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C O N T E N T S

PROCEDURAL INSTITUTIONS COVERED BY THE PRELIMINARY TITLE OF THE CODE OF CIVIL PROCEDURE

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Abstract: *The preliminary title of the Code of Civil Procedure in force today allocates space to fundamental institutions, which establishes and supports the entire content of the text. With fidelity to the qualification given by the legislator, they concern the following: Regulatory Scope of the Code of Civil Procedure (Articles 1-4), Fundamental Principles of the Civil Trial (Art. 5-23) and Application of the Civil Procedure Law (Art. 24-28).Apparently, the debut in this systematization manner may seem scholastic, if we consider that the procedural law to be replaced by the new code debuted, almost abruptly, with the institution of jurisdiction of the court. In reality, the text is not intended to be pedant but, even if it may seem too didactical, its practical reason must be fully revealed. And this stems from the fact that all three institutions addressed in the preliminary title form the basis of a normative structure that wishes to be coherent and easy to implement*

Keywords: *civil trial, principles, applicable law, Code of Civil Procedure*

1. Regulatory Scope of the Code of Civil Procedure

The scope of the Code of Civil Procedure[1] also provides the subject of study for the *civil procedural law*, the latter being defined as *the set of legal*

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[1] CPC references refer to the text of Law No. 134/2010 on the Code of Civil Procedure, effective from February 15, 2013, republished in 2015, with subsequent amendments (a significant one being Law No. 17/2017 regarding the approval of GEO No. 1/2016 for the amendment of Law No. 134 / 2010 on the Code of Civil Procedure, as well as related normative acts, published in the Official Gazette No. 196 of 21.03.2017; a recent amendment is the Decision No. 454 of 04.07.2018 of the Constitutional Court of Romania, published in the Official Gazette No. 617 of 18.07.2018).

rules governing the way in which civil cases are dealt with, as well as the enforcement of court rulings in these cases.

The *rules of civil procedural law* are understood as those general, abstract and binding rules governing the organization and conduct of the civil trial. Their most important categorization is the delimitation of: *rules of judicial organization*, *rules of competence* and *procedural rules* (contentious and non-contentious).

The scope of the civil procedure is enacted today in the very beginning of the Code of Civil Procedure. As *civil law is a common law* for other branches of substantive law, the *civil procedure* has created rules that are applicable not only to litigations deriving from civil law relations, but also to disputes arising from the realization of substantive law relations of branches related to civil law, which confers its status of *common law procedure*.

Thus, according to the legislator, both purely civil litigations (to which it applies directly and with priority), as well as labor, administrative, financial and fiscal litigations, or those arising between professionals, although benefiting from particular substantive regulations, also invoke, in their resolving, the rules of civil procedural law. Thus, under the heading *General Applicability of the Code of Civil Procedure* (CCP), the provisions of Art. 2 of CCP establishes the quality of *common law of the code of procedure* in civil matters. Thus, the applicable character of the provisions of civil procedural law in matters other than those derived from substantive civil law relations is stated.

At the same time, in relation to the mandatory force of the norms of internal law in relation to those of international and / or union law, the provisions of Art. 3 and 4 of CPC affirm *the priority of international treaties on human rights (Article 3) and European Union law (Article 4).*

2. Fundamental Principles of the Civil Trial

The civil trial is the lawful activity of the judicial court, parties and other participants for the purpose of realizing or recognizing the subjective

rights and other legal situations subjected to the judgment, as well as the enforcement of judgments or other enforceable titles[2].

It is known that in the old regulation, the issue of the principles of the civil trial is not subject to unitary and explicit regulation in the Code. The doctrine also does not provide a unitary treatment in this matter. Thus, in the absence of unitary and explicit regulation, the principles of the civil trial now have varied origins: most of them are regulated at constitutional level, others are taken as such or nuanced in the law of judicial organization, while others (much fewer) are only evoked in isolated texts of the current regulation framework of the civil procedure. That is why it can be affirmed that, rightly, the matter of the principles of the civil trial can be currently assimilated with a doctrinal creation, sanctioned by jurisprudence, rather than with an act of the express will of the legislator.

The new text comes to remedy this often unnoticed shortcoming[3]. Under such conditions, no matter how perfectible it would prove – a trait that is inherent, sometimes, for a new regulation – the New Code of Civil Procedure (NCCP) has an indisputable merit. It carries out the coagulation

[2] The civil trial usually goes through two phases: *the phase of the trial* (in the first instance and in the appeals) and *the forced execution phase*.

[3] For a broad discussion of the issue, see the corresponding topics in the papers signed: Pentru o tratare amplă a problematicii, a se vedea temele corespunzătoare din lucrările semnate: Gabriel Boroi, Mirela Stancu, *Drept procesual civil* (Civil Procedural Law), 4th Edition, revised and supplemented, Hamangiu Publishing House, Bucureşti, 2017; Viorel Mihai Ciobanu, Traian Briciu Claudiu Constantin Dinu, *Drept procesual civil. Drept execuţional civil, Arbitraj, Drept notarial, Curs de bază pentru licenţă şi masterat* (Civil Procedural Law, Civil Execution Law, Arbitration, Notary Law, Basic License and Master Course), Naţional Publishing House, Bucureşti, 2013; Ion Deleanu, *Cod de procedură civilă. Comentarii pe articole* (Code of Civil Procedure. Comments on articles), Universul Juridic Publishing House, Bucureşti, 2013; Ioan Leş, Noul *Cod de procedură civilă. Comentariu pe articole* (The New Code of Civil Procedure. Comments on articles), C.H. Beck Publishing House, Bucureşti, 2013; Danil Matei, *Drept procesual civil. Note de curs pentru ID* (Civil Procedural Law. Course notes for Distance Education), Valahia University of Târgovişte, 2015 Edition; Florea Măgureanu, *Drept procesual civil* (Civil Procedural Law) – revised, modified and extended edition, Universul Juridic Publishing House, Bucureşti, 2015; Andreea Tabacu, *Drept procesual civil* (Civil Procedural Law), Universul Juridic Publishing House, Bucureşti, 2013; Mihaela Tăbârcă, *Drept procesual civil* (Civil Procedural Law), vol. I, Universul Juridic Publishing House, Bucureşti, 2013.

of those basic rules of the civil trial, some configured over time[4], others as amendments necessary for a modern normative context.

The principles thus regulated have a dual qualification. On the one hand, they are prerequisites for starting the work of lawmaking and are the foundation of the whole new normative edifice. On the other hand, they are the imperatives to which the entire content of the regulation needs to answer.

The new Code provides this subject with regulatory space in Chapter II Fundamental Principles of the Civil Trial (Art. 5-23) of the Preliminary Title, entitled Regulatory Scope of the Code of Civil Procedure and the Fundamental Principles of the Civil Trial.

In a brief inventory[5], out of the 18 articles of text devoted to the matter, 13 can be extracted as proper principles[6], some classical, most being already constitutionally regulated or/and regulated at the level of international documents of significance for the internal law, while others are treated by the doctrine and confirmed by the jurisprudence.

Although the order of their regulation in the text does not appear to be random, the text does not excel in the rigorousness of its systematization. Thus, once it reaffirms the free access to justice associated with the obligation of the civil justice to rule on all the cases in which it is invoked, and not being allowed to refuse to judge on the grounds that the law does not provide a regulation for the matter, or the one that provides is unclear or incomplete (Article 5, paragraph 1), the opening text of the chapter on the

[4] Prerequisite developed and assimilated as a fundamental premise in the Explanatory Memorandum to the Draft of the Code of Civil Procedure, February 25, 2009. In this regard, see also the Preliminary Theses of the new Code of Civil Procedure, approved by GD No. 1527/2007 (published in the Official Gazette of Romania, Part I, No. 889 of 27.12.2007).

[5] It is interesting and worth mentioning the classification proposed in the doctrine, according to which, in a double categorization, the newly established principles could be grouped in: *platform or tutelary principles* and *operational principles*, *principles with sanction* and *principles without sanction* - details in Danil Matei, *op. cit.*, pp. 112 et seq.

[6] As a general observation, it was pointed out in our recent doctrine that although the establishment of the fundamental principles remains a matter at the discretion of the legislator, it must be retained as necessary to distinguish the fundamental principles of the trial from other rules or procedural law provisions - details in Ioan Leş, *op. cit.*, pp. 64-65.

fundamental principles of civil trial excludes the civil jurisprudence from being a formal source of law, its provisions stating that it is forbidden for the judge to lay down general binding provisions by the judgments he issues in the cases brought before him (Article 5, paragraph 2).

The first principle evoked as such is the expression of a *suma divisio*, because all other principles are but guarantees of efficiency for it; achieving the requirement of a fair trial is the complex response to a set of sub-conditions that they provide. The legality and equality established by the text are the subject of basic rules in the functioning of justice in general. The principles that circumscribe the procedural framework (the right to defense, the non-intermediation and the publicity) and the specificity of the civil trial (good faith, right to decide) are then approached.

The chapter then establishes a principle that reflects the judge's responsibility for the quality of the judgment and ends - for symmetry - with a requirement that previously seemed to be subsumed to others, namely the respect for justice.

Without making a detailed account, we briefly present an overview of the regulatory option offered by the current code, proposing a concise analysis of each principle evoked by the text.

2.1. Under the principle of the *right to a fair trial*, *in a timely and predictable term*, any person has the right to a fair trial, carried over in a timely and predictable term, by an independent, impartial and lawful court.

The principle stated as such by the text of the code is the expression of a *suma divisio*, since, in reality, all the other principles are but guarantees of efficiency for it. Achieving the requirement of a *fair trial* is the complex response to a set of sub-conditions that they provide.

In close connection with this principle, in the same context, the civil procedural legislator establishes an obligation - *the court is bound* - for the court to take all necessary steps to carry out the procedural steps in these terms. The wording of the text is eloquent.

Compared to the text of the previous code, which used the term *reasonable time*, the authors of the CCP opted for setting an easier-to-quantify time parameter - *optimal and predictable term*[7].

In this way, it is considered that the judge's appreciation of the rhythm of the trial which is referred to him/her is closely related to the criteria of determination - the complexity of the case, the nature of the right in trial, possible tendencies of delay coming from the parties, etc. - and thus less permissive to subjectivism.

With regard to *predictability*, the Code provides that, in relation to the concrete circumstances of the case, at the first term of the case to which the parties are legally cited and after hearing them, the judge will *estimate* the length of time needed to investigate the trial and will record it in the conclusion, to be reconsidered during the proceedings only for good reasons. It is therefore also intended to establish a procedural discipline of all participants in the trial and a presumption of predictability relative to the duration of the case settlement.

Without providing a distinct text, in regulating the right to a fair trial, CCP also evokes the requirement of the *celerity of the judgment*[8]. Both the *principle of the right to a fair trial, in an optimal and reasonable*

[7] A formula that is rather preferred and imposed by the jurisprudence at the level of the European Court of Human Rights. For our domestic law, the option is criticizable as it shows inconsistency with other normative acts in the matter - Art. 21, par. 3 of the Constitution of Romania and Art. 10 of the Law No. 304/2004 which uses the expression "*reasonable term*".

[8] Celerity is one of the essentials of the new civil procedural legislative framework. Along with improving the act of justice, securing the speedy resolution of cases is an imperative that the text attempts to answer to. Thus: the simplification of procedural forms, the reshaping of the stages of the civil trial, the redefinition of jurisdiction and the redress of appeals, the regulation of the appeal procedure regarding the delay of the procedure are just a few expressions of this concern of the new civil procedure law. In the same note, the Preliminary Theses of the Draft of the New Code of Civil Procedure very well synthesized this issue, stating that "*while pursuing the construction of a modern and balanced civil procedure, the project focuses specifically on measures that accelerate the obtaining of the judicial response in a particular term, while respecting the procedural rights of the parties and the fundamental principles of the civil trial*" - Preliminary Theses of the New Code of Civil Procedure, approved by the GD No. 1527/2007 (published in the Official Gazette of Romania, Part I, No. 889 of 27 December 2007).

term, as well as the *celerity requirement* cover the whole civil process, in its entire course[9].

2.2. The principle of legality appears as more of a confirmation of the constitutional text.

Apparently, his explicit presence in the text, welcome of course[10], seems to only have the intent of discouraging the options of view for which the principle should not be reckoned as such, its evocation being understood.

In reality, although the Code reserves only one article (Art. 7) for it, its dimensions are much broader. Rightly, all those new principles, qualified as *obligations* and included in the category of civil trial principles, are rather the reflections of the principle of legality.

As to the procedural aspect, the text that establishes the legality also provides a duty for the judge, namely to observe the provisions of the law on the realization of rights and the fulfillment of the obligations of the parties in the trial (Art. 7 (2)).

2.3. Similarly, the *equality* in the civil trial enjoys normative regulation, even if the text has a concise wording. It only circumscribes the requirement of equality of legal treatment in civil justice as well: "*In the civil trial, parties are guaranteed the exercise of procedural rights equally and without discrimination*." The text suggests that guaranteeing such a right requires diligence from the person who handles the case, namely the judge of the case.

As in the case of legality, the full understanding of the dimensions of the principle is conditioned by the appeal to other texts that confirm it (e.g. the equality of procedural means or the content of the parties' procedural rights and duties).

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[9] Its provisions being also applicable in the forced execution phase – Art. 6 (2).

[10] It is inspired and welcomed the option of expressing it explicitly, especially in a context where the crisis of credibility of the law is a matter of notoriety. Under other conditions – of normality – such normative regulation seems unnecessary or at least understood under the conditions of a natural belief that all actions involved in the trial can only be *in full compliance with the law.*

2.4. The principle of disposition or the right of disposition of the parties

The provisions of Art. 9 of CCP have, as a matter of regulation, a principle of the *essence of the civil trial*, of its specificity[11], known in the current regulation as the principle of availability. The law establishes the *right of disposition of the parties*[12] as a fundamental right.

The content of the principle is reflected in several essential dimensions, as prerogatives given to the parties:

- The right to dispose on the initiation of a civil trial;
- The right to dispose on the object and limits of the action;
- The right to waive the trial or the right, the right to acquiesce or transact;
- The right to waive the legal remedy or to enforce the judgment.

The text is not limiting. It accepts other situations than those stated, *the party being able to dispose of its rights in any other manner permitted by law* - Art. 9 (3).

A derogation from the principle of disposition is the innovation brought by the code through *enhancing the role of the judge* and conferring his prerogative *on the forced introduction of another person in the trial*[13].

It has been argued[14] that the purpose of this derogation is to make the unitary judgment more efficient, not only the legal relationship remitted to settlement by the will of the plaintiff and / or the defendant, but also other legal relationships closely related to the original one. It should be stressed in this context that such a dimension of the principle, which is normatively admitted, does not annihilate the flexible nature, essentially disposable, of the civil trial, but in practice, we consider that it is necessary to take full

[11] Unlike the civil trial matter, in criminal trial matter, the defining principle is *the principle of officiality* (the fundamental distinctive mark between the two major judicial proceedings).

[12] The text of Art. 9 (1) also mentions the possibility of the unqualified owner of the right under judgement to start the civil action (this may be *another person* - than the one interested in it - namely: *an organization or other authority or public institution or of public interest*).

[13] Depending on the contentious or non-contentious nature of the procedure, the prerogative is regulated differentially.

[14] Preliminary Theses of the New Code of Civil Procedure, approved by the GD No. 1527/2007 (published in the Official Gazette of Romania, Part I, No. 889 of 27 December 2007).

precaution in taking such measures. Equally, even if the text does not provide expressly, the action of the parties by virtue of their disposition must also be regarded within the limits allowed by law, and in close correlation with the principle of good faith. Otherwise, they are also guilty of abusive exercise of their procedural rights.

Although the text of the law is not exhaustive, it must be said that, with respect to the principle of the judge's active role in finding out the truth, disposition is a matter of priority, which means that the new regulation makes it impossible for the court to pass over the will of the parties, many of the code texts evoking the requirement for the court to order a measure *only after it has been brought to the attention of the parties*.

2.5. The principle of good faith

In the general spirit of the text, the *good faith*, this concept that is very present in the field of the law, but evoked mainly in the matter of substantive law, is subject to the regulation of a procedural text and, among other arguments, perhaps confirms the need for its current reconsideration. Correlated with the text of the Civil Code[15], which states that "Individuals and legal entities participating in civil legal relationships must exercise their rights and perform their obligations *in good faith*, in accordance with public order and good morals", good faith being presumed until proven otherwise, the text of the CCP also sanctions the abusive exercise of procedural rights[16]. The principle also confirms here a fundamental duty, namely that of the exercise of procedural rights in accordance with the intended purpose of their regulation, as well as the respect for the full exercise of the corresponding rights of the other participants in the trial. The principle is not

[15] Art. 14 of the Law No. 278/2009. In close connection with the requirement to exercise the rights in good faith, the text invoked regulates in an immediate succession *the abuse of law*. Thus, according to the text of Art. 15 of the Law No. 278/2009, "No right may be exercised for the purpose of harming or damaging another, or in an excessive and unreasonable manner, contrary to good faith".

[16] The text establishes the liability of the party for material and moral damages caused by the abusive exercise of the rights conferred by the rules of procedure (see Articles 10 and 11 of Law No. 134/2010).

an absolute novelty for the civil procedure matter, but its placement in the range of fundamental principles, expressly formulated as such, cannot be ignored. It reflects the intention of the entire normative body to ensure, among other things, a higher degree of accountability for both the judge and the parties. In this case, it is attempted to discourage any means or forms of procedural manifestation that are unproductive or in contrast to the purpose and foundation of the judgment[17].

2.6. The principle of the right to defense

The right to defense is guaranteed - this is the debut text in the regulation of the corresponding principle - Article 13 (1). The dimensions of defense in the trial - *formal* and *material* - are also eloquently revealed in the regulation provided by CCP.

From a formal point of view, the parties have the right to be represented or, where appropriate, assisted by a specialized advocate (lawyer or legal counselor), under the law. The optional nature of specialized defense, a specific note of the civil procedure, is maintained.

From a material point of view, the parties are given the opportunity to participate in all stages of the trial. They can get acquainted with the contents of the file, submit evidence, defend themselves, present their written and oral submissions, and exercise legal remedies, in accordance with the law.

2.7. The provisions of Art. 14 of CCP are intended to regulate ***the principle of contradiction***[18].

The principle is documented in the doctrine under the title *audiatur et altera pars* and is expressed through a set of rights and obligations, for the

[17] The principle should be correlated with the provisions regarding the *participants in the civil trial* (see Title II of CCP).

[18] It should be understood that the notion of *contradiction* is not that of common language. Contradiction as a principle of trial procedure do not necessarily imply adversity, opposition of opinions or disagreement.

court and for the parties, designed in such a way as to provide a necessary balance in the judicial dialogue.

At the beginning of the text that formulates this principle, the obligation for the court not to rule on an application until after the citation or appearance of the parties[19] is also established.

The text establishes the imperative for the issues being trialed to be settled only after they were debated by the parties, the court's decision being based only on factual and legal grounds, on explanations or on evidence which were previously debated in contradiction.

Once the general framework has been established, the text sets out two obligations for the parties: the obligation to make known - in good faith[20] - in a reciprocal and timely manner, directly or through the court, the factual and legal grounds on which they base their assertions[21], as well as the means of proof which they intend to make use of, and the obligation to express their own point of view on the other party's allegations regarding the relevant facts of the case[22]. It is also added to them the right to discuss and argue any matter invoked during the trial by any participant, even by the court, ex officio.

From a semantic point of view, the meanings of the notion are maintained. This contradiction is not essentially conflicting, which makes the principle valid even for the non-contentious procedure. From the point of view of procedural language, the contradiction should be understood as *the prerogative of the parties to be able to express themselves and to support their views*, whether or not they are in opposition.

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[19] The same regime is followed by other applications subsequent to the introduction to the court, any exceptions or factual circumstances invoked – Art. 14 (5).

[20] "*Without distorting or omitting the facts that are known to them*" – as stipulated by the provisions of Art. 14 (3) of CCP.

[21] Whether they are *claims* or *defenses*, according to the manner in which they are distinguished by the text in the regulation of civil action (Art. 40 of the CCP).

[22] The principle provides for a guarantee of the exercise of the right to a defense when it states that the purpose of *informing the parties* of their procedural situation is that *each of them can organize their defense – Art. 14(2).*

2.8. The principle of oral proceedings

The text devoted to the oral proceedings has a concise wording: "*Proceedings are debated orally, unless the law provides otherwise, or when the parties expressly request the court to make the case only on the basis of the documents filed in the file*" – Art. 15.

Although, in the light of CCP, there still remains a *written stage* of the civil trial, it is obvious from the wording of the text that the scope of oral proceedings also encompasses *the investigation and debate of the trial in first instance*.

However, situations are admitted where the parties may request the court to make the judgment only on the basis of the pieces that form the case file.

2.9. The principle of immediacy

The principle evoked by Art. 16 of CCP is the one of *immediacy*.

The text confines itself to imposing an obligation on the court dealing with the case - the court panel - to act directly, without intermediation on the pieces of the case file and to directly administer the evidence on which the solution to the case is based.

This is the rule. As it is formulated, the text also allows for exceptions, in which case the evidence may also be administered under other conditions, permitted by law[23].

2.10. The principle of publicity

The text that establishes the principle of the public character of the civil trial is contained in Art. 17 of CCP, which states that "*Trial hearings are public, except for the cases provided by law*". This is a faithful takeover of the corresponding constitutional text[24], and of the corresponding text from the organic law in the matter[25].

In terms of *publicity*, the law states that the *trial hearing* is public. However, there are exceptions provided by the Code in this matter. Thus,

[23] An eloquent example is the administration of evidence through the *rogatory commission.*
[24] Provisions of Art. 127 of the Constitution of Romania.
[25] Provisions of Art. 12 of Law No. 304/2004 on judicial organization.

for the stage of the *investigation of the trial* and only for *the first instance trial*, the option of the law is to limit the public character, the rule being *a judgement in the council chamber*[26]. At the same time, for certain cases, *the law* provides that certain trials are to be conducted in the council chamber or, in certain situations, *the cou*rt may decide to conduct the trial in the council chamber, even if the law does not provide for it[27].

The condition of publicity has always been considered as the first guarantee of a transparent, real justice, and today, in the light of the new requirements, also an expression of the fairness of the trial. In line with the general note, the publicity of the civil trial is also a guarantee for the disciplining of the parties and the court, which CCP tries, through many of its texts, to consolidate.

2.11. The principle of the language of the trial

The statement that establishes the rule on the language of the trial enjoys, in the new text, a more comprehensive wording (Art.18). The marginal title avoids detailing: *the native language* or *the official language of the trial*. It opts for a generic formula - the language of the trial – then detailing:

– *The official language of the trial* is Romanian; the civil trial is carried out in the Romanian language (Art. 18 (1)), the applications and procedural documents shall be made only in Romanian (Art. 18 (4)).

[26] A provision whose entry into force has been successively postponed. The last one is brought by GEO No. 95/2016 for the extension of certain deadlines, as well as for the establishment of some measures necessary for the preparation of the implementation of certain provisions of Law No. 134/2010 on the Code of Civil Procedure (which extended the period provided for in Article XII of Law No. 2/2013), according to which the investigation of the trial will take place in a council room for trials *started from 1 January 2019.*

[27] Where the public debate could affect morality, public order, the interests of minors, the private life of the parties or the interests of justice, the court may order, on request or ex officio, a trial closed to the public. However, the parties may be present, together with their representatives and other persons to whom the court, for motivated reasons, admits their presence in the proceedings - the provisions of Art. 213 CCP.

– The conditions in which *the categories of procedural subjects who do not know and / or do not understand the Romanian language* can participate. Thus, Romanian citizens belonging to national minorities, foreign citizens and stateless persons who do not understand or speak the Romanian language have the right to express themselves *in their native language* before the courts of law, to get acquainted with all the documents and works of the file and to formulate conclusions, by way of authorized translators. The text concurs with the detailed provisions provided by the Code in the provisions of Art. 225[28], thus promoting a distinction between a *translator* (when the Romanian language is not known) and an *interpreter* (when the person is mute, deaf or deaf-mute or, from any other cause, cannot expressed itself, the communication being made in writing, or if the person cannot read or write).

2.12. The principle of continuity

CCP also provides express regulatory space to the requirement of continuity of the composition of the court panel throughout the trial.

Art. 19 refers to the judge - in a generic sense, of judicial institution - when it states that "*The judge in charge of dealing with the case cannot be replaced during the trial unless for good reasons, under the law*."

From the point of view of *continuity*, the requirement is that the formula of the court panel should be maintained in the course of the judgment, the reason for this provision being centered on the need for the judge to form his conviction on the solution only after perceiving the whole proceeding, thus eliminating the risk that relevant aspects for the case (some of which possibly inadequately recorded in the conclusions) to not be directly and personally known to them. Thus, possible changes in

[28] Having as marginal title *Using the Translator and the Interpreter* - (1) When one of the parties or persons to be heard does not know the Romanian language, the court will use an authorized translator. If the parties agree, the judge or the clerk can make the office of a translator. (2) If one of the persons mentioned in par. (1) is mute, deaf or deaf-mute or, for any other reason, cannot express itself, the communication with this person will be in writing, and if they cannot read or write, an interpreter will be used.

the composition of the court panel can only be justified *for objective reasons* (e.g. promotion, transfer, parental leave, etc.). If the replacement takes place after the hearings are completed but before the solution has been adjudicated in the case, it is necessary to refer the case back to court for the resumption of the debates in the new formula of the court panel.

In other words, continuity is ensured only if the same court panel (unipersonal or collegial) in front of which *the debates have been held and closed*, takes part in *the deliberation and judgment*.

Otherwise, the judgment given is susceptible to annulment (by way of appeal)[29] or to cassation (by way of recourse)[30].

The text confirms the requirement of continuity in the case, in order to ensure consistency in the investigation of the trial and, implicitly, a higher degree of accountability of the judge in solving the case.

2.13. The principle of role of the judge in finding the truth

As stipulated in the new text of the Code - under the title of *the judge's role in finding the truth* (Art. 22) - the principle of the truth or the principle of finding the truth is illustrated rather as a corollary. It is the result of the articulation of other principles (previously analyzed) governing the civil trial, the preponderance being given by the attributes of *the active role* in relation to the *parties' disposition*, the *contradictory character* of the procedure and *the legality.*

In essence, as it is formulated, the principle defines the points of interference between the procedural exercise of the parties and the role of the person in charge of the case, both understood within the limits of exercise set by the texts:

- *The judge has the duty to prevent*, by all legal means, *any error in finding the truth* in the case, based on the identification of the facts and the correct application of the law, for the purpose of giving a sound and lawful decision, purpose for which he/she is entitled to require the parties to

[29] Provisions of Art. 480 alin. (6) of CCP.
[30] Provisions of Art. 488 par. (1) item 2 of CCP.

provide oral or written explanations, to discuss any factual or legal circumstances, to order the administering of evidence and other measures they consider necessary, even if the parties object;

– *The judge may order the introduction of other persons in the case,* to whom the legal status of disposition applies (to waive the trial or the demanded right, the acquiescence, using the transaction);

– *The judge gives or re-establishes the legal qualification of the acts and facts* inferred to the judgment, putting to the debate of the parties the exact legal qualification;

– *The judge has to rule* on everything that has been requested, but without exceeding the limits of the investment, unless the law provides otherwise.

The current regulation of the principle appears, at first reading, to be too didactic and summative compared to the provisions of the entire Code. Perhaps with the intention to provide additional text and to accentuate again the idea of the accountability of the judge - as an essential note of the whole regulation - the text risks having redundant provisions, part of which being present, even in complete form, in other regulations with which the matter of this principle is completed.

In addition to the principles evoked as such, the text of the Code makes a distinction when establishes *obligations* for parties and third parties and *duties* for the judge.

Thus, the text defines *the obligations of the parties* (Art. 10) and of *third parties* (Art. 11) in the procedural acts, under the conditions, order and terms established by the law or by the judge, the support brought in the matter of assuring the probation and its administration, as well as, in general, the contribution to ensuring *a trial without delay* and to its completion[31].

The Code also evokes *the duty to show respect for the fundamental principles,* laid down by the text for the judge of the cause, to create the conditions for the effective realization of the principles, both on his/her part and on the part of the other participants in the trial (Art. 20) and *in regard to the*

[31] Provisions are stipulated under the sanction of *payment of a judicial fine*, and for third parties, if any, of *payment of damages*.

justice (Art. 23), a text that places the task for the judge to ensure the police of the hearing and the respect due to the trial by all the participants in the trial.

Although not expressly stated, *the judge's duty to strongly recommend the reconciliation of parties,* throughout the process (by giving them guidance in this respect) or *to recommend* the parties to appeal to the alternative of an amicable settlement through mediation[32], without hurting the voluntary character, which must take precedence (Art. 21).

The fundamental principles of the civil trial must not be treated and understood as separate entities. Their invoking implies a permanent interdependence and conditioning, so that each of them acquires full expression only by reference to the others. Equally, the violation, ignoring or disregard of one of them may compromise the quality of the act of justice in its entirety[33].

3. Enforcement of the Civil Procedure Law

3.1. Time of enforcement of civil procedural law regulations

The Code of Civil Procedure waives the rule of immediate enforcement of the new civil procedure law, a rule applicable in the old Code of Civil Procedure, and establishes *the application of the new procedural law only to trials and forced executions that have begun after its entering into force*.

For *new trials* or *forced executions* commenced after the entry into force of the new law, the applicable civil procedure law is the new one, both regarding the trial phase and the forced execution phase (Art. 24 of the CCP).

For *trials* or *forced executions in progress* at the time of the entry into force of the new law, the applicable civil procedure law is the law under which they proceeded initially, both with respect to the competent court and the remedies (motives and deadlines).

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[32] Under the terms provided by the special law in the matter (Law No. 192/2006 on Mediation and Organization of the Mediator profession).

[33] Some of the grounds for appealing are *violations of some of the fundamental principles of the civil trial* (see Book II, Title II of the Code regarding appeals, with insistence on extraordinary remedies, where the reasons have express stipulations).

In the case of dismantling of the court invested under the old law, the case will be sent ex officio to the competent court according to the new law (which will, however, judge according to the procedural law under which the proceedings started).

The *ultra-activity* of the old law in terms of *competence* is preserved, including in the case of referral to a retrial, a hypothesis in which, according to CCP, the case should have been sent to the newly-qualified court.

The rule of *ultra-activity* is maintained relative to *the remedies*, the deadlines for their exercise, as well as their reasons, relative to the start date of the trial.

For the *means of proof*, a distinction is made between the applicable law in terms of admissibility of the evidence and the applicable law for the administration of the evidence. Thus, in terms of *admissibility*, the applicable law is the law in force at the time of their appearance or at the time the legal deeds which are the subject of the proof took place. This means continuing the application of the old law (i.e. the *ultra-activity of the law*), under which the deeds subjected to proof have been committed, relative to the admissibility conditions and the proof power of the pre-constituted evidence. However, as regards the *administration* of evidence, the applicable law is the law in force at the time of administering the evidence.

3.2. Space of enforcement of civil procedural law regulations

The issue of the application in space of the rules of civil procedural law presents two aspects:

An *internal* one - the rule that governs is that of territoriality, the provisions of the civil procedural law being applicable throughout the country (Art. 28 of the CCP).

An *international* one - specific rules for legal relations with a foreign element, a situation whose matter is regulated by Book VII of CCP on the *international civil trial*[34].

[34] The issue is the subject of study for the private international law (autonomous branch of law and corresponding discipline of study).

4. Conclusions

The Code of Civil Procedure in force today enjoys a didactic systematization, allocating, in the beginning, treatment space to fundamental institutions. Thus, in the order of their stipulation, the Code begins with provisions on: the regulatory field, the fundamental principles of the civil trial and the rules on the application of the law of civil procedure, the Preliminary Title thus providing a welcome and very necessary preamble to the entire regulation.

This systematization is apparently scholastic in relation to the old code, which the new regulation would explicitly repeal in 2013. The legislator's option in this respect is, however, far from criticism. On the contrary, it is categorically welcomed and, although the reason that dictated it may seem only a theoretical preciousness, its practical reason must be fully revealed. Undoubtedly, all three procedural institutions addressed in the preliminary title form the foundation of a coherent and easy to implement normative structure and their understanding and appropriation should constitute a first and important step in understanding and appropriating the text, in its entire content.

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NEW APPROACHES TO THE NOTION OF STATE AID FROM THE PERSPECTIVE OF THE CONCEPT OF ENTERPRISE

Manuela NIȚĂ*

Abstract: *The major impact of competition rules on trade is no longer a new issue, leading to a competitive economy. It is very important for European and national lawmakers to adjust legislation to the market requirements that are constantly changing. Basic competition concepts themselves need to be re-analyzed, re-interpreted so as to ensure the functioning of the delicate "playing" competition by stimulating the exercise of freedom in business on the one hand, and by tempering excessive, anti-competitive behaviors on the other. State aid law is in this situation when, due to the many practical situations in the Member States, the notion of state aid requires clarifications, recommendations by field of activity so that the classification in this category to be a correct one and not excessive. The state aid procedure is not simple and the placement of a support measure in this category needs to be carefully analyzed. The present study aims to address the new dimensions of the concept of state aid, so that interpretative trends are useful to practitioners and theorists in the field.*

Keywords: *competition, state aid, authority, support measures*

1. Introductory

Repeated changes to legislation are not a factor of stability, even more so from an economic point of view. It is appreciated that there is a tendency in times of crisis to relax the competition rules and to offer a greater permissiveness for situations which, in another context, would not have been accepted, including in the field of competition[1]. In fact, the result of

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[1] http://ec.europa.eu/competition/recovery/index.html

this relaxation would turn against trade, emphasizing the causes which generated the economic crisis.

The European Commission and the national authorities have the role of ensuring the application of competition rules, of disciplining the legal relationships taking place on the market.

As we have shown, instability does not lead to progress, but on the other hand, we must not remove from the outset any initiative to adapt the legislation.

Moreover, it is sometimes not necessary to change the existing laws, as it is sufficient for the competent authorities, on the basis of actual legislation, to express themselves in clear areas, by the development of clarifications, recommendations, application guides, through which there are detailed the existing rules (without modifying them) in order to ensure the uniform application at Union level and, where appropriate, at Member State level, by explaining the meaning of the basic competition law institutions in the new context.

In our study we will focus on the recent approaches at the level of the European Union on the notion of state aid, being convinced that they contribute to the streamlining of the enforcement of the competition rules and the elimination of any barriers, constraints, limitations in the development of trade but also of society in general.

2. Fundamental benchmarks on the notion of state aid and enterprise in European law

According to European legislation, State aid is defined as " any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member "[2].

[2] Article 107 (1) of the Treaty on the Functioning of the European Union (TFEU)

From the content of art. 107 par. (1) of the Treaty, we can specify the cumulative conditions that any market support measure must fulfill to qualify as State aid:

- to be granted a state facility from the state (or by using state resources);
- to benefit a particular business or economic activity;
- the measure leads to distortion or to the possibility of distortion of competition,
- affect trade between Member States.

Failure to meet one of these conditions has the effect of not classifying that aid as State aid, being a simply measure of support that does not require a special procedure.

Support measures are state-owned facilities from state sources and resources - public funds or funds provided by public authorities, institutions or businesses – trough which to provide an economic advantage to an enterprise or economic activity that affects or may affect competition on a given market.

By economic advantage, according to the law, we understand "*Any form of granting a quantifiable advantage in money, regardless of its form: subsidies, debt cancellation or loss taking, exemptions, reductions or delays in payment of taxes and duties, renunciation of normal revenues from public funds, including the granting of preferential interest-rate loans, preferential guarantees, State capital holdings, central or local public authorities or other bodies managing state or local government sources if the rate of return on such investments is lower than the one normal, anticipated by a prudent private investor, price cuts in supplies and services provided by central or local public authorities, or by other bodies managing local or local authorities, including the sale of land belonging to them d to the private domain of the state or local public authorities, below the market price, the creation of a market or the strengthening of the beneficiary's position on a market etc.* "[3]

[3] According to art. Article 2, paragraph 1, point h^1 of Emergency Ordinance no. 77/2014

In order to be State aid, the advantages must be granted to an entreprinse or to an activity consisting in the supply of goods, services and works on a market [4].

Because this study follows the analysis of the state aid component or an enterprise, it is impetuous to refer to the concept of enterprise.

Law no. 21/1996, the competition law, creates a common terminology between European and national legislation, indicating that through the concept of enterprise we understand any entity engaged in an economic activity, which means an activity consisting of offering goods or services on a given market, independently of its legal status and the way of financing (Article 2 paragraph 2). This entity may consist of natural or legal persons of citizenship, respectively of Romanian or foreign nationality (Article 2 paragraph 1).

It may be a natural or legal person or any form of organization without legal personality capable of acting through production, trade, investment, on the Common Market in a competitive environment.

The legal form (company, association, foundation, economic interest group, natural persons), the way of financing, whether or not motivated by a profit, are not criteria that can exclude the entity from the notion of enterprise.

The legislator, through the ordinance regulating state aid in Romania, strengthens these definitions, emphasizing that by enterprise we understand any entity, irrespective of the legal status and the way of financing, including the nonprofit entities, which carry out an economic activity (article 2, paragraph 1, point p of EO 77/2014).

From the perspective of regulating State aid, the relevant criterion for qualifying an entity as an enterprise is whether this entity carries on an economic activity or not.[5]

[4] Article 2, paragraph 1, point a of Emergency Ordinance no. 77/2014, defines the expression of economic activity

[5] We find this criterion both in the Communication of the European Commission and in the Competition Council's Guide on the incidence of the state aid law on the financing of sports activities

3. Appreciation of economic activity versus non-economic activity and application of state aid rules

The European Commission, taking into account the Court of Justice's solutions, considers that economic activity consists of providing goods, services and works on a given market (text also found in our legislation), but the existence or not of a market for a particular service differs greatly from one state or other and these markets are subject to many factors such as the decision makers' choice, the development of commerce at some point, even the economic recession by restricting some markets[6].

It is also correct to note that if an entity carries out both economic and non-economic activities at the same time, it must be regarded as being an enterprise only in respect of economic activities[7]. For example, if a sports club receives funding for running amateur sports activities, these are non-economic activities. If the same club also has groups of professional players, then it also carries out economic activities because it can operate on the market of professional player transfers. In this case, it is necessary that the two activities be organized distinct from the financial and accounting point of view,[8] analyzing separately the application of the State aid rules.

At the same time, if an entity which does not carries out economic activities owns shares in another entity which does carries out economic activities, the first one will not automatically become an enterprise with an economic activity if it does not provide services or goods on its own behalf on a given market. The quality of a shareholder confers specific rights to company law such as the right to vote and the right to dividends.

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[6] See, Gh. Gheorghiu, M. Nita, Competition Law, 2nd Edition amended and completed. Ed. Universul Juridic, Bucureşti, 2017, p168-169

[7] Commission Notice on the notion of State aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union C/2016/2946, published in the Official Journal of the European Union no. 262/1 of 19.07.2016

[8] See in this respect the Guidelines of the Competition Council on the incidence of the state aid law on the financing of sports activities

On the other hand, if that entity exerts more prerogatives as a shareholder, existing several functional links between the two entities forming an economic unit, then it becomes a enterprise with economic activities, in which case it may be subject to specific rules State aid.

4. Impact of legislation on State aid in the educational activity of educational establishments

In Romania, the educational system, regardless of level, has two forms: the public system and the private system. The analysis of the impact of the legislation on state aid in this area must be differentiated considering the two forms and correlated with the previous explanations regarding the economic and non-economic activity respectively.

The main feature of public education is the form of financing from the state budget, and in addition, this system aims at educating, social protection and cultural development of the population, so it follows the general interest of society.

Public education is free of charge, as enshrined in the Constitution, which guarantees the right to education of the population. A discussion can arise in terms of university education, where studies are conducted both in fee-free and with tuition fees. It is wrong to interpret that as long as there are tuition studies, the university, even the public one, would carry out an economic activity. The approach is not correct because the purpose of public education is not the economic activity itself, through the collection of taxes, but those fees complement the source of financing, the purpose being the one outlined above.

It is considered that [9] these fees (admissions, studies) contribute to the running costs of the institution and represent only a fraction of the costs of

[9]Commission Notice on the notion of State aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union C/2016/2946, p.8

the education service provided and do not represent a remuneration for the service provided to give to this activity an economic character.

Even if tuition fees studies are supported in the public system, this does not change the non-economic nature of the activity, since the beneficiary of the studies has the right to undertake unpaid studies if it fulfills certain conditions and therefore the rules on State aid does not apply.

Regarding private education, regardless of level, it also aims at educating the population, but the main objective is to carry out an economic activity in the educational field, which attracts the application of the rules regulating the state aid.

The European Commission notes [10] that there are Member States where public institutions can also provide educational services which, under certain conditions (their nature, financial structure, the existence of competing organizations) must be regarded as having an economic character. It is very possible, as in Romania, on a case-by-case basis, to extend the interpretation in this respect.

As far as research activities are concerned, whether organized by universities or other bodies set up for this purpose, they will not have an economic character and therefore are not subject to the State aid rules as long as the research income is reinvested in the basic activities of the institution.

There are situations when a research institute (whether or not part of a university) or a university structure offers consultancy, testing, production, laboratory work for third parties for a contractually agreed remuneration. We might think that in this case the activity of the institution turns into an economic activity, deviating from its original purpose, but as stated above, as long as the resulting income is reinvested for the main activities of the institution, the non-economic character of the competition is preserved.

[10] idem

5. The incidence of the legislation on State aid in the healthcare activity

At Union level, healthcare systems are not uniformly regulated, each one having their own particularities, which has given rise to different approaches to fitting a given situation as State aid. Faced with these differences of interpretation, the European Commission also comes up with clarifications in this sector, which can only be beneficial to the competition authority.

The healthcare system in Romania has two components: the public healthcare system and the private healthcare system. The public system operates on the basis of the principle of solidarity, with an emphasis on the social function it has for ensuring equitable access to basic medical services for all categories of population.

Since the public system is funded through social security contributions and other state resources, public sanitary and hospital units will never be considered as businesses because services are provided free of charge. Although some of these services are sometimes chargebale, as in the discussion on the education system, these costs are only a fraction of the cost of the service provided and are not a remuneration to give it economic value.

The same is the case in which the public hospital can not provide everything that the medical service requires, and the patient has to purchase his / her own medical needs, but not from the public hospital, but from third-party suppliers. These costs are not transferred directly to the hospital, but are borne separately by the patient's decision.

As for the private system, it is not based on the principle of solidarity. The services are indiscriminately but cost-effectively, representing economic activities. The private system operates on the basis of free competition, with fierce competition among healthcare providers. Even if private healthcare providers benefit from funds from the health insurance system (public funds), their activity keeps their economic status, because the remuneration is pursued.

If hospital units and other healthcare providers provide services against a fee paid by the patient or an insurance company, then we are in a situation of economic activity, in which case even a public hospital can be found.

In the latter hypothesis of the public hospital which carries out the two types of economic and non-economic activities at the same time, it is necessary for the two activities to be organized distinct from the financial and accounting point of view, analyzing separately the application of the state aid rules.

6. Incidence of legislation on state aid in the cultural and heritage conservation field

In principle, public funding of cultural and heritage conservation activities are not economic activities, support measures from public funds aiming at promoting and developing cultural activities, but also protecting and preserving heritage. As long as resources are used to allow the general public access to cultural values and activities, their character is uneconomic.

If the activities are fully supported through taxes by visitors, users or other commercial means, then they are economic activities. Basically, the decisive element of analysis is the commercial character of organized events.

The Commission considers that the above reason must also be taken into account when it comes to the restoration and preservation of buildings of historical monuments the use of which is exclusively in the interest of a private entity, in which case it is advisable to qualify as having economic caracter and therefore the rules on State aid apply.

I believe that, according to our legislation, the qualification as a state aid of a support measure aimed at restoring and preserving a private historical monument building may result in a decrease in the authorities' interest in rescuing buildings of immeasurable value. Obviously, these situations represent a public investment in the private domain, and the reasoning of the Commission is logical, but in practice the effect can be devastating for heritage values.

Conclusions

The existence of regulatory differences at the level of the Member States regarding the development of certain activities and services that ensure the development, stability and functioning of the rule of law have led to difficulties in applying the competition rules, implicitly state aid rules. For this reason it was necessary for the European Commission to intervene for a coherent and unitary application, by elaborating clarifications on the concept of state aid, being situations in which some state support measures or state resources were wrongly subject to the rules specific to state aid. The study highlighted some of the issues that authorities need to consider when qualifying support measures, namely the beneficiary and the type of an activity as being an economic or non-economic activity.

These aspects have been analyzed by reference to three key sectors of society, namely education, health, culture and heritage conservation, correlating with the interpretative recommendations proposed by the European Authority.

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THE PENALTY FOR NOT DECLARING THE MAIN TAX LIABILITY ACCORDING TO THE FISCAL PROCEDURE CODE. LEGAL REGIME

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Abstract: *The lack of payment of the main tax liability at the due date triggers the accessory tax liabilities related to it, which have the following forms: (fiscal) interest, delay penalties, missing statement penalties, delay increases. The missing statement penalty has been instituted quite recently, starting with January 1st 2016, being enforceable in the specific situation in which the main tax liability is not declared/is incorrectly declared. It will represent the subject of the current analysis, aimed at describing the legal regime of it, but also at differentiating it from the delay payment, by excluding one another. The documents upholding this liability are represented by the legal norms allocated to it by the Fiscal Procedure Code1, but also by the Order of the President of the National Agency for Fiscal Administration No. 3834/2015 on the approval of the procedure for the establishment of accessory tax liabilities representing missing statement related penalties*[2].

Keywords: *main fiscal duty, accessory fiscal duty, delay penalty, penalty for not declaring the fiscal obligation, taxation decision.*

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[1] Official Gazette, Part 1, No 547/23 July 2015.
[2] Official Gazette, Part 1, No 984/30 December 2015, briefly called OPANAF 3834/2015 in this study.

1. Introduction

According to the Code of Civil Procedure, taxes, fees or mandatory social contributions *represent main fiscal duties devolving upon the taxpayer*, defined by him as: "the obligation to pay the taxes and social contributions, as well as the obligation of the fiscal authority to refund the amounts collected without being due and to reimburse the due amounts, for the cases and under the conditions stated by the law" (Art 1 Para 28). The not performed/performed with flaws main fiscal duty entails an *accessory fiscal duty*, defined as: "the obligation to pay or to refund the interests, penalties or increases related to certain main fiscal obligations" (Art 1 Para 29).

Though it is not found in the above-mentioned definition, we emphasize the fact that the accessory fiscal duty includes the *penalty for non-declaring* the main fiscal duty. The quality as accessory duty of the penalty for non-statement is emphasized by its definition stated by Art 1 Para 34 of the Code of Fiscal Procedure: "the accessory fiscal duty represents the sanction for non-declaring or incorrectly declaring, in the final return of incomes, the taxes, fees or social contributions".

The reason for establishing the penalty for non-statement, the premises of its application, as well as certain procedural aspects shall be subjected to our further analysis.

2. The premises of the application of the penalty for non-declaring the main fiscal obligation

The penalty for non-declaring is stated by Art 181 ("The penalty for non-declaring of the fiscal claims administered by the *central fiscal authority*") of the Code of Fiscal Procedure, different from the other accessory duties. According to Art 181 Para 1 of the Fiscal Procedural Code, "for the main fiscal duties non-declared or incorrectly declared by the taxpayer and established by the fiscal inspection authority through self-

assessments, the taxpayer owes a penalty for non-declaring of 0,08% per day, starting with the day after the next term and until the date in which the amount has been paid, including from the main fiscal obligations non-declared or incorrectly declared by the taxpayer and established by the fiscal inspection authority through self-assessments".

The incidence of the text refers to the cumulative meeting of the following *premises*:

a) The existence of certain main fiscal claims managed by the central fiscal organ. Paradoxally, the requirement is stated only by the annex of Art 181 – *"The penalty for non-declaring the fiscal claims managed by the central fiscal authority"*, and not by Art 181 Para 1.

The revealed circumstance emphasizes *two aspects*: which is the main fiscal authority, and which are the fiscal claims managed by the central fiscal authority.

The central fiscal authority. According to the incident norms, the central fiscal authority operates through the National Agency for Fiscal Administration (ANAF)[3]. It has been established through G.E.O No 86/2003 on the regulation of certain financial-fiscal measures[4], being essentially reformed by G.E.O No 74/2013; it has the functions revealed by Government Decision No 720/2013[5] and, from the perspective of our analysis, it has the prerogatives established by the Code of Fiscal Procedure, subsumed to the activity of managing the fiscal claims.

The fiscal claims managed by the central fiscal authority. In order to separate the fiscal claims managed by the central fiscal authority, it is necessary the corroboration of the Fiscal Code[6] - expressly stating the budgets where the taxes, fees or contributions need to be directed, with the

[3] ANAF operates through its empowered territorial fiscal authorities.
[4] Published in the Official Gazette, Part 1, No 624/31 August 2003.
[5] Published in the Official Gazette, Part 1, No 470/30 July 2013. According to Art 6 Let b) of this normative act, ANAF has the obligation to "collect the state's incomes". The fiscal incomes from the budgets of the administrative-territorial units are managed by the local fiscal authorities, according to Art 37-38 of the Code of Fiscal Procedure.
[6] Law No 227/2015 on the Fiscal Code, published in the Official Gazette, Part 1, No 688/10 September 2015.

provisions of Art 29-30 of the Code of Fiscal Procedure, stating the general competence of the central fiscal authority, namely its territorial and material competence.

First of all, according to Art 29 Para 1 of the Code of Fiscal Procedure, the central fiscal authority manages the taxes and social contributions representing incomes for the state budget, the budget of the public social security system, the budget of the single national Fund for health social insurances and the budget for unemployment insurances. Practically, the main fiscal collections are managed by the ANAF, through its specialized territorial structures, such as: the corporation tax, the income tax, the dividend tax, the taxation on the incomes of small enterprises, the VAT, the excises, the mandatory social contributions, including custom taxes[7], this being the rule.

But, *even if the law states otherwise,* the fiscal claims related to these budgets can be administered also by *other entities* (others than the central fiscal authority), the provisions of Art 29 Para 1of the Fiscal Procedure Code, stating an exceptional provision. We consider that in accordance with this exception are the provisions of Art 29 Para 3 of the same Code, according to which: "For the case of the income taxation and the social contributions, by Government Decision, a special management competence can be allocated to it". We deduce from here that in the area of the claims administered by the central fiscal authority, namely of the penalty for non-declaring, *can be limited*, but according to certain special judicial norms, to which the above-mentioned provisions refer to.

Second of all, according to Art 29 Para 2 of the Fiscal Procedure Code, "The central fiscal authority performs activities of management also for *other claims* due to the general consolidated budget than the ones stated by Para 1, according to the competences established by the law", hence the conclusion of the possibility for the enlargement of the area of the claims

[7] The custom duties are stated by the Romanian Customs Code – Law No 86/2006, published in the Official Gazette, Part 1, No 350/19 April 2006.

administered by the central fiscal authority, implicitly, the enlargement of the area of applicability of the penalty for non-declaration.

Therefore, based on the provisions of Art 29 of the Code of Fiscal Procedure, it can be concluded that the penalty for non-declaration has a *circumstantiated applicability* because of the:

- Taxes and contributions owed to the state budget, to the budget of state social insurances, to the budget of the single national fund of social health insurances, to the budget of the unemployment insurances which are under the management of the central fiscal authority (ANAF);

- *Other claims*, owed to other budgets from the structure of the general consolidated budget, to the extent to which these are *managed by the central fiscal authority*, according to the competences established by the law;

b) The main fiscal obligations were not declared or were declared incorrectly by the taxpayers[8]/citizens[9]. Obviously, are aimed those fiscal obligations whose settlement is based on the declarative system[10], preferably by the Romanian legislator. The declaration of the fiscal obligation represents the legal obligation of the taxpayer established by the fiscal law.

Where appropriate, the taxpayer:

- *Has the obligation to calculate (quantify) himself the fiscal obligation*, if this is stated by the law; as an example, we mention the obligation of the taxpayer to calculate and declare the tax on profit he dues, at the latest on the 25th of the first month after the conclusion of the past trimester to be declared. In this case, the notice of assessment is just a legal

[8] Seen as "every natural or legal person or any other entity without legal personality which owes, according to the law, taxes and social contributions" (Art 1 Point 4 of the Code).

[9] Seen as "the person who, in the name of the taxpayer, according to the law, has the obligation to pay or to withhold and pay or to collect and pay the taxes and social contributions. Is also a payer the secondary office compelled to register as payer of salaries and income assimilated to salaries, according to the law" (Art 1 Point 35 of the Code).

[10] According to Art 93 of the Code, the fiscal claims are established as following: a) by a notice of assessment, according to Art 95 Para 4 and Art 102 Para 2; b) by a notice of assessment issued by the fiscal authority, for the other cases.

act which the legislator empowers with the legal features of the *claim*[11], being assimilated by the legislator to a *tax decision*, but, with certain exceptions[12], under the reserve of its subsequent verification by the empowered fiscal authority, by one of the means integrated within the fiscal control;

- *Has the obligation to declare the incomes/assets/taxable operations, without being compelled to calculate the taxes or due contributions*. In this meaning, the issued notice of assessment is assimilated to a tax decision, being the base for the quantification of the fiscal burden of the taxpayer, calculated by the competent fiscal authority.

A simple assessment is not sufficient. The assessment must be entirely and correctly filled in, to reflect the elements of the assessment base and, if necessary, the related taxes. The notice for assessment can be *corrected*, by submitting a *rectifying assessment*, but just in accordance with the restrictive conditions stated by Art 105 of the Code of Fiscal Procedure.

Here are relevant the provisions of Art 105 Para 8 of the Code of Fiscal Procedure, according to which: "If during the *fiscal inspection* the taxpayer registers or corrects the notice of assessment for the periods and fiscal claims which are subjected to the inspection, it should not be taken into consideration by the fiscal authority".

Obviously, we are in the present of an obligation of *to do*, whose content consists in *declaring, declaring correctly* the basis for taxation, the taxes and social contributions owed by the taxpayer. It also represents one of the elements differentiating the penalty for non-declaring from the penalty for delay, as we shall see next.

c) The main fiscal obligations are established by the fiscal inspection authority by tax decisions. It is a premise related to the precedent one. As a rule, the fiscal obligations are established by the very taxpayers and

[11] Regarding the fiscal assessment, see also: Rada Postolache, *Drept financiar*, 2nd Edition, C.H. Beck Publ.-house, Bucharest, 2014, pp. 195-199.

[12] We are considering the exception of the case in which the establishment took place as effect of a fiscal inspection or of a verification of the personal fiscal situation or the right to a subsequent verification has been prescribed.

communicated to the fiscal authority as a legal act – *the notice of assessment*. These notices are not definitive, presuming the reflection of the fiscal reality declared by the taxpayer until the contrary, being under the reserve of a subsequent verification by the fiscal authority.

When does the fiscal inspection authority can establish a fiscal obligation for the taxpayer, who had the obligation of establishing and quantify it himself? The quoted text here refers only to the hypothesis of the *tax inspection*[13], in which it was found that there is a main obligation (tax, compulsory social contribution) which:

- Either it has *not been declared*[14]; where appropriate, the non-declaration is an offense, as the constitutive elements of the offense may also be met;

- Or, it has been *incorrectly declared*; according to the law, we consider that the incorrect declaration must be taken into consideration, first of all, from the perspective of the *tax base*, which must be determined by taking into account all its constituent elements, as provided for by the tax rules, differently for each compulsory tax levy; these are elements that directly influence it – increasing or diminishing it, with direct consequences on the owed taxation.

We need to mention that the tax inspection is performed according to the Code of Fiscal Procedure. It is performed with a legal periodicity, for selected taxpayers. As rule, they are *notified* to make an appointment for this inspection (Art 122 of the Code of Fiscal Procedure), in order to give them the possibility correct the possible financial irregularities. The law includes the possibility to submit/correct the notice of assessment, at the latest by the date of the start of the tax audit, to the extent that these legal transactions have not taken place. According to Art 105 Para 8 of the Code of Fiscal Procedure, after the beginning of the tax inspection the taxpayers shall not have this possibility, the main obligation (completely or partially) and the

[13] Stated by Art 113 and next of the Code of Fiscal Procedure.

[14] The fiscal obligation is established from the date of the establishment of the basis of taxation.

generated accessories – the penalty for non-declaring – being established by the tax inspection authority.

To summarize, the penalty for non-declaring shall be applied only for the case in which the main fiscal obligation is stated by the tax inspection authority – during the tax inspection.

3. Procedural aspects of the application of the penalty for non-declaration of the main fiscal obligation

Up next, we shall consider, beside the act stating the payment obligation for the penalty of non-declaring, the percentage which it entails, in relation to the factual tax situations of the taxpayer.

3.1. The percentage of the penalty for non-declaring. According to Art 181 Para 1 of the Code of Fiscal Procedure, "the procedure for non-declaring is of 0,08% per day (29,2%/year), starting with the following day of the deadline and until the payment of the due amount, including from the main fiscal obligations non-declared or incorrectly declared by the taxpayer and established by the fiscal inspection authority through "tax decisions". Obviously, it is a high percentage, in relation to the penalty for delay – 0,01% of the total due claim (3,65%/year).

The penalty starts from the day following the deadline of the non-declared or incorrectly declared main obligation, until the day of the payment, without overcoming the level of the main obligation which generated it[15] [Art 181 Para 11 of the Code of Fiscal Procedure, OPANAF No 3834/2015, Point 7].

The reduction of the percentage for the penalty for delay. The law provides the possibility of the reduction of this percentage with 75% at the

[15] For the interest and penalty for delay the final amount due with this title may overcome the level of the main obligation, not being capped.

request of the taxpayer, for the case in which the main tax liabilities established by the tax decision:

a) Are extinguished by payment or *compensation* until the deadline stated by Art 156 Para 1[16]. The diminution brings it closer to the level of penalty for delay of payment – 0,02%, namely 0,01%, with a significant difference. Practically, are encouraged the collection of the main fiscal obligation, until the stated deadline, as well as the dynamicity of the taxpayers in having an appropriate fiscal behavior;

b) Are scheduled for payment, according to the law. In this case, the reduction is granted at the end of the payment schedule – the obligation being completely fulfilled. The payment schedule as tax facility must follow the steps and regime stated by the Code of Fiscal Procedure and the special norms stated in its application.

The reduction of the penalties for non-declaring are granted by the competent fiscal authority issuing a decision for the reduction of the penalties for non-declaring, according to the model stated by Annex 2 of the OPANAF No 3834/2015.

The incrementation of the percentage for the penalty for non-declaring. The penalty for non-declaring stated by Art 181 Para 1 of the Code of Fiscal Procedure, shall be *incremented by 100%* if the main fiscal obligations

[16] According to Art 156 (Deadlines of payment) of the Code of Fiscal Procedure:
(1) For the differences between the main fiscal obligations and for the accessory fiscal obligations, established by decision according to the law, the deadline for payment shall be established in accordance with the date of their notification, as such:
a) if the date of communication is in the range of 1-15 of the month, the payment term is until the 5th of the following month included;
b) if the date of the communication is between 16 and 31 of the month, the payment deadline is until the 20th of the following month, including.
(2) The provision of Para 1 shall be applied accordingly also for the following cases:
a) of the decision to acquire joint liability, issued in accordance with Art 26;
b) of the decision issued according to Art 100 if the law does not state another payment deadline;
c) of the tax decision issued by the fiscal authority, according to the law, based on the rectifying decision submitted by the taxpayer;
(3) for the fiscal obligations scheduled for payment, as well as for their accessories, the payment deadline shall be established by the document granting the rescheduling.

resulted from the commission of *tax evasion*[17], discovered by the judicial authority, according to the law. Obviously, the incrementation must discourage the tax evasions[18], which have become a mass phenomenon.

The incrementation of the penalties for non-declaring shall be addressed by the fiscal authority through a decision for incrementation of the penalties for non-declaring, according to the model stated by the Annex 3 of the OPANAF No 3834/2015. The difference between the incremented penalties for non-declaring and the ones established through the decisions initially communicated shall be paid within the deadline stated by Art 156 Para 1 of the Code of Fiscal Procedure and by Point 8 of the OPANAF No 3834/2015.

Non-application of the penalty for non-declaring. According to Art 181 Para 6-7 of the Code of Fiscal Procedure, the penalty for non-declaring shall not be applied if:

- *Its value is less than 50 lei*; it is a "*ceiling stated for annulment*", in this case, in the absence of a tax decision, with some exceptions (at the request of the debtor or for cases expressly stated by the law);
- The main fiscal obligations non-declared or incorrectly declared by the taxpayer and established by the fiscal authority through tax decisions result from the application of certain fiscal provisions by the taxpayer, according to the *interpretation of the fiscal authority* included in norms, instructions, circulars or opinions communicated to the taxpayer by the central fiscal authority. Normally, the presumption of guilt of the taxpayer shall be inoperable.

3.2. The establishment of the penalty for delay through the tax decision. According to Art 181 Para 8 of the Code, "Information about the application of the penalty for non-declaring according to Para 1 or, where necessary, about its non-application according to Para 6 or 7, *shall be*

[17] We need to take into consideration the provisions of Art 132 of the Code regarding the notification of the criminal investigation authorities, according to the criminal law.

[18] The tax evasion is subjected to the Law No 241/2015 for the prevention and combat of tax evasion, published in the Official Gazette, Part 1, No 672/27 July 2005.

recorded and reasoned in the report of the fiscal inspection. Art 130 Para 5[19] and Art 131 Para 2[20] are applied accordingly". The above-mentioned act of control shall be communicated to the competent fiscal authority, according to the law – other than the fiscal inspection team, for its valorization, through the issuance of a tax decision.

The procedure for the application of the penalty is *detailed* by the normative act expressly allocated to it – the Order of the President of the ANAF No 3834/2015 on the approval of the procedure establishing the accessory fiscal obligations representing penalties for non-declaration, edited for the application of Art 181 Para 10 of the Code. The tax decision has a content in accordance with the model stated by *Annex 1* of the above-cited Order.

The decision will also state, beside the main obligation for payment, the amounts established as *penalties for non-declaring the main fiscal obligation*.

The tax decision shall be issued *trimestral,* for all debtors, except the cases stated by Point 11-12 of the OPANAF No 3834/2015[21].

The decision could be issued and submitted to the debtor ex officio or every time he requests the payment of the penalties for non-declaring, with the condition that the reception be confirmed, and the data from the confirmation be registered within the informatic system.

The decision shall be issued and submitted to the debtor if the competent fiscal authority ascertains the danger of the prescription of the right to establish the fiscal obligations[22].

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[19] It states provisions regarding the information of the taxpayer who is subjected to a fiscal inspection.

[20] It states provisions regarding the fiscal inspection report.

[21] According to Point 11 of the OPANAF No 3834/2015, the exceptions aim: a) the debtors who register fiscal obligations which are the object of payment eases; b) the debtors who register obligations emerged previously or subsequently of the date at which the decision for dissolution is registered in the Trade Register; c) the debtor for who was opened the procedure of insolvency based on the Law No 85/2014 on the procedures for preventing insolvency, for who shall not be calculated accessory fiscal obligations for the claims previous to the procedure, except the cases stated by Art 80 Para 2 and Art 103 of the Law No 85/2014; d) the debtors declared insolvent who do not have trackable revenue and assets.

[22] Where appropriate, it is a term of 5 or 10 years – the case of the facts fulfilling the constitutive elements of an offence, ascertained by the competent authority.

After its issuance, the decisions shall be communicated according to Art 47 of the Code – the general rules for the communication of the fiscal-administrative act.

4. The legal nature of the penalty for non-declaring and its consequences

Art 1 Para 34 of the Code defines the penalty for non-declaring as "the accessory fiscal obligation representing the *sanction* for non-declaring or incorrectly declaring, in the notice of assessment of the taxes and social contributions". Thus, qualified and similar with the penalty for delay – also a sanction, less harsh, which is the reason of its establishment?

The measure was designed to *additionally sanction* those who do *not declare* or *incorrectly declare* their taxable incomes/assets. Practically, the new regulation differentiates between the taxpayers having an appropriate fiscal behavior, acting in good-faith from those acting in bad-faith, hiding their fiscal obligations or submitting declarations which do not reflect their fiscal reality.

Which is the interest of its express qualification? On the one hand, thus qualified, it is totally different than the fiscal interest[23] – qualified as equivalent of the prejudice generated for the fiscal authority by the failure to pay at deadline the main fiscal obligation. Based on this, the two accessories, having different legal natures, can be cumulated. In this meaning, according to Art 181 Para 4 of the Code: "The application of the penalty for non-declaring (…) shall not remove the obligation to pay the interests stated by the current Code".

On the other hand, being a sanction, it cannot be cumulated with another sanction for the same offence – of declaring or non-conforming declaration

[23] The interest has a percentage of 0,02% for each day of delay from the total due amount, namely 7,3%/year of the total due amount.

of the main fiscal obligation, by complying with the rule *non bis in idem*. Under this circumstance, we take into consideration:

- The exclusion of the cumulation of the penalty for non-declaring with the penalty for delay. In this meaning, we are considering Art 176 Para 4 of the Code, according to which: "The penalty for delay shall not apply for main fiscal obligations non-declared by the taxpayer and established by the fiscal inspection authority through notices of assessment";
- The exclusion of the cumulation of the penalty for non-declaring with the application of a *contravention*; according to Art 181 Para 9 of the Code, if the main tax liabilities are established by the fiscal authority as effect of the failure to submit the notice of assessment, shall be applied only the penalty for non-declaring, without applying the *contravention* for the failure to submit the assessment. The quoted text aims only the hypothesis of the non-declaration, and not that of the incorrect declaration, for which the contravention shall not be applied.

5. The penalty for non-declaration v the penalty for delay of the payment of the fiscal obligation

The presentation of the penalty for non-declaring emphasizes the elements that resemble/differentiate it from the penalty for delay of the payment of the fiscal obligation, synthetized by us as such:

a) Common elements:

- Both are *accessory obligations*, qualified by the special law as sanctions of the inappropriate fiscal behavior;
- Both are established *as percentages*, starting from the day following the deadline until the day of the payment;
- Both shall operate *ope legis* and are individualized (stated) in the decision of the fiscal authority.

b) Distinctive elements:

- Each of the two sanctions knows has a *different percentage quota*: 0,08% of the amount of the compensation of the non-declared/incorrectly

declared fiscal obligation, namely 0,01% of the amount of the fiscal obligation, but unpaid at due date;

- *Are generated by different premises*: non-declaring or incorrect declaring and the failure to pay the main fiscal liability at the due date, the latter one concerning (correctly) *declared* fiscal debts, but unpaid at the due date; law sanctions the guilty conduct of not paying within the term stated by the law or the fiscal body, as the case may be;
- Unlike the penalty for delay for the payment of the main obligation, the penalty for non-declaring *is capped*, without exceeding the level of the main obligation for which is due;
- The penalty for non-declaring is diminished, incremented or even unapplied – in the presence of a specific hypothesis, restrictively stated by the Code of Fiscal Procedure, already mentioned; the penalty for delayed payment of the fiscal obligation shall follow the route stated by the Code, but may be subject to the *payment facilities*, which have a different regime (delays, rescheduling);
- Having the same legal nature – as sanction for the non-compliant fiscal behavior, they are found in a relation of *exclusion*, their express cumulation being excluded by the legislator (Art 176 Para 4 of the Code; Point 2 of the OPANAF No 3834/2015).

Conclusions

To synthetize, the provisions stating by Art 181 of the Code regarding the penalty for non-declaring, reveal the following aspects:

- The penalty for not declaring the main tax liability shall apply for *the failure to submit the statement* or for the *non-conformity* of the submitted fiscal declaration ("main obligations incorrectly declared);
- It has an *application circumstantiated* by the taxes or social contributions managed by the central fiscal authority – ANAF, according to Art 29-30 of the Code;

- It represents an *accessory obligation*, taken into consideration by the legislator as *sanction*, which leads to the possibility of its cumulation with the fiscal interest, but not with a penalty for delay, or with any contravention, being in a relation of exclusion with these ones;
- It is established by the fiscal order by a *tax decision*, issued to valorize the fiscal inspection report which ascertains and registers it;

To summarize, it represents a supplementary penalty for the taxpayer who fails to declare or declares incorrectly his taxable incomes/assets/operations.

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PRACTICAL ASPECTS OF CRIMINAL INVESTIGATION OBJECT AND BODIES

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Abstract: *In the criminal process, the essential procedural functions that are carried out during the procedural phases, which are made up of all the procedural and procedural acts and measures that have a generally limited purpose, are distinguished. After solving the problems at each procedural stage, a solution is made according to which the criminal case passes to the next stage. Thus, the criminal prosecution function and the disposition function on the fundamental rights and freedoms of the person are exercised within the criminal investigation phase which we can say has a special role due to its own purpose and function. Criminal prosecution is a mandatory stage in the criminal process, thus passing through each stage from the referral to the end of the criminal investigation. By way of exception to this rule, we have the situation where although the criminal investigation phase ended with a non-adjudication solution, the judicial activity continues following the order of the preliminary chamber judge, legal provision according to art. 341 par. (7) point 2 lit. c) of the Code of Criminal Procedure and reads as follows: "In the cases in which the criminal proceedings were ordered, the preliminary chamber judge ... admits the complaint, abolishes the contested decision and orders the commencement of the trial on the facts and persons for who, during the criminal investigation, has initiated the criminal proceedings, when the legally administered evidence is sufficient, sending the file for random assignment."*

Keywords: *criminal process, criminal investigation, criminal prosecution, trial, fundamental rights and freedoms.*

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1. The subject of the criminal investigation

Criminal investigation is the procedural stage in which the evidence is administered, so the object of the criminal investigation is to collect the necessary evidence regarding the existence of any crime, to identify the persons who have committed an offense and to establish their criminal liability as it appears from art. 285 par. 1, the Code of Criminal Procedure. The provisions of the new Code are similar to the Code of Criminal Procedure of 1968, the difference being that the precursors have been dropped, all activities being carried out only in a procedural framework.[1]

In order to counteract the criminal activity, specialized bodies have been set up dealing with specific activities in the pre-trial stage taking into account the fact that in the modern age the way of committing crimes is more and more complex and in some cases they have an organized character. These organs have a well-defined competence by law and carry out their activity during the criminal investigation phase. [2]

By the phrase "gathering the necessary evidence" the legislator referred to the evidence gathering operation as well as their examination and evaluation in order to make the right decision to refer or not to send the criminal case to the court.[3]

The text „the existence of criminal offenses" has the role of commissioning the criminal prosecution bodies with specific activities in the event of an offense being consumed or even remaining in the attempted phase. These activities can also lead to identifying the author/perpetrators of a crime because the socially dangerous result of a crime can occur only as a result of a person's activity.

As regards the „establishment of criminal liability of persons who have committed crimes", it is known that a person commits a criminal offense with the guilt of the law provided. Thus, the criminal investigative body

[1] Mihail Udroiu, *Codul de Procedură Penală – Comentariu pe aticole*, 2015 p. 829.
[2] Ion Neagu și Mircea Damaschin, *Tratat de procedură penală-partea specială*, 2015, p. 16.
[3] Dongoroz III, p.140.

must ensure that all the evidence gathered reveals unequivocally the form of guilt of the author, as well as whether he is liable to be criminally liable.

Even if it is not explicitly provided in the law, the subject of the prosecution is also the identification of the victim of the offense.

Practical aspect:

➢ *On 01.07.2017 the witness M.I. led the criminal investigation bodies to a deserted fountain located on the outskirts of Bradu, where the human body of one person was found. As a result of the forensic expertise, it was found that the victim was a female person, about 25, a brunette who was killed about three years ago. On the basis of the evidence administered, the criminal investigation authorities have started from the premise that the author lived near the place where the woman was found. Several people were checked, resulting in about three years ago, called I.V, had a R.C. concubine. what is the same from Merişani and disappeared suddenly, and shortly called I.V. went to work in Italy and did not come back. Verifications were carried out at Merişani's home of R.C. thus establishing its identity precisely, which eventually led to the probing and prosecution of the author I.V.*

In order to achieve the purpose of criminal prosecution, the criminal investigating authorities and the prosecutor carry out criminal prosecution activities that may be procedural or mitigating acts and procedural acts by which the provisions of the procedural acts that usually belong to the prosecutor, except for the commencement of criminal prosecution, taking the decision to detain a person, change the legal classification, etc. Procedural acts are usually carried out by criminal investigation bodies following the prosecutor's disposition, exemplified by conducting a home search, on-site investigation, enforcement of the technical supervision mandates requested by the court prosecutor, etc. All activities carried out in the framework of criminal prosecution following procedural or procesual acts are recorded in documents which must contain certain formal and substantive conditions and are stipulated even in the content of the law texts of the New Criminal Procedure Code. We can consider that all the

documents in a criminal file have the purpose of achieving the object of criminal prosecution.[4]

One of the principles specific to the stage of criminal prosecution is the non-public character expressly stipulated in the New Criminal Procedure Code at art. 285 para. 2. The exception to this principle is found in the assistance of witnesses in the conduct of criminal investigations, such as conducting a home search in the absence of any person. There is a communication between the criminal prosecution bodies and the representatives of the press, which is usually done in an organized way by the specialized personnel or by the heads of the units, but this does not affect the non-public character of the prosecution. In order to ensure compliance with this principle, the legislator has criminalized the deed of compromising the interests of justice by unlawfully disclosing data related to the prosecution provided in art. 277 The New Criminal Code.[5]

Practical aspect:

➢ *Illustrating the principle of non-public prosecution through a case in European jurisprudence, the Dinger Gul case against Germany concerning the non-public character of criminal prosecution and access to the file of the investigated person. The person complained that the refusal of the criminal investigation authorities in Hanover to grant his lawyer access to the criminal investigation file at the preliminary investigation stage was affected by the possibility of establishing an effective defense by violating his right to a fair trial and the judicial authorities did not hear him during the preliminary proceedings. The Court has held that a "charge" does not mean an official notification by the authorities that a person has committed an offense, but can be sustained by any judicial measure that affects the suspect's situation. It was found that on January 28, 2005, a home search was carried out at the applicant's home suspected of trafficking in dorguri, on 1 February 2005 an arrest warrant was issued, and on 17 February the first application for the file, which implies that the applicant was aware of*

[4] Ion Neagu, Mircea Damaschin, *Tratat de procedură penală-partea specială,* 2015, pp. 18-19.

[5] Mihail Udroiu, *Procedură Penală. Partea specială*, 2017, pp. 4.

the allegations brought to him by being recorded in the home search warrant, in which both the legal classification of the deed and the concrete circumstances of the offense were observed. As regards the rejection of the lawyer's requests to study the criminal investigation file, the Court found that the applicant had refrained from prosecution, hence not being heard, and through his ties to people suspected of drug trafficking in Turkey, making the criminal case available to study could have affected the preliminary investigation. This reasoning was also found in the authorities' decisions to reject the suspect's lawyer's requests and it was not found that they had been arbitrarily taken. In view of the reasoning, the Court has resolved the conflict by winning the German judicial authorities.[6]

2. Criminal Investigation Bodies

Obviously, for the purpose of carrying out the criminal prosecution, there must be specialized personnel consisting of general or special prosecutors and criminal investigation bodies.

The attributions of prosecutors constituted in the Public Ministry are found in art. 63 of Law no. 304/2004 republished. Thus they carry out the criminal investigation under the conditions established by the law and participate in the conflict resolution by alternative means. Prosecutors conduct and supervise the criminal investigation activity of the judiciary police as well as other criminal investigating bodies, and at the end of their criminal prosecution they refer the criminal cases to the courts. Under certain conditions provided by law, prosecutors are civilian and participate in court hearings, with the possibility to appeal against court decisions. Under the terms of the law, prosecutors have the duty to defend the rights and legitimate interests of minors of people under interdiction, displaced persons and others. At the same time, it acts for the purpose of preventing and combating crime,

[6] Alina Barbu, Georgiana Tudor, Alexandru Mihaela Şinc, *Codul de procedură penală adnotat cu jurisprudenţă naţională şi europeană,* 2016, pp. 644-647.

under the coordination of the Minister of Justice, and by studying the causes that generated or favored crime, it develops and puts forward proposals to eliminate them, but also to improve the legislation in the field.[7]

The Prosecutor's Offices operate alongside the courts of law and operate on the basis of the principles of legality, impartiality and indivisibility. Legality is that prosecutors can only act in the manner and means prescribed by law within the limits of their competencies. As regards impartiality, prosecutors defend the rule of law, citizens' rights and freedoms, and disregard the quality of individuals, while ensuring that this principle is also respected by the criminal investigation bodies whose activities it oversees. Hierarchical subordination is the most debated principle of the activity of the prosecutor's offices and the provisions of the hierarchically superior prosecutor, given in writing and in accordance with the law, are mandatory for the subordinated prosecutors, but they can not influence the solution that each prosecutor deems necessary to be ordered in a case, and the conclusions he wishes to support before the court. The superior hierarchical prosecutor may refuse to motivate by an ordinance made ex officio or under the conditions provided by art. 336 of the Criminal Procedure Code the acts and procedural measures considered unlawful or non-industrial as ordered by the prosecutor under his/her subordination. They exemplify the orders to start criminal prosecution, to continue the criminal prosecution, the ranking solution, etc. At the same time, it should be taken into account that these measures are taken under the law and respecting the hierarchical subordination so the prosecutor of the prosecutor's office attached to the tribunal can not refute an act or measure that was ordered by a prosecutor within a prosecutor's office near the court but only if these were ordered by the first prosecutor of the prosecutor's office attached to the court.

The file that was assigned to a prosecutor may be transferred to another prosecutor at the disposal of the head of the prosecutor's office only if the prosecutor has been suspended or has ceased to act as a prosecutor, is absent

[7] Law 304/2004 R. Art. 63.

and there are objective causes justifying an emergency situation or leaving cause in undue work more than 30 days.

The criminal investigation bodies carry out their criminal prosecution under the coordination and supervision of the prosecutor and are divided into judicial police investigation bodies and special research bodies.

The judicial police research bodies are officers and police agencies specializing in the detection of offenses, the gathering of data to initiate criminal prosecution and criminal investigation. These police officers acquired these duties following the request of the Ministry of Internal Affairs to obtain the favorable opinion of the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice. Also, criminal investigation authorities and border police officers have the favorable opinion of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, and the police officers who do not have this opinion can only make statements of facts.[8]

Within the National Anticorruption Directorate there are also police officers conducting criminal investigations ordered by the N.A.D. prosecutors under their direct management, supervision and control. Documents drawn up by police officers are made on behalf of the prosecutor as a result of his disposition.

The prosecutors of the Directorate for the Investigation of Organized Crime and Terrorism coordinate the activity of officers and judicial police officers as a result of their delegation to carry out criminal investigation activities, provided that the police officers have a favorable opinion from the Chief Prosecutor of D.I.O.C.T.

Within the Public Ministry, detainees may work to carry out the technical supervision mandates, which are carried out under the direct supervision and control of the prosecutor who requested the supervision. This situation was also regulated in O.U.G. no. 78/2016 art. 7 for the detachment of police officers in D.I.O.C.T.

[8] Mihail Udroiu, *Procedură penală. Partea specială*, 2017, p. 9.

There are also judicial police officers established within the General Anticorruption Directorate that have the competence to carry out criminal investigation activities ordered by the competent prosecutor for the offenses provided by Law No. 78/2000 by the staff of the Ministry of Internal Affairs.

The special research bodies are appointed officers who have received the favorable opinion of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice and carry out criminal investigations in the case of crimes committed by the military or in the case of committing corruption offenses or services to civilian naval sailors if the deed was likely to endanger the safety of the ship or personnel.

The prosecutor's functional comprehensiveness for criminal prosecution is usually optional, the prosecutor being able to take the criminal file from the criminal investigation body whose activities he supervises for the purpose of conducting criminal prosecution, and in certain situations he obligatorily performs the stipulated art 56 paragraph 3 let.a-e of the Criminal Procedure Code.

Material jurisdiction belongs to the Prosecutor's Office attached to the court having jurisdiction to hear and determine at first instance. There are also situations of exeption such as the possibility of a prosecutor from a hierarchically superior prosecutor to delegate by order the execution of criminal investigation papers by another prosecutor from a hierarchically inferior prosecutor's office. At the same time, the prosecutors from the higher prosecutor's offices may take criminal investigations into criminal investigations, which are the material competence of a hierarchically inferior parquet unit. Regarding the substantive competence of the criminal investigation bodies, we can say that they have a general competence except for the crimes whose prosecution is obligatory performed by the prosecutor.[9]

Regarding territorial competence, the law provides for the possibility of extending territorial jurisdiction in cases where certain acts of criminal

[9] Mihail Udroiu, *Procedură penală. Partea specială*, 2017, p.13.

prosecution have to be carried out outside the area of territorial jurisdiction, activities which may be ordered by the criminal investigation body by delegation or rogatory commission.

The criminal investigative body has the obligation to verify its competence, and if it finds that it is not competent, it will send the case to the competent prosecutor.

The situation of non-compliance with the provisions regarding the material or personal competence of the criminal prosecution bodies raises the absolute nullity stipulated in the Constitutional Court's decision of 4 May 2017.

Practical aspect:

➢ *On March 12, 2014, the workers of the Public Order Bureau of Tecuci Municipality Police after the notification of the person I.V. they went to the 14C block, apartment 11 in Tecuci, where the public peace disorder was claimed by Mihalcea spouses scandal. When arrived at the police station, the police identified the M.T. aged 69, whose breath smells of alcoholic hale and wife M.M. aged 67, who grew up on the edge of the bed, accusing her of being sick, having to stay in bed longer, and her husband having trouble with alcohol and beating it periodically, and a few minutes ago she even put her pillow on her face he tried to asphyxiate her, managing to escape after he pulled his hair tightly. Taking into account the verbal accounts of the old woman and the fact that there are hair marks on the bed of the bed, and on the pillow side of the sling traces the policemen conserved the room, immobilized the suspect who had become agitated and immediately informed the criminal investigating bodies suspected of committing an attempted murder by the husband M.I. Subsequently, the criminal investigation organs and the prosecutor who carried out the field research came to the spot, raising the hair marks on the bed sheet and pillowcases for the purpose of ciminalistic research, thus finding that the saliva belonged to the woman, and the hair belonged to the husband's appearance which was corroborated with those declared by the woman, that she slept alone in that bed and that fragments of her husband's skin were*

found under the woman's nails. The husband admitted and was held criminally responsible for the act committed.

3. Conclusions

In view of the above, both from the theoretical and practical point of view, we appreciate that the conduct of criminal prosecution benefits from a broad legislative framework, adapted to the social conditions of our country, but leaves room for improvement.

We believe that the role of criminal prosecution is to ensure a social order climate by identifying antisocial facts and bringing to account the perpetrators.

To achieve this goal an important role is played by the prevention of criminal offenses, which are mainly carried out by civil servants belonging to the Ministry of Internal Affairs.

The criminal legislation has always undergone changes because it has to be adapted to the evolution of social conditions, the operational situation and the rules recommended or imposed by Romania's strategic partners.

With the accession to the European Union, we are committed to putting more emphasis on respect for citizens' rights, which is why a new criminal code, a legislative change that opened new procedures, was launched in 2014, by creating another type of procedural framework from which we were accustomed.

We shall continue to express my views on the evolution between the old legislation and the current legislation as well as what changes can be made to improve the conduct of criminal prosecution.

The acts of referral that practically pave the way for prosecution cover all the possible situations whereby the judicial bodies may become aware of criminal acts. We believe that the new Code of Criminal Procedure makes it possible to formulate an electronic notification in line with the current society addressed to urban areas in particular. However, judicial bodies do not freely use computers that are connected to the Internet to receive such

complaints or even check on the Internet certain issues that may help or even constitute evidence in their criminal prosecution. We believe that in the future it is necessary to allocate funds to equip prosecutor's units and criminal investigation bodies with electronic devices connected to the Internet, both mobile and fixed, which are to be used in the criminal investigation activity.

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THEORETICAL AND PRACTICAL CONSIDERATIONS ON THE SANCTIONS FOR BREACHING ONE'S JOB DUTIES

Adrian-Remus GHICULESCU*

Abstract: *This article briefly examines the main forms of legal liability in the case of a public servant breaching their job duties, i.e.: administrative liability, disciplinary liability, civil and patrimonial liability of the public servant, the conditions of entailing each form of legal liability and the principles based on which they operate. All the forms of legal liability have in common the principle of legality of prosecution and the principle of legality of sanctions.*

Keywords: *legal liability, administrative liability, disciplinary liability, civil liability, patrimonial liability, job duties, public servant.*

I. ***Legal liability*** *represents a form of social responsibility consisting of the whole set of related rights and obligations which, according to the law, occur after committing torts and set the framework where legal sanctions are enforced and executed, in order to re-establish the rule of law*.

Committing a tort represents a necessary and essential condition to entail a person's legal liability. But, besides this condition, any form of liability also presupposes the existence of a legal norm imposing a certain conduct.

The public servant committing torts, in performing his/ her job duties, entails his/ her criminal, civil or administrative liability.

Whilst the civil and criminal liability are entailed according to the specific legislation, the administrative liability is entailed under the conditions stipulated by the Act no.188/1999 on Public Servants' Statute.

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Administrative liability represents that form of legal liability consisting of the whole set of related rights and obligations of administrative nature which, according to the law, occur from committing a tort whereby norms of administrative law are violated. Administrative liability can be disciplinary liability, civil or patrimonial liability.

II. *Disciplinary liability* *represents a form of administrative liability occurring in the case of committing a disciplinary offence, in the sense that public servants infringe upon their job duties and norms of compulsory conduct stipulated by the law.*

For the existence of an actual relation of disciplinary liability the following premises are necessary: a qualified perpetrator (public servant), the incriminating legal norm and the disciplinary offense.

The active subject of disciplinary liability is the public authority who faces the consequences of a disciplinary offence and in whose competence it is to hold the perpetrator liable.

The passive subject of disciplinary liability is the public servant who has committed a disciplinary offense.

The legal norm is the necessary premise for the existence of the subject of disciplinary liability, of disciplinary offence, of the abstract report but also of the concrete report of disciplinary liability.

De lege lata, the notion of disciplinary offence is defined by the provisions of art.77 paragr.1 of the Public Servants' Statute, i.e. as being a deed guiltily committed by the public servants, consisting of an action or inaction in which they infringe upon the duties incumbent on the public service they hold and the norms of professional and civil conduct stipulated by the law.

Guilt may exist in the form of intention or fault. The disciplinary offense is committed intentionally when the perpetrator foresees the result of their deed and aims at producing it by committing that deed or, even though he/she does not aim at that, they accept the possibility of producing the result. The disciplinary offense is committed by fault when the perpetrator foresees the result of their deed, but does not accept it, believing

without cause that it will not occur, as well as in the situation in which they do not foresee the result of their deed, although they should have and could have foreseen it.

The jurisprudence and doctrine have constantly retained that the disciplinary liability operates based on three principles:

1. *The principle of legality of liability* – administrative liability cannot operate except in cases, conditions and limits established by law, according to a procedure carried out by the authorities invested in this purpose;

2. *The principle of liability proportionality* – correlating the applied sanction with the degree of social hazard of the disciplinary offence committed, with the form of guilt established and with the extent of the damage, if any, through correct individualization;

3. *The principle of celerity* – the moment of enforcing the sanction must be as close to the one of committing the disciplinary offence as possible, so as the social resonance of the applied sanction should be maximum, increasing its preventive effect.

These principles implicitly result from the way the disciplinary liability is governed by the Public Servants' Statute, which lists the deeds that represent a disciplinary offence, the disciplinary sanctions and the disciplinary procedure.

In applying the legal provisions, the jurisprudence has focused on certain individualization criteria of the disciplinary sanction, i.e. the causes and the gravity of the disciplinary offence, the circumstances in which it was committed, the form and the degree of guilt, the consequences of the offence, the perpetrator's general behaviour in exerting his/her job duties and, according to the case, the existence in his/ her history of other disciplinary sanctions which have not been erased according to the law.

Thus, it has been noted that the sanction is not established function of the employer's subjective perception on the gravity of the committed deed, which may be different from one person to another, but function of the objective data resulting from the evidence presented in the case.

In the operation of sanction individualization, it is also relevant to see the potential risk of the committed disciplinary offence, since the gravity of the deed results from it directly. It results that it is not necessary that the risk should occur, it is enough for the potential risk to be significant.

As far as the disciplinary procedure is concerned, the jurisprudence has noted that hearing the employee and checking his allegations must be done before applying the disciplinary sanction and represents an essential condition of the prior investigation which is compulsory because the disciplinary sanction can only be applied if this legal requirement has been fulfilled. The employer infringing upon these legal liabilities is violating the guarantees regarding the employee's right to defence before being sanctioned, ruled in his favour and in order to limit the employer's absolute power in applying disciplinary sanctions.

Observing the imperative legal provisions related to the procedure of prior disciplinary investigation represents a basic legal obligation inherent to the measure of disciplinary sanction, being a guarantee that the employee's right to defence is observed before applying the sanction, and its infringement brings about the absolute express nullity of the ordered sanction.

In this sense, the provisions of art. 251 of the Labour Code punish with absolute nullity the application of a disciplinary measure in the absence of a prior disciplinary investigation, which presupposes observing the entire procedure stipulated by the law and all the guarantees offered to the employee for the observance of his/ her right to defence**.**

Pursuant to the provisions of art.278 paragr.2 of the Labour Code, the provisions of this code are applied as common law also to all those legal work relations not based on an individual employment contract, whereas the special regulations are not complete and their application is not incompatible with the specific character of those work relations and, according to art.117 of the Public Servants' Statute, its provisions are completed with the provisions of the work legislation, as well as the rules of civil, administrative or criminal common law, according to the case, as long as they do not contradict the legislation specific to the public service.

The Constitutional Court has constantly ruled, in its jurisprudence, that legal work relations must be carried out within a legal frame, in order to observe the rights and obligations, as well as the legitimate interests of both parties.

In the considerations of the Decision of the Constitutional Court no. 95 of 05 February 2008, rejecting the constitutional challenge of art.267 of the Labour Code, it has been noted that „*the disciplinary investigation prior to applying the sanction largely contributes to the prevention of abusive, illegal or groundless measures, ordered by the employer, taking advantage of his/ her dominant position.*".

Analysing the criticism formulated in this cause, The Court has also noted that „*the principle of citizens' equal rights, claimed in supporting the challenge, is not applicable, taking into consideration that the employer and the employee are in objectively different situations. Subjecting the application of the disciplinary sanctions to the making of prior investigations does not diminish the employees' disciplinary liability in any way and does not create any privilege for them. If the work litigation started with the application of the disciplinary sanction is subject to settlement by the court of justice, the parties benefit from the principle of equality of weapons, each of them having the same procedure means and guarantees at hand, regulating the free exercise of the right to defence and of the right to a fair trial*".

The Court has also found that „*also groundless is the statement of the challenge author according to which the provision of the obligation to observe the obligation of complying with some procedure rules in relation to the disciplinary sanction against employees and even the sanction of absolute nullity of the measures ordered by infringing upon these rules would affect in any way the property right or economic freedom. Free access to an economic activity and free initiative, consecrated by art. 45 of the Constitution, do not confer discretionary rights and powers to the employer in his relation to the employees. These rights can only be exerted under the conditions of the law*".

Consequently, the disciplinary liability is established in compliance with the principle of contradiction and of the right to defence. This form of liability is subject to the control of administrative civil courts of justice. Pursuant to the provisions of art.80 of the Public Servants' Statute, the administrative civil court, upon request of the public servant discontent with the applied sanction, may annul or amend according to the case, the order or decision of sanction.

III. ***The public servants' civil liability*** *is entailed in the case they have committed a minor offence identified according to the specific legislation in the field of minor offences, during or in relation to the job duties.*

The procedure of finding the minor offences and applying civil sanctions is stipulated by the Government Order no. 2/ 2001, and the competence for settling the complaints against the minutes belongs to the district court under whose jurisdiction is the registered office of the public authority where the sanctioned public servant is appointed.

IV. ***The public servants' patrimonial liability*** *is governed by the provisions of art.84 and art.85 of the Public Servants' Statute and is entailed:*

1. for the damages caused by guilt to the patrimony of the public authority where he/ she works;

2. for not returning the unduly granted amounts within the legal term;

3. for the compensations paid by the public authority, as the principal, to some third parties, based on a final court decision.

In the first two situations, the damages shall be repaired according to the order or imputation decision issued by the manager of the public authority or, according to the case, by undertaking a payment commitment.

In the third situation, the damages shall be repaired according to the final court decision which represents an enforceable title.

Against the order or imputation decision, the public servant may address the administrative civil court competent from the material and territorial point of view.

V. In conclusion, we may state that the infringement by a public servant of their job duties may attract various forms of legal liability. All these forms of legal liability have in common the principle of legality of prosecution and the principle of legality of sanctions, principles traditionally formulated through the additions *nullum crimen sine lege* and *nulla poena sine lege*.

These principles are consecrated by the provisions of art.1 and art.2 of the Criminal Code, but also the other forms of legal liability are applicable, according to the provisions of art.1349 Civil Code, art.77 of the Public Servants' Statute, art.1 and art.5 of the Government Order no.2/2001 regarding the juridical regime of minor offences.

The application of these principles, both by the public authorities and by the courts of justice, must be permanently observed because it represents one of the fundaments of the rule of law.

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TAX EVASION, FICTITIOUSNESS OF COMMERCIAL OPERATIONS AND UNREPORTED EMPLOYMENT

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Abstract: *The article briefly analyses the accomplishment of the conditions to hold the author criminally liable for committing the crime of tax evasion pursuant to art. 9 letter c) of the Act 241/ 2005 in the case the taxpayer records in the accounting book some fiscal invoices certifying fictitious commercial operations, which have been performed in reality.*

Keywords: *tax evasion, financial receivables, tax receivables, tax liability, trade companies, fictitious commercial operations.*

1. Introduction

This article aims at being a practical approach to a subject that has definitely inspired many pages of juridical literature and on which the jurisprudence has started having a modern approach but continues to be *awkward* in relation to the social reality nowadays – tax evasion, in the case the taxpayer records in the accounting book some fiscal invoices certifying fictitious commercial operations.

For a correct analysis we shall start from the legal text regulating this situation, the present form, as rendered in the contents of art. 9 letter c) of the Act 241/ 2005: *The following deeds committed in order to avoid fulfilling one's tax liabilities represent crimes of tax evasion and are punished with imprisonment from 2 years to 8 years and the denial of certain rights:* ***c)*** *recording in the accounting books or in other legal documents expenses which are not based on real operations or recording other fictitious operations;*

* PhD student.

2. At first sight, things do not appear to leave any room for interpretation from the juridical point of view, in the sense that, if a taxpayer knowingly records in the accounting books an invoice certifying the performance of a fictitious service, then we are in front of the aforementioned crime.

Yet the factual reality has shown a number of legislative drawbacks which question the tipification of the crime in the aforementioned form, starting from the case example of the following situation: *the companies M, N, P, Q are major companies on the market of construction works, and the company X is a subcontractor of the aforementioned ones, specialized in performing construction works and which has a number of works in progress and sites opened in various locations, but given the large volume of activity they cannot make it with their own employees. In this sense, the company X appeals to a number of classified ads which are usually posted by other contractors with smaller companies who aim at getting fast profit in a vast domain where constructors usually deal with a huge lack of qualified or unqualified labour. The works for which collaboration is requested are performed for short terms, of 5 up to 10 days, the payment is made in cash by the director of the company X, every day, within the limit of the amount of Ron 5,000 allowed by the law, this payment modality representing from the very beginning the work condition imposed by the smaller companies who are obviously interested in having the guarantee of the payment for the works they perform. We must mention that the commercial relation is accompanied by a work agreement, fiscal invoices, performance schedules, copy of the registration certificate etc. The history of the commercial relations between M, N, P, Q on the one hand and X on the other hand is a good one, the company X pay for their contractual obligations in due time, the works are performed in good quality consequently the payments related to the subcontracting agreements are made in time and paid by bank transfer.*

3. Criminal prosecution bodies observe ex officio that M, N, P, Q and X have committed the crime of tax evasion, and they believe that the final beneficiaries of the construction works, i.e. the companies M, N, P and Q have recorded in their accounting books fiscal invoices issued by the company X reflecting fictitious commercial operations, since, after checking the company X, the criminal prosecution bodies have found that they only have a number of 6-8 constant employees, who could not have performed construction works as extended as the ones performed.

Criminal prosecution is initiated for having committed the aforementioned crime and, on being heard, the directors of the four companies (M, N, P, Q) declare that the works listed in the fiscal invoices, the work progress reports, the agreements etc. have been performed accordingly and paid, by stages, by bank transfer, the full performance of the works being supplied by the company X to whom they had entrusted the performance.

The first loophole we notice, which is perpetuated in the practice of the criminal prosecution bodies, is that they base their opinion that a construction work is fictitious on the number of employees of the building/ executing company; in this sense, in the presented example, the number of 6-8 employees would be insufficient to perform works of laying floor screeds, dig/ cover ditches etc., and this is the reason why the criminal prosecution body believed that there is enough evidence to initiate the criminal prosecution *in personam* against the directors of the companies M, N, P and Q.

On hearing the director of the company X as well, he admits that it was his company who performed the works subcontracted from the companies M, N,P and Q and mentions that in his current activity, in order to be able to finish the subcontracted works in time he also appealed to a number of workers teams from classified ads, who performed for short periods part of the works that the company X should have performed. In this sense, the company X has signed a number of work agreements with various smaller firms and paid for their works every day within the limit of the amount of Ron 5,000. In this sense, he shows the criminal prosecution bodies all the

fiscal invoices and agreements signed with the companies contacted from classified ads.

At the stage of the *in rem* criminal prosecution, all the directors of the companies contacted from classified ads have been heard, and they declared that they did not know the director of the company X and that they never had any commercial relations with the company X, **but they also mention that they had been asked before to make various declarations in front of some authorities, on which occasion they found out that several counterfeited fiscal invoices had been issued before in the name of the companies they run.**

Based on the presented evidence they start criminal prosecution also against the director of the company X, initiating the criminal proceedings also for the crime of tax evasion in the form stipulated by art. 9 letter c) of the Act 241 /2005; temporary release under judicial supervision is ordered against him.

The obvious question that the criminal investigation must answer is the following: has the director of the company X committed the crime of tax evasion, and if so, in what way?

4. There are obviously two work hypotheses, in the sense that, either the director of the company X (the company who obviously performed the construction works) has committed the crime of tax evasion by recording in the accounting books some fiscal invoices certifying fictitious commercial operations, which they actually performed, and he wanted to deduct the expenses incurred, or he has been fooled by the workers contacted from classified ads who gave him counterfeited fiscal invoices, for works actually performed, but in the name of companies they had no relation to whatsoever in reality.

In this case, the two work hypotheses are harmoniously blended, in the sense that ***in order to take money out of the accounts of the company X, so as to pay the workers teams contacted from classified ads in cash, and to justify the expenses incurred,*** the director of the company X had to record in the accounting books fiscal invoices certifying fictitious commercial

operations, ***which were performed in reality, but not by the companies mentioned in the header of the fiscal invoices.***

5. The Tax Evasion Act defines the tax liability, and the norm containing the definition sends to the Fiscal Code and the Fiscal Procedure Code. In order to establish the content of the tax liability notion, in the sense of the Tax Evasion Act, we must establish the connection between these liabilities and the taxable base it bears upon. This is because, even if they are financial liabilities, not all payment obligations represent tax liabilities, in the sense of the Tax Evasion Act, but only the tax receivables, because the latter are the only ones established function of the taxable base. Therefore, a difference must be made both from the point of view of a fiscal trial and from the criminal point of view, between financial liabilities and tax liabilities[1].**[2]**

6. The possibility given to the tax inspection bodies to assess the reality of some tax operations is described through art. 6 of the Act 207/ 2015 regarding Fiscal Procedure Code which stipulates that:

(1) The tax authority is entitled to assess, within the limits of their attributions and competences, the relevance of the fiscal states of fact by using the means of evidence stipulated by the law and to adopt the solution based on the legal provisions, as well as on complete findings on all the circumstances enlightening the case, at the moment the decision is made. In exerting their rights to assess, the tax authority must take into consideration the written opinion issued by the competent tax authority at the headquarters of the taxpayer/payer in the activity of taxpayers/payers assistance and guidance, as well as the solution adopted by the tax authority through some fiscal administrative act or by the court of justice, through a final decision, previously ruled, for similar situations of fact to the same taxpayer/ payer. Whereas the tax authority finds there are

[1] D. Dascălu, Tratat de contencios fiscal (Treatise of Fiscal Administrative Law), Ed. Hamangiu, Bucharest, 2014, p. 170.

differences between the fiscal state of fact of the taxpayer/ payer and the information they took into consideration in issuing a written opinion or a fiscal administrative act to the same taxpayer/ payer, the tax authority is entitled to note the findings according to the real fiscal situation and the fiscal legislation and they must write down the reasons why they do not take into account the prior opinion.

(2) The tax authorities exert their assessment right within reasonable and fair limits, assuring a just proportion between the purpose aimed at and the means used in reaching it.

(3) Whenever the tax authority must establish a deadline for the exercise of a right or for the fulfilment of a liability by the taxpayer/ payer, this must be reasonable, in order to give the taxpayer/ payer the possibility to exert their right or fulfil their liability. The deadline can be extended, for justified reasons, with the agreement of the tax authority manager.

Articles 2, 9, 14, 62, 63, 167, 168 and 178 of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value-added tax must be interpreted in the sense that they oppose the possibility of denying a taxable person, under circumstances such as the ones in the main litigation, the right to deduct value-added tax related to some delivery of goods for the reason that, taking into account the frauds or inadvertences committed before or after this delivery, it is considered that the subsequent delivery has not been performed, without having established, in relation to objective elements, that this taxable person knew or should have known that the operation claimed to justify the deduction right was involved in a fraud related to value-added tax which occurred before or afterwards in the delivery chain, but this aspect must be checked by the issuing court.

In motivating this decision, the Court of Justice of the European Union has noted that <<[…] the fight against fraud, tax evasion and any abuses is an objective admitted and encouraged by the Directive 2006/112[3] .

[3] The Decision Halifax and others, point 71, Decision Kittel and Recolta Recycling, point 54, the Decision of 7 December 2010, R., C-285/09, Rep., p. I - 12605, point 36, the Decision of 27 October 2011, Tanoarch, C-504/10, Rep., p. I - 10853, point 50, as well as the Decision of 21 June 2012, Mahagében and Dávid, C-80/11 and C-142/11, point 41).

36. In this respect, the Court ruled that litigants cannot fraudulently or abusively claim the norms of the Union rights[4].

37. Consequently, national authorities and courts are able to deny the right of deduction if they establish, based on objective elements, that this right is fraudulently or abusively claimed[5]. 38. This is the case when a fiscal fraud is committed by the very taxable person. Thus, in this case, the objective criteria at the basis of the notions of goods delivery or service performance made by a taxable person who acts as such and of economic activity are not fulfilled[6].

39. Likewise, a taxable person who knew or should have known that, through their purchase, they participate in an operation involved in a VAT fraud must be considered, in the sense of Directive 2006/112, as participant in this fraud, irrespective of whether they obtain or do not obtain an advantage from the resale of the goods or using the services in the taxable operations performed by them afterwards[7].

40. It results that the deduction right cannot be denied to a taxable person unless it is established, based on objective elements, that this taxable person, to whom the goods have been delivered or the services have been provided, justifying the deduction right, knew or should have known that, through their purchase of such goods or services, they have participated in an operation involved in a VAT fraud committed by the supplier or another operator intervening before or afterwards in the chain of such deliveries or services provided[8].

41. In exchange, it is not compatible with the deduction right regime stipulated in the mentioned directive to sanction, by denying such right, a

[4] See especially the aforementioned Decisions Fini H, point 32, Halifax and others, point 68, Kittel and Recolta Recycling, point 54, as well as Mahageben and David, point 41).

[5] Decisions Fini H, point 34, Kittel and Recolta Recycling, point 55, as well as Mahageben and David, point 42).

[6] See the aforementioned Decisions Halifax and others, points 58 and 59, as well as Kittel and Recolta Recycling, point 53.

[7] See, in this sense, the aforementioned Decisions Kittel and Recolta Recycling, point 56, as well as Mahageben and David, point 46.

[8] See, in this sense, the aforementioned Decisions Kittel and Recolta Recycling, points 56 - 61, as well as Mahageben and David, point 45.

taxable person who did not know or could not have known that the said operation was involved in a fraud committed by the supplier or that another operation belonging to the delivery chain, before or after the one performed by the said taxable person, was affected by a VAT fraud[9].

42. Thus, instituting a system of objective liability would exceed what is necessary for the protection of public treasury rights[10].

43. Consequently, since denying the deduction right is an exception from the enforcement of the fundamental principle this right represents, the competent tax authorities are charged with properly establishing the objective legal requirements which allow the conclusion that the taxable person knew or should have known that the operation claimed to justify the deduction right was involved in a fraud committed by the supplier or another operator intervening before or afterwards in the chain of such deliveries or services provided[11].

7. In conclusion we may state that the discovery of the fictitious commercial operations, under the present-day market conditions, is not that easy; the mechanisms of tax evasion become more diversified, function of the particularities related to the scope of activity of each taxpayer. At the same time, it is certain that the light reasoning adopted in many cases by the criminal prosecution bodies, in their investigations, has had its shortcomings many times, involving a large number of trade companies in these investigations, without checking the condition of the works/ services performed. This aspect is especially important given that, in any market economy, in order to generate profit, one must make an expense.

[9] See, in this sense, the aforementioned Decisions Optigen and others, points 52 and 55, Kittel and Recolta Recycling, points 45, 46 and 60, as well as the Decision of 21 June 2012, Mahagében and Dávid, C-80/11 and C-142/11, point 47.
[10] See Decision Mahageben and David, previously mentioned, point 48.
[11] See the Decision of 21 June 2012, Mahageben and David, C-80/11 and C-142/11.

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EFFECTIVE REMEDIES INTRODUCED IN NATIONAL LAW FOLLOWING ECHR JURISPRUDENCE

Florin Octavian BARBU*

Abstract: *The European Convention on Human Rights is an international treaty that establishes the fact that the first judge of the Convention is the judge of the national judge. In achieving this goal, by the consecration of the right to an effective appeal, the Convention establishes an effective supplementary guarantee of the conventional rights, pointing out that international protection mechanism is the matter only where the national systems of European States do not respond appropriately to the violations of the human rights, but without attempting to transform the Court of European contentious into a substitute of the internal routes of attack. In this respect, guaranteeing the right to an effective appeal is fundamental, as any person whose rights and freedoms have been infringed, has the right to address effectively to a national court, even where the breach would be due to persons who have acted in the exercise of their official duties.*

Keywords: *international mechanism, subsidiary character, human rights, defence, expediency.*

1. Introduction

The European Court of Human Rights found fault[1] with the authorities as a result of the delayed transfer of documents, the undue citation of

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[1] ECHR, Judgment 6th December 2007, in *Bragadireanu v. României*, para. 119-122; M. Udroiu, *Procedura penala. Sinteze si grille,* C.H.Beck, Bucuresti,2016, p. 36

witnesses, the delay in communicating the judgment, successive declines in jurisdiction, etc.

The term "*reasonable time*" should not necessarily be identified with the "operability" of the criminal process. [2]

Thus, a criminal trial within a reasonable time implies the observance of the operability (quick and efficient settlement of the case), but the requirements of operability, a criminal trial conducted within a reasonable time, are not always respected, because the settlement term can be considered reasonable, but the length of time does not correspond to the requirements of speed and efficiency[3].

2. Casuistry

States Parties to the Convention have regulated at national level certain remedies designed to prevent and/or sanction non-compliance with reasonable time requirements[4] following the judgment of the Court in *Kudla v. Poland*. We will also analyse these mechanisms[5] by doing the same to an analysis of the jurisprudence of the Court on this matter. We have opted for this presentation doubled by an assessment precisely because the mere

[2] I. Neagu, M. Damaschin, *Tratat de procedura penala.Partea generala,* Universul juridic, Bucuresti, 2014, p. 89.

[3] Barbu Denisa (2015), *The Requirement for the Existence of an Internal Remedy against the Infringements of the Rights Provided in the Art. 13 of the ECHR*. In Sandu, A., Frunza, A., Ciulei, T., Gorhiu, G., Petrovici, A. (eds.), Rethinking Social Action. Core Values. 6th International Conference LUMEN 2015, April 16-19 (pp.105-110). Bologna, Italy: MEDIMOND- Monduzzi Editore International Proceedings Division.

[4] S. Guinchard coordinator), *Droit processuel. Droit commun et droit comparé du procès*, 3e édition, „Dalloz", Paris, 2005, p. 761.

[5] For existing national regulations, we have in particular considered J.-F. Flauss, *Les recours internes destinés à garantir le respect ou la sanction de la règle du délai raisonnable consacrée par l'article 6(1) de la Convention Européenne des Droits de l'Homme*, rapport, in G. Cohen-Jonathan, J.-F. Flauss, E. Lambert Abdelgawad (coordonatori), *De l'effectivité des recours internes dans l'aplication de la Convention Européenne des Droits de l'Homme,* Edit. „Bruylant", Bruxelles, 2006, pp. 87-124.

existence of a "remedy"[6] in national law is not sufficient, but this remedy must also be "effective".

If, initially, the Court considered that the applicable Austrian mechanism in civil matters was effective in the case of *Holzinger v. Austria*[7], as well as the administrative remedy in *Egger v. Austria*[8]), the Court subsequently relied on those conclusions, remedy was not effective in some situations. The problems of the "Holzinger remedy" in particular concerned the supreme jurisdiction, as there was no higher court to which the interested party could complain[9], or the cases in which the general length of the proceedings, although unreasonable, could not be attributed to a particular authority or court[10].

In Portugal, the existence of a compensatory remedy for the excessive duration of the proceedings stems from the judgment of the Supreme Administrative Court of 15th October 1998, pronounced in the Pires Nino affair.

Thus, following the judgment in Pires Nino and following the crystallization of domestic jurisprudence, the European Court of Justice has recognized the existence of an effective compensatory remedy.[11]

In criminal matters, it should be emphasized that in the Portuguese criminal proceedings there are maximum time limits for each phase of the procedure. If these deadlines are not observed, the person concerned may file an application for accelerating the proceedings so that the prosecutor or the court can be compelled to comply with a determined procedural act

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[6] R. Chiriţă, *Convenţia europeană a drepturilor omului.Comentarii şi explicaţii*, „C.H. Beck", Bucureşti, 2007, vol. II, p. 209-210, in the sense that the correct term is the actual remedy and not the actual "appeal", and there is the risk that the second alternative may be confused with the actual appeal in the sense of an appeal against a court order.

[7] Judgment 30th January 2001.

[8] See Judgment 9th October 2003. There are also exceptional situations: see the Judgment in 24th February 2005, *Kern v. Austria;* Judgment 7th April 2005, Jancikova v. Austria. In the latter case, the court held that the national court needed 1 year and 8 months to justify a judgment. In those circumstances, the Court held that the remedy provided by the Austrian legislation was ineffective, in the absence of the reasons which substantiated the decision of the court of first instance.

[9] Judgment 27th November 2008 *Potzmader v. Austria*.

[10] Judgment 15th September 2003, *Maier v. Austria*.

[11] Judgment 27th March 2003, *Paulino Tomás v. Portugal.*

within a fixed term (Articles 108-109 of the Code of Criminal Procedure Portuguese). Due to the mandatory nature of the provisions given to the prosecutor or the competent court, the European Court of Justice has judged that there is an effective remedy (for example, the judgment in Tomé Mota v. Portugal[12]).

The Spanish legislator provided two ways of preventing and/or penalizing the exceeding the reasonable duration of the procedure. First of all, during the trial, the parties to the proceedings may request the court hearing the case to speed up the proceedings and if they fail to comply, they may apply directly to the Constitutional Court through the so-called *d'amparo* appeal. If it finds a violation of the right to a fair trial within a reasonable time, the Constitutional Court may adopt immediate enforcement measures to bring the violation to an end, mandatory measures for the culpable court[13]. For the hypothesis of the proceedings, the parties have an action for compensation for the damage caused (which may be triggered even if the appeal of *the amparo* appeal was previously used). The claim for damages is addressed to the Minister of Justice, and his decision may be appealed by the administrative litigation on the dissatisfied side.

These remedies were considered by the Court to be in line with the standards imposed by the Convention in the case of *González Marin v. Spain*[14] and even given as an example of regulation in the judgment in *Kudla v. Poland*.[15]

Therefore, the Spanish State has no problems with regard to the effectiveness of the appeal[16] and the applicants are obliged to use internal remedies[17].

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[12] Judgment 2nd December 1999.

[13] A.L. Alonso de Antonio, J.A. Alonso de Antonio, *Derecho Constitucional Español,* tercera edición, "Editorial Universitas", Madrid, 2002, p. 281-292, see details on the *d'amparo* appeal.

[14] Admissibility Decision of 5 October 1999, which was confirmed by the Admissibility Decision of 8th October 2002 in *Fernandez Molina Gonzalez and others v. Spain*.

[15] See para. 154 in *fine* of Court Judgment.

[16] Judgment 18th October 2011, *Prado Bugallo v. Spain*.

[17] Judgment 28th January 2003, *Caldas Ramirez de Arellano v. Spain*.

Although some countries do not benefit from a specific remedy for cases where the reasonable duration of the procedure is exceeded, they have not come to the attention of the Court (for example, the case of Andorra[18], Armenia, Bosnia-Herzegovina, Latvia, Lithuania or the Principality of Monaco[19]). It should also be noted that, although it appears to be an exception, some of the States signatories of the Convention do not have any special problems in ensuring that cases are dealt with within a reasonable time and are rarely convicted of lack of effective remedy in the matter Sweden, Iceland, Norway, Switzerland, Estonia, the Netherlands, the Principality of San Marino, Finland and the United Kingdom.)

Special efforts are being made to ensure that cases are dealt with within a reasonable time in the Nordic countries. Thus, there are a number of mechanisms through which this objective is pursued: the presidents of the courts have the power to set deadlines and order measures to improve duration of the procedure; they can appeal to the *Ombudsman* and/or the Ministry of Justice to complain about the unreasonable duration of the proceedings; in criminal matters, exceeding the reasonable time is usually sanctioned by reducing or removing the penalty, but pecuniary repairs are an alternative; in civil matters, the remedy for damages caused by overcoming the reasonable period is the award of monetary damages; in general, the criteria for assessing the reasonableness and the amount of compensation are those resulting from European case law, which are applied by national courts and are widely presented in various regulations drafted by the ministries of justice[20].

As far as Romania is concerned, until recently there was no effective remedy, as confirmed by the Court in *Soare v. Romania*[21], when the Court

[18] In fact, this Lilliputian State has only registered two convictions in the Court throughout its history.

[19] For some details, see also the Venice Commission, *Study on the Effectiveness of National Remedies in Respect of Excessive Length of Proceedings - Replies to the Questionnaire*, Strasbourg, 15th February 2007, passim.

[20] Denisa Barbu, op. cit. *The Requirement for the Existence of an Internal Remedy against the Infringements of the Rights Provided in the Art. 13 of the ECHR.*

[21] Judgment 16th June 2009.

held that before 1st January 2004 the applicant had no effective remedy, in national criminal law, to complain about the prosecutor's acts in terms of the length of the proceedings. As such, even if the actual remedy had been institutionalized after that date, he could no longer reduce the already excessive duration of the procedure in any way (paragraph 35).

Moreover, in the case of *Abramiuc v. Romania*[22], the Court also carried out a thorough examination of national rules and judicial practice in order to determine whether there was an effective remedy to contest the excessive duration of the proceedings, regarding the article 13 of the Convention. The Court's conclusions were clear, arguing that formulating a disciplinary complaint against the judge of the case at the Superior Council of Magistracy is not an "effective remedy" within the meaning of Art. 13, since this complaint has no direct and immediate consequences on the excessive duration of the procedure, but rather has the vocation to lead to the disciplinary liability of the magistrate (paragraphs 123-124), in the same respect, the Court noting that the Government did not provide any example showing that formulating of such a complaint would lead to the procedure being unblocked.

Regarding the other remedy proposed by the Government, namely an action based directly on the conventional and constitutional provisions, seeking compensation for the damage caused by the excessive duration of the procedure (remedy "proven" by the Government in a single non-final judgment of the Iaşi Court), the Court held that Romania had not demonstrated the existence of a consistent judicial practice of admitting similar actions (paragraph 128) and that, however, that remedy would only concern the hypothesis that the proceedings had already been completed and not the situation in which the applicant claims the acceleration of the procedure (par. 129), for example, in the case of the *Greek Catholic Parish of Saint Basil the Great vs. Romania* (paragraphs 99-106) [23], respectively *Floarea Pop v. Romania*[24].

[22] Judgment 24th February 2009.
[23] Judgment 7th April 2009.
[24] Judgment 6th April 2010.

The Venice Commission classifies the appeals that a dissatisfied person with an excessive length of proceedings can bring:

1. Preventive or accelerated appeals to reduce (shorten) procedures;

2. appeals for reparation of material or moral damages resulting from the unreasonable term of the process.

Some appeals may be used either when the procedure is completed or when it is peddled, and others may be used either for all categories of proceedings or only for criminal proceedings.

ECHR through the provisions of art. 13 guarantees the right to an "effective appeal" whereby any person can complain before a national court in breach of the State's obligation to conduct criminal proceedings within a reasonable time.

Thus, any person who considers himself a victim of a provision of the European Convention has the possibility to bring an action by a state authority in order to request the finding of the violation, termination and reparation of the prejudice (by acting, in this context, a criminal complaint, an administrative request, a challenge, etc.).

The right to an internal remedy is a deprived right of independence and can only be invoked in relation to another right recognized by the other conventional provisions.

In Romania, there is no effective remedy in case of lack of celerity of judicial bodies in the criminal proceedings, in national legislation there is no effective internal procedure to ensure any person who has violated the rights and freedoms recognized by the ECHR (Article 13 of the ECHR) to effectively address a national court, even if the infringement was due to persons who acted in the exercise of their official duties.

The jurisprudence of the European Court shows that, in order to comply with the provisions of Art. Article 13 of the European Convention requires the two categories of appeal to be governed by domestic law: acceleration and compensation.

In order to comply with the provisions of art. 13 of the European Convention, the case-law of the European Court of Justice states that it is

necessary to have two categories of appeal in domestic law: acceleration and one for damages.

The European Convention on Human Rights is an international treaty which establishes that the first judge of the Convention is the national judge.

In doing so, the Convention establishes an additional effective guarantee of conventional rights by stating the right to an effective remedy by showing that the international protection mechanism only deals with the case when the national systems of the European States do not respond adequately to human rights violations, without trying to turn the European litigation court into a substitute for domestic remedies.

In this respect, guaranteeing the right to an effective remedy is fundamental because any person whose rights and freedoms have been violated has the right to effectively address a national court, even if the violation is due to persons having acting in the exercise of their official duties.

Article 13 of the Convention therefore imposes a positive obligation on Contracting States to regulate an appeal under national law to remedy any breach of the Convention, the effectiveness of which consists in empowering the competent national court to examine the content of the substantiated complaint on a provision of the Convention and provide adequate repair. The absence of such an appeal in national law leads to a breach of this obligation and thus to the provisions of the Convention.

Expressing explicitly the subsidiary nature of the European protection system, art. Article 13 of the Convention explicitly states the obligation of States Parties to defend human rights, first of all, in their own legal order, thus establishing in favor of individuals a further guarantee of effective recognition of these rights. The right recognized by art. 13 is not an own subjective right, but rather a means of defending the rights and freedoms recognized by the Convention. The right to an effective remedy may be considered as a complementary right colliding with other rights of an equivalent nature, in particular with the right to control the legality of possession (Article 5 (4)) and the right to a fair trial (Art. 6 (1). In such a situation, the Court tends to consider that Article 13 enshrines a general

guarantee which does not apply to those cases where the specific and stricter guarantees in Art. 5 par. 4 or art. 6 par. 1.

Referring to art. 35 parag. 1 of the Convention, we understand that the "effective" appeal within the meaning of Article 13 is a "useful" appeal that the applicant must exercise before referring the case to the Court.[25]

3. Conclusions

Thus, we consider that the existence of these convictions, the Court's conclusions, the excessive length of the procedure very acutely felt at national level, as well as the large number of complaints filed with the Court made the Romanian legislature identify some national preventive and/or compensatory.

There are, however, a number of questions about the processes started before February 1st, 2014, and yet unfinished, what solutions are there for them, if there was not an internal remedy until then.

In the Romanian criminal procedural system, in the application of the Criminal Procedure Code, in the special proceedings, the challenge of the reasonable duration of the criminal proceedings was introduced in order to harmonize the national legislation with the requirements of the observance of the right to a fair trial, the jurisprudence of the European Court of Human Rights Man constantly highlighting this element.

It should be noted that this procedure applies only to criminal proceedings initiated after the entry into force of the Code of Criminal Procedure, according to art. 105 of the Law no.255 / 2013.

According to art. 488¹ (1) Criminal Procedure Code, it may be appealed by requesting the *acceleration of the procedure* if the criminal prosecution or trial is not carried out in a reasonable time, from which we can deduce that in our legal system only "the acceleration contestation is considered" and not the one in damages, which should have been cumulative in domestic

[25] Denisa Barbu, *Principiile procesului penal*, Ed.Lumen, Iasi, 2015, p. 96.

law, according to the European Court of Human Rights. The claim for damages only appears *a posteriori* (after breaching the right guaranteed by the European Convention), so that it cannot talk about its contribution to preventing the violation of the right to a fair trial.[26]

Beneficiaries of this right are, in addition to the one accused of committing an offense and the injured person, the civil party, who are equally entitled to a fair trial of reasonable duration or to the solution of the civil side within a reasonable time.[27]

The Romanian Code of Criminal Procedure regulated in the special proceedings the contestation of the reasonable duration of the criminal proceedings, harmonizing the criminal law with the requirements of the observance of the principle of the right to a fair trial[28].

Therefore, art. 488□-488'6 C.C.P. refers to the contestation of the reasonable length of the criminal proceedings relating only to criminal proceedings commenced after the entry into force of the C.C.P., so we can only speak of an acceleration contest, not a claim for damages, even if the jurisprudence of the European Court shows that there must be both cumulative procedures in national law.

In the Romanian criminal procedural system, in the special proceedings, the contestation of the reasonable duration of the criminal trial, in order to harmonize the national legislation with the requirements of the observance of the right to a fair trial, the jurisprudence of the European Court of Human Rights constantly highlighted this element.

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[26] Denisa Barbu, *Drept procesual penal. Partea generala*, Lumen, Iasi, 2016, p .40-42.
[27] N. Volonciu, A.S. Uzlău and others, *Noul Cod de procedură penală, commented,* Hamangiu, Bucureşti, 2014, p.1209.
[28] Denisa Barbu, *Principiile procesului penal*, Ed. Lumen, Iasi, 2015, p. 98.

that in our legal system only "*the acceleration contestation*" is considered and not the one in damages, which should have been cumulative in domestic law, according to the European Court of Human Rights. The claim for damages only appears *a posteriori* (after breaching the right guaranteed by the European Convention), so that it cannot talk about its contribution to preventing the violation of the right to a fair trial.

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10. Judgment 6th April 2010.

JUDICIAL SYSTEMS IN ANGLO-SAXON LAW FAMILY. BASIC ELEMENTS

Steluța IONESCU*
Traian Alexandru MIU**

Abstract: *Traditional delineation of law systems in established families is common knowledge. The legal geography of the world inherently also generates a judicial geography. In other words, not only the legal order has distinctive elements but, as a consequence, the judicial organization naturally adopts particular aspects, in both form and content. The present study focuses on the Anglo-Saxon systems (the British law system and American law system), whose legal order has as a dominant element the recognition of the judicial precedent as the prime source of the law, hence a special care for the organization and the functioning of the judicial system in which the precedent occurs. There is a demarcation between the states that promote the essence of this law family, as though they are largely governed by the same rules, there are, however, specific features that are of interest in the research in its entirety. Thus, if the British law, of consuetudinary nature, places the judge in the position of creator of law, the written law being the exception here, for American law, the elements that make him particular derive, on the one hand, from the way in which the judiciary is organized and operates, and, on the other hand, from the relation established between the custom and the written law. This is precisely why the analysis focuses on some of the defining aspects of the two law systems, concentrating on the way in which their judicial systems are organized and operated.*

Keywords: *law families, continental law, Anglo-Saxon law, judicial system, jurisprudence*

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1. Typology of Law Systems

It is widely known that the formation of law families is not a spontaneous occurrence, located at a precise or easily defined historical moment; instead, it is the end result of an evolutionary process centered around some fundamental sources, called reception processes, whose purpose was to penetrate into different geographic areas and to mold, according to certain rules and principles, the various legal systems. Under this heading, it is worth mentioning: the reception of Roman law, applicable in a pure form in some countries or adapted in others, in many of them, with the same legal force today; the reception of French law (the fruit of Napoleonic elaborations), which would become applicable law in most of the occupied states, maintained in some of them even after they gained their independence; the reception of British law (common-law), expanded and maintained especially in former colonies, but not only there.

The legal geography of the world is marked today by the division into law families, comprising large legal systems, usually united on the historical criterion.

Since Romanian law is an important part of the Romano-Germanic (or continental) law family, we consider of interest to distinguish between this continental-type civilization and the Anglo-Saxon-type civilization, by highlighting some distinctive elements between them.

On the one hand, the law systems of states such as France, Germany, Greece, Italy, Spain, and Romania are included in the family of Romano-Germanic or continental law systems. What is promoted in these systems is a legal order characterized by the primacy of the legislative process and its creation, the source of formal law with the highest legal significance being the law (in the sense of written law, adopted by the state and, most often, accompanied by a sanction).

On the other hand, in the family of Anglo-Saxon or Anglo-American law systems, the dominant element is the recognition of the judicial precedent - the jurisprudence - as a prime source of law. Among the systems

belonging to this family, however, a demarcation must be made because, although in general they are governed by the same rules, there are still specific elements that are of interest in the research in its entirety.

Thus, British law, of consuetudinary nature, but not limited to it, places the judge in the position of the creator of law. The written law constitutes the exception here, the supreme legal force being concentrated in what is called the judicial practice. The solution that the judge gives to the case has the merit of imposing on cases pending in lower courts and in similar cases. In relation to his or her position to apply the common law, understood as having an objective existence, whether or not it is expressed in acts, the law appears in an auxiliary position. The provincial law of Britain is found - says Hegel - in statutes (formulated laws) and in a so-called unwritten law; and because this unwritten law is included in the decisions of the courts of law and of the judges, the latter are continually called upon to legislate, in that they are equally held to refer to the authority of their predecessors.

For American law, also detached from the same Anglo-Saxon law family, the elements that make up its particularity derive, on the one hand, from the way in which the judiciary is organized and operates and, on the other hand, from the relationship between custom and written law.

2. The British Judicial System

The most appropriate qualification attributed to English law is that of *customary law*. The explanation for this is simple, English law being, at the beginning, a custom law, hence the name, already established, of *common-law*[1]. Today, such an affirmation needs to be reconsidered, as English law no

[1] The term *common-law* derives from *commune ley*, which designates the common law, originating in the customs in force before the Norman Conquest. Today, the term *common-law* has two meanings: in broad terms, it expresses the great system of English origin, and in a narrow sense, it defines only one of the specific regulatory branches, which brings together the solutions in the courts.

longer consists of a sum of systematized customs, but a true *jurisprudential law*, a qualification that we will try to support in the following.

The peculiarity lies in the fact that it was not legalized but developed "over time", the only systematization of customs being given by the Royal Courts of Westminster, that is, through jurisprudence. That's why Jeremy Bentham vocally asserted the expression "*judge-made law*", the English law being reputed as a creation of jurisprudence.

Common-law is based on the judicial precedent, which is the "*most important mechanism in the formation of the English system, its polar star*"[2].

In each case, the judge is guided by solutions given in similar cases, previously judged, which have thus become *precedents*. But when these do not exist, the judge will follow the general principles of law, and the solution he pronounces will in turn become a genuine judicial precedent.

The preference given by the judges to the judicial precedent, about which a contemporary Romanian author[3] states that "represents the most important mechanism in the formation of the English law system" is so pronounced that, even in the presence of a law or a customary rule, they choose, in motivating their decisions, to draw inspiration from previous judgments in the same legal issues. This intercession of jurisprudence is the fruit of a conviction that is impossible to overthrow. Even though today it has a mitigated character and even if there are voices that say that a simple fiction is actually being promoted, the reality of the legal framework in this part of the world still reveals the same truth. The practice of the courts enjoys a real and undisputed consideration.

Broadly speaking, the organization of the British judicial system is characterized by the existence of two main categories of jurisdictions: civil and criminal. With a pronounced centralized character of the jurisdictions,

[2] Victor Dan Zlătescu, *Drept privat comparat* (Private Comparative Law), Oscar Print Publishing House, Bucharest, 1997, p. 249.
[3] Mihai Bădescu, *Familii şi tipuri de drept* (Families and Types of Law), Lumina Lex Publishing House, Bucharest, 2002, p.63.

the English judicial system is organized in a pyramid form[4], with the *House of Lords* holding the supreme position. At the lower hierarchical level is the *Supreme Court*, and at the base of the system there are *county courts* and *magistrates courts* (courts of first instance).

As a specific note, the Supreme Court does not have the nature of a genuine court, as is called and encountered in continental law systems. The *Supreme Court* is not a single entity, it has three other courts: the *Court of Appeal*, the *High Court* and the *Crown Court*. An *inventory of the competencies* of these courts is impossible to be presented in a few pages.

It is relevant and useful, however, to show at least the nature and powers of the supreme court.

With the highest position in the current English judicial system, the *House of Lords* has a very special significance today. The main functions of this court are divided into two categories: legislative[5] and jurisdictional. With regard to the latter, the *House of Lords*, made up of *law lords*[6] called to provide the last level of jurisdiction in civil and criminal matters, functions as a court of appeal and ultimate jurisdiction. Given that appealing is subject to prior authorization, in order to confirm that the litigation raises issues of public interest, the House of Lords is not a very busy court, in practice[7].

Particularly important, the *jurisprudence*[8] of the House of Lords has a special legal significance. It undoubtedly constitutes a source of law. An

[4] The current judicial organization of the English system is that of the *Judicature Act* adopted in 1873, later amended in 1970 (by the *Administration of Justice Act*) and in 1971 (by the *Courts Act*). Changes in the structure of the Supreme Court also occurred in the next decade (through the *Supreme Court Act*, adopted in 1981).

[5] The terminology must be observed with caution in order not to cause a confusion. The legislative nature derives from the very nature of the English law, in which the judge is a true creator of norms, a true legislator.

[6] Appointed from the *barristers* of at least 15 years of experience or from the judges with at least two years at the Supreme Court. *Lord Chancellor* is the most important function in the judicial hierarchy and, as any of the judges of the English system, he enjoys a special prestige.

[7] Annually, approximately 150 civil appeals are brought to trial and solved before the House of Lords - see Ioan Leş, *Organizarea sistemului judiciar în dreptul comparat* (Organization of the Judiciary in Comparative Law), All Beck Publishing House, Bucharest, 2005, p. 16 et seq.

[8] The name of the solutions of the *House of Lords* is that of *decisions.*

eventual modification of it may be made only by an act of Parliament or by a subsequent decision of the same court.

In line with the principle of the hierarchy of jurisdictions, the House of Lords may overrule a decision of the Court of Appeal, which, in turn, may overrule a solution pronounced by the High Court.

All decisions of the House of Lords are brought to attention by publishing in the *Law Reports*, the court itself being related to them, in the cases subsequently remitted for settlement.

Even in brief, the characterization of the English judicial system cannot ignore the specificity of the court proceeding. All the more since the English law is - as René David shows - *a law of individuals involved in the procedure and of practitioners*. It is understandable why one of the important chapters of *common-law* is represented by the *adjective-law* (the system for regulating the judicial procedure). Without going into detail, it is worthwhile and must be stressed that the principle that animates English jurists is the correct application of procedural rules, this being the only and surest guarantor of reaching the decision (*the due process of law*). Rules and principles present in other judicial systems (the public character of the hearing, the oral and the contradictory nature of the debates) are used here as well. However, the preoccupation for the celerity[9] of the trial and the keeping of the jurors in the judicial procedure[10] is significant in this case.

In trying to formulate a conclusion, it must be said that the preponderance of the procedural form on the substantive content of the trial is an essential feature of the English law system. The easiest argument to invoke is a historical one, because: "*In a country where there is no body of laws to refer to, judges being pushed to empirically build the common-law, the rule that strict adherence to the procedure leads with certainty to a just conclusion was naturally formed*"[11].

[9] Unlike the situation of the continental law systems, including the Romanian law, which are accused of lack of concern in this matter.

[10] Although their role is reduced today, in civil cases only being present exceptionally, and in criminal cases, only for solving the causes involving serious crimes.

[11] René David, *Les grandes systèmes de droit contemporaines*, Dalloz, Paris, 1950, p.167.

Regardless of the longevity of many of its particular features, the English law system, implicitly his judicial side, is not free from criticism. A balanced analysis of its advantages and disadvantages is made by a direct observer, the English author W. Geldart[12], for whom the shortcomings of the English system could be summed up as follows: a pronounced rigidity of the rules, capable of determining a continuously increasing power or the judge; the danger of making some rules applicable in situations for which they were not created, the analogy being forcibly used. However, the most acute reproach for the English system is the complexity of applicable rules, doubled by their large volume, which leads to discouragement of those who appeal to the justice service.

3. The Judicial System of the United States of America

With roots in the classic English law and belonging to the same law family, namely the Anglo-Saxon, the law that dominates today in the United States of America is not a faithful takeover of the system of origin, but the expression of transformations produced over time.

Although retaining its mark, many of the institutions and rules of English law still being kept, the American law would gradually break away from the classical *common-law*, making possible for a configuration substantially different from that of the English law

The tendency of autonomy was to manifest itself long before the historical moment that confirmed it. This relates to the proclamation of independence, which determined Professor Zlătescu to assert that the year in which the American law was born is 1776[13]. The proclamation of the 13

[12] W. Geldert, *Elements of English Law,* Oxford University Press, London, New York, Toronto, 1966, p. 13 et seq.

[13] The *Declaration of Independence* was adopted on July 4th, 1776, in Philadelphia, with a text by Thomas Jefferson. It is indicative of the reasons which dictated it the very first paragraph: "*When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation*".

colonies as independent also brought with it new legislation, intended to take the place of the original English one. Of course, the federal structure of the new state has also contributed, to this situation.

However, the feature which would detach the most the American law system of its system of origin is the attempt to systematize the legislation, a reality generated by the influence of the continental law system.

In fact, the particular feature of the new American system, in relation to English law, is precisely the consideration for law-making, and the most eloquent expression is the Constitution itself, self-defined as *the Supreme Law of the Country*[14].

Any attempt to present the legal force of this document, its power to inspire texts of the same nature, and, in particular, its survival over time risks being qualified as a truism. Characterized by "simplicity and flexibility," the American constitution has guided the evolution of government institutions for two centuries and provided the basis for political stability, individual freedom, economic development and social progress[15].

The judiciary system, its way of organization and its functioning were in the beginning, under the influence of the British colonial domination. In the context of gaining the independence, a division of the three main functions (legislative, executive and judicial) between the federation and the constituent states inevitably took place. Thus, the judicial system has acquired, from this perspective only, two dimensions: federal and statal[16].

In most cases, the member states' judicial organization identifies three categories of courts, which correspond to three levels of jurisdiction: *first instance courts*, *courts of appeal* and a *supreme court*.

However, there are also peculiarities from state to state. Thus, some of the US States have a more simplified structure, lacking courts of appeal,

[14] On the law of American States, see also Costică Voicu, *Teoria generală a dreptului* (The General Theory of Law), Sylvi Publishing House, Bucharest, 2000, p. 86 et seq.
[15] Mihai Bădescu, *op. cit.,* p. 87.
[16] Given that the state courts are those to whom individuals turn to for justice, with much higher frequency than in the case of the federal ones, they are considered to be *the basis of the US judicial system* - for details, see Anne Deysine, *Justiția în Statele Unite ale Americii* (Justice in the United States of America), Rosetti Publishing House, Bucharest, 2002.

others, on the contrary, add other courts to deal with more minor causes (often referred to as courts with limited jurisdiction). There is also no uniformity on the terminology, since the names of the courts are often different from one state to another[17].

As in the case of the British legal system, it would be very difficult to summarize the issues related to the jurisdiction of these courts and the peculiarities of the proceedings. That is why we will resort to a short exposition on only the supreme court, both at member state and federal level, with a brief explanation of the legal force of its jurisprudence.

The common name being *Supreme Court* or *Supreme Judicial Court*, the supreme court in every US state is the third and highest jurisdiction. Its primary role is to achieve uniform interpretation of the law throughout the state. The *Supreme Court* is a single court[18], in principle, and its rulings are final and binding for the parties.

The legal principles set out in the grounds of the court's judgments constitute precedents which, having *normative value*, bind the lower jurisdictions[19].

At federal level[20], the American judicial system is organized on the hierarchical-pyramidal principle as well. It should also be noted that there are specialized federal courts as well, whose purpose is to settle cases arising from certain procedural matters. Thus, there are: *U.S. Tax Court* (an itinerant court, whose competence includes federal taxes); *U.S. Claims Court* (a fixed court, headquartered in the US capital, competent to hear complaints by individuals about damage caused by government officials);

[17] By way of example: in North Carolina, the first-instance courts are called *district courts*, in Florida or Oregon they are called *circuit courts*, while in California their name is *upper courts.*

[18] Exceptionally, in Oklahoma and Texas, there are two supreme courts, for civil and criminal cases respectively.

[19] Anne Deysine, *op.cit.,* p. 57.

[20] Currently, the Federal Courts system consists of the following jurisdictions: District Courts (94 jurisdictions, at least one per state), Courts of Appeal (13 jurisdictions, established in 1891), and the Supreme Court of Justice – for details, see Elena Simina Tănăsescu, Nicolae Pavel, *Constituția Statelor Unite ale Americii* (The Constitution of the United States of America), All Beck Publishing House, Bucharest, 2002.

U.S. Court of International Trade (fixed court, headquartered in Washington, competent in the field of customs law); *U.S. Court of Military Appeals* (court with jurisdiction in military matters, competent to resolve appeals against military courts).

At the top of the system is the Supreme Court, whose configuration is given by the fundamental law itself. Established on February 2nd, 1970, the Supreme Court of Justice is qualified, similarly to the Congress and the other governmental authorities, as an equally judicial and political institution. Of the latter, suggestive is, we believe, the view expressed by the American political scientist O'Brien, who sees in the North American Supreme Court "a temple of law - an arbiter of political disputes, an authoritative body of law, and an expression of the American ideal of the *rule of law, not of man*"[21].

The primary jurisdiction of the Supreme Court is to resolve appeals against judgments handed down by lower federal courts and state courts.

Initially, the procedural means with which the supreme court could be invested were those inherited from the English system of *common-law*, carried over by the legislation on judicial organization from the American law. These are: the *writ of appeal* (a means that was abandoned following the 1988 reform), the *writ of certiorari* (very common in practice) and the *certification of questions*. Such a procedural approach implies that a lower court is required to rule on a matter of law, on the clarification of which depends the resolution of the case[22]. Through the procedural means at its disposal, the supreme court assumes its political and legal role of interpreting the Constitution, whose guarantor is.

As is known today, even to non-specialists, the American judicial system is still loyal to a procedural institution of great importance, as old as

[21] D. M. O'Brien, *Storm Center, The Supreme Court in American Politics,* Second Edition, W.W. Norton & Compagny, New York – London, 1990, p. 13 apud Ioan Leş, *op. cit.,* p. 256.

[22] A comparable procedural mechanism exists today in the EU judiciary, in relation to the pre-litigation procedure before the Court of Justice in Luxembourg.

it is present in the "American judicial duel." This is *the jury court*[23], an institution of tradition in the American law system, applicable to both civil and criminal lawsuits[24]. Specifically, the jury court involves performing judicial debates in front of a jury composed of people outside the judiciary, with a good reputation and impeccable moral attitude, these being true *popular judges*[25].

The institution is the expression of a constitutional regulation[26] according to which every individual has the right to a trial by an objective, impartial jury, capable of contributing to the maintenance and consolidation of the trust of the subject in justice[27], the preoccupation of this law system for the protection of the rights and freedoms of its citizens being well known.

Without further development, we can conclude by pointing out that, from the point of view of the organization and functioning of the judiciary, in the United States of America currently exists "one of the most solid democracies and whose prestige lies in the particular importance it has always given to the fundamental rights of the citizen"[28].

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[23] The meaning is generic and relates to one of the symbolic procedural elements for American justice (although also present in European law systems, such as those in England and Switzerland).

[24] Originally, although the opposite would be considered to be the case, the *trial jury* or *the jury* institution was present in civil, not criminal, cases. Today, *trial jury* or *petit jury* is equally applicable to the two categories of cases.

[25] As qualified by Ioan Leş, *op. cit.,* p. 260.

[26] Amendments VI and VII to the US Constitution. The first concerns only criminal cases, stating that: „*In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation […]".* The second one (Amendment VII) provides for the institution of the *jurors* in the civil proceeding, the text having the following form: „*In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law".*

[27] This is, however, obviously conditioned by a good selection of jurors, otherwise the reason that gave rise to the need for the jury court does not find its effectiveness.

 Ioan Leş, *op. cit.,* p. 260.

4. Conclusions

The legal geography of the world is marked today by the division into law families, comprising large legal systems, usually united on the historical criterion.

Romanian law is an important part of the Romano-Germanic (or continental) law family, a family of law characterized by the force of written law, by respect for the law and by the reluctance to *de jure* recognition of jurisprudence as a formal source of law. In antithesis, Anglo-Saxon law systems (on which this analysis was focused) are defined by a preoccupation with the judicial precedent and the judgment in equity, which implicitly also generates a differentiated concern for the organization and functioning of courts.

Although parts of the same whole, the two legal systems under consideration - British and American - do not have identical configuration. Both in the legal order, in the way in which the courts are organized and in the court proceedings, distinctive features are distinguished. British law still stands out in a rigid conservatism, in which the judge is tributary to his status as a creator of law, and the diversity of empirically-derived procedural rules risks to undermine the substantive nature of the law. From the same perspective, the American states community, although not breaking from the rule of the judiciary precedent as a formal source of law, also gives, over time, more attention to written law. Legislation goes beyond the exception status from the British law and takes on a new, reconsidered position. Nevertheless, the spirit of case law is maintained, and jurisprudence continues to remain the main element of the law.

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*** *Judicature Act of United Kingdom* adopted in 1873, amended in 1970 (by the *Administration of Justice Act*) and in 1971 (by the *Courts Act*).

*** *Declaration of Independence* adopted on *July 4th, 1776*, in Philadelphia, with a text by Thomas Jefferson.