about what changes to expect in the selection criteria and the impact of the linear reduction - factors which, combined with the fact that most grant approvals were only for one year at a time, gave rise to a certain insecurity and made planning difficult. The task of adjudicating on a rapidly growing number of applications (exceeding 10,000 in 1982), while presenting advantages from the perspective of preserving a Community dimension, was straining the Commission's capacity, with limited staff resources, to deal with the workload and raising questions about whether this was any longer the best way to manage the Fund.

The project approach, moreover, required individual processing of thousands of payment applications, which led to long delays in the capitals as well as Brussels as the volume of demand grew. There was, moreover, an increasing tendency towards the view that local planning, a bottom-up approach, would lead to more effective use of funds. The single project system was considered to have outlived its usefulness and to be ill-adapted to the enhanced scale of the Funds' operations especially with the enlargement of the Community to twelve Member States. The growth of the subsidiary idea (later to be enshrined in the Maastricht Treaty) also influenced the move to decentralise the administration of the ESF, through the introduction of integrated programming.

A foretaste of what was to come appeared in a Commission report in 1983 which recommended 'the introduction of a Community development and structural adjustment policy in the service of priority activities defined by the Community and implemented by the entire armoury of the Community's Structural Funds and other financial instruments.'

The first real examples of such integrated action with the involvement of partnerships were the Integrated Mediterranean Programmes launched in 1986, to cushion the Mediterranean regions of France, Italy and Greece against the impact of the enlargement of the Community to Spain and Portugal.

These programmes involved assistance for industrial and agricultural conversion by the ERDF and EAGGF with the essential human resources component provided through the ESF, in a framework of multiannual programming.

Around the same time, other Member States were encouraged to submit Integrated Development Operations constructed on the same lines as the IMPs but despite the priority offered them in the guidelines for the management of the ESF, the response was limited.

2.6. *The 1988: a radical new approach*

The adoption of the Single European Act, which entered into force on 1 July 1987, providing for the completion of the single market and incorporating a new commitment to the economic and social cohesion of the Community, set the scene for the fundamental reform of the Structural Funds which was put forward by the Commission in 1988.

The notion of Community solidarity in itself was not new; the Treaty of Rome contained a protocol calling for the use of the ESF to help tackle the structural problems of the Mezzogiorno. Both the ESF and the ERDF, as already mentioned, had been contributing substantially to the underdeveloped regions. The magnitude of this task had increased, of course, with the admission in the eighties of new Member States with severe problems of regional underdevelopment - Greece, Spain and Portugal.

Article 130a obliged the Community to ensure the reduction of disparities between regions and to improve the position of the least-developed regions.

The European Regional Development Fund (ERDF) was given the mission under Article 130c to contribute to the cohesion objective by helping to redress regional imbalances in the Community by aiding the least-developed regions and the conversion of declining industrial regions.

Article 130d called on the Commission to submit a comprehensive proposal to the Council on the changes necessary in the Structural Funds (ESF, ERDF and EAGGF (guidance section)) to co-ordinate their activities and increase their efficiency so as to promote the objectives of Article 130a and 130c.

The Commission put forward, therefore, in 1988 a proposal for the fundamental reform of the Structural Funds involving the doubling of resources in the period up to 1992, and using the funds in a concentrated, integrated way to promote economic and social cohesion in the Community.

2.7. *The 1989-1993: breakdown of structural fund allocations*

The relevant legislation consisted of two Regulations which re-defined the tasks of the Funds, specifying the framework in which they should operate and coordinate between themselves and other financial instruments, such as the EIB (European Investment Bank). These were complemented by separate regulations for each individual Fund

The new approach was built on four basic principles: concentration, partnership, programming and additionally.

Concentration applied in various ways. Five Objectives were set out to be achieved by the Funds collectively in the combinations appropriate to each Objective. Two of these, combating long-term unemployment (Objective 3) and ensuring a start for young people in working life (Objective 4) applied EU-wide and involved solely the ESF. The Social Fund was also involved in the regional Objectives (1, 2 and 5b), which applied to designated regions; its role was to ensure the development of the human resources needed to maximise the investment in regional and rural development financed by the ERDF and the EAGGF. In practice, this reinforced the ESF's traditional role insofar as much of the human resource support for the development of the less prosperous regions was targeted at people at risk of unemployment eligible under Objectives 3 or 4.

The concentration principle applied also in the form of a sharp focus of resources on the least developed regions. Structural Fund aid for Objective 1 was to double between 1988 and 1992. Eligibility was for the most part limited to regions with a GDP of around 75% of the EU average, covering 21.7% of the Community's population. Objective 2 - for regions with severe unemployment due to industrial decline - was to be limited to 15% of the EU population while the Objective 5b regions, with rural .development deficits, accounted for no more than 5% of the total EU population.

The new implementation procedures were based on *partnership* and *programming*.

Each Member State submitted its plans, at regional level where appropriate, analysing its situation and outlining national or regional strategies in relation to the aims of the new Objectives. On this basis, discussions were held in a partnership involving the Commission departments dealing with the various Structural Funds and national/regional authorities in the Member States. This resulted in

Community Support Frameworks (CSFs) setting out the priorities for Structural Fund assistance with indicative allocations from each Fund over the entire *programming* period 1989-1993. Separate Operational Programmes (OPs) and Global Grant schemes were subsequently agreed for each field of activity. This process involved a new level of integration between the workings of the Commission departments, which was reflected also in enhanced cooperation between different ministries within Member States.

The *partnership* concept was continued into the implementation and monitoring phases with the Commission working with the national, regional and local authorities in tracking the progress of the various OPs and Global Grant schemes to identify the fine-tuning and changes indicated through experience. Partnership in this phase frequently involved a wide range of local social and economic actors as well.

The *additionally* principle required that the Structural Funds should not be used merely to replace national funds. The increased EU aid was to result in at least an equivalent increase in total EU and national aid in the Member States, taking macro-economic considerations into account. The observance of this principle was verified during the partnership discussions on the CSFs. Compatibility with the other aspects of Community policy, in the fields of competition and the environment, for example, was also ensured.

The Scope of the ESF was extended and it had become clear that the administrative structures in many of the Objective 1 regions needed to be strengthened, if they were to be in a position to maximise aid from the Structural Funds. This led to an extension of the ESF eligibility rules in these regions to cover the training of public servants in subjects relevant to the Structural Funds.

The growing links between education and work and the erosion of what came to be seen as obsolete distinctions between education and training also led to the enlargement of eligibility for ESF funding in Objective 1 regions. It now included young people over compulsory schooling age being trained within the education system as well as the off-the-job part of apprenticeship training.
The eligibility rules for participants in schemes covered by the new Regulation were very broad. They included, in the Objective 1, 2 and 5b regions, the unemployed, people threatened with unemployment and workers in SMEs or integrated development schemes. In Objective 1, eligibility was wider, extending to the additional categories referred to in the preceding paragraph.
Objective 3 was for people over 25 and out of work twelve months or more, but this minimum period was waived in the case of women returning to work and people with disabilities. Young people, to be eligible under Objective 4, had to be over compulsory school age and under 25.

As in the past, ESF funding supported recruitment aids for new jobs including self-employment (up to a maximum period of 12 months); other types of recruitment subsidies were phased out from 1992. Vocational training for trainees and instructors together with related services such as guidance, counselling and placement were also supported.

Provision for technical assistance was an important innovation in the new system, helping to raise standards and effectiveness with support ranging from the preparation to the execution and evaluation of programmes. The proportion of the overall budget allocated to this and related studies was up to 0.3%.

Social dialogue also became eligible for ESF support: this financed schemes involving workers in different Member States in the transfer of knowledge relating to the modernisation of production systems.

From the user's standpoint, much had changed. Decisions on project applications were decentralised and taken at national or, sometimes regional level. The increased budget meant greater chances of funding even if this was offset to some extent by increasing demand and the wider range of applications in Objective 1 for newly eligible actions. The new system, moreover, with its multiannual programming, promised greater security, continuity and flexibility. A new payments system was designed to reduce previous delays and cash flow problems. This provided for an initial advance of 50% within two months of the approval of the project and a further 30% when half the initial advance had been used.

The new system, which took effect from 1989, had much greater budgetary resources, involved multiannual programming and largely decentralised planning and management of the schemes covered by all the Structural Funds.

The Commission drew up guidelines relating to vocational training and employment policy to highlight policy priorities relevant to planning and programming under Objectives 3 and 4. These included the special attention needed for persons with particular disadvantages in relation to the labour market such as migrant workers and people with disabilities.

The need to promote the integration of women in occupations in which they were under-represented was also highlighted. Emphasis was put on innovation, transnational projects and training in advanced technology and the improvement of training structures.

Special efforts were made in several Objective 1 regions to raise training standards through multifund programmes with the ERDF financing infrastructure and equipment and the ESF supporting training and related measures

Community Initiatives were designed essentially to support Member State policies in the drive towards economic and social cohesion. The new system also provided for Community Initiatives to promote the Community dimension through innovatory transnational projects testing new approaches which could influence mainstream practice. The Human Resources Initiatives (Euroform, Now and Horizon were approved on 18 December 1990. They involved mainly the ESF, accounting for almost 3.8% of its total resources for 1989-1993, with investment in infrastructure aided by the ERDF.

Euroform was aimed at developing new qualifications and employment opportunities for the single market.

Now was concerned with promoting equality of opportunity for women vis-à-vis the labour market.

Horizon with improving job prospects for people with disabilities or at risk of exclusion from employment for other reasons.

The ESF also contributed, during 1989-1993, to the human resource content of the following other Community Initiatives: Envireg, Renaval, Prisma, Regis, Interreg, Stride, Regen, Konver, Rechar, Leader, Resider, Retex, Telematique.

The Reform of 1994-1999

This was the period of a reform to the ESF in the direction to reinforce the vocational training like instrument to fight the economic and the labour market situation. In fact at the time of programming of Community structural funding for the period 1994-1999 the individual Member States, with few exceptions, were undergoing a period of economic recession.

In particular the labour market after the sustained growth experienced during the second part of the eighties, when over 9 million new jobs were created throughout the Union, unemployment began to rise again in 1990. The rise in unemployment hit the most vulnerable people hardest, particularly the young, women and the long term unemployed with poor qualifications. However, a higher educational level was not always a guarantee against the risk of unemployment because of the numbers of graduates with qualifications not suited to the jobs available.

At the time of programming, unemployment was higher among women than men in all countries apart from the UK, although since the mid-eighties the gap between male and female unemployment rates had narrowed over the Union as a whole. In the less developed regions, however, the gap had widened.

Programme content and ESF policy aims like analysis of common approaches and differences total budget a massive increase over the preceding period; additional resources were agreed so the ESF accounts for some 30% of total Structural Fund aid.

Member States with the biggest financial allocations tend, naturally, to be those with a combination of high population and deficits in regional development. Germany, Italy and Spain are examples ESF allocations per capita are under ECU 100 per person in all Member States apart from Greece, Spain (about 250), Portugal (about 330) and Ireland (more than 500). At the other end of the scale, Luxembourg receives about 65 ECU per capita.

It is also interesting to look at ESF allocations in relation to unemployment.

Portugal emerges as the principal beneficiary with ECU 12,000 for each unemployed person over the period 1994-1999 with Denmark (ECU 1,190) at the other end of the scale.

The new economic situation has involved in the ESF programmes new actions based on vocational training and education to increase the labour market, in particular for the long-term unemployment, young people, people at risk of exclusion. New attentions were set up to the equal opportunities in the labour market between men and women, adaptation of workers skills to change.

Finally was increased the attention on the employment growth and stability, to boost human potential in the field of research, science and technology, to develop the training of public officials.

2.8. *Vocational integration of people threatened with long-term unemployment*

During the early years of the nineties, long-term unemployment rose in almost all countries, as reflected in the importance given, in the national programmes, to actions directed at the integration of the long-term unemployed. Five Member States (Belgium, Denmark, Finland, Netherlands and Spain) devoted the highest share of their ESF resources to this aim.

The variations in the proportion of ESF aid allocated by Member States to this priority reflect, naturally, the relative gravity of this problem compared to other priority objectives. Where Objective 1 regions cover a substantial part of the country, allocations to other priorities are greater then elsewhere and this can reduce the relative provision for combating long-term unemployment.

As might be expected, all national programmes indicate training as the main tool to combat long term unemployment. It became increasingly evident that training alone was insufficient to provide the long term unemployed with effective supports. The programming, therefore, envisaged measures to tackle long-term unemployment in an integrated way - the pathways approach favoured by the Commission in line with EU employment policy. Aspects like guidance, counselling, motivation and help with job search usually form part of the strategy.

Employment premiums are used for the most part in Member States where problems of long term unemployment are most acute.

Support for socially-useful work projects is provided in a number of countries, as is the creation and development of the so-called ‘third sector’ enterprises.

Ireland and Italy have programmed training (including language skills) for people emigrating to work in other Member States. These might be regarded as small steps on the road to an EU labour market as envisaged in the White Paper on Growth, Competitiveness and Employment.

2.9. *Vocational integration of young people*

Youth unemployment had risen in most countries in the years immediately preceding the programming period.

Youth unemployment was particularly serious in Spain, Finland, Greece, France, Ireland and Italy. In Spain, almost 45% of all young people aged between 15 and 24 were unemployed but were not in education or vocational training. Austria and Luxembourg, on the other hand, had very low levels of youth unemployment.

In general, the allocations for this priority are consistent with the severity of the problem. In the case of Greece, youth unemployment is 50% and the ESF allocation 3%. This is attributable to the type of classification system used: the Greek authorities focus their efforts mainly on the strengthening of the apprenticeship and educational systems. Such measures are obviously geared directly to combating young unemployment, but they are classified under the heading “Strengthening and improving educational and training systems”. Moreover, in Greece, many young people are assisted under the heading of ‘long term unemployed’, which does not contain an age differentiation.

The approaches followed by most of the Member States to tackle this problem are broadly similar. Target groups are often divided in two: those under 20 years of age without skills (school drop-outs and low achievers) and those with a school certificate which is insufficient to permit them to find a job.

For the first group, programming documents envisage Youthstart type actions. The ESF finances actions integrating education, training and work experience for the young under-20s who have no qualifications.

For the second, the measures aim to improve educational attainment and provide supplementary training in the skills most needed in the labour market.

2.10. *Integration of people at risk of exclusion from the labour market*

Slow economic growth and increasing immigration flows from non-EU countries are the main factors exacerbating the problems of persons excluded or at risk of exclusion from the labour market. In some countries the additional factor of social expenditure restrictions makes the problems more acute.

The relative shares of ESF funding allocated by Member States to this priority vary considerably. In Luxembourg the ESF allocation to this priority is relatively high; the target group is mainly composed of persons with disabilities, a category with a high unemployment rate.

Member States, in varying degrees, have taken action to improve labour market mechanisms and structures to help combat social exclusion. In some countries, such as Greece, ESF-financed actions include direct information and awareness campaigns directed at the general public, aimed at combating negative stereotyping. In Britain, the Government endorsed the Confederation of British Industry's targets for raising educational attainment and skills levels. France and Italy encourage the activities carried on by 'third sector' organisations, through grants for establishing new projects in the social services or new SMEs. Spain highlights training and other supports for Spanish migrants returning to Spain.

In all Member States, there is specific provision for persons with disabilities. There seems to be a shift of approach in the 1994-1999 programming documents, compared to 1989-1993. The focus has shifted away from sheltered workshops to integration into the open labour market, a process assisted by ESF financial incentives, compensating for lower levels of productivity.

2.11. *Promotion of equal opportunities in the labour market between men and women*

The unemployment rate for women is above the male rate in most Member States, with the exception of Sweden, Finland and the United Kingdom.

Austria, Germany, Italy and Luxembourg are the only countries allocating to this priority a figure equal to or above 4% of total ESF allocations. In general, there is a direct link between the gap between male and female unemployment and the ESF allocations to the equality of opportunity priority. In the case of Spain, Portugal, France, Greece and Belgium, the ESF allocation is less than one might expect. It would be a mistake, however, to draw definitive conclusions from these figures because equality of opportunity is a horizontal policy objective implemented across the full range of measures aided by the Structural Funds. The variations in these allocations reflect in fact the different perceptions of the Member States of the necessity of supplementing the general equality priority with specific measures under Objective 3.

2. 12. *Anticipation of labour market trends and adaptation of workers skills to change*

While all the other Member States made provision for Objective 4 type programmes, the UK opted not to do so in the initial period, 1994-1996, but is currently preparing a programme for 1997-1999.

Irrespective of the different amounts allocated), all Member States indicated four main components of their programmes under this priority:

- anticipation;
- vocational training itself, guidance and counselling;
- training systems;
- technical assistance.

Allocations to these components as a percentage of ESF resources assigned to Objective 4.

Actions to anticipate and plan for change had not hitherto widespread in the Community, but the introduction of Objective 4 gave significant stimulus to programmes dealing with this problem; this involve putting in place an ongoing system of monitoring the labour market and forecasting skills

needs. Member States have indicated in their programming documents that all parties concerned will be involved in this process.
Member States have adopted varying approaches according in particular to the size and ownership of beneficiaries companies. The Greek model is probably the most comprehensive, as beneficiaries can be employed in private or public companies irrespective of size.
Almost all the countries prioritise action for SMEs (up to 250 employees), with preference, in some cases, to companies with less than 50 employees.

2.13. *Employment growth and stability*

The comparison between Austria and Spain is interesting. Austria, with a relatively low unemployment rate, uses 23% of its allocations for the regional objectives to promote employment, growth and stability. Spain, on the other hand, with the highest unemployment rate in the EU, allocates 26% to combating long-term unemployment and for the vocational integration of young people, leaving 9% for employment, growth and stability.
Actions pursued in the Member States reveal broad similarities. Programming documents indicate that action to promote employment and growth is based on developing and strengthening companies, especially SMEs. In some Member States, the emphasis is on tourism and culture, while others focus on the industrial sector.
In SMEs, the ESF provides financing - in conjunction with a contribution by the companies themselves- for improving management capabilities and increasing competitiveness.

2.14. *Boosting human potential in the field of research, science and technology*

At European level, the average annual investment in RTD amounted in 1991 to about 2% of total GDP. This is significantly below that of the Union's competitors in global markets - the US (2.8%) and Japanese (3%). The European Union, moreover, has fewer numbers of researchers employed. Most Member States gave a certain degree of emphasis to the R&D sector in their programming documents for 1994-1999.

At EU level, the average of total ESF allocations for 1994-1999 destined to boost human potential in R&D amounts to 2.4%, but differences between Member States are significant, ranging from 5.7% in Sweden to a lack of specific provision in Denmark, Ireland and Luxembourg. Because of variations in programmes structure in the latter cases, provision for R&D forms part of wider ranging programmes for industry.

The strategies pursued by the Member States all contain ESF support for the strengthening of links between universities, research institutes and companies. It is recognised that RTD in the EU needs more effective transfer mechanisms to ensure that results are more effectively translated into practice by industry.

2.15. *Strengthening and improving education and training systems*

The ESF allocation to this priority amounts to about ECU 5 billion, or 12.2% of the total ESF budget for the period 1994-1999. As in the preceding case, the national policies assign varying degrees of emphasis to this priority. Reasons for these differences are presumably related, apart from variations in objective needs, to the extent to which further development of the educational and training system could impact positively on the employment level, or in other terms, to the effectiveness of today's systems.

National allocations, in percentages of ESF allocations, are given in figure 18[17].

Greece and Portugal account for almost 50% of total ESF allocations to this priority. In these countries the ESF assists large-scale reform and development programmes, which probably would have been difficult to carry out without ESF support. In addition to strengthening national apprenticeship and vocational training systems, the ESF focuses on the training of teachers, trainers, school managers and counsellors in the secondary school system, improving management and reforming university curricula. The development of a certification structure is assisted in Greece, including quality assessment of life-long training centres, subsequently extending to the accreditation of training of trainers.

2.16*. Contributing to development through the training of public officials*

Only a few Member States planned to allocate ESF resources to this priority (which is applicable only to Objectives 1 and 6 regions). They are Greece, Spain, Italy and Portugal, i.e. the countries of greatest need in this area.

In each of the four participating Member States, the ESF allocation for this priority is less than 2%. Action financed by the ESF is primarily intended to improve the efficiency of the public sector. In Italy, Spain and Portugal, the emphasis is on the improvement of the capacity of public systems dealing with the Structural Funds.

Because of the special situation in Greece, the scope of action there goes beyond the management of the Structural Funds and extends to other important areas of the public service. There is special emphasis on training in new technologies and management, and the ESF also contributes to the modernisation of the tax, custom, budget and treasury departments.

3. CEDEFOP[1]

How pointed out for the ESF origins and aims also those of the Cedefop, European Centre for the Development of Vocational Training Cedefop established in 1975 as a non-profit making body, independent of the Commission, are characterize by the demand to create a close relationship from vocational training ad labour market.

In fact its an organism with the task to help rethink the direction and requirements of vocational training and assist the Commission in promoting the development of vocational training.

Its the European agency that helps policy-makers and practitioners of the European Commission, the Member States and social partner organisations across Europe make informed choices about vocational training policy.

The EC Treaty places vocational training squarely within the responsibility of the Member States (subsidiary principle) but requires that the EU support and supplement Member States' efforts.

The Cedefop enjoys the broadest legal status in all the Member States and seat in Thessaloniki (Greece).

The purpose is to provide assistance to the Commission and to contribute to the promotion of vocational and continuing training at Community level through its scientific and technical activities and through courses and seminars, study contracts and carry out pilot or specific projects; publish and distribute documentation (including a Community- wide vocational training journal); establish contacts with specialised bodies, public authorities, training institutes and employers' and workers' organisations.

Its tasks are:

- to compile and disseminate selected documentation covering recent developments, research and structural problems connected with vocational training;
- to develop and coordinate research teams in the field of vocational training;
- to stimulate interest in the changing nature of occupations and vocational qualifications so as to raise awareness and improve information in this respect within the Union;
- to contribute to the implementation of the Leonardo da Vinci programme and to administer, on behalf of the Commission, the "study visits" programme aimed at promoting exchanges of experience and information between experts and policy-makers in the field of training;
- to provide a forum for meetings and discussion.

The Centre is administered by a Management Board comprising 48 members representing the governments of the Member States (15), employers' professional organisations (15), employees' trade-union organisations (15) and the Commission (3). The Director of the Centre is appointed by the Commission.

[1] "Cedefop" is the French acronym of the organisation's official title, European Centre for the Development of Vocational Training (**C**entre **E**uropéen pour le **Dé**veloppement de la **Fo**rmation **P**rofessionnelle).

The Directorate-General for Education and Culture, implements the Leonardo da Vinci programme in vocational training, which Cedefop supports with surveys and analyses. Cedefop also organises study visits for vocational training specialists within this context.
Cedefop also supports the "Bruge-Copenhagen process" of cooperation in vocational training. The process comprises discussions and analysis of key themes in vocational training - the European dimension, certificate and validation of non-formal learning, transparency of qualifications and quality. This process supports the realisation of the objective agreed by the Lisbon European Council to make the EU the most dynamic knowledge-based economy in the world, by 2010. Cedefop provides technical support through analyses of the themes and an interactive platform for discussion and exchange about them on its virtual communities.

European Training Village

Cedefop has also established in 1998, the European Training Village, an electronic village for training in Europe, which counts up to 25,000 members and is rapidly growing. Its an Europe virtual community for vocational education and training professionals which aims to facilitate the exchange of information between experts in the field of professional training.
The ETV is an interactive platform; a meeting point for policy-makers, social-partners, practitioners, researchers and all those with an interest in vocational education and training. Its an interactive website where participate by sending news, taking part in virtual conferences, exchanging information, registering in mailing lists, if you are involved in any aspect of vocational training.
The chance to participate in networks which collect and disseminate innovative solutions to training problems, comparative statistical information on VET in the Member States.
Experts in the field can share and exchange knowledge and experience with associates within and outside the European Union.

THE TRANSPORTATION LAW – INTERFERENCES AND PARTICULAR FEATURES IN REGARD TO OTHER LAW BRANCHES

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Abstract : *The forming of transportation law as a distinct law branch took time, as it followed the economical essor and, implicitly, the one of the transportation means. Though it is, among juridical branches, a ranch of its own, the transportation law presents a lot of correlations with other law branches. When its juridical norms happen to have lacunae, common law comes to fill in these gaps.*

Key words :*The transportation law, law branches*

Preliminaries. The forming of transportation law as a distinct law branch took time, as it followed the economical essor and, implicitly, the one of the transportation means. Though it is, among juridical branches, a ranch of its own, the transportation law presents a lot of correlations with other law branches. When its juridical norms happen to have lacunae, common law comes to fill in these gaps.

