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THE ETHIC – A MODERN WAY TO PREVENT THE ILLICIT ACTIVITIES

Candidate to Ph.D lecturer **Laurenția Georgeta Avram**
Spiru Haret University
laura.avram@yahoo.com

Abstract:
The business from the financial field must submit to a great volume of the new legal obligations which wants to attract them in a network of the secure and control system and their goal is to detect the money washing and the finance of the terrorist activities, when they appear, and to stop the law breakers to obtain the incomes from the illicit activities.

Keywords: ethic, money washing, legal.

The business from the financial field must submit to a great volume of the new legal obligations which wants to attract them in a network of the secure and control system and their goal is to detect the money washing and the finance of the terrorist activities, when they appear, and to stop the law breakers to obtain the incomes from the illicit activities.

The money washing is a process which gives or tries to give a legality appearance of some profits obtained illegal by the law breakers who benefit after that by those incomes, without to be compromised.

This dynamic process is evolved in three phases: obtaining and moving the funds obtained directly or indirectly from the malpractice, hiding the traces or the origin the incomes to avoid any suspicious or investigations, and, finally, to available the money and their reinvest in the legal activities.

1) In the initial phase or **embarking** the money washing, the law breaker includes his illegal profit in the financial system. It can be done through divided the big amount of money into smaller ones which are directly deposited into a bank account or using in buying some financial instruments (cheques, the order tickets etc.).

2) After the entrance the funds in the financial system, it takes place the second phases – **stratification.** In this phase, the law breaker does some conversion or moving the funds to estrange more by the provenience source, the more used way being the electronic transfer in a series of accounts in the different banks from all over the world. There are preferable these geographical zones or jurisdictions

which do not cooperate with the investigation organs specialised in combating this law-breaking phenomena.

3) After two money washing phases, the law breaker or law-breaking group pass to the third phase – **integration** –when the funds come into a legal economical circuit. The money washer can invest the legal funds on the real market, on the luxury goods or in the business.

The all-three phases can be distinct evolved, but it can take place simultaneous or, frequent they can superpose.

Through their illicit processes, the law breakers can invest in the economical sectors when the assets can be used then like the money washers. More, in an economy when the advance technology and globalization permit the fast funds transfer, the missing control over this law breaking phenomena can disrupt the financial stability. In a country with precarious financial statements, the extracting of annual millions or milliards of dollars from the normal process of the economical increasing represents a real dangerous for the credibility, the economical stability and the national security.

The facts done by the terrorist entities are sanctioned in the following conditions:

a) They are done with violence, as a rule, and product the anxious state, incertitude, frightening, panic or terror between the populations;

b) They attempt hardly over the specific or unspecific human factors and over the material factors;

c) They follow to realise some specific objectives by the political nature through determining the authorities of the state or an international organization to dispose, to give up or to influence taking the decisions in a terrorist entities favour.

In concordance with article no. 3 of the same normative act, the terrorism acts are the transnational nature, if:

"a) they are done less on the two states territory;

b) they are done on the state territory, but a part of planning, preparing, leading or controlling take place on the other state territory;

c) they are done on the state territory but involve a terrorist entity which evolve activities on the other state territory;

d) they are done on the state territory but they have substantial effects on the other state territory."

More times, the terrorist is the citizen of the A state but he has the nationality of the B state, he actions against the C state with guns from the D state gave by the intermediate people from the E state, he wants his documents to has a bigger publicity in these states, to captivate the mass-media interest and the sympathy of his countrymen.

Essentially, the principal objective of the terrorism which represents the most dangerous phenomena of the international organised crime is to intimidate the population or to oblige a government or an international organization to do or not to do any action. Generally, the terrorism is an action of on organised group, with ethnic reasons and rarely is a desperate action of some isolated people.

Generally, obtaining the profit is the objective of other types of organised crime. While the difference of the final goals between each of these activities can reach some limits, the terrorist organizational need the financial sustain to reach their goals. A success terrorist group like a criminal organization must be capable to build and conserve an efficient financial infrastructure.

Generally, the terrorism finance has two principal sources:

a) The first source is the financial support by the states or organizations with a sufficient infrastructure to collect and dispose the funds to the terrorist organization. So, the sponsor-states of the terrorism decline in the last years and replaced with other ways for sustaining. A physic person with enough financial resources can give substantial funds to the terrorist groups. For example, Osama bin Laden, owner of some factories contributed with significant sums from his fortune at the found of the terrorist network Al-Qaeda;

b) The second major source of the funds for the terrorist organization is represented by the indirect gain from the activities which generate the incomes.

Like the criminal organization, the incomes of the terrorist group can be obtained from the law breaking or other illegal activities.

The traumatic events since 11 September, Bali, the bomb assault since July, 7th from London and others do impossible the counteraction of the official insistences that the new controls are, the least, necessary in the public interest. But only, when do the accountants, auditors and lawyers break their professional principles to respect the new legal requirements give their contribution against the illegal activities?

The promoter of all standards of regulation which are now introduced in the entire world, in this field, is the Financial Action Task Force (FATF), an intergovernmental organism with the headquarters in Paris which was found in 1989 by G7.

The mission of this group is to look over the used methods by those who wash the money and by the terrorism financers and to recommend the adequate protection and control measures which the national government should implement to fight against the threats.

Although, the FATF visited and concentrated over the bank sector, its applicability is extended, it regulation a large business area and new non-financial profession including the accountants (the financial auditors), lawyers, the real agents and casinos.

The progress and the applicability of the law breakers suggest that for sustaining the impact of the secure services already included – like an apparent grade of success in the bank case, should be extended, so that, to be applied to other types of intermediate which can be involved conscious or not in the money washing.

Because of this fact, there are advised the government that the control standard methods and fighting against the money washing must be applied to the accountants and financial auditors or at least the accountants from the public sector which are involved in the specific actions of the clients (which refers at the manage

of the client funds and at the buying or selling the goods and properties in the client name).

The accountants (and the financial auditors) have the fiduciary responsibilities beside their clients; they are tided by the ethic codes and have professional values which impose to respect the confidentiality of the information of their clients business.

This thing does not mean that the confidentiality fender should be used to help and sustain the illicit activities of the client. The ethic responsibilities of the accountants (and the financial auditors) can alternate the detail, in different countries, but the majority will follow the base principle fixed by the ethic code by the IFAC (The Accountants International Federation).

This code includes the next elements:

- Before accepting a new client, the accountants and the financial auditors should analyse if there are aspects of the potential client which can affect the capacity to action with integrity, in concordance with the different aspects of the code – if there are these kind of aspects that accountant (the financial auditor) feels that cannot correlate with his obligation respecting the code, he must refuse to represent this client.
- Like the integrate element of the professional behaviour, the accountant (and financial auditors) should conform to the relevant laws and must avoid any action which can denigrate or discredit the profession.
- The accountants (and the financial auditors) should not divulge the confidential information out of the company during the professional relation with a client or with a potential client without a specific and clear authorization or without the legal or professional right to do this thing.

From the two first elements of the list above result that the accountants (and the financial auditors) will be asked to look critically at the potential clients and decline any action in the client name when they think that is impossible to action without to compromise the proper obligations and to respect the professional norms. Also, there is in the ethic code a strong caution against any type of illegal activity. More, the code admits that the confidentiality given to the client is a norm and to divulge the information can do in the case when this is a legal obligation.

An optimum function of the market rules is determined by the quality of the sociologic, culture, and moral values proposed and stated. The culture and the ethos of the community are vectors and finance sources for supplying the behaviour. They define the limits and permissibility, acceptability and non acceptability, desirable and non desirable, in the maximum objectiveness zone of the economic. So that, the quality and the functionality of the norms and values which regulate the community medium are supports at the product and they reproduce the model of the conduit and the behaviour in the business. Of course, in a society there are created structures and institutions, norms and rules, especially by the juridical nature, solicitudes to promote these existential values that are compatible with the people looking for. The market economy is an open

concurrence. The finality of the competition is the profit. The behaviour rules are at the limit.

In a well known book "THE PROTESTANT ETHIC AND THE CAPITALISM SPIRIT", MAX WEBER, the German sociologist in the XIX century, averts over the risks that the capital world to divorce by the moral values. Observing the compatible of the business is different by the moral values, because the different finality and the mechanism of expression, often opposite, Weber put the two categories of the human activities under the sign …."two different fundamental precepts from the ethic view and absolutely contrary". He named those "the conviction ethic" (the moral) and "the responsibility ethic" (business). The conviction ethic shows a moral authentic attitude, in a pure moral sense, abstract. On this base the person who action conforms to his convinces without to think at the consequence of the action. The responsibility ethic is specific to the businessman who see not only the immediate intentional consequences and those the unintentional. Although, sometimes, the Weber conception was interpreted like a disjunction between the business and moral, his pleading was for osmosis business-moral "the responsibility ethic and that of the conviction (moral) are not excluded one another, they are completed", but together formed a real man, that man who can have the vocation of the businessman, of the undertaker, of the authentic entrepreneur.

"The ethic paradox" can be put under the grave interrogation for the business man to assume the responsibilities and the inherent risks of his economical actions or to remain at the moral, abstract judge without the responsible engage? This dilemma – responsibility/morality move the accent to the conduit code of the businessman from the "morality" at the "the responsibility ethic".

In the business a series of the moral commune values (clemency, altruism, love, philanthropy etc.) can produce the failure, the bankruptcy with all the a-moral consequences which derive from an organizational catastrophe.

Romanian societies, in a transition, which pass over the limited threshold, evolutes towards the market economy, where there are the business in the centre like the principal actors. As a pity, the sociological medium and the mechanisms promoted contain the multiple dysfunctions a-ritual for the market economy. The perverse and undesirables effects generated by the socio-economical medium are because the successive and repeated fails of the political power in the concurrencies economy. The political power failed until now in assuming the responsibilities, abandoning the double obligation: the citizens' obligation to conform and obligation of the government to satisfy the requirement of the citizens.

Incapacity or political aboulia for assuming the responsibilities generates multiple effects what put in a critical situation the business ethic, because a hostile medium of the business born a-ritual behaviours, shaking the system of the ethic values. The bureaucracy, corruption, taxation, more politics etc. are the enemies of the free economy. In the surviving effort of the businessman are determined to abandon the conduit code of the specific deontology. The relation between the business ethic and the political ethic are fundamental.

How a well known French sociologist, Raymond Pollin, says in *Etique et politique* (1968):

"The good government which realisations are good and assures the effective rightful and common well is the only legal government". The legality crises of the power have profound effects and lasting over the ethic crises in the business. So that, the moral health and the quality of the ethic values of the community determine the quality of the business ethic.

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UNSOLICITED COMMERCIAL MESSAGES – ACCURATE REALITY OF THE NOWADAYS INFORMATIONAL SOCIETY

Georgeta Basarabescu
National Supervisory Authority for Personal Data Processing

Abstract:

Through the services that supplies, the Internet brings and brought multiple advantages to the scientific research, the education, administration, business, human communication etc. Still, in the virtual area of Internet were discovered external factors extremely favorable for those who commit unsocial facts, which are to be sentenced and which may extend to acts of sexual harassment or dissemination of pornographic images, acts of stilling, identity theft included, and, more recently acts of terrorism.

In this context, all domain of Internet, meaning the ones benefic to the majority of users of such an informational network represents, the same time, prolific offences fields for those which such intentions

So, we may conclude that the services provided by Internet have the benefit of a special attention form the side of the "bad intended persons", reaching the notion of "informatics offences" in the current vocabulary.

Key words: commercial, information, society.

Being considered an "informational network of the networks" which compiles some thousands of networks of different shapes and forms, all over the world, the Internet gives to the users` diverse categories of services, the "e-mail" having the biggest impact off all.

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The phenomena of offences in the virtual space, is the unpleasant part of the informational society. The use of new technologies does not bring along only enormous benefits to the society but also gives the possibility to commit classic or new offences through new means. The majority of states and national or international organizations, being conscientious about the problem of the informatics offences started being preoccupied with facing and stopping this phenomena, the main objective being that of creating an informational society in which citizens may enjoy freedom and safety, and, not at least, intimacy.

From the services provided through Internet, electronic mail is, maybe, most often used. So, sooner or later, everyone who uses e-mail will end up receiving e-mails from other users, unsolicited e-mails included.

Spamming is the process of delivering unsolicited e-mails (spam), most of them commercial ones, publicity or electronic marketing ones.

But, the recent definition given to the term refers to spam a being the "massive delivery and sometimes repeated delivery of unsolicited electronic e-mails to persons with whom the sender has never had a contact and whose e-mail address was not obtained using legal ways. Spam distinguishes itself, after all, through its aggressive, repeated character, option depriving too.

According to some recent studies, unsolicited e-mails represent 60% of all e-mails received by a user, private person or company. Spam takes the storage space used on the e-mail servers, extra internal traffic for the delivery of these messages to the employees, and not at least the time of those who receive them. In the line of a recent report, in medium, each user looses daily about 50 minutes in order to check, erase and delete the unsolicited messages. So, at global level the damage caused by spam is estimated at 81, 2 billion dollars annually.

In **Romania,** too, the advantages given by the services supplied through Internet came to the existence, in this very moment, of almost 4 millions users. Still, Romanian users of Internet are affected by the spam type e-mails, the damage thus caused being considerable.

In this sense, it is necessary that each e-mail user distinguishes between different types of spam e-mails in order to create a solid strategy to combat the phenomena, So, among the measures necessary to be taken by an e-mail user, using programs filters he owns, is to sort received e-mails. These can be divided into six categories:

- Personal messages addressed directly to the e-mail user, part of this category being e-mails received from friends, relatives, working contacts etc. Still, we must underline the fact that certain programs block the spam by mistake, will consider certain authentic e-mails as spam, due to some words they may contain and which are considered by the program to be typical spam words.

- Personal messages copied by the e-mail delivery person himself. In this category are to be included the messages containing the field CC (courtesy copy) or

in the field Bcc (blind courtesy copy) the delivery persons address. Mechanic filters often mistake these messages with the spam type ones.

- Messages sent to a „mailing list" the recipient being part of such a list. The Software which rules the mailing list servers help to the protection of users by hiding the name and e-mail of users behind one address called „list alias". The registered persons can send messages to other persons only through such an address ***alias***. Passing the list server it automatically checks if the message will be delivered to the destination (forwarded) or rejected (rejected). The messages sent from a "mailing lists" are often mistaken with the spam type messages because they are not addressed directly to the recipient but to that persons` alias address.

- Commercial messages requested or approved by the e-mail user. Many companies keep in touch with different people, especially clients, through e-mail. This is being done with the consent of the client who enters the company site either to register to the newsletter or when he registers and receives the newsletter involuntarily because he did not undo the section with this option. These companies send, especially to their clients, commercials, special offers, and the most important the demand of a confirmation from the client that he really desired to buy products or services or information form that company which are necessary to decide the details of delivering the products bought. The sorting of such a type of e-mails is the most difficult thing for an anti-spam program.

- Commercial unsolicited messages delivered by known companies. Certain companies use an aggressive marketing strategy, irritating sometimes, sending announces and unsolicited commercials to potential clients. This type of e-mail is the equivalent of the real world type of commercials and offers printed and delivered by mail to mail boxes, through which, more often, the recipients ignore or throw away. Because they were not requested these types of e-mails are considered spam. There are also companies which, even if they approach such an aggressive style of marketing give the possibility to confirm the cancellation of the delivery of a new message. These types of messages are easy to filtrate.

- Unsolicited **Bulk e-mail, anonymous source.** This category consists in messages sent using „**bulk software"** which hides the e-mail address of the delivery person. From this category come the majority of e-mails announcing fabulous gains at lotteries, chained letters, pornographic contain announces etc. Blocking such a category of spam is quiet difficult because the programmers who build software of type bulk-mail always find methods to cheat on the filters.

Except for the above mentioned categories, we consider necessary to clarify some aspects linked to the processing of personal data during publicity campaigns done through mailing.

So, in order to launch a publicity campaign through electronic mail (mailing) a company must obtain an e-mail addresses list of potential clients. There are three possibilities in this sense: direct collecting from clients or visitors of a web site, buying a list did by a third party or collecting data from public sites of Internet such as public directors, forums or „chat rooms".

A specific characteristic of the commercial e-mail is that, meanwhile the costs of delivery are extremely low compared to other traditional marketing method; the recipient must pay the connecting time. This is way such a method is world wide spread.

From the citizens point of view the problem raises three points: first of all, the inclusion of an e-mail address in a list without the data subject consent, secondly, the receiving of a large amount of unsolicited publicity messages and thirdly the cost of the connection time.

Once the e-mail is well spread and due to the process of delivering e-mails, the majority of states started to be part of the fight against spa taking into consideration the consequences of the intrusion of this in the private life of each user, adopting many laws in the field.

U.S.A. adopted in 2003 the Federal Law „Can-Spam" referring to the control of the assault of electronic messages, pornographic and unsolicited commercial ones. This law contains provisions which impose the implementation with priority in relation to other federate state, except for the states which forbid the sending or the re-sending of messages with fraudulent contain.

The American federal law authorizes the transmission of unsolicited commercial messages but impose that each of the companies must include a very clear mechanism which may allow the recipients to forbid future receiving of such type messages. The mechanism of opposition may take two shapes: an electronic address to which the recipient may answer or a response mechanism on the Internet, for example hyper - link to a web which allows the erasure from a list. The majority of commercial messages must also include, either at the object or contain a clear indication that it is about publicity or a request. All spam must contain a permanent e-mail address of the delivery person and those with sexual contain must also include, extra, a warning about contain.

This law states also sanctions, criminal and civil ones. The criminal sanctions go up to 5 years in prison for facts like: intended falsification of the contain with the purpose of misleading the recipient, dissimulation of the message origin or the delivery person identity, registering more then 5 e-mail accounts with false information in order to deliver spam, etc..

Considering the civil sanctions, according to Can-Spam, any general prosecutor of a state is authorized to file a complaint to the court of law against a spammer, in the name of the citizens from his state. He has the power to inquiry and demand pecuniary sanctions for the violation of the Can-Spam law. The amount of the pecuniary sanctions varies from 250 dollars for each spam up to a fix rate of 2.000.000 dollars for the excessive and illegal sending of such messages.

In S.U.A. the independent competent authority fighting spam is the Federal Trade Commission, which has powers to enforce the law Can-Spam, by issuing methodological norms to amend some provisions of the Can-Spam, to build and fill in a register with the spam delivers addresses, proposing criminal and civil sanctions. The same time, this commission decides the performance of bilateral

agreements with other states which have legislation and organisms fighting against spam.

At the level of the European Union, it is now recognized also how important it is for the safety of citizens and consumers to find solutions referring to the protection of internet user's private life and also the problem of informatics offences. In this mean, there were adopted many directives among which some with a major impact, as the Directive 95/46/CE of the European Parliament and the Council regarding the protection of individuals concerning the processing of personal data and the free movement of such data and the Directive 2002/58/EC regarding the processing of personal data and the protection of private life in the field of electronic communications.

Directive 95/46/CE contains general provisions regarding the personal data, the data controllers` obligations, the data subjects rights. The importance of the legal act resides also in the fact that the e-mail is considered to be part of the personal data category or contains personal data and the data subjects may be the also recipients of the electronic messages, even those of type spam.

Through the Note 4/2007 regarding the concept of personal data, document elaborated by the Art. 29 Working Group for data protection, it was realized an analysis of the personal data concept based on 4 main "component elements" which can be found in the "personal data" definition, meaning „any information", „related to", „identified or identifiable", „physical person". These elements are very close linked between and supply each other, but, only together may establish if information can be considered as "personal data".

So, in the context of the above mentioned, in case an e-mail contains cumulatively "any information", "related to", "physical person", "identified or identifiable" this one can be considered personal data.

Other two directives which contain provisions directly applicable to the virtual space are Directive no. 2000/31/EC of the European Parliament and the Council regarding certain legal aspects of the informational society services, especially the electronic commerce on the internal market and the Directive no. 2002/58 regarding the processing of personal data and the protection of private life in the field of electronic communications which contains provisions referring to personal data and electronic communications, too.

The general Directive (Directive 95/46/EC) establishes that personal data must be collected for determined, explicit and legitimate purposes and processed in a legal manner according to the declared purposes. The processing must be done with the respect of the legal principles. Plus, the data subject must be informed about the purpose of the processing and must be given the right of opposition to the processing of his/her personal data for direct marketing purposes.

Another directive with impact upon the protection of private life, Directive 97/66/CE regarding the protection of intimacy in the sector of telecommunications gives the Member States the possibility to choose between the implementation of the rules type opt-in" and the voluntary exclusion of the „opt-out" for the unsolicited commercial communications. For the protection of personal data there

are supplementary demands inspired from the consumer protection. Directive 97/7/CE regarding the protection of consumers in the field of distance sales request, for example, that a certain consumer is granted the minimum right to oppose to a distant communication, meaning through e-mail.

The above mentioned directives were transposed into the national legislation of the majority of the Member States. In Romania, the above mentioned are transposed through the Law no. 677/2001 for the protection of personal data and the free movement of such data, Law no. 506/2004 regarding the processing of personal data in the field of electronic communications, Law no. 365/2002 regarding electronic commerce, included.

We must underline the fact that the authorities having powers given by the above mentioned legislation are the National Supervisory Authority for Personal Data Processing and the National Authority for Communications.

In order to align the Romanian legislation to the *acquis*, it was necessary to establish an independent supervisory authority against any other public administration authority, also against any other person individual or legal one form the private sector. This has the administrative capacity to implement the legislation on personal data protection at a level comparable to that from other European Union member state.

The protection of personal data represents a new field in the legislative space of Romania. Its contain regards, in a generic manner, the right of the individual to have the defense of those characteristics which lead to her/his identification and the correlative obligation of the state to adopt adequate measures in order to assure an efficient protection.

The Legislative has given to the National Supervisory Authority for Personal Data Processing a series of special powers, both in the field of electronic commerce and of electronic communications.

So, the transposing of the Directive 2002/58/CE of the European Parliament and the Council, regarding the processing of personal data and the protection of private life in the field of electronic communications is assured through the Law no. 506/2004. This particularizes the specific legal sector of electronic communications created by the Law no. 677/2001 and guarantees the protection of personal data processed by the electronic communication suppliers of public services, suppliers of VAT and registers of users.

For the protection of personal data being processed in the sector of electronic communications, the suppliers of such type of service are obliged to take a series of measures which guarantee the confidentiality and the security of networks communications. If for the establishing of the security conditions is responsible the national Authority for Communications, the confidentiality of the communications, the respect of this, falls mainly under the control of the National Supervisory Authority for Personal Data Processing. For example, the national supervisory authority has the possibility to apply administrative sanctions in case in

which electronic communications or traffic data are being intercepted or surveyed, in other ways than those possible and stated by the law.

Considering the legislation applicable we state that by Law no. 365/2002, through **commercial communication** we must understand any form of communication destined to promote, directly or indirectly products, services, image, name, firm or symbol of a company or a member of a profession ruled; they are not commercial communications the followings: information allowing direct access to the activity of an individual or legal person, especially on the name or area or e-mail address, communications linked to products, services, image, name or brand of an individual or legal person, performed by a third independent party, especially when done free of charges[1]

Also, Law no. 365/2002 contains in art. 6 paragraph (1) provisions related to the mandatory obtaining in advance of the explicit consent of the recipient for receiving electronic communications through e-mail. This way, the delivery of electronic communications by e-mail is forbidden except for the case in which the recipient has given his in advance explicit consent for such communications. In conclusion, the key word on the topic is not necessarily "message contain" (a quiet wide definition) but the *"recipients` consent"*.

By exception, from the consent rule, are allowed such communications in case of promoting the products and similar services to those which conducted to the initial collecting of the clients` personal data, under the term of information for each time on the possibility of opposition using a simple and free of charge to such practices. In all the cases still is forbidden the delivery through electronic mail of commercial communications in which the real identity of the person in whose name or based on whom the communications are done is hidden or does not specify a valid address at which the recipient may send the demand of termination of such communications. The same time, the violation of the provisions referring to unsolicited communications is sanctioned (administrative sanction).

Also, we must underline the fact that every controller is obliged to take adequate technical and organizational measures in order to protect the personal data stored in an informatics system preventing and stopping the misuses of data, intentional or not, by different agents (users or programs) no matter if they belong or not to the organization that owns the system.

Considering the Law no. 506/2004, this imposes, concerning the transmission of commercial communications, the modality opt-in in the relationship between the appliers of direct marketing and the Internet users. This thing is stated by art. 12 paragraph (1), which states the forbiddance of doing commercial communications through using some automatic systems of calling which do not need the intervention of an human operator, by fax or electronic mail, or through any other method which uses electronic communication services destined to the public, except for the case in which the user has given in advance his explicit consent for receiving such communications.

[1] Internet source: http://www.mcti.ro.

From this rule there is an exception stated in paragraph 2, which takes into consideration those who obtained the addresses with the occasion of the sale of a product or a service, but which gives to the recipient a simple and free way of opposing. At paragraph 3 of the same article it is stated that are forbidden the unsolicited messages which hide the identity of the delivery person or of the person for whom he works and does not give the recipient the possibility to oppose.

The sanctions stated by this law are administrative ones, if the violation was not performs in such ways that it may constitute an offence. So, the violation of the provisions of art.12 referring to unsolicited communications is a contravention sanctioned with a fee from 500 lei up to 10.000 lei, and for the companies that have the business amount (turn over) of more then 50.000 lei, by exception from the provisions of the Government Ordinance no. 2/2001 regarding the legal regime of contravention, with a fee up to 2% of the business amount (turn over).

In the field of electronic commerce, the National Supervisory Authority for Personal Data Processing confronted with a series of individuals` complaints claiming the fact that they were assaulted with commercial messages without their prior consent and also numerous cases which felt under the competences of other authorities, as the National Authority for Communications or the prosecutors offices.

In this context, many complaints received by the National Supervisory Authority for Personal Data Processing did not fall under its competences, the unsolicited communications referring to phishing, a kind of a criminal activity consisting in the obtaining of confidential information, personal data included, as access data for banking systems, trading systems, information related to credit cards, using manipulation techniques of the identity of a person or of a body.

Such a regulate phishing type attack, consists in the delivery from the fighter of an electronic message using instant mailing systems or by phone, in which the recipient is asked to supply confidential data in order to win a prize or he is informed that these are necessary due to some technical errors with had the consequence of initial data loose. In the electronic message it is usually indicated a web address which contains a copy of the site of the financial or trading institution.

But, as previously stated, the transmission of the unsolicited category of messages which can be punished is only that of unsolicited commercial messages. The law forbids the performance of commercial communications using automatic calling systems which do not require the intervention of a human factor, by fax or electronic mail or any other method which uses electronic communication services destined to public, except for the case in which the user has given his prior consent for such communications. This anti-spam provision intends to protect private life of individual towards the massive receiving of unsolicited messages with commercial contain

By exception from the consent rule, other type of communications are allowed in case of promoting products or similar services compared to the ones which led to the initial collection of the clients` personal data under the term of each time information upon the possibility of opposing through a simple and free of

charge way to such practices. In all cases it is forbidden to perform through electronic mail commercial communications in which the real identity of the person on behalf of whom they are performed is hidden or in which is not specified a valid address at which the recipient may send a demand for the termination of such communications. The same time, the violation of the provisions regarding unsolicited communications is sanctioned as a contravention.

During 2007, the National Supervisory Authority for Personal Data Processing investigated cases concerning the violation of the provisions of Law no. 506/2004, in two cases being applied, for the first time, the sanctions provided by the legislation in the field. The fees summed 10.000 Lei .

Further more, in order to solve *complaints*, a tourism agency was inspected, for the verification of the implementation conditions of the Law no. 677/2001 and Law no. 506/2004, in the context of the aspects brought by the complainant, regarding a possible violation of the right to intimate life, family and private life, through the repeated receiving of unsolicited commercial messages (publicity for the new services provided by the tourism agency in case) despite the opposition expressed for such type of communications.

So, considering the first message received the complainant exercised his right of opposition as stated in art.15 of the Law no. 677/2001. Still, the complainant continued to receive messages of the same character, repeatedly, form the same agency. It was so proved that the right of opposition was not respected.

Also, it was also visible the fact that those messages did not offer the possibility to oppose through a simple and free of charge mechanism to such messages, fact that is a contravention according to the provisions of art.12 from the Law no. 506/2004, the contravention of unsolicited commercial communication, sanctioned by art.13 paragraph (1) letter l) of the sale law.

During the investigation it was also stated that the data controller did not assure the clients about the means and measures necessary to offer clearly and explicit possibility to oppose through a simple and free of charge mechanism to the receiving of such unsolicited commercial communications.

Plus, the checks performed in the field, came out the fact that the tourism agency despite the quality of data controller, as stated in the Law no. 677/2001, processing personal data in its activity, establishing the purpose and the means of the processing did not notify the processing , according to the provisions of art. 22 from the Law no. 677/2001, a contravention stated at art.31, in case the omission to notify.

Further more, based on the results of the investigation the president of the National Supervisory Authority for Personal Data Processing issued a decision for the erasure of the complainant personal data form the tourism agency list of data used to deliver commercial messages. Following the investigation, the data controller respected also the recommendation to notify the processing of personal data performed for the purpose of *supplying tourism services and commercial, marketing and publicity* (for the same type of services).

During 2008, following the investigations performed by the National Supervisory Authority for Personal Data Processing a company was sanctioned with a fee of the amount of 5000 RON, for violating the provisions of art.13 letter l) of the Law no. 506/2004.

Limiting the phenomena that comes out not only on national level can be done through an active cooperation and a conjugated action of the authorities involved.

EXCHANGING CONTRACTS END TRADING MECHANISM ON FUTURES MARKETS IN ROMANIA

Candidate to Ph.D Lecturer **Gabriela Bologa**
AGORA University, Oradea
gabriela_bologa@univagora.ro
Student **Maria (Agape) Roşca**
AGORA University, Oradea
Faculty of Law and Economics
maria_rosca@yahoo.com

Abstract:

The ample and unanticipated oscillations of prices on the spot markets, together with the limited power of the participants on these markets, were favorable factors to the apparition of forward and futures transactions. The mechanism of transaction on the futures markets is being realized in special spaces arranged for this activity, places called rings or pits. The base rule on futures markets is to buy at low cost and to sell at high price, no matter in what order.

Since their apparition, stock exchanges gained a special attention from the public, representing a hope for a quick enrichment, and the solution in searching a security for the near or distant future. The process of un materializing as the materials was the first step towards futures transactions. Facilitating the ascertainment of goods contributed to the development of active capital.

Key words: spot contract, forward contract, futures contract.

I. Exchanging contracts

Since their apparition, stock exchanges gained a special attention from the public, representing a hope for a quick enrichment, and the solution in searching a security for the near or distant future. The process of un materializing as the materials was the first step towards futures transactions. Facilitating the ascertainment of goods contributed to the development of active capital.

The ample and unanticipated oscillations of prices on the spot markets, together with the limited power of the participants on these markets, there were favorable factors to the apparition of forward and futures transactions.

- The spot contract – its object is present merchandise, that exists at this point of closing a contract and that is going to be delivered and paid immediately.
- The forward contract – it is private agreements to buy or to sell, to deliver or to pay at a certain future date some goods, currency or a financial asset at a rate (price) set at this point of closing the transaction.
- Futures contract - it is a standardized agreement to buy or to sell an asset,

some goods, financial title or monetary instrument at a rate (price) set at this point of closing the transaction and dissolution at a future date.

- Option contracts – are contracts between a buyer and a seller that give the rights, but not the obligation to buy or to sell at a future date an asset, some goods, financial title or monetary instruments, the right obtained with the payment of the first tinge.

The spot contracts

The spot contracts are sale contracts that take place, theoretically, immediately after closing them. They are executed between 24 hours and 10 banking days, and they must deliver the merchandise.

The merchandise that stays at the base of spot contracts is:

- Seen (it exists);
- Available (it isn't involved in any obligations, for example: bond);
- Present (it is in a deposit agreed by the exchange).

The strike price of the contract is set at the time of closing the deal.

Forward contracts

Once the exchanges appeared, the sellers and the buyers had the possibility to reduce the uncertainty of the prices through a forward cash sale.

A forward cash sale or a forward contract represent a private negotiation in which the seller and the buyer agree upon a price of the merchandise that is going to be delivered in the future. At forward cash contracts, the merchandise could not be sent until the pre established delivery date. Now, the seller and the buyer have the possibility to block a price long before the execution of the contract and to eliminate the uncertainty caused by the price fluctuations from this period.

The certainty of the price offers the possibility to buyers and sellers to anticipate correctly the future incomes. The forward contract helped to reducing the risk of changing the price and facilitated the development of markets and selling the merchandise.

However, the risk that a merchant (the buyer of the merchandise) not to execute the contractual stipulations in the case when the prices reduce dramatically didn't disappear, the producer remaining with the goods in stock and without other buyers. On the opposite case, if the prices increased dramatically in the period between closing the deal and delivery, the seller would have been tempted not to respect the contract trying to sell to another for a much higher price than the one set in the contract.

To solve the problem of ensuring the execution of the transaction a new method developed. Each participant to a transaction deposit a sum of money to a third part, a neutral one. This thing ensures the security that each part will respect

the contract. If one of the parts doesn't obey the obligations, the other part will receive the money as a compensation for any financial loss.
The exchanges developed for themselves standards of quality and measure units for each merchandise. This led to the marketing (selling and buying) contracts for merchandise securities that specified the quantity, quality, maturity date and delivery date of a merchandise.
The most representative example of a forward contract used daily by every one is the subscription to a newspaper, for which it is collected a pre established price for the whole period of the subscription (contract).

There are some advantages of forward contracts. Besides the obvious ones, as knowing the exact sum and quantity that is going to be received, the quality level and the delivery moment, the certainty of the price is important because the buyer will anticipate the costs. The seller will know beforehand the incomes. So, the certainty of the price gives the possibility to the buyers and the sellers to correctly anticipate the future incomes.

Future Contracts.

Appeared 100 years later, the futures contracts noted a fulminate expansion in the financial world at the end of XX century, the volume of transactions of these exceeding in the present world widely any other exchanging products. The explication of this state is a very simple one: through their nature, these futures contracts offers to the one who is trading them the possibility of substantial earnings through locking up a reduce sum of money. Of course, the risk taken in such a transaction exists, and it cannot be ignored. The bigger it is the chances of winning increase, on one hand, but also the chances of losing, on the other hand. The big diversity of these derived products (they are called this way because they have at their base an active support – projections, interest rates, stock indexes, etc.) and especially their flexibility allows the investors not only substantial reducing the risk that is taken at trading such a product, and in some cases even avoiding it in some strategies well theorized and correctly applied in practice.

Once the launching towards trading the first futures contract at the Monetary, Financial and Commodity Exchange Sibiu, in 1997, the investors from the Romanian financial market and all the Romanian businessmen have the possibility to take advantage of these offered products, regardless if their purpose is realizing some immediate profits or just protecting against the risks that float over their own businesses.

The futures contract is a standardized agreement among two partners – a seller and a buyer – to sell and to buy a certain asset (projections, interest rates, financial and stock indexes), at a price set at the point of closing the transaction and with the execution of the contract at a future date called deadline. In other words, by this kind of contract, the seller commits himself to sell, and the buyer to buy the asset from the contract at a future date (deadline), but at a price set at the point of closing the deal.

The advantages of futures contracts:

- The futures contracts are standardized.
- The price changes daily in relation with the ration between demand and offer
- Differently from forward contracts, futures contracts have a secondary market.

Option contracts

An option contract represents a right, bunt not an obligation to buy (an option CALL) or to sell (an option PUT), a financial asset (a share, a futures contract, etc.) at a future moment and at a price set in the present (called strike price). The buyer of the option contract can decide if he will exert or not the option of buying or selling the asset, relating his own interests and projections. For this right of option, the buyer must pay the seller at the point of closing the deal a sum of money called a bonus. The value of the bonus is that negotiated at the exchange, and it is the object of demand and offer.

So, the buyer's loss is limited at the bonus that he is paying to the seller of the contract. If his predictions don't confirm, the buyer is not obliged to exert his option, losing only the bonus. If his predictions confirm, the buyer will exert his option. For the seller's part, the earning is the bonus collected from the buyer, the seller doesn't have any decisional power to exert the option, he is going to wait for the buyer's decision on this matter.

II. Futures market and option market

In the operations executed on futures market a series of specific terms are used and the participation on this market expects knowing them.

The terminology used in futures

A bull market or the markets under the sign of the bull represent the market in which the prices are increasing. When a market is called bullish, there is a perspective that the prices will increase.

A bear market or the markets under sign of the bear represent the market in which the prices are decreasing. Therefore, a bearish market gives a pessimist perspective and the operators consider that the prices are decreasing.

The long position: if a futures contract is bought, the buyer has a long position. The operator initiates long positions when a future increasing of the futures price is expected. The hedger will initiate long positions when it is exposed to the increasing of the price of the asset.

The short position: somebody who will sell futures contracts that he didn't previously have is short, or he has open short positions. This concept is not to be confused with the one in which somebody who initially had a long position by buying some futures contracts, and then he sells them to compensate his position on the market. The operator initiates short positions when he anticipates the

decreasing of the futures price. The hedger initiates short positions when he is exposed to the decreasing of the price of the merchandise or of the asset.

The marking at the market of futures contracts makes that the account is daily credited and debited, relating to the evolution of the price of the open positions. The loss or the profit, resulted by marking the market makes that the sum existing in the account to oscillate, but this cannot decrease under the level of the safety margin.

The appeal in margin**:** the situation in which the sum from the margin account decreases under the level existing in the account, the holder of the account (name of account) receives an appeal in margin for the difference between the initial level of the margin and the sum existing in the account. The holder has to respond with adding funds until the beginning of the next trading session, so all the naked position are sold out forcibly until the sum from the account reaches the initial level of the margin.

The delivery of the merchandise or of the currencies to the exchanges around the world is optional. In USA, 98% of the futures contracts are sold out on the market and only 2% have as a result physical delivery or selling out the merchandise. For some futures contracts, as those for synthetic articles – a stock index, currency index – there isn't a possibility of physical delivery. The positions are closed by selling out and paying the differences.

Symbols and specifications

The futures contracts can be realized through many units of trading and that's why the exchange practice imposed the simplification of the names through symbols. So, the next symbols were adopted:

1) Futures contract on American dollar, symbol: ROL/USD
2) Futures contract for European currency, symbol: ROL/EURO
3) Futures contract for the stock index, BVB called BET, symbol BET (ROL)

Similarly, symbols for other trading units can be adopted.

The trading unit represents the assets from the contract such:

ROL/USD = 1.000 USD

ROL/EURO = 1.000 EURO

BET (ROL) = 10.000 ROL multiplied with BET index in points.

The value of the futures contract: it is obtained by multiplying the futures price at which the transaction was closed with the last trading unit.

The step of the futures contract is represented by the minimum fluctuation that can modify the price quotation, and it refers to an up and down movement of the price of the support asset. The step is that of 1 ROL for futures contracts ROL/USD, ROL/EURO and of 0.1 points for the contract on stock index BET and the options having futures contract as a support on BET index.

The limit of daily oscillation of the price is determined by the exchange, and it represents the oscillation of the previous day that can be admitted.

The initial margin is the value that the name of account must have in the margin account at the initiation of each contract. The value of the margin is set by

the exchange after consulting the house of compensation and any other situation of destabilization of the market, is immediately applied.

The maintenance margin is the element that ensures the integrity of the house of compensation and the broker agency. The maintenance margin represents the minimum sum that the name of account can have in the margin account to maintain naked positions for futures contracts, and it represents 3 from the initial margin.

III. The trading mechanism on futures markets

The trading mechanism of futures markets is realized in places specially arranged for this activity, places called rings (pits). In our country, at BMFM Sibiu, the trading took place in rings taking into account the trade assets. However, in 2000, BMFMS introduced the electronic system of trading of futures and option contracts. The new system represents a national premiere, and it is available from the distance too, from any part of the country. The new software SAGGITARIUS was created integral by the department of informatics and trading af the Exchange and Romanian House of Compensation, bring more premiers. The most important novelty is represented by the replacement of the margin system with an evaluation system of the risk that takes into consideration all the naked positions of a futures or option contract. Relating to this, the risk of a contract is evaluated, that can reach to zero.

The base rule in futures markets is to buy at a low price and to sell at a high price, regardless the order.

Trading orders

All the trading on this market is realized on the base of some pre established orders of the clients of the societies of exchange. There are three types of fundamental orders: selling order, buying order, spread orders. However, these orders vary in many categories. Relating to the validity of an order: orders valid one day only and orders with validity set by the investor; relating to the price of the transaction there are two types of orders: price market orders and set price orders.

Market order given to the agent to realize immediately a transaction at the price market that is going to be at the point of execution, this being the best price.

Limit orders divide themselves in two categories “at limit” and “stop limit” and each of them can be bought or sold.

Spread order represents the order of buying a futures contract and to sell simultaneously another futures contract on the same merchandise or a similar one, at a different price.

These types of spread orders gave birth to some types of special transactions called spread transactions. Spread transaction is realized by buying and selling simultaneously two related futures contracts. This type of transaction is initiated hoping that the difference of price among the two contracts will be changed in its profit before compensating the transaction.

The difference between the contracts is called spread. Let’s suppose that, following the spread among the contracts, we expect that the prices of the futures contracts for dollars and euros to grow, but not the same. So, we think that the

spread among the two contracts will be modified. We could buy the contract of which growth we estimate to be higher (euro) and to sell the other one (dollars). This means to use a spread transaction. Let's suppose that the euro price grows bigger. When we close the spread transaction, we will obtain more money by selling the euro contracts than by losing from re-buying the dollar contracts. The profit obtained by this transaction is equal with the changing of the spread among the two contracts, shown in the below drawing by the grey colored zone.

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ABOUT CORRUPTION WITHIN THE PUBLIC-PRIVATE PARTNERSHIP

Candidate to PhD **Alexandrina-Augusta Bora**
„Alexandru Ioan Cuza" Police Academy
augustabora@yahoo.com

Abstract:

The domains in which there is a risk for corruption acts are diverse, even if we talk about clear objectives, with clear tasks, as the ones established for Romania's adhesion to Schengen space. In the same manner, the corruption phenomena can take place at any level.

The manner of prevention and combating of corruption depends on the stage of this phenomenon within a certain environment. As it emerges from the explanation attempts in this paper, the corruption develops in relation with the business and economic environment, furthermore, at the interference of the public and private environment, within the domains in which the public decisions affect the activity of the private agents from the economic point of view. Besides the large number of laws that refer to corruption, there have been created institutions with the purpose of fighting against this phenomenon.

In spite of the ancient history of corruption and of the presence of this phenomenon in every society, it has been said that a definition of corruption could never have the same level of acceptance in all countries.

The active corruption within the private sector[2] has been treated, during the last century by the civil law (for example within the law regarding the competition), by the merchant law or by general dispositions of the criminal law. The incrimination of the private corruption has emerged as a necessary and innovative effort to avoid all the gaps of a global strategy of fighting against corruption.

Keywords: corruption, public sector, private sector, national legislation, lobby.

The roots of corruption can not be known in time, as this phenomenon has been mentioned since Ancient Greece, where the bribery was so frequently met that Platon proposed death punishment for the civil servants who receive gifts for doing

[2] Idem note 4, p.38.

their duty. You shouldn't accept gifts –he said- not for the good things you've done, or for the bad ones[3].

In spite of the ancient history of corruption and of the presence of this phenomenon in every society, it has been said that a definition of corruption could never have the same level of acceptance in all countries. The international community didn't find a widely accepted definition of corruption. The Council of Europe[4] Criminal Law Convention on Corruption defines „active corruption" as being „the promise, offering or giving, directly or indirectly, by any individual, of any undue advantage to any of its public officials, for him or her to act or refrain from acting in the exercise of his or her functions" and „passive corruption" as being „the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, in order to act or refrain from acting in the exercise of his or her functions" [5].

The Explanatory Report of The Council of Europe Criminal Law Convention on Corruption[6] describes different types of corruption within the public and private sector. Therefore, „the active corruption of public national agents" [7] requires an action from those who corrupt, who can be anyone and can act in different roles (business man, public agent, private person etc.). The corrupted one needs to be a public agent. It is of no importance if the beneficiary is the agent himself of somebody else.

These undeserved advantages are generally of economic or financial nature, but they can also have a non material character. The important thing is that the person who corrupts (or a third party or relative) is seeing his own position improved comparing to that before the crime and this improvement is undue. These undue advantages can take in different forms: money, vacations, lawns, food or drinks, the speed-up in resolving a paper, better perspectives in career etc.

The material elements of the passive corruption of the national public agents[8] include the requirement or acceptance of an undue advantage or to accept an offer or a promise already expressed.

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[3] G. Antoniu, Marin Popa, St. Danes, *The penal code for everybody* , Political Publishing House, Bucharest 1970, p.210, cited by Dobrinoiu,Vasile, *Corruption in the Romanian Penal Code*, Atlas Lex Publishing House, Bucharest, 1995, p. 85.

[4] *The Council of Europe Criminal Law Convention on Corruption adopted at Strasbourg* , 27th of January 1999, ratified by Law no. 72/2002, published in Official Monitor no. 65/30th January 2002

[5] Mădulărescu, Emilia. *Traffic of influence: study of doctrine and jurisprudence*, Hamangiu Publishing House, Bucharest, 2006, p. 8.

[6] *The Council of Europe and The Criminal Law Convention on Corruption, The Explanatory Report The Civil Convention regarding the Corruption, The Explanatory Report*, Bucharest: R.A. Official Monitor, 2001,http://www.coe.ro/biblioteca_carti.php.

[7] Ibidem, p. 34-35.

[8] Idem note 4, p.36.

The active corruption within the private sector[9] has been treated, during the last century by the civil law (for example within the law regarding the competition), by the merchant law or by general dispositions of the criminal law. The incrimination of the private corruption has emerged as a necessary and innovative effort to avoid all the gaps of a global strategy of fighting against corruption. There have been arguments stated, arguments which sustain the necessity of incriminating this type of corruption: it influences certain values, such as trust and loyalty, which are necessary for the conservation and development of social and economic relations, it also prejudices the society unit and it favors the disloyal competition. The passive corruption within the private sector[10] surprises the comments related to the passive corruption of the national public agents regarding the corruption acts and the moral element.

The manner of prevention and combating of corruption depends on the stage of this phenomenon within a certain environment. The researchers[11] have identified 4 categories, 4 „syndromes" of the corruption, with different characteristics and which claim different combating methods: influence markets (within the mature democracies: USA, Japan, Germany), elite coalitions (within the democracies in course of consolidation: Italy, Korea, Botswana), oligarchs and clans (within the regimes in transition- Russia, Mexico, Philippines), official moguls (within the non-democratic regimes- China, Kenya, Indonesia).

From the point of view of the effect gravity on social level, there have been outlined three types of corruption[12]: the routine corruption (using bribe to make easier the processing of certain documents), the fraudulent corruption (using bribe to pay lower taxes), and the criminal corruption (using bribe to overlook illegal operations, for example illicit drugs trade or slave trade).

The domains in which there is a risk for corruption acts are diverse, even if we talk about clear objectives, with clear tasks, as the ones established for Romania's adhesion to Schengen space. In the same manner, the corruption phenomena can take place at any level. If we consider the external interactions, there can be made a distinction between the relations with the citizens and those with other organizations (public-central or local- or private). Within the relations with the citizens, the levels exposed to corruption are the ones represented by those civil servants or office workers who are coming in direct contact with the citizens. On the contrary, within the relations with other organizations (public – public

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[9] Idem note 4, p.38.
[10] Idem note 4, p.40.
[11] Johnston, Michael, *Corruption and its forms: richness, power and democracy*, Polirom Publishing House, 2007, Iaşi, p.53-80.
[12] Mihaiela Ristei, Nenad Senic, *Corruption and European Integration: Comparative Study of Romania and Slovenia*, 2007, Department of Political Science Western Michigan University
http://www.allacademic.com//meta/p_mla_apa_research_citation/2/0/9/9/0/pages209905/p209905-5.php.

partnerships or public – private partnerships), the segment in sight on the top of the administrative hierarchy[13]..

The general conditions which favor the phenomenon vary considerably from a society to another, but the reactions regarding the politics are framed in three categories: factual, structural, and moral[14]. The general tendency is that of resolution of the corruption facts by punitive judicial laws. Thus the internal and international legislation abounds in norms, conventions, laws which either try to define, outline, describe the corruption phenomenon, or stipulate sanctions for such deeds. We will only remind some of them. At international level, there have been adopted: The Civil Convention regarding the Corruption"[15],The Convention regarding the protection of the financial interests of the European communities[16] (PIF Convention) 1995, The European Union Convention regarding for the fight against corruption, The ONU Convention against Corruption[17].

The ONU Convention against corruption doesn't define corruption, considering the concept as being in a continuous evolution, as its nature bears multiple approaches. The Convention adopts a descriptive manner, which covers various forms of corruption existing today, but also offers the frame for other forms that may appear in the future. The Convention also obliges to incriminating the corruption facts committed by legal entities, as well as facts of participation to or preparation of attempt of such deeds[18].

The internal legislation cannot explain either this concept's sense, the only definition being the one stated in the Anticorruption National Strategy during 2005-2007[19] , which is:

i) the systematic deviation from the principles of impartiality and equity which need to exist at the basis of public administration and which assume that the public goods should be distributed universally, equitable and equally.

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[13] Parlagi, Anton P. Profiroiu, Marius, Crai, Eugen, *Ethics and corruption in the public administration*, Economic Publishing House, Bucharest, 1999, p.33.

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[15] *The Convention regarding the protection of the financial interests of the European communities* 26th of July 1995 (Known as PIF Convention) (JO C 316, 27.11.95, p. 48).

[16] Adopted by The Council of Europe at 4th of November 1999, ratified by Law no.147/2002, published in Official Monitor no.260/18 of April 2002.

[17] *The ONU Convention against Corruption, adopted at New York*, 31st of October 2003 ratified by Law no.365 from 15th of September 2004, published in Official Monitor no.903/5 of October 2004.

[18] http://cristidanilet.wordpress.com/2008/01/09/coruptia-judiciara-2-ce-este-coruptia/.

[19] Decision no.231/2005 regarding the approvement of the Anti-corruption national strategy on 2005-2007 and of The Action Plan for implementing The Anti-corruption national strategy on 2005-2007, published in Official Monitor no.272 from 1st of April 2005.

ii) Their substitution with practices which lead to the assignment by certain individuals or groups of a disproportionate part of public goods as compared to their contribution.

The corruption acts are those steps which are injurious to the universal and equitable distribution, with the purpose of bringing profit to certain individuals or groups. Law no 78/2000 for the prevention, detection and sanction of the corruptive facts[20] established as a central element the use of public position as a source of income, of acquirement of material advantages, or of personal influence, for yourself or for others. This approach converges towards the definition given to corruption within the Global Program against corruption, lead by ONU: „the essence of the corruption phenomenon is in the power abuse in order to obtain a personal favor or profit, directly or indirectly, for yourself or for someone else, in the public or private sector" [21].

Within the internal legislation, we can find norms which hint at corruption prevention and combative norms, like Law no 78/2000 for the prevention, identification, and sanction of the corruption facts, with the ulterior completions. The law sets up measures of prevention, identification and sanction of the corruption facts, the problem of European funds and the protection of their usage being stipulated in the „Infringements against the European Communities funds" chapter.

The stipulations of the mentioned law refer to the big corruption which is delimited by three categories of competences regarding: the important people in the public and private life (the material competence), important domains of activity of the public and private life (activity sectors- material competence), and important activities (commercial transactions, privatization activities, financial operations money laundering- material competence) [22].

As it emerges from the attempts of explaining the phenomenon previously, the corruption develops in relation with the business and economic environment, furthermore, at the interference of the public and private environment, within the domains in which the public decisions affect the activity of the private agents from the economic point of view. In order to limit this phenomenon and to make the influence of the private environment over the public one more transparent, in some countries there has been legitimated and institutionalized the lobby activity.

The concept of lobby has received a negative connotation; in fact, it represents the expression of the constitutional right of citizens to address to the

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[20] Published in Official Monitor no. 219 from 18th of May 2000, modified and completed by Urgence Ordinance no.43 from 4th of April 2002; Law no. 161 from 19th of April 2003; Law no. 521 from 24th of november 2003; Urgence Ordinance no.124 from 6th of September 2005.

[21] http://www.mai-dga.ro/downloads/cadrul_legal/HOT%20231%20din%2030%20martie%202005.pdf.

[22] Ciuncan, Dorin, *Jurisprudence and penal doctrine in the corruption's domain*, Lumina Lex Publishing House, Bucharest, 2004, p.116.

decision factors and having the character of influencing the legislative body vote for or against a legislative measure[23], „the citizens being able to maximize their power, in order to make them heard" [24]. What is essential though in the lobby activity is the fact that the „venality of the decision factor" is excluded, as opposed to the traffic of influence, where the goods, the advantages, are obtained illicitly? In Romania, Law 78/2000 prohibits implicitly the lobby activity, as in the present legal conditions the influence cannot be exerted transparently. There have been expressed some arguments pro and against a lobby law in Romania[25]. Formally, by Law 52/2003 regarding the decisional transparency in public administration[26], the mechanisms for the influence of the public decisions have been created, and the individuals interested could make proposals in order to sustain their interests. A normative act to regulate the lobby activity would diminish the corruption through the traffic of influence due to the inexistence of the legal frame, which would determine the groups of interests to intervene by other means, putting pressure on the decision factors. The conclusion[27] formulated as a result of the analysis underlines the fact that „we cannot be sure that the legalization of such activities would contribute to the fight against corruption, but it would at least change the fight tactic, which, until now, has proves to be inefficient".

Another significant normative act is Law no. 161/2003, regarding certain measures for assuring the transparency in the exercise of public dignities and in the business environment, the prevention and sanction of corruption[28], which introduces new regulations in different domains and modifies a series of previous regulations from the prevention and combating of corruption, financial crimes, of business environment and public clerks.

Besides the numerous laws referring to corruption, there have been created institutions with the purpose of fighting against corruption. The Anticorruption General Directorate created within The Ministry of Interior and Reform Administration as a specialized structure of preventing and fighting against the corruption of the ministry personnel. According to its structure and perspectives, this ministry is seen at the intersection of the public and private environment and thus considered to be exposed to corruption.

The Anticorruption General Directorate has been created per Law no. 161/2005, regarding the settlement of certain measures for the prevention and sanction of corruption[29] and was considered as a measure adopted by Romania for accelerating the fight against corruption within the public administration, being one of the priority tasks for accomplishing the engagements assumed by Romania in

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[23] Mădulărescu, Emilia. *Cited paperwork*, p.98-99.
[24] St.Deaconu, *The necessity of law regarding the lobby in Romania*, in The Law Magazine no.2/2001, p.59, cited by Mădulărescu, Emilia, *Cited paperwork*, p. 99.
[25] Mădulărescu, Emilia, *Cited paperwork*, p.101-103.
[26] published in Official Monitor no.70 from 3rd of February 2003.
[27] Mădulărescu, Emilia, *Cited paperwork*, p.103.
[28] Published in Official Monitor no.279 from 21st of April 2003.
[29] Published in Official Monitor no.476 from 6th of June 2005.

the process of European Union integration, Chapter 24 –„Justice and Internal Affairs".

Upon the modifications **and ulterior completions of the Urgent Ordinance no. 120/2005 regarding the operational of The** Anticorruption General Directorate from MIRA and of the Law no. 385/2005[30] for the approval of The **Ordinance no. 120/2005,** [31] **the judicial police officers part of The** Anticorruption General Directorate, the Ministry of Interior and Reform Administration have the competence to do, under law restrictions, activities for the prevention and discovery of corruption, as well as criminal law investigations disposed by the competent prosecutor regarding the crimes **committed by the MIRA personnel and** mentioned by **Law no 78/2000 for the prevention, identification, and sanction of corruption acts, with the ulterior completions.**

As mentioned by The **Urgent Ordinance no. 30/2007**[32] **regarding the organization and functioning of the** Ministry of Interior and Reform Administration, **The** Anticorruption General Directorate is a specialized structure of the ministry for the prevention and sanction of corruption among the ministry personnel. **The** Anticorruption General Directorate is a central structure of **the** Ministry of Interior and Reform Administration in the direct subordination of the minister.

The analysis[33] of failures and achievements as they resulted from the efforts of sanctioning corruption in different countries lead us to identify some key elements which can represent obstacles to the progress. One of them consists in exaggerated confidence in judicial solutions. Modifying laws and improving their application is an unsafe strategy for changing people's behavior.

An exaggerated confidence in law application leads to repression, power abuse and the rise of a larger number of corruption cases[34]. That's why it is preferably to introduce some ethics programs and to periodically organize discussions on ethics dilemmas specific to the clerk's work, so as the right behavior has an internal motivation, based on socially desirable valuable systems.

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[30] Published in Official Monitor no.1159 from 21st of December 2005.

[31] Published in Monitorul Oficial no.809 from 6th of September 2005.

[32] Published in Official Monitor no.309 from 9th of May 2007 and aproved with modiffication by The Law no.15 from 14thof February 2008 for the approuval of The Urgence Ordinance no.30/2007 regarding the organization and functioniong of The Ministry of Interior and Reform Administration, published in Official Monitor no.127 from 19th of February 2008.

[33] Stapenhurst, Rick. Kpundeh, Sahr J.. Polocoşer, Simona, *Corruption and fighting against it :to an example of a national integrity's building*, Irecson Publishing House, Bucharest, 2003, p. 110.

[34] Ibidem.

As a matter of fact, the vulnerabilities to corruption derive from the administration of public funds too. As the specialists said[35], the public funds represent the temptation of financial crimes as well as of corruption, the attraction being different depending on the budget phases: in the first phase, that of collecting the taxes, it is seen as exemption from taxation for the groups of interests, and as the resolving of financial crime cases in the favor of those who broke the law, and in the final stage, that of the use of public funds, there are auctions organized, whose winners are previously well known.

The requirements for Romania's adhesion to Schengen space impose the continuation of the anticorruption measures, focalizing on the vulnerable domains from this process's perspective, that is, the control at the external borders in the context of the adhesion to Schengen space and the administration of nonrefundable funds which constitute Schengen Facility. In this context, for the implementation of Schengen Facility from the Ministry of Interior and Reform Administration, the integrity of the ministry personnel sustained by the corruption prevention and sanction programs becomes vitally important.

Among the Anticorruption General Directorate objectives is that of preventing and sanctioning the corruption facts which can involve the MIRA personnel. This structure's activity has as a goal the development of an integrity attitude among the ministry personnel, the improvement of their understanding regarding the corruption mechanisms, as well as the stimulation of a civic anticorruption attitude through information campaigns.

[35] Birle, Vasile, *The tax didging and the corruption in the fiscal system*, Casa Corpului Didactic Publishing House, Baia Mare, 2003, p.210-211.

THE PENAL PROTECTION POSIBILITY OF THE EU'S FINANCIAL INTERESTS BY MEANS OF CRIMINAL LAW

Ph. D professor **Alexandru Boroi**
„Alexandru Ioan Cuza" Police Academy

Abstract:

The European institutions competence of imposing regulations in the field of criminal law represented a serious problem through time.

The positive effect that community right has over criminal law is represented by the obligation of the member states to apply in practice the harmonization directives which come to complete the common market and the implementation of common policies like agriculture policy. The positive effect is manifesting under the form of measures taken in the area of criminal law by the member states in fulfilling the obligations that drift from community law.

A recent decision of EU Court of Justice comes to clarify the distribution of competence between the first and the third pillar regarding criminal law area.

Regarding the guarantees offered by the community institutions, the actual situation is of a nature to cause concern. The fundament that legitimizes the adoption of criminal law measures on the level of the Member States is given by the national Constitution which stipulates the rights and fundamental liberties and democratic principles for the protection of these.

Key words: penal protection, financial interests, criminal law.

The European institutions competence of imposing regulations in the field of criminal law represented a serious problem through time.

Since the Rome Treaty to the beginning of the 70's, the EU didn't have competence regarding criminal law. The only exceptions were false statement and protecting the nuclear secret[36]. The Schengen Agreements permitted for the first time approaching this topic, but only to forbid the direct intervention of the Communities in this matter[37]. Criminal law is part of the EU competence once the EU treaty appeared and laid down "criminal cooperation" as a common interest issue (art 29 of Amsterdam Treaty")[38]. A criminal penalty is also set forth in the

[36] Art. 194, Euratom Treaty.

[37] H. Habayle, *L'application du Traite sur L'Union Europeenne*, RSC, January-March 1995, p. 34 and the following.

[38] This article stipulates that in order to accomplish the Union' objectives, especially free movement of persons, and without prejudicing the communities' competencies, the member states consider the following fields as common interest matters: fighting against drugs addiction, fighting international

Amsterdam treaty at art 31, alin.e where it is mentioned that "the mutual activities in the area of criminal cooperation aim at adopting measures regarding minimal rules that are to be applied when considering the constitutive elements of crime and the penalties that are to be applied for these" in the area of organized crime, terrorism and drug trafficking[39]. The introduction of criminal penalty in the EU competence needs further provisions.

Initially, the communities, could impose the member states the obligation to sanction certain actions, but not in the criminal law area. Therefore, the states had the obligation to take the required measures to ensure the fulfilment of the obligations from the treaty. With the passing of time, the liberty of the states has diminished. Therefore, the EU Court of Justice estimated in a ruling that the member states had "to watch that the infringement of the community law be punished by basic and procedural conditions similar to those applicable infringements of national law and to ensure that the sanction a binding proportional and discouraging feature[40]. Among other things, choosing the means by the member states started to be limited by the disposal of more and more detailed measures and by a bigger competence area from the communities.

The criminal law influence by judicial instruments started to manifest recently in two ways:

A prime aspect regarding communities influence in the criminal law area is represented by the *neutralizing effect*[41] or *negative,* which is manifested when national criminal sanctions are incompatible with community sanctions. It's about banning taking measures by the member states which can harm the community principles, or the abolition of such measures taken. Therefore, regarding the proportionality principle, the EU Court of Justice has decided that every disproportioned sanction to the nature of the committed cause represents an equivalent measure to a forbidden restrain[42]. For this reason, the fact that a citizen of a member state didn't state his presence to the police on the territory of another member state in a three days term can't be punished with a penalty privative of liberty, which would be a disproportioned penalty[43].

The positive effect that community right has over criminal law is represented by the obligation of the member states to apply in practice the harmonization directives which come to complete the common market and the implementation of common policies like agriculture policy. The positive effect is manifesting under the form of measures taken in the area of criminal law by the member states in fulfilling the obligations that drift from community law.

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fraud, criminal judicial; cooperation, police cooperation against terrorism, illicit drugs trafficking and other forms of international criminality.

[39] Veronique Robert, *La sanction penale au sein de "L'espace de liberte, de securite et de justice*", Agon no. 33, October/December 2001, p. 2.

[40] CJCE September 21st 1989, Commission e/Gerece, 68/88, Rec. CJCE, p. 2979. This measure was then introduced in art. 280 TUE.

[41] Jean Pradel, Geert Corstens, *Droit penal europeen*, Paris, Dalloz, 1999, p. 407.

[42] CJCE December 15th 1976, Donkerwolke, 41/76, Rec. CJCE 1921.

[43] CJCE July 7th 1976, Watson, 118/75, Rec. CJCE 1185.

Although EU can impose harmonization in the area of criminal right, the influence that is exercised over national legislations remains limited due to the insertion of this competence domain, at least at first sight, into the third pillar (judicial and police cooperation in criminal matter).

The inclusion of criminal right within the Maastricht, Amsterdam and Nice pacts into intergovernmental cooperation area would have profound implications regarding implementation of judicial instruments in this field of expertise. In difference from the first pillar where are domains in which the competence of the community organs is exclusive, having as features the elaboration of norms with direct applicability, in the member states as part of the judicial cooperation in criminal matter the decisional process is different. The subsidiary and proportionality principles stipulated in article 5 from EU treaty, which rules the community right in domains that are not under exclusive competence of the communities, are in connection also with judicial and police cooperation in criminal matters. In this way, Communions will act in this domain, in accordance to the subsidiary principle, unless and only the proposed measure cannot be accomplished in a satisfactorily way by the member states and can be better accomplished, in consequence, in comparison with the extent and it's effects, by the Community. In accordance to proportionality principle, an act of the Community will not exceed the necessary means for fulfilling the objectives of the treaty. Therefore, it cannot appeal to disposals of criminal right for settling certain social relations in various domains of activity only in the situation in which harming these relations has an transnational character, and resolving it based on general regulations regarding judicial cooperation is difficult and it doesn't cause effects. Also, is necessary that every other measures susceptible to be taken for settling the situation to be insufficient, imposing the adoption of criminal sanctions.

The decisional procedure as part of the judicial and police cooperation in criminal matter regards the common competence of the community institutions and the member states. The judicial instrument laid at the disposal of the community organs is the framework decision. Another judicial instrument in this area, laid this time at the disposal of the member states is the convention[44]. Both of them show inconvenience regarding the penalty of not abiding the provisions concerning the implementation of disposals which they refer to[45]. Also, the decisional procedure prescribes unanimity for the adoption of these legislative instruments, unanimity which is hard to obtain.

It is noticed, thus, a restrain of the EU action in this area through judicial instruments situated at the disposal of the communities. These instruments don't have a coercion character, couldn't be compared with the action of the member states in the area of criminal law. So, instruments like the statute or directive can't be used for dictating the member states the incrimination of any facts as

[44] According to art. 34 fron the EU Treaty, the Council, may adopt framework decisions in order to harmonize the legislation of the member states. These decisions will be compulsory for the member states but the national authorities will adopt the implementation methods.

[45] The Council may propose to the member states conventions to be adopted.

infringements of the law or to enforce criminal penalties. Though a decision of the EU Court of Justice admitted that, in certain conditions, to put such directive into operation can impose enforcement of criminal penalties[46], this decision remains isolated. In an equal meaning, some authors have qualified as disguised criminal penalties, the administrative sanctions applied within a statute[47], but this opinion is far to be embraced by the doctrine or the jurisprudence of the EU Court of Justice[48].

Article 280 TCE could serve as legislative ground to enforce criminal penalties in the community domain, but this interpretation remains uncertain, especially due to the express reference to criminal law from this article[49]. This reference restrains the community legislator competence in the criminal law area of expertise, this, having the right to incriminate in the area of criminal protection of the financial interests of the EU, but couldn't interfere in the area of applying national criminal law.

Can it be, maybe, that the criminal law is inserted totally in the third pillar, the judicial and police cooperation? Or criminal law provisions can be adopted as part of and with the support of instruments from the first pillar?

A recent decision of EU Court of Justice comes to clarify the distribution of competence between the first and the third pillar regarding criminal law area[50].

Everything started from the EU commission petition addressed to the EU Court of Justice to nullify the primal decision 2003/80/JHA from 27th of January 2003 regarding the protection of the environment through means of criminal law[51], which provides the obligation for the member states to incriminate and to punish crimes headed against the environment. The motive of this nullifying application was constituted by the legal base which served conceiving the primal decision, the constituent treaty of EU(TUE), Title VI (the judicial and police cooperation in the criminal law area). In this case, the commission sustainers that the enforcement of the provisions from the prime-decision shouldn't have been made based upon the

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[46] According to CJCE January 28th 1999, alin. 36, quoted by S. Manacorda, Le droit penal et l\Union europeenne, esquise d\un systeme, RCS, 2000, p. 95. The stipulations the member states must implement in order to avoid any kind of publicity that contains certain characteristics of the cosmetic products is a crime punished with a penalty with discouraging effect.

[47] Rule no. 2988/95 December 18 1995, JOCE 1995, L312/1. See Jean Pradel, Geert Corstens, p. 494. C. Hennau-Hublet, Les sanctions en droit communauitaire; Reflexions d\un penaliste, in La justice penale et l\Europe, sous la direction de F. Tulkens et H. D. Bosly, Bruylant, Bruxelles, 1996, p. 489; for an opposite opinion see M. Delmas-Marty, Union europeene et droit penal, Cah. Droit europeene, 1997, p. 640.

[48] CJCE aff. C 240/90 27 October 1992, RFA/c Commission, C-240/90, Rec. CJCE, p. 5383.

[49] According to art. 280, par. 4, The Council may adopt the necessary measures to fight fraud that influences the financial interests of the European Communities in order to insure a equal protection for the member states.

[50] CJCE aff. C 176/03 13 September 2005, action for annulment of the framework decision 2003/80/JHA-protection of the environment.

[51] JOCE no. L29, march 5 2003, p. 55.

bylaws of the 3rd pillar[52] (Title VI TUE), but based upon the bylaws of the 1st pillar, art. 175 from the European Communities Constitutive Treaty, which stipulates the enforcement of measures on a communitarian level for the protection of the surrounding environment.

The court ruled on cancelling the decision, but not because this contained criminal law provisions, but because the legal basis was established along with the infringement of the 47 art. from the EU Constitutive Treaty[53] in a wrong way in the Title VI from the TUE, instead of the art.175 TCE.

The court decided that, although a general rule, neither the criminal law nor the criminal procedural law are in the Communities competence area, this does not stop the community legislative to enforce certain measures in the criminal law area of the Member States, when the application of some effective, proportional and discouraging penalties constitutes an essential mean in combating some serious crimes against the surrounding environment, considering them necessary for the effective implementation of the community rules established in the domain of the protection of the environment.

Although this decision was taken only regarding a certain law and a certain community policy (the environment), the Court's ruling establishes principles with a general application which do not apply only to that specific community policy, the same arguments being available regarding the other community policies, and also in the area of the four liberties (freedom of travel, freedom of goods, freedom of services and freedom of capital).

The Court's decision clearly establishes that the criminal law does not constitute a community policy, and the Communities actions in this domain is based upon the competence associated to a specific legal basis.

Thus, adequate measures can be adopted based upon the community legislation only on sectorial level and only with the condition of an obvious need to combat some certain deeds that infringe on the completion and implementation of the community legislation. Also, criminal law measures have to ensure the effective application of community policies or the proper functioning of liberties.

The Court does not make any distinction regarding the nature of the criminal law measures that have been adopted. The fundament that justifies the adaptation of criminal law measures through community is the necessity to ensure the abiding of rules and community bylaws. The necessity of adopting criminal law provisions will be established for every case each. From case to case, depending on the necessity, the level of implication of the Communities will be established in the criminal law area, giving at the same, priority to the application in the Member States of the non-criminal horizontal measures. But, where the necessity of implementation of the community legislation demands it, the freedom of the

[52] Environment protection is a community policy and the community institutions are the only ones with competencies.

[53] Art. 47 stipulates the importance of the community legislation in relation with Title VI from the constitutive treaty.

Member States to choose the applicable sanctions can be restrained, and only criminal sanctions can be applied.

Although through the community legislation the enforcement of criminal law measures can be imposed for the required purposes, this fact can be achieved only by complying with two rules: necessity and consistence.

The criminal provisions adopted on a sectorial level based upon the community legislation must be in accordance with complete systematization and the consistence of the criminal law, in general, and the EU legislation, even if these provisions are adopted on the basis of the1st pillar or the 3rd, to ensure the integration and assimilation of these. These provisions must not be fragmented or against other provisions adopted before[54].

The interpretation of the Court decision by the Commission led to the distribution of competence between the 1st and 3rd pillar in the criminal law area, as it follows:

The criminal law provisions necessary for the effective implementation of the community legislation goes in the competence area of the Communities based on the European Community Constitutive Treaty. This leads to the stop of use of the double mechanism (directive or bylaw and ground-decision), which was used very often before the appearance of the Court's ruling. So, in this situation, it is either necessary to adopt a criminal provision for the effective appliance of the community legislation and will be adopted based only on the 1st pillar, or there's no need to go to the criminal law at the Union level, and in this case, the criminal law legislation is not stipulated;

- Criminal law horizontal provisions destined to encourage police and judicial cooperation in a general way, including mutual recognition measures for court decisions, measures based on the disponibility principle, and measures for the harmonization of criminal law provisions regarding the development of a liberty, security and justice space , that aren't linked with community politics implementation or fundamental rights enters the third pillar area of competence, adopted by grounds of TUE Title IV. Also the harmonization of criminal law provisions in some domains stipulated in Title IV (like terrorism, drug trafficking, international fraud etc) enters in the mutual area of competence (of Communities and member states).

Through the European Constitution criminal law provisions sphere that are applied according to community provisions tends to expand in the third

[54] The criminal law provisions from Title VI TUE are the community instrument stipulated in the framework decision. Thus, if the community institutions wanted to regulate a certain field of activity they needed to adopt legal instruments. On the one hand they needed to adopt a regulation or a directive, on the other hand, a framework decision according to the third pillar to establish the incriminated acts and the crimes. For example there has been adopted Directive no. 91/308/ECC, 1991; JOCE no. L 166, 1991; Framework decision no. 2001/500 JHA, 2001; European Parliament Directive no. 2005/35/EC, 2005; JOCE no. L 255, 2005, p. 11, 64; Framework Decision no. 2005/667/JHA, 2005.

pillar, judicial and police cooperation in criminal law. It is true that at the present moment the European Constitution has determined a crisis within the Union, putting under a question mark the possibility of adopting it. The necessity of a coherent legislative ground compilation capable of offering keys to problems that can be raised because of a 27 states integration into a mutual European desideratum that will certainly conduct to adopting it, even if it will be amended for sure.

Thus, the prior stipulations of art. 31 from the treaty that establishes the European Union, including some new elements that consider thoroughly the integration in this area at a European Union level. Also, it is stipulated the minimum mutual rules extent that will be established through community acts (laws and primary laws) in the following areas: mutual admissibility proofs, a person's rights in criminal procedure, the rights of crime victims. These rules can be extended on any other aspect of criminal procedure identified after Council Constitution implementation through a unanimous decision with the European Parliament consultation.

A stipulation with extensive character regarding the provisions of TUE's 31 art. constitutes the establishment, through European ground laws, of a series of crimes and their punishments: serious crimes, with outside border implications, whose combat requires cooperation actions in areas like terrorism, human being trafficking, sexual exploitation, arms and drug trafficking, money laundering, corruption, money forgery, organized crime.

The area list can be extended through decision, adopted unanimously by the Council, with the European Parliament approval.