On the place held by transportation law into the law' system, the doctrine mentions two opinions: a theory which considers transportation law as a subordinated branch of trading law; another one which sees transportation law as a distinct law branch[1]. As far as we are concerned, we do join the second opinion, viewing transportation law as a distinct branch, while trading law has upon it the function of common law.

A first step in sustaining the autonomy of this branch of law is to precise what object does it rule. For transportation law, this is necessary because, generally when the constitution of a law branch is foreseen, its would-be ruled object is seen as the fundamental criterion able to separate it from other existing law branches and to establish into the law system the sphere of the juridical relationships ruled by the respective law branch. For a branch of law, in the process of delimiting it from the others, and implicitly of forming it, a series of criteria are taken into account: the method of ruling, the subjects' quality, the norms' character, the specific sanctions, the principles[2]; but most of the doctrine simultaneously admits that the fundamental element of separation, in regard to the above mentioned criteria, which are thought as auxiliaries to the formation of law branches, is the object that the respective branch rules[3]. "The essential problem which has to be analysed is the one of the criteria upon which relies the distinction to be made among branches and their distinct evolution as separate rule' systems which sprung from the global juridical system"[4].

The specialized literature[5] defined the branch of law as the aggregate of the juridical norms which rule the social relationships from a domain of social life, relying upon a specific method of ruling and upon some common principles. For a law branch, its juridical ruled object is constituted by the social relationships that are ruled through a norm of law, and which own features that are specific to the respective law branch.

The juridical object ruled by the transportation law is, so, constituted by the social relationships which are ruled by it: the ones which generate the transportation activities or the transportation itself; in other words, the social relationships which express themselves" which

[1] Gh. Piperea, *Dreptul transporturilor*, Editura All Beck, Bucureşti, 2003, p. 9.
[2] Gh. Beleiu, *Drept civil român. Introducere în dreptul civil român. Subiectele dreptului civil*, Casa de Editură şi Presă Şansa, Bucureşti, 1992, p. 33.
[3] I. Dogaru, *Drept civil român*, Editura Europa, Craiova, 1996, p. 29-30.
[4] I. Dogaru, D. C. Dănişor, Gh. Dănişor, *Teoria generală a dreptului*, Editura C. H. Beck, Bucureşti, 2006, p. 231.
[5] N. Popa, *Teoria generală a dreptului*, T.U.B., 1992, p. 154; see also J. Renauld, *Cours d'encyclopedie du droit*, litography, Louvain, 1966, p. 108; "a frame of law rules meant to rule a specific domain of social relations".

materialize, through the transportation activity[6]. As the object of transportation law, the activity of transportation could defined as: the activity supposing the displacement into space of some persons or be goods, with the help of a transportation mean and through the use of a transportation way. So, transportation supposes a series of elements: displacement into space; persons or goods that constitute the object of this displacement, the use of a vehicle (transportation mean, the realisation of this displacement upon a transportation way[7].

The transportation law represents the aggregate of regulations concerning the professional activity organized by carters, with adequate vehicles, in order to displace, on the ground of contracts and under legal conditions, persons and/or goods[8].

Transportation law is an autonomous, distinct law branch, with a special legal frame but, for certain aspects of its juridical institutions, as it lacks norms of its own, it does complete its possible lacunae from the common law simultaneously interacting with disciplines which, through their contents, are kindred to it. So, the doctrine has stated that transportation law does interact with[9]: trading law, civil law, administrative law and penal law, with the civil procedure's law and with the penal procedure's law, with the international privacy's law with the international public law and even with constitutional law.

Transportation law and trading law. Trading law does constitute the common law in regard to transportation law[10]. The trading Code contains a detailed regulation of the terrestrial objects' transportation contract, namely arts. 413-441 of Title XII. It tackles, in this respect, with a vast network of themes: the appropriate contents of the transportation document, the carter's liability, the guaranty required by the carter for the payment of the transportation's price, the destinatary's rights, the cumulative transportations. The Trading Code has also regulated the maritime contract for goods and voyagers, under the name of hiring contract, in arts. 557-600. Art. 3 item 13 of the Trading Code also justifies the qualification of the transportation activity as an objective trading act. The article counts among the facts considered as "trading" by the law *the transportation enterprises, for persons or things, on water or on dry ground.*

The Romanian Trading Code does not define the concept of *trading act*. Yet, the doctrine of trading law does provide a general definition for it. The Trading Code only enumerates the juridical acts and operations which it states as trading acts, from a perspective which is rather pertaining to economy than juridical. Suiting the doctrine[11], *the trading acts or, more largely speaking, the trading deeds, are the juridical acts, the juridical facts and the economical operations through which are realized the production of merchandise, the execution of works or the carrying out*

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[6] Not all displacements into space do constitute the object of the transportation activity. So, the transportation for personal interests, the transportation of oil, water or gases through pipelines, the transportation of electrical power supply could not form the object of a trading transportation contract. In these situations, the transportation contract. In these situations, the transportation is realized through devices of one's own, and, as the specific operations of transportation are not realized, the transportation activity is not justified. Are not seen as transportation activities, as well, the new technologies of displacing some merchandises through pipelines, due to a flux of water or air. The mail's transportation, the transmissions of phone, flex, radio and T.V. broad casts, telegraphy, are not included to the object of transportation law. The post transportation submitted to some special conditions (special regulations, issued from special conventions) is in the same situations, since these regulations state that we are not in the presence of a transportation activity.

[7] Ghe. Piperea, *Dreptul transporturilor*, Editura All Beck, Bucureşti, 2003, p. 3.

[8] O. Căpăţână, Gh. Stancu, *Dreptul transporturilor. Partea generală*, Editura Lumina Lex, Bucureşti, p. 10.

[9] Transportation law also presents connections with environment's law. So, in the domain of transportation there are arguments about an insufficient attention paid to the environment. Yet, at the E.U. level, a series of actions have been taken, related to transportation and environment: the Directive of December, 19-th, 1984, which limits the weight of trucks, the Directive of February 17-th, 1975, which supports the emergence of a multi-modes system of transportation, etc.. See, to this purpose: A. Duşcă, P. Drăghici, *Dreptul intern şi comunitar al mediului*, Editura Universitaria, Craiova, 2003, p. 297.

[10] The common law is the branch of law which provides the adequate norm, when a branch of law should not contain norms of its own, able to rule a certain aspect of a juridical relationship. See, to this purpose: I. Dogaru, S. Cercel, *Drept civil. Partea generală,* Editura C. H. Beck, Bucureşti, 2007, p. 15-16.

[11] S. D. Cărpenaru, *Drept comercial român*, Editura All Beck, Bucureşti, 2002, p. 31.

services or an interposition within the merchandises' circulation, with the purpose of obtaining profit.

Art. 3 of the Trading Code presents as trading deeds: item 5 - any supplies' providing enterprise, item 6 - enterprises of public shows; item 7 - commission enterprises, business agencies and offices; item 8 - building enterprises; item 9 - factories, manufactures, printing houses; item 10 - publishing houses, bookselling, artefacts; *item 13 - transportation enterprises, for persons or things, on water or on dry ground*; item 20 - insurance enterprises and storage enterprises, into docks and storehouses.

Due to the fact that trading law only states an enumeration of the enterprises which are seen to be trading deeds, but yet does not expressed define the concept of enterprise, it belongs to the doctrine to formulate a general definition of the enterprise. Still, the expressed points of view highly diverge one from another.

So, following one opinion, the enterprise is a complex activity which consists in the repeated, organized and systematically exercising of the operations which are expressed stated by the Trading Code[12]. Another perspective defines the as an economical organism, headed by a person named entrepreneur, who combines the forces of nature, capital and work, in order to produce goods and services[13]. A third opinion outlines the enterprise as an organized structure for which the essential element is the speculated work of other persons, for the purpose of obtaining products and services meant to be exchanged[14]. Contemporary doctrine tries to elaborate a new definition of the enterprise, focusing not only upon the material side, around which the traditional approach was focusing its definition, but also upon the subjective and social elements, meaning the human collective which accomplishes this kind of activity. The economical aspect of the notion of enterprise and the elements which are specific to trading facts should neither be ignored.

In this respect, the enterprise is defined[15] as an economical and social organism - an autonomous organisation of an activity, by the entrepreneur who assumes his own risks, with the help of production factors[16], for the purpose of producing goods, of executing works and carrying out services, viewing to obtain a profit. This definition refers only to the activities stated by the art. 3 of the Trading Code, that is to say only to the operations that are registered as trading deeds. So, the concept of *enterprise* was submitted, like many other concepts existing into our law system[17], to a process of modification of the concept' sense, of evolution of its contents. This process is natural and suits the social and economical evolution of our society. So, according to the Romanian Trading Code, the concept of enterprise designates an activity organized under certain conditions and bearing a clear finality, yet without being recognized as a subject of law. According to the trading law, it is the entrepreneur who owns the quality of subject of law, as the one who organizes the activity. This one may be organized by one or more persons, in the frame of a trading society, so it results that, in the case of the individual enterprise. it is the individual person who is herself the subject of law. For the case of the trading company, which owns a moral personality[18], itself becomes a subject of law. According to the trading law, are trading deeds *the transportation enterprises, for persons or for things, on water or on dry ground*. Suiting the Trading Code, the transportations' asset of being a trading operation aims to the transportation of persons as well as to the one of goods, but only on water and on dry ground. Yet from the spirit of its regulations, it results that the airway transportation of persons and goods also constitute some trading deeds.

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[12] It is a definition grounded upon the professional criterion, to which is brought the objection of being not precise enough.

[13] I. N. Finţescu, *Curs de drept comercial*, vol. I, Bucureşti, 1929, p. 44-45

[14] It is a definition considered as restrictive for certain types of enterprises, such as business offices and trade agencies, but yet permissive towards other types of activities which are not enterprises, such as the activity of a freelance professional having a clerk of his own.

[15] M. de Juglart, B. Ippolito, *Cours de droit commercial*, Editura Montchrestien, vol. I, 1978, p. 134.

[16] The forces of nature, the capital and the work.

[17] For instance, the concepts of public order, of sovereignty, etc.

[18] S. D. Cărpenaru, *op. cit*., p. 41.

Anyway, suiting the Trading Code, transportation operations should be trading deeds only if they would be exerted within a systematically organization of the specific parameters, meaning under the conditions of an enterprise. *Per a contrario*, occasional operations, random transportations are not considered as objective trading deeds from the category of enterprises. Still, under legal conditions, they may be qualified as connex objective trading deeds accessory ones[19] or subjective trading deeds[20].

Transportation law and Civil law

The prescriptions of Civil Code regarding the transportation law are applied only in the situation when trading legislation should suffer from lacunae. This rule is instituted by art. 1 paragraph (1) of the Trading Code: "The present law is to be applied for trading. The Civil Code will be applied where the former does not dispose".

The regulations from the Civil Code that are applicable to transportation law are the following: art. 1470 item 2, through which the transportation contract is taxonomised art. 1473-1475, through which the carter's liability is ruled; art. 1476, which precises that: "the entrepreneurs of public transportations, on dry ground and on water must keep an account of their money, of the effects and packages they are taking the charge of"; art. 1477, which sends to the specific regulations of the various transportation branches, precising that those are, respectively, applicable[21].

So the Civil Code and the Trading Code do constitute the common law for trading transportations and they are applied, in the situation when these categories of transportation might not obey to a special juridical regulation, for the road transportation, stream transportation, railway, maritime and airway transportation.

Still, *lato sensu*, the transportation contract may be analysed as one which presents peculiarities, exceptions from the classical "structure and rules "of a civil contract. This analysis points to the idea that, in its ensemble, the contract of transportation too relies on the juridical ground, and makes use of as a starting point of the civil contract, the structure of which it takes as a "basis", a juridical "skeleton". Upon this former, with its respective peculiarities and specific assets, comes to develop itself the autonomous transportation contract. The doctrine considers civil law as the true "core" of the juridical system[22] so it constitutes for transportation, as well as for the other branches of private law, the common law to be applied.

We might start the analysis even from the discussions concerning *the birth of the transportation contract*, usually considered as being generated by the existence of another contract or by an obligation assumed through another contract. Economically speaking, the merchandises' circulation, as a category is generated by the conclusion of contracts such as the ones of sale-purchase, hiring, deposit etc. - so, they are civil contracts. The transportation contract, therefore, is a consequence of the execution of some obligations assumed through these contracts. Yet, as a juridical figure, the transportation contract is an independent one, with a juridical structure of its own, a result of the complexity of the civil and trading obligations created through the sides; economical relationships.

Thus, into this context, we have to analyse two kinds of relationships: one fundamental juridical relationship, the initial one which creates the first juridical connections, able, later to lead to the assuming of some obligations that will require, to be honoured, the conclusion of another contract, the one of transportation, another, derived, juridical relationship, which is represented by

[19] The connex trading deeds are juridical acts or operations which acquire the trading feature due to the tight connection they have with acts or operations considered by the law as trading facts.

[20] The subjective trading facts are the ones which acquire the trading feature due to the person who does them, due to his quality of being a trader. In this respect, here is the art. 4, Trading Code: "Apart from these, are thought as trading facts the other contracts and obligations of a trader unless they would be of civil nature or unless the contrary would result from the act itself".

[21] The entrepreneurs of public transportations and coaches, as well as the ships' owners, are also due to respect the particular regulations, which have law power, between, themselves and the other citizens.

[22] I. Dogaru, S. Cercel, *Drept civil. Partea generală*, Editura C. H. Beck, Bucureşti, 2007, p. 15-16.

the transportation contract itself. Through they are connected one to another, the two relationships, practically the two contracts, are, each of them, independent.

About *the sphere of the persons to whom the contract in our case, the transportation one, is opposable,* let us precise that, for the transportation contract, the sides are: the forwarder and the carter. Yet, the beneficiary of the contract is the recipient, who, though he takes no part into the conclusion of the contract is (if he would join the respective contract) an acquirer of rights and obligations which originate from the transportation contract. Therefore, this contract is considered an exception from the relativity principle of the juridical act's effects (*res inter alios acta aliis nequere nocere, neque prodesse potest*) and is analysed by certain authors from specialized literature as a stipulation for another with certain particular features[23].

Thus the transportation contract appears as concluded for the benefit of a third side, that is to say a contract concluded between the forwarder, with the quality of stipulator and carter with the quality of the promiser, for the benefit of the transportation's recipient - the third side as beneficiary - who, this way, acquires a right of his own in regard to the carter. But, from the stipulation for another, there are differences, too. They aim to the fact that, in the case of the stipulation for another, the third side as beneficiary could become only a rights' owner, while, in the case of the transportation contract, the beneficiary bears obligations as well, (the recipient). Our conclusion is that there is no identity but only similarities between the position of the third side beneficiary in the stipulation for another and the one of the recipient in the transportation contract.

According to some other opinions to which we are joining[24], the recipient is the owner of some autonomous right, born straightly from the transportation contract. So, even if the transportation contract should not be totally reducible to a previous juridical construction like the stipulation for another, still the juridical nature of the recipient's rights could be explained through the analogy with the former. Therefore, the stipulation for another may be considered as a juridical ground upon which to properly define the juridical position of the recipient in the transportation contract.

About *the essential conditions*, the ones required for the validity of the transportation contract, they are the same as the ones for any convention, namely: the capacity of contracting, the valid consent of the side who obliges itself, a determined object and a licit cause. The form of the contract may also be an essential condition, if the law should stipulate this expressed. If one side would be a moral person, an essential condition should be, for validity, the respect of the speciality principle for the use capacity, according to which a moral person could enter juridical relationships only insofar those would be appropriate for the purpose of its foundation.

For the transportation contract, peculiarities concern only some aspects of the consent. So according to the legal stipulations of the matter, the carter is in a permanent offer status in regard to the public, and he does not have the right to refuse the performing of transportation, unless in cases expressed stipulated by the law. More, in the case of line transportation[25], where it is the carter who establishes conditions and brings them to the knowledge of the public, the acceptance given by the forwarder or by the traveller consists practically, in an adhesion. About the carter's capacity, he is required to own the capacity of being a trader[26] and, about the object, the carter could refuse a transportation only if he would not own the appropriate transportation means required by the respective types of goods. In principle, the transportation ought to be possible with the means owned by the carter.

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[23] The stipulation for another is the contract through which a side obliges itself to dispose that the other side, (the stipulator), should give, do or not do something for the use of a third person (the beneficiary) who does not participate in the conclusion of the respective contract nor is represented in it.

[24] Şt. Scurtu, *Contracte de transport de mărfuri în trafic intern şi internaţional*, Editura Themis, Craiova, 2001, p. 26-30.

[25] Transportations performed following a preestablished itinerary, with a regular and permanent frequency, with an unchanged schedule known by the public.

[26] Art. 7 Trading Code stipulates: "are traders those who do trading deeds, having the trading as their ordinary profession, and the trading societies".

This cause presents no peculiarities that would part it from the above mentioned rules of civil law. To it are applicable the arts. 966-968 Civ. Code, the following way: for the carter, the purpose for which the transportation contract was concluded is to obtain the transportation's price into which his own profit is included; for the forwarder and the traveller, the purpose is represented by the displacement of goods or of their own person. Following the Civil law rules in the matter of contracts, art. 969 Civil Code stipulates: "the conventions legally concluded have law power between the contracting sides". Thus the compulsory force of the contract derives from "the law power" which is recognized by the law itself to the contract in the relationships between sides. From this value, recognized to the contract, do result two important rules for the contracts' domain: the contracts' irrevocability and the relativity principle for the contract's effects[27].

A contract is concluded through the sides' agreement - *mutuus consensus* - and might be cancelled the same way, through the sides' common opinion - *mutuus dissensus*. This is the rule of the contracts' irrevocability.

Yet, legal stipulations on the transportation contract do depart from the principle enforced by the art. 969 paragraph (2) Civil Code and do grant to the forwarder the right to desist from the contract or to unilaterally modify it, with the obligation of paying to the carter the expenses done and the damages, direct and immediate, that would result from the execution of his disposition. So, according to the stipulations of art. 421 par. (1) Civil Code "the forwarder has the right to suspend the transportation and to demand the restitution of the transported objects or their handling to another person than the one indicated in the way bill, or to dispose how he might find suitable for himself, but he is due to pay to the carter the expenses done and the damages, direct and immediate, resulting from the execution of this counter-order".

Therefore, to the forwarder are granted: the right of renunciation about the contract[28], exerted unilaterally, and the right to modify certain clauses of the transportation contract[29] through a counter-order, meaning the juridical act through which the forwarder unilaterally modifies the transportation contract. More, to the forwarder is granted, in the case of the transportation's hindering or delay, due to overwhelming forces or to a fortuitous case, the right to cancel the contract itself. Art. 420, Trading Code, precises, in this regard: "If, due to a u case or to an overwhelming force, the transportation would be hindered or excessively delayed, the carter ought to immediately notify this to the forwarder, who owns the faculty of cancelling the contract, paying only the expenses made by the carter, and if the hindering should happen during the effective transportation, the carter would still be entitled to the payment of his performed service, in proportion with the accomplished route. In both cases the copy of the way bill that he had undersigned, either as promissory note or as payable to the bearer, should be returned to the carter". The difference between the two articles resides in the question of the damages that the forwarder should have to pay to the carter: according to art. 421 T. Code, the forwarder is obliged, if he should unilaterally modify the transportation contract, to pay to the carter all the direct and immediate damages resulting from the execution of the counter-order. Yet the art. 420 T. Code limits the forwarder's pecuniary obligations in regard to the carter. So, the forwarder who cancels the contract due to hindered transportation or to its delay issued from overwhelming force or fortuitous case is obliged to pay only the expenses made by the carter in order to duly execute the contract, when the delay occurs before the transportation's start; when the hindering occurs during transportation, the forwarder pays for the expenses made for the partial execution of the contract, meaning a part of the price, proportional with the route accomplished until that moment. Thus, the respective articles differ about the obligations they create for the forwarder.

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[27] According to art. 973 Civ. Code: "conventions have no effect, unless between the respective contracting sides". So, contract produces its effects only inside the contract's circle, only among the sides which concluded it. The compulsory power of the contract concerns as well other persons, such as the sides' causes holders, the contract being opposable to the latter's.

[28] The revoking may intervene before the contract's execution had started, but also during transportation, that is to say after a partial execution of it.

[29] For example, the forwarder's right to designate another recipient.

The disrespect of the obligations assumed through the transportation contract do generate civil liability, for the carter and forwarder as well.

About the liability of the forwarder and the one of the recipient, the applied rules are the ones from common law; but, as the carter is concerned, we have to tackle with aspects that differ from common law's rules. We have to analyse two aspects: the carter's liability grounded upon the contract and the carter's liability for misdemeanours.

The juridical regime of the carter's liability is given by the stipulations of the Civil Code: arts 1073-1090 do rule the contracted liability while art. 998-1000 rule the carter's misdemeanour liability. For merchandises' transportation, the carter's liability is also ruled by the Trading Code. The regulations stated by the Civil and Trading Codes are applicable only insofar certain aspects of the transportation contract should not obey to special regulations[30].

Civil liability for misdemeanours is a specific sanction of civil law applied for the perpetration of the illicit deed causing prejudices, and owning a reparatory function[31].

Through the execution of the transportation contract, the carter involves his liability, as well to his contractor, but perhaps also towards third sides; when, there are deeds perpetrated by the carter outside of the occasion of the transportation contract the carter's liability would be civil for misdemeanours. The legal frame of this situation is given by art. 998 Civil Code, which makes the precision: "any human deed causing prejudice to whoever obliges the one due wham's error it was occasioned to redress it", and by the art. 999 Civ. Code which stipulated: "a man is liable not only for the prejudice he has caused through his deed, but also for the one caused due to his negligence or his imprudence".

The professional carter is a trader, which provides, for the extra-contract action too, - when it was perpetrated during profession's exercising - a mercantile feature[32], therefore operating the mercantile presumption, as stated by art. 4 Trading Code[33]. The essential condition for the involvement of the carter's contractual liability, is the existence of the transportation contract. In order to involve the transporters contractual liability, the transportation contract has to cumulate the following requirements to be a juridical valid contract, direct juridical relationships to be established between the carter and the for - warder/recipient, - between the damaged side and the prejudice's author; the prejudice to be resulted from the total or partial non-execution of an obligation born from the transportation contract itself, meaning from the contract itself which binds the damaged side to the author of the prejudice[34]. But if we are speaking of a "transportation enterprise", this would be a moral person and the liability should be no more direct, but a contractual liability for another side. The general conditions of the carter's contractual liability are the ones from common law: the illicit deed causing prejudice, the author's guilt, the existence of the prejudice and the causal bond existing between the prejudice and the illicit deed.

The doctrine considers the carter's juridical regime as worsened than the one of the contract liability from common law. This fact is due to the obligation assumed by the carter to handle the transported wares to the recipient. Therefore, the carter's *obligation* is a compulsory result one, so any deficiency in its execution might be assimilated to an illicit deed. In transportation law, compared to common law, the carter's contract liability presents specific elements. About its juridical regulation, it is applied as follows: in priority the stipulations of special laws[35] and, only in the case the formers should not exist, the rules of common law would be applied[36]. In regard to the

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[30] Gh. Filip, *Dreptul transporturilor,* Casa de Editură şi Presă "Şansa" SRL, Bucureşti, 1998, p. 44-45.
[31] V. I. Niță, *Drept civil. Teoria generală a obligațiilor*, Editura Universitaria, Craiova, 2004, p. 112-115.
[32] O. Căpățână, *op. cit*., p. 169.
[33] Art. 3 Trading Code: "The law considers as trading facts (...) transportation enterprises for persons or things on water or on dry ground" and art. 4 Trading Code: "Apart from these, are thought as trading facts the other contracts and obligations of a trader unless they would be of civil nature or unless the contrary would result from the act itself".
[34] O. Căpățână, *op. cit*., p. 171.
[35] Laws that are specific to some types of transportation, Trading Code's regulations, transportation rules
[36] Şt. Scurtu, *Contracte de transport de mărfuri în trafic intern şi internațional*, Ed. Universitaria, Craiova, 2003, p. 81-83.

rules of common law, the specific elements of the carter's contract liability are, in priority, concerning the charge of the evidence's admission and the extent of the indemnifications[37]. According to the Trading Code[38], the carter is liable for the loss or deterioration of the things that were entrusted to him for all the duration of the transportation contract, unless he is able to prove that the damaging respectively the deterioration of things came from a fortuitous case or an overwhelming force, or either from the things' inner vice or nature, or again from the deed of the forwarder or the one of the recipient. Therefore art. 425 Trading Code institutes a relative presumption of guilt if the carter should not fulfil his contract obligations. This legal relative presumption, however, does not harden the regime of the carter's liability; it simply obliges him to display the evidence required. About the extent of the carter's liability, according to art. 430 par. (1) Tr. C., in case of loss or deterioration of the merchandise entrusted for transportation, the compensation is established the effective damage only (*damnum emergens*), but not in regard to the unrealized benefit (*lucrum cessans*). This means that the carter's liability, as established by the Trading Code, is reduced compared to its statement by common law (art. 1084-1086). There, the total prejudice contains as well the effective one and the unrealized gain.

The Civil Code and the Trading Code consider the liability of the carter guilty of humbug or some grave deed as being still contractual, and they aggravate it at the damages' calculation; so, the humbug and the grave deed do not become assimilated to the fraud case into which they should attract a misdemeanour liability[39]. Our analysis proves that the civil contract, as it does for other contracts from the sphere of private law, does ensure a starting point and juridical ground for the transportation contract, but yet this latter remains a distinct, autonomous contract.

Hence, the transportation contract is a convention between the professional carter and the forwarder, through which the carter obliges himself, in exchange of a remuneration, to transport, with an adequate transportation mean, and in a certain period of time, wares or persons. In case of merchandise transportation, the carter obliges himself to handle the goods to the recipient.

The unity of the Romanian law system is assured, among others, through correlations and interferences between its components (branches) firstly, and secondly, through the juridical institution of a law branch as *common law* for one or many other branches. In the case of transportation law it is the Trading Code and the Civil Code that are taken as *common law* for it.

Transportation law and international private law

The international private law is, in the internal law of each state, the branch representing the corpus of rules, applicable to individual and moral persons, as subjects of private law, in the frame of international relationships. The object it juridical rules is, for the international private law, the private law relationships with an extraneous element, largely speaking the civil law relationships with an extraneous element, containing all juridical relationships mentioned by the frame law namely the Law nr. 105/1992 on the regulation of international private law relationships.

Art. 1 par. (2) of the law stipulates: "*In the sense of the present law, the international private law relations are the civil, trading, work, civil, procedure ones, and other private law relations with an extraneous element*. Therefore , may constitute the object of international private law only the juridical relationships that own the specific features of this branch of law, namely: the relations are established between persons (individual and/or moral) as subjects of private law; they contain an extraneous element; they pertain, largely speaking, to civil law, meaning that they come from: civil law, family's law, procedure civil law, work law, trading law, transportation's law, real estate's law, environment's law, intellectual property law, competition's law etc.[40] Transportation's law is connected to international private law mostly about the laws' conflict in space. It comes to birth due to the extra-territorial feature of transportation activity. The Law, nr. 105/1992 itself establishes this connection. This law rules a series of aspects directly related to transportation law: the conflict

[37] Ibidem, p. 84.
[38] Trading Code, art. 425.
[39] Şt. Scurtu, *op. cit*., p. 84.
[40] B. Predescu, *Drept internaţional privat*, Ed. Universitaria, Craiova, 2002, p. 42-47.

norms from the matter of contracts, which indirectly create connections with the transportation contract, may this latter be of civil or trading natures; directly, through the special regulation regarding the conflict norms ruling the contracts of transportation and forwarding; the conflict norms regarding the goods during their transportation; the conflict norms regarding the means of transportation; the conflict norms regarding civil navigation - on sea on streams, on air; the juridical acts and facts happened aboard the ship or airship the illicit deeds perpetrated by ships or airships or aboard them which may cause prejudices to their outside the collision of ships or airships; the assistance to and rescue of ships; the incidence for the Romanian law, of the immediately applicable norms[41]. Transportation law and international private law are also connected through conventions of international public law, but bearing effects for the international private law; they concern, within international private law, the liability for the prejudices caused by the objects launched in the space outside the atmosphere. In the matter of contracts, in order to establish which law should be applied to one precise contract, the Romanian international private law follows the principle that the sides are entitled to choose which law should be applied to the contract with an extraneous element[42]. So, art. 73 of the Law nr. 105/1992 stipulates: "The contract is submitted to the law chosen by consensus by the sides" and art. 74 dispose: "The choice of the law applicable to the contract must be expressed or should undoubtedly result from its contents or from the respective circumstances". The contract's law - *lex contractus*[43] - may be *lex voluntatis*, meaning the law chosen by the sides on behalf of their will's agreement - autonomy of will. If the sides' manifestation of will, regarding the law applicable to the respective, contract, should lack, this latter would be located into the sphere of a law system, following objective criteria, stated by the law. The *lex voluntatis* rule operates not only in the field of civil contracts, but for trading ones, being imposed, appropriately, by the needs of economic development and goods' exchange, as a rule mostly promoted by economically developed states[44].

Art. 103 of the Law nr. 105/1992 stipulates that, if the sides' agreement on the law should lack, in the contracts of transportation, forwarding and others kindred would be applied *the law of the transporter or of the forwarder's siege*. Thus, the law of the carter's siege should be applied as ruling law of the transportation contract only if the sides, through their own will, would not have established a law applicable to the respective contract. This law rules upon the contracts' essential conditions and effects, while the regimes of the goods during transportation and of the transportation means are submitted to other confliction solutions, those stated by arts. 53-56 of the Law nr. 105/1992[45]. This regulation is applicable to all kinds of transportation, and it could be substituted only by the existence of an international convention which should establish uniform norms for a certain type of transportation or about a certain problem of law. The good, during its transportation, is submitted to the law of the state wherefrom it was forwarded[46]. To the law of forwarding place, the law stipulates from 3 exceptions:

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[41] D. A. Sitaru, *Drept internațional privat. Tratat*, Editura Lumina Lex, 2001, p. 477-501.
[42] I. Filipescu, *Drept internațional privat*, Editura Actami, Bucureşti, 1999, p. 349.
[43] The competent law for governing the essential conditions and the effects of the contract.
[44] B. Predescu, *op. cit*., p. 417.
[45] To this purpose, art. 53 of the Law nr. 105/1992 stipulates that the good being in course of transportation is submitted to the law of the state wherefrom it was forwarded, unless if: the interested sides might have chosen, through their agreement, another law, which, therefore, becomes applicable; the good comes to be stored into a warehouse or placed under distraint on the ground of some insurance measures or due to an unwilling sale- purchase: in these cases, during the time of deposit or restraint being applicable the law of the place where it was temporarily relocated; if the good should figure among the personal effects of a passenger, it would be submitted to his own national law. The law also stipulates that the effects and conditions issued from the reserve of the ownership right concerning a good meant for exportation, if the sides should happen not to convene otherwise, would be ruled by the exporting state's law. The constitution, transmission or extinction of real rights upon a transportation mean are submitted to:
a) the law of the pavilion displayed by the ship or the airship;
b) the law applicable to the organic statute of the transportation enterprise, for the railway means and road vehicles from its patrimony
[46] Art. 53 of the Law nr. 105/1992.

(a) when interested parts have chosen, by their own agreement, under the conditions stated by arts. 73 and 74, another law which, therefore, becomes applicable;

(b) if the respective goods should be stored into a warehouse or placed under distrait due to some insurance measures or due to a forced sale-purchase. In such case, for the period of the deposit or of the restraint, is to be applied the law of the place where the goods have been temporarily located;

(c) if the respective goods should be part of the personal belongings of a passenger, they would, into this situation, be submitted to the passenger's national law.

The juridical regime of transportation means is submitted to different laws, as a function of the fact if there is a flag colour or not. So:

- ships and airships are ruled by the law of the flag they are raising, namely the *lex pavilionis*[47];
- for transportation means which own no pavilion, the law of the organic statute[48] of the transportation enterprise to the patrimony of which they belong should be applied. This kind of law rules the questions that follow as a synthesis:

a) constitution, transmission or extinction of real rights upon a transportation mean[49];

b) the regime of goods staying long-time aboard this transportation mean, as forming its technical endowment;

c) the claims having as object the expenses made for the transportation mean's technical assistance, maintenance, repairing or renovation[50].

The conflict norms regarding civil navigation benefit from a special regulation, in the Law nr. 105/1992, in its Chapter V, focused on goods, but also in its Chapter X, entitled: "Civil, stream, maritime and air navigation"[51]. So, art. 55 of the Law 105/1992 stipulates: "the constitution, transmission or extinction of real rights over a transportation mean are submitted: a) to the law of the pavilion raised by the ship or airship". Art. 56 shows that pavilion's law is applied as well to the goods staying long time aboard, as forming its technical endowment, as to the claims having as objects the expenses made for the technical assistance, maintenance, repairing or the renovation of the transportation mean.

The juridical acts and facts pertaining to civil navigation usually are submitted to the *lex pavilionis*[52].

About the application domain of this law, its art. 139 shows that: "The law of the ship's pavilion or the law of the ship's registration state are applied to the juridical acts and facts occurring on board, if according to their own nature, these would be submitted to the law of the place where they occurred". Art. 140 precises that: " the ship pavilion's law or the law of the registration state for aircrafts rules particularly:

a) the powers, competencies and obligations of the ship or airship's commander;

b) the employment contract of the navigating personnel, if the sides have not chosen another law;

c) the ship owner's liability in regard to the deeds and acts of the ship' commander and of the crew, and the liability of the transportation enterprise for airships;

d) the rights, real and the ones of guarantee, on the ship or airship, as well as the publicity forms concerning the acts through which such rights are constituted, are transmitted or cease". Arts. 141 and 142 of the law focus on the regulation of the maritime and stream boarding and on the

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[47] Ships and airships own a nationality expressed through their pavilion. This nationality is given by the country where they have been recorded or registered, therefore displaying the pavilion of this country. The pavilion's law represents the juridical connection, grounded upon registration, between ships or airships and the territory of a state, respectively this state's law system. A ship or airship can have only one pavilion.

[48] The organic statute's law represents the law of the social siege; it plays the same role as the pavilion's law for ships and airships: it confers a nationality to the respective transportation mean.

[49] Art. 55 of the Law nr. 105/1992.

[50] Art. 56 letters a) and b) of the Law nr. 105/1992.

[51] Arts. 139-144 of the Law nr. 105/1992.

[52] D. A. Sitaru, *Drept internațional privat*, Ed. Lumina Lex, Bucureşti, 200*1*, p. 484-487.

collision into air. Arts. 143 and 144 of the Law 105/1992, treat of other situations which attract civil liability. The pavilion's law has very extended competencies, due to the fact that the inside space of ships and airships is considered to be an extension of the national territory of their registration states. This is the reason why the pavilion's law rules a very large category of juridical problems related to ships and airships. So, the regime of ships and airships, seen as goods, is ruled by the *lex pavilionis*. Therefore, it owns competencies over: the ways of acquiring real rights over ships and airships, the ways of transmission and extinction of these rights, on the real pledges constituted over ships and airships, on their juridical regime, on the claims constituted over ships and airships.

The *lex pavilionis* also rules over the regime of the goods being aboard ships and airships which are tightly related to their normal exploitation[53] and over the forms of publicity requested, in most of law systems, for the rights constituted over ships. The pavilion law is applied whenever an act should be elaborated aboard the respective ships or airships, in regard to the exterior form of the act, if, for the validation of the respective act, the intervention of a public authority would be necessary[54]. Pavilion's law averagely rules the regime of juridical facts which happen aboard ships and airships, but also the misdemeanour produced at large into the sea and into the air space beyond. If ships or airships would be in the internal maritime space, distinction should be made upon the applicable law following the criterion of application exerted upon the outside environment or not. If the external environment should be afflicted, the law of the prejudiced territory would be applied as the *lex loci delicti commissi*. If there would be no application, the *lex pavilion* is should be the one applied[55]. The immediate application norms, or material norms, are the ones which express a special interest, either social economical or political. They are imperative and they are applied on the territory of the state which enforced them. So is avoided the possibility of application of a foreign law and the appearance of the laws' conflict. In this respect, art. 143 of the Law nr. 105/1992 is an immediate application norm stipulating: "the dispositions of Romanian law regarding the flight routes and security within the Romanian air space are applied to whatever airship, no matter of its registration state, as well as to its crew and passengers from aboard". The art. 11 of the Air Code states also that: "regulations in the domain of airships circulation within the national air space are compulsory for all civil airships, no matter of their category and nationality". The stipulations of the Gov'. O. nr. 42/1997 on naval transportation follow the same idea, insisting that, for all ships within our territorial waters, either maritime or streams, it is compulsory to respect the imperative navigation rules stated by our law.

Transportation law and public international law

The connection between transportation law and international public law is especially pointed out about questions pertaining to the juridical regime of the territory. Its statute is defined by international public law, but its connections to transportation law reside insofar transportations are performed within these spaces. There are matters like: the juridical regime of the sea at large, or the one of the air space beyond the sea at large, the juridical regime of territorial sea, of straits, maritime channels, other problems related to the territory's definition and delimiting. The state's territory represents, for public international law, the geographical space within the limits of which the state exerts its full and exclusive sovereignty; it represents, joining the population and the structure of the power's organs, one of the premises of the state's existence. The components of the states' territory are: the terrestrial space[56], the aquatic space[57] and the air space[58]. As components of

[53] This is not about the regime of the personal effects of the travelers, since they are ruled by the personal law of the traveller.

[54] The commander of the respective ship or airship represents the public authority; he has the prerogatives of a legal status delegate, and according to the Romanian law, facts of legal status may be registered aboard ships, respectively births and deaths, but also acts of civil status, like a marriage. In any case, the powers, competencies and obligations of the ship or airship's commander are stipulated by the pavilion's law.

[55] B. Predescu, *op. cit*., p. 477-481.

[56] The terrestrial space is the one containing the soil and the underground within the limits of the state frontiers, no matter if this one would be made of an one and only surface or should be split by maritime waters.

[57] The aquatic space contains the inside waters (rivers, streams, channels, lakes and inside seas). For the states owning a littoral, it contains the inside maritime waters and the territorial sea.

the territory the frontiers are also classified as: terrestrial, stream, maritime and air frontiers[59]. International sea law is a part of international public law and it is formed of the frame of international law norms - either customs or conventions - which rule the maritime space's juridical regime and the cooperation regime among states regarding the use made of these spaces and of their resources[60]. The law questions it tackles with are a lot: inside maritime waters, territorial sea, contiguous zone, continental plate, islands' regime, exclusive economical zone, sea at large, maritime straits used for international navigation, maritime channels with an international regime, submarine space's international zone, contained and semi-contained sea.

Are regarded as maritime inside waters, for the states with a littoral, the waters of harbours and road stead's[61], of bays and fjords, situated between the littoral and the base line of the territorial sea. The harbour waters are the ones sited between the shore and the line which reunites the harbour equipments the most outstanding towards the large, under the condition that the structures of these equipments should be integrated to the one and only respective harbour' system. The bays waters are delimited towards the sea at large by the line which reunites the most advanced points of a notch in the shore, this distance having not to be larger than 24 sea miles[62]. For inside maritime water the juridical regime is dominated by the principle of the full exercise of the riverside states' sovereignty[63]. This principle operates a clear separation between trading ships and state ships used for other purposes than trading (especially military ones) concerning the access and standing of foreign ships. In this regard, access conditions for trading ships into maritime inside waters are exclusively decided by the respective riverside state, while, for state ships, access to the inside maritime zones is submitted to much more restrictive requirements, such as: the term of previous notification, the limiting of the allowed time or allowed manoeuvres, sometime even the refusal of granting entrance. The only admitted exception to this rule is the case of an overwhelming force, when the harbour's access is admitted for whatever category of ships, even for military ones.

The territorial sea represents the part of the sea or ocean's waters, along the territory of a state, which lies between the base line and the outside line[64] and which is under the authority of the riverside state[65]. The territorial sea, as for its juridical regime, is submitted to the sovereignty of the riverside state, which exerts exclusive competencies upon this space. The riverside state's rights briefly synthesized, are: economical rights[66] the right of ruling navigation in its territorial sea, the right to ensure the security of this respective zone and the right of exerting jurisdictional, penal and civil competencies within its respective territorial sea. The juridical regime of territorial sea presents some particular assets, issued from the combination of this - border - space's physical and geographical features and - with - the connection of this space with the sea at large. One of the outstanding questions concerning the juridical regime of territorial sea is how to ensure *the right to a harmless transition through this zone* to foreign ships. So, to be considered harmless the transition of a ship has to fulfil the following requirements: to be a continuous and fast transition; not to cause prejudices to the juridical order in place, to peace and to the security of the riverside state: to respect the rules of international law. The riverside state may forbid to foreign ships the

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[58] The air space represents the air column situated beyond the terrestrial territory and aquatic space of the state.

[59] R. Miga-Beşteliu, *Drept internaţional. Introducere în dreptul internaţional public*, Editura All, Bucureşti, 1998, p. 212.

[60] M. Mihăilă, *Elemente de drept internaţional public şi privat*, Editura All Beck, Bucureşti, 2001, p. 66-67.

[61] These are water areas joining to the ports, partly confined through jetties, who serve for ship' sheltering or as anchors' casting places, before entering harbours or getting out at large.

[62] The historical bays, which may exceed this largeness limit, are excepted from this rule.

[63] This principle was validated through the habit's way and by the Convention and the Statute from Geneva, in 1923, concerning the harbours' international regime.

[64] The external line of the territorial sea is an imaginary line, parallel to the territorial sea's base line and sited at a distance equal to the territorial sea's width.

[65] M. Mihăilă, *op. cit*., p. 67.

[66] The exclusive right of fishing, the exploration right and the right to exploit the soil's and underground assets of the territorial sea.

access to certain security zones, but yet it is obliged to ensure their right to transit through maritime routes.

The contiguous zone represents the sea strip joined to the territorial sea. It lays beyond this formers' external line till an upmost distance of 24 sea miles at large, measured from the base lines of the territorial sea. The riverside state exerts prerogatives similar to the ones upon its territorial sea and they consist in preventing the trespassing of its laws, of its regulations on customs, tax imposing, sanitary, security ones, on navigation, immigration or fishing.

The continental plate or platform represents geologically, the natural extension of the shore, which descends, by a soft slope, under the sea waters till the continent's reaching a depth of, usually, not more than 150-200 m. Next follows the abrupt continental batter going down to the seas and oceans' great pits[67].

About the continental plate's juridical regime, the riverside state is the one which exerts upon this space: "sovereign rights of exportation of its natural resources". The riverside state has also the right of building upon and implanting on the continental plate artificial islands and other devices meant to explore or exploit its resources; such rights have to be exerted in such a way that the regime of sea at large of the waters beyond should not be infringed, as well as the freedom of the air space. The riverside state cannot prevent other states from implanting and using of submarine pipelines and cables within the perimeter of its continental plate.

The islands are natural land surfaces, surrounded by water, which remain beyond water during the high tide. If they would be inhabited, the islands should have a territorial sea, a contiguous zone, a continental plate and an exclusive economical zone. The islands, usually are parts of the territories of the various states. The exclusive economical zone represents a new institution of maritime law, which appeared due to reasons related to the necessity of exploring, exploiting and preserving resources. It is an area joining the territorial sea, submitted to specific regulations, which could not exceed beyond 200 sea miles from the base lines from which the territorial sea was measured. Into this space, the riverside state owns sovereign rights only concerning the exploration, exploitation and preserving of natural resources, either biological or non-biological. The riverside state also owns the right to implant and use of, into this zone, artificial islands, devices and equipments, to perform scientific research upon the sea and to preserve the marine environment. All the other states have there the full rights of navigating and air transit beyond it, as well as the right of settling submarine cables and pipelines. The Convention of 1984[68] greatly developed maritime law by the regulation it offered to this marine space, which is of high importance. But the precise juridical nature of this regulation is difficult to establish, since it reunites elements from the regimes of territorial sea with elements from the one of the sea at large. The sea at large is the part of the sea which is not contained by any exclusive economical zone, any states' territory, any states' maritime inside waters nor in the archipelago waters of an archipelago state. This zone is not submitted to the sovereignty of any state or group of states.

The basic rule which governs this space is the one of freedom, that is to say a space open to all states, no matter if they would be riverside states or they would own no littoral. The juridical regime of the sea at large is founded upon some principles: the principle of freedom for the sea at large (for navigation, for air transition in the air space beyond the free sea at large, freedom for fishing, etc.), the principle of preventing and repressing some infractions within the free sea at large, the right to visit and pursuit of ships within the sea at large and the right, for the states with no littoral, to access the sea at large. For this kind of sea, one of the most important aspects of its juridical regime is represented by the straits' situation. These straits are the water areas, situated between terrestrial areas, which form tight passages useful for navigation. These straits have an international juridical regime, due to the fact that they allow the connection between parts of the sea at large or of exclusive economical zones and another parts of them. The riverside states of maritime straits do own the right of adopting laws and regulations concerning the assurance of

[67] R. Miga-Beşteliu, *Introducere în dreptul internaţional public.* Ed. All, Bucureşti, 1998., p. 232-234
[68] The United Nations' Convention on the sea's law.

navigation security through the straits, the prevention and reducing of pollution for sea waters, for the forbidding of fishing into the straits, for the embankment or landing of persons or merchandise that would be contrary to the laws of the coast' states, either in customs, internal revenue, heath or immigration.

The channels of this category represent navigation paths artificially created, in order to facilitate a quick communication between certain seas and oceans. They are valuable for international navigation. A channel is a water inside flow, which belongs to the state that owns the two shores of the sea or the ocean; this until the granting of the international statute, that is to say until the channel becomes open, without discrimination, to the navigation of all states, through an international agreement or through an unilateral statement of the riverside state. This type of zone owns a specific juridical regime, regarding the surface and underground of seas and oceans, beyond the limits of the national jurisdiction of riverside states. It is yet different from the juridical regime of the sea at large. This other zone and its resources are considered as the common patrimony of humanity. Unlike for the other international spaces, where the states' access is free, in the International Zone of Submarine Spaces any activity may take place only due to an authorization issued from the International Authority of Submarine Territories-a specialized inter-governmental international organization, with its headquarters in Kingston, Jamaica, founded upon the principle of the states' sovereign equality. The confined or semi-confined sea represents a bay, a basin or a sea surrounded by many states and connected through a strait or either mostly or entirely constituted of the territorial seas the exclusive economical zones of many states. The juridical regime of semi-confined seas is influenced by the regime of their straits.

The streams' international law consists in the ensemble of juridical norms which rule the relationships among states concerning the use of non-maritime waters, especially for navigation. The dominant principle of this matter is the freedom of navigation on these streams.

The national air space of a state represents the air column situated beyond its terrestrial territory and its territorial sea. The international air space is the one beyond the sea at large and beyond the exclusive economical zone and the continental plate of some states. It is open to the air navigation for all states. The juridical regime of air navigation, bringing no prejudice to the states' sovereignty over their own air space sustains a series of rights which were adopted through international practice and are called: "air liberties". They may be classified in two categories: transit rights and traffic rights. The transit rights are: the right to pass through the territory without landing and the right of landing for non-trading reasons. The traffic rights are: the right to disembark passengers and to unload mail and merchandise, that have been embarked on the territory of the state wherefrom is the ship's nationality; the right to embark passengers, mail and merchandise destined to the territory of any other contracting state; the right to disembark passengers, mail and merchandise coming from the territory of any other contracting state; the right to embark mail and merchandise towards the territory of the state wherefrom is the ship's nationality.

So, transportation law presents connections with international public law, on the fields of territory questions and of international regimes for some spaces, in actual international law. They exist insofar transportation law makes use of the specific denominations enforced for these spaces, which are defined and precised by public international law. It also makes use of a set of rules and principles that are valid within the geographical analyzed zones. The juridical regime of these zones is established and governed by the norms of international public law. As these two law branches belong to different law spheres - public and private - the connection of them is possible especially due the feature of extra-territoriality owned by some transportation categories.

Transportation law and constitutional law

The principles governing transportation law are issued from its specific norms; yet, we may find among them some which are assumed from the Constitution, such as: the assurance of free circulation for persons and merchandises[69] or the application of the stipulations of conventions and

[69] Art. 20 of the Romanian Constitution.

agreements into which Romania is a side[70]. The right to a free circulation, stated by the Constitution, is the one which ensures the citizen's freedom of movement, under both its aspects: the free circulation on the Romanian territory and the free circulation outside of it. This principle should not be understood as providing an absolute freedom of circulation; it is governed by rules, and some conditions, established by the law, have to be fulfilled and respected. These conditions, regarding the exercising of the right to a free circulation aim, in fact, to protect some economical and social values, the fundamental rights and liberties, the normal course of our relations with other states[71]. The Romanian Constitution also sustains an actual principle: the priority of international regulations versus the internal ones. The purpose of it is, firstly, to state our modern vision on the relationship between internal law and international law and, secondly, to point out the receptiveness and adhesion of the Romanian law system to international regulations[72]. The constitutional rules issued from this principle are: the stipulations on the citizens' rights and liberties are interpreted and applied in accordance with the statements of international treaties of which Romania is a side; priority is granted to international regulations from the treaties ratified by our country versus our internal regulations, in case of misfittings between them[73].

Transportation law and administrative law

The sanctioning aspect of transportation law supposes compulsory completion references to administrative law, in the matter of contraventions.

In a transportation contract, the sides' claims might be satisfied through two possible ways: the administrative denunciation and/or the lawsuit in front of competent courts. The administrative denunciation represents an efficient way of avoiding litigations and of solving the claims raised versus the carter by the other side of the transportation contract. This phase, prior to standing into a judicial court, is particular for transportation law. Its purpose is to try for an amicable resolution of differends, a higher celerity in revaluating the claims towards the carter and, last but not least, the necessity of avoiding, for judicial courts the large number of litigations issued from claims expressed due to transportation contracts. Another particular asset, if compared to common law, is that the right to decide belongs to the carter, and that negotiations, not like in common law, do not have equal positions for the sides[74]. For some transportation contracts, like railway transportation, the administrative denunciation in order to repair the damages caused by the unfulfilled carter's obligations is even compulsory. The main effect of the administrative denunciation is to disturb the course of extinctive prescription, suspending it until the denunciation would be solved by the competent organ.

Transportation law and penal law

The sanctioning part of transportation law also supposes references to penal law regarding the infractions perpetrated by the carter the passengers and the third sides[75]. Penal sanctions are also stipulated for those who do not respect the instituted requirements for transportation's organizing and execution, as well as for the protection of its infrastructures, as a function of the deed's gravity[76]. For example, in the case of railway transportation, the services of which are increasingly requested, in accordance with economical development and social progress, the beneficiaries of this type of transportation become increasingly exigent about transportation capacity, about efficiency, comfort, quickness, safety of it. In order to realize these requirements a rigorous organization is necessary for transportation, accomplished by a personal that is compared by juridical literature[77],

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[70] Art. 148 paragraph (2) of the Romanian Revised Constitution.

[71] I. Muraru, S. Tănăsescu, *Drept constituţional şi instituţii politice*, Editura Lumina Lex, Bucureşti, 2001, p. 209.

[72] D. C. Dănişor, *Drept constitutional si institutii politice, Vol. I, Teoria* generala, Tratat, Ed. C.H. Beck, Bucuresti, 2007, p. 554

[73] Anyway, this priority aims exclusively to the regulations from the domain of human rights, but not from other domains.

[74] O. Căpăţână, Gh. Stancu, *op. cit*., p. 233.

[75] Ibidem, p. 12.

[76] A. Călin, *Dreptul transporturilor*, Ed. Evrika, Brăila, p. 31.

[77] See, to this, purpose H. Diaconescu, *Drept penal. Partea specială*, vol. II, ed. a 2-a, Editura All Beck, Bucureşti, 2005: "The railway, its workers, were sometimes seen as representing a second army".

in terms of discipline and rigorousness, to the military force. The economical and social importance of this type of transportation, the increase of the demand for it, the exigencies imposed in order to offer above all safety, request the incrimination of facts which infringe the duties regarding the transportation' safety on railway. The generic juridical object of this type of infractions is constituted by the social relationships which are formed, developed and accomplished through the existence and increase of the safety for railway transportation. It is, as well, tightly related to the adequate fulfilling of their duties by the personnel in the railways' exploitation and maintenance[78]. Therefore the necessity of a normal exploitation of the railways' infra-structure and of the full safety of transportation claims for the protection given by the penal law. It is due to these reasons that, in the sphere of penal law, all reunited under the denomination: "crimes and misdemeanours versus the circulation' safety on railroads", we will meet infractions such as: the failure to the duty requirements or their inadequate fulfilment, due to guilt, the departure from one's post unauthorized, the presence on duty in a state of ebriety, false signalisations and destructions, etc.
Transportation law interferes with penal law, and this fact can be noticed for other kinds of transportation too, not only for the railway one. It expresses this interference through the protection offered by the penal law's sanctions, given to those who do not respect the stipulations instituted in order to ensure the transportations' organization and execution in safety and under normal conditions.

Transportation law and procedural civil and penal law

The steps of contentious nature which are inherent to transportation activity are ruled, at the common law level, by civil or penal procedure law, suiting cases. Averagely, litigations in the transportation domain are ruled by norms of the Civil Procedure Code. Lawsuits issued from the transportation contract are procedural means through which the sides do realize their claims concerning the execution of the obligations generated by the transportation contract or regarding the restoration of the prejudices caused to the sides by the disrespect brought to the contract's clauses. These lawsuits may be contractual[79] or to be issued from misdemeanours[80]. So, in the matter of transportation law, we may speak of the application of the common law regime of the civil or trading lawsuits, following the case, when it comes to the trial's phases, to the evidence providing, to the participation of third sides, etc.

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[78] Ibidem, p. 249-265.
[79] The lawsuits issued from the transportation contract grounded, for instance, upon the loss or damage suffered by the transported object or the delaying of the respective transportation.
[80] The lawsuits issued from the infringement of the law, for instance the unjustified refusal of the carter to agree upon a transportation contract, the primacy granted by the carter to another forwarder for transportation, even if this latter had concluded the transportation contract after the claimant had done it.

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THE FORWARDER'S RIGHTS AND OBLIGATIONS IN THE TRADING CONTRACT OF MERCHANDISES' TRANSPORTATION

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Abstract: *The paper work regards the forwarder's rights and obligations in the trading contract of merchandises' transportation, considering the fact that a lot of specialized works have noticed and pointed out that human life is ruled directly on indirectly, by the contract. It represents a juridical instrument through which the goods' circulation is realized without which the life of a community is inconceivable*[1]*. Speaking of the importance of goods circulation and of the contract's importance within society, we may state that the transportation contract is important and useful for the ordinary human life.*

Key words: *Contract of merchandises transportation, forwarder's rights*

Preliminaries. A lot of specialized works have noticed and pointed out that human life is ruled directly on indirectly, by the contract. It represents a juridical instrument through which the goods' circulation is realized without which the life of a community is inconceivable[2]. Speaking of the importance of goods circulation and of the contract's importance within society, we may state that the transportation contract is important and useful for the ordinary human life.

It has a complex juridical physiognomy and, to explain it, we have to sketch some essential elements: the contract' sides, namely the professional carter and the forwarder, the sides' obligations namely: an execution term for the transportation, an adequate transportation mean, an itinerary to be travelled, the recipient, who is not a side of the contract, but is its beneficiary; sometimes, he may even be subject to obligations.

So, the transportation contract is a convention[3] between the professional carter and the forwarder, convention through which the carter obliges himself, in exchange of a remuneration, to transport, with an adequate transportation mean, and in a certain lapse of time, persons or merchandises. For the case of merchandise transportation, the carter obliges himself to handle the goods, at the arrival point, in the recipient's custody.

Art. 3 item 13 Trading Code frames as a trading deed the "transportation enterprises, for persons or things, on water or on dry land". So, the transportation pertains to trading and is carried out under the "enterprise" form, by this meaning an activity that follows certain rules[4] and under a professional title. The feature of being professional is essential in defining the transportation activity and for the transporter[5].

But the transportation contract might be also a civil one, when transportation is for free or when it is occasional, even remunerated, under the condition, for the latter case, to be performed, randomly, by a non-trader.

The effects of the transportation contract are represented by the totality of rights and obligations issued from the respective contract[6]. They are owned by the sides (the forwarder and the carter) but also by a third side, the recipient, who is not a side of the contract. As we have precised, the transportation contract is regarded as an exception from the principle of effects' relativity for the juridical civil act. It is necessary, in order to point them out, to analyze the rights and obligations issued from the transportation contract, following the execution stages of this type

[1] I. Dogaru (coordinator), *Drept civil. Contractele speciale*, Editura All Beck, Bucureşti, 2004, p. 1-3.
[2] I. Dogaru (coordinator), *Drept civil. Contractele speciale*, Editura All Beck, Bucureşti, 2004, p. 1-3.
[3] See the analysis of the concepts of contract and convention from *I. Dogaru* (coordinator), Drept civil. Contractele speciale, Editura All Beck, Bucureşti, 2004, p. 1-2
[4] Şt. Scurtu, *Contracte de transport de mărfuri în trafic intern şi internaţional*, Ed. Themis, Craiova, 2001, p. 7-8.
[5] The legal ground which sustains the professional title necesary for exerting the transportation activity is also assured by arts. 1476 et 1477 Civil Code
[6] Gh. Piperea, *Dreptul transporturilor*, Ed. All Beck, Bucureşti, 2003, p. 33.

of contract. It is useful to study them in the 3 important moments of the transportation: at the starting point, during the transportation of merchandises and at the point of arrival.

As we have precised, the sides of the transportation contract are *the forwarder* and *the carter*.

But the beneficiary of this contract is the recipient, though he does not participate in the conclusion of it. The forwarder is also named the transportation's *creditor*, and is the person who concludes, directly or through a representative, the transportation contract[7]. It creates for him a series of rights and obligations which have elements from the general matter of contracts, but also remarkable exceptions from it, such as: the right of a side (the forwarder, in this situation) to renounce to (call off) the contract or to modify it unilaterally.

By analyzing the forwarder's obligations chronologically, *at the starting point*, we might identify the following obligations:

a) to choose the mean of transportation to be used;

b) to cooperate at the elaboration of the transportation's document;

c) to handle to the carter the transportation's accompanying documents and to confide in his trust the merchandises;

d) to load in the merchandises, if this obligation should pertain to his side, according to the concluded contract;

e) to pay the transportation's price, if this obligation should pertain to his side.

The forwarder may perform these operations directly or through an expeditionary agent[8].

The operation of choosing the mean of transportation. This operation is realized according to the nature of the transported goods[9]. The forwarder has to verify the transportation mean provided by the carter to see that the vehicle really is adequate for the type of merchandise he intends to transport and to see if the vehicle fulfils its (appearant) functioning requirements[10]. If malfunctions are spotted at the respective transportation mean, the forwarder has to bring them to the carter's attention and to make the appropriate mention in the transportation's document, because if the carter should keep using of the same vehicle, his liability would be engaged in this respect[11].

The forwarder's participation in the elaboration of the transportation's document. This involvement is very important, because the forwarder' statements will constitute the contents of the way bill regarding: the merchandises' type (their quantity and quality, their weight and value, the indication of the itinerary and of the recipient).

The forwarder is liable for the correctness of the statements he makes in the transportation document[12].

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[7] He may be the owner of the goods that are going to be transported or a detainer only. The forwarder may conclude personally the transportation contract or through his proxy or mercantile agent. When the transportation contract is concluded through a proxy, the juridical relationships are established directly between the forwarder-mandant and the carter; when the transportation contract is concluded through a forwarder's mercantile agent, since the contract is concluded nominally by the agent (though on behalf of the forwarder), the juridical relationships are established between the carter and the agent.

[8] The expeditionary, also designated as "mercantile dispatcher", or "dispatching house", is a trader, authorized to carry out such an activity by the Ministry of Transportations. Therefore its activity is carried out under the from of an "enterprise", under its own name and for the purpose of obtaining profit. The operation of merchandise dispatching may as well be exerted as an accessory activity by the carter, but the actual trend, especially in the developed countries, is to separate the two activities: the transportation-as the main one from the dispatching which is accessory to the former.

[9] For the transportation of living animals, requiring appropriate conditions, the used transportation means will be duly specialized; for the carrying of perishables, specific transportation means will be used; for oil, tank trucks or tank waggons, etc.

[10] For example, if the closing systems are functional

[11] O. Căpăţînă, *Dreptul transporturilor*. Partea generală, Ed. Lumina Lex, Bucureşti, p. 78-80

[12] If he declared that he was transporting a lower quality merchandise, though the real quality was higher, more valuable, in case of loss or damaging of the goods, the indemnifications received will be in conformity with the previously done statements. The declaration of a type of transported goods, though in reality what was transported were other types of merchandises, of higher values, for the purpose of obtaining a lower price for transportation, will also lead to indemnification according to the statements made in the transportation's document.

The entrusting of documents. Art. 416 Trading Code stipulates that: "the forwarder is due to entrust to the carter the custom papers or whatever ones might be needed; he is liable for their contents and due regularity".

If the documents should not be exact, the damages suffered by the carter or he would have to receive for this reason would be assumed by the forwarder, unless the cases when the carter's guilt should be attested[13].

At international transportations, the obligation to fill in the custom documents accompanying the transportation's document might pertain as well to the forwarder or the recipient. This is why the doctrine[14] has stated that the dispositions of art 416 T. C. are not complete, as they impose this obligation to the forwarder only.

The loading in of the merchandises. It is the sides who decide to the charge of whom will be the obligation to load in the merchandise into the transportation mean and how will be divided, between carter and forwarder, the obligations regarding accessorily the loading of merchandises into it.

Usually in practice, the charge of installing the merchandises within the transportation vehicle pertains to the forwarder[15]. But the carter is the one who watches over the loading up manoeuvres and for the respect of the technical loading norms, which he is obliged to elaborate and to provide to the forwarder[16]. The end of this operation coincides with the next step, namely the one of applying the seals over the closing system of the transportation means.

The sides also establish, while performing these operations, how long the loading should take, if it is done by the forwarder.

It there is nothing established about it, the local customs would be applied, or either the carter's usual regulations.

If they should lack, the reasonable term for performing this type of operation would be estimated by the court[17].

If the loading time should be exceeded, the sanction would be the payment, by the forwarder, of some delay penalties, keeping account of the carter's non-attended gain, missed due to the unexpected stillness of the transportation mean.

The payment of the price. Usually, the obligation to pay the transportation's price is the forwarder's. As an exception, it could be charged to the recipient through the sent payment clause, which has to be expressed accepted both by the carter and the recipient[18].

The moment of accomplishing the payment is, generally the one of handling over the merchandises. If the payment should not be done properly, the carter would be entitled to suspend the effective transportation[19].

The transportation price is formed in respect to the offer and the demand existing on the market and suiting a series of elements like: the nature of the goods to be transported, the distance to be crossed, etc.

The transportation's price is not seen as a validity element for the contract, so its lack does not affect it. Added to the effective price of the transportation, there are other types of expenses, required by the carter: the accessory expenses, issued from the activities performed by the carter and related to the transportation, and the anticipated expenses (provisional), that is to say the commission, if the principal transporter would ensure the displacement by calling in, for a part of the road, a transportation commissioned agent. So, the transportation's price might be paid either by

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[13] E. Cristoforeanu*, Despre contractul de transport*, Cartea I, Tipografia Curierul Judiciar, Bucureşti, p. 143.

[14] Şt. Scurtu*, Contracte de transport de mărfuri în trafic intern şi internaţional*, Ed. Themis, Craiova, 2001, p. 53-54.

[15] For example, in railway transportation, in most of cases the forwarder delivers to the carter the respective waggon, already loaded in and sealed.

[16] On the occasion of the loading in operations, some specific technical activities are realized: wedging, levelling, ropes' tying of merchandises, if necessary, wrapping up, stapling, etc.

[17] O. Căpăţînă, *Dreptul transporturilor*. Partea generală, Ed. Lumina Lex, Bucureşti, p. 77.

[18] Gh. Piperea, op. cit., p. 36.

[19] According to the rule *exceptio non adimpleti contractus.*

the forwarder or the recipient. It is worthy to mention that it is possible, for the forwarder, to temporarily pay the price at the forwarding point, and next the carter should assume the obligation of recovering the price from the recipient at the moment of handling the merchandises, The sum recovered this way will be remitted to the forwarder and the procedure is called cash on delivery.
The guarantee. Anyway, in order to guarantee the payment of the transportation's price, arts. 437-438 of the Trading Code grant to the carter a *reservation right* on the merchandise and a *privilege right* upon the price obtained from the sale of transported merchandise in regard to other creditors of the forwarder.

If the price should be paid by the recipient, the clause inserted to the transportation contract would have the juridical nature of a delegation of payment. It should not relieve the forwarder of from the obligation of paying the price but should create, for the carter, the obligation requesting the price of the transportation from the recipient.

If this one should adhere to the contract and should pay the transportation's price, the forwarder would by, consequently, relieved from this obligation.
If the recipient should not adhere to the contract, the transporter would not be entitled to sue the recipient, in order to oblige him to pay transportation's price, but would by entitled to retain the merchandise till the price is paid, to sue the forwarder or to coarsely sell the merchandise in order to realize his claim[20].

During the transportation, the forwarder, being no longer in possession of the goods, in principle, is no more held by obligations. It is the carter who possesses the goods then and he is the one who ought to fulfil the main obligation within the transportation contract, the one to displace the goods to their destination.

Yet, as an exception from the general situation, the forwarder might have the obligation to accompany the merchandise or to designate companions for it, for the displacement's duration[21], in the case of cargos which require special cares to be provided[22]. When it should be left to the appreciation of the forwarder or of the recipient the escort would be optional, but it would be compulsory when the law expressed states that merchandises have to be accompanied during transportation.

In this latter situation - the legal obligation, related to merchandises, of being escorted, during transportation, by the forwarder or by an employee of his - the fact that the carter does accept to perform the transportation with no escort signifies that the carter does assume the liability for the goods' loss or damaging and, consequently, that he does accept to pay the possible indemnifications.

At their destination, the merchandises will be delivered by the carter to the recipient. If the recipient might not be identified by the carter, the forwarder should to be notified about that.
In the case of an unidentified recipient, the carter is not allowed to send back the goods at the starting point without the forwarder's expressed acknowledgement, because this new displacement would cause to the forwarder new expenses that he is not obliged to cover unless he had consented to them.

The T. C. stipulates that, when the recipient could not be identified by the carter on the basis of data provided in the way bill, the carter ought to address to the competent judicial instance and to request for the storage authorization regarding the transported goods, in warehouses or general storehouses, on the recipient's expenditure, so that the transportation mean might be released from duty.

If he should think it necessary, the carter could also request to the juridical court the verification of the goods' general shape at that moment.

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[20] Șt. Scurtu, op. cit., p. 42-45.
[21] For instance, at the transportation of animals alive or of products which could not be delivered for transportation through weighing, piece by piece (one by one) or by volume units.
[22] O. Căpățînă, op. cit., p. 95.

To this purpose, the art. 438 par. (1) T. C. stipulates that: "If the recipient should not be found, or if a disagreement should appear about the receipt of the transported things, the president of the respective tribunal, or the district judge, may order these things to be deposited or placed under distrait. He may also order the verification of the shape in which these things are, and then order their sale purchase till the amount owed to the carter should be fulfilled" Yet, trading habits have modified by correction the stipulations of art. 438 par. (1) T. C., in the sense that the carter becomes obliged to, firstly, bring to the forwarder's knowledge the difficulties occurring at destination, so that the latter could provide him new data, enabling the recipient's identification.
The procedure established by art. 438 par. (1) T. C. could be followed by the carter only if he should have no way how to notify the situation to the forwarder, or if this latter should not respond to the notification within a reasonable time[23].

The forwarder's right to call off the transportation contract or to modify its stipulations

Rules of civil law in the contract's matter. Art. 969 Civil Code states: "The legally concluded conventions have the power of a law among the contracting sides". So, the compulsory force of the contract derives from (issues from) the "power of law" which the law itself recognizes to the contract, in regard to the relationships among the sides. From this value, recognized to the contract, are issued two important rules that are valid for the domain of contracts: the contracts' irrevocability and the principle of relativity for the contract's effects[24].

The contracts' irrevocability signifies that a contract might be revoked only through the mutual agreement of the sides: *mutuus consensus, mutuus dissensus*[25].

The rule of the contracts' irrevocability

The rule of the contracts' irrevocability does express the idea that a contract could only be revoked through the sides' agreement.

This is the common rule. As an exception from it, the contract could be cancelled by the will of only one side of the contract, but only for the causes that are authorized by the law[26].

As we have previously precised, the contract is the sides' agreement of wills, intervened with the purpose of producing juridical effects, that is to say to give birth to, modify, transmit or extinguish juridical relationships. Right from its definition, it results that it is concluded through the consensus of the sides' wills – *mutuus consensus* – and it is natural that it could be undone the same way – *mutuus disensus* – in other words again, with the common mutual agreement of the sides[27].

The contract could not be revoked by the will of an unique side, unless into the contract's contents was previously inserted a cause of denial according to which the sides – both or only one of them – could untie themselves from the contract, by paying an indemnity to the other side. In this

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[23] *E. Cristoforeanu*, op. cit., p. 189-190; *O. Căpăţînă*, op. cit., p. 120.

[24] According to art. 973 Civil Code: "conventions are effective only among the contracting sides". Thus the contract produces its effects only inside the contract's circle, meaning only among the sides who concluded it. The compulsory power of the contract involves other persons as well, like the sides' cause-holders, the contract being opposable to these latters.

[25] I. Dogaru, T. Sâmbrian, P. Drăghici, A. Oroveanu-Hanţiu, S. Ionescu*, Drept civil român. Teoria generală a obligaţiilor, vol. III, Ed. Europa, Craiova, 1997, p. 121-123.*

[26] The regulations concerning the transportation contract, as they figure in the Trading Code, have enforced a derogation from the principle established by the art. 969 par. (2) Civil Code. The forwarder is therefore, authorized to call off the contract or to modify it unilaterally, but then assuming the obligation to pay to the carter the expenses done and the direct and immediate damages resulting from the execution of the forwarder's dispositions. In this respect, art. 421 par (1) Trading Code stipulates that: "the forwarder is entitled to suspend the transportation and to request the restitution of the transported goods, or their delivery to someone else than the person indicated into the way bill, or either to dispose *how he should think appropriate*, but then he is due to pay to the carter the done expenses and the direct and immediate damages caused as the result of this counter-order's execution". We do meet derogations in the civil law too, having as ground the art. 969 par. (2) Civil Code according to which to conventions' revoking could also be done due to: "causes authorized by the law". The art. 1365 Civil Code stipulates that the sale purchase may be cancelled for not having paid the price. According to art. 1020 Civil Code, in synallagmatic contracts, the resolutory condition is always tacitly implicit for the case of one side not fulfilling its obligations, etc.

[27] *I. Dogaru, S. Cercel*, *Drept civil. Partea generală,* Editura C.H. Beck, Bucureşti, 2007, p. 158-172.

case, the contract is revoked, but, in fact, this is still done through the wills' agreement of the sides, because this option was stipulated on the occasion of the contract's conclusion, when the sides decided together about it.

But, from the rule of the contracts' irrevocability, there are some exceptions:

a) the contracts with an undetermined duration in time could, usually, be cancelled through the unilateral will of any of the sides[28] or through the will of only one of the sides[29];

b) contracts could also cease independently from the sides' will, in the circumstance where one of its essential elements would cease to exist[30];

c) in the case of contracts with a successive execution, the compulsory power should be suspended due to some circumstances that are considered as *force majeure* and should be restored at the ceasing of the respective situations;

d) the suspension of the compulsory force might intervene in some contracts if one of the sides should not fulfil its obligations[31]

Relativity of the contracts' effects

According to art. 973 Civil Code "conventions do have effects only among the contracting sides". The contract produces its effects only within the contract's circle that is to say among the sides who have agreed upon it.

But the compulsory power of the contract concerns as well other persons: the contract is opposable to the sides' cause holders. It is in this respect that we have to look at the "law power" of the contract towards the sides' cause holders and we have to elucidate their connection with the contract[32].

A side in the contract is the author of an expression of will at its conclusion. If a person would be deprived of her exercise capacity, the expression of her will should be performed through her legal representative – a parent or a tutor.

By third sides we mean the persons who are completely stranger to the contract (*penitus extranei*). As completely strangers to the contract, as a principle, to third sides the contract brings no benefit, but yet no prejudice: *res inter alios acta aliis neque nocere neque prodesse potest*. In other words, the contract is not opposable to third sides. As an exception from this rule there are cases when third sides could not afford to ignore the contract; further more, there are cases when third sides could not be considered as strangers to the contract.

So, if the contract should concern real rights, which are absolute rights, due to their feature of being opposable *erga omnes*, this would mean that, if all the others should respect these rights then, implicitly, the respective contract would be respected.

This way, the third sides become obliged to respect even the debt claims of the sides. To impeach the execution of these rights signifies to be liable for the possible prejudices caused to the sides.

In the cases of the *porte-fort* convention and of the stipulation for another, third sides are considered not to be strangers from the contract[33].

In the matter of the transportation contract

The Trading Code derogates from the principle instituted by art. 969 Civil Code par. (2), and grants to the forwarder the right to call off the contract or to modify it unilaterally. But this involves the obligation to pay to the carter the expenses done and the direct and immediate damages that would result from the execution of his given dispositions.

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[28] For example, the mandate contract

[29] For example, the deposit contract.

[30] For example, when the contract is concluded *intuitu personae* and one of the sides has died, the contract does lawfully cease.

[31] For example in the insurance contracts if the obliged side should not pay the ensured amounts, the insurance contract would be lawfully suspended.

[32] *I. Dogaru, S. Cercel*, op. cit., p. 158-172.

[33] *I. Dogaru, T. Sâmbrian, P. Drăghici, A. Oroveanu-Hanţiu, S. Ionescu*, op. cit., p. 121-123.

So, according to art. 421 par. (1) Trading Code: "the forwarder has the right to suspend the transportation and to ask for the restitution of the transported goods, or their delivery to another person than the one mentioned in the way bill, or to dispose as he would think convenient, but he is due to pay to the carter the expenses this one had to do and the direct and immediate damages resulting from the execution of this counter – order".

Ultimately, the forwarder is granted with: the right to call off the contract[34] and the right to modify certain clauses of the transportation contract[35].

The reasons for which the forwarder has been granted with this right are economical and juridical: through the enforcement of this right, the forwarder's interests are better satisfied, since he may change the destination, directing the merchandise towards a more profitable market, or may have the interest of stopping the transportation, because the recipient might be dead or bankrupt before the merchandise reaches its destination; if the merchandise should happen to be alienated during transportation, the purchaser, subrogating into all the seller's rights, might have the interest of changing the destination of the merchandise[36].

The juridical act through which the forwarder modifies, unilaterally, the transportation contract is called a *counter-order*. The forwarder is the one who ought inform the carter about his intention of calling off the transportation contract or of modifying it.

The Trading Code does not stipulate a precise form for the counter order's validity[37]. But practice has instituted the use of elaborating a written document, because this fact would be an advantage in regard of probation.

If the transportation's document would be a negotiable title (a bearer bond or a promissory note), the forwarder who has called off the contract or who has modified it is obliged to handle back to the carter the respective written document in order to avoid a possible ulterior transmission of it, which would enable a third person to claim the respective goods from the carter.
According to art. 421 par. (3) Trading Code "if the way bill should be a bearer bond or a promissory note, the right stated in the first part of this article belongs to whom possesses the copy of the way bill that was undersigned by the carter. When receiving the counter-order, the carter is entitled to demand the restitution of the respective copy or, if the destination of the transportable goods should change, to pretend for another way bill".

The orders given by the forwarder are compulsory for the carter, the latter having no possibility to refuse the execution of the counter-order, unless in exceptional situations, namely when its execution would cause troubles in the good functioning of his service.

The correlative obligation exists too: the forwarder is obliged to pay to the carter the done expenses and the direct and immediate damages caused, in other words, to integrally restore the prejudice suffered by the carter due to the execution of the counter-order given by the forwarder.

In the case when the way bill is a promissory note or a bearer bond, the law stipulates that whom transmits the counter-order is obliged to return to the carter, on his demand, the elaborated written document, in order to prevent an ulterior fraudulous transmission of it by the forwarder to a third person who could raise claims from the carter. If by the counter-order the destination initially established should be changed, the carter may require the elaboration of a new transportation document.

If the prime forwarder has previously alienated the way bill and, consequently, he no more owns the right to emit counter orders[38] the counter-order's execution by the carter without requesting the restitution of the transportation document should lead to the engagement of the carter's liability in regard to the recipient or to the gyratory.

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[34] This cancellation might occur either before the contract's execution has started or during the transportation, that is to say after a partial execution of the contract.
[35] For example, the forwarder's right to designate someone else as recipient.
[36] *Şt. Scurtu*, op. cit., p. 78.
[37] Neither for the validity requirement of the transportation contract, a precise form does not exist.
[38] *Şt. Scurtu*, op. cit., p. 58.

If the way bill should be a nominative title, the law does not impose to the carter to request the restitution of the way bill by the forwarder in order to execute the given counter-order because, in this situation it is the forwarder only who could claim the merchandise, until its arrival to the recipient[39].

The forwarder's right to cancel the contract when the transportation would be excessively delayed

If the transportation would be excessively delayed, the carter is obliged to notify this fact to the forwarder. Art. 420 Trading Code precises: "If, due to an unexpected circumstance or to the *force majeure*, the transportation should be impeached or excessively delayed, the carter would compulsorily notify the forwarder about that on the spot; this latter has the option to cancel the contract, paying only the expenses done by the carter and, if the impeachment should occur during transportation, the carter would still be entitled to his fee, proportionally with the distance crossed. In both cases, the copy of the way bill, as either a bearer bond or a promissory note, undersigned by the carter, would be returned to him".

The Trading Code does not precise the moment when the carter ought notify the forwarder, so it is considered that the carter has this latitude left by the existing customary use. If the transportation could no more be performed, the contract is cancelled, because there is no more interest to maintain a contract which is impossible to be executed.

If the transportation could be executed, but with an "excessive" delay, at the moment he receives the carter's note, the forwarder has two possibilities: either to maintain the contract, accepting its postponed execution, or to declare its cancellation through the unilateral expression of his will.

If the carter could continue the transportation following a different route, with the same expenses and execution term for the contract, he should become obliged to choose this new road and to continue the transportation. If the initial route would require new terms for execution or increased expenses, the carter ought to ask for the forwarder's agreement in order to make the transportation on another itinerary[40].

At the contract's annulment due to a *force majeure* or to an unexpected situation, the carter is entitled to demand from the forwarder all expenses caused by the transportation's execution. If transportation was partially accomplished, the carter may require its payment in proportion with the road that was fulfilled.

If there is no sides' agreement about the price that the forwarder has to pay to the carter for covering the expenses done for the transport's preparation and, eventually, for the attended portion of the way, it is the court of law which will establish the sum's amount.

The Trading Code rules, by two articles, the forwarder's right to decide upon the fate of the misfitting transportation: arts. 420 and 421.

Though, apparently, the two articles deal with the same juridical situation, between them exists an important difference, concerning the amount of the forwarder ought to grant to the carter.

Art. 421 Trading Code stipulates that, in case he should unilaterally modify the transportation contract, the forwarder would be obliged to pay to the carter the expenses done related to transportation and all the direct and immediate damages[41] issued from the counter-order's execution.

Art. 420 Trading Code precises that the forwarder who cancels the contract due to the transportation's impeachment or delay coming from a fortuitous circumstance or from a *force majeure* is obliged to reimburse the expenses made by the carter for the execution of the contract, when the delay happens before the start of the transportation.

[39] Yet, the restitution of the way bill is advisable, as a precaution taken by the carter, to avoid possible frauds.
[40] *Şt. Scurtu*, op. cit., p. 54.
[41] Predictable

When the impeachment occurs during transportation, the forwarder will also pay the expenses done for the partial execution of the contract, meaning a part of the price that would be proportional to the attended distance.

We also remark that the stipulations of art. 420 Trading Code do constitute an exception, favourable to the carter, from the general principles of law concerning the contractual risks for results' producing obligations. The general principles of law, in the case of results' producing obligations, state that the contract's risks are at the charge of the debtor who could no more fulfil his results' producing obligation.

Thus he could no more require from the other side of the contract the respect of the correlative obligation, and this latter, if the non-execution would be due a fortuitous case, should obtain no indemnifications even if he might have been prejudiced.

To apply these principles to the transportation contract would mean that the forwarder, as the creditor of the deed that has become impossible to execute due to *force majeure*, should suffer the respective damages, without being able to pretend from the carter the transportation of the goods at their destination, but should also not owe to this latter the payment of the price.

As a debtor of the obligation which has become impossible to execute, the carter does assume the risks, in the sense that he looses the equivalent value to which he would have been entitled if the merchandise should have reached its destination.

Art. 420 Trading Code brings to this principle some "equitable corrections"[42]. It precises the forwarder's obligations in case of annulment of the contract due to a fortuitous cause[43] "the carter is still entitled to the payment of the carrying in proportion of the attended distance".

When the recipient manifests his will of adhesion to the transportation contract, the forwarder's right of disposition ceases[44]. The fact that the carter requests the handling of merchandises and of the transportation's document does mean that the recipient has expressed his will of adhesion to the transportation contract.

The recipient may forward his request either when the merchandise has effectively reached its destination or at the moment when it should have reached it. If the forwarder would send to the recipient the duplicate of the way bill, at the moment when the recipient receives it, the forwarder's right of disposition should cease. From the moment when the recipient adheres to the transportation contract on, he may exert all the rights issued form this contract, as well as to sue for indemnifications, under the condition that he should have to execute all the obligations foreseen into the way bill[45].

If the recipient would not join the contract, the right issued from the transportation contract should keep belonging to the forwarder, even if the merchandise would have reached its destination.

Yet, there is a period of time when the owner of the right of disposition over the merchandise is not certain. It lies between the moment when the goods effectively arrive to their destination and the one when the recipient effectively accepts the contract. During this period, the goods remain at the forwarder's disposition, or either the first between the forwarder and the recipient who would give an indication to the carter should gain priority[46].

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FACTORS INFLUENCING THE OCCURRENCE OF CRIMINAL RECIVIDISM

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Abstract: *The presence of a relatively large segment of recidivist prison population, characterized by the repetition of criminal acts with negative consequences upon the entire spectrum of social life (for victims, inmates and the society at large) imperatively requires a scientific approach to factors that jointly contribute to the perpetuation of such undesirable situations for society. This paper aims to identify the social factors that contribute to the existence of criminal recidivism, in order to emphasize the mechanisms of the most severe form of legal non-responsibility.*

Key words*: recidivism, social exclusion, prison, social re-integration*

Introduction

Criminal liability is reflected by the extent to which the citizens of each state accept and respect penal juridical norms. The most dangerous form of penal juridical non-responsibility is the recurrence of criminal acts and is revealed by the dimensions of phenomena such as criminal recidivism. The task of preventing repetitive anti-social forms of behaviour must be a constant concern for the society at large and particularly for specialists activating within the social and the legal domains. In this respect, the prevention and the treatment of this type of delinquency should represent priorities for actions associated with the social and the penal activities of the state.

The phenomenon of criminal recidivism is subordinated to the field of deviance from the norms and values of society, being simply one of its specific manifestations. Criminal infractionality, as well as criminal deviance, might be analysed starting from a multitude of theories that, over time, have elaborated casual frameworks; however this paper will focus upon the possible relationship between the forms of social exclusion and the infractional recidive, as the former might generate the latter.

The social importance of this subject lies in the need to analyze and understand the dynamics of recidivism as a phenomenon that: endangers the social order, since recidivists repeatedly transgress juridical norms; contributes to the proliferation of negative emotions such as fear and insecurity among people, given the antisocial potential of recidivists; involves significant costs allocated to the prison system; presents a high incidence among inmates.

The level of common knowledge is insufficient for addressing a phenomenon that seriously threatens the social order and consequently a scientific approach, rigorous especially from a theoretical and methodological point of view, is required, since the phenomenon referred to above is characterized by complexity, diversity and specificity. It is worth mentioning here that the explanatory paradigms characterizing the sociology of deviance (the theory of social disorganization, the theory of anomie, the theory of cultural transmission, the functionalist conception, the theory of social control, the paradigm of conflict and the labelling theory) have searched for and elaborated answers to delinquency causes, but have not approached separately the phenomenology of criminal relapse, which has a longitudinal dimension in the life of criminals.

The scientific approach to the theme is relevant for the following reasons: it refers to a segment of the population that is difficult to investigate; the social problems confronted by liberated inmates have not been the object of either scientific research or of special measures of social inclusion on the part of national authorities.

The present survey aims to decipher the social factors that influence criminal relapse. In order to investigate this field, it is necessary to understand the social characteristics of this segment of imprisoned population and the situations the previous inmates have confronted during the post-release period. Once such information has been gathered, the mechanisms that determine criminal relapse can be identified. The results of a scientific study focusing upon the criminal relapse phenomenon could be turned to good account in the implementation of strategies for the social recovery of inmates, taking into consideration the fact that the measures for social inclusion, promoted at various levels, are not very efficient.

Research question

The research question is: why do some of the previous inmates relapse into crime?

Conceptual framework

The theoretical construct below will be directed towards meeting the demand of determining "the increase of our collective capacities to build verifiable scientific explanations" for some aspects related to the investigated domain.[1]

The preparation of the research requires the definition of dependent and independent variables, between which a relation of interdependence might be established. The term variable refers to indicating the property of social phenomena and processes to change and have different values at different moments in time, or from one community to another, regardless of the nature of the respective phenomenon. [2] In the present research, the dependent variable is the phenomenon of criminal relapse, and the interdependent variable is represented by social exclusion. The definition of these two variables should be followed by the identification of their dimensions and indicators, with the view of observing the different forms in which the phenomenon under investigation manifests itself. This process of conceptual operationalization is meant to direct us towards observable and measurable "signs", which might help in characterizing social units and their qualities.[3]

Criminal relapse

The concept of criminal relapse is a legal rather than a sociological one.

In common language (Webster's dictionary), criminal relapse is defined as the tendency to revert to a previous criminal behavioural pattern.

From the scientific point of view, there are several ways of defining criminal relapse.

Thus, criminal relapse can be associated with: "the re-imprisonment and isolation of convicts by means of penal sanctions" [4]a new arresting of former inmates, after the period of their imprisonment ended [5]a delinquent act that is subsequent to a prosecuted offence[6]; a return to prison as a result of violating the post-detention supervision and/or a new conviction [7]either a re-arrest or the revocation of supervision.[8]

We shall assume that criminal relapse refers to the juridical situation of a person who is imprisoned for having committed a new criminal act, which entails the state of relapse.

Social exclusion

The concept of social exclusion is more comprehensive than that of poverty since it refers not only to the absence of material means but also to the impossibility to be included within different social, economic, political and cultural "networks". Besides the deficit of material means, social exclusion also involves a deficit of normal participation to everyday life and different social activities. Another definition of social exclusion is that of "incapacity/failure to integrate a person or a group into one or more (sub)systems: the democratic and the legal system, implying civic

[1] King, Keohane, Verba, 2000, p. 28
[2] Mărginean, p. 170
[3] Chelcea and al., p.77
[4] Broadhurst et al. 1998, p. 85
[5] Kim et al., 2007, p. 437
[6] (Schwalbe et al. 2007, p. 351
[7] Pettus & Severson, 2006, p.210
[8] Kubiak, 2004, p.427

integration; the job market, which promotes the economic integration; the system of the welfare state, which promotes what can be defined as social integration; the system of the family and of the community, which promotes the interpersonal integration."[9]

The following sections will attempt to achieve an optimal operationalization of this concept, starting from an understanding of the particularity of this phenomenon that is as accurate as possible, but constantly relating it to the objectives of this research. We consider the following dimensions as being relevant for the concept of social exclusion, in relation to the phenomenon of criminal relapse: the occupational one (labour market integration), locative, familial, interpersonal (relations with both individuals and representatives of institutions). The literature in the field also refers to two other dimensions: the educational and, respectively, the sanitary one, but we believe that these are not significant for the present research as the subjects are often too old to be included in any educational system, and the exclusion from health is not significant in relation to the recurrence of the criminal behaviour.

The research

The current research is characterized by the following elements: it was a practical study, based upon the interaction with the investigated subjects; the research method was the sociological survey; the questionnaire was used as method for gathering data; the analyses were of the qualitative type; most data referred to was of the transversal type; the results aimed at were preponderantly exploratory; the level of representativeness was high for the prison space of Oradea Penitentiary and relatively low for the entire imprisoned population in Romania. The method of information gathering was the questionnaire. These choice had in view the adaptation of the research instrument to the specific of the research, taking into account the advantages provided by the questionnaire in relation to other techniques: limited time and material costs, eliminating the disturbing influence of the operator, eliminating the registration and interpretation mistakes of the operator, ensuring anonymity, allowing subjects a time to think before formulating the answers and a higher possibility of representativeness.[10]

The analysis unit was made up of 176 persons, namely a group of relapsed inmates who were imprisoned in Oradea Penitentiary at 25th of August 2009. The registration unit was the person included in this group of inmates, who answered the questionnaire. For different reasons (refusal, psychic problems, transfer), only 153 questionnaires could be used. Before being asked to answer the questionnaire, the investigated inmates were presented with the reasons for their inclusion in the research and with a brief description of the research; they were informed about anonymity and the confidentiality of data, as well as about the coordinates to be followed in the completion of the questionnaires. The questionnaires were self-administered for the inmates who had a high schooling level; the ones who encountered difficulties in reading, writing or understanding were assisted by a survey operator. The 153 questionnaires were answered during the period 26.08.2009 – 31.08.2009. The data obtained were implemented and processed using the SPSS (Statistical Package for the Social Sciences) computer software. After finishing this process, taking into account that most scales are nominal and ordinal, we have proceeded to the stage of statistic processing, respectively to designing the frequency tables that might be useful in constructing graphics, interpreting data and eventually drawing conclusions.

Results

In terms of guilt, most inmates (75,8%) consider themselves as responsible for their state of criminal relapse, while others (15,2%) attribute their guilt to the social environment they belong to. There are relatively few subjects who attribute their guilt to their familial background, or to their educational level.

[9] Zamfir, 2007, p.240

[10] Rotariu, T., Iluţ, P., 1997, pp.60-61

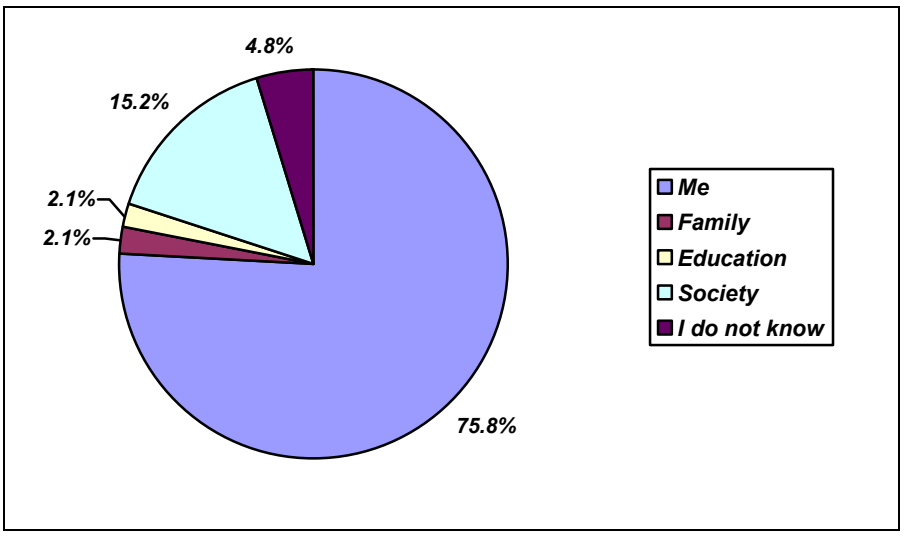

Figure 1 Evaluating the level of guilt associated with the state of criminal relapse

The difficulties encountered by inmates after their last liberation, as presented in figure 2, concern the possibility to find a job, arrange their locative situation, renew family ties, re-establish relationships with friends and the communication with state institutions. In order to facilitate the understanding of figure 2, we merged the response options "very difficult", "difficult" and "rather difficult" in the generic words "hardships", or "difficulties".

As far as the *reintegration into the labour market* is concerned, about half of the respondents (49,1%) state they have encountered difficulties in obtaining a job. This percentage can be considered quite alarming, since for most former inmates a job might ensure them licit sources of livelihood.

Regarding their *locative situation*, more than a quarter of the respondents (26,1%) said they had difficulties in solving this problem. The absence of satisfying housing, which might ensure the satisfaction of indispensable existential needs, can determine individuals resort to antisocial acts, which might help them satisfy their basic needs or ensure their return to prison, where the locative problem is solved.

In terms of *family relations*, 16,8% of the interviewed inmates said they encountered difficulties in re-making these ties. It is highly probable that this relatively low percentage might be made up of de-structured and disorganized families, characterized by alcoholism and permanent conflicting situations. Renewing family relations after the end of the imprisonment period was a rather easy process for most former inmates. Such a situation might be explained by the legal possibilities provided to inmates in order to maintain the relations with their families, namely: visits, telephone conversations, correspondence and permission to go out of prison.

Re-establishing the relations with the group of friends, relatives and different acquaintances proved difficult in 23,3% of the cases. Thus, almost a quarter of the interviewed persons encountered difficulties in renewing such relations, which might indicate a disguised form of interpersonal exclusion as a result of being labelled as a former inmate. Restoring relationships with the group of friends was generally achieved without difficulty. Sometimes such connections facilitate the re-integrative process in the community, if the respective group is not specialized in criminal activities.

Communication with the state institutions, with the view of solving different types of social problems, has been perceived as difficult by more than half of the respondents (51,3%). Such a high percentage can be explained in many ways: communication has been perceived as difficult because applicants did not obtain what they had asked for; officials lacked the communication abilities needed in interactions with such social categories (characterized by low schooling levels, low capacity of verbalization, multiple social needs); or, given their social characteristics (ex-convicts, poor persons, etc.) they were treated improperly.

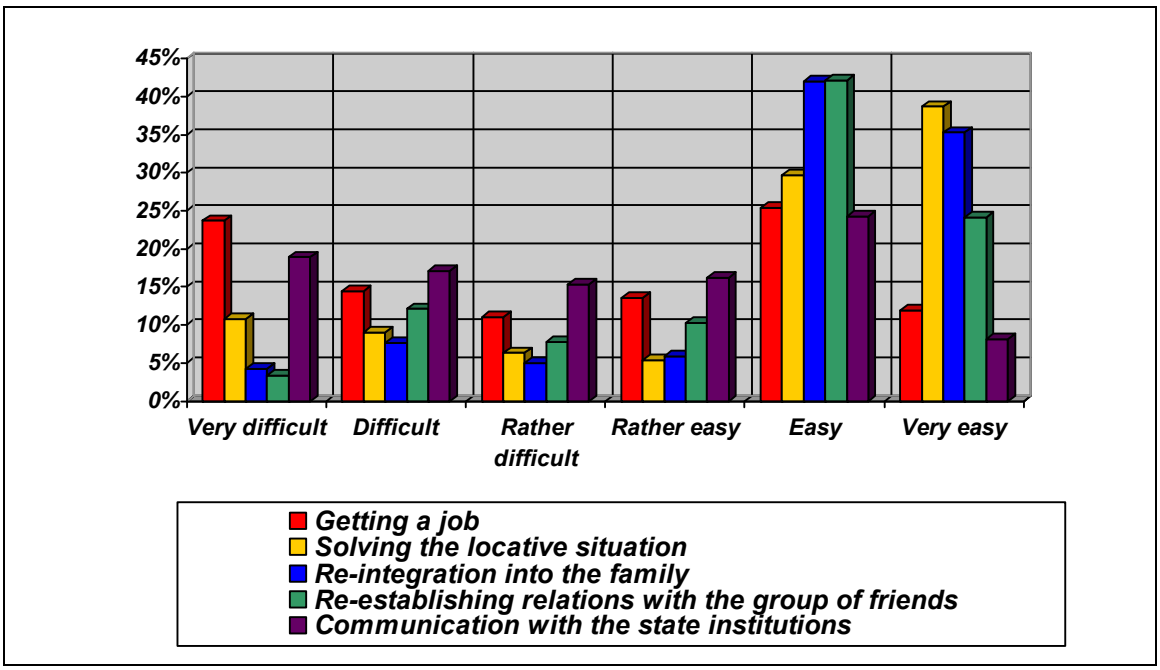

Figure 2 Perceiving the process of resuming some aspects related to social life, after liberation

In the questionnaire, the recidivist inmates were asked to indicate why they felt they had relapsed. The answers are indicated in Figure 3.

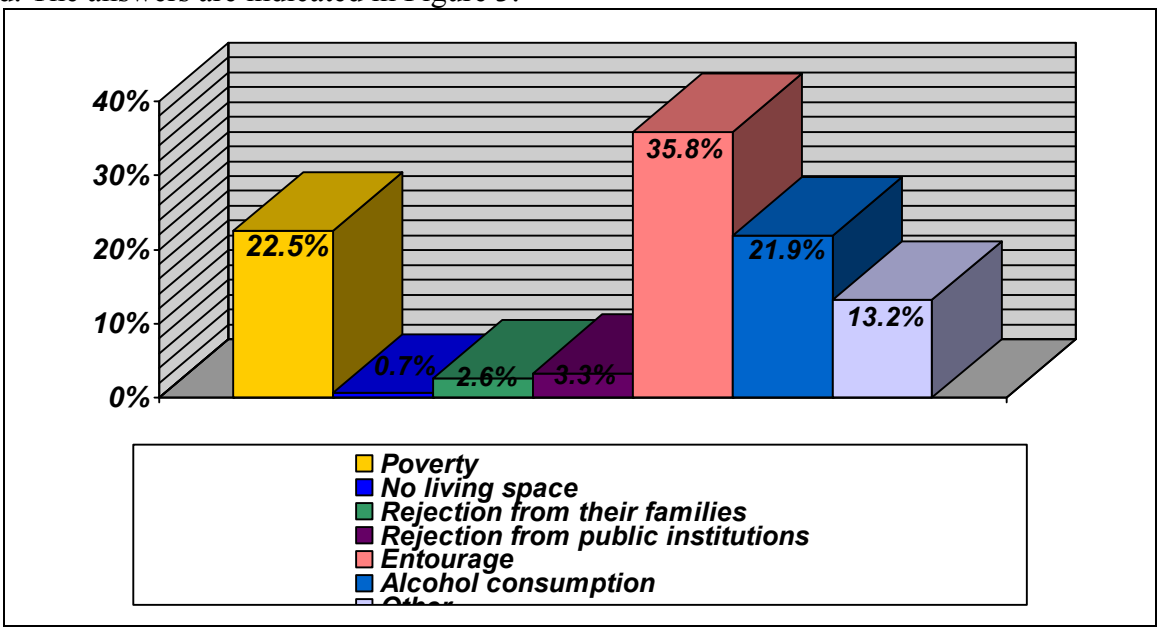

Figure 3 Opinions concerning the reasons associated with criminal relapse

The most cited reason for acquiring the state of recidivist was the *entourage*. We believe that one can identify at least two explanations for this high score (more than a third of the subjects). The first refers to the fact that the great majority of penal acts are most frequently perpetrated by more authors or co-authors. The second explanation is that most criminals, once they have been identified and prosecuted, demonstrate a strong defensive attitude during the trial, minimizing or even denying their contribution to the crime, with the aim of being charged with minimal penal sanctions. This defensive attitude often turns into a process of rejecting guilt and attributing it to others.

Poverty is considered by almost a quarter of the interviewed recidivists as the reason that had determined the criminal relapse. It is very likely that these figures might closely reflect reality if we take into consideration other characteristics of the imprisoned population, such as: structure by nationality (about one third are Roma ethnics); low schooling level (about one fifth are illiterate);

weak professional training (the massive absence of professional qualifications); lack of abilities that might facilitate their integration into the labour market; improper living conditions; very low income. The existence of such factors among families and the communities the inmates belong to determine them to trespass laws in order to satisfy basic needs for themselves or their families.

Alcohol consumption is third among the reasons for which the inmates become recidivists. Such a classification, with a percentage of 21,9%, can be largely explained by the attempt to minimize guilt, but also by associating alcohol consumption with lifestyles that characterize the environment the inmates belong to.

Another dimension of this research has sought to apprehend the intentions and the perception of some aspects of prison and post-prison life. With this purpose in mind we have asked the respondents to express their agreement or disagreement in relation to some statements. The options related to these statements are presented in Figure 4.

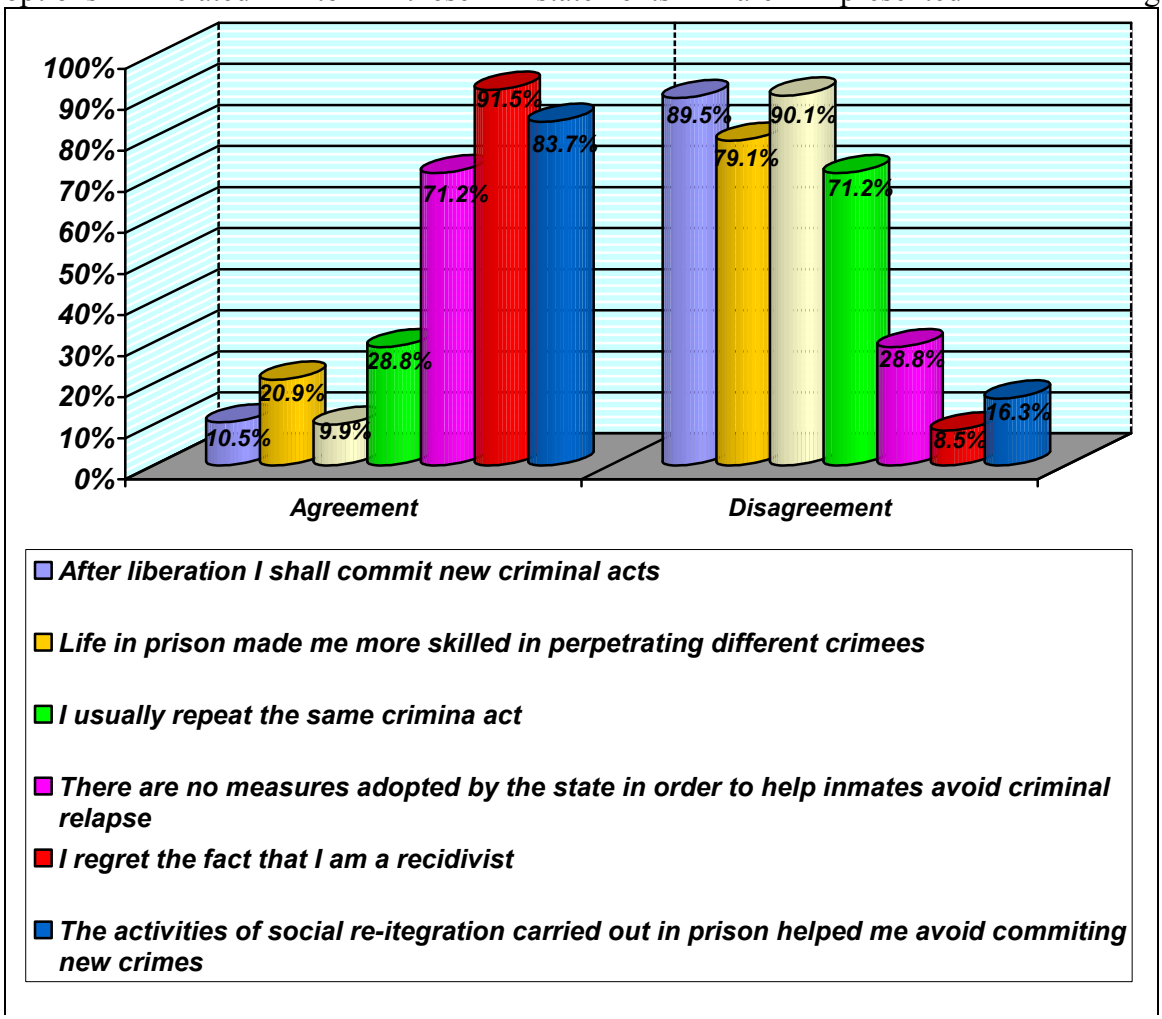

Figure 4 Opinions regarding some aspects of social penal and post-penal life

As regards the *delinquent future* of the respondents, 10,5% of them agree that they are going to commit criminal acts again. Certainly, the number of those who relapse will be much higher, as indicated by the statistical figures referring to the phenomenon of criminal relapse, which oscillate around the value of 50%. It is possible that the difference of 40% to be represented by inmates who do not intend to become recidivists, but for various reasons end up committing antisocial acts again. At the same time, the percentage of 10,5% is probably represented by what the literature in the field calls professional criminals, who are usually "trained and socialized in the direction of committing the crime".[11]

[11] Mitrofan and al., 2000, p.81

The percentage of those who admit that the detention period made them more *experimented* in delinquent techniques is rather high (20,9%). Such an undesirable situation has been explained some decades ago by the theories of the delinquent culture, according to which "deviance is the result of a splitting between goals and means and an individual can move from one way of adaptation to another".[12]

The detention conditions, which are currently rather acceptable (food, heat, rights, etc.) are in some cases beyond the possibilities that characterize the inmates' lives in freedom and for this reason 9,9% of the recidivists are indifferent with regards to the prospect of their criminal relapse. I can state here that the ones who expressed such view are largely the same individuals who said they were going to commit new criminal acts after liberation (10,5%) and therefore I believe we cannot find a correlation between the detention conditions and the occurrence of criminal relapse. According to international regulations and recommendations, reasonable detention conditions must be provided for people in general and for the inmates in particular, as they can represent an example for living a balanced and orderly life after liberation. This idea is emphasized by two fundamental principles, found among the Recommendation of the Ministers Committee from the member states of the European Council, referring to the European rules for penitentiaries (2006): "all the persons deprived of freedom shall be treated so that the human rights will be respected" and "life in penitentiaries should be as close as possible to the positive aspects of life outside prison".

Criminal versatility has been emphasized by the statement "I usually relapse with the same type of crime", to which 71,2% of the respondents did not agree. This fact indicates a certain diversification of criminal preoccupations, which might be explained either as a result of developing a certain criminal "professionalism" during prior periods of imprisonment, or as an instability of the antisocial behaviour, attributable to different causes (poverty, alcohol consumption, entourage, etc.).

The measures adopted by the state in order to prevent criminal relapse are perceived as inexistent by 71,2% of the recidivists. This percentage clearly indicates the absence of strategies and programs for the monitoring and the rehabilitation of inmates after they are liberated from prison: these former inmates must manage alone, without a minimum amount of support. The only forms of preventing criminal relapse are the forms of education and psycho-social assistance carried out in penitentiaries, but these might become inefficient if not continued after liberation, until the reinsertion of the individual in different social networks (family, work, etc.).

Understanding the *unpleasant social position* of inmates is appreciated as regrettable by most subjects (91,5%). This high score is indicative of the fact that these people partially admit the fact that they did wrong thing, and feel ashamed in the situation they find themselves; such a situation could be improved during recuperative strategies aimed at helping inmates increase their self-esteem and self-confidence, in order to return to a normal social life.

The usefulness of activities aimed at social reintegration, carried out in penitentiaries, is appreciated by 83,7% of the respondents. Such an acknowledgement of the useful character of social reinsertion activities results from the fact that lately these recuperative efforts have been adapted to the inmates' individual needs for education and psycho-social assistance (literacy, education, professional qualification, etc.), which is actually one of the objectives of the Strategy of the Romanian Penitentiary System for the period 2009-2013.

Conclusions

The great majority of recidivist inmates accept the guilt for having committed criminal acts and regret the undesirable situation that isolates them at the most undesirable extreme of the social scale.

The most important hardships encountered by former inmates when trying to adapt to the demands of normal social life (away from criminal environments) have been: communication with authorities and the possibility to have their social problems solved by the institutions of the state (51,3%); finding a job (49,1%); solving housing problems (26,1%); re-establishing relationships

[12] Ogien, 2002, p.109

with the group of friends or acquaintances (23,3%); re-establishing relationships with their families (16,8%).

The negative effect of acquiring new criminal "competences" during the period of imprisonment, through the moral contamination of inmates with elements of a criminal subculture, can also be emphasized.

For a rather narrow segment of recidivist inmates (10,5%), their social future remains the criminality area and consequently there are weak chances of social recovery in their case: most probably, they can be included in the category that the literature in the field calls "professional criminals".

The information gathered during this research indicate that inmates have different degrees of perception in relation to forms of exclusion they are faced with (institutional, occupational, locative, familial), which can further direct them towards criminal existential routes. The poor capacity of the state to manage and prevent the phenomenon of criminal relapse can also be emphasized.

The answer to the research question is that the elements that determine criminal relapse are very diverse (entourage, poverty, alcohol consumption, etc.), are facilitated by the possibility to develop an even more accentuated antisocial behaviour during the period of detention and can be related to the incapacity of public institutions to monitor and support former prisoners.

The limits of the present study derive from two sources: the lower degree of confidence in terms of information provided by inmates as compared to other categories of respondents and the absence of other research instruments, which might prove the veracity of data gathered with the help of questionnaires.

Such research should be continued and intensified in order to design recuperative strategies for a category of inmates that so far has proved that previous imprisonment periods did not determine them to give up antisocial forms of behaviour and the penal politics of the state have failed in terms of their social recovery.

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PROBATION AND ITS ROLE IN THE CRIMINAL JUSTICE SYSTEM

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Abstract: *This paper treats the crucial role that probation has in the criminal justice system, both in terms of crime reduction as a whole, and the appropriate treatment applied to criminal offenders.*

Probation represents a revalorization of the punishment because it doesn't have in view only the delinquent, but also the victim trying to restore the order existed before the crime.

The juridical promotion and regulation of probation was made step by step, under the impact of a complex of processes and changes that interfered in the sphere of law and criminal justice.

Key words: *socialization process, criminal justice system, probation, re-socialization*

Treating and preventing infractionality involves directly responsibilities at all social levels, having in view the fact that poverty, the economical and social crisis do not generate from themselves these kind of phenomena, criminality having a much more complex etiology, and it's prophylaxis presumes the cooperation of all entities that have contact with this phenomena (from state institutions to NGO's).

In this period, there appeared and structured new fundaments with the potential in favour for the infractionality phenomena.

The uncontrolled explosion of the source of information which instead of contributing to the diminution of the phenomena did nothing else but becoming motivational vehicles for the proliferation of delinquent acts.

In this context, there impose a series of socio-juridical modalities of control and diminution of the negative impact of the mentioned factors from the perspective of the sanctionary treatment, with the accent put on the alternative punishment.

An important method of reducing relapse is diversion to other penal sanction instead of the punishment with jail.

The role of the socio-economical factors must be treated with much attention when we talk about the delinquency phenomena knowing the fact that the economical basis determines the social, political, cultural, institutional structure that is why the economical situation of a stat or of a small area determines some human behaviours including criminal one. On the other side the socio-cultural factors have a predominant roll in the positive or negative socialization of people and in the end they lead them to committing crimes. As well, we can show that there is social tolerance towards the deviant behaviour, latent or manifest, with the condition that these behaviours do not affect the wellbeing of the society.[1]

The approach of delinquency on the coordinates of the normal binomial – pathologically we find it in the specialty literature[2] where the criminal behaviour is seen as a result of the psychical abnormality, or as a result of a form of perfectly normal behaviour, but it can not be compatible with the standards of normality of the cultural group or context.[3]

The social and juridical laws indicate what is fair on unfair, moral or immoral, legal or illegal, licit or illicit, etc. establishing the area in which the action or the behaviour of the individuals is permitted. Because the specifically and general features of the offences and crimes are evaluated within the penal law, there are differences from a juridical system to another,

[1] Ogien A., *Sociologia devianței,* Editura Polirom, Iaşi, 2002;
[2] Rădulescu Sorin, Banciu Dan, *Sociologia crimei şi criminalității,* Editura Şansa, Bucureşti 1996, pag. 20
[3] Idem, pag. 21

differences that are in connection with the cultural and historical traditions, of the customs and habits of each society.

On the other hand even though, apparently, the crime appears as a juridical phenomena enforce by the rules of the penal law, it is at firs a social phenomena, which is produced in the society having negative and destructive consequences for the security of individuals and groups. So, in its general juridical sense, criminality includes those violations of the penal rules through which social and normative order is protected, the laws and freedom of the individuals and social groups, the security of the fundamental institutions of the state are protected.

Defining the offences and crimes just through the criteria of the penal normative is much reduced because the evolution of the criminality phenomena is influenced by a series of socio-cultural variables.

In other words achieving the interiorization of the valuable normative system of the society in the consciousness and behaviour of each individual is the normal task of the socialization process.

As the sociologist Szczepanski[4] said, in the socialization process " the society forms the ways of behaviour, guides the satisfaction of the needs and what is called human nature, no matter the way it is defined, it is a sum of elements of the culture that have been internalized"[5]. Conceiving socialization as a process within an individual gets a determined cultural identity and at the same time, reacts to this identity, B.Bernstein considers that, in the end, "socialization has as an effect making people lonely and predictable", because within this long process "the individual becomes aware, through the different codes that he is called to fulfil, of the different principles that actuate in the society".[6]

The reform of the penal systems and the criminal justice is marked by the end of the XX-th century by the attempt to find, build and experiment new models of prevention of criminality, grounded on modalities and restorative practices. For every person, minor or adult, depriving of liberty is a distinct situation, which has great impact in his life, in the time of the detention and afterwards when he is free. In the time that the individual is in prison, with people that just like him committed crimes, the biggest difficulties are located in the relationship with other people, but also adapting to a way of life that has multiple privations.

The specialty studies[7] highlight the fact that at the minors that get for first time in prison there come multiple somatisations (they become thinner, have insomnias, cry, have pain in the inferior members). In this case, the shock of being in the penitentiary is for the minors directly proportional with the emotional damage that already existed, the sensitive ones, those that are socially and affectively immature, those that are sick are the ones that suffer more in general.

These arguments lead us to the idea that prison is in the most cases a "source of criminality" because the penitentiary must remain the last one of the applied penal sanctions.

In reality, though, there appear serious obstacles even though once with the reform of the penal sanctionatory system, the process of re-socialization reports itself also to the alternative forms of sanctioning the delinquents, mostly the youngsters and minors, which in the present become larger through their educational efficacy.

In the spectrum of alternative sanctions, with a special role in the recovery process of the offenders is the probation.

Etymologically, the term of probation becomes from "probatio" that is a Latin word and it mean a period of demonstration, or attempt of forgiveness. So, those that are convicted that showed their will to change through the established period of time, by fulfilling the conditions imposed by their probation, are forgiven and sent free from other implications of the criminal justice system.

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[4] Jan Szczepanski în Banciu Dan, Rădulescu Sorin, *Evoluţii ale delincvenţei juvenile în România*, Editura Lumina Lex, Bucureşti 2002 pag. 18

[5] idem, pag. 19

[6] Basil Bernstein în Banciu Dan, Rădulescu Sorin, *Evoluţii ale delincvenţei juvenile în România*, Editura Lumina Lex, Bucureşti 2002 pag. 18

[7] Gheorghe Florian, *Psihologie Penitenciară*, Editura Oscar Print, Bucureşti, 1996, pag.121;

Referring to the penalization of the offenders, probation is in fact a sanction, but with all these, its philosophy is based on the component of the offender individual in view of re-socialization and social reintegration. With all these, in the specialty literature appears frequently numerous incoherencies in interpreting these terms.

Each state has its own penal philosophy, the most used one can be the punitive sanction and other times counselling /assistance replaces almost integrally the punishment. The proportions in which the punishment and the assistance in the penal legislations are in the sanctionary field of penalization the offenders are being found in the modality through which the system of probation becomes efficient.

Probation represents a valorisation of the punishment, but although the accent remains put on the punishment, this is understood more brightly and is developed more complete in its content but also the victim trying in this way the restoration of the existent order before committing the offence.

At world scale, the role and functions of the incarceration, as an instrument of social control rises a controversial of great importance. So, some specialists consider that re-education in prison does not lead to a good result, but it has a dehumanized aspect on the human personality.

The work document made by the secretary of the VI-th Congress of the United Nations, referring to the prevention of crimes and treatment of the delinquents (Caracas - Venezuela, 1980) establishes that incarceration is not capable to turn better the chances that a delinquent follows the right way and the fact that the imprisonment institutions have not succeeded in reducing criminality.[8]

The existent theories in the specialty literature based on the cases found in the current practice demonstrate and sustain the inefficiency of the custodial punishment, which enforces the fact that when the antisocial facts that are committed have a reduced public danger the best solutions are the alternative sanctions.

The appearance of the alternative sanctions with the incarceration is owed to the fact that traditional penal law could not respond anymore to some principles that are much more accepted by the specialists and the ones that practitioners in the field of justice: the priority given to the reasocialization in the open area (community), involving community in the reaction towards criminality, the place and rights of the victim, as well as the delinquent, etc. As Denis van Doosselaere shows, the alternative is a measure that allows the delinquent to live in his natural life environment; it is a particular condition for maintaining him in the family.[9] It "the neutralization of the most violent ways, in the absence of the avoidance of the appeal of penal law, which represents the failure of the will of preventing some situations and some behaviours". The juridical promotion and regulation of the alternative sanctions was made gradually, under the impact of a complex of processes and mutations that came in the area of law and criminal justice.

The specialty literature gives the alternative measures some other advantages, comparatively to the incarceration and part of them are[10]: their flexibility practice, according to the seriousness of the crime and the intensity of the necessary effort, the active collaboration of the delinquent, having to do this because he wants to escape from the judgment control, or because he wants to set himself free from the feeling of culpability, because he wants to repair the damage by himself to the victim, the possibility of offering compensation on the victim and last but not least, the participation of the community in solving the criminality problem, including to modify the perception of the community towards delinquency.

In Romania, the first step in the direction of the development of this system of alternative sanctions was made by introducing probation in the justice system. This was just the beginning, it's consecration in the practice of instances was late gaining field in the direction of building a specific legislation and an adequate institutional frame that, regarding our country is still in the full process

[8] Revista de Ştiinţă Penitenciară, nr. 1-2/1990, Direcţia Generală a Penitenciarelor din Ministerul Justiţiei, pag. 31

[9] Denis van Doosselaere, *Alternative la privarea de liberate: Ce măsuri trebuie luate pentru minorii din comunitatea franceză din Belgia*, Revista Română de Sociologie, anul IX, nr. 5-6, 2003, pag. 357

[10] Dan Banciu, *Crima şi criminalitate, Repere şi abordări juris-sociologice,* Editura Lumina Lex, Bucureşti, 2005

of fundament. So, in the year 2000, the institution of probation in Romania was legislatively consecrated by adopting the Government Ordinance nr.92/2000 about the organization and function of the reintegration services of offenders and the supervision of the no custody sanctions execution, approved with some modifications in 2002, trough the law nr.129.
By the end of the year 2002 the infrastructure was developed at a national level by organizing 41 social reintegration and supervision services, near the law courts.

The process of organization and development of the probation system has gone trough some phases. The first, was an experimental one and it focused on activities of promotion for probation institution, its role, the people that benefit from using the alternative sanctions at detention, in front of the magistrates, the local authorities, public opinion and also in unfurling some specifically activities at the court, in prison and community.

In the year 2006, by promoting the law nr.275, we can talk about a new phase that included the development of the probation services. Once promoting the law nr.275/2006 referring to the punishment execution and other measures disposed by the judiciary organs through the penal process, it is mentioned that a probation counsellor must be a member of the committee for individualization the regime of custodial punishment execution.

The year 2007 marks the extinction of the personal schemes in the local services and reorganization of the system at a central level: Direction of Probation-Ministry of Justice and at the local level; 41 probation services under the authority of the Ministry of Justice trough the local courts.

Elaborating the normative frame had in view the national and international experience, as well as a series of recommendations of the Council of Europe, such as The Recommendation R (92)16 regarding the European Regulations for sanctions and communitarian measures, Recommendation R (2000)22 regarding the improvement of applying the European Regulations for sanctions and communitarian measures.

Based on the study [11] made in 2007, regarding the perception of specialists, from the point of view of those that are in the academicals field, the role of alternative sanctions applied on minors and youngster that committed crimes, is of educational order but also social following the reintegration in the society after the punishment execution and avoiding the repetition of criminal behaviour.

The role of application the alternative sanctions is cantered by the opinion of specialists from justice, in the same study, trough the social reintegration and correction the criminal behaviour of minors. Trough these kinds of punishment, the educational and re-education process are easier and more efficient, and there is much more entities that can offer sustainment for minor's rehabilitation: family, school, pedagogues, psychologists, social workers, group of friends, etc.
Regarding the replacement custodial punishment with the alternative sanction the opinions are split. On one side it is underlined the utility of the alternative measures and why they are need, because they are less serious facts for which it would be recommended. On the other hand, it is underline the role of exemplarity and of discouragement of punishment with imprisonment.

The perception of the prison officers, the specialists who work in the re-education centre, police officers and probation counsellors regarding the role of alternative sanctions, this is grouped round the concept of delinquent education, of social reintegration but also of being aware of the gravity of the committed facts. A great attention from the family but also from the teachers, counselling and sustaining for rehabilitation can become a key factor in avoiding a relapse from offenders in a way, and in forming a pro-social behaviour, on the other hand
Regarding the type of sanction that must be applied to the delinquent minor, in all groups were the same tendency: the punishment must be established taking in consideration the gravity of the committed fact, but only the penal violent facts should be sanctioned by deprivation of liberty. In

[11] Mihaela Tomiță, *Delincvența juvenilă. Sisteme alternative de executare a pedepselor*, Editura Eurobit,Timişoara, 2008, p. 221

these kinds of situations, the alternative sanctions are recommended and sustained by the interviewed ones.

In the opinion of all the interviewed ones, the problems that appear in applying the alternative sanctions are of legislative order. The absence of a coherent legislation, adapted to the social Romanian system, generates failures in administrating the criminal phenomena, in preventing or combating it.

The introduction of alternative sanctions, of the probation at least, represents an important step in the direction of harmonizing the penal Romanian law with the European one, even if this challenges many controversies regarding to its conceptualization in direct feature with the specific philosophy of each criminal justice system.

Known also as "social work for justice", probation is a sanction situated within the binomial of to punish – to help/assist and it is focused on involving the civil society in the social reintegration process of offenders.

In Romania, at modernizing his probation should remember so as to render traditional signs of their identity, and so as to stimulate future work concerns the efficiency of renewals urgently needed.

Probation, in communities where they operate, there was both practical contributions to the re-socialization of offenders and increasing the overall quality of civic values in the western-style communities where the motto "in democratic law is king ", generated a decrease in crime rate and a greater respect for authority in the general sense of the term. Probation acted thus in directly, the purpose of rationalizing and articulating all social controls beneficial effects on social entropy decrease.

Justice, as the genesis to a social problem, so Community administration thereof, into the logic impending democratic management of all components of a pluralistic social space.

In these coordinates, the contribution of probation as an institution and profession, is felt through the management equation of community problems by involving the community itself, which provides as taxpayer, and spread the necessary financial functioning of the system justice and prison system.

In addition, non-custodial sanction offenders, reveal an important resource to reduce costs arising from the traditional type of custody conditions.

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EUROPEAN AREA OF JUSTICE

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Abstract: *European area aims to different fields of major importance for the functioning of our societies, while aimed at ensuring the free movement of persons and the protection of citizens' fundamental rights, but also at solving issues of immigration and asylum, organizing judicial cooperation in civil and criminal matters within the European Union, the fight against crime and terrorism, as well as the management of common borders of the Union. "The European Union is an area of freedom, security and justice with respect for fundamental rights and for different legal systems and judicial traditions of the Member States"*[1].

Key-words: *cooperation, justice, security.*

1. European cooperation in JAI plan

European cooperation in justice and home affairs is a relatively recent phenomenon. Following a number of ad-hoc partnerships, such as the TREVI group of police chiefs later incorporated into the Single European Act, concrete arrangements were provided in the main by the Schengen Agreement of 1985, the Convention of 1990 concerning the application of the Schengen Agreement and the 1999 Europol Convention. It was only the Maastricht Treaty (1993), though, which first introduced cooperation in the area of justice and home affairs, with the creation of the "third pylon".

Article 29 of the Treaty establishes a fundamental objective in the sense that, subject to Community competence, the European Union has to offer citizens a high level of safety within an area of freedom, security and justice by developing a common action among Member States in the fields of police and judicial cooperation, in criminal matters and by preventing and combating racism and xenophobia.

This objective is achieved by preventing and combating organized crime or other type and in particular terrorism, human beings trafficking and crimes against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:

- closer cooperation between police forces, customs authorities and other competent authorities from Member States both directly and through Europol, according to art. 30 and 31 of the Treaty;

- Closer cooperation between competent judicial authorities and other authorities, including the European Judicial Cooperation Unit (Eurojust), in accordance with Art. 31 and 32, creating Eurojust was set in the Presidency Conclusions of the European Council from Tampere, between 15-16 October 1999.

- Approximation, where necessary, of rules on criminal matters of Member States in accordance with Art. 31 points. e)[2].

Maastricht informal cooperation rests on justice and home affairs until then on a proper legal basis, although if one which avoids the institutions of European Community in favour of an approach from state to state known as "the third pylon" of the European Union. The third pylon covered nine issues of what was defined as "common interest". These were: asylum policy, rules governing immigration and external border control in the Union, immigration, combating drug addiction, international fraud, judicial cooperation in civil and criminal matters, customs cooperation and police cooperation to prevent terrorism, drug trafficking and other serious forms of

[1] Article 61, paragraph 1 from the Lisbon Treaty.
[2] Octavian Manolache, *Tratat de drept comunitar,* Ed. CH Beck, Bucureşti, 2006, p. 517.

international crime, the latter including the organization of an information exchange system within the European Police Office known as Europol. There were many elements that could trigger warnings especially on civil liberties because the Parliament has been excluded from the decision-making process[3].

With the Treaty of Amsterdam (1999), this cooperation was recognised as a separate category of cooperation and the European Union set itself the goal of gradually creating an area of freedom, security and justice (FSJ). This means that citizens are able to move freely, live in safety, enjoy equal access to justice and have their fundamental freedoms respected within this area.

This area of freedom, security and justice therefore covers multiple issues, centred mainly on four basic domains: (i) visas, asylum, immigration and external border control; (ii) judicial cooperation in criminal matters and police cooperation; (iii) judicial cooperation in civil matters; and (iv) access to justice.

The Council and the Commission have co-product, in 1999, an Action Plan to implement the optional rules of the Treaty of Amsterdam concerning the establishment of an area of freedom, security and justice (AFSJ)[4]. The plan envisaged the incorporation of Schengen, an agreement between most Member States aimed to build freedom of movement in UE context and sketched a program for the free movement of persons, the fight against human trafficking and other organized crime, development of Europol and a closer judicial cooperation[5].

The Action Plan defines the following concepts "area of freedom, security justice." It also refers to the components of the justice area involving: judicial cooperation in civil and criminal matters, cooperation in respect of procedural rules and border processes. The Action Plan stresses the priority to be pursued in the work of the European Union to create the area of freedom, security and justice, as well as the measures to be taken in this regard: measures related to free movement of persons, police cooperation and judicial cooperation in criminal matters.

However, specific measures are set to develop a common European policy on control and on the right to enter at the EU borders and in particular concerning asylum and immigration. In a period of five years after the Treaty entered into force all Member States should take measures aimed at:

- suppression of any control of persons at internal borders, be it the citizens of the EU', whether the citizens of third countries;
- establishment of common rules and procedures concerning the control of persons at external borders of the EU and of common rules concerning visas for a maximum stay of three months.

Treaty also defined, minimum rules concerning:

- Reception of asylum seekers in Member States;
- Conditions to be met by citizens of third-countries in order to request refugee status;
- Procedures for granting and withdrawing refugee status in the Member States of the Union;
- Temporary protection of persons from the third-countries who can not return to their home country and those who otherwise need international protection.

With The Treaty of Amsterdam, a part of the areas that belonged, in accordance with the Maastricht Treaty, to the third pillar of the Union, were transferred in the first pillar (free movement of persons, asylum, immigration etc.). Thus, in Title VI (police and judicial cooperation in criminal matters) there are the activities to prevent and combat racism and xenophobia, terrorism, human trafficking and crimes against children, drug trafficking, arms trafficking, corruption and fraud.

The incorporation of the Schengen system and the general expansion of EU powers regarding the civil liberties came under fire first by those who were concerned that the type of democratic control over the police and courts that exist in the Member States will be undermined or weakened. For example, while Europol would not be in any way under the effective control of

[3] Steven McGiffen, *Uniunea Europeană – ghid critic,* Monitorul Oficial, Bucureşti, 2007, p. 62.
[4] Gavril Paraschiv, *Drept penal al Uniunii Europene,* Ed. CH Beck, Bucureşti, 2008, p. 23.
[5] *The Schengen Acquis and its Integration into the Union,* http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33020_en.htm

national courts, European Court of Justice could not have powers to hear individual complaints related to civil liberties or to exercise any jurisdiction in the overall behaviour police or other law enforcement bodies.

The European Council highlighted the need to extend access to justice for citizens, to develop minimum rules to simplify the procedure for prosecution, trial and execution of the sentence. It also stressed the need for mutual recognition of judicial decisions, for improvement of the fight against crime across the EU, for the cooperation development in preventing and combating crime and for conducting specific actions in the fight against money laundering derived from crimes.

As a result of the European Council meeting in Tampere, Finland (between 15-16 December 1999), The Work Program of the European Union concerning the development of an area of freedom, security and justice has entered a new stage, after the Council's decision to make from this area of freedom, security and justice a priority for the European Union as a necessary element to speak of a true "Union", by adopting such a program that has defined the guidelines, the benchmarks and a timetable for implementing for the period 1999-2004.

The European Council reaffirmed the importance of dealing with human rights, of the development of democratic institutions within the European Union. In order to achieve full stability it is necessary to ensure an area of justice in which every citizen can recourse to the courts and the authorities of any Member State as he would address to the authorities of their country, not to give offenders the opportunity to take advantage of differences between the legal systems of Member States, and the judicial bodies to be respected and enforced[6].

During the recent years, the EU has played an increasing role in determining the police, customs and judicial cooperation, as well as in implementing a coordinated policy on asylum, emigration and external border control. Union and its Member States security problem shall also make a renewed sharpness, especially in the light of terrorist attacks committed in the United States in 2001, in Madrid in 2004 and London in 2005.

In 2005, the European Council invited the European Commission to elaborate an Action Plan for achieving the goals and the priorities of the work schedule until 2007. In this program are incorporated and embodied the objectives of the action programs in order to fulfil fundamental rights, to strengthen freedom and security but also police cooperation and judicial bodies, for preventing crimes, combating organized crime and corruption, establishing an effective strategy in the fight against drugs, strengthening the justice, increasing mutual trust, mutual recognition of judgments, and in order to approximate the laws of both the procedural aspects and in terms of substantive law, both having a cross-border dimension[7].

During the meeting in Brussels (16-17 June 2005) the European Council presented a new multi-annual program, which was called Hague Program[8], which is directed towards improving the capacity of the joint European Union and its Member States to ensure respect for fundamental rights over minimum procedural safeguards and access to justice, enhancing cross-border fight against organized crime, against terrorism and serious crimes, advocating the proper use of the potential of Europol and Eurojust.

As for the fight against terrorism, The Hague Program contains a list of ten priorities of the Union in order to strengthen the area of freedom, security and justice in the next five years. The program is based on the balance of the Commission concerning the implementation of the Tampere Program, set in 1999. Thus, the Hague Program is a global and indispensable response, if someone wants to fight effectively against terrorism. The Commission has focused on preventing terrorism and exchanging information. It supports Member States in the fight against terrorism, focusing on issues aimed at recruiting and financing terrorism, prevention, risk analysis, infrastructure

[6] George Antoniu*, Dreptul penal şi integrarea europeană*, RDP nr. 3/2001, p. 24.
[7] Gavril Paraschiv, *op. cit.,* p. 25.
[8] JOCE C53/2005.

protection and crisis management. To achieve this, significant efforts have been taken focused on the following directions: prevention, protection, punishment and response to terrorism.

2. The international and institutional context

The delineation of freedom, security and justice space cannot remain an internal problem of UE. On the contrary, the fields of interest for SLSJ mainly refer to its direct neighbours and the third countries with which the Union concluded cooperation agreements. This thing was demonstrated clearly, in the case of migration, but it also applies in many other fields: phenomenon such as terrorism and organized crime can no longer be solved by other states unless they act isolate.

As direction for the development of partnerships with the third countries, UE adopted, in November 2005, "the strategy regarding the external dimension of the internal justice and affairs: freedom, security and justice in the entire world". This strategy underlines three main objectives: the management of migration, the fight against terrorism and actions against the organized crime. To accomplish this mission efficiently, it is necessary that the Union to complete a greater harmonization and a better use of its own resources and of those of the member states. These means must be applied in partnership with the third countries and with international organizations to obtain a positive and optimal effect. In this way, the European citizens will benefit of this space, not only between the borders of the European Union, but also outside them, and the Union will have an important contribution to the stability and peace of the world. That is why, intense contacts are established in the fields of justice and internal affairs, with countries from Balkans, North Africa, Russia and United States, and the agreements negotiated with these partners always include a section regarding the cooperation in the field of freedom, security and justice. It must also be mentioned the fact that, as a consequence of the tsunami disaster from 2004, the Union takes into consideration some means to guarantee a more efficient intervention when the European citizens are victims of the natural disasters (both between and outside the borders of UE).

The SLSJ problem is a touchy subject, because justice and internal affairs are directly linked with the security, public order and national judicial systems, which, often developed along centuries, at national level, and are, in most cases, orders and homogeneous, natural, judicial practices, but different one of another. In the ad-hoc negotiation treaties, the member states carefully decide in the main fields, fact reflected in the humanity rule and in the more restrained competences of the Commission, European Parliament and the European Court of Justice, especially in the case of the criminal and constabulary cooperation.

Once legitimating the Nisa Treaty, the problems related to immigration, visas, the check at the external borders, the home and the civil, judicial cooperation are "community" matters. Starting with the 1st of January 2005, a disposition of the Nisa Treaty is used to apply the qualified majority and the right to co-decide of the European Parliament in all the matters that are related with these aspects, with the exception of the legal immigration. The judicial cooperation in criminal and constabulary matter is reflected in frame-decisions, reflected at intergovernmental level and is governed by the rule of humanity. The European constitutional treaty represents a considerable amelioration in comparison with the existent treaties in the fields of justice and internal affairs, especially because of the entire "communitarian" sector (with the exception of the family law) as well as the abrogation of the humanity rules.

Once with the revision of the Hague Program, it was observed that, indeed, the rule of humanity regarding the criminal judicial and constabulary cooperation stops the use of these ambitious objectives. The importance and the impact of certain adopted instruments faced some limitations, compromises, exceptions and other techniques destined to make them acceptable for all the member states. They lose their value and their use by the judges is problematic. This type of cooperation necessitates that the instruments to be transposed in the national legislation and, they remain outside the European Parliament control (that can formulate only notice) and of the Court of Justice. These instruments or their transposing in the national judicial order cannot be contested.

The Lisbon Treaty includes the greatest part of the innovations found in the Constitutional Treaty (the elimination of the structure on pylons and the introduction on a large scale in the process of co-

decision of the qualified majority – with some exceptions)[9], but also introduces some modifications, regarding a series of important problems is the introduction of an automatic cooperation consolidated in the fields in which humanity cannot be obtained (example the operative cooperation of the police) and the growing importance of the national parliaments (the principle of subsidiary). The provisions referring to SLSJ were gathered in a single title that will be introduced in the Treaty regarding the function of the Union that includes five chapters: (i) general provisions, (ii) the politics regarding the border checks, homes and immigration, (iii) the civil, judicial cooperation, (iv) the criminal, judicial cooperation and (v) the constabulary cooperation.

Thus, in the Lisbon Treaty, the Union will benefit of an extended capacity of action regarding the freedom, security and justice that will bring direct advantages in what regards the Union capacity to fight against terrorism and criminality. The internal security of UE, through the SLSJ institutionalization but also through the institutionalization of the structural Cooperation for the defence is the base of a combined defence at UE level. The new provisions regarding the civil protection, human help and public health have as objective to enhance the capacity of the Union to react to the threats at the address of the European citizens' security[10].

3.EuropeanAreaofJustice

A. Judicial cooperation in civil field

The purpose of the adoption of instruments in the field of judicial cooperation is to help European citizens who face cross-border cases and procedures. The adopted instruments aim at mutual recognition of taken decisions, parental responsibility, legal assistance, the significance and notification of judicial and extra judicial documents, the acquirement of proofs in civil and commercial field, the insolvency proceedings. Being given the limited legal basis, we are talking about a minimal approach in the procedure field for cross-border cases, but not in material law.
Among "the most ancient" instruments from this field, we can mention the following:

- "Brussels I" Regulation in 2000 concerning the jurisdiction, the recognition and execution of the resolutions in civil and commercial matters, simplifies and accelerates the exequatur procedure. This regulation places the Brussels Convention of 1968 pertaining to the same subject at Community level. The regulation concerning the European executor title from 2004 goes even further, eliminating the exequatur procedure for uncontested claims and introduces a certificate that allows obtaining immediate execution of a decision in another country.
- "Brussels II" Regulation from 2000 concerning the competence, recognition and the execution of judicial decisions in matrimonial matters is applied to civil proceedings referring to divorce, separation and marriage revocation. However, this one does not work as the precedent. Indeed, the exequatur procedure, although simplified, was maintained, as well as the right of the judge from the other country to proceed, on its own initiative, to a series of assessments and, depending on the case, and to refuse the execution. However, the reasons of refusal, both for recognition and execution, have been limited.
- Since March 2005, "Brussels II" has been replaced by a new regulation called "Brussels II bis" concerning the jurisdiction, the recognition and execution of judicial decisions in matrimonial and parental responsibility matters, regulation adopted in November 2003. The regulation concerning the significance and the notification of judicial and extra judicial documents, as well as that one referring to obtaining proofs in civil and commercial matters, adopted in 2001, aim also to improve and simplify the judicial cooperation between the member states by facilitating, in particular, the transmission of judicial and extra judicial documents between the member states. Thus, the court of a member state may ask the court of another member state to carry out an act or to proceed directly to take evidence in another member state.

The Council directive 2003/8/EC of 27th January 2003 of improvement the access to justice in cross-border disputes by establishing some minimum common rules concerning the legal aid for

[9] Iordan Gheorghe Bărbulescu, *Procesul decizional în Uniunea Europeană,* Ed. Polirom, Iaşi, 2008, p. 100.
[10] http://europa.eu/lisbon_treaty/glance/index_ro.htm

such disputes[11] is aimed at improving the access to justice in cross-border cases. Thus, common minimum standards are set on legal aid. If financial resources do not allow a litigant to bear the costs of cross-border procedures, he may ask to receive legal aid.
In addition to its legislative activity, the Council created, in May 2001, the European Judicial Network in civil and commercial matters. This network, composed of contact points designated by each member state, allows the ease and the hastening of judicial cooperation in civil matters, in some specific cases (by its point of contact, a judge can quickly obtain all the practical information concerning the law/ procedure in another country).The network strengthens the cooperation mechanisms between the member states and, to that end, organises meetings of these contact points, at the Commission initiative. A meeting of all network members is held annually. In 2008, the decisions of the Council have been taken to create a similar network in criminal matters.

There are also a number of objectives in the field of judicial cooperation in civil matters, in the multi annual schedule in Hague, aimed at strengthening the area of freedom, security and justice in European Union. These ones aim to facilitate the cross-border proceedings; tracking the mutual recognition of decisions, the improvement of the cooperation, to assure the consistency and to improve the quality of EU legislation, to ensure the consistency between communitarian judicial law and international judicial law.

The schedule from Hague has provided a number of new tools, the following being significant: In April 2006, the Council reached at a political agreement concerning the Regulation on the law applicable to no contractual obligations (Rome II Regulation[12]). The Regulation aims to standardize the requirements for the no contractual obligations and, thus, to harmonize the private international law in civil and commercial matters The parties may decide in advance the applicable law to a particular judicial situation. The European Parliament finally amended this compromise and a final agreement took place in June 2007. In collaboration with the European Parliament, a political agreement was concluded in December 2007 aiming at a regulation on the applicable law to contractual obligations (Rome I[13]). This regulation aims to replace and modernize the Rome Convention in 19th June 1980 and to establish the rules concerning the conflict of laws in contractual plan, both in civil and commercial matters.

It is the Council which made, in November 2007, an agreement relating to a proposal for a directive on certain aspects of the mediation in civil and commercial matters, a directive which aims to facilitate the access to disputes settlements and to promote the amicable settlement of disputes by encouraging the use of mediation and ensure a balanced relationship between mediation and judicial proceedings.

Moreover, a regulation adopted in 2005 aims to introduce an European proceeding on payment summons. The regulation aims to simplify, to speed up and reduce the costs of proceedings in cross-border disputes concerning uncontested pecuniary claims and to ensure the free movement of European payment summons in all member states. The Council took a position in April 2008 on a common reference for European contractual law which could possibly offer an impetus for the European Code of commerce.

B. Criminal judicial cooperation

The European Council from Tampere included the principle of mutual recognition of judicial decisions, as the base stone of judicial cooperation. This principle aims to ensure the free movement of decisions, so in a cross-border issue, the European citizen is certain of the fact that decision issue by a court of a member state will be also recognised in another member state and will be executed without excessive formalities.

Another instrument of cooperation lies in appropriation of criminal legislations. A certain harmonization of criminal law is really necessary to reinforce the mutual confidence and, thus, to facilitate cooperation. The Union has also adopted framework decisions which aim at

[11] JOL 26 from January 31, 2003.
[12] 9751/7/2006 - C6-0317/2006 - 2003/0168 (COD).
[13] COM(2005)0650 – C6-0441/2005 – 2005/0261(COD)

approximation of national legislations by defining certain crimes such as terrorism, drug traffic, counterfeiting of the euro, money laundering, human traffic, sexual exploiting of children, and corruption in private field. This alignment is most often minimal because the criminal law is, in fact, considered by some member states as being closely related to national sovereignty.

Having in view the difficulties related to the condition of ratification of conventions and the difficulties related to traditional forms of cooperation with the coming into effect of the Treaty of Amsterdam (1st May 1999), it was elected a double change of strategy. Firstly, this change has not eliminated all the problems because the framework decisions don not have a direct effect and they must be transposed by member states into national law. A positive element is the fact that this implementation is mandatory in the absence of ratification, condition specific to conventions. The negative element is given by the fact that, in the Pillar III, the Commission cannot release an infringement proceeding in front of the Court of Justice in the vent that a member state is not fulfilling its obligations to transpose[14]. Secondly, the EU imposed in criminal matters, in addition to legal aid, the traditional form of cooperation, and mutual recognition of decisions. The special meeting of the European Council held in Tampere, on 15th –16th October 1999, concluded: " strengthening the mutual recognition of judicial decisions and judgements and the harmonization of legislations will facilitate the cooperation between the authorities and the judicial protection of human rights. The European Council approves the mutual recognition principle, principle which must become the cornerstone of judicial cooperation, both in civil and in criminal matters within EU" (section 33)[15].

The principle of mutual recognition was reflected mainly by adopting the European arrest[16] warrant which allows simplification of extradition procedures. Mutual recognition technique was also extended to decisions to freeze assets, to financial penalties and to confiscation decisions.

The objective of European warrant for taking evidence, adopted in June 2006, is establishing a mechanism for obtaining evidence in cross-border cases on the principle of mutual recognition. It is about obtaining objects, documents and information to be used in criminal proceedings.

In judicial assistance field in cross-borders case it was adopted the Convention on mutual judicial assistance in criminal matters between member states of European Union[17], on 29th May 2000, and the Additional Protocol of 16th October 2001[18].

A number of new instruments have been adopted over the coming years, the representative criminal judicial cooperation being:

- The framework decision 2005/214/JHA of 24th February 2005 on the principle of applying the mutual recognition of financial penalties[19];
- The framework decision 2006/783/JHA of 6th October 2006, on the applying the principle of mutual recognition to confiscation orders[20];
- The framework decision2008/947/JHA of the Council of 27th November 2008, on the principle of mutual recognition to judicial decisions and probation decisions for the supervision of probation measures and alternative sanctions[21];
- The framework decision 2008/909/JHA of the Council of 27th November 2008 on the applying the principle of mutual recognition to judicial decision in criminal matters which impose punishments or measures of loss of liberty to execute them in EU[22] ;

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[14] Diana Ionescu, *Legea nr 222/28 octombrie 2008 pentru modificarea şi completarea legii nr. 302/2004 privind cooperarea judiciară internaţională în materie penală (II),* în CDP nr. 2/2009, p. 5.

[15] *The Conclusions of the European Council from Tampere*, October 15-16 1999(www.europarl.europa.eu).

[16] The frame decision of the European Union Council from July 13,2002 regarding the European arrest warant and the procedures of surrender between the member states. (2002/584/JAI).

[17] The convention is based on the dispositions of the European Convention for judicial assistance in criminal matter elaborated by the Europe's Council on April 20 1959.

[18] The Act of the Council regarding the setting, in accordance with art. 34 from the Treaty regarding the founding of the European Union, of the Convention for judicial assistance in criminal matter between the member states of the UE.

[19] JO L 76/22.03.2005.

[20] J.O. L 328/24.11.2006.

[21] J.O. L 337/16.12.2008.

- The framework decision 2008/978/JAI of the Council of 18th December 2008 on the European evidence for the purpose of obtaining objects, documents and data to use them in criminal matters proceedings[23];
- The framework decision 2009/299/JAI of the Council of 26th February 2009 amending the framework decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, to strengthen the procedural rights of persons and to encourage the application of the principle of mutual recognition of decisions rendered in the person's absence from trial[24].

The principle of mutual recognition of the decisions will witness a new phase of development with the coming into effect of the Treaty of Lisbon. The next art. 83 par (1) of the Treaty of functioning of EU provides: " judicial cooperation in criminal matters within the Union is founded on the mutual recognition of judicial decisions and of judgements and includes the alignment of laws, regulations and administrative provisions of member states in areas previewed in par (2) and at art. 83".

Besides this express dedication in this new phase of evolution, yet, having in view the negative vote of Irish referendum, still under uncertain sign, the principle of mutual recognition will benefit from the change of the competence of promulgation and of legal instruments adopted, being opened the way of regulations in this area. In addition, according to art 82 para (2) and (3), the harmonization of criminal legislation and of criminal procedural, in the measure which it is necessary to apply to the principle of mutual recognition, may be subject to regulation by means of directives[25].

C. Compliance and active promotion of human rights

Since 1970, European Court of Justice has raised the human rights to the rank of fundamental principle of community rights (besides primacy, direct effect, subsidiary, etc.): *Internationale Handels-gesellschaft, Nold* etc, having as main source of inspiration the European Convention of Human Rights (as the Court held in the case *Rutili* in 1975[26]).

In 1991, the Luxembourg Court said that: "as this Court has already ruled consistently, the fundamental rights form an integral part of the general principles of law, whose end is ensured in the end, the Court inspires from the common traditional traditions of the member states and from guidelines provided by the international treaties for the protection of human rights to which the member states have collaborated or of which they are signatories. (…) The European Convention has a particular significance in this regard (…). The Community cannot accept measures which are not compatible with the human rights as recognised and guaranteed"[27]. The recognition of fundamental laws as a principle of community law was later enshrined in a treaty (art. F§2 Maastricht, art. 6§ 1 Amsterdam).

All these evolutions, from the purely economical nature of European Communities, to a complex union, political-judicial, has led to the need, accepted by the majority of member states, of adoption of an unique document able to express the conception of the Union on human rights, document which represent *a summum* of common European values, of traditional constitutional traditions of member states, of common constitutional traditions in field and of previous experiences of the Union. This document was adopted and it is now *The Fundamental Rights Charta of European Union* and, in the same time, part of the Lisbon Reform Treaty. The founding ideas, political and economical, of the Charta were inspired by the fact that Europe and its essence lie in a global process of transformation to a consolidates union based on common values[28].

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[22] J.O. L 327/5.12.2008.
[23] J.O. L 350/30.12.2008.
[24] J.O. L 81/27.03.2009.
[25] Diana Ionescu, *op. cit.,* p. 6.
[26] CEJ, *Rutili* v. *Minister of the Interior,* case 36/75 (1975).
[27] CEJ, *ERT v. DEP,* case C-260/89 (1991).
[28] „ The Union is based on the values of the human dignity, freedom, liberty, democracy, equality and the respect for the human rights including the rights of the persons belonging to a minority. These values are common to the member states in a society based on pluralism, nondiscrimination, tolerance, justice, solidarity and equality between men and

The Charta contains a number of general principles which refer to its field of application, its autonomy, and its limitations to rights. As for the rights catalogue, the document reaffirms the classical rights- human dignity, freedom, equality, justice, containing a rich catalogue of social rights: right to work, social security, social aid, at strike etc. Currently, the Charta is on track to become part of "European Union law" (primary legislation) as defined by the Treaty of Lisbon (December 2007). Unlike the constitutional Treaty, the Lisbon Treaty will not include the Charta, but it will give this one *per se* value of primary right.

Worthy of note is that the fact that, in the spirit of Hague schedule, the Union developed a decision of establishing a framework-schedule "Fundamental and justice laws", which includes, especially, specific programs to "Fundamental and Citizens Rights", " Fighting violence" and "Drug prevention and information"". Furthermore, EU supports the protection of females and children, but the protection of personal data represents a permanent objective of all actions taken in freedom, security and justice.

As mentioned above, the protection of the personal data represents an essential element for the Union, the guideline of the whole legislative activity in the justice and internal affairs field.
As mentioned above, the protection of personal data is an essential element for the Union, the guideline of all legislative activities in justice and home affairs.

After the adoption of the Directive 95/46/EC[29] concerning the personal protection of data, generally, a framework-decision was adopted concerning the protection of personal data processed within legal and police cooperation in criminal matters.

The Directive has a fields of application extremely large, given the fact that it is applied to „the processing of personal data, all or partly automated, as well as the non-atomised personal data included or intended to be included in this file[30]. There are identifies some principles regarding the quality of data (accurate and relevant) and processed (in accordance with the principles of security, purpose, proportionality and transparency). In addition, the persons whose data are included in the files must have the right to information, access, rectification and deletion.

These provisions have been specified also in the Directive 97/7/EC of 20th May 1997[31], subsequently replaced by the Directive 2002/58/EC concerning the processing of personal data and the protection of private life in telecommunication matters. These were completed by the framework-decision from 2008 concerning the protection of personal data within the police and legal cooperation in criminal matters[32].

In accordance with the political mandate of European Council, in February 2007, it was adopted the regulation[33] which transforms the European Centre of monitoring of racism and Xenophobia in a fundamental rights agency of European Union, based in Vienna. The mission of this new agency is to assist the European institutions and member states of the Union in the development and implementation of community law so, in theirs competences, the fundamental citizen's rights to be fully respected.

4. Romania's legislative policy

Within every state of the European Union, the space of justice has as foundation, the existence of an independent judicial power and well-trained magistrates. Furthermore, the recognition and the enforcement of the decisions regarding the civil and criminal matter, as well as the insurance of the same guarantees during the procedures, will have to provide the same sense of justice for all citizens of Member States.

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women." (Bianca Selejan-Guțan, *Spațiul european al drepturilor omului. Reforme. Practici. Provocări,* Ed. CH Beck, București, 2008, p. 9).

[29] JOL 281 from November 23 1995.

[30] D. KORFF, *Data Protection Law in Practice in the European Union,* Bruxelles/New York, 2005.

[31] The directive 97/66/CE of the European Parliament and Council from December 15 1997 regarding the private data processing and the protection of the private life in telecomunications. .

[32] The frame decision 2008/977/JAI from November 27, 2008.

[33] The statute (EC) nr. 168/2007 from February 15, 2007.

Currently, within the European Union, there are a variety of judicial systems, which determines a number of difficulties, when several Member States are involved in the legal procedures. Moreover, the process in a Member State, other than the case when the citizen is judged, may create difficulties for individuals and legal entities.

For solving this situation, there were introduced some measures that would lead to greater harmonization and cooperation between the legal systems of Member States. To this end, Romania is passing through a vast process of reforming the internal legislation, with profound implications for the society, contributing to the development of a viable market economy, social stability and security of social life and to strengthening the state. In this respect, it is worth being exemplified:

- Framework Decision on the European arrest warrant and surrender procedures between Member States of the European Union was fully implemented in Title III of the Law 302/2004 on international judicial cooperation in criminal matters, as amended and supplemented by Law no. 224/2006 and Law no. 222/2008.

- European Convention on judicial assistance in criminal matters drawn up by the Council of Europe on April 20th 1959, was ratified in Romania by the Law no. 236/1998, and in February 2007 Romania notified the General Secretary of the European Union Council, about the statements regarding Romania's application of the Convention on mutual judicial assistance in criminal matters between the Member States of the European Union and the application of the Additional Protocol.

National legal framework that regulates the judicial cooperation with the Member States of the European Union is particularly represented, by the Law no. 302/2004 on international judicial cooperation in criminal matters, with subsequent changes and additions, Law no. 58/2006 for the ratification of the Agreement on cooperation between Romania and Eurojust signed at Brussels on December 2nd, 2005, and for the regulation of some actions regarding the Romanian representation to Eurojust, during the period preceding the accession and after accession to the European Union - in criminal matter and Law no. 189/2003 on international judicial assistance in civil and commercial matter, amended and supplemented by Law no. 44/2007 - in civil matter. This is supplemented by multilateral agreements that are part of the acquis communautaire and by the community regulations in civil and commercial matters and by the Treaty of Accession of Romania (and Bulgaria) to the European Union, under which our country has become party to a number of conventions and protocols relating to judicial cooperation field. The Romanian Central Authority in international judicial cooperation in criminal and civil matters is the International Law and Treaties Department from the Ministry of Justice.

a. Judicial cooperation in civil matters

Since January 1st 2007, the moment when Romania accessed to the European Union, the judicial cooperation has taken place directly between the competent judicial authorities, for the identification of which there is used the European Judicial Atlas[34], published on the website of the European Judicial Network for cooperation in civil and commercial matters[35].

The Romanian Judicial Network for cooperation in civil and commercial matters was established in 2004, similar to RJE comprising judges from courts of appeal and coordinated by the national contact points for the European Judicial Network, designated by the Ministry of Justice.

Internally, the framework law on international judicial cooperation is Law no. 189/2003 on international judicial assistance in civil and commercial matters developed according to the latest relevant Community instruments that regulate the conditions on which the communication of judicial and extrajudicial documents abroad and from abroad, taking evidence from international commissions, obtaining information on foreign law and access to justice for the foreigner.

The changes and additions to Law no.189/2003 by Law No. 44/2007, allow the application of Community instruments in the field. Practical implementation of these new instruments of cooperation did not face any particular problem, but rather, it was appreciated by Romanian

[34] http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm
[35] http://ec.europa.eu/civiljustice/

magistrates as being more effective and much faster than the previous one, when the cooperation existed only through the Ministry of Justice.

b. Judicial cooperation in criminal matters

By Law no. 302/2004 on international judicial cooperation in criminal matters, with subsequent changes and additions, Romania has transposed into national law, the Council's Framework Decision no. 2002/584/JHA of June 13th 2002 on European arrest warrant and surrender procedures between Member States of the European Union - the first evident action in the field of judicial cooperation in criminal matters between Member States of the European Union when applying the principle of mutual recognition, the European Union Convention of May 29th 2000 on legal assistance in criminal matters between Member States and its Protocol of October 16th 2001, the Convention of June 19th 1990 for implementing the Schengen Agreement of June 14th 1985 on the gradual abolition of checks at common borders and other relevant rules to judicial cooperation in criminal matters with the Member States of the European Union.

2002/584/JHA Framework Decision of 13th June 2002 on the European arrest warrant and surrender procedures between Member States was implemented by Title III of Law no. 302/2004, and the practical application of this instrument of cooperation, meaning the issue and execution, despite some legislative failures, did not encountered difficulties Romanian judicial authorities being very open to the principles on which the European arrest, for recognition and mutual trust.

By the harmonization of procedures of different legal systems, it will be easier to obtain the recognition of judgments issued in one state and applicable to another. The recognition principle is a key factor for developing an area of freedom, security and justice, but also for increasing protection of fundamental rights. Realizing the fact that a decision made by a state will not be appealed to, by another state, the recognition of decisions will help to ensure the legal certainty within the European Union.

CONTROL OF THE VEHICULAR TRANSPORT OF DANGEROUS GOODS AND OBSERVANCE OF REGULATIONS REGARDING DRIVERS' HOURS AT THE ROMANIAN-HUNGARIAN BORDER

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ABSTRACT

Hungarian Police control the international transportation of passengers and goods passing through border crossing points and the observance of drivers' hours regulations according to various international treaties and contracts as well as the relevant Hungarian statutory instruments in force. According to this legislation, all persons, cargo and vehicle documents are checked. Sanctions are applied against those who transgress the transport of dangerous materials and the drivers' hours regulations on the basis of this legislation. The control of drivers' hours is fixed by the EC. The drivers' hours are controlled on the basis of AETR or EC regulations depending on the county of origin.

Key words: road transport, dangerous material, driving and resting-time, administrative process, documents, fine

Control of the carriage of dangerous goods by road (ADR)

Hungary supervised and harmonised its Road Traffic Regulations during the country's preparation for EU membership. The ADR prescribes standardised controls for member states, thus in our country, control[36] of the carriage of dangerous goods meets the requirements of the EU.

The modified ADR agreement promulgated[37] in our country determines that drivers of the following vehicles transporting dangerous goods must have an appropriate training certificate: vehicles with fixed tanks or demountable tanks with a capacity of greater than1000 l, battery-vehicles with a capacity of greater than 1000 l, vehicles with tanks with a capacity of greater than 3000 l, vehicles with portable tanks or MEG containers, or vehicles with a maximum permitted weight of more than 3500 kg.

The following tank vehicles transporting the types of dangerous goods determined in the ADR international agreement are obliged to have an approval: vehicles with demountable tanks with a capacity greater than 1000 l, battery-vehicles with a capacity of greater than 1000 l, tanktainers with a capacity of greater than 3000 l, vehicles transporting EX/II. and EX/III. type explosives. If the vehicles listed are trailers or semi-trailers, then the hauling vehicles is also obliged for an approval.

[36] 1/2002. (I.11.) Government Decree
[37] 48/2003. (VII.24) Decree of the Ministry of Economy and Transport

The verification document of such approval must be kept in the vehicle while transporting the dangerous or uncleaned materials referred to above.

Regardless of the permitted maximum allowed weight, an appropriate training certificate is needed for the drivers of vehicles transporting explosive (ADR class 1) or radioactive materials (ADR class 7). The lorry driver may only drive the type of vehicles (with tank or without tank) and transport dangerous materials belonging to a certain class for which he has a valid training certificate.

Special rules and regulations for the control of ADR vehicles[38]

ADR checks must be carried out according to the internationally prescribed, uniform routine. Dangerous materials over a limited amount, as set out in the annex of the decree, may only be transported via an assigned route[39]. The decree allows the Police only limited checking abilities in the field of ADR. Nevertheless based on the legislation listed above they may carry out independent checks.

The competent authorities may check the carriage of dangerous goods and the observance of the relevant regulations any time. The stakeholders of the dangerous material transport must submit all the information to the competent authority or its representative needed for the control. If the authorities notice that ADR prescriptions are not adhered to, they may forbid the delivery of the consignment, or they can suspend the transport, till the deficiency is set right, moreover if necessary they can take further actions or they can impose an administrative fine[40]. If the consignment can not be transported any further they can impound the vehicle. This can happen on the spot, or for security reasons at another place chosen by the authority.

In all transports covered by the ADR the cargo must be accompanied with documents except for cargo under exemption. In addition, they need to have documents regarding the vehicle and the vehicle crews. While carrying out the control of the documents special attention is paid to the documents for the dangerous materials. We check if:

a) if they contain name and address of the consigner
b) there is appropriate documentation for all consignment classes and types of vehicles
c) the cargo-acknowledgement includes the name of the cargo, the designation of the amount of the cargo and accurate classification (material-identification UN number, material designation, class and packaging group and the ADR designation),
d) the documents are available in the language of the country of the checking process
e) other entries are correct or not, (combined transport, bi- or multilateral agreement based transport, etc.).

The written instruction is an important document. Written instructions are required for each type of dangerous cargo belonging to the ADR regulations in the consignment. This obligation is independent from the way of transportation. An exemption is in the case of the grouped written instructions. For example: in the case of „toxic gas transport" and carriage of crude oil derivatives a grouped written consignment might be given, if the features of the dangerous goods in question are similar. The style of the written instructions must be easy for the driver to understand, furthermore

[38] Council Directive 95/50/EC of 6 October 1995 on uniform procedures for checks on the transport of dangerous goods by road
[39] Decree 122/1989. (5 December) of the Council of Ministers on the route setting for vehicles transporting dangerous goods
[40] Goverment Decree 57/2007. (31 March) on The Penalties Imposed if a Breach of Certain Road Transport Provisions Occurs

it must also be provided in the language of the departure, destination, and any transit countries. It must be kept in the driver's cabin at a place where it can be easily seen. The second specimen may be placed, (not compulsory) behind the danger-marker plate in a water-proof sachet. The written instructions which refer not on the cargo in the cargo bay, must be kept separate from the valid documentations, so that they can not be mixed up.

Beside the documents extra attention has to be paid for the check-up of the fittings needed for the dangerous materials transport. During such checking the presence, and the adequacy of fittings are controlled.

Implementation of control of the vehicles transporting dangerous materials (ADR)[41]

The control procedure starts after the vehicle is safely moved from the road traffic to the assigned control-area. Based on ADR regulations the vehicle and the driver transporting dangerous goods does not need to be controlled, if the driver proves with an appropriate control documentation that he has already been controlled 2-3 hours before. If transport conditions have significantly changed soon after the first control, the second control can be carried out. The ADR-based control of the transportation of dangerous materials has to be carried out according to the aspects of the „control manifest". If a breach of regulations concerning the carriage of dangerous goods is observed, the „supplementary form" of the control manifest has to be filled in and it has to be attached to the issued documents (official record, administrative or criminal accusation).

The controlling authority is entitled to record and handle the personal data of the driver and the accompanying person. This rule refers to the data contained in the control manifest (name, citizenship, place of birth, mother's name, address, health and suitability information contained in the driving licence, identification number of passport/identity card, number of the ADR training certificate). Such data is kept for five years.

During the ADR control carried out based on the aspects of the control manifest warning or imposing a fine are not allowed.

If the features of the cargo allow this and a safe waiting area is available, the vehicle must be hold up, in case the deficiency can be set right on the spot (e.g. not adequate vehicle classification, inappropriate loading, the compulsory accompanying person is missing, there is no route-assignment, etc.).

If environmental pollution occurs because the dangerous material is leaking or some parts of the cargo are damaged, the vehicle has to be stopped until the situation is solved. The competent environmental inspectorate has to be informed about such environmental pollution. Time, place of and reason for forced hold up have to be indicated in the notes section of the control manifest's supplementary form.

It has to be taken into consideration that the persons contributing to the carriage of dangerous materials are liable for the infringements they commit. Therefore, according to the ADR regulations, they are responsible persons. In the ADR cargo transport the operator and the driver of the vehicle, the consigner, the loader, the transporter and the accompanying person are responsible for the prescribed implementation of the activity.

Initiating an administrative or criminal reporting process against the Hungarian or foreign driver has to be carried out according to the general rules. The report has to be forwarded to the territorially

[41] 1/2002. (I.11) Government Decree on the uniform process of controling the road transportation of dangerous goods

competent police department or to the local health protection service. In case of any other contributor – Hungarian citizens – the reporting process has to be initiated in his/her absence by attaching all the available evidences. In case of non-Hungarian citizens an official record or report has to be made about the breach of regulations, and the control manifest and the supplementary form should be attached. These have to be forwarded to the National Traffic Authority within eight days, because they can forward it to the competent authority of the country involved.

Controlling the driving and resting time of the crew of vehicles carrying out international road transport

Within the territory of the Hungarian Republic controlling the driving and resting time of those involved in domestic and international road transport is based on the AETR Agreement[42] or on EC Regulation 561/2006[43] depending on the official labelling of the vehicles.

According to international agreements, vehicles in international road traffic regulated by these agreements have to be equipped with a tachograph set. The agreement sets out the rules for building up, equip, use and control of such tachographs. The tachograph records the speed of the vehicle, the distance, the driving-time, the period of the brakes and the resting-time on a disc, or in case of a digital tachoraph, on a chip. The control is primarily aimed at the data recorded with the equipment.

The social (labour) norms of the drivers employed in road traffic as well as regulations for tachographs are regulated separately from general legal provisions. Within the Community Council[44] regulation concerning the use of tachograph devices in road transport activities and EC regulation 561/2006 on the applicable control procedures are operative. In such case when a vehicle is crossing the border from a third country or to a third country, or transiting through a member state between two third countries, AETR regulations are to be used instead of the above mentioned legislation.

Traffic control of vehicles usually covers:

a) the gross vehicle weight (permissible maximum weight), the maximum speed allowed for the given vehicle and the number of seats,
b) the existence of the special transport conditions defined in the agreement,
c) the identification of the drivers, their number, age and their appropriate qualifications for driving the given vehicle,
d) the normal functioning of the tachograph device, the validity of its calibration, the quality of its record sheets/data
e) the existence of data recording sheets
f) the recorded continuous driving and resting periods and the breaks during driving.

If legislation regarding resting and driving time is violated the controller can order the driver to keep a resting time. This is based on the act on road transport[45].

Control

[42] Act IX of 2001 on the work of Crews of the Vehicles Engaged in International Road Transport (AETR)
[43] Regulation 561/2006/EC of the European Parliament and of the Council on the harmonization of certain social legislation relating to road transport and amending Council Regulations 3821/85/EEC and 2135/98/EC and repealing Council Regulation 3820/85/EEC
[44] Council Regulation (EEC) No 3821/85 concerning social legislation relating to road transport activities
[45] Act I of 1988 on Road Transport

At least twice a year member countries carry out a conciliated and coordinated traffic control of the vehicles and drivers subject to the above mentioned legislation[46]. If it is possible such control has to be carried out at the same time by the authorities of two or more states, with each of them operating on their own territory.

A policeman is entitled to carry out such control after passing a theoretical and practical final exam on the AETR and the relating EEC regulations. The independently initiated control is carried by at least two persons. They should be qualified for the simultaneous control of the vehicles, drivers and their documents. If joint control is implemented with the co-workers of the Traffic Authority and the authority provides the appropriate number of control staff, then one controlling policeman is acceptable.

During control the controller need to have a vehicle suitable for approaching the control point and the appropriate IT equipment. Each control point need to have an evaluation disc (set up, manually „calibrated"). In case a large amount of record sheets are to be evaluated appropriate IT support is necessary. The only case when such support is not needed, if there is a joint control with the traffic authority. If a policeman carries out the control alone, a standardised AETR Control Hungary stamp is to be used in each control point[47].

The control can be carried out anywhere in a residential area or outside this, anywhere on the road, but should be done without holding up the traffic. The control spot have to be chosen so that the stopped vehicle won't cause traffic jam, and should not endanger others participating in the traffic, furthermore the vehicle has to be approachable from all directions.

The control consist of checking:

- daily driving time, breaks (intermission), and daily rest periods;
- the last resting period (if appropriate);
- the appropriate functioning of the tachograph device (possible misuse or not appropriate application),
- the existence of the documents defined in the 561/2006/EC regulation.

Differentiation between the domestic and foreign vehicles is forbidden.

In case during traffic control it can be suspected that a driver has committed misdemeanor, but significant data is missing to prove it, competent authorities (in Hungary this is the National Traffic Authority) of the countries involved should cooperate in clarifying the issue. In cases when a domestic authority carries out control procedures at the place of operations of a foreign company, results of such control should be communicated with the authorities of the country where the company is registered.

Use of a tachograph disk in international road transport

Controllers can draw far-reaching consequences from the data recorded on the tachograph disk. First of all he can make sure if work-related regulations were observed by the driver, furthermore he can find out whether the tachograph device was used according to prescriptions. He can also clarify whether the device was manipulated or not. The controller's ability to apply regulations in an experienced and creative manner is essential in this process.

[46] 561/2006/EC and 3821/85/EEC regulations
[47] 561/2006 EC regulation, AETR agreement

Among the prerequisites of sound decision-making are practice, carefulness, familiarity with the handling of the device, deep knowledge of the diagnostic signals of the equipment and stable geographical knowledge of the controller. (He must know that the distance between two cities is constant, independently from what the measurement device or the tachograph disk shows.)

A logical evaluation can only be based on the evaluation disc. With this tool, we can clarify all those recorded actions that we could not be able to reveal or discover by using other tools. (For example when the clock is turned back, we can determine actual driving and resting time, and we can initiate a procedure not only because the prohibited activity, but because violating the regulations concerning driving time as well.) It is important to note that professional examination of the disc is also based on the evaluation disc. In this case th professional making the evaluation uses a magnifier, a microscope, special light, or special IT support.

Computer assessment

It is primarily applied in cases when a quick evaluation of a huge amount of material is needed. The system is not appropriate for reading coloured discs, or for analizing disks with multiple layers of marks on them. Also the system cannot interpret disks when two disks are opened on the same day (the current legislation allows this). The accuracy of the system can be questioned, because uploaded data - the marks on the disc - can be modified in a wide range, that is why they always use the original disc during misdemeanor proceedings.

Procedures

A basic principle that it has to be clarified on the spot, whether the deficiency observed is due to the driver or to the company. If we have the possibility to talk to the driver, we try to reconstruct the process based on his story, if I it is realistic we have to accept it.

The controller has the right and duty to take differentiated measures after considering all the conditions of the case. Primary aspect during such actions is traffic safety, secondary is providing „equal conditions for competition". Another important aspect is handling the problems arising because of the traffic jams at the state-border.

Personal documents of the driver cannot be taken away during the waiting period necessitated by legislation. However withholding the documents of the consignment or other documentation is not prohibited. If the controller withholds such documents, he has to organise returning those documents in time. When deciding upon making the driver wait, one has to take into consideration the consignment of the vehicle, for example it is not advisable to withhold a vehicle transporting livestock.

If the controller initiates misdemeanor proceedings, he takes away – upon a proof of receipt - the travel diagram and if it is possible gives a copy of the proof to the driver. On the copy the proof of receipt the reason for taking away should be indicated, as well as the stamp, the date and signature.