Between the new factors of great importance introduced in the Constitution can be found art. III-270's alin.3 and 4 and III-271 's alin.3 and 4 provisions, that have eased member states' agreement for the introduction of qualified majority vote in police and judicial cooperation area (criminal law)[55]. It is about a new proceeding through which a state that believes that a European law or a European ground law in judicial and police cooperation area from criminal law infringes some fundamental principle of its criminal law system, this can submit the problem to the European Council having the possibility of stopping the legislative procedure. The text creates the possibility of starting a new intensified cooperation on the basis of the initial project, between states

[55] The new regulation in the field of judicial cooperation requires unanimity in order to adopt legal instruments.

that wish adopting the legislative project, on whose territory the project provisions are applicable[56].

Criminal law sphere of incidence has extended considerable because of a European Court of Community Justice's decision through which it has been admitted the possibility of adopting criminal stipulations on the basis of the first pillar instruments.

The European Court of Justice' decision has been assimilated by the European Commission[57]. Remains to be seen I this decision shall be interpreted in the same way by community legislative institutions (European Council and Parliament). This way shall represent a key moment in community provisions, acknowledging the possibility of adopting laws containing criminal provisions with the help of first pillar instruments. This way at least in theory criminal law provisions can be adopted through the bylaw. The bylaw is the first source of derivative law, having a general sphere and a compulsory character for the member states in all its elements. The primary effect of a bylaw containing criminal provisions would mean indirect penalty imposing with direct applicability in European Union member states[58].

The penalties imposed by community institutions in criminal law can be decided in[59]: direct penalties which suppose a community penalty imposing and its use by the community institutions and indirect penalties, penalties imposed by community institutions, applied by national institutions using national procedure. The first hypothesis consists of the developing from a community criminal law. The second one refers to criminal law harmonization with the community law provisions.

As opposed to the criminal indirect penalties, in certain areas the community institutions which may impose national legislation organization regarding the indictment and the application of direct criminal penalties, the Community's area of competence is practically inexistent in the present regulation.

[56] See art. III-416-III-423, European Constitution.
[57] See the Commission briefing, September 13, 2005, COM 2005 583, Bruxelles, November 23 2005.
[58] Jean Pradel, Geert Corstens, p. 20.
[59] J. Stuyk, C. Denys, *Des sanctions communauitaires*, in La justice et l'europe, Bruylant, Bruxelles, 1996, p. 423.

Truly, if one can imagine that the community legislative can enforce criminal law measures that can be directly applied in member states, there isn't any community institution with the competence of accomplishing this measures and applying the community penalties imposed.

This would imply the existence of a community police with competence through all the member states' territory and the existence of a competent community court that would judge criminal facts committed in any of the member states. Thus: up to now the only step made towards this way is the European Constitution provision of funding a European prosecutor with competence over the entire community territory. Criminal facts will still be judged by the member states national courts, and the appeal in front of the European communities Court of Justice could regard only procedural facts.

Thus, the creation of a criminal community law, which means the constraint of community penalty and its enforcement by the community institutions, cannot be established in the near future. In spite of this, the creation of a general set of rules at a community level within the criminal law, rules applicable by the member states' national instances, could be realized.

Regarding the indirect sanctions a difference can be made between the sanctions with direct applicability in the internal law (adopted through a rule, according to the actual community legislation or through a European law according to the European Constitution) and the ones which need a further action of the member states to enforce the community acts, dispositions which contain penalty stipulations. It is preferred to adopt a direct applicability law, leading to appliance uniformization on the whole community territory. The laws that need further intervention from the member states in order for them to be enforced, have the disadvantage to let at their judgment, even limited, the election of the way and the form of obtaining a result. Thus, if such possibility exists, some member states can elect the appliance of an administrative sanction as opposed to penalty sanctions, or the differentiated establishment of the crime's constitutive elements, in comparison with the community law.

This way the different application of this law can appear in the member states' territory which, concerning border's crimes, may lead to different sanctions applied to the criminals, depending on the crime scene or on the crime's judgment location.

Thus, in case of adopting community laws it would be preferred for these to have direct applicability inside the member states, especially since community institutions can interfere regarding criminal law only if and as long as the proposed action cannot be done satisfactory by the member states and it may be fulfilled better regarding the surface and its effects upon the Community.

For the time being, there is only one decision of the EU Court of Justice, which establishes that laws can be adopted by community institutions in criminal law with the help of the instruments from the first pillar (hereby also including the bylaws).

Community institutions' competence regarding the direct applicability of penalty provisions seems to have place in the European Constitution.

Its provisions come in order to expand the community organs' competence, both by enlarging the crimes' sphere for which it could intervene and regarding the decision of taking and applying its provisions.

The provisions from article III-415("Fraud fighting")[60] which take over the provisions of article 280 from TCE, are very interesting, because they present two important differences: there is no referring made to legiferating limitation regarding the application of national criminal law or justice's administration and the legislative instrument put at its disposal is the law or the European ground law. This means that the community legislative institutions gain legislative competence concerning the criminal law, matter which, at least theoretically, is similar to the one belonging to member states(but only in a restrained domain – the one of protecting the UE financial interests).The provision which give the possibility of elaborating a respective European law is very important. This means that the possibility of establishing a source with direct applicability concerning criminal law is stipulated in the Constitution. The European law is governed by the community law's primordially principles towards the national law and its direct application, having as an effect its obligatorily on the member states' territory.

[60] According to art.III-415, The Union and the member states fight fraud and any other illegal activity that influences the financial interests of the Union by measures adopted according to this art. These measures are meant to discourage these activities and to protect the member states. The European legislation establishes the necessary measures to fight fraud and to offer protection for the member states.

Although a unification of penalty provisions in the European judicial space would be beneficial from the point of view of the prevention and punishing transnational crimes and the equal treatment concerning the perpetrator and the crimes' victims, there are some questions regarding the legitimacy of adopting such provisions by the community organs.

This questioning of the legitimacy of the Communities competence in the criminal law domain was primarily founded on two arguments. First, a political one was based on the idea that the criminal law implies the right to punish, which is one of the fundamental attributes of the states sovereignty. The second argument resulted from the community structures functioning, that could not satisfy the democratic exigencies in the area, not having the necessary institutions, like a democratic chosen legislative organ, a European police or a competent criminal law court.[61]

The right to punish is in fact, a fundamental attribute of the states sovereignty. But, with the latest crisis of the national criminal law systems, a great number of states had to adopt new criminal law code to comply with the actual necessities generated by the more and more highlighted orientation to European integration.

Regarding the guarantees offered by the community institutions, the actual situation is of a nature to cause concern. The fundament that legitimizes the adoption of criminal law measures on the level of the Member States is given by the national Constitution[62], which stipulates the rights and fundamental liberties and democratic principles for the protection of these.

On the community level, in the present legislation it's hard to find this fundament. The European communities (and the institutions that represent them) are not signing institutions of the European convention of human rights. The lack of a legal basis in which the fundamental principles to anchor in, principles that govern the criminal law is amplified by the rising possibility of the political power to impose criminal sanctions through judicial community law instruments. Indeed, the growing role of the European Parliament (the only institution whose members are democratically and directly elected in the Member States) in the legislative process can not eliminate this drawback.

The solution for the legitimate offer in the process of adopting provisions with criminal character is found in the European constitution. On the other way, it includes the Fundamental Human rights Chart, in Part I, Title II, specifying the EU obligations to accede at the European convention, in order to protect human rights and fundamental liberties[63]. On the other hand, it specifies the fundamental principles that govern the EU activity, this functioning on the competence giving

[61] U. Sieber, Union europeenne et droit penal europeen, July 1993, p. 258.
[62] See Peter Alexis Albrecht, Stefan Brown, *Deficiencies in the development of European criminal Law*, in the European Law Journal, vol. V, no. 3, 1999, p. 293.
[63] Art. 1-9 from the Constitution.

principle from the Member States. Also, the European Parliament's duty grows in the legislative process. Practically, the council cannot take any important decision without parliament's implication, its opposing conducting to the impossibility of the act adaptation.

The identification of such deficiency regarding the fundament of provision adopting with criminal character on a community level doesn't have to lead to the idea of rejecting a European criminal system, but only to draw an alarm signal for judicial stabilization of legal ground that can offer provision legitimately adopted on a community level.

Even though a future European criminal law code represents a utopia, at the present moment the provisions in the criminal law are heading towards a more and more highlighted harmonization of the EU member states legislations. The community institutions have already obtained legislative competence in this area. The reglementation area, limited at first, has extended very much, lately. Social realities determined by the development of a European space will inevitably lead to the development of directory principles and to the elaboration of provisions for the unification of criminal law legislation in certain sensible domains for the European Union, like the protection of the financial interests of it. From here and to future community criminal law code enforcement is only one step away. Will this step be accomplishable? Everything depends, in this moment, on the faith of the European Constitution.

CONSIDERATIONS REGARDING THE CRIMINALITY IN THE BUSINESS FIELD

Assist. **Laura – Dumitrana Bosca Rath**
AGORA University, Oradea

Abstract:

Business and businesspeople have always existed and will exist forever. As society progresses thanks to its scientific discoveries, the criminal businessman will continue to shock the public opinion through his ingenuity, intelligence and, sometimes, easiness in committing an offence. The more intelligent is the criminal businessman, the more elaborate and hard to uncover will be the offence he has committed.

In today's society, we are hoping and expecting that the efforts to impose the law should become so powerful as to overwhelm those who favour the violation of the law.

Most worrying are the offences in the field of informatics. We are glad to see that technique and technology have progressed so much, that we are actually witnessing a digital revolution. These are great achievements for mankind (performing, in record time, a multitude of transactions, affairs and communications with any parts of the world), but, at the same time, new and wide horizons have opened for the offenders who exploit these informatics networks for the purpose of achieveing profit, having the possibility to produce enormous frauds. This new type of criminal offence does not only threaten bank accounts, business dealings between companies and individuals, but it also represents a real danger for large worldwide concerns and even for state security.

Criminal offences in the business field are more frequent in a state facing an economic and social crisis, as the case has been so many times for Romania since 1989. We have often witnessed a void of power, a void of justice and lawfulness.

The bodies entitled to pursue criminal procedure and the judicial system will be forced to adapt, to understand the way that business offenders operate, to adopt new techniques and establish new methods of approaching justice.

Key words: business, criminality, businesspeople, financial

Dear readers, I will start this article by presenting the explanation that The Dictionary of the Romanian Language provides for the terms ”business“ and ”businessperson“.

BUSINESS[64] Financial, commercial or industrial transaction, usually based on racket or speculations, Enterprise having a favourable outcome, Important affair, Pursuit, Occupation.

BUSINESSPERSON[65] Person working in business, adj. BUSINESSLIKE Profiteering, Speculating, Gambling, Racketeering.

Looking back at the period following the 1989 Revolution, at the multitude of criminal offences committed in this period, at the variety of the criminal offences committed by Romanian citizens, and not only, at the ingenuity of the way these offences were committed, all we can do is admit that certain Romanians have grasped the exact meaning that The Explanatory Dictionary of the Romanian Language assigns to the term ”businessperson“: a person working in business who is a profiteer, a speculator, a gambler or a racketeer.

Business and businesspeople have always existed and will exist forever. As society progresses thanks to its scientific discoveries, the criminal businessman will continue to shock the public opinion through his ingenuity, intelligence and, sometimes, easiness in committing an offence. The more intelligent is the criminal businessman, the more elaborate and hard to uncover will be the offence he has committed.

I would like to refer to the expression ”white collars“, used for the first time by an American criminologist, Edwin Sutherland, who maintained that: ”*White collar* criminality most often takes place through the erroneous presentation of the financial status of the companies, through the manipulation of the stock market and the bribing of public persons for the purpose of ensuring advantageous contracts, through the bribe given in order to strike a bargain, defalcation and use of the respective financial funds for other purposes aiming at violating the law, through the large-scale practice of fraudulent bankruptcy“, and the enumeration goes on, as the possibilities to violate the law are varied and countless. *White collar* criminals commit deeds defined by Sutherland as ”a violation of the criminal law by persons of a high class socioeconomic status, while performing their occupational activities“. The American criminologist also presented arguments by which he demonstrated that *white collar criminals* are quite immune from criminal conviction, given the power of the class they belong to influence justice as regards the implementation and application of the law. As a result of this class tendency, Sutherland says, ”the criminal offences committed by those belonging to the upper classes are generally treated differently from those committed by people belonging to the poor strata of society“[66].

Although this expression was first used in 1939 by the American criminologist Edwin Sutherland in a report he addressed to the American

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[64] Afacere — Business, The Explanatory Dictionary of the Romanian Language, Publishing House of the Academy, 1988

[65] Afacerist — Businessperson, Businesslike, The Explanatory Dictionary of the Romanian Language

[66] Tudor Amza, Criminology. Treatise of Criminological Theory and Policy, Publishing House Lumina Lex, Bucharest, 2002

Sociological Association and, even if it is considered by present-day criminologists as ambiguous and controversial, personally, I can only find that this theory, this expression fits precisely many facts that took place in the period following the 1989 Revolution.

”The true question“, Tudor Amza maintains, in ”Treatise of Criminological Theory and Policy“, trying to explain *white collar* criminality from the viewpoint of the theories regarding criminal behavior, ”is whether it is possible to adopt laws which are opposed by quite a significant segment of the population and, once they have been adopted, whether it is possible to apply them“. The author of the treatise gives the example of the American law which in the period 1917 — 1933 prohibited the production and commercialization of alcohol, a law opposed by large segments of the population. In this case, as it is well-known, a systematic violation of the law took place. Finally, the respective law was abandoned and the incriminated practices became legal[67].

In today’s society, we are hoping and expecting that the efforts to impose the law should become so powerful as to overwhelm those who favor the violation of the law.

We must admit that the state of a society and its reaction to the criminal offences in the business field often stimulates the offenders. They would do anything in order to achieve financial success and, if success involves even the use of illegal means, why not? The end justifies the means[68].

Criminal offences in the business field are more frequent in a state facing an economic and social crisis, as the case has been so many times for Romania since 1989. We have often witnessed a void of power, a void of justice and lawfulness.

The transition from an organized state-controlled economy to a free-market economy has been an extremely difficult process, sometimes hard to understand for certain”businesspeople“who thought that everything is allowed. It is the task of the state and of the competent institutions to interfere in such a case, in order to make sure that all market economy participants observe the rules and that those who violate the law are harshly sanctioned, depending on the gravity of their deeds.

There are countless criminal offences in the business field: from racket, fraud, disclosure of an economic secret, circulating counterfeit objects, unfair competition, tax evasion, performing prohibited activities to ill management and so on....

Most worrying are the offences in the field of informatics. We are glad to see that technique and technology have progressed so much, that we are actually witnessing a digital revolution[69]. These are great achievements for mankind (performing, in record time, a multitude of transactions, affairs and communications with any parts of the world), but, at the same time, new and wide horizons have opened for the offenders who exploit these informatics networks for

[67] Tudor Amza, Criminology, Treatise of Criminological Theory and Policy, Lumina Lex, Bucharest, 2002
[68] Costica Voicu, Dirty Money and Organised Crime, Artprint Publishing House, Bucharest, 1995.
[69] Tudor Amza, Treatise of Criminological Theory and Policy, Lumina Lex, Bucharest, 2002

the purpose of achieving profit, having the possibility to produce enormous frauds. This new type of criminal offence does not only threaten bank accounts, business dealings between companies and individuals, but it also represents a real danger for large worldwide concerns and even for state security.

”Most criminal offences in the business field committed by means of the computer are criminal acts perpetrated by the employees“[70].

”Also, financial attacks are often planned by people from the inside, who know the technical details“.

There are countless illustrating examples.

”Technology, justice and crime, all develop in the same area, and there is a race for improving the means of taking action and gathering evidence against the criminals, but also for committing new crimes with a greater impact, as well as for producing laws that might protect this important discovery of the human genius, informatics“.

As regards the situation in our country, we must still remark that the qualified authorities have issued laws aiming at regulating the economic, commercial and business relations established between various partners.

I would like to mention from among these laws the following:

- Law no. 31/1990 regarding trading companies, which stipulates a number of deeds representing criminal offences, which might be committed by the administrators, partners or founders of companies. The law also has in view aspects concerning the social and juridical relations established in commercial activity, everything that is related to the existence of a trading company, to the relations which must be based on the good faith of the business partners;
- Law no. 11/1991, modified by Law no. 298/2001 regarding the fighting against unfair competition (the use of brands, inventions, firms, emblems liable to cause confusion, the circulation of counterfeit goods, etc.);
- Law no. 241/2005 regarding the criminal offences of tax evasion (hiding a taxable or dutiable asset, adulterating, destroying or hiding accounting acts);
- Law no. 21/1996 regarding competition (the deed of the natural person of participating with a fraudulent intent in conceiving, organizing or performing anticompetitive practices).

Thus, we are noticing that our institutions, as well as the international ones are concerned with knowing this phenomenon of business criminality as well as possible and finding effective counteracting means, goals that can be fulfilled only through legislative harmonization and international cooperation.

The bodies entitled to pursue criminal procedure and the judicial system will be forced to adapt, to understand the way that business offenders operate, to adopt new techniques and establish new methods of approaching justice.

Many of the criminal offences committed in the business field and which encroach upon the rights of the individual or of the community he/she belongs to

[70] Dan Banciu, Sorin Radulescu, Corruption and Organised Crime in Romania, Publishing House Continent XXI, 1994

and which harm the social rules settled in a country have eluded legal incriminations and an adequate solution is not always found, because they often take new forms, that the legislator did not have in mind when elaborating the law. A thorough study of comparative law should be carried out regarding the way in which other legislations take action against such criminal offences.

All we can do is hope that Romanian society will mature from the point of view of the perception of the notion of"democracy", of the words"business","businessperson"and of many others, among which I think that the most important are"truth, justice and law". It is within our power that these"words"become more than just words, that they become principles, values that should guide our thoughts and activity.

Even if the Dictionary of the Romanian Language provides the definitions of the words "business" and "businessperson" presented at the beginning of this article, we should try to give another explanation to these words, such as:

Business = a financial, commercial or industrial transaction based on trust and understanding, from which all parties obtain, if not the result they wanted, at least a favorable one.

FUNDS EMBEZZLEMENT WITHIN THE EUROPEAN COMMUNITIES BUDGETS

Legal adviser **Ionut Casuneanu**

Abstract:

Regarding the financial interests of the community when it comes to costs, changing the funds destination means to use them, even if they are legally obtained, otherwise than their initial destination.

To commit a fraud regarding the financial interests of the community means to change the funds destination which is obtained legally and as a result to unlawfully get profits and in the same time the community budget diminishes.

For embezzlement, the material element is the action to change the destination of the funds and to use them otherwise than initially agreed. It is not compulsory in this case that the funds are legally obtained as in the case of changing the destination of the profits.

Key words: embezzlement, budget, European communities.

1. Embezzlement of the funds

Regarding the financial interests of the community when it comes to costs, changing the funds destination means to use them, even if they are legally obtained, otherwise than their initial destination.[71]

In Greece and Ireland, the fraud committed by changing the destination of the funds appears in the legislation, following the ratification of the PIF Convention and keeping its provisions.

In Belgium, Germany, Portugal and Finland, the changing of the funds destination is a form of fraud which appears in special laws or dispositions in the Criminal Code regarding fraud in the field of aids and subventions. In all these countries changing the funds destination which is neither aids nor subventions falls under the criminal law if we have all the constitutive elements for abuse of trust. Moreover, art. 37 from the legislative decree in Portugal no. 28/84 limit the implementation of the criminal provisions only for aids and subventions given to a company for its development. Chapter 29(5) in the Criminal Law in Finland does not incriminate fraud when it comes to the financial aid given for personal use.

In Criminal Codes from Austria[72], Denmark[73], Germany[74], Italy[75] Luxembourg[76], Spain[77], Sweden[78] changing the funds destination falls under

[71] Explanatory report of the Convention, PIF, JOCE no. C 191 from June 23rd 1997.

special dispositions which are different than the fraud. In Italy, the crime falls under art. 316bis from the Criminal Code and regards only the funds given to develop public interest activities. In Luxembourg, Netherlands, Austria and Sweden the crime is constituted only if the funds are aids or subventions.

French criminal law defines the changing of the funds destination as the crime of abuse of trust.

In Great Britain there is no specific crime for changing the funds destination. In several cases this can be considered theft and falls under statutory offences, under the Theft Act 1968 and Theft (North Ireland) 1969.

2. Embezzlement in the case of a legally obtained profit

To commit a fraud regarding the financial interests of the community means to change the funds destination which is obtained legally and as a result to unlawfully get profits and in the same time the community budget diminishes.[79]

In Denmark, Greece, Spain, Ireland and Luxembourg, changing the destination of something obtained in a legal way falls under fraud.

In Germany, Italy, France, Netherlands, Austria, Portugal and Finland is considered fraud in the field of taxes when one omits to indicate any change in circumstances that would lead to obtain unlawful funds.

The legislation in Belgium has the same system to incriminate fraud. Regarding the customs regime, the specific crime needs a supplementary constitutive element which is the intention to deceive the customs authorities.

In the criminal Swedish law changing the destination of a legally obtained profit is not incriminated as a way to commit a fraud against the financial interests of the community. There are doubts when it comes to incriminating this act as crime in the field of taxes and excise under Section II in the Swedish Fiscal Code.

In two of the Great Britain jurisdictions (England and Wales and North Ireland) neither the crimes stipulated in special laws as the law regarding taxes-1979 or the Law regarding VAT-1994 nor those in the common law apply to fraud by changing the destination.

3. The incrimination of embezzlement in Romania

The unlawful change of the destination of funds obtained from the general budget of the European Communities or from the budgets administered by these is considered a crime under art. 18, paragr.1 from the Law no.78/2000. If this act generated serious consequences the punishment is more severe (art. 18, par. 2C).

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[72] 153 Criminal Code, Austria.
[73] 289a (2) Danish criminal Code.
[74] 264 (1) (2) German Criminal Code.
[75] see art.31 italian Criminal Code.
[76] see art.496-2 Criminal Code, Luxembourg.
[77] art. 06 Spanish Criminal Code.
[78] Chapter 9 3a Criminal Code, Sweden.
[79] Explanatory report of the Convention, PIF, JOCE no.C 191 from June 23rd 1997.

Par. 3 stipulates a separate crime related to the prejudices of the profits. Thus, the unlawful change the destination of a legally obtained profit which generates the diminishing of the resources in the Community general budget is a crime.[80]

The crime that falls under par. 1 is a special example of embezzlement but the difference regards the origin of the funds obtained from the European Communities budgets.

The object of the offence

The crime is considered against the social relations regarding the financial discipline within the EU which presupposes the use of funds and profits according to the dispositions in the field.

Modus operandi

For embezzlement, the material element is the action to change the destination of the funds and to use them otherwise than initially agreed. It is not compulsory in this case that the funds are legally obtained as in the case of changing the destination of the profits.

My opinion is that in the situation in which the funds are illegally obtained we are talking about the crime regarding non-observance of the provisions regarding the funds from the community budgets, falling under article 18 in the law no. 78/2000. In this situation the final destination of the funds is not important to establish the character of the action. To support this statement we have the regulations regarding community fraud in art. 1 from the PIF Convention where fraud regarding expenses is stipulated in three different ways: to have forged documents, not accurate or incomplete, the omission of giving information and embezzlement. This Convention represents the source of inspiration for the Romanian law maker.

In conclusion embezzlement requires to lawfully obtaining community funds. These funds will be used afterwards for other reasons than the initial ones.

Further on I will give some examples from the legal practice which will give details about the modus operandi.

Expenses fraud – embezzlement – Kosovo. At the end of April 2002, the mission of the United States in Kosovo (MINUK) suspected a case of fraud by embezzling some subventions meant for the electricity sector in Kosovo. Following the investigations, it has been discovered that the funds were transferred in personal banking accounts in Gibraltar. The second attempt to transfer the funds by the main suspect, from Gibraltar to Belize was stopped by the authorities. Following the

[80] These incriminations are stipulated in the project for the new criminal code, 2007, which is debated in public on the Ministry of justice site. According to art.305, under European funds embezzlement there is under par. 1 a crime which presupposes to change the destination of the funds obtained from the European Communities general budget or from the budgets administered by the communities. In par. 2 it is a crime to change the destination of the lawful financial profits which generates a diminishing of the resources.

cooperation with the general prosecutor in Gibraltar, in August 2002, 2.7 million euro from the funds meant to restructure the energetic system was given back. In June 2003 the former employee of the United Nations was convicted to 3 years and 6 months in prison.[81]

The project for the sewerage system in Paraguay. At the beginning of the 2004, The European Commission Delegation in Paraguay informed OLAF on a presumed embezzlement of the community funds meant to improve the sewerage system in 50 counties. At the beginning of the 2003, an external audit commission said that approx. 90% of the community funds were embezzled in a banking account that belonged to a foundation.[82]

Preordering embezzlement. The defendant refused to explain how he spent 12.527 euro given to his company on the basis of the financial aid contract for a decentralized program – External aid from the European Community. The defendant asked for the money to develop a technologic system for processing the milk and he obtained a contract within PHARE 2000 program – "Economic and social cohesion". After investigating the case it appeared that the amount of money was used for other purposes than the ones mentioned in the contract.[83]

In art.18 from the Law no. 78/2000 there are two different situations: funds embezzlement stipulated in par. 1, which represents fraud related to expenses and profits embezzlement, under par. 3 which is a fraud related to profits.

How can one accomplish the embezzlement of the lawful obtained profit? This cannot be done by not declaring the profits and the budgetary obligations and this is the situation for illegally diminish the resources under art. 18, Law no. 78/2000. Nor can be done by false statements regarding the profits or other documents. The conclusion is that we are talking about a budgetary obligation known by the fiscal and the customs authorities which is not observed by the subject. Thus, it is about not paying the taxes and using the money for other purposes.

The incrimination of this act is something new in the legislative tradition of our country.

The connection with other crimes

Taking into consideration that the community finances are accomplished together with the national ones, it is very likely to be a conflict of norms in the Romanian criminal law between funds embezzlement under art. 18, paragr.1 from the Law no.78/2000 and funds embezzlement under art.302 from the Criminal Code.[84] There are many situations in which the Romanian authorities are obliged to contribute with national funds to finance together with the community funds different projects. The regional development policy which regulates financing

[81] OLAF report, 2003, p. 25.
[82] OLAF report, 2004, p. 40.
[83] OLAF report 2004, p. 63.
[84] According to Law no.302, to change the destination of the funds or the material resources without observing the legal provisions, if this act caused prejudices, represents embezzlement.

through Structural Funds is governed by the complementarily principle and the action of the European Communities joins the actions of the member states.[85]

In this situation one may ask if there is only one crime or several crimes. I am of the opinion that we are talking about a single crime regarding fraud in the case of subventions which has repercussions on the national interest and the community one.[86] The constitutive elements are those of a simple crime. The question is the law this crime comes under: Law no. 78/2000 or the criminal code. The solution would be the following: if the national funds constitute the main part of the amount, the prejudice is more serious for the national funds than the community ones and the crime falls under art.302 from the Criminal Code. If the subvention is mainly from the community funds, the crime will fall under art.18, paragr.1 from the Law no.78/2000.

[85] Louis Cartou, L'Union Europeenne, 6th edition, Dalloz, 2006, p. 264, 562, 564.

[86] Analogically, the theft committed through the same action or through different acts, under the same circumstances, even if prejudices two different patrimonies, is a simple crime. See Alexandru Boroi, Criminal Law, Specific Aspects, CH Beck, 2006, p. 158.

REGULATION FOR INFRACTIONS OF ABUSE IN SERVICE AND CORRUPTION IN THE PENAL FRENCH LEGISLATION

Candidate to Ph. D lecturer **Angelica Chirilă**
University "Danubius"of Galați

Lawyer Galati Bar Candidate to Ph. D
assistent **Alina ŞOOŞ**
University "Danubius"of Galați

Abstract:

The incriminations contained in other penal legislations than the Romanian one are edifying to the importance the lawgivers give to the abuse in service and corruption acts, by including these in the penal illegal area, even if the same foreign lawgivers have sometimes different opinions on the penal liability of some categories of people due to their position.

The compared right aspects in what service and service connected infractions are concerned especially refer to the penal French legislation, without omitting other incriminations that highlight, in essence, the conception of some west-european lawgivers on the incrimination of these acts.

The abstraction and misappropriation of goods is provided as a separate infraction, consisting of the deed of a person exercising public authority or commissioned with a public service mission, of a public accountant, public depositary or of one of its subordinates to destroy, missappropriate or abstract an act or a title, public or private funds or other effects, pieces, titles, objects that have been handed in to them on behalf of their functions or missions.

Key words: abuse, corruption, French legislation.

1. The incriminations contained in other penal legislations than the Romanian one are edifying to the importance the lawgivers give to the abuse in service and corruption acts, by including these in the penal illegal area, even if the same foreign lawgivers have sometimes different opinions on the penal liability of some categories of people due to their position.

As shown before, the supression of these acts is based on the criterion of a good functioning state of the socio-economical activities and of activities of other nature, functioning that cannot be perturbed by commiting abuse and corruption infractions.

The comparative presentation of the incriminations has influence not only on the theoretical discussions that necessarily arise, but also has practical goals that will be materialized in a modified penal legislation.

The compared right aspects in what service and service connected infractions are concerned especially refer to the penal French legislation, without omitting other incriminations that highlight, in essence, the conception of some west-european lawgivers on the incrimination of these acts.

2. The new French Penal Code was published trough four laws of 22nd of July 1992. The fifth law, from 16th of December 1992, called the adaptation law (''loi d'adaptation''), modifying the French Penal Code of Procedure and other material penal right texts[87], his redaction resulting from the law of 19th of July 1995, established at 1st of March 1994 the entering into force of the new French penal Code and the abrogation of the Penal Code of 1810. The decree of 19th of March 1993 regarding the part regulated by the new French Penal Code and applicable to the same date completes the reformation.

After a few years of applying the new French Penal Code, the continuity of penal right, refound by the lawgiver, is confirmed. The new jurisprudence from the Court of Cassation does not mark, in whole, any breach from the previous jurisprudence, which appeared under the old Napolean code empire.

The new French Penal code is structured on seven book, entitled as follows: Book I – General provisions (Title I – About penal law [French], Title II – About civil liability, Title III – Punishments), Book II - Crimes and deliquencies against persons (Title I – Crimes agaist humanity, Title II – Attempts against physical persons), Book III – Crimes and deliquencies against goods (Title I – Fraudulous attempts, Title II – Other attempts to goods), Book IV – Crimes an deliquencies against the nation, state and public peace (Title I – Attempts against the fundamental interests of the nation, Title II – Terrorism, Title III – Attempts against the state authority, Title IV – Attempts against public confidence, Title V – About the participation in organized gangs[88]), Book V – Other crimes and delinquencies, Book VI – Contraventions (Title I – General provisions, Title II – Contraventions against persons, Title III – Contraventions against goods, Title IV – Contraventions against the nation, peace or public peace, Title V – Other contraventions), Book VII – Provisions applicable on the territories beyond sea and in the territorial community of Mayot.

The service and service connected infractions from the Romanian penal code have correspondence in the new French Penal Code in Chapters II and III of Title III – Attempts against state authority, Book IV – Crimes and delinquencies against the nation, state and public peace, called "Attempts against public administration committed by persons in public functions" (Chapter II) and

[87] *French Penal Code*, Dalloz, 1997-1998, 2006.
[88] *L'association de malfaiteurs* (French in the original).

"Attempts against the public administration committed by private persons" (Chapter III)[89].

Chapter II ("Attempts against public administration committed by persons in public functions") regroups the infractions committed by persons in public functions described in the new Penal Code through the generic expression of "person exercising public authority or commissioned with a public service mission".[90] This designation is substituted to multiple notions used by the new French Code, such as "public servant", "agent or government delegate", "judge", "administrator", "agent or public administration delegate".

This expression is used in order to define the majority of infractions under Chapter II. The expression in likewise used in Books II and III, in order to show the quality of the author or of the victim of certain infractions, when this quality constitutes an aggravanting circumstance. The expression is also used in the next chapter dealing with attempts to public administration committed by private persons for infractions that provide for the victim (passive subject) the quality of person in public functions.

The formulation discussed in not new, considering that it was issued by doctrine and jurisprudence, it was used many times by the lawgivers, especially in articles 177 and 187-1 of the current French Penal Code.

Besides the advantage to simplify and homogenize the redaction of incriminations, this expression is, essentially, pertinent to the highest degree. It adopts a functional criterion, contrary to present terms that show the status of the person in question (such as the term of "public servant"), which is not satisfactory and, moreover, obliges jurisprudence to interpret these terms in an extensive manner. Thus, it is not important to know the professional status of the author of the infraction, but to know whether he exerts functions that take part in the public affairs management.[91]

Likewise, the expression "person exercising public authority" designates persons that exert an authority function, other administrative, jurisdictional or military. The person's status, either private (such as a juror or an unprofessional assessor in the court for minors), or public (such as a professional magistrate) is not important. The expression "person commissioned with a public service mission" implies private or public persons who, without exercising a part of public authority[92], fulfil, temporarly or permanently, voluntary or following an authorities' recruitment, a public service of any kind. These expressions indicate, in particular, the public or ministerial officers, to the extent to which the last

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[89] Châpitre II, *Des atteints à l'adminisration publique commises par personnes exerçant un fonction publique* ;Chàpitre III, *Des atteintes à l'administration publique commises par les particuliers*. (French in the original).

[90] *Personne dépositaire de l'autorité publique ou chargée d'une mission de service publique*.(French in the original).

[91] *The circulary of 14th of May 1993 which discusses upon the New French Penal Code provisions*, Dalloz, 1997-1998, 2006.

[92] *D'une parcelle de autorité publique*. (French in the original).

mentioned, according to the activities fulfilled, either exert authority functions (such as an executor that proceeds to the execution of a book debt or of a expulsion), or are commissioned with a public service (such as a notary effectuating a real estate sale).

There is no doubt about the assimilation, to the same extent, of civil servants or of territorial units agents who, according to the decentralization laws, are exercising parts of public authority (although current texts, especially the expression "agent or government delegate", do not seem to refer to them).[93]

Finally, this expression seems to also refer to international civil servants, considering that their powers of authority or public service missions on French territory are acknowledged in the application of internation conventions.

Before examining the various infractions provided under Chapter II, it must be noticed that some of them can be invoked only against persons who are simply commissioned with a public service and that others, in their reason, do not include persons who exert public functions (for example, the crime made by an old servant, provided in art. 432-13 from the French Penal Code). Moreover, other infractions can be invoked, to the same extent, against persons commissioned with an elective public mandate (for example, deliquencies regarding interference, corruption or traffic of influence) who are not necessarily exercising public authority (such as a deputy who, if compared to a mayor, does not exert an authority function). The lawgiver often mentioned, by enumerating the persons susceptible of committing certain infractions, particular functions that are obviously included in the generic expression of "persons exercising public authority or commissioned with a public service mission" (for example, article 432-15, that represses the goods abstraction, refers to accountants and public depositaries).

Chapter II is structured on three sections that contain the infractions committed by persons exercising public authority or commissioned with a public service mission, sections called as follows: authority abuses against the administration itself (section I); [94] authority abuses against private persons[95] (section III) that refer to attempts to individual freedom, discriminations, attempts to the inviolability of domicile, attempts to the secrecy of correspondence; infrigements of the probity obligations[96] (section III) that refer to the abuse in levying taxes and duties[97], passive corruption and traffic of influence committed by persons exercising public functions, illegal influence regarding interests[98], attempts to the freedom to accede and equality between candidates regarding markets, public transactions[99], abstraction and determination of goods.

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[93] *Agent ou preposé du Gouvernement*; preposé,e-personne (fonctionnaire, employé etc.) chargé d'un service particulier ; Hâchette, Dictionnaire de français, 1997, page 879.
[94] Des abus d'autorité dirigés contre l'administration elle-même (Frech in the original).
[95] Des abus d'autorité commis contre les particuliers (Frech in the original).
[96] Des manquements au devoir de probité (Frech in the original).
[97] De la concussion (Frech in the original).
[98] De la prise illégale d'interêts (Frech in the original).
[99] Des atteintes à la liberte d'acces et à l'egalité des candidats dans les marchés publics.

If compared to the Romanian penal code, in the new French Penal Code there are provided infractions that concern abuses and corruption committed by persons indicated by law, but grouped differently in comparison to the Romanian penal code. Although ressemblances can be found through the fact that abuses can concern public, as well as private interests - in the Romanian penal code there are distinctively incriminated deeds under art. 246 and art.248 Penal Code – some of the abuses regard specific actions that are provided in the Romanian penal law in chapters, sections, other than those incriminating service infractions.

For example, the attempt to the individual freedom of physical persons – that refers first of all to the illegal measures to limit freedom – is provided as infraction in Chapter II of Title VI of the Romanian penal code (special part) – art.266 Penal Code, illegal arrest and abusive investigation. Attempts to the inviolability of domicile are provided as infraction in Chapter II, Title II of the Romanian Penal Code (special part), in which the deeds causing damages to individual freedom and to all attributes regarding individual freedom are incriminated (art. 192 – violation of domicile). In the same chapter under the Romanian penal law, the infraction of violating the secrecy of correspondence (art.195 penal code) is provided, corresponding to the attempts to the secrecy of correspondence from the French law.

Discriminations – as infraction – correspond in the Romanian penal code to the abuse in service through the limitation of rights (art. 246). The French lawgiver distinctively incriminates the deeds of infrigement of the probity obligation, that consist in abuses at levying taxes and duties, passive corruption and traffic of influence, legal influence of interests, attempts to the freedom of access and equality of candidates to public market, abstraction and missappropriation of goods. Thus, the French penal code provides as distinctive infraction the abuse in levying taxes, duties, which would be classified, according to the Romanian penal law, as abuse in service against individual interests – incrimination with a general character. Different from the Romanian penal law, the French lawgiver incriminates the traffic of influence committed by public, as well as private persons.

It is also disctinctively incriminated the deed of a person exercising public authority or commissioned with a public service mission or invested with a function through a public elective mandate to have, conserve, directly or indirectly, an interest of any kind in an enterprise or in an operation, having, in a moment of the deed, the total or partial task to ensure supervision, administration, liquidation or payment (payments) – infraction of illegal influence of interests. The attempts to freedom of access and equality of candidates to public markets and to the empowerments in public services that might be also qualified as abuses, meaning the deed of a person exercising authority or commissioned with a public service mission or invested with an elective public mandate or exercising functions as representative, administrator, agent of state, of territorial units, of public institutions or of mixed economical societies of national interest, commissioned with a public service mission, or of mixed local societies, to obtain or to attempt at

obtaining for another person unjustified advantages through an act contrary to the legislative provisions or to regulations, aiming at ensuring free access and equality of candidates to public markets and to empowerments in public services.

The abstraction and misappropriation of goods is provided as a separate infraction, consisting of the deed of a person exercising public authority or commissioned with a public service mission, of a public accountant, public depositary or of one of its subordinates to destroy, missappropriate or abstract an act or a title, public or private funds or other effects, pieces, titles, objects that have been handed in to them on behalf of their functions or missions. The deed could have as a correspondent the infraction of abstraction and destruction of documents, but documents (acts, titles) are "goods" – patrimonial values and regarded as such, not as documents without economical value, whose destruction, abstraction would damage the public authority relations.

Corrupt practices are provided and punished in this chapter, as well as in the next chapter, entitled "Attempts to the activity of justice", as distinct penal facts committed by a magistrate, juror or by any other person fulfilling attributions in a jurisdictional activity.

The traffic of influence activity can be committed by perssons to whom the above mentioned Chapter II is addressed, by private persons and by magistrates or by any other persons involved in acts of justice.

The French penal code does not incriminate the infraction of abusive behaviour, as provided in the Romanian penal code – service infraction, but under violent infractions, the violent acts committed by servants are considered aggravating circumstance (art. 223-13 French penal code).

The infraction of negligence on duty could have as correspondent the infraction provided in the new penal French code under art. 413-10, section II ("Attempts to the national defence secrecy"), Chapter III, Title I ("Attempts against the fundamental interests of the nation"), Book IV. The infraction consists of the deed committed by any person depositary, by means of the state, profession, function or a temporary or permanent mission, of a piece of information, procedure, object, document, file that represent a secrecy regarding the state defence to destroy, abstract, missappropriate or reproduce it or to disclose it to the public or to any unqualified person. The infraction also consists of the deed of a depositary person to let destroy, missappropriate, abstract, reproduce or disclose the information, procedure, object, document, file referred to in the previous paragraph. The deed can be committed by fault, in the form of intention or guilt. Obviously, besides the existence of the guilt, the deed must be of such nature so as to affect state interests.

3. Exempli gratia, there will be defined and presented some abuse and corruption acts provided in the new French Penal code.

According to art.432-1 French penal code, it constitutes abuse against the administration itself the deed of a person exercising public authority to take measures destined to fail the execution of the law, during the exercise of his

function[100], and, according to art. 432-3 French penal code, it constitutes infraction the deed of a person exercising public authority or commissioned with a public service mission or invested with a public elective mandate, informed on the decision or the circumstances of his function's termination, to continue to exert his attributions[101]. Article 432-3 French penal code is applied, for example, to the police commissary who continues to exercise his function after having been declared available, and this measure has been communicated to him; elected civil servants that continue to exercise their attributions after having been replaced, without being necessary for them to have been revoked, suspended, legally removed. [102]

According to art.432-7 French penal code, it constitutes infraction the discrimination – defined in art. 225-1, committed against an physical or moral (juridical) person by a person exercising public authority or commissioned with a public service mission, when exercising his function or on the occasion of exercising his functions or missions, (…), when the deed consists of:

1. the refusal to award the benefit of a right provided by law;
2. the limitation of the normal exercise of an economical activity.[103]

It constitutes discrimination, according to art. 225-1 French penal code, any distinction made between physical persons based on origin, sex, social status, health, handicap, mores, political opinions, union activities, true or assumed ethnic affiliation of non-affiliation, nation, race, determined religion. It also constitutes discrimination according to art. 225-1, paragraph 2 French penal code, any distinction made between moral (juridical) persons based on origin, sex, social status, health, handicap, mores, political opinions, union activity, true or assumed ethnic affiliation of non-affiliation, nation, race, determined religion of members or of certain members of these moral persons.

The provisions of art.432-7 French penal code are not applicable when the deeds referred to in the article are according to the Government directives, taken depending on its economical and commercial policy or by applying its international commitments[104]. The jurisprudence shows that it does not constitute religion based discrimination the expell of two pupils in a schooling institution on the grounds of

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[100] Art.432-1 French penal code :''Le fait, par une personne dépositaire de l'autorité publique agissant dans l'exercice des ses fonctions, de prendre de mésures destinées à faire échéc à l'exécution de la loi (…)''(Frech in the original).

[101] Art.432-3 French penal code :''le fait, par une personne déposiatire de l'autorité publique ou chargée d'une mission de service public ou par une personne investie d'un mandat electif public, ayant été officiellement informée de la decision ou de la circonstance mettant fin à ses fonctions, de continuer à les exercer(…)''(Frech in the original).

[102] *Nouveau Code pénale*, ancien code pénale, Dalloz, 1997-1998, page 537.

[103] Art. 432-7 French penal code ''La discrimination definie à l'article225-1, commise à l'égard d'une personne physique ou morale par une personne dépositaire de l'autorité pubplique ou chargée d'une mission de service public, dans l'exercice de ses fonctions ou de sa mission, est punie d'une activité economique quelconque.''(Frech in the original).

[104] *Code pénale*, Dalloz, 1997-1998, 2006, page 540, mentioning art.32-III of Law no.77-574 of 7th of June 1977, modified through Law no. 92-1336 of 16th of December 1992.

their religious propagandistic attitude contrary to the laic constitutional principles and of their infrigement of interior regulations[105].

The passive corruption and the traffic of influence are incriminated in a single article that constitutes part of section III ("infrigement of the probity obligation"). According to art.432-11 French penal code, it constitutes infraction the deed of a person exercising public authority, commissioned with a public service mission, to unrightfully claim (request) or accept, directly or indirectly, offers, promises, gifts, benefits or advantages of any nature:

1. so as to commit or not to commit an act that enters into the attributions of his function, mission or mandate or an act facilitated by his function, mission or mandate;
2. so as to abuse his real or assumed influence, in order to obtain from an authority or from public administration distinctions, jobs, transactions or any other favorable decision[106].

In Frech jurisprudence, it has been decided that it is equally a constitutive element the promise to have sexual relations in order to retain the application of art. 432-11 French penal code[107], but the act of requesting subjective advantages, consisting of the "termination of resentments, of hatred" is not assimilated to the requests for offers, promises, goods (gifts) or other benefits[108]. It constitutes, according to art. 432-11 French penal code, a civil servant's infraction of passive corruption (corrupt practices) the deed of a Ministry of Reconstruction's agent, for example, to request and receive goods from the distressed in order to control files and to redirect them to the fund ordering department; the deed of a tax inspector to promise to delay the expertise, in exchange for benefits, no matter the party requesting it, considering that this "deed" enters in his attributions; the deed of an agent in the architecture department of a city to request and receive gifts from a contractor, in order to approve the construction awarding projects and in order to "attenuate" control; it does not constitute corrupt practice the act of a police commissary in favour of an individual presented as informer, the moment the corruptibility is revealed through univocal acts. [109]

The expression "favorable decision" used in the text from art.432-1 French penal code must be understood in the broader sense and applied to all deeds which,

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[105] Idem page 540.

[106] Art.432-11 French penal code:''Est puni […] le fait, par une personne dépositaire de l'autorité publique, chargée d'une mission de service public, ou invetie d'un mandat electif public, de solliciter ou d'agréer, sans droit directement ou indirectement, des offres, ds promesses, des dons, des présents ou des avantages quelconques :1 soit pour accomlpir ou s'abstenir d'accmplir un acte de sa fonction, de sa mission ou de son mandat ou facilité par sa fonction, a mission ou son mandat ; 2 soit pour abuser de son influénce réelle ou supposée en vue de faire obtenir d'une autorité ou d'un autorité ou d'une administration publique des distinctions, des emplois, de marches ou toute autre décision favorable.''(French in the original).

[107] *Code pénale*, Dalloz, 1997-1998, page 546.

[108] Idem page 546.

[109] Idem page 546.

instead of being obtained through legitimate means, are obtained through guilty influence. [110]

It constitutes infraction of traffic of influence, provided in art. 432-11, paragraph 2, French penal code, the deed of a commune agent to inform on some construction demands, by means of his function and relations, being able to obtain the permits which will be requested, to determine the persons to trust he will elaborate the plans and the bill of quantities in order to constitute de file and to claim various amounts of money as remuneration for his effort[111]. The existence of the traffic of influence infraction is given by the fact that the beneficiary of the gifts or of the benefits must be considered or be present as an intermediary of the real or assumed influence, of such nature so as to obtain a favour of any sort or a favorable decision of a public authority or of an administration; a contrario, passive corruption, as infraction, is retained for the public servant receiving the goods or the benefits in order to personally execute the act by means of his function – legal or illegal act. [112]

4. Chapter III concerns attempts against public administration committed by private persons. The chapter consists of eleven sections, entitled as follows: Active corruption and traffic of influence committed by private persons (section I), intimidation acts committed against persons exercising a public function (section II), abstraction and missappropriation of goods from a public warehouse (section III), assault (section IV), rebellion (section V), opposition to the execution of public works (section VI), usurpation of functions (section VII) referring to the involvement in a public function and to acts of nature to cause confusion about a public function, usurpation of signs reserved to public authorities (section VIII), usurpation of titles (section IX), illegitimate use of the quality (section X), attempts to the persons' civil status (section XI) concerning the non compliance with the civil acquired name, bigamy, celebration of religious matrimony before the civil one and attempts to funeral freedom.

As resulted from the above, the majority of infractions shown as a correspondent in the Romanian penal code, the penal acts incriminated under Title V – Infractions against authorities. Besides these, infractions included in other chapters are stipulated, such as active corruption (corrupt practices) and traffic of influence or bigamy (art. 303 Romanian penal code) – chapter I ("Infractions against family"), Title IX Penal Code – special part. Moreover, the French lawgiver incriminated acts that have no correspondent in the Romanian penal code as distinctive incriminations, but these could be included in law text provided in the Romanian penal code or in special laws.

For example, the infraction provided in art.238 penal code (offense against authority), currently abrogated through art. I, point 3 of G.U.O. no. 58/2002, represented essentially the infraction provided in art. 433-3, French penal code (incrimination acts committed against persons exercising public functions), assault

[110] Idem page 549.
[111] *Nouveau Code pénale*.
[112] Idem page 549.

(art. 239 Romanian penal code) is the same in both law texts (art. 433-5 French penal code). Function usurpation acts (art. 433-12 and 433-13 French penal code) are usurpation of official qualities acts (art.240 Romanian penal code). Moreover, the French lawgiver makes a regulation distinction by providing two function usurpation infractions, one referring to the deed of the person who, acting without a title, interferes in the exercise of a function, by fulfilling an act reserved to the titulary of function, and the second to the deed of the person to exert an activity in conditions of such nature so as to create in the public conscience a confusion connected to a public function exercise or to an activity reserved to public or ministerial officers or to make use of documents and acts presenting a ressemblance of such nature so as to create confusion in the public conscience. Also, usurpation of signs reserved to public authority (art. 433-14, art. 433-15, art. 433-16 French penal code) has as correspondent, grosso modo, the infraction provided in art.241, Romanian penal code (illegally bearing of decorations or distinctive signs). Moreover, in the new French penal code, the title usurpation infractions (art. 433-17, French penal code) and the illegal use of quality (art. 433-18, French penal code) are provided. The infraction of illegal use of quality consists of the deed of a founder to make appear or to let appear during a publicity activity organized for the interest of his company the name and quality of a former or current member of the Government, Parliament, European Parliament, Constitutional Council, State Council, Economical and Social Council, Superior Magistracy Council, Court of Cassation, Court of Accounts, Frech Institute, Directory council of the French National Bank, the name and function of a former or current magistrate, of a former or current civil servant, of a former or current public or ministerial officer etc.

Moreover, the French penal code provides in this chapter infractions that have correspondent in the Romanian penal code. It is the case of rebellion, provided and punished by art. 433-6, 433-7, 433-8, French penal code, consisting of – by comparison with the assault – the deed to oppose violent resistance to a person exercising public authority or commissioned with a public service mission, in the exercise of his functions, implying the execution of laws, public authority's orders, decision or justice mandates. Up to a certain point and with some limitations, the act ressembles to the infraction of non compliance to court decisions (art. 271 Romanian penal code). The infraction of opposition to public works execution is also provided (art. 433-11, French penal code). "Public works" is understood as authorized works, not only those executed for the French state, but also, in equal measure, those performed for a department, given that the execution was provided by the prefectorial authority[113]. The French lawgiver also incriminates attempts to the civil status of a person through art.433-19, art.433-20, art.433-21, art. 433-21-1, French penal code, consisting either of the deed of the person who, through a public or authentic act or through a administrative document aimed for the public authority uses a name other than the one had or acquired or by

[113] *Code pénale*, Dalloz, 1997-1998,2006, page 571.

changing it alterates or modifies the name detained through his civil status (art. 433-19 French penal code), or through the religious ceremony of marriage, anterior to the civil one (art. 433-210), or in the deed of a person giving the funeral a character contrary to the will of the defunet or to a judiciary decision, by knowing the will or the judiciary decision (art. 433-21-1 French penal code).

In the French lawgiver's conception, the corruption infractions, such as abuse, are not penal acts that affect job relations, but the authorities of the state, the job relation not being important, but the quality of the person involved, in one way or the other, in commiting the infraction and also the fact that, through committing certain deeds, the state authorities are damaged directly or indirectly.

5. This is also the situation of the active corruption and traffic of influence infractions committed by private persons, infractions provided in section I of chapter III.

According to art.433-1 French penal code, it constitutes infraction the deed of a person to unrightfully propose, directly or indirectly, offers, promises, gifts, benefits or advantages of any nature in order to obtain from a person exercising public authority, commissioned with a public service mission or invested with a public elective mandate:

1. to commit or not to commit an act by means of his function, mission or mandate or an act facilitated by his function, mission or madate;
2. to abuse his real or assumed influence in order to obtain distinctions, jobs, advantages or any favorable decision from a public authority or from a public administration.

According to paragraph 2 of art.433-1 French penal code, it constitutes infraction the deed of a person who gives in to a person exercising public authority, commissioned with a public service mission or invested with a public elective mandate, that unrightully requests, directly or indirectly, offers, promises, gifts, benefits or other advantages of any nature in order to fulfill or not to fulfill an act provided in point 1 or to abuse his influence under the conditions shown at point 2.[114]

The Romanian penal code does not make the distinction between corruption offers in terms of direction – whether the offering, promise, giving of money or other benefits to a civil servant or the traffic of influence is the result of the briber's or the influence trafficker's will or of the servant's will – as proceeded by the French lawgiver. Moreover, in the case of the traffic of influence, if the civil servant acts through an intermediary and claims influence, money or other benefits from a person in order to fulfill or not to fulfill an act entering in his job

[114] Art.433-1 French penal code :''Est puni[…] le fait proposr, sans droit, directement ou indirctement, des offres, des promesse, des dons, des présentts ou desavantages quelques pour obtenir d'une personne dépositaire de l'autoritée publique, chargée d'une mission de service public ou investie d'un madat electif public : 1.Soit qu'elle accomplisse ou s'abstienne d'accomplir un act de sa fonction, de sa mission ou de son ou supposée en vue de faire obtenir d'une autorité ou d'une administration publique des distinctions, des emplois, des marchés ou toute autre decision favorable.

attributions, he will not be charged for the infraction provided at art. 257 penal code, but for corrupt practices (art. 254 penal code), and the intermediary will answer, as the case may be, for complicity or instigation to the corrupt practices infraction.

Corruption results of offers, promises, goods or other benefits, made with the intention to corrupt, no matter whether these are object to verbal of written proposals[115]. The infraction is consumed when the one doing it has made use of means provided by law in order to reach the goal indicated by it; for example, offering an amount of money does not constitute an unpunishable attempt, but an active corruption infraction[116].

In what the active corruption is concerned, it is not important whether the corruption offer has succeeded or not, in the sense that the civil servant has been corrupted or not, these circumstances being used for characterizing the infraction of active corruption.[117]

The active corruption infraction has been charged on the defendant who offered a certain amount of money to some police inspectors so they wouldn't elaborate a penal file or they would release him after arrest.[118] The person who, caught by a peace officer when committing the infraction of assault against good mores[119], gives in to the officer's wish to have sexual relations with him, so he wouldn't elaborate a minute[120], commits the active corruption infraction on a civil servant.

It constitutes infraction in a more attenuated form and less severely punished the deed of any person who claims or accepts, directly or indirectly, offers, promises, gifts, benefits or any other advantages of nature to abuse his real or assumed influence, in order to obtain distinctions, jobs, advantages or any other favorable decision from a public authorithy or a public administration, as well as the deed of any person to give in to the requests provided in the previous paragraph or to unrightfully claim, directly or indirectly, offers, promises, gifts, benefits or other advantages of any nature so as a person would abuse his real or assumed influence in order to obtain distinctions, advantages or other favorable decisions from public authorities[121] (art. 433-2 French penal code).

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[115] *Code pénale*, Dalloz, 1997-1998, page 559.
[116] Idem page 560.
[117] Idem page 560.
[118] *Code pénale*, Dalloz, 1997-1998, page 560.
[119] L'oultrage public à la pudeur (French in the original).
[120] *Code pénale*, Dalloz, 1997-1998, page 560.
[121] Art.433-2 French penal code:''Est puni[…] le fait, par quiconque, de solliciter ou d'agréer directement ou indirectement, des offres, des promesses, des dons, des présentes ou des avantages quelconque pour abuser de son influénce réele ou supposée en vue de faire obtenir d'une autorité ou d'une administration publique des distinctions, des emplois, des marchés ou toute autre décision favorable. Est puni des mêmes peines le fait de céder aux sollicitations prevues à l'alinea précédent, ou de proposer, sans droit, directment ou indirectement, des offres, des promesses, des dons, des présents ou des avantages quelconques pur qu'une personne abuse de son influénce rêele ou supposée en vue de faire obtenir d'une autorité ou d'une administration publique, des distinctions, des emplois, des marchés ou toute autre décision favorable.''(French in the original).

Through the incrimination at art.433-2 French penal code, the infraction of traffic of influence provided in art.433-1 of paragraph 1 point 1 and paragraph 2 French penal code is actually performed, in the ways indicated by law, with the single mentioning that the requests do not address to civil servants and the giving in does not happen at a servant's request, but to any person. In this way, the French lawgiver defends social relations born in connection to public authority that can be indirectly breached in this manner, not having in mind a person exercising state authority, commissioned with a public service mission or invested with a public elective mandate.

TAX PARADISES – THE COVER-UP FOR „LEGAL" TAX DODGINGAND MONEY LAUNDERING.THE SWITZERLAND CASE

Candidate to Ph. D lecturer **Angelica Chirilă**
University "Danubius"of Galați

Lawyer Galati Bar Candidate to
Ph. D assistent **Alina ŞOOŞ**
University "Danubius"of Galați

Abstract:

A country which does not collect taxes or in which taxes are cut down, for just some or may be for all the categories of goods, a country in which there a high level of bank and commercial secret, minimal requests from the part of the central bank and lack of restrictions on the exchange value, such a country represents a tax paradise.

The tax dodger will make use of the tax paradise in his attempt to make more complicated his action of archiving the undeclared income, of studying the fund wave and of destroying the defence by referring to the non-taxable fund sources.

The tax paradises are used in order to give birth to some apparently legal documents, documents which are of use to the tax dodger when proving, in case of an administrative control, the continuous activity of the society set up in the fiscal paradise, although these documents are just formally made up.

The lack of whatever value and bank control, as well as the absolute anonymity, give to the collectors the opportunity to transfer the cash from the country of origin into banks from a tax paradise. After the entering into the offshore banks, the money circulates freely all over the world.

Both deposits and withdrawals from a fund accompanied by some enclosed papers which prove the legal origin of the cash are eased up by the lack of control over the cash.

Key words: tax paradise**,** tax dodging, money laundering.

A country which does not collect taxes or in which taxes are cut down, for just some or may be for all the categories of goods, a country in which there a high level of bank and commercial secret, minimal requests from the part of the central

bank and lack of restrictions on the exchange value, such a country represents a tax paradise.[122]

The tax paradises are characterized by:

- Reduced taxes. The tax paradises practice a reduced level of taxes, this kind of action being part of their politic of attracting money from outside the country and also foreign economic and financial corporations[123];
- Bank secret. In this kind of countries the bank and commercial information are protected, this protection being assured even if a law was broken;
- the relative importance of the bank activity. The bank activity from the tax paradises represents the main attraction for citizens who are not residents for this reason have to pay a symbolical tax and whose bank operations are not checked, etc;
- the promotional publicity, many of the tax paradises have at their disposal a high tech communication network, phone and TV services, a network who offers the opportunity to be in contact with the most important countries from which come the deposited funds or, with the countries towards which go the financial waves;
- the lack of control over the money. Inside the tax paradises, only the residents have to pass through a money and exchange control, the non-residents being left alone.

These characteristics of the tax paradise make it attractive to tax dodgers and money launders.

The tax dodger will make use of the tax paradise in his attempt to make more complicated his action of archiving the undeclared income, of studying the fund wave and of destroying the defence by referring to the non-taxable fund sources.

The tax paradises are used in order to give birth to some apparently legal documents, documents which are of use to the tax dodger when proving, in case of an administrative control, the continuous activity of the society set up in the fiscal paradise, although these documents are just formally made up.

The apparently legal documents are also used to show the firm's solvency in case that it will be involved in commercial or bank relations with organisms outside the tax paradises and in which these were registered.

The tax paradises are used also for another type of activities than taxes, for example the secret of a fiscal paradise may be used as proof in divorce cases, partition and inheritance.

Moreover, we may exemplify the case in which the branch of a bank is registered in a fiscal paradise in order to avoid the requests regarding the minimal reserve compulsory in the country of origin.

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[122] Stefan Popa, Adrian Cucu, *Underground Economy and Money Laundering,* Expert Publishing House, Bucharest, 2000, page 41.

[123] Voicu Costica, Alexandru Boroi, *Business Criminal Law,* C.H. Beck Publishing House, Bucharest, 2006, page 177.

Switzerland is the country in which it is very easy to bring in illicit funds in a bank by using, extremely strict, the professional secret.

The Swiss banking system is very old and preferment, having at its disposal branches all over the world.

The aspect which makes the Swiss banking system attractive regards the structure and the integrity of the bankers, their reputation inside international financial community, the wide range of services put at their clients' disposal, the possibility offered to the depositors to convert their money reserves in Swiss francs or in other money in order to cover up the inflation or depreciation risks, lack of control over the operations and also the lack of regulation or state intervention in the activities of the bank, as well as a special political stability.

The bank secret is safe. The banking system is the most developed from the world, the sums being estimated at about 615 billions USD in banking deposits and 1715 billions USD in investment instruments.

The fund collectors are attracted by the tax paradises because, as we mentioned before, these paradises assure the secret over the transactions so that a manager of a society registered in such a paradise will not be linked to the fund wave.

The lack of whatever value and bank control, as well as the absolute anonymity, give to the collectors the opportunity to transfer the cash from the country of origin into banks from a tax paradise. After the entering into the offshore banks, the money circulates freely all over the world.

Both deposits and withdrawals from a fund accompanied by some enclosed papers which prove the legal origin of the cash are eased up by the lack of control over the cash.

An aspect that is characteristic to Switzerland is the obligation imposed to the local companies and that is referring to the fact of not undertaking any kind of activity related to the banking system, investment funds, insurance and reinsurance.

In Switzerland, tax dodging is considered to be an infringement of the civil law. There are societies of limited responsibility and action societies (the disclosure of the managers is forbidden).

In what concerns the fight against money laundering, the Swiss judicial system deserves a special attention.

The fame of the Swiss bankers and the stability of the country made that the Swiss banking system earns an excellent fame and the trust of its clients.

Moreover, the conditions in which this system was exploited by the translational criminal organizations were excellent.

The Swiss solutions became a model for all the others European countries.[124]

Switzerland has today an entire system of provisions meant to counteract and fight against laundering dirty money, provisions which establish how to

[124] Graham, Saltmersh, *Money laundering in Central and Western Europe*, The emergence of organized crime in the financial and business sector, Praga, 1994, page 26.

proceed and define the scale of obligations for the banks' scrupulosity. This system comprises:

Art.305bis from the Swiss Penal Code punishes the carrying out, with knowledge, of transactions concerning money laundering, as being a felony.

The action of laundering dirty money, but with no intention, is not punished, but the prohibition referring to such an attitude results undoubtedly from the Banking Law (art. 3, paragraph 2, letter c), this interdiction being a sine qua non condition for the activity of the leading team of the bank, eventually of the bank itself.

Art.305 from the Swiss Penal Code punishes any person who professionally accepts, keeps on deposit, manages or transfers assets, contrary to the provisions referring to the bank's scrupulosity.

The Agreement from July 1987 concerning the compulsory professional rules, agreement signed between the Swiss Bankers Union and the other Swiss banks and it establishes aspects regarding the identification of some persons suspected of using banks for money laundering, for undertaking operations covering fraudulent actions, the persons who have to investigate and look into the suspect cases.

The special circular of the Federal Banking Commission from 6thApril 1990 referring to establishing the identity of the persons who have administrative prerogatives and to the interdiction endorsing the application of the so-called B formulary.

The Directives of the Federal Banking Commission from 6th April 1990 regarding the provisions in the field of qualified commerce with banknotes inside the banks refers only to the more important banks which have developed activities in this field.

The Directives of the Federal Banking Commission from 18th December 1991 regarding the counteracting and fighting against the laundering of dirty money, document which came into force since 1st May 1992.

The project of modification of the Swiss Penal Code contains provisions like: the punishment for participation in a criminal organization will be the seizure, the recognition of the bank officers' right to give to the tracking officers' information regarding their professional activity, as well as to establish the criminal responsibility of the institution. The last two provisions endorse also the banks. The consequences, rather tough, will be the result, first of all, of the sanctions proposed to the concerns in case of a malfeasance. These consequences could start from the obligation to pay a large sum of money, the prohibition to develop – on a certain period of time or not – some concrete activity and arrive up to the bringing the guilty ones in front of the justice[125].

An important step made at the Swiss banking-administrative level in the 70ies, that endorsed the contract of the cleaning up dirty money phenomenon, was

[125] Voicu Costica, cited paper work, page 139.

the „deal" from July the 1st, 1987. This agreement was signed between the Swiss Bankers Union and the Swiss National Bank.

One of the agreement's main objectives was to combat the abuses made when talking about banking secrecy, in view of keeping the fame of the Swiss banking system.

In this way, when starting to do a financial transaction, we have to strictly establish the identity of the bank customer, the provisions in the second article from the agreement stating that "the banks are obliged to identify the parties of the agreement if there is to establish a certain financial relation". This aspect endorses mainly:

- opening accounts and safe deposits;
- carrying out some confidential activities;
- renting safe deposit boxes;
- transactions made over the counter, if the a transaction exceeds 100000 francs, especially transactions made with cash, as: exchange value, selling or buying noble metals, paying cheques, etc.

The identity of the physical persons is checked during a preliminary face to face talk, and the presenting of some official identity cards. When someone wants to open a deposit account through correspondence, the provisions in force make some difference between the customers who live in Switzerland and the ones who live abroad.

The customers from abroad have to authenticate their signatures, and for the business customers and the associates, the checking of the identity is made through the cross-examination of what appears as registered in the institutions' register, or if we talk about associations, foundations, etc their statutes are checked. The same procedure is to be put into practice for some foreign societies.

In view of counteracting the anonymity in business, the text of the agreement contains the denomination of person empowered economically, which replaced the term of real empowered. The provisions contained by the third article from the agreement, which settled the naming of the person empowered economically, stipulates that when opening an account, a deposit or even at the beginning of the confidential transaction there are doubts concerning the identity of the person who is engaged in an agreement with the person empowered economically, the banks have to ask to the person empowered a written statement - the person is empowered economically, and if not the bank has to find out who that person is.

This kind of declarations are the so-called A form.

Beyond doubt, when establishing the identity of the subjects empowered economically the rules of the desirable secrecy have to operate for each particular case. The bank starts from the assumption that the contractual party is the same person as the person empowered economically but, in some special cases, of course the bank gives this idea up. Doubts also appear when the bank observes aspects, like the following:

- the person empowered, it is obviously not in good relationship with the

contractual party;

- from the information the bank has, concerning the financial statute of the person who wants to open an account, a deposit etc., it results that the transferred goods or brought to be checked exceed the person's financial possibilities;
- the opening of an account, through correspondence, by a person who lives abroad, who has presented an authenticated signature to the bank, but who is still a stranger to the bank;
- other special cases, which appear from the contract signed up with a customer. If the contractual party says that a third person is empowered economically, the bank has the obligation to identify his/her name, surname, address and country where he/she lives, eventually check the company, its address and the country where it has the permanent seat.

In case of serious doubts regarding the authenticity of the customer's written declaration, which cannot be eluded by giving another declaration, the bank has to stop the closing of the transaction the customer wanted to do.

The banks have always the possibility to elaborate their own forms, corresponding to some specific needs. These documents have to contain the entire text of the model form; nevertheless, the bank are not allowed to diminish or simplify the observation in the text that refers to the exceptions – foreseen by the legal provisions – concerning the banking secrecy, compulsory for the leading bodies of the banks and for the officers. The banks have to assert their customers the control over the decisions taken by the persons empowered economically through their organism of internal audit and through other similar organisms.

From the principle according to which the bank has to know the owner of the deposited goods, it was established an exception that refers to the persons obliges to keep the professional secret, protected by law.

In Switzerland, this obligation falls back on the lawyers or notary public and in this way, the above mentioned agreement from July 1987, by applying analogy principles to the members – registered – of some institutions like: the Confidential Room, Swiss Institute of Chartered Accountants.

The Swiss Bankers Association gives to the banks a list with the members of these units, the banks having just the possibility to check, every time, if a certain account administrator is a member of the association.

As regards the persons who have the obligation to keep the professional secret, the bank is obliged just to obtain, through out the B form, a declaration according to which the identity of the person empowered economically is known and that nothing betrays – after a careful check up of the circumstances in which the transaction was made – an activity developed in view of abusing of the banking secrecy.

There are two types of B form. There is form B1 – for the lawyers and the notary public who lives in Switzerland – and form B2 – for the confidants and for the Swiss goods administrators. The B form and the A form, mentioned above, may be presented in different languages (German, French, Spanish, English and Italian).

An essential element of the text that appears in both versions of the B form is the declaration according to which:

- the subject who signs it acts according to his/hers own professional obligations;
- the mandate given does not have temporary character;
- the main goal of the mandate is not to keep secret the identity of the person empowered economically when in connection with the bank.

If the person obliged to keep the professional secret is a judicial person or an association (society), the form will be signed in the company's name, in case the subject the bank is interested in is a worker or he/she makes part of the leading bodies of the bank, he cannot present to the bank the B form, he will only present the A form.

According to the information received from the Federal Banking Commission, in 1989, 30344 B forms were prepared, the banks being in the position that until 1992 – to replace these documents with A forms or with written declarations – both forms producing the same consequences – of the parties from the sealed conventions and that referred to the identity of the person empowered economically.

THE DOCTRINARIAN CHARACTERIZATION OF DECEPTION IN CONVENTIONS

Candidate to Ph.D
Andreea Cimpoeru

Abstract:

Through the expression ''with the opportunity of concluding'' it is understood the whole period that would pass from the beginning of the negotiations and till the establishment of the agreement; and through ''with the opportunity of the execution'' it is understood the whole period in which the contractual obligations are found in the situation of accomplishment until the final performance. For the existence of the infringement deception it is sufficient that in this variant the delusion has been accomplished in one of the two opportunities

The action of cheating to determine those deluded to conclude or to execute the contract in the conditions stipulated, that is in the conditions that otherwise wouldn't have been accepted and which created a damaging situation for the passive subject.

In conclusion, the special variant of the deception in conventions defined by art. 215 par. 3 Penal Code is submitted to some hot criticism, but at least until this moment, it is considered as being suitable to the requirements of alignment to the constitutional principles.

Key words: deception, conventions, negotiations.

The first special variant [art.215 par. (3)C.pen.] has all the essential common elements with those of the deception variant type to which there are introduced some specific conditions. [126]

So, the first condition is that the delusion must be produced with'' the opportunity of ending or execution a contract''. The contract must concern the patrimony of the deluded person. The object of the contract and its character does not present any interest, sufficiently that through it there are or there have been taken commitments of patrimonial order[2.] .

Through the expression ''with the opportunity of concluding'' it is understood the whole period that would pass from the beginning of the negotiations and till the establishment of the agreement; and through ''with the opportunity of the execution'' it is understood the whole period in which the contractual obligations are found in the situation of accomplishment until the final

[126] I. Pascu, M. Gorunescu, Penal Law, special edition, Harmangiu Publishing, Bucharest, 2008, page 282
[2] Al. Boroi, pag.quote pag.238

performance. For the existence of the infringement deception it is sufficient that in this variant the delusion has been accomplished in one of the two opportunities[3] .

The second condition is that the delusion has been produced in such a way that without that error the deceived person wouldn't have concluded or would not have executed the contract in the stipulated conditions, that is, the cheating could have been decisive for the mislead person (causa dans contractui) [4] . If without the delusion the contract still had been concluded or executed the notion of deception wouldn't have existed, even if one of the parties realized subsequently that it would suffer after that contract.

The action of cheating to determine those deluded to conclude or to execute the contract in the conditions stipulated, that is in the conditions that otherwise wouldn't have been accepted and which created a damaging situation for the passive subject.

The action to be accomplished with intention[5] - it is a general condition that has in view the subjective side of the infringement of deception, but receives special tints to the variant from parag.3 of the art. 215C.pen. because a simple failure of a single obligation that results from a contract doesn't represent an infringement, and it can be situated on the domain of the contractual civil responsibility to the extent in which the failure is not imputable to the person that commits it.

Concerning this special variant, there were formulated many times exceptions of unconstitutionality[6] . In motivating the exception of unconstitutionality its author advocates that the provisions of the art. 215 paragr.3 from criminal law, that incriminates a person's delusion with the opportunity of concluding or executing a contract, comes into contradiction with art.45 from the fundamental Law, concerning the free access of a person to an economic activity, because "the intrusion of the state in the economic reports between the parties is opposed to the text and to the characteristic of Constitution".

Examining the exception of unconstitutionality, the Constitutional Court realize that the economic liberty, devoted by art.45 from Constitution, claimed to be breached, assumes the liberty of any person to initiate and undertake an activity with lucrative purpose in the conditions of the law, and not the exercising of this right with bad-faith and the creation of prejudices to the economic partners through their delusion with the opportunity of concluding some judicial documents. The last ones are facts that enter the unlawful sphere and they aren't an expression of the economic liberty.

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[3] V.Dongoroz, Theoretical Explanations vol.III, page quote, page 529

[4] Appeal Court Bucharest, sect.I-a pen.dec.1156/1998, RDP no. 1/2001, page 143

[5] V. Dongoroz and col.Deceptions against the community's wealth, Academic Publ. 1963, Bucharest, page 302

[6] Constitutional Court, decision No. 173/1999 (Off. Gazette of Romania, I part, no. 624/1999), no. 215/2005(Off. Gazette of Romania, I part, no. 478 from June 7 2005), no. 403 /2006 (Off. Gazette of Romania, I part, no. 526/2006), no. 999/2007 (Off. Gazette of Romania, I part, no.853 from December 12 2007).

As such, the Court didn't retain the critique of unconstitutionality according to which the provisions from the art.215 par.3 from criminal law, concerning the infringement of delusion, are contrary to the provisions of art.45 from Constitution.

Otherwise, the criticized text of law constituted many times the object of the control of constitutionality, and the Court for exposed arguments rejected every time the exception of unconstitutionality and realized that the provisions of art. 215, par.3 from criminal law is constitutional.

In such case, the Court retained that the deception, in any of its variants, is a deception against the patrimony, realizing that the deception of confidence of the participants to the patrimonial judicial reports, situation that is absolutely intolerable within their framework. In all systems of law the deception or the fraud is an incriminated action and is severely punished. In this way, the criticized legal provisions, that regulate this infringement, not only that they don't bring economic freedom, but, on the contrary, they assure the exercising of the free initiative in the conditions of the law, their purpose being that of protecting those that are exercising with good-faith the rights and the economic, commercial liberties, inclusively the contractual ones[7].

Because the text from the art. 215 from criminal law offers sufficient signs and elements so that the person to whom it is addressed to understand what are the incriminating facts by the legislator, it cannot be retained either the critique formulated according with the provisions of art.7 from the Convention for the protection of human rights and of fundamental liberties, concerning the incrimination legality. The presence in the content of the criticized penal norms of some notion as: "error", "false actions" etc., indicated in exception as being too "vague" and of "excessive generality", don't determine a lack of predictability of the judicial norm, the material element of the objective side of the offence of deception, in all its variants, being clearly circumstantiated by the legislator. Moreover, the European Court of Human Rights claimed in many causes, including that of Hertel against the Switzerland, 1998, and Reckveny against Hungary, 1999, that the predictability of the Law doesn't necessary be accompanied sometimes by an excessive stiffness, or the right must know to adapt to the changes of situation. Also, in the case of Sunday Times against the United Kingdom of Great Britain and of North Ireland, 1979, the Court from Strasbourg retained that there are many laws that profit, by the force of things, of formula more or less vague whose interpretation and application depend on practice.

In another situation[8], in the formulating of the exception it was proved that the criticized legal provisions are unconstitutional, because through the incrimination of some facts that are concerned with the commercial activity a penal punishment is established which ignore the liberty of commerce and the contractual liberty, in the conditions in which an eventual contractual error or the non-fulfillment of a contractual obligation can be punished only in a civil matter. In

[7] Decision no. 403/2006, in the Off. Gazette of Romania, I part, no. 526/2006.
[8] Decision no. 215/2005, in the Off. Gazette of Romania, I part, no. 478/2005.

such a situation, the application of some penal punishments contravenes to the provisions from art.1 of the Protocol no. 4 additionally to the Convention for the protection of the rights of human and of fundamental liberties, concerning the prohibition of privation of liberty of a person for the single reason that it is not capable to execute a contractual obligation.

Examining the exception of unconstitutionality, the Court retained that the par. 3, as well as par.4 of the art. 215 from the criminal law incriminates the deception that a serious antisocial fact against the patrimony, consisting in the deception of the confidence of the participants to the patrimonial judicial reports, an intolerably situation for these. Moreover, in all the systems of law the deception or the fraud is an incriminating action and severely punished.

Concerning the breach of the constitutional provisions of the article 45 relating to the economic Liberty and of the article135, paragraph (2) letter a) concerning the insurance by the Romanian state of the commerce liberty, the Court retained that, as it results from the content of the criticized text, the material element of the infringement of deception has a allowed action and, respectively, an omission that leads the contractor into a determined confusion to the concluding or executing of the document. If the error hadn't existed, the contract wouldn't have been concluded or executed in those conditions. Therefore, the infringement of deception cannot be confounded with the non-fulfillment of a contractual obligation. For this reason, the invocation of the specified constitutional provisions, as well as those of art. 11 from the International Agreement concerning the civil and political rights, concerning the interdiction of the penal punishment of the non-performance of contractual obligation, were considered totally impertinent.

In conclusion, the special variant of the deception in conventions defined by art. 215 par.3 Penal Code is submitted to some hot criticism, but at least until this moment, it is considered as being suitable to the requirements of alignment to the constitutional principles.

Aspects of jurisprudence concerning the deception in conventions:

1. High Court of Cassation and Justice[9] decided that the obtaining of a credit for the insurance of some activities of the beneficiary commercial society and the immediate filling of money by the administrator into an account to the bearer with a higher interest, in his own benefit, followed by the returning of the loan only through execution over the goods that were guaranteed, constitutes the infringement of deception in conventions provided in art. 215 par. 3 C. pen.

It was noted that the defendant borrow the amount of 1.600.000.000 lei from the bank to procure goods and to straighten financially the commercial society where he was administrator. Although he has the obligation of respecting the declared destination of the contracted credits, in the second day after he received the loan, the defendant, issued a payment order through which he

[9] ICCJ, sect.pen., decision No. 2801/2002, www.scj.ro

transferred the amount of 1.400.000.000 lei from the society's account in the account of another where the defendant was also a shareholder and administrator, in the bearer's deposit with an interest of 45% per year during 3 months.

The solution had in view the fact that the defendant obtained the credit for financing the activity of the commercial society, although in reality, he was interested in a benefit for his own by changing the destination of the credit, transferring immediately the money from an account into another, the last one being carrier of higher interests and he profited by it. The bad-faith of the defendant results in this case from the manner in which he acted, as well as from the circumstance that the recovery of the borrowed amount was made after the beginning of the penal procedures and not only through the revaluation of the warranties.

2. In another case another aspect concerning the deception through checks was discussed. In this way, the High Court decided that in the case in which it is decided the conviction of the defendant for accomplishing the infringement of deception provided by art. 215 par.4 Penal Code, but not to the false infringement, the cancellation of the used checks used in the accomplishment of the infringement is not legal[10] .

Concretely, it was retained that the defendant, the unique administrator of a commercial society, has bought from a company, on September 5, 1997, goods consisting in the amount of 54.795.896 lei and from another on September 11, 1997 goods consisting in the amount of 1.165.576 lei, and for their payment he issued to the providers checks for which he didn't have a coverage in the bank. The defendant was sent to court and accused for accomplishing an infringement against the patrimony, consisting in the emission of some checks without existing the provision or the necessary covering, and not for the emission of some fake checks, situation in which it would have been imposed the cancellation of these.

As the issued checks by the defendant are not affected by the invalidity, the prescribed measure, of their cancellation, it is ascertained to be illegal and it was eliminated as a result of the admission of the appeals.

[10] ICCJ, Penal Section, decision no. 1892/2002, www.scj.ro.

INFRINGEMENTS AGAINST THE PATRIMONY IN THE ITALIAN LEGISLATION

Candidate to Ph.D **Andreea Cimpoeru**

Abstract:

The Italian Penal Law distinguishes among the infringements against the patrimony, depending on the violence against a person, and or things, or has as a fundament the fraud.

This classification became traditionally has been took over from the Middle Age's jurists who used to make difference between the facts against patrimony committed by violence and those committed by fraud (aut vi, aut frauda delinquitur).

However, the Italian penologists have underlined however that this classification of the infringements against the patrimony doesn't include all the infringements being multiple infringements that could not be placed in any of these categories. Hence, the efforts of some authors to identify other larger classifications of infringements against patrimony.

Opinions have been expressed in the sense of inutility of any classifications, given that the permanent grow, under the modern life conditions, of the forms and methods of aggression against the patrimony.

Key words: patrimony, fraud, Italian legislation, penal law.

The Italian Penal Law distinguishes among the infringements against the patrimony, depending on the violence against a person, and or things, or has as a fundament the fraud. This classification became traditionally has been took over from the Middle Age's jurists who used to make difference between the facts against patrimony committed by violence and those committed by fraud (aut vi, aut frauda delinquent). However, the Italian penologists have underlined however that this classification of the infringements against the patrimony doesn't include all the infringements being multiple infringements that could not be placed in any of these categories. Hence, the efforts of some authors to identify other larger classifications of infringements against patrimony. Opinions have been expressed in the sense of inutility of any classifications, given that the permanent grow, under the modern life conditions, of the forms and methods of aggression against the patrimony. The argument that the purpose of the special part of the criminal law to facilitate the profound knowledge of penal law and the correct solution of disputes arising out of its interpretation has been also added , any other preoccupations ,such as those of systematization, classification of these infringements being without any

importance[127]. However, the latter idea has been remained singular, the Italian majority doctrine having a contrary opinion, in the sense that the division of these infringements against patrimony, even it does not contribute to a more profound knowledge of these infringements (it has not any dogmatic significance), is useful for didactic purposes, contributing to a more serious fixation of the notions which the legislator operates in the this matter.

Many of the Italian authors classify the infringements against patrimony into:

A. Unilateral aggression Infringements , among them are located stealing infringements (theft , robbery),abuse infringements on patrimonial assets(abuse of confidence), infringements of destruction, infringements of possession interference and abuse on other's asset; B. Infringements committed in cooperation with the victim , among whilst are found the black mail infringement, person sequestration for blackmailing , cheat, usury, and the person debility status abuse; C. Infringements of patrimonial damage making and consolidation ,among which are situated the infringement originated money hiding and recycling[128]).

From the first group of infringements, of unilateral aggression against the patrimony (infringements of stealing), make part, as already specified above, the theft which regulated in several variants (common theft, small thefts, theft from common property, theft in the military life, the theft committed to the board of the ships (by a member of the crew). We will analyze the first 3 categories of theft only, incriminations that have their center in the penal code, last two being included in special laws.

The theft, in the conception of the Italian legislation includes the following fundamental elements: the existence of a stealing of a mobile good from the detention of another, the transfer of the good in the detention of the agent, the existence of a material object (that it must be a mobile good of the other), should exist a property damage, and the agent should have been operated with specific malice, that is in the purpose of getting a profit.

As in the Romanian penal law, the theft implicates a dispossession of that that previously had the possession or the detention of the good. The Romanian penal law considers that the immediate continuation of the crime, under penal aspect, is not the patrimonial damage, but the illicit change in the situation of crime that the good used to previously had, the damage is the consequence of the civil law of the theft; if the agent gives the good back or reimburses who he had the good taken from, the infringement will subsist. The Romanian penal law ,under the subjective aspect, also pretends that it should exist a specific malice (a qualified purpose intent), but the purpose must not be getting a profit(as in the

[127] Francisco Antolisei, Manuale di diritto penale, parte speciale I, Milano, 1996, pp. 278- 281.

[128] Ferrando Mantovani, Diritto penale, Delitti contro il patrimonio con appendice di aggiornamento, CEDAM , Padova, 1994, p. 59; Giovani Fiandaca, Enzo Musco, Diritto penale, parte speciale, Zenichelli, Editore,Bologna, 1996, pp. 46,141,217.

Italian penal law), but the purpose is to unfairly appropriate the good , and in the case of a vehicle stealing, it should exist the purpose of unfairly make usage of the vehicle[129] without interesting if the agent had got or not a profit

The active subject of the infringement, according to the Italian law, can be any person; only in the case of the theft in the military life or on the board of a ship, the active subject should be qualified.

The Italian doctrine does not deal with the juridical object specific to any infringement, but only with the material object (the juridical object problematic is exhausted within the general explanations given as to the infringements against the patrimony). The material object of the theft is not only the object that the holder has in his hand or in his vicinity, that is in a sphere where he has the possibility of an immediate access, but also, if the object is found at the distance , if the subject it preserves the possibility to establish the physical contact with the good itself (for example, in the case of the forgotten things, the knowing the place where the good is found and being in measure to get it back in any moment; or in the case of the things left without overseeing ,but which are located in the sphere of immediate access of the holder (such as his/her own boat anchored to the shore, or the vehicle left ahead railroad the station to continue the trip by train, the table companion's steal of the dishes ,the steal of the house servant of the good from her landlord's house ,the steal of the commodity from the part of a customer, of books from the reading room, the steal of the gasoline from the part of the driver and so on).

Under the aspect of the material element, the theft is consumed through stealing, and the agent's dispossession as well, elements that the doctrine and jurisprudence distinctly analyze them directly, because they may exist in an autonomous way ; if both effects are not carried out, then the theft infringement does not exist.

In the conception of the Italian doctrine as compared to the Romanian doctrine, which adopted an adverse thesis, their no theft (but theft tentative), if the good continued to remain in the sphere of the holder's surveillance (for example, it is still found in the house, hidden by the agent, or it is found even on him), because in such situations the passive subject has not lost yet the material contact to the said good, and the agent has not acquired the possibility to freely dispose on the stolen good. There will be a consumed theft, if the agent, even he has not left the territory of a farm, has acquired the possibility to automate dispose of the stolen good[130]. Thus, the Italian doctrine was situated on the point of view according to which the carrying out of the theft is not estimated depending on a space material criterion, but on a personal criterion, that is the active subject should have got the possibility to dispose of a good freely, and the passive subject should be deprived of such possibility.

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[129] F. Mantovani, cited paperwork, p. 59 ; Antolisei, cited paperwork, p. 286 ; G. Fiandaca,E. Musco, cited paperwork, p. 46

[130] Vintila Dongoroz e coll.,Spiegazioni teoretiche del Codice Penale Romeno, vol.III,Editura Academiei, Bucarest, 1971, pp. 464-466.

In the Romanian doctrine ,these moments are not dealt separately, considering implicitly, that once with the stealing ,that is the change in the situation of the good, the latter is not found any more available for the person who used to previously have in his possession or detention, and it is also carried out the transfer of the good at the agent's disposal (dispossession)[131]

In such a concept, it is justified to be admitted the possibility of theft carrying out, even if that one is hidden by the agent in the house enclosure where it was previously, bringing it ,at an opportune moment , to another place. Such a position is disputable with regards to the Italian vision. According to some Italian authors, the two moments may intervene to a distance of time one from another and even in different places (for example, if the agent throws in the court or from the train the stolen things , that he will going to pick them later on). Between the two moments the voluntary desistment or the impediment of the production of the result may occur, since, up to the moment of the effective taking of the good (dispossession), the infringement has not carried out, failing to produce the result required by the law[132].

The theft is qualified, according to the Italian penal law (art.625), under the following circumstances:

a. if the agent uses violence on the things or it makes use of any other fraudulent means
b. if the agent, in order to commit a theft, enters an edifice or other place with the destination of dwelling
c. if the agent is in possession of guns ,or narcotic substances , without use them;
d. if the crime is committed with ability (pickpocket theft or tearing the object from the hand or from the victim (for example, the theft of the tie, necklace, and so on).
e. If the crime is committed by three of more persons ,or by a disguised person ,or simulating an official quality or by a person in charge with a public service
f. When the crime is committed on travelers' luggage of any vehicle, on the stairs, on the bank ,of in hotels or other places ,where food and drinks are consumed
g. If the crime is committed on things found in public units or subject to sequestration or exposed by necessity, custom or destination to the public confidence or destined to a public service , or designated to a public utility service, or for defense purpose against collectivity damaging events or for demonstration of the veneration, of the respect towards specified things;
h. If the crime is committed against three or more animals gathered in herd or on cattle, horses even not in herd;
i. If the crime is committed on guns, ammunitions, or explosive substances in arsenals or warehouses or other places designated to their storage.

[131] Vintila Dongoroz e coll.,Spiegazioni teoretiche del Codice Penale Romeno, vol.II , pp. 464-466.
[132] Ibidem,p.464

As one can noted, some aggravate circumstantial elements are similar to those of the Romanian penal law, others are different in comparison with the traditions and the repressive needs of the Italian society. We would draw attention on the aggravate as to the violence on things, which circumstance makes the difference between the theft and the robbery, where violence is exerted on people. Lack of such an aggravating act in our penal law has determined the rendering of controversy solutions in the interpretation of the material element of the robbery infringement.

The common theft is punished by the Italian penal law with prison up to 3 years and a fine from 60,000 to 1,000,000 LIT, and in the assumption of the qualified theft with prison from 1 to 6 years and a fine from 200,000 to 2,000,000 LIT. In the case of the aggravating act as to the gun, ammunitions or explosive theft, the penalty is with prison from 3 to 10 years and a fine from 100,000 to 400,000 LIT. In the case of aggravating act concurrence the penalty is with prison from 3 to 10 years and fine from 400,000 to 3,000,000 LIT, and if the gun, ammunitions or explosive theft infringement is in concurrence thereof, the penalty is prison from 5 to 12 years and fine from 200,000 to 600,000 LIT.

Minor thefts. Under this name there are included thefts punished in the previous claim. In this category is included the theft from a residence (when the theft has been committed for an immediate utilization and the thing has been given back at once; the theft committed on low value things and to meet a serious and urgent need; the abusive harvesting of vegetable rests from other's land, tough the harvest has been collected by the owner.

The theft of common property assets(art. 625 Penal Code) refers to the common property stealing committed by a co-owner, co-heir , partner .This is not an infringement ,if it is a question of fungible things, and their value is not higher than the value due to the agent. These crimes are also pursued, at the previous claim.

The penalty for theft in all hypotheses, when they are opuses at previous claim, is prison up to 2 years, and fine from 40,000 to 400,000 LIT.

We note that the sphere of thefts under pursue at previous claim is larger in the Italian penal law (model to which the Romanian legislator may reflect on). The differences made by the Italian law between the common theft and the theft of low importance values or for meeting an urgent and serious need ,or the common property theft , meet to objective realities, such situations relevant a lower danger of the crime and the agent as well. The Italian law does not make a difference between the common theft and that committed between the spouses or close relatives or in the other assumptions of art.210 Romanian Penal Code, the more favorable proceeding regime being conditioned by some essential requirements of the material element or of the agent's co-owner, partner or co-heir quality. On the other hand, the more favorable proceeding regime in such situations is accompanied by a gentler punishing regime, which the Romanian law recognizes in the assumptions under art.210 Penal Code.

THE DELIMITATION OF THE INFRINGEMENT OF DECEPTION THROUGH INFRINGEMENT CHECK OF EMISSION OF CHECK WITHOUT COVERING (ART. 84 PCT 2 FROM LAW NO. 59/1934)

Candidate to Ph.D **Andreea Cimpoeru**

Abstract:

Otherwise, in the judicial practice there were also many problems concerning the delimitation between the two, realizing that there were pronounced different solutions concerning the judicial framing of the action of emission a check, without the necessary covering, in the case in which the situation is knew and accepted by the beneficiary, as well as the action of emission of a check, without the necessary covering, in the purpose of delusion the beneficiary, with the consequence of injuring this one.

It is noticeable that the legislator, referring to the actions that he incriminated, he stated that the punishment provided in the mentioned text of law is applicable'' except the case when the action constitutes an offence penalized with a bigger punishment, in which this punishment is applied''.

Key words: infringement, check, law

An infringement with which the deception presents many elements of covering is that from art. 84 par. 1, point 2 from Law no. 59/1934 and for this reason, in the doctrine [1] and in the judicial practice appeared many points of dispute concerning the delimitation between the two of them.

Otherwise, in the judicial practice there were also many problems concerning the delimitation between the two, realizing that there were pronounced different solutions concerning the judicial framing of the action of emission a check, without the necessary covering, in the case in which the situation is knew and accepted by the beneficiary, as well as the action of emission of a check,

[1] Dinu Nica - Again about the actuality of some norms with a sanctuary penal character from the law against the check no. 59/1934, Law no. 1/2002 page 163; I. Mirea - Comments concerning the infringement of deception through the emission of check without covering, Law no. 11/2002 page 161; Tiberiu C-tin Medeanu - The punishment of the checks without covering, Law no. 2/2001 page 164; V. Dabu and A. Gusan- The check without covering in account. Warranty. Deception. Provided by the law of check, Law no. 6/2004 page 161, etc.

without the necessary covering, in the purpose of delusion the beneficiary, with the consequence of injuring this one.

Otherwise, some courts have considered that the action of emission a check against an institution of credit or against a person, knowing that for its revaluation doesn't exist the provision or the necessary covering, constitutes the infringement of deception provided in art. 215 par. 4 Penal Code, if a damage was produced to the beneficiary of the check, as well as in the case in which the beneficiary didn't know that in the moment of the emission, the necessary disposal of covering the check didn't exist, as well as in the case in which the beneficiary knew about this situation.

In the motivation of this point of view it was emphasized the lack of delusion, deduced from the knowledge and from the acceptance by the beneficiary of completion the check without the necessary covering, it doesn't justify the registration of such action in the infringement provided in art.84 par.1 point 2 from Law no. 59/1934, as long as the producing of a prejudice followed.

Other courts registered the deeds, in both modalities of accomplishment, in the infringement of deception provided in art.215 par.4 Penal Code considering that the art. 84 par.1 point 2 from Law no. 59/1934 was implicitly abrogated on the date of entering in operation of the criminal law adopted in the year 1936, through the regulation in the art. 553 of the infringement of deception concerning the emission of check, as well as a consequence of incrimination the same action through the par. 4 of the art. 215from the present criminal law, the way it was modified through the Law no. 140/1996.

There were some courts that framed the action, in both hypotheses, only in the infringement provided in art.84 paragr.1 point 2 from Law no.59/1934, appreciating that this judicial registration, being provided in a special law, is the only one, which imposes to be adopted.

Finally, other courts framed distinctly the two deeds in comparison with the circumstance if the beneficiary knew and accepted the completion of the check without having the necessary covering.

The latter instances considered that the action of emission a check, knowing that for its revaluation doesn't exist the provision or the necessary covering, as well as the deed of drawing, after the emission, the provision, entire only a part, or to forbid the direction of paying before the expiration of the term of presentation, in the purpose of obtaining for his own or for other person an useful unjust material, if a damage was produced to the check's beneficiary, it constitutes the infringement of deception provided in art.215 par. 4 criminal law.

All these courts came to the conclusion that, if the beneficiary knew, in the moment of emission, that the necessary disposal for the covering of the check didn't exist, the deed must firstly be framed in the provided infringement in art.84 par.1 point 2 from Law no.59/1934.

The High Court accepted this point of view.[2] Indeed, through art.84 from Law no. 59/1934 there were indicated the actions that constitute infringements done in conjunction with the emission of checks, being provided, among other things, in the par. 1 point2, that the established sanction in this text of law will punish ‘’anyone who emits a check without having drew the sufficient disposal, or after he drew the check and before passing the fixed terms for the presentation, disposes in this way, totally or partially by the disposal that he had it’’

It is noticeable that the legislator, referring to the actions that he incriminated, he stated that the punishment provided in the mentioned text of law is applicable’’ except the case when the action constitutes an offence penalized with a bigger punishment, in which this punishment is applied’’.

It results that through this special law it was reaffirmed the principle suitable to which the incrimination was determined by the provision which provided that the most difficult punishment, that which corresponded to the regulation given in that period to the ideal number of infringements, retaken subsequently in art.103 from the criminal law adopted in the year 1936.

As a result, against the incrimination of the action to which refers the art.84 paragr.1 point 2 from Law no.59/1934 and through the art.553 from the mentioned criminal law, the latter provisions were applicable, which provided the most difficult punishment.

In the present criminal law, being given a new content of the art.215 through the Law no. 140/1996, it was provided in paragr.4 of this article, that the ‘’emission of a check against an institution of credit of a person, knowing that for this revaluation doesn’t exist the provision or the necessary covering, as well as the action of withdrawal, after emission, the provision, in entirely or only a part, or to forbidden to the drawing to pay before the expiration of the presentation term, in the purpose showed in art.1, if a damage has been produced to the possessor of the check, it is penalized with the punishment provided in par.2’’

In this way, the legislator incriminated the infringement of deception, through the present par.4 of art.215 from the criminal law, as well as the action of emission of a check against an institution of credit or of a person, knowing that for its revaluation doesn’t exist the provision or the necessary covering, as well as the action of withdrawal, after emission, the provision, in entirely or only a part, or to forbid to the drawing to pay before the expiration of the presentation term, in the purpose of obtaining for his own or for another one an useful unjust material, if a damage has been produced to the possessor of the check.

It results that the beneficiary’s prejudice of the emitted check, through the accomplishment of any of the action of delusion showed above, in the purpose of

[2] I.C.C.J., United Section, decision. no. IX 24 Oct. 2005, published in the Off. Gazette of Romania, Part I no. 123/2006.

obtaining for his own or for another person a useful unjust material, constitutes the infringement of deception provided in art.215 par.4 from criminal law.

In the case in which the beneficiary knows, in the moment of emission, that it doesn't exist the necessary disposal for the covering of the drawn check, but the action cannot constitute any more the infringement of deception provided in art. 215 par.4 from criminal law, because an essential constitutive element is missing, respectively the delusion, condition required without any doubt through par. 1 of the same article.

But a present action is irritable to be registered in the provisions of art.84 paragr.1 point 2 from Law no. 59/1934, according to which it accomplish the infringement provided in this text of law '' anyone who emits a check without having drawn the sufficient disposal, or after he has drawn the check even before the passing of the fixed terms for presentation, disposes otherwise, in totality or only by a part from the disposal that he had''.

In this way it is good to keep in mind that the provisions of art.84 paragr.1, point 2 from Law no. 59/1934, not being abrogated through the Law no.140/1996, as a consequence of the introduction of par.4 in art.215 from criminal law, and not through previous provisions, they cannot be considered as drawn out of force, because they produce the effects.

Because of this, whenever the beneficiary knows, in the moment of emission, that the necessary disposal for the covering of the drawn check doesn't exist, so the constitutive element of delusion required through the art.215 par.1 from criminal law is lacking, the action constitutes the infringement provided in art.84 par.1 point 2 from Law no. 59/1934, and not the infringement of deception provided in art.215 par.4 from criminal law.

ASPECTS REGARDING ECONOMICAL INFRACTIONS OR THOSE WITH CONSEQUENCES IN THE ECONOMICAL DOMAIN-FISCAL

Candidate to Ph. D lecturer **Diana Cîrmaciu**
University of Oradea, Law Faculty
diana.cirmaciu@rdslink.ro
Judge Hall **Loreley Emese Mirea**

Abstract:

To delimit the economical infraction some necessary measures must been taken, complex measures which regarding organization and administration of the society, in its full state of mind even for the public power that must be put in the citizens hands.

The main tasks of the competent public organs regarding to the efficient fight against economical-financial infractions should aim:

- realizing the most important directions in this matter;

- the recognition of the new social-economical realities;

- ranging and execution of the necessary measurements.

Key words: economical infraction, fiscal evasion, manifestation form, punishments.

The economical infractions or those which have economical consequences represent harmful phenomena, with grand effect on our economical social lives; so that all these must be fought through efficient legal economical measures.

The legal practice sometimes offers explanations of the same law problems- this is a situation created even by the complexity of the presented phenomena (so can be considered an economical crime near fiscal evasion, washing money, even closing a bag deal or work negligence, etc.).

The economical infractions or the ones which have economical consequences are found in the Penal Code; (ex: energy theft[133] -art. 208

[133] C.A. Craiova, Penal domain, decision No. 930 from 07.07.2004 – energy theft – TV signal – economical value – the actions of the defendant to obtain TV signal with the help of an improvised installation constitutes elements of infractions mentioned by art. 208 paragraph 2 reported by art. 208 paragraph 1 Penal Code, because the video signal represents an electromagnetic energy which can be measured, the measure unity being MHz; this energy has a determined economical value, mainly determined by the cost of production, of preparation and transmitting of the signal.
Through penal judgment No. 6087/16 December 2003, Judge's Office Targu Jiu, based on art. 11 point 2, latter a) reported to art. 10 latter b) Penal procedure judged the defendant

B.A. for committing infractions foreseen by art. 208 paragraph(2) reported to art. 208 paragraph (1). Penal procedure applying art.41 paragraph (2). In essence, to decide, the first instance reminded the following situation: The representants of the civil part SC RCS SA Bucharest, work office in Targu Jiu, together with the representants of the police remarked at the address where the defendant lives an improvisational installation which made possible to obtain TV signs from the distributional box built in the block of flats. Precisely a thin table was identified, connected in the center of an adapter and which was connected to the apartment where the defendant lived, obtaining TV signal this way.

The injury caused to the civil part had a value of 6826400 ROL, representing the value of the obtained magnetic energy (TV signal), plus some cost because the interruption of the TV signal by the users, as the costs of the license for 36 months before the identification.

Taking into consideration the administrated proves, the judges established that the action of the defendant is not remarked by the penal law, adopting, as consequence an according solution, through motivating the fact that the TV signal is electromagnetic signal and that has no own economical value, resulting from the fact that its quantity can't be measured.

On the other hand, the judges established that the injury pretended by the civil part is the consequence of the service contract, being the result of the breaking of the rules from its dispositions.

Against the decision of this first judgment the Prosecuting Magistracy of Targu Jiu declared an appeal, criticizing it for non-equality and non-validity, in the matter that the situation and also the solution of judgment of the defendant are wrong, because the electromagnetic energy can be measured and so it can be the material object of an infraction described in art. 208 paragraph(2) of the Penal Code, energy which has its own economical value, possible to be determined.

The appeal declared by the Prosecuting Magistracy was rejected, being unfounded through decision No. 155 from 10 March 2004 of the Court of Gorj, judgment, which integrally sustained the decision of the first judgment, considering it legal and valid. Farther criticizing the anterior decisions, the Prosecuting Magistracy of Court Gorj invoked the case by art.385/9, part 16 of the Penal Procedural Code; that the judgment of the defendant was wrong according to art. 208 paragraph(2) reported to art. 208 paragraph(1) of the Penal Code, applying art. 41 paragraph (2) of the Penal Code, sustaining that in essence the TV signal constitutes energy with own economical value.

This appeal was appreciated as founded, the Court establishing that in this case it is applicable the case described by art. 385/9, part 16 of the Penal Code, because the first judgment and also the second one, after validating the proves, adopted wrong solutions in case of the defendant, remarking that his fact was not mentioned in the penal law.

In reality, the Court established, that the complex color video signal SUCC represents an electromagnetic energy which can be measured, the measurement unit being MHz; this energy has a determined economical value, mainly by the cost to keep, to treat and transmit this signal. The fact that this kind of electromagnetic energy can't be stored has no importance upon its nature, this being essentially a productive energy which has some production costs with materials and employees, etc.

To have an access to some programs and to obtain the right for transmission through cables, optical cables or even with satellite, the civil part SC RCS SA Bucharest pays the rights for authorship, some taxes, in other words, a sum of money which must be reflected by the price of the licenses which must be paid by every user.

As a conclusion, considering all these arguments, after the admission of this appeal, conform art.385/15, part 2, latter d) of the Penal Code and after the annulment of the anterior decisions, it was decided that the infraction described by art. 208 paragraph(2) reported to art. 208 paragraph(1) of the Penal Code must be art. 41 paragraph(2) of the Penal Code applied.

align. 2-Penal Code; fake declaration, money forgery and value forgery- art. 282 from the Penal Code) even in special laws (ex: fiscal evasion -art. 3-9 from the Law nr. 241/2005 to prevent and to fight fiscal evasion[134]).

Across time the complex phenomena of fiscal evasion[135] had took ample in our country - a phenomena with social, economical, political, moral implications.

Fiscal evasion has an evolution determined by the action of some factors like: real economy dynamics, the quantity dimension and the quality dimension of the law, institutional frame, the level of fiscality, other intern and extern factors. The phenomena is complex, it must always be followed to be able to fight it. The prevention and fighting of the fiscal evasion was and will remain a priority for the Romanian legislator, as we remember the Law nr.87/1994[136] through Law nr.241/2005.

The new law regarding prevention and fighting fiscal evasion contains harsh legal norms - a harsher punishment for this phenomenon (ex: the crime that was found in the 3rd article from Law nr. 241/2005 has no equal in the old law. Anterior regulation considers that is a contravention "not bringing on time of the given dispositions given through the control act closes by the financial organ - giving her a fine from 50 Ron to 3000 Ron, for the physical persons and between 500 and 10000 Ron for the judicial person. We are confronting with the generic punishment of every kind of behavior not respecting the law.[137]

Other examples foreseen by the Law nr.241/2005 are :

- the unjustified denial to show legal documents and patrimonial belongings, etc;[138]

Though it was stated that the action committed by the defendant, through minimal touching of the values protected by the law, as through its concrete content (the injury caused being relative small, 6826400 ROL/ 682,64 lei), it is without importance, not representing a social danger, being remarked in this case art. 18 of the Penal Code, regarding to which, from the point of view of the defendant, it was adopted an appeal of the solution conform art. 11 part 2 latter a) reported to art.10 latter b) of the Procedural Penal Code.

[134] Law No. 241 from 15.07.2005 to prevent and fight fiscal evasion published in the Official Monitor of Romania No. 672/27.07.2005.

[135] In the opinion of C. I. Gliga " fiscal evasion is pilfering of the tax-payer, when he doesn't pay his financial-bugetary obligations, totally or partially, through any method mentioned by the law" – C. I. Gliga "Tax dodging – Regulation. Doctrine. Jurisprudence. Bucharest, C. H. Beck Editor, 2007, page 34.

[136] Law No. 87 from 18.10.1994 to fight against fiscal evasion published in the Official Monitor of Romania No. 299/24.10.1994, republished in the Official Monitor of Romania No. 545/29.07.2003.

[137] Financial Code art.3 of Law No. 241/2005 " it is considered infraction and it is punished with a surcharge from 5000 lei to 30000 lei the action of the tax-payer, who intentionally doesn't renew the earlier destroyed book-keeping documents in the term specified by the control documents, in case he is able to".

[138] Financial Code art.4 of Law No. 241/2005 "it is considered infraction and it is punished with prison from 6 months to 3 years or with surcharge the unjustified refuse of a person to present in front of the competent institutions, in case he was 3 times announced, the legal

- not allowing the access of the superior law representatives[139] – these representatives can be part of the National Agency for Fiscal Administration, which controls financial actions, the Financial Gourd, etc;

- retaining or not paying the taxes and contributions;[140]

- creating and printing of markings and papers in special order;[141]

- obtaining fiscal benefits in an illegal way;[142]

- hiding taxable goods;

- hiding totally or partially or not telling your financial transactions;[143]

- to introduce in the bookkeeping documents or in other legal documents of some costs or operations which have no real base or to introduce other fictive operations;[144]

- damaging, hiding, destroying of the accountancy papers.

- double bookkeeping;

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documents and patrimonial belongings, with the aim to restrain the financial, fiscal or custom controls.".

[139] Financial Code art.5 of Law No. 241/2005 "it is considered infraction and it is punished with prison from 6 months to 3 years or with surcharge to restrain with any method the representatives of the competent institutions to enter, in the conditions foreseen by the law, offices, spaces or terrains, with the aim to do a financial, fiscal or custom controls.".

[140] Financial Code art.6 of Law No.241/2005 " it is considered infraction an is punished with prison from 3 years or with surcharge to restrain or no to pay intentionally, in more than 30 days of sum of money representing taxes and fees".

[141] Financial Code art.7 paragraph 1 of Law No.241/2005 " it is considered infraction and it is punished with prison from 2 to 7 years and with the refuse of some rights, to create stamps, banderoles or standards forms without any right, used in the fiscal domain for special goals"; Financial Code art 7 paragraph 2 of Law No. 241/2005 " it is considered infraction and it is punished with prison from 3 to 12 years and with the refuse of some rights, to create fake stamps, banderoles or standards forms, used in the fiscal domain for special goals".

[142] Financial Code art.8 paragraph 1 of Law No. 241/2005 "it is considered infraction and it is punished with prison from 3 to 10 years and with the refuse of some rights the establishment, with bad intentions, by the tax-payer of taxes, fees or obligations, having as a result the attainment, without rights of some sum of money as reimbursement or refund from the general budget or compensations of the general budget"; Financial Code art. 8 paragraph 2 of Law No. 241/2005 " it is considered infraction and it is punished with prison from 5 to 15 years and with the refuse of some rights the association with the aim to commit the infraction mentioned in paragraph (1)".

[143] This infraction was already mentioned by Law No. 87/1994 – being the most frequent form of fiscal evasion – art. 11 paragraph 1 latter c of Law No. 87/1994 ("the hiding, totally or partially in the book-keeping documents or in other legal documents of some commercial actions or of some profits realized or to register some unreal operations or costs, with the aim not to pay or to diminish taxes, fees or contributions"). This incrimination was kept by the new law too.

[144] This infraction we can find – in a similar form – also in Law No. 87/1994 republished – in art. 11 paragraph 1, latter c.

- avoidance from the financial checking, fiscal or custom control by not declaring all or forger declaring, or inexact declaring regarding the main residence of the checked beings.

- substitution, degradation, alienation of the debtor or of the 3rd party of the sequestrated goods in conformity to the Penal Code and the Fiscal Code.

To foresee and to fight the fiscal evasion the actual legislation must better up, must be completed and put in order with the communitarian norms, adopted in matter and not at least must be taken care of the real practice. The finalization of these measurements targets the controlling of the evasion phenomena and not only of the infractions in the financial-economical domain.

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THE CURRENCY AND THE MONEY

Ph. D reader **Vasile Cret**
Candidate to Ph. D assistant **Dumitra Madalina Pantea**
AGORA University, Oradea

Abstract:
The coin is a metal piece – made of gold, silver or copper etc. – that is generally presented as a plate disk and is used as a circulation or payment means and maybe – when it deserves – a hoarding means. As opposed to currency, the coin is not a generic term; it refers to a certain kind of money that is the metal pieces which have a full or own value or an inferior one to its nominal value. The purchasing power of the coin made of precious metals depends on its exchange value or on its production cost as opposed to that of the goods. It also depends on the quantity: "…there is no demand for a certain amount of cash as there is for the pieces of clothing or the food. The demand for cash is regulated only by its value, and its value depends on the quantity." (Ricardo) The golden coin is like any other goods from the production cost point of view but it is not a normal ware from the use of the coins point of view.
Key words: money, coins, euro, leu, dinar.

1.1. THE APPEARANCE OF THE COINS AND MONEY IN THE WORLD

The coin is a metal piece – made of gold, silver or copper etc. – that is generally presented as a plate disk and is used as a circulation or payment means and maybe – when it deserves – a hoarding means. As opposed to currency, the coin is not a generic term; it refers to a certain kind of money that is the metal pieces which have a full or own value or an inferior one to its nominal value. The purchasing power of the coin made of precious metals depends on its exchange value or on its production cost as opposed to that of the goods. It also depends on the quantity: "…there is no demand for a certain amount of cash as there is for the pieces of clothing or the food. The demand for cash is regulated only by its value, and its value depends on the quantity." (Ricardo) The golden coin is like any other goods from the production cost point of view but it is not a normal ware from the use of the coins point of view.

There are more types of currencies and the most representative are:

The reference currency

- the foreign coins (currency) which, according to the legal stipulations of a country is used to establish the parity value of the national currency. As a consequence of the successive devaluation of the dollar, the changed statute of the I.C.F. (1978) replaced the dollar as the reference currency with the special right to drawing (S.R.D). Within the currency

areas, the participant countries establish the parity value of the national currency, having as a reference currency the leading one in the area.

The electronic currency

- the name given to the electronic cards that are issued by some banks to their clients, instead of cash money or checks. With the help of the cards, the clients can shop at any of the stores that have a terminal linked to the electronic computer of the bank. The cards are introduced in the terminal of the shop and the computer of the bank immediately communicates the available sum of money in the bank account. If the available sum of money is covered, the account is credited to the bank and the bank account of the shop is credited with the same sum. This system was called "on line", because it supposes the existence of a material connection between the net of the shops that have terminals and the bank which has a computer. The system is simple.

The international currency

- the national currency which, due to some special circumstances circulates also outside the borders of the issuing state, serves as a reserve and payment possibility with an international character. There were many like this kind (in a historic order): the French napoleon (20 francs), the pound, the Turkish pound, the Austrian ducat – golden coins – or the French 5-franc coin, the Prussian dollar, the Turkish icosar – silver coins. The paper pound had currency international functions on the British imperial times and after that during the Commonwealth and the dominions and then it gave them to the dollar in the first decades of the 20th century.
- the currency issued by an international institute in order to be used in the whole world or only regionally. In this case, it can circulate together with the national currency or in their place.

"The name of international currency appeals to human fantasy as much as to a scientific elaboration" (A. Nussbaum). **Money** is the generic name for all kinds of coins and valuable signs. The money represents a social instrument, an immediately mobilized particular form of the social wealth, a transmittable and having an omni-valence representation of the purchasing power, which gives to the owner the right upon a part of the social product of the issuing country. The circulating money conditions the world demand in the economy. "The monetary sign is a transmittable claim, arbitrary and artificially issued, whose essential function is the ability to be changed directly on a quantity of goods and services until it is destroyed."(J. Riboud). "Money is power. They can buy anything."

Thus, money is not the product of a convention where people would have gotten in order for them to ease the exchanges, and no juridical fiction, a "creation of the right order", as some of the non-scientific theories sustained regarding the appearance of the money. In fact, the documents gathered up to the present days that can be used by the researchers concerning the appearance of the money, do not refer to this appearance but to some distant steps of the evolution of the monetary instrument. In China, according to some numismatists, there were metallic coins in the 9th century B.C. Herodotus informs us that the first metal coin in Europe belongs to the 7th or 6th century B.C., its native place being Lydia. If we were to believe the lexicographical researcher Pollux, king Gyges of Lydia, the presumptive author of this coin, he wouldn't have had any merit but for the placing of his seal on an oval electrum or golden and silver pieces. The true father of the metallic coin would have been Phidon, king of Argos who had lived before Gyges, as he had held the Olympic Games in 748 B.C. This presumption is confirmed by other sources, for example by the Paros Chronicle. Money had been at the disposal of the Western world for at least 27 centuries. Taking into consideration the changes suffered by the form of the money, this period of time can be divided into three very different spread sub-periods. For 26 centuries, which is until the beginning of the First World War, the people had used metallic, gold or silver coins. The banknotes appeared in the 17th century and taking this into consideration we can say that, for three centuries (1600-1914), there had been a transition period of time when the human kind had used golden and silver coins having a self value and also money without a self value, the banknotes which represented the gold and the silver and for that they were fully convertible into gold or silver.

From the First World War and until today there had been the sub-period of the exclusive circulation of the convertible and nonconvertible banknotes and also the money in accounts.

In the primitive communal system the form of the money was not used. The production means and the products of the labor were in the commune property of the people and the products were not transformed into goods. The goods exchange appeared during the decompositions of the primitive communal system as a result of the social division of the work and the appearance of too many objects. The passing from the singular exchange to the regular goods exchange took place after the first big social division of the work. If at first the form of a direct exchange of some goods for another was practiced, afterwards the process became more complex, the direct exchange disappeared and some goods which became the general equivalent for all the other appeared. This stage was known as a general equivalent after regions, cattle, furs, tobacco, shelves etc. In time, the role of a general equivalent was taken by metals, starting with the weapons and finishing with the gold, having physical–chemical qualities which especially qualified it for such a role.

The passing to the use of unique goods as a general equivalent marks the appearance of the money form of the value. From the objects – metal coins having the form of ingots, arrow peaks, rings or bracelets – as a historical following, the

money period with full own value made place to the period in which it lost even more the intrinsic value up to its disappearance, the money being now a sign of value: the banknote which was convertible in gold on demand, the treasury note issued by the state, with no right to convertibility. Thus, the circulation of the money signs generally limited to the territory of the issuing country, but the problem of the insurance of the cash in the capitalist conditions was also solved, that is some increased needs as a consequence of the development of the economy and the transformations of the natural carrying outs into money carrying outs – first of all the payment of the salaries – and, on the other side the problem of the covering of the nonproductive expenses of the state which surpassed the current incomes. Finally, there was a general giving up to this form of money known under the generic name of cash and the use of some abstract money: the account money (written money) as open deposits and the creditor balance of the accounts at the banks (with the exception of the issuing bank), the open deposits and the creditor balance of the accounts of the issuing bank (except for the assets of other banks at the issuing bank) and the deposits in the open current accounts at the Post (the "postal check service"). The circulation of the account money is made by transfers between the accounts. Nowadays, most of the money in circulation is account money. For many years it has been thought that the money mass is formed only by cash (not being taken into consideration the cash in a bank). Today the quality of the money as money in an account is recognized. It is comprised in the money mass because they are used just like the cash for payment and cashing, for purchasing with a similar economic effect, thus being able to be transformed into cash whenever it is necessary and the other way around: cash can be transformed into account money by depositing it in a bank account. In everyday speaking for all the above mentioned means of instruments the term "currency" is also used (the main and divisionary currency, the credit currency, the account currency, the monetary system). The terms of money and coins are not synonymous. As opposed to money, "coin" is not a generic term; it refers to a certain kind of money – that is the metallic pieces of self value. In practice, the distinction between the two terms is not generalized. In the present structure of the circulating money issuing and the control of their circulating quantity depend almost exclusively on the decisions of the issuing bank for the bank notes and on that of the other banks for the account money and also on the credit operations.

In the case of the circulation of the golden and silver coins, the treasury had served the spontaneous process of contraction and successive expansion of the money circulation depending on the constraint and the widening of the production and the goods circulation.

Along with the disappearance of the metallic coins, the function of universal money is fulfilled by some national currency unanimously excepted. There are also other opinions regarding the number and the content of the functions of the money.

Thus, money is considered to have three own functions: standard of the prices, circulation means and the valuable reserve. It was also stated that they

would be "socially admitted as signs of wealth, as carriers of the purchasing power, as a way of freeing payment." (S. Brunhoff).

In other opinions, money would have two main functions: evaluation of goods and services ("tertium comparationis") and the facilitation of the exchanges ("tertium permutationis"), as well as many other secondary functions: a) the facilitation of the payments, the money having a freeing power; b) the facilitation of a credit, that is the temporary transmission of a purchasing power; c) the facilitation of the savings, money making useless the in kind economies, as the goods accumulation; d) the keeping and the transfer of the values, that is the on time and space transportation; e) the distribution of the goods and services according to the purchasing power the society confers to its members in different ways.

The money for the credit which, like any other forms of the credit money (cambia, checks) appeared and developed along with the development of the credit relationships and of the function of the money as a payment method, that is, along with the spreading of the sale-purchasing goods for a payment written promise at a certain deadline, as well as the advance payments received by the producers from the traders and vice versa.

It looks like the first banknotes began to circulate in China, where they used a banking system in the 10th century or even earlier. The existence of the offering banknote (for religious ceremonies) has been certified since the 7th century and it is not impossible for these banknotes to have appeared before the one used for economic purposes. In Europe, the first deposit banks like those in Amsterdam (1609) and Hamburg (1619) were private banks which received as deposits coins or golden ingots and in exchange they used to give receipts circulating as endorsed by the receivers.

1.2. THE MONEY IN ROMANIA

On the Romanian territory, the first known coins were the silver drachmas made in the Pontic town of Histria in the 10th up to the 4th century B.C. The Gaeto-Dacians issued, at about 300 B.C., their own coins which were imitations after the Greek-Macedonian coins and then, with local original symbols: "The Gaeto-Dacians coins represent the most authentic monuments of Dacian art." (C. Moisil). The feudal states had their own monetary systems, the first issuing being in the Romanian Country, those of Vladislav I (Vlaicu) (1364-1377), in Moldavia, those of Petru Musat (1375-1391) and in Transylvania, those of Ioan Zapolya (1510-1540) and also during the Principate. After the First World War, the making of the golden and silver coins with a self value for the free circulation ended. In the present conditions when there are only divisionary currencies, the term currency was extended in the every day speaking to name any money sign, including the

account money that does not have a material existence (the written currency or the account money). The monetary systems are those which do not have metallic money with self value. The confusion also appears in other languages.

1.2.1. "Leu" is the Romanian monetary unit. Its parity value: 0,148112 g of fine gold (31st of January 1954). The origin of the name is controversial. The most plausible hypothesis is for it to come from the name of a silver Dutch coin, the dollar-leu, which circulated on our territory between the 16th and 18th centuries. The first documentary mention regarding the circulation of the dollar-leu coins on the Romanian territory was registered in 1581. Afterwards, this coin was predominant in the circulation in the Romanian countries. Towards the middle of the 18th century, these coins disappeared because they were no longer issued in their native country. Their name was kept though, the "leu" becoming a fictitious currency, used only in calculations, used in the normative documents, in the calculations of the treasure house, to express the prices, the value of the foreign currencies circulating in our country etc. The reappearance of the "leu" as an effective currency, this time a Romanian one, happened in 1868, by the law of 4th of May 1867 by which the first national monetary system of Romania was adopted with the "leu" as a monetary unit. This system, having a bimetal basis defines the "leu" by a quantity of 5 gr. of silver with the title 835/1000 and 0, 32258 gr. of gold with the title 900/1000 (0, 290322 gr. of fine gold). The monetary law divides the "leu" in 100 "bani", giving up to the traditional sharing of a "leu" in 40 "parale". Based on the 1867 law, golden and silver coins were issued. A project in 1866 foresaw the placing into circulation together with the metallic "leu" of some treasury notes with a nominal value expressed in "leu". These monetary signs were issued later, on the basis of a law which appeared in 1877 and they were named mortgaging notes. In 1880 the first banknotes as "lei" were placed into circulation and they were issued by the National Bank of Romania. The banknotes were convertible in gold and silver at the bank's choice. The mortgaging notes placed into circulation were replaced by banknotes. In 1890, the national monetary system was passed on the mono-monetary golden basis. The "leu" was made only of gold by the same quantity established in 1867. During the First World War only the banknotes remained in circulation – they were non-convertible – and the divisionary money, after the golden and silver coins were made only part of the treasure. At the banknotes issued by the National Bank, the money issued by the General Bank for the German occupants in war, was added and circulated, also under the name of "leu", in the territories occupied by them.

After the war, as a consequence of the closing of the forming process of the Romanian unitary national state, the circulation of the "leu" was extended over the whole Romanian territory by means of the monetary unifying (1920-1921). In February 1929, the devaluation of the "leu" influenced by the inflation during the war and after it, was officially recognized by a devaluation and stabilization operation. By the stabilization law, the "leu" was defined by a quantity of 10 mg of gold with the title of 900/1000 (9 mg of fine gold), 32,258 times less than in the definition of 1867 and 1890. For a little while the convertibility of the banknotes into gold or foreign currency was reestablished. The progressive devaluation of the "leu" between the two World Wars (the 1929 stabilization was not successful) – it led to the giving of currency as bonuses and the raise of price of gold. They represented hidden devaluations of the "leu". In 1935 and 1936 a bonus of 38% was given to the "strong" currencies and in 1940 the first foreign currency was increased to 107%, and in 1941 it was established at 90%. The inflation during the World War II and the next years was cleared by a monetary reform on the 15th of August 1947. The gold content of the "leu" was established at 6, 6 mg with the title 900/1000 (5, 94 mg of fine gold). As a consequence of the economic remake and the development of the production forces of the country, at the monetary reform of 1952 it received a new definition, comprising 79.346 of fine gold.

The "leu" –currency (in Romania) is a notion having a historical character, appeared in the economic vocabulary after the World War II as a consequence of the specific conditions in which the currency relationships took place. The "leu" is defined by a content of 0,148112 gr. of fine gold. By using the "leu"-currency, the prices, the rates etc. expressed in the foreign currency have been established at the same denominator. The "leu"-currency was used to determine the economic efficiency of the trade with the foreign countries. For the export, the obtained external price, transformed in "leu"-currency was compared to the internal price of the exported ware, the sum in internal "lei" to be spent for the obtaining of the "Leu"-currency being established. For the import, the sum in the foreign currency to be spent for the important goods, transformed into "leu"-currency, was compared to the price these goods are sold in Romania. The more the difference between the sum in "leu"-currency and that in internal "lei", the higher the efficiency of the import was. Along with the passing to the unique commercial course (1st of January 1981), the "leu"-currency stopped being used.

1.2.2. The dinar was a Roman silver coin (republican and then imperial), weighing the 96th part of a libber (3, 41 gr.) which circulated on the Romanian

territory in the second half of the 2nd century B.C. It was made in the Gaeto-Dacian workshops. In time, it suffered much deterioration. It was the golden coin of the Arab caliphs, the currency issued by the Salzburg archbishops (Friesach dinars) in the 14th century. It also circulated in Transylvania. The trite dinar, issued in 1255 by Slavonia's money. In 1333 Cluj issued itself some trite dinars, marking the beginning of the money making on the Romanian territory. The silver coin issued by Vladislav I (Vlaicu) (1364-1377) was the more ancient in the Romanian Country, weighing about 0,70 gr. The coin issued in Hungary and introduced in Transylvania in Matei Corvin's time (1458-1490) was known from the documents of the 14th and 17th centuries as "ban" (Slavic: "pineg"). The rebellion of the peasants in Bobalna (1437) was made because of the devaluation of the Hungarian dinar (the golden florin, equivalent to 100 silver dinars, had been changed for 400-500 dinars). The bishop of Transylvania, Gheorghe Lepes, not collecting the taxes for three years and to avoid their payment in deteriorated dinars emitted in 1433, wanted them retroactively in 1436, but this time in new dinars. The refusal of the peasants to subject to this claim turned into a rebellion that was stopped at the beginning of 1438. The dinar was also the currency issued in 1558 in Moldavia (Alexandru Lapusneanu's reign). It was also a Transylvanian currency issued at the beginning of the 17th century. It was also the monetary unit of many states: Algeria, Jordan, Iraq, Serbia, Kuwait, Lebanon, Yemen and Tunisia.

1.3. THE UNIQUE CURRENCY AND THE EURO

1.3.1. Despite the progress made by the states of the European Union in the attempt to align their economies, the problem of the keeping in time of the European Monetary Union (E.M.U.) "experiment" remains open and also the real degree of convergence of the national currency towards the unique one. It was actually constructed similarly to the German marks and the credibility of the selection process.

The countries which are members of the E.M.U establish the Euro as the currency at the Madrid Conference in 15th -16th of December 1995. In May 1998, these countries defined the appearance of the unique currency starting with the 1st of January 1999. Only 11 countries of the European Union have chosen the moving space of the Euro: Belgium, The Netherlands, Luxemburg, Germany, France, Italy, Austria, Finland, Ireland Portugal and Spain. England, Denmark, Sweden and Greece are not present in the action

area of the Euro currency. While England and Denmark were situated on a waiting position, Sweden had a complex monetary law whose revision is not a simple one and Greece did not satisfy the necessary criteria to adhere to Euros.

Since July 2002, Euro has been the unique legal payment modality in E.M.U. for transactions with cash or without. In the first 6 months of the year 2002, the two phases were superposed. This long period of transition to the E.M.U., 1999-2001, was called by some people the *virtual monetary union*. In fact, the countries included in the currency area are going to use this time to put the basis of a new post- E.M.U. world. This means the success of the C.E.B. functioning; the making of the new EURO forum, used by the member states to coordinate their economic policies.

By defining EURO, it represents the European currency common to all the 11 countries of the E.M.U. and it is supposed to accomplish the same functions as the national convertible currency of these countries. The value of each national currency as opposed to Euros is fixed and unchangeable. As opposed to the other foreign divisions (dollars, Yens) the Euro is the only having a quotation. Obviously, the complete accomplishment of the functions of the Euros implies a transition period which the 11 countries established to happen between the 1st of January 1999 and the 31st of December 2001. Thus, we can say that the passing to Euros has three stages, two of them being already accomplished:

The first stage: 1st of May 1998 – 31st of December 1998

The most important step in the last 40 years towards the great European integration was made between the 1st and 3rd of May 1998 in Brussels, when the 15 government chiefs of the European Union established the 11 funding members of the Economic and Monetary Union, based on the reports given by the European Commission and the European Monetary Institute.

Within this stage, the conditions for the practicing of the monetary politics and the unique exchange were defined and many juridical documents were also adopted because of the Euros. Within the participant countries, the preparations were intense especially on the levels of the administration, the banks and the financial institutions. The European System of the Central Banks (ESCB) was also inaugurated in Frankfurt and all the EU member

states (including those entering the Euro area) which represent the foundation, the central piece of the European Monetary Union.

The second stage: 1st of January 1999 – 31st of December 2001

On the 1st of January 1999, the effective debut of the Economic and Monetary Union was made among the member states of the EMS, by establishing the conversion rates between the currencies of the participant countries and the unique currency.

Euro has become a full currency and the basket currency ceased to exist. In this stage the EBCS became operational. This one defines and leads the monetary politics and the unique exchange in Euros. The exchange rates of the participant national currencies disappeared and the new emissions to cover the public needs were made in Euros.

The most important significance of the Euro stabilization and of the official conversion is that, starting with the 1st of January 1999, the risk of the foreign currency and the 11 currencies of the EMU disappeared.

The structure of the international liquidity will also know significant mutations.

Between the 1st of January and 31st of December 2001 there were and functioned in every member country of the EMU, two parallel markets: the Euro currency market and the currency market in the national currency.

The third stage: 1st of January 2002

Since the 1st of January 2002, the Central European Bank, with the headquarters in Frankfurt, has put into circulation the Euro bank note and the Euro currency, thus, the "cash" payments would be possible only in Euros. The international credits of the Euro countries will only function in Euros.

The Central European Bank is responsible for the monetary politics of the EMU. It will make Euro issuing as bank notes (of 5, 10, 20, 50, 100, 200 and 500 Euros) and also the Euro coins (1 and 2) as well as the cents (1, 2, 5, 10, 20, and 50).

All the bank accounts will be transformed into Euros and the traders will be forced to accept the two currencies: the national currency and the EURO.

For the conversion of the accounts from a certain currency into Euros, the banks will not take commissions.

Starting with the first semester of the year 2002, a progressive withdrawal of the national currencies will take place and in July 2002, these will lose their legal statute.

The banknotes and the coins will continue to be exchanged at the official exchange rate of the EURO, according to the stipulations of the authorities in each country.

From this moment on the exclusive use of the Euros will be done. The national banknotes and coins could be changed in an interval of a year.

THE ORIGIN OF BUSINESS IN EUROPE AND AMERICA

Ph. D reader **Vasile Cret**
Candidate to Ph. D assistant **Dumitra Madalina Pantea**
AGORA University, Oradea

Abstract:

The word business does not mean anything else, but business. In order to partly clarify the term, we have to clarify three notions: the free initiative, the competition and the business itself.

This system of business in which the individuals decide to produce, how to produce and the price to sell is called the free initiative. This system has roots in the capitalist traditional societies and in the constitutional right of the private property. The competition of the business represents in its essence, a rivalry between the businesses for sales at the potential consumers.

The business is an organized effort of the individuals to produce and sell, for a profit, goods and services that satisfy the needs of the society. The most important characteristic of the business is the freedom of the individuals to start a business, to work for a business, to buy and sell the stock of a business they own or to suddenly sell the entire business.

The term "business" refers to all the efforts of this kind in a society (like in the American business), or an industry (like the steel industry or the transportation one). From the above mentioned there comes clearly out that the "business" does not refer to the narrow meaning of "business", a term which became popular because of the centralized economy, it refers especially to the commercial transaction or the market exchange and, of course, it does not have the pejorative meaning which is sometimes attached to it. Or, differently stated, the content of the "business" notion in the Romanian language must be revised.

Key words: business, Europe, America, role.

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1.1. THE APPEARANCE AND THE EVOLUTION OF THE BUSINESS IN EUROPE UNTIL THE 14TH CENTURY

The economic development of the Western Europe has given the conceptual bases on which the American economic order settled. The Western Europe in the ancient Greek and Roman times has tried to escape poverty and famine. The family clans, the villages, the towns and the nation states have tried to raise the quality of life by the economic growth that is to raise the quantities of goods and services to further increase the individuals' consume. Thus, in order to achieve this objective, an economic order was created, mainly based on the private property right. This economic well-being furnished the rewards for the individual stimulation and the desire for additional goods and services stimulated its creation. The long-term growth of the wealth of every individual has proved the importance of the raw materials presence and the technological changes. By furnishing more goods for the growth of the markets, the Europeans discovered the significance of the mass production, where the costs of the products unit definitely decreased. The appearance of the market society has also put a mark on the economy and the reinvestment of the economies to increase the volume of the capital. The groups of individuals combined their capital in order for them to enroll in bigger enterprises and thus, they developed more efficient organizations to maximize their profits. The accomplishment of these endings lasted almost a thousand years.

The history of trades and commerce starts, of course in the antiquity and it is certain that small "enterprises" appeared right before the "Golden Epoch" of Greece and the Roman Empire. The Mediterranean commerce reached substantial quotations in the days of the Rome and it comprised goods, metallic goods and slaves. The merchants and the handicraftsmen worked either alone, or in a temporary partnership, furnishing luxurious goods to the wealthy elite of the towns. But the mass consume in the big agrarian society remained at primitive levels. But the Romans developed an entire corpus of laws to govern the commercial activities in the whole empire, as well as a unique monetary system coordinated by the central government. The order and stability that permitted this commercial development started to decay before the fall of Rome in 476.

From the 5the century up to the 9th century, The Western Europe was subjected to a wild process of de-pollution. The stability of the Roman laws was despised and replaced by "the governing" of the chaos and the invasion of the Oriental or

Norwegian tribes of Scandinavia. The agrarian economy of the famous Roman Empire fell apart, not being able anymore to produce enough food for the population and also, a very fragile system of distribution that sometimes stopped working, contributed to a continuous threat with starvation. Thus, another social, economic and political system appears, that is the feudalism which started the construction of the Western civilization. Some people built fortifications around the strategic points of transportation in order to become sovereigns of the immediate communities. The free peasants and the serves were working the field for the nobles who protected them from the havoc of the wars and the invasions of the small groups of rich knight warriors and "unemployed" mercenaries. The seniority was also a structure with serves who worked the land to which they were tied by ownership of the feudal lords. Around the castles and houses of the feudal lords there appeared communities which had as a basis the closed economy, that of self-sufficiency, in which agriculture was predominant. In the end, a more complex economy developed along with the demand of: harnesses, flour, luxurious goods, weapons and other goods in the big cities. In the new big cities and in those which survived the Roman times, the guilds and the professional organizations were formed and they entirely controlled the production activity and sometimes event he mats. Skills, or better said, qualifications as: sewer, mason, metal worker and dyer were almost monopolies of the guilds that requested long periods of training to follow the steps from apprentice to journeyman and then a craftsman. The guilds tried to preserve a way of life and not especially the increase of the profit. Along with the appearance of the commerce based on the substantial growth of population and the appearance and rise of the important cities, the European economy gained in richness, especially in the 12^{th} and 13^{th} centuries. The crusades established commercial routes in the eastern parts of the Mediterranean Sea and exposed the Europeans to a series of luxurious and new goods as: spices or silk, and the commercial activities that these crusades generated, had brought even more wealth for some towns as Venice. This development of the market economy was influenced between 1347 and 1351, because the plague ravished and crucified the continent which lost at least a third of the population.

The catastrophic loss of population brutally stopped the evolution and development of the society, but slowly, the earlier appeared tendencies started to be redone. The rural zones remained decimated, but the towns were rebuilt, the commerce was revitalized and a more systemic economic order appeared, one which put an emphasis on the need of some tools to save the work and demand mechanization. While 90% of the people remained dependant on agriculture, the non-agrarian sector of the economy substantially changed. Before the 12^{th} century, the Roman-Catholic Church dominated the religious life of the Western Europe; it elaborated and took main decisions that affected the secular society. The church practically opposed usury, which is the perception of interest in a loan. The usurious interest was considered to be a deadly sin and the ones protecting it were thought to be guilty of heresy. The Church also opposed the accumulation of wealth and its obvious exposure and generally to the concept of profit. The

tradesmen were glad to sell their products at a "fair price", a price to cover all the expenses. These attitudes have changed in time. The Church became itself a significant land owner and very much prospered in the crusades period. It became a loaner, a debtor and thus, a "tax payer" as interests. Meanwhile the main efforts of the Church to prevent the making of the profit were redirected to keep a low price for the food in the starvation period. The leading churches gathered wealth for themselves and for the institution and sometimes they had obscure objectives. While there was no conditioning or accusing of the profit making, the conviction laws of these two "evil things" disappeared.

1.2. THE PLACE AND ROLE OF THE BUSINESS IN EUROPE FROM THE 15TH CENTURY UP TO THE PRESENT DAYS.

In the 15th century, the trades and businesses revived and touched higher levels than the ones existing before the plague. Small groups of traders were traveling from the estates to the houses and were kindly selling goods brought from the Middle East. The individuals formed commercial organizations that supplied the long distance commerce. The commercial league (Hanseatic one) that was developed in the North of Europe helped and stimulated the Baltic commerce. In Italy, the banks, as the one which belonged to the De Medici family, developed modern practices of business, new accounting procedures and a new system of monetary payment based on credit, loans and promissory notes. The power of the trade guilds, increasing in towns, made them become participants in this new commercial world, and their production of goods and services grew along due to the increasing demand for food. Thus, the economic order also started to change and the political one was completely and drastically modified.

Along with the maturity of the feudalism, groups of nobles unify to reciprocally protect and gain profit. The most powerful leaders which appeared slowly started to create states-nations much more politically powerful than the little villages or town-states that exited before. The growth of the population not only stimulated the economy but also furnished "troops" that were enrolled by the barons and the nobles for the kingdoms. The development of the powerful national governments in England, France, Spain, Sweden and other parts created laic competitors of the Roman-Catholic Church. The social, political and economical problems appeared among the leaders of the nations-states and the church. The disputes with the church regarding the taxes, the land and the power started wars among the kingdoms. Along with the cultural rebirth that flourished in Italy, Holland and England, the national and religious wars tore and separated the post-feudal European factory.

The efforts of the nations-states to gain riches – in order for them to pay the armies that were protecting the kingdoms and were adding new territories- made them look for the most profitable markets. The transportation improved the growth of the fairs and the special raise of the town-ports contributed to the commercial expansion. The Portuguese, the Spaniards, the French, the Dutch and the English started to look for new markets in Africa, the Middle East and the New World. The great traders of these nations accumulated resources and made a progress when forming new capitals. They were then new rivals of the noble people, without having an economic power, and their contributions to the force of the nations-states significantly changed the social structure. The need of some bigger taxes made the leaders define the rights of properties more accurately and to put a limit the object of the land. It was clearly an advantage for the monarchs to promote the "property of the land owners" and that of the traders and thus assuring the long-term taxes (incomes) than to confiscate the properties of their subjects. The society dramatically changed along with the decline of the nobility and thus, the class of the traders comes to dominate the secular governing.

Simultaneously, The Roman-Catholic Church discovers that its position in a large part of Europe was undermined by the leaders of the powerful state-nations and the Protestant Reform. The refusal of the monarchs, like the one of Henry VIII of England, to subject to the church in what the diplomatic and economical problems were concerned, lead to vehement discussions and, in the end, to complete breakings. The excesses of the Church determined the appearance of the religious rebellions as Martin Luther and the vehement claim of the change of the internal order in the church and a new reform. The most important aspect of the Protestant Reform regarding the economy and business was the Calvinist concept. The protestant reformer John Calvin believed in God's harshness and anger who said that only a part of the people of this world would be saved. While living a pious, hard-working life, only a few would escape the curse. Calvin sustained that individuals had to dedicate to themselves in order to prove their quality as God's chosen people. Everybody has to be dedicated to work, to economic success; hereby, dignity and material well-being become synonymous. The Calvinists believed that the richness was not for vulgar displays, for fame but for the capital. The economy and not the poverty becomes the major virtue, whereas property represents the key to God's kingdom. This doctrines corpus, known as the Protestant Ethics, dominated the attitudes and the secular behaviors of the Protestant Europeans. The Calvinists in Switzerland and France, the Lutherans in Germany and Sweden and the Anglicans in England shared this doctrine. While little of the Protestant Ethics influenced the banker in the Italian Renaissance, these faiths were soon adopted and holily sustained not only by the superior rich classes, but also by the entire society. These faiths furnished the bases of the philosophy on which the capitalist structure could be formed.

In the 16th century, when the discoveries and exploitations periods became something serious, the situation of the Western Europe could be best described as volatile or extremely unsecure. The Protestant Reform led to religious wars and

actions against the reform which produced intense national rivalries. The authority of the Catholic Church was seriously challenged in some parts of Europe by other religious philosophies or it was even destroyed. A new philosophy appears and begins to dominate the North of Europe and it leads to a greater involvement and dedication for the aspirations and the earthy ideas. The accumulation and the use of the capital became a virtue, the saving and the investment became objectives, purposes both individual and national ones. The raise and the accentuation of nationalism promoted these conceptions and brought the economic progress for the nations in a desperate need for incomes coming from taxes, in order to support the continental wars and the conquering campaigns out of the national borders and over the seas.

Materialism, which put a mark and increased the physical comfort and the goods accumulation, becomes a trademark of the society. The significant progresses in science and technology put a mark on these materialistic and national ambitions, even the long-distance commerce of raw materials and luxurious goods stimulated Europe's economy. The bigger capital, the bigger investments, the developing of the trading companies and the use of some bigger delivery and order units of goods with reductions, they all contributed to the economic growth. In this way, the exploration and exploitation of the Northern America were simply a part of the broader maturing process by which the Western Europe developed and furnished a capitalist society.

1.3. BUSINESS IN THE AMERICAN SOCIETY

Those who came on this land and most of their descendants had been involved in a business or a profitable enterprise ever since the discoveries and explorations of the 15th century up to the present days. The result of this constant economic activity was an extraordinary growth. With less than 7% of the world population, U.S.A. today generates around 40% of the world incomes, while almost two thirds of the people live close or under the poverty level. The social commentators, the economists, the foreign observers and many more have put a mark on the significance of the business in the American culture. One of the most important philosophers of the American nation, Ralph Waldo Emerson declared at the beginning of the 19th century that: the most important provider of the world is "selfishness", a fact he thought it was horrible but true. An extremely perspicacious English observer, Lord James Bryce, would later on state that "business is America's king", that is the use of man-power and the capital to produce goods and profitable services.

U.S.A. represents the most obvious and the most dominant example of the civilization of the world businesses. Between 1929 and the mid 1970s, the gross national income increased yearly by 3, 2%. This meant that the goods production doubled almost every 20 years. It is not a surprise that the rest of the world is astonished or terrified of this enormous economic machine which forms the basis of every American's life. The Americans are the richest in the world and the open

structure of their society made their dreams of success different from the Arab Emirates, but they surpassed the American ones in the 1980s. The trust in the system continues and there are no doubting signals.

The search for economic profits dominated the culture of the American nation. The measure of the society is the quantity of goods and the quality of the services the American can get. Of course, It is obvious that the distribution of the goods and services in not equal. The system supposes, in fact, to allow the people get goods and services in unequal proportions. Of course there are areas of complete poverty both in the urban and rural parts and only the American government sustains many families not to be under the poverty level. The raw materials, abounding in the 19th century, now in the last decades of the 20th century are extremely rare. The less rational spending of the resources sometimes fit the government's politics to favor the interests of some segments of the society. The capitalist system in America worked for many. The individual efforts in enterprises created chances and opportunities for all the Americans. The objectives of the society made businesses and also success grow, as the American people showed a universal interest for business. The society has created a structure whose purpose was to encourage the leading enterprises to "manipulate" the goods and services production in order to create profits. The reinvestment of a part of these profits has fed the wonderful engine of the capitalism.

The American economy evolved in 200 years. This evolution was slow until 1830 when the movement was emphasized along with the appearance of the rail system that linked all the prosperous towns in a net. The immense urban markets for the construction materials, food and sources of raw materials helped the small enterprises grow in industrial giants. Technology, as the servant of the industrial development, gave new and important products and also many more efficient ways to make and distribute the goods. The leading enterprises were constantly looking and had found new techniques and methods to face the changes in the society and economy and increased their efforts to save time and use less energy and also produce more products and services which meant less costs for the consumers and bigger profits for the companies. The big corporations extended their dimensions, integrated their productions and diversified their activities. For most of the Americans, business means those giants of Capitalism, those companies we find every year in the famous 500 American enterprises top, published in Fortune magazine. Meanwhile, we have to state that the American nation has remained though, a fertile ground of the small enterprises.

JURIDICAL ANALYSIS FROM THEORETICAL AND PRACTICAL POINT OF VIEW OF THE BANK CREDIT CONTRACT

Candidate to Ph.D Assistant **Aida Diana Dumitrescu** University of Craiova, „Nicolae Titulescu" Faculty of Law and Administrative Sciences
aida_dumitrescu@yahoo.com

Abstract:

The contract in general and the bank credit contract in special are realities of an irrefutable need into the scenery of the modern economy.

The analysis of a bank credit contract is justified in our days taking into consideration the fact that on world and on national level appear invoked repeatedly subjects as financial crisis, credit contract, the difficulty of conditions for a credit, etc. also a complete view over this problem can be made only through a double expectation theoretical and practical.

The bank credit represents any payment engagement in exchange of the repayment right of the paid amount of money and also to the payment of the interest or another expenses concerning this amount or any kind of prolongation for the date of payment (term) and any kind of engagement of acquisition for a title which incorporate a claim or of another payment right for an amount of money.

Key words: bank credit contract, annulment, nullity, authority of being judged.

I. Theoretical aspects

The bank credit contract[145] represents a one sided and intuitu personae convention that oblige a bank or another similar credit institution, in exchange of a remuneration, to offer money to a person for a time and in a established amount or to assume for somebody interest an money engagement or a guarantee[146] letter.

The bank credit represents any payment engagement in exchange of the repayment right of the paid amount of money and also to the payment of the interest or another expenses concerning this amount or any kind of prolongation for the date of payment (term) and any kind of engagement of acquisition for a title which incorporate a claim or of another payment right for an amount of money.

[145] Dan Drosu Saguna - Financial and fiscal law, - vol. I, Oscar Print Publishing House, 1997, p.272 and next.
[146] Dan Drosu Saguna - some book, p.272 and next.

The doctrine realized more classifications of the credit contracts, from which we hold that :

- conforming to the period of reimbursement exist: credit bank contracts on short term (no more then 12 months), credit bank contracts on medium term (between 1-5 years) and credit bank contracts on long term (more then 5 years),
- conforming to the credit destination: credit linked to a certain operation and credit for covering general needs; credit for financing some positions on the balance and specific credits (consume credit)
- from the point of view of juridical techniques: opening account, crediting under the transfer on a debt (discount for the bill of exchange), and credits through signature (guaranty of a bill of exchange and the acceptance).

Choosing the type of credit means to take into consideration the needs of the client and the interests of the bank. The credit is given on base of the client initiative which represents a manifestation of wish materialized into an application for the credit. The remuneration of bank is different from one kind of credit to another but it always include the interest counted to the given for the amount and the bank commission.

The credit contracts include usual clauses and specific clauses. The usual clauses from a credit contract concern: name and residence of the bank, name and function of the persons that represent it, the identification of the debtor and of the persons that represent him, the quantum of the credit in lei and the percent of the interest, the signatures of the representatives of the banks and of the debtor.

The open credit is accompanied by common right guarantees (security, guaranty of the bill of exchange, assurance, etc.) or special guarantees (endorsement of the bill of exchange, transmission of property of a protestable invoice, factoring etc.).

II. Practical aspects

a. The annulment of credit contract. Modification of the conditions for accordance the credit. Express resolute pact under IV degree. If one of the parties go to law in front of the instance, the instance can only constant if the conditions mentioned into the express resolute pact are fulfill.(Commercial section, decision no.907 from the 2 of march 2006).

Annulment represents the sanction for the guilty non execution of the sinalagmatic contract and it consist on the contract retroactive abolish and the reinstate of the parties into the situation they had before the contract[147].

The express clauses from the contract regarding the annulment for non-execution are known under the name of express resolute pact and they depart from

[147] Constantin Statescu, Corneliu Barsan- Civil Law. General theory of obligations, All Educational Publishing House, p.86 and next., Valeriu Stoica - The annulment and the cancellation of the civil contracts, All Publishing House, 1997.

the provision of art.1021 Civil Code in order to reduce or even to eliminate the role of the instance into the annulment of contracts. This clauses are wrote in different manners and they produce more powerful or less powerful effects but the only one which can appreciate if there is or if there is not the case to apply annulment is the creditor which executed or declare himself ready to executed his obligations.

The express resolute pact known as having the powerful effects it is the express resolute pact under IV degree. In conformity with this pact the contract is considered as being rightly abolished without asking for formal notice or another previous formality.

Taking into consideration these theoretical aspects we observe that in front of the High Court of Cassation and Justice parties asked for a solution in a cause concerning the application of a resolute pact under IV degree.

So, the claimant A S.A[148].asked to force the defendant the bank B S.A. to respect the credit contract that was transact on 31 of may 2004, to accord him the credit in amount of 1.590.0 euro necessary to buy a brick factory from the German company T.H.G.

Between parties transacted the credit contract from the 31 of may 2001, this contract included a clause on who the parties agreed on the 44 article of the credit contract, this clause foresee that „if any clauses of quilt from article 43 appears, the contract is considered as being complete annulled without the need to respect another formality, without formal notice and instances intervention".

The claimant began the deploy of the contract for payment of the first part of the established amount, 280.000 euro, payment executed through an open documentary letter of credit and the part affirm that this payment represent an irrevocable operation.

The defendant invoked the annulment of the contract declaring in front of the judge that it received on 21st of June 2004, from M.F.P., Big Contributor Administration Office, addresses of making attachment under the money availability of the company for the amount if 62,3 milliard lei, representing its debts toward the stat budget. The defendant affirmed about the clause from the art.44 of the contract that it have the value of a resolute pact under IV degree and so the annulment of the contract is conceivable.

Also it affirms that the reason of annulment it is not caused by the accounts lockout, this fact does not represent a guilty case under the article 43 of the credit contract. So, not the attachment under the accounts represent a guilty cause but the non execution from the claimant part of the obligation to announce the bank in term of 5 days about the existence of the report control that represent a writ of execution.

Instances had different opinions on this case but finally, on the appeal of the defendant in front of the High Court of Cassation and Justice against the decision of Court Appeal, being invoke the reason of not being legal (art.304 p.9 Code of civil procedure), (under the judgment is not legal or is the result of a not legal application) and under the art.312 al.2 Code of civil procedure and art.315(1) Code

[148] S.A.- it represents a stock company.

of civil procedure admitted the appeal, pronounce the cassation of the judgment attacked and send the cause to the Court Appeal Craiova in order to be re-judged.

The appeal was appreciated as founded, the previous judgment did not respect art.969 Code of civil procedure, conforming to who, the legal conventions have law power for parties and for instance.

Instance considered that this clause on who parties agreed on art. 44 from the credit contract, represents a express resolute pact under IV degree, so the role of instance about the application of the annulment does not exist.

So, if one of the parties come in front of the judge on this cause, the instance can only verify if they are respected the conditions from the express resolute pact under IV degree, in this case if there is a case of guilty from art.43 letter j of the contract (invoked by the defendant on appeal).

b. Concerning the bank credit, the authority of judgment done and force fulfillment. The High Court of Cassation and Justice decided that if the claimant-creditor formulate a new action against the unique association of the debtor company, this fact does not mean that it can be broke the authority of done judge of the judgment that obliged the debtor, physics person solider with the debtor company to pay the rest of the credit and the bank interests. (Commercial section, decision no. 800 from 10th of February 2005).

c. Analyzing the credit contract and this contract causes of nullity, into a recent decision, the supreme court affirmed that because the amount mentioned as a credit title was not granted, it observed the nullity of the credit contract, as long as an act to sustain the wish of parties to make a novation (substitution of a new obligation to an old one does not exist).

d. Into a case of forced fulfillment of the credit contract and the application of art.79 al.2 from Law58/1998 republished, the supreme instance decided:"The bank credit contracts and the real and personal guarantees constituted in purpose to guarantee the bank credit represent writ of execution. (The High Court of Cassation and Justice, United sections, decision no. XIII from 20th of March 2006

e. Absolute nullity of the credit contract. The claimants were misguide by the defendant when they transact the documents for real guarantee, they understood that they are signing an act of real guarantee for the quality of employee and not some acts for real guarantee for the credit that the company obtained. This fact represents a lack of consent and under art.948 Civil Code it conducive to the absolute nullity of the juridical paper. (Commercial section, decision no. 1844 from 17th of March 2005).

The theoretical and practical aspects presents as a short juridical analyze of the bank credit contract are suppose to underline the actuality, the complexity and the importance of this contract.

A good acquaintance of the legal stipulations on this field, knowing the practices of the instance abut also a economical perspective under this contract converge to the idea of a successful business..

THE CRIMINALITY IN BUSINESSES – ORGANIZED CRIME AND FOREIGN AFFAIRS

Preparatory **Sebastian Nicolae Ganea**
AGORA University, Oradea

sebi_ganea@hotmail.com

Abstract:

This type of criminality, criminality in businesses is a criminological concept and presents three important plans: crime, criminal and society.

Discovering and sanctioning this type of crimes is relatively low, but on the other hand, inside the criminality, the real ratio is much higher, because their nature and their pursuit have a specific type: the facts, as a rule, don't have precise and individualized victims that should claim the crimes, the criminality is hidden and not opened.

More and more, the criminal organizations take advantage of the contradictions generated by the allowance or even by the lack of some laws, by not applying the existing laws, by the inadequate relations between the politics, economics and administrative domains, as well as by the inefficiency or the weak co-operation between the internal structures that are competent in fighting the criminal phenomenon.

Key words: criminality, business, organized crime, problems, cases.

The crime, itself, that can be found inside this domain of businesses, is an action that violates a legal rule regarding professional activities done by a person that has a high social-economical status that is respectable, being outside any suspicion.

Criminality in businesses, being a criminological concept has three plans, as follows: the crime, the criminal and the society.

The statistics respond to the questions regarding the persons that do such actions that present a social danger. These acknowledge the fact that their conduct has an illegal character, but they not consider themselves as being criminals. Their beliefs start from the idea that the reason, the business, the aim, the benefits, the achievement and the social or financial success have the precedence in front of the law, of the rule, taking into consideration their efficiency.

Talking about touching the aim of these actions, this doesn't exclude the illegal or immoral ways, because it is for the society to establish that there is a personal right based on the social position that has been earned, and that is to break the law, "the little criminal" being appreciated. From the psycho-sociological point of view and then from the juridical one, these persons are not treated as classical

criminals, that receive the promptly penal treatment, on the contrary, sometimes they are judged with special judicial procedures that end with material, administrative or disciplinary sanctions. But, as we know, the juridical order contains those juridical rules that are rationally organized, that accustoms the society to good discipline, presenting an ordinary, normal and essential characteristic so as the chaos should not be set up in the world and in the society[149].

The discovering and sanctioning ratio of this type of crimes is relatively low, but on the other hand, inside the criminality, the real ratio is much higher, because their nature and their pursuit have a specific type: the facts, as a rule, don't have precise and individualized victims, that should claim the crimes, the criminality is hidden and not opened, the ones that do them belong to the fortunate social category and not to the unfortunate one, that are situated inside the domain of the commune penal law.

In front of the prosecutors from the specialized departments there are causes in which the disciplinary or administrative sanctions aren't considered enough, but the thing that concerns us the most is the fact that, in the public conscience, sometimes, the criminality from the businesses is not taken as a criminality as the word means, although the economical and social crisis situations amplify the phenomenon of the criminality in businesses.

Talking about that intellectual-volitional process, as a constitutive part of the crime itself, of the persons that are placed in the criminality from the businesses' world, this takes to achieving some aims in the company's benefit, those fiscal frauds, against it, against the state, against other persons or simple personal interests. The danger is represented through the fact that these facts are obviously against the financial, economical, social order, against the life's quality and the public trust and are linked to the author's power of decision, offered by its responsibility in the economical-social domains.

The criminality in businesses regards to the crimes from the special laws with penal stipulations, that belong to the penal businesses law and has as a target point the trading companies, the competition, the intellectual property, the banking regime, money laundering, transferable securities, Accountability regime, the tax dodging, the customs regime, the land fund, , public authority, etc. These juridical rules with penal character, as a rule, have the incrimination disposition as a frame, fact that makes necessary a link to other stipulations contained in the same law or even another one.

Concerning the subjective element, we have in front of us some specific elements, when the guilt is presumed, it is being based on the idea that breaking the rule from the businesses domain, emphasizes the guilt as it has to be known and to be respected. Yet it can not be generalized, because breaking the rule, do not prove, necessarily and enough the guilt, without taking into consideration the

[149] Voicu Bara, *Administrative law and political-administrative institutions. The second revised edition*, 2004.

psychological intellectual-volitional processes that goes before and with the material side from the crime's content.

Remaining in this domain of specific, even the proving plan is a specific element for determining the crime, through the procedures, where the examinations, the verifying and control official reports are essentials, but without excluding other ways of proving. At the same time the founding papers before the beginning of the penal pursuit, because this establish the fact elements, , representing actions or flaws related to the law that stipulates that kind of activity, that are relevant and pertinent to the general analysis.

It is certain that, taking into consideration the activity domain and the action ways in the businesses domain, the judicial authorities that perform the penal pursuit, must adopt specific, efficiently tactic ways that can assure the society's steadfast retort, the prompt discovery of the crimes and sanctioning the guilty person.

From this point of view, of the procedure's one, establishing the general frame of content is followed by the complex process of systematization, abstracting and verifying the criminal activity, with the multilateral analysis of the proves that exist in the file, in a tight relation with the present volume of knowledge from the businesses' domain.

In Romania, the setting up and the functioning of the financial instruments markets, with the institutions and the operations that are particular to these, as well as of the collective disposal bodies, for moving the financial reserves throughout the investments in financial instruments, is stipulated by the Law no. 297 from 28th of June 2004, that repealed the old law that had been set up by the Emergency Ordinance no. 28/2002.

This penal rule assures the observance of the law's stipulations inside the capital market, through applying the sanction. So, it belongs to the businesses penal law, in the way in which it can be presumed as existing and this kind of reality is accepted, a kind of reality that can not be denied.

As a result of using these incomplete penal rules, a certain imprecision in defining the outlaw is touched, that causes the transfer of some competences from the legislative domain to the judicial one[150].

Essentially, the penal stipulation contained in Law no. 297/2004 refers to: drawing up the documents according to the legal dispositions, presenting this to the right institutions for giving the financial audits, controlling them, to be known by the competence ones, the interdiction on the persons that detain privileged information to use them on their own or on the thirds, directly or indirectly, for getting or selling financial instruments, divulging the privileged information to other persons or recommending to a person, based on the privileged information, to work with financial instruments, as well as getting in market's manipulation activities.

[150] Viorel Florescu, *Banking and currency law*, Bucharest, 2006, page 139.

More and more, the criminal organizations take advantage of the contradictions generated by the allowance or even by the lack of some laws, by not applying the existing laws, by the inadequate relations between the politics, economics and administrative domains, as well as by the inefficiency or the weak co-operation between the internal structures that are competent in fighting the criminal phenomenon.

The infiltration of the organized crime's structure inside the economical structures encloses the free access to investments, affects the labor power, the consume, the sale markets, the property, the capital, the productive activity, that has negative consequences upon the population's welfare and upon the economical development. The organized criminality and corruption are phenomena that can be found anywhere, that can be found in different countries regarding the economy or the social development. Even though some societies are more vulnerable than the others and can suffer more after the devastating effects of the organized criminality and corruption, still no country in the world isn't, nowadays, immune to the destructive influence of the corruption and organized criminality.

The extension and the fast evolution of the organized criminality and corruption is in a tight causality relation with the dynamic of the whole economical-social assembly, being an indirectly reflection of its lacks and malfunctioning.

Fighting against the organized criminality and corruption can not be efficient only if there is an economical, political and moral straightening of the society, as a decisive premise to assure the observance of the law by the citizens. It is called for stopping the multitude of criminal actions that are done against the property, against the economical-financial interests of the country or against the population's legitimate interests. The experience has proved that there isn't just one landing in fighting against the organized crime and corruption that could be really efficient. The success can be assured by a large scale of strategies that takes place in a concentrated way. These strategies have to include measures that should minimize the proliferation conditions of corruption and its results, which should help in finding the corrupt practices and in punishing those that are guilty of corruption.

The programs against organized criminality and corruption are based on, especially, on two elements. One element regards to carrying out the economical, financial and administrative reforms that can minimize the conditions that help the organized criminality and corruption. The second element is about strengthening the institutions that, among other, inform the public about the corrupt behaviors and their costs, as the press, Parliament, surveying agencies and the judicial institutions.

Trying to present the national integrity building examples, the paperwork called "The corruption and the fight against it", of which's translation was authorized by the World Bank, analyses, on some countries, the political and social context in which the anti-criminality and anti-corruption programs work. It is mainly about Tanzania, Uganda and Sierra Leone. Tanzania and Uganda have

acknowledged and successfully applied anti-corruption measures, while Sierra Leone had failed in its efforts of fighting against corruption. The conclusion of the paperwork is that a polyvalent strategy that combines the economical reforms with the consolidation process of the institution that are capable to maintain "the national integrity" can be more successful than the progressive reforms, like creating some anti-corruption agencies without making the proper reforms. For a lasting development, in any country there have to be, permanently, measures for preventing and fighting against the corruption.

The activities where something has to change throughout the reform process are those that involve a discretionary control. Among these the following can be enumerated: the remitting of licenses, authorizations, importing quantitative restrictions, passports, customs documentation, as well as banking licenses; blocking the access on the market for the new companies or investors and setting up the monopole power; giving the public acquisitions to different companies; giving subventions, taxes exemption and maintaining the tax dodging; constraining some checking on the external trades; discretionary allocation of properties, depositing places; the selective applying of the stipulations with social impact; the maintenance of some confusing or secrets budgetary accounts or helping the budgetary "leakages" to private accounts.

The conventional economics reforms can have an important effect: the macroeconomics stabilization removes the discretionary rights upon the subventions supplying and advantageous credits conferring, getting into private property depoliticizes the state's companies, and the consolidation of a society that sustains the competition and the extended liberalization of the market reduces the conditions that supports the corruption's tolerance.

The simple reform of the macroeconomics politics is not enough in the fight against the criminality and corruption.

A special emphasize must be put on the fiscal reform in the way of creating a regime that is simple, that is not discretionary, of moderate taxes, accompanied by a determined application of the law and by the exemptions elimination. Also, it has to be taken into consideration the governmental and budgetary reform, consisting of the creation of some financial transparent and solid mechanism for managing the incomes and the expenses and, on long term, the ample institutional reform consisting of – among others – the customs and juridical reform.

The administrative reform must be settled towards the development and the support of an administrative system that should protect the decisions taking process, to stipulate the conflict of interests in the public sector, to rebuild the procedures that are particular for the public service, for these to correspond in a bigger way to the public interest (in some of the countries an ethical code of conduct has been created for the public sector).

It is well known the fact that the clerks' inappropriate salaries contribute to the appearance of the corruption situations. Many of the countries that are developing don't have the necessarily financial power to pay bigger salaries for clerks. These countries are caught in a vicious circle: low salaries determine some

clerks to take for their own governmental funds, and the maladministration of these funds do affect the Government's funds, that is so in the impossibility of raising the salaries in the public sectors. Fighting the corruption, cutting the channels that supply the bribe are methods for solving the low salaries problem, but raising the salaries in the public sector must be permanently reevaluated. Despite the fact that Singapore has started from a weak economical basis and from a hard corruption level, as far as an economical growth existed, the Government has become capable of offering the clerks bigger salaries. So it has arrived to the situation in which the salaries received by the Singaporean clerks are the biggest in the world.

In Uganda, inside the public service reform, the following measures have been taken: halving up the personnel and trebling the salaries. Having the support of the World Bank and having considerable bilateral assistance, through the taken measures the clerks were less tempted to accept bribe, they have got to the point in which they cherished more their jobs, facts that lead to the growth of the standards in the public services, similar to the ones in Singapore of which's efficiency and productivity is unanimously recognized.

The recent experience from South Africa proves the way in which the reformatting procedures initiated by the Parliament can support the adoption of responsibilities and transparency, minimizing the corruption in the democratic process. The South African's reform aim was to make out of the Parliament's activity a more opened process for the public and the press and to authorize a number of committees, especially the Committee for Public Accounts, to call to account the chief of the Government. All the committees gather in public assemblies, and if they want to have a closed door assembly they will have to debate in public the reason of this decision.

The Parliament has through its main functions to supervise the Government, including the governmental functions. Contributing to the assurance of public sector financial operations' responsibility and transparency assurance, the Parliament contributes in fighting the economical-financial criminality and corruption.

In the first 14-15 years of transition, Romania has been being characterized throughout the incapacity of capitalizing the economical, social, demographical, cultural, educational and informational advantages of the capitalist system. The reasons for these facts are based on the fact that the Romanian economical background have had, at least in these 14-15 years, as a particular thing changing the competition with the political connections, obtaining, as a matter a fact, a preferential place on the market not through the competition fight, but through political and governmental support; also, the population, in its majority, has a collectivist-leveling attitude and behavior, considering that it is its right to be "an assisted population", seeing the ones, which have individual initiative and are real professionals, like criminals[151]. To these there are added other explanations, as real

[151] Cristof Rühl, Daniel Daianu, *The Economic transition in Romania – past, present and future*, Bucharest, 1999, page 125.

and sustainable as the others, that regard to the way in which the International Monetary Fund and the World Bank had evaluated Romania's situation in the transition period, thing that has been recognized, as a matter of fact, by these international bodies in the "Evaluation report of the last 14 years of programs with Romania", published at the end of April, 2004. It is about the fact that it has been underestimated the balance that had to be done between the economical cost and the reform's social one, compressing the consuming, with bad effects in the budgetary politics plan.

The result was that instead of having an economical growth through investments processes, we had a financing growth of the subventions politics and social payments. At the same time, in our country there have been produced big delays in getting the companies into the private sector and in the loss sectors restructuring. The high taxation policy have debased the Romanian economic background and more, not just through the disappearance of an important number of companies that could not face the taxation policy, but even because it lead to the development of some underground economics' practices, from tax dodging to contraband.

The evolution of the economical-financial criminality phenomenon is in a tight relation with the dynamic of the whole economical-socially aggregate, being an indirect reflection of its malfunctioning[152].

The appearance of some new illegal goods and services, for which there is demand, determines the creation of a new "black market" and, as a consequence, of a new special category of specialized sellers.

Being ascertained that the number of criminologists, jurists and experts that are aware of the problems in the financial-banking businesses domain is extremely low, the Public Ministry, in the Strategy of fighting the organized criminality, has stipulated a number of measures – with terms, financing sources and concrete responsibilities – for supporting the training of the magistrates on economical-financial problems and, at the same time, supporting the research.

Applying the legislation from this domain into practice it has been carried out in the research and suing, in the first half of the year 2006, of some cases of high corruption. In these strategies there are stipulated repressive actions, extremely firm that hit criminality in its particular things, meaning "the organized delinquency" and in its complicity character to the criminal activities, in the most vulnerable sectors were it penetrates, like: credit, private enterprise, public acquisitions, agriculture, public administration, etc. There have been mentioned identifying measures and the groups and politics personalities have been documented, those that have relations that support the criminality to create not only practically objective advantages, but an extremely negative moral authority in the social domain with what it has a direct contact.

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[152] Dan Drosu-Saguna, *Treatis on financial and fiscal law*, All Beck Publishing House , Bucharest, 2001, page 211.

In the fight against the organized criminality and corruption there are geared the state's institutions with responsibilities in creating, protecting and affirming Romania's fundamental interests. According to Law no. 30/2003 regarding fighting the organized criminality, The Public Ministry gets information concerning the organized criminality and high corruption crimes from the Romanian Police, The General Inspectorate of the Customs Police, RIS, EIS, PPS, The National Anti-corruption Direction and from others institutions that have attributions in this domain. The obtained information connected with the prosecutor's office database from other files take to strategic sustainable analyses regarding the content of the groups that are involved in the perpetration of organized criminality actions and the connections between them.

The strategic analyses, the tactic ones and the relational maps regarding the groups and the networks from the country and those with transnational connections given to the prosecutors give these the opportunity to transform the data and the information into proves to be managed in the penal trial. In complex causes, of organized macro-criminality, with involving in more activity sectors are being formed complete work teams under the leading of the prosecutor, with the co-opting of finances, banks and other domains specialists.

The central structure and the territory ones of the Public Ministry co-operate with the Ministry of Internal and Administrative Reform, RIS, EIS, Ministry of Justice and Ministry of National Defense. Also, there is a collaboration with the Ministry of Public Finances, The National Authority for Control (Financial Guard, The National Customs Authority), The National Bureau for Preventing and Fighting the Money Laundering, The Accounts Court, the Commerce and Industry Room, different ministries, Romanian National Bank, the Romanian Committee on Migrations and Refugees Problems, The Romanian Committee for Adoptions, etc. The specialized structures of the Public Ministry co-operates with similar structures from other countries, as well as with international bodies that are competent in the organized crime's domain, Euro just, Europol, S.E.C.I Centre and Interpol. Analyzing the criminal phenomenon, on its main elements as follows: organized crime, corruption and high financial-banking criminality, the Public Ministry has come to the following conclusions:

- adapting rapidly the "examples" from other countries, the criminals that make their moves on the market of drugs or persons traffic, of contraband, or in the financial-banking frauds domain have gathered in well structured groups, with ramifications and supporting points in that territory and not in few cases, in the outside. These created structures have used the most modern ways of communication and of fast shifting, including electronic transferring of the profits that had been obtained from perpetrating the crimes;
- in most of the penal researched cases, these profits were used in an important percent for corrupting the clerks, the criminals obtaining in this way the directly support or their protection;

- a striking tendency is the one that through the way of money laundering, money that come from the outlaws, the criminal groups to take places or entire economical sectors, creating the appearance of some legal activities;
- the main tendencies of the criminality phenomenon – in its elements that represent the biggest danger for the society – are the organization, modernization and internationalization.

The clandestine and illegal exchanges market had given thousands of accused searched or judged for the crimes of tax dodging, contraband, person traffic, prostitution, panders, taking and giving bribe, etc. There isn't a domain of the market or of the economical-social activity in which criminality and corruptions phenomena didn't appear. The files that have been solved or are being solved by the Prosecutor's Office and Justice regards to businesses with oil, woods fund, wooden mass, alcohol, tobacco, illegal getting goods into private properties, financial engineering, banking crimes, money laundering, human being traffic and drugs and precursors traffic[153], etc.

Romania's integration in the EU allowed not only the unprecedented movement of the goods, persons, services and capital, but even of the economical-financial criminality phenomenon, with foreign elements. From these reasons, the fight against organized criminality and corruption must be continuous and firm.

If I have spoken about these crimes that exist at the internal level of the country, but even at the level of connectivity with the EU member countries, I will continue with a major existing problem in Romania for more than a century, and that took amplitude through updating it starting with 2005. So, some of the crimes from the businesses' domain, like: money laundering, tax dodging, second degree robbery, remitting false documents, that together lead to a hard to destroy criminality chain, have as subjects natural and artificial persons, but we didn't mentioned about the problem of the state's existence, through its representatives in the foreign affairs' domain, as subjects of this type of crimes.

The problem of the Romanian-Hungarian agreement regarding the setting up, at Budapest, of a foundation that should manage the inheritance left "to the Romanian nation" by Emanuil Gojdu has raised a lot of question marks among the law specialists from our country, and the crimes that could rise up, but maybe that had raised, but remained undiscovered, will be presented as follows in the Gojdu Case.

Emanuil Gojdu, lawyer and politician in the Austrian-Hungarian Empire, had established through a will that a big part of its fortune to be managed by a foundation that should have had his name after his death. The Gojdu Foundation set up in 1870 gave scholarships for 5300 Romanians, among who were Traian Vuia, Aurel Vlaicu, Octavian Goga, Petru Groza. The Government from Budapest

[153] Theodor Mrejeru, Dumitru Andreiu, Petre Florescu, Dan Safta, Marieta Safta, *The tax dodging*, Tribuna Economica Publishing House, Bucharest, 2000, page 217.

blocked in 1920 the Gojdu fortunes from Hungary, followed by a number of negotiations, finished in 1938, through which Hungary agreed to return the Gojdu Foundation's goods. The return didn't happen, and in 1952 Hungary nationalized Gojdu's goods from Hungary, buildings and bank accounts. The Gojdu buildings from Budapest have entered, in 1990, in the property of the 7th Sector's City Hall of Budapest. In 2003 the intention of transforming the Gojdu Courts into commercial centre has been done public and the Romanian part took the necessary steps for this intention not to become real. The Gojdu Courts have passed, in December 2004, under the property of the Israelian Company Autoker Holding Rt.

According to Gojdu's Will, the real owner of the inheritance is Gojdu Foundation from Sibiu, lead by the Transylvanians bishops. The Government from Budapest does not recognize the Gojdu Foundation from Sibiu that has been quickened anew in the 90's.

The agreement concluded in October 2005 between those two Governments, signed by the Ministers of Foreign Affairs, Mihai Răzvan Ungureanu and Ferenc Somogyi stipulated the set up, at Budapest, of a new foundation that have had as an aim supporting the co-operation between those two countries, followed by giving scholarships, taking care of organizing expositions, scientifically programs and to support the functioning of the "Emanuil Gojdu" museum and library. This new Gojdu Foundation, under the Hungarian legislation, should have been co-financed by the two subscribing states.

As we know, an agreement concluded between two subscribing states, to be applied, it has to be ratified by the two Parliaments, meaning the Hungarian and the Romanian ones. The Hungarians were the first to do the step, and the Parliament from Bucharest rejected the Ordinance regarding the ratification of the agreement (OUG nr.183-2005), in March 2006. After two years of discussions and postponing, the senators admitted that through the creation of the Romanian-Hungarian Public Foundation "the will of the great patriot is being broken", since Gojdu has left as inheritance "his entire fortune to that part of the Romanian nation from Hungary and Transylvania that keeps it orthodox religion", according to the will.

In right, of this inheritance can not take advantage the Hungarian country nor the Romanian one, because this is the private property of the Christian-Orthodox believers from Transylvania, as the dead left before he died.

So we could have been in front of some crimes against the state's security, against the person's private property and maybe even of high betrayal.

Through the concession of the buildings that are on the Hungarian territory, the Romanian country could obtain annual incomes of 2 billions Euros, sum that in this case, when we are in front of a global economical crisis, would bring a huge benefit to the Romanian state, being a more than semnificative impulse in our affirming in the world, both from the economical point of view and as an image of a country that managed to destroy some criminal phenomena, that in some more developed countries are very well saturated.

For a better understanding of the word concession, throughout the Romanian law, it has to be mentioned the fact that the concession operation is being done on the basis of a concession contract. According to article no. 1, aline no. 2 from Law no. 219/1998 comes out that through the concession contract a part named concedent, hands over for a determined period, for not more than 49 years, to the other part, called concessionary, the right and the obligation of a goods' exploitations, on his risk and on his responsability, in exchange of a due[154].

Among others, the infractionality from the foreign affairs' domain, in which the subject is the state, through its representative the Government, it is being developed through agreements, treatises containing dispositions that if they pass, through ratification, in the one's country legislation, can represent "perfect legally crimes". That is why maybe, sometimes, to deeply engaged in the fight against corruption and against the criminality inside the country, the competent authorities does not manage enough resources for controlling these kind of businesses.

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[154] *Law no. 219 / 1998*, published in The Official Monitor no.459 from 30.11.1998.

A FEW CONSIDERATIONS REGARDING THE CRIMINAL OFFENCE OF SMUGGLING

Candidate to Ph.D Lecturer Police Chief Inspector **Nicolaie Iancu**
Sector Chief – Frontier Police of Borş
AGORA University, Faculty of Law and Economics
ianico_laie@yahoo.com

Police Chief Inspector **Gheorghe – Viorel Nemeş**
Director of the Frontier Police Board of Oradea

Abstract:

Smuggling is a fraud which affects gravely the social relations in the field of the customs system or which is of interest for this system.

In this article we are presenting particularities of this phenomenon at the Western border of Romania, namely: illicit cigarette traffic, counterfeit goods traffic, illegal traffic in stolen cars and equipments, illegal traffic of arms, ammunition and prohibited substances, illegal drug traffic.

Among the causes, conditions and circumstances that determined, encouraged or facilitated the committing of the criminal offence of smuggling, we may mention the following: the existing geopolitical situation in this part of Europe; the existence of limitations regarding the import or export of certain goods; the existence of measures of protection of the national economy, established by instituting customs duties, excise duties; the intensification of the traffic of goods and travelers; the existence of different prices or qualities for the same products.

Key words: smuggling, statistic data, Romania's Western border.

I. General considerations. Smuggling is the guilty violation of the law with a view to eluding the customs duties imposed when passing goods over the frontiers, the prohibitions and the import-export commercial quotas. Authors of the specialty literature have noticed that the existence of smuggling presupposes as a premise a judicial customs system.

Smuggling is a fraud which affects gravely the social relations in the field of the customs system or which is of interest for this system. It is a crime committed in bad faith in order to mislead the customs authorities about the situation of certain goods, generating insecurity and disorder in the sphere of passing goods over the border, in a word it creates social danger[155].

The judicial customs system represents all the provisions included in the Customs Code, in its Enforcement Regulation, as well as in other internal and

[155] C. Voicu, *Business Criminal Law,* Rosetti Publishing House, Bucharest, 2002, pp. 200-201.

international normative acts ratified by our state and which contain provisions regarding the customs field. These provisions regulate customs inspection of goods and of means of transport, customs taxation by applying the customs tariff and other operations specific to the customs clearance activity.

The Romanian Criminal Code. The Special Part establishes the criminal offence of non-observing the provisions regarding import or export operations, with the following legal content: the performance, without an authorization, of any acts or deeds which, according to the legal provisions, are considered as import, export or transit operations[156], is punished by imprisonment between 2 and 7 years.

Smuggling is the crossing of the frontier in other places than those established for the customs inspection of commodities or other goods. It is also a criminal offence the passing over the frontier, without an authorization, of arms, ammunition, explosive or radioactive materials, stupefacient and psychotropic products and substances, essential chemical precursors and substances, toxic products and substances.

The obligation of the Romanian state to incriminate and fight against customs related criminal offences, mainly smuggling, is also derived from the provisions of certain international normative acts of which Romania is a party, to which it has adhered or which it has ratified.

On grounds of these normative acts, Romania has taken on the obligation to ensure the observance of the rights and liberties of all persons regardless of their citizenship or nationality who are on its customs area, including the elimination of the risk of a prejudice that might be caused by committing the criminal offence of smuggling.

Among the causes, conditions and circumstances that determined, encouraged or facilitated the committing of the criminal offence of smuggling, we may mention the following: the existing geopolitical situation in this part of Europe; the existence of limitations regarding the import or export of certain goods; the existence of certain measures of protection of the national economy, established by instituting customs duties, excise duties; the wish to obtain goods produced in other countries; the intensification of the traffic of goods and travelers; the existence of different prices or qualities for the same products.

II. Particularities of the phenomenon at the Western border of Romania

In the course of time, it has been noted that certain criminals abstract from customs clearance any commodity that, in a period or another, in a place or another, is of a high commercial interest or is subjected to prohibitory arrangements.

1. Illicit cigarette traffic

The aspect with the greatest impact from the point of view of its dimensions, social and negative economic effects is represented by the illegal cigarette traffic.

[156] According to the provisions of art. 302 of the Romanian Criminal Code. The Special Part.

This illicit traffic is achieved mostly through actions of smuggling at the frontier with Ukraine.

In the year 2008, the quantity of cigarettes illegally trafficked and retained as a consequence of the actions organized by the frontier police in co-operation with the customs authority, at the border crossing points, as well as on communication routes, has increased as reported to the same period of the year 2007 (i.e. the first semester).

As regards the way of committing them, these criminal offences have several characteristics, among which we may mention:

- cigarettes are trafficked through organized networks, having connections in Ukraine, Romania, Hungary and this traffic implies a high degree of socialization as the income of the population in the frontier area is quite low, and, moreover, the involvement of transnational criminal networks;

- in the area of Satu Mare, the direction of the traffic is from Ukraine to Romania. It takes place both at the Border Crossing Point of Halmeu and at the green frontier. Taking into account the specific character of the area, the cigarette traffic is generated by the duty-free shops;

- the illicit cigarette traffic in Ukraine is committed along the frontier with the Hungarian Republic;

- at the border crossing points in the counties of Arad and Bihor, this illicit traffic of cigarettes coming from other sources than Ukraine has increased, the organized transport of cigarettes taking place by goods trains to countries of the European Union.

2. Tax evasions. Counterfeit products

The economic and commercial opening of the European Union has generated the opportunity for certain Romanian and foreign economic agents to evade the intra-communitarian commercial norms, as well as to commercialize counterfeit products.

The structures of the Frontier Police supported the customs authorities and the Financial Guard in the actions that these institutions carried out at the most important border crossing points.

The consequences of the actions carried out were as follows:

a) Products were impounded because of the fact that there were missing legal commercial documents:

- farm food products, domestic appliances, coffee (829,200 lei)

- cosmetics and textile goods produced in Turkey and destined for countries in Western Europe (4,091,235 lei);

b) The Frontier Police drew up 9 criminal reports regarding counterfeiting and tax evasion.

In this respect, the following case is illustrative: the Frontier Police of Satu-Mare identified an organized group specialized in cloning electronic means of payment. Under the surveillance of the prosecutor of D.I.I.C.O.T. (The Board for the Investigation of Organized Crime and Terrorism) of Satu-Mare, the frontier

police carried out 7 domicile searches, retaining 9 persons involved. The prejudice caused by the illicit actions of the respective group is estimated at 260,000 USD.

3. Illegal traffic in stolen cars and equipments

The phenomenon of illegal traffic in stolen cars and equipments is active and has also been pointed out by the Hungarian party. Three cases have been traced out at the common frontier, 13 stolen vehicles have been found, of which 12 came from Western European countries.

In the process of investigating these criminal offences, the Border Control Point of Oradea had an important part, carrying out 3,527 checks, as well as ensuring the proper performance by the authorities entitled of the qualified informative activity.

As a result, in 4 cases there were found stolen equipments (5 miniexcavators, 1 motor tractor and 1 trailer), a fact also signaled by the Hungarian party (3 cases with 3 miniexcavators, 1 tractor, 1 fork-lift truck) and 17 criminal reports were drawn up.

4. Illegal traffic of arms, ammunition and prohibited substances

In this field, the activity relied mainly on supervising the transport of arms, explosives (with an industrial destination), as well as on the exchange of operative data and information with the structures entitled by the law.

Although the quantities of explosive materials, such as industrial, military explosives and ammunition were significant (3,696 tons) and were transported by 335 means of transport in 186 transportations, not many of these were carried out illegally.

Also, there were 3 cases of (legal) import and transit of 9,784 kg of radioactive materials; 2 (authorized) transports of 24,689 kg of materials in a precursor system; 6 authorized (outward) transports of 76 tons of different chemical offal.

Following the performance of specific activities of investigation, there were drawn up:

- 6 criminal reports for the arrangements of arms and explosives, causes related to the introduction in the country, without legal approval, of pyrotechnic materials (fireworks) and the possession of a gas revolver;
- 1 criminal report for the arrangements of prohibited substances and 2 kg of mercury were retained.

5. Illegal drug traffic

Combative activities in this field are the most efficient, with the most remarkable results and relied on two elements:

- integrated, continuous and coordinated action of specialized structures belonging to the board of the frontier police of Oradea;
- co-operation with the General Inspectorate of the Frontier Police, with the Regional Centre for Fighting against Organized Crime and with the Board for the Investigation of Organized Crime and Terrorism.

In all the 16 cases that resulted in retaining psychotropic substances, action was taken on the basis of qualified informative work. Thus, 15 persons were held,

of which 6 arrested preventively (2 Turks, 11 Romanians, 2 Hungarians) and 10 criminal reports were drawn up.

As details, we are mentioning the following: 383.29 kg heroine, 123 g cannabis, 70 g cocaine, 6.48 kg hashish, 10,082 pieces of Ecstasy, 10,216 pieces of anabolizing tablets.

Conclusions

1. Romania's joining the EU brings the across-border criminal phenomenon to our attention, as it is growing and diversifying.
2. We are noticing an increase of the cigarette traffic at the frontier with Ukraine and an extension of cigarette transports to the European Union countries by goods trains.
3. There is a slight decrease of traffic in cars and equipments stolen from the countries of the European Union.
4. A quite significant number of fictitious commercial actions, with no proving documents, are still carried out. The traffic in psychotropic substances.
5. The traffic in prohibited and strategic substances has increased.
6. We are noticing the gradual extension and the organized, conspired and transnational character of drug and cigarette traffic in Ukraine.

Annex: The situation in this field and the data presented have been provided by the Compartment of Analysis, Statistics, Evaluation.

Source: The Frontier Police Board of Oradea

Indicator	**Sem.I-2007**	**Sem.I-2008**	**Trend**
Stolen cars and equipments	**20+1**	**13+7**	**Decrease**
Drugs	**51.1 kg**	**394 kg**	**Increase**
Cigarettes-packets	**2 500 000**	**4 266 400**	**Increase**

PENAL ACTION AND CIVIL ACTION IN BANKRUPTCY'S OFFENCE CASE

University reader Ph.D . **Gheorghe Ivan**
University „Dunarea de Jos" Galati
Faculty of Rights
The Public Right Desk
ivan_gheorghe_p@yahoo.com

Abstract:

Civil action may be exercised along with penal action, only with the purpose of bringing back the goods, the hidden values or the fraud values in a strange way to the failure table, due to some actions which enter in bankruptcy's underground content.

Creditors may have a civil part quality because they suffer the damages of the action, also like the insolvent debtors.

The penal action and the mercantile action of the judicial reconstruction or debtor bankruptcy's are independent, having a different current, the charges of the 19th article, the second paragraph, Code of criminal procedure being impracticable.

Only final injunctions of the penal instances have judge work authority. There is an exception: the solution of the penal pursuit instances, only if they aren't confirmed by the judgment instances.

The final injunction of the mercantile instance regarding the unsolved procedure has judged work authority in front of the penal and judicial instances (prosecution instances and judgment organization) that solve the penal action, human penal responsibility, which make the bankruptcy's offence to be the object in the mercantile insolvent existing state of the condition.

Key words: penal action, civil action, bankruptcy.

1. Civil action along with penal action forms a very controversial problem for the damaged creditors through the bankruptcy's offence. In an old opinion it sustained that the civil action is not allowable because, through it the creditor who would make the civil action would obtain, individually, damages which would break the leveling rule of the bankrupting contestable procedure[157].

In another opinion[158], creditors may form civil parts in penal process, in the action of requiring damages from the bankruptcy's offence (ex delictu).

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[157] M. Pascanu, *Romanian Bankruptcy's Right*, Cugetarea Publishing House, Bucharest, 1926, page 659.

[158] N. Buzea, *Note,* Pandectele Romane, 1930, II, pages 18-20.

Like other authors[159], we consider that the civil action may be exercised near the penal action, but only with the purpose of bringing back the goods, the hidden values or the fraud values in a strange way to the failure table, due to some actions which enter in bankruptcy's underground content.

Regarding the civil part quality in the penal process for the bankruptcy's offence, it was reflected the opinion that each of the damaged creditors don't have a same quality and only a local-judge has in his fortune's name which is administrated by him, and into whom he intends to bring the foreign good for the creditors well-being. Maintaining this opinion, there were evoked legal charges which provide the local-judge's right to make civil actions for bringing the foreign goods in debtor's fortune.

Far away to deny a same faculty of the local-judge we can't pass over the fact that the creditors are the damaged persons and no other persons or state instances. During the incriminatory norms, in the case of some bankruptcy's offence modalities, the lawgiver previewed in an express way that the material-element may be fulfilled only in the creditors' fraud. In conclusion, creditors may have the civil part quality because they suffer the prejudice caused by the committed act.

In the other hand, according the 24th article, the first and the second paragraph, Code of criminal procedure, the person who suffered a physical, moral or material damage through the penal act is named a civil part if he participates to the penal process.

In the same case, the 85/2006 Law gives creditors a lot of faculties in bankruptcy's matter: they can elicit the bankruptcy's opening procedure; they can participate to the bankruptcy's procedure etc. The bankruptcy's procedure represents the collective contest and the leveling contest of unsolved procedure which is applied to the debtor for his fortune's liquidation, for the quiescent coverage, being followed by the debtor's radiation from the register in which he is matriculated.

Regarding the local-judge, we have to mention that, according to the 11th article, the first paragraph, the „g" letter from the 85/2006 Law, he has like competences the involving demands' judgment of the board members' responsibilities who contributed to the debtor's reach in insolvency, according to 138th article the approach of the penal investigating organization linked with the previewed damages committed from the 143-147th article, from the same quota's act.

According with the second paragraph from the 11th article, from 85/2006 Law, the local-judge's responsibilities are limited to the judge's control of the judicial managers' activities, or, in exceptional way, to the debtor if nobody takes him the right of managing his fortune. Managerial decisions may be controlled by the creditors, under the opportunity's aspect, through their organization. From the

[159] V. Pasca, *Bankruptcy's fraud previewed in 64/1995 Law*, regarding the judicial and failure reorganization's procedure, *The Phoenix insolvency magazine nr.11/2005*, page 45.

same quota's act, the 12article, the first paragraph provides that the local judge decisions are finally and executor.

In conclusion, the local-judge can't have a civil part quality in the penal process, being a judicial authority who accomplishes only a judgment and a solved function of the insolvency procedure. Also, in the 5th article, from the 85/2006 Law, it provides that judgment's members (local-judge, judicial manager and the liquidator member) are the members who apply the procedure.

In the 20th article from the 85/2006 Law the judicial manager's actions are previewed: book debit's encashment, checking the book debit's encashment, referring to the goods from the debtor's fortune or to the amount of money transferred by the debtor before the procedure's opening; the actions' formulation and maintenance in demands for the debtor's book debit's encashment with the purpose of employing lawyers. In the case of the liquidator member we have the same competences (the 25th article, „g" letter from the 85/2006 Law). Also important is the fact of mentioning that after the insolvency's opening procedure, the general meeting of the debtor's investors/ co-partners will denote a commissioner, physical or judicial person, and a special manager, on their expense who has to represent their interests and the society's interests and to participate to the procedure, on the debtor's experience. After taking a managerial right, the debtor is represented by the judicial manager/ liquidator member who also manages his commercial activity and the special manager mandate will represent only the investors/ co-partners interests.

From these legal dispositions it is deduced that also the debtor may have a civil part quality in the penal process, being represented by the special manager, judicial manager or the liquidator member who appears in the insolvency procedure's stages: the special manager- in the moment of the insolvency's opening procedure; the judicial manager- in the moment of the insolvency's opening procedure; the provisional liquidator- in the moment of the simplified opening procedure; the liquidator- in the moment when it is disposed the pass to the bankruptcy. The creditors' committee is involved in bankruptcy's matter, like a creditors' commissary that may action only when the judicial manager and the liquidator remained inefficient and they didn't introduce actions for the debtor's book debit's recuperation.

All the recovery goods will enter in debtor's fortune and will be destined, in reorganization case, to the accomplishment of the necessary supply for the debtor's continuity actions and also for the passive coverage in the bankruptcy's case (140 article from the 85/2006 Law).

2. The penal action's independence toward mercantile action represents an old problem, since the Mercantile Code was adopted.

According the 138th article, the second paragraph from the 85/2006 Law, the application of the first article referring at the civil responsibility's booking of the person who caused the debtor's insolvency cause, doesn't discharge the penal law application for the acts which constitute frauds.

This norm consecrates the independence rule of the penal action along with mercantile action.

In this case, the bankruptcy's procedure may be sustained like a commercial venue which is independent from the penal procedure and they will expand independently one from another. The mercantile action of the debtor's reorganization or bankruptcy will follow it course even if the penal pursuit against persons who made simple or fraud bankruptcy was started. The 19 article dispositions, the second paragraph, Code of criminal procedure regarding the civil actions' reprieve, promoted in the front of the civil action until the penal action's solution, they don't have incidence in bankruptcy's fraud matter[160].

The most important argument which can be brought to support the 19th article inapplicable previews of the law, from the second paragraph, Code of criminal procedure is constituted by the fact that, usually, it doesn't exist an identity between the passive subjects of the two actions, because, in most of the cases, the penal action is used against a physical person, while the mercantile action is used against a judicial person.

However, it may be encountered situations when it is a passive subject's identity, like in the case of merchant-physical person or that person in which the penal responsibility of the judicial person may be employed.

Into the doctrine was also told the opinion according with no one from the existing opinion from the special literature can be accepted, respectively the two actions are independent[161] or the mercantile action has to be suspended due the basis of the phrase „the penal keeps place to the civil"[162], because the actions' source is different[163].

Pleading for his opinion, the author shows that the bankruptcy's fraud represents the penal action's source, while the procedure previewed in the 85/2006 Law has in basis the simple existence of the insolvency state. In this case, the legal solution is the 244th article dispositions' application, the first paragraph, second point, Code of civil procedure which previews that the instance may suspend the judgment „when the penal prosecution started for a damage which would have a decisive state over the following decision"[164].

To support his point of view, the author also evokes other two arguments, from the law regarding the insolvency procedure: the mercantile procedure may be unrolled in the same time with the penal procedure; even if the merchant is investigated for bankruptcy's fraud, the merchant may satisfy his creditors during

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[160] V. Pasca, *Bankruptcy's fraud*, Lumina Lex Publishing House, Bucharest, 2005, page 161; V. Berchesan, N. Grofu, *Criminalistic investigation of the fiscal fraud and bankruptcy's fraud,* Little Star Publishing House, Bucharest 2003, page 170.

[161] V.Pasca, *Bankruptcy's fraud*, the cited opera, page 36.

[162] G. Piperea, *The obligations and responsibilities of the mercantile managers' society. Elementary notions* , All Beck Publishing House, Bucharest, 1999, page 244.

[163] R. Slavoiu, *Some aspects regarding the bankruptcy's fraud*, Law no.3/2006, page 218.

[164] Ibidem, pages 218-219.

the procedure, this case being declared independent by the administration if, at that moment, the penal responsibility was established or not[165].

In other opinion it was sustained that, in all the situations in which the passive subject's identity exists, like for example, the case of the merchant-physical person, the 19th article, the second paragraph, Code of criminal procedure is applied and the mercantile situation previewed in 85/2006 Law will be suspended until the final conclusion of the penal action for the bankruptcy's fraud[166].

If the debtor's reaching in the insolvency state was induced of one of the acts which constitutes different modalities of the bankruptcy's fraud, it can say that it is the source (the basis, the cause) of the mercantile action and also of the penal action, because money's cessation is an existing condition of the bankruptcy's fraud. This thing means that insolvency state is the cause of the two actions and in bankruptcy's case, the insolvency conditions of the act's content. None of the two actions may be promoted without ceasing money's supply[167].

The fact that the instance may suspend the mercantile action, in the situation in which the solution from the penal process may influence the mercantile instance decision is a farther more argument that the penal action and the mercantile action mustn't be regarded in a different way, every time[168].

Regarding our opinion, we believe that the passive subject identity has no relevance in this subject matter. But, the 19th article application, the second paragraph, Code of criminal procedure can be referred only in the case in which the penal action and the civil action have the same source-committing an offence[169].

In our case, the penal action and the mercantile action don't have the same source – the commission of a fraud, only the insolvency state linked them which constitute a premise situation in the bankruptcy's fraud content and a condition for the bankrupting opening procedure.

The permitted situation resides in the preexisting of a same reality, fact state etc, on which the course act's performance has to be grafted, for being considered a fraud.

The premises may be defined like those elements, natural or judicial element, previous to the incriminated action and independent between them, which are asked for the fraud's existence, like, for example, the existence of the pregnancy in the case of the illegal abortion's provocation, the existence of a previous marriage in bigamy's case etc.

In the Italian doctrine, the fact premises (presupposti del fatto) were denoted by the phrase „the course's premises" (presupposti della condotta),

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[165] A. Gabrielli, *Grande dizionario illustrato della lingua italiana (A-L)*, a cura di Grazia Gabrielli, Editore: CDE Sp A-Gruppo Mandadori, 1989, page 219.
[166] M. A. Hotca, *Bankruptcy's fraud*, C. H. Beck Publishing House, Bucharest 2008, page 59.
[167] Ibidem, page 59-60.
[168] Ibidem, page 60.
[169] I. Neagu, *Procesual penal right*, Treaties on, First volume, The general part, Global Lex Publishing House, Bucharest, 2006, page 254.

because them, even if there aren't independent in front of the active subject's behavior, they aren't strange for the act previewed by the law as a fraud[170].

In opposition with the constitutional elements of the incrimination which can only be concurrent or chronological, the fact premises are the preexisting conditions of the fact.

Accordingly, insolvency is a fact premise, before the acting of the material element of the bankruptcy's fraud and it mustn't be mistaken with the fraud itself.

We can't deny the fact that insolvency, like a fact premise, enters in the bankruptcy's fraud structure, but it can't present the sign of equally between the frauds itself and one of its element.

In sustaining our opinion, we can evoke the 137th article dispositions, the first paragraph from the 85/2006 Law, according with, by bankruptcy's final procedure the debtor-physical person won't have the responsibilities that he had before the bankruptcy's opening, but under their thought of „not guilty" in the bankruptcy's fraud case, payments or fraud transfer; in there situations he won't have responsibilities, only if there were paid during the procedure, the 16th article case, the first paragraph, the third point being an exception. This article has two different procedures: the penal procedure through where the debtor was found guilty of bankruptcy's fraud and the mercantile procedure, where the debtor accomplished his responsibilities.

Consequently, the penal action and the mercantile action of the debtor's judicial reorganization of bankruptcy are independent and they will follow their own way, the 19th article dispositions, and the second paragraph, Code of criminal procedure being impracticable.

The 137 article, the first paragraph from the 85/2006 Law must be interpreted in the way that the penal process may be started after the insolvency's final procedure (The Appeal Court Cluj, mercantile section, 612/1999 decision).

Nowadays, there is no legal disposition to correspond with the 714th article's disposition in which „the bankruptcy's procedure before the mercantile venue and the directive or the penal procedure will follow one to another in a different way. Applying this legal disposition, the old Justice Court decided that the public action for the bankruptcy's crime is independent from the failure state of the mercantile action[171]. At one time opened, the public action will follow its course, without allowing of what was decided for the failure's state, no matter what the mercantile law court would decide (Cass, Sect. Unite 3/1911 number[172]).In this way, if the mercantile law court took over the bankruptcy's state, after a merchant declared the bankruptcy's state, the law court may send the merchant in front of the repressive instances to respond for his frauds, inasmuch as the law court decision

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[170] F. Antolisei, *Manuale di diritto penale. Parte generale*, Dott. A. Giuffre Publishing House , Sp. A. Milano, 2000, page 215.

[171] V. Pasca, *Bankruptcy's fraud*, cited opera, pages 112-113.

[172] M.I.Papadopolu, *The adnotet penal code*, National Edition- S. Ciornei, Bucharest, 1930, page 358.

can't constitute a judged thing for the penal instance (Appeal Court IV Bucharest, 204/1929 number[173]).

3. The judicial decisions' authority for the penal matter and mercantile matter is another delicate problem.

According the 22nd article, Code of criminal procedure, the final decision of the penal instance has judged thing authority in front of the civil instance which judges the civil action regarding the existing fact, the person who committed it and her guilt.

Two hypotheses are possible. The first is that when the penal action is finally solved by the judicial decision, before the mercantile decision. In the doctrine it was presented the point of view that, excepting the case when judicial-material matter is unchangeable, from the time of the final result of the penal action to the time of the mercantile action's exertion, in all the cases, the final solving existence doesn't influence the mercantile action exercise in some way, because the payment cessation must be analyzed between the instance moment and that of the demand's solving, regarding the insolvent opening procedure, which means that the temporal existence or inexistence of the circumstances' causes are the same[174].

We believe that, from the moment when the insolvency constitutes a fraud content's element and its existence was finally canceled by the penal instance, the discussions in front of the civil instance has no result. The penal instance discovered the payment final state and no circumstance can change this fact situation.

Only final judicial decisions of the penal instance have judged thing authority. The solutions of the penal pursuit instances (of not starting the penal pursuit, of taking from the penal pursuit, of dismissal, of ending the penal pursuit) aren't necessary for the mercantile instance. However, this is an exception: the penal pursuit instances' solution, attested by a judicial instance, in the complaint matter against penal pursuit acts and measures. According the 278th article, the 11th paragraph, Code of criminal procedure, in the situation made provision in the 8th paragraph letter a) − when the judge denies the complaint made against procurator's resolutions or orderly of not sending in the justice, through the sentence, like unallowable sometimes, after the case, maintaining the resolution or orderly attacked − regarding the person for whom the judge decided through a final decision that isn't the case of the penal pursuit again started for the same act, only in the case in which some new facts or circumstances are unknown by the penal pursuit instance and none case made provision in the 10th article appeared, Code of criminal procedure.

The second hypothesis refers to the contrary situation, when the penal action is solved after the irreversible solution of the mercantile action, regarding the insolvency procedure. In this case, the irrevocable decision of the mercantile instance regarding the insolvency procedure has judged thing authority in front of

[173] Idem.
[174] M.A. Hotca, cited opera, pages 54-55.

the penal judicial instances (penal pursuit instances and judicial instances), who solve the penal action having like object the penal draw responsibility of the persons who made the bankruptcy's fraud, referring to the existing state condition of the mercantile insolvency[175]. In such a case, the insolvency case analysis constitutes a perquisite thing.

According the 44th article, the third paragraph, Code of criminal procedure, the final decision of the civil instance has judged thing authority in front of the penal instance, over a circumstance which represents a perquisite thing,

The perquisite thing is an extra-penal problem and its perquisite solution is linked with the penal cause conclusion[176].

We have to mention the fact that, according the 44th article, the first paragraph, Code of criminal procedure, the penal instance may judge any thing of which depends the cause solution even if, through its nature, that thing represents another instance capacity.

In the case in which the mercantile instance pronounced finally and irrevocably that the bankruptcy's act doesn't exist or it wasn't made by the guilty person or the culprit didn't action with fault, than the 22nd article dispositions, the second paragraph, Code of criminal procedure, are applied and the prosecutor can send at law the accused, and the penal judged instance may sentence him if the tests managed during the penal trial confirms this solution.

4. Another delicate problem represents the 36th article interpretation and application, from the 85/2006 Law in which „from the time of the procedure's opening, it is suspended by the right all the judicial actions or extra-judicial actions for the book debits creation over the debtor or over his goods." According the 32nd article dispositions, the first paragraph from the 85/2006 Law, the local-judge will pronounce a final opening of the attorney procedure or of the simplified procedure.

Through the phrase „all the judicial actions or extra-judicial for the book debit's creation over the debtor or his goods" we understand only those judicial actions (including the coerced execution) or extra-judicial, which has as purpose the book debit's satisfaction, regarding the debtor's person or his goods. In conclusion, the 36th article from 85/2006 Law doesn't refer at the penal action, too[177]. Moreover, the penal action hasn't like object some book debit's creation but penal draw responsibility of the persons who are guilty of a bankruptcy's act.

In conclusion, the penal action of the bankruptcy's fraud isn't suspended and it can't be suspended by the mercantile instance by the fact of the insolvency opening procedure[178].

However, like a rule, it isn't normal like a penal action take place in a place by the civil action (privacy). The penal action is regarded with some characteristics: in a

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[175] Ibidem, page 55

[176] I. Neagu, cited opera, pages 291-192; Gr. Theodoru, *The treaty of the procesual penal right*, Hamangiu Publishing House, Bucharest, 2007, pages 314-318; N. Voicu, *The treaty of penal procedure. The general part, vol.I*, Paidela Publishing House, Bucharest, 1998, pages 315-318.

[177] M. Hotca, cited opera, page 67.

[178] Ibidem, page 68.

public order, unavoidable, indivisible and not available. For this reason, it is hard to accept that the „penal keeps place to the civil" [the 19th article, the second paragraph, Code of criminal procedure].

This rule is necessary to solve the penal action first, because the solution giving in this situation, with a public order character, must be taken in consideration for the civil action solution[179].

[179] Gr. Theodoru, cited opera, page 233.

THE OBJECT AND THE CONTENT OF THE REPORT OF FISCAL LAW, PREMISE CONCEPTS IN THE JURIDICAL FRAMING, THE INVESTIGATION AND TRIAL OF THE OFFENCE OF TAX DODGING

Ph. D. professor **Vasile Luha**

„1 Decembrie" University of Alba-Iulia

The Faculty of Law and Social Sciences

Abstract:

The author sets the abstract and conceptual frame for the investigative evaluation of the economic activity of any entrepreneur, a potential active subject of committing an offence with a specific content from the business area; it starts from the premise that the actions of fighting offences cannot be efficient without balanced juridical frames which should not disturb unjustified the economic circuit; by interpretation he reaches two conclusions having the value of principles: ***a.*** *the entrepreneur does not have the constitutional obligation to have a conduct which to make him pay the highest fiscal imposition and* ***b.*** *the investigator, in his legal approach, must never exclude the possibility that the fiscal authority may abuse; these theoretical fundaments may become operational when appreciations are made on the objective or subjective side of the offence, when the juridical frame of the investigated misdeeds is done.*

Key words: fiscal law, investigation, trial, offence, tax dodging.

Specification

The economic activity implies a diversity of actions having an economic content or only an economic meaning done by the entrepreneurs in order to achieve their interests. The juridical classification of their actions, to distinguish between a permitted action and an unpermitted one, from the perspective of the existence or inexistence of an offence of tax dodging, which is the concern especially of the judicial or law enforcement bodies, is an intellective and logical and complex approach which needs previously a compulsory and exact definition of the conceptual frame of the compulsory juridical report of fiscal law[180]. The juridical object and the content of the fiscal juridical report are two essential components of the fiscal juridical report. The precise setting of the sphere and content of the two concepts is necessary for directing the conduct of the entrepreneurs in their business actions and of the activities of the law enforcement agencies or juridical

[180] For details related to the specific of the investigation of offences from the business environment see: Augustin Lazăr, *The antifraud research in the business aria*, Lumina Lex Publishing House, Bucharest, 2004; Augustin Lazăr, *Criminalistic*, Altip Publishing House, Alba Iulia, 2004, pages 320-365.

bodies for the investigation, prosecution or bringing to trial the offences of tax dodging[181].

The object of the fiscal juridical report

The object of the fiscal juridical report is the conduct of the parties, this is the actions or lack of actions to which the active subject is entitled and from which the passive subject is held.[182] This can be: declaration of incomes by the tax payer, paying the taxes and contributions, paying back the sums that are not owed, compensation etc.

The object of the fiscal juridical report must not be mistaken with its content, as one can not equal the conduct of the parties with their rights and obligations. Both represent different elements which put together make up a whole: the fiscal juridical report.

When discussing about the object of the fiscal juridical report, about the object of the fiscal duty we notice that this is much more complex than that what people are generally willing to accept. It does not mean only the duty that the tax payer has to pay as it is generally considered (payment of the taxes, contributions etc.), but also other tasks to do something: records, registers, formalities, submitting documents, declarations on one's own account.

We must notice that also the fiscal authority is entitled and, why not, obliged to some duties which must not be forgotten in the case of a conceptual analysis on the fiscal juridical report: to control, to evaluate, to set circumstances, days, processes, actions, all these in a frame that has been established only by the law.

Each of the subjects of the fiscal juridical report acts in a frame determined, in abstract by the law and fixed operationally, casuistically, by jurisprudence or by administrative orders for the fiscal authorities. Each of the subjects of the fiscal juridical report, the entrepreneur or the fiscal authorities, when projecting their actions they do it based on their own evaluation of their interests and, especially, on the legitimateness of their future actions.

The approach has a practical signification which must not be neglected, especially in the area of responsibility, of setting the conditions of responsibility. Any juridical frame of setting the responsibility for not fulfilling the obligations in this area must start from the object and content of the fiscal juridical report which sets the responsibility: which are the duties to which the parties were entitled or which they had to fulfil and which were the limits within which they were fulfilled.

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[181] We consider here in the meaning of our approach the tax dodging incriminated by art. 9 paragraph 1 letter.b and c from the Law no. 241/2005 concerning the prevention of and fight against the tax dodging. Official Gazette no. 672/2005 from 27th July 2005; the author considers that these texts regulate the principle regulation of tax dodging; the other incriminations express particular forms of the illegitimate, tax dodger conduct of entrepreneurs.

[182] M. N. Minea, C. Fl. Costaş, *The law of public finances. Fiscal law*, 2nd volume, Sfera Publishing House, Cluj- Napoca, 2006, pages 11-15.

If the approach starts from the stated principle according to which the fiscal authority also has to maintain a certain conduct, the interpretation perspectives change radically.

Our interpretation starts from the observation according to which the fiscal authority operates within a legal frame set by the fundamental law and by ordinary laws. The conduct of the authorities, which is inevitably part of the object of the determined fiscal report, is linked to two constitutional principles: the respect of the market economy and the direct economic interest of the tax payer.

Even more, the rules of the constitutional state, which has been undoubtedly consecrated in the constitutional norm, impose that the state which issues the norm also follows it.

The tax payer who declares or registers his incomes for which he has to pay taxes to the budget interprets the norms issued by the state making his own qualifications on his fiscal duties, considering, obviously, his economic interest; the fiscal authority must respect this qualification if it was done by respecting the law and in the spirit of the positive market economy.

Or, starting from such a conceptual approach, we reach to the conclusion that the interpretation of the fiscal norm must be done within the spirit of the market economy and not in the interest of the state. In practical terms one can notice that no tax payer must to have a conduct which to force him to pay the highest taxes.

In practical terms this means that one must distinguish between a managerial and financial dexterity which has as a goal to diminish the spending or to increase the incomes and the entrepreneurs' options to fraud the fiscal authority. The objective side of the offences of tax dodging cannot be set without the judiciary agent having previously made the difference, between a diligent or cautious financial management and fraud.

Even more, we cannot ignore the reason of the approaches of the subjects of the juridical report, the immediate reason for their actions: the concrete reasons which drive them to one or the other option, the certitude, the interior drive that they act legitimate or fraudulently[183]. Setting the subjective side of the crime done by the entrepreneur must start from this theoretical support.

The content of the fiscal juridical report

The content of the fiscal juridical report is made up of the correlative rights and obligations of the parts involved in this juridical report[184].

The rights and obligations of the subjects of the fiscal juridical report results from the law and are enumerated explicitly in art. 21 and 22 from the Code

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[183] Details on the theory of the law abuse in the fiscal area see in: Maurice Cozian, *Les grandes principes de la fiscalite des entreprises*, 4-ème edition, Litec, Paris, 1999, pages 19-81.

[184] D. G. Şaguna, *Financial and fiscal law. Treaties on*, Eminescu Publishing House, Bucharest, 2000, page 685; Vasile Luha, *The business law. Elements of the fiscal obligation's general theory*, Risoprint Publishing House, Cluj-Napoca, 2007, pages 26-31.

of Fiscal Procedure, although the expression is in our opinion wrong, by calling the rights found in the content of the fiscal juridical report as "fiscal debts".

This way, the main subjective fiscal rights were the right to collect taxes, contributions and other sums which make the incomes of the general consolidated budget, and the right to reimburse the VAT, the right to reimburse contributions, taxes and other sums like these which constitute incomes to the general consolidated budget, and those accessories were the right to collect interests and delay penalties.

The subjective fiscal rights are this way patrimonial rights which are specifically stipulated by the law.

On the other side, the main fiscal duties are the following: the obligation to declare the taxable goods and incomes or, according to situation, contributions, taxes and other sums owed to the general consolidated budget; the obligation to calculate and register in the bookkeeping and fiscal registers the contributions, taxes and other sums owed to the general consolidated budget; the obligation to pay in due time the contributions, taxes and other sums owed to the general consolidated budget; the obligation to calculate, retain and register in the accounting and payment registers, within the legal deadlines, the contributions and taxes which are collected at the source[185]; any other obligations of the tax payers, physical or legal persons, in the enforcement of the fiscal laws.[186]

The accessory fiscal obligations were the obligation to pay interests and delay penalties, related to the contributions, taxes and other sums owed to the general consolidated budget.

Next to the above enumeration we would like to draw attention to some other rights conferred by the lawmaker – through art. 11 from the Fiscal Code (Law no. 571/2003) – to the fiscal bodies, as follows:

- To "not take into consideration a transaction which does not have an economic purpose" or to " reconsider the form of a transaction in order to reflect the economic content of the transaction" in establishing the amount of a contribution or of a tax or
- In a transaction between affiliated persons, to " adjust the sum of the income or expense of any of the persons, as necessary, in order to reflect the market price of the goods or services offered in the transaction". It is also stipulated that "in establishing the market price of the transactions between affiliated persons the most adequate of the following methods is used:

[185] One can notice that in this case it is an obligation of procedural fiscal right and not of material fiscal right, of persons who have the obligation to pay or retain in the name of the debtor contributions, taxes, fines and other budget incomes.

[186] Regarding the tax payers one can notice that the legal text mentioned does not contain all their obligations, and obligations resulting from other legal texts can be added.

a) The method of price comparison, through which the market price is established based on the prices paid to other persons who sell comparable goods or services to independent persons;
b) The plus-cost method, through which the market price is established based on the costs of the good or service done through the transaction, increased with the corresponding profit limit;
c) The method of the resell price, through which the market price is established based on the resell price of the good or service sold to an independent person, diminished by the sell expense, other spending of the taxpayer and a profit limit;
d) Ant other method that is recognized in the guidelines concerning the transfer prices admitted by OECD.

In the first case the fiscal authorities are given the possibility to appreciate that the goal of a transaction is not the one specified by the two parties and to eliminate this transaction in the moment of establishing the contribution or tax or to reinterpret the transaction in another manner and to set the contribution or tax starting from this own interpretation.

In the second situation a legal presumption of stimulating price in transactions closed between affiliated persons is instituted, with the possibility to take in consideration another price than the one set by the parties for determining the contribution or tax.

By affiliated persons we understand relatives up to the 3rd degree inclusively, in the case of physical persons and physical or legal persons who own directly or indirectly at least 25% of the value/number of the participation titles or of the voting rights of the other person in the case of legal persons, respectively the third party that holds directly or indirectly at least 25% of the value/number of participation titles or voting rights of both legal persons.

What mean and what are the consequences of these rights that are granted to the fiscal authorities?

One can notice that the lawmaker granted the fiscal bodies similar attributions to those of the courts of law. These have the possibility to "notice" that the goal of a transaction may be entirely different to that specified by the parties involved in the transaction and to disregard a transaction or to "adjust the sum" of the income or spending when setting a contribution or tax.

Although the legal expression can lead to the impression that it refers only to the economic goal or content of the transaction, we consider that the implications are much broader, exceeding from the frame used to set a tax or a contribution.

In other words, although the convention closed between the parties is still perfectly valid, not being cancelled or modified by any court of law, it is ignored or reinterpreted by the fiscal body empowered to establish the corresponding tax or contribution.

We are practically in the situation of a juridical contradiction: a convention cannot produce effects in relation to the fiscal bodies, which have the quality of a third party in this case, if they consider that the price or the transaction itself would be simulated but it produces effects to the contracting parties and the others as it was established initially.

On the other side we must not forget that the contract closed with the intention to avoid the payment of some taxes and contributions is null and void.
Is it enough though the observation of the fiscal bodies in this respect or is it necessary to have a decision from a court of law? A normal question, in a space of the free thought.

Therefore, the analysis of the concept shows us undoubtedly that in the fiscal matter, the authority has a privileged position. We can even call it the privilege of power[187]: the authority, by its own exclusive power, sets the juridical content of the reports established between the debtor of the fiscal duty and its partners, according to the own evaluation and according to the own interest, establishes the opposability situations in the juridical relations of the third parties, observes the cases of fraud of the creditor[188], accepts evidences or rejects them, accepts or rejects exceptions, ascertains nullities, gathers patrimonial or administrative consequences, all from a unilateral perspective; one of the subjects of the fiscal report is the judge of the own case in the determined juridical relation of setting the actual fiscal duty.

Obviously, there are practical reasons that justify such prerogatives in the hands of the fiscal authorities just as the law grants the taxpayers the right to contest in the court the fiscal observations and the debt titles.

But this reality of the positive law must be known by the judiciary authorities and approached as it is: not all the allegations of the fiscal authority, not all their observations are clearly equidistant; on the contrary, as a principle they are interested as they express the point of view of a party which is interested from the juridical report of fiscal law. However objective and legitimate the fiscal agent would be he cannot deny that he is the agent of one of the interested parties. From this approaching perspective comes the idea that the abuse of the fiscal agent cannot be excluded; therefore the judiciary authority must consider with precaution his observations and his value judgments.

Taking in consideration the establishing protocols fulfilled by the fiscal authority as exclusive means of evidence in the probation of the offences of tax dodging must be done extremely careful; the observations from these documents

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[187] Details on this approaching type, see: Fl. Deboissy, *La simulation en droit fiscal*, L.G.D.J., Paris, 1997, pages 266-267; Ph. Bern, *La nature juridique du contentieux de l imposition*, L.G.D.J., Paris, 1972;

[188] In the juridical reports of private law this type of observation is done only in front of the judge by specific actions: see in this respect: C. Stătescu, C. Bîrsan, *Civil law. General theory of obligations*, 9th edition, Hamangiu Publishing House, Bucureşti, 2008, pages.352-360; Liviu Pop, *Treaties on civil law. The obligations*, I, Juridical General policy, C.H.Beck Publishing House, Bucharest, 2006, pages 350-413; Mircea N. Costin, Vasile Luha, *General theory of obligations*, II, Risoprint Publishing House, Cluj-Napoca, 2007, pages 172-284.

must be checked, the judgments of the fiscal agents must be resumed in the specific conditions of presenting the evidence according to the rules established by the penal procedure[189].

[189] Related to this area see: Gr. Teodoru, *Treaties on penal procedure law*, Hamangiu Publishing House, Bucharest, 2007, pages 329-425; Ad. Tulbure, *Romanian penal procedure*, Continent Publishing House, Sibiu, 2005, pages 169-2003.

MONEY LAUNDERING – AN INTERNATIONAL PHENOMENON

Candidate to Ph.D Assistant **Dan Lutescu**
University of Pitesti
dancorespondent@yahoo.com

Candidate to Ph.D Assistant **Catalin Bucur**
University of Pitesti
bucurc2000@yahoo.com

Abstract:

The new millennium brought along the globalization of the world's markets, and an unprecedented increase in the national economies too. The development of the global economy favored that of the transnational organized crime and terrorism.

The increase of the funds resulted from the organized crime's activity determined an augmentation of the necessity to recycle these funds, generating the alarming situation in which the underworld leaders and the operators involved in the money laundering could control the economy or parts of it.

The laundering of funds affects the free access to the investment funds, the legal labor market, the retail trade, the consumership and the production itself.

The International Community analyzed the etiology and outcome of the business criminality, and recommended to the states members to take action in order to limit it, but the diversity of the legislations and the social-economic peculiarities worldwide made almost impossible the consecration of an accurate definition of business criminality.

The authors of the present article conclude that only the consecration of a common legal body shall help the competent national and international institutions in their cooperation to reduce and eradicate the money laundering.

Key words: money laundering, organized crime, business criminality, transnational economy, international cooperation.

The new millennium brought along not only a significant globalization of the world's markets, but also an unprecedented increase in the national economies. Obviously, such processes favored the development of the global economy, but also that of the transnational organized crime and terrorism.

The continual increase in volume of the funds obtained as a result of the organized crime's specific activities determined an augmentation of the necessity to recycle these funds at such extent that generated the alarming situation in which the underworld leaders and the operators involved in the money laundering could control and even influence, in some countries, important branches of the economy, finances, politics and administration. The laundering of funds acquired in the illegal activities directly affects the free access to the investment funds, the legal labor market, the retail trade, the consumership and the production itself.

The late XX century and the early XXI century revealed the remarkable amplitude of the economic activities undertaken in the most developed and industrialized countries from Europe, America, South-Eastern and Eastern Asia. Nowadays the international economic relations experience a dynamism that is unprecedented in the history, new states and economic systems being integrated as well[190].

It is beyond a shadow of a doubt the fact that within this endless territory of the economy a massive number of illegal affairs initiates itself, develops and transacts, which forms what is often known as the business criminal phenomenon.

The fraud affects the economy in its entirety[191], causes enormous financial losses, weakens the social stability, threatens the democratic structures, determines the loss of trust in the economic system, corrupts and compromises the economic and social institutions.

Concerned by the business criminality issue, The International Community analyzed its etiology and its outcome, recommending to the states members to take actual measures for its limitation. In this matter, the diversity of the legislations combined with the social-economic peculiarities deriving from the development studies of both the European and other states, made virtually impossible the consecration of an accurate definition of business criminality.

The business criminality involves two dimensions:

- the national dimension;
- the international dimension.

The national dimension points to the amount of the offences that are incriminated in the criminal law or in the special laws of each and every country, offences that occur within the economic and financial system and don't involve nor include any foreign element.

The international dimension designates the sum of the offences that occur and finalize in the presence of the foreign element that can be represented by persons, firms, corporations, banks.

These two dimensions never had nor will have a static character[192]. Nowadays it is obvious the internationalization of the criminal type of business, in the most notorious cases of contraband, tax evasion, drug traffic, illegal import-export operations, the criminal partnership perfected itself. The alcohol or tobacco

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[190] Dragos Alexandru Sitaru, *Internationa commerce law*, Bucharest, 1996, p. 154.
[191] Constantin Enescu, *External commerce analysis methods*, Bucharest, 1993, p. 69-75.
[192] Nicolae Hoanta, *The tax dodging*, Tribuna Economica Publishing House, Bucharest, 1997, p. 99.

smuggling, the drug dealing and the arms traffic cannot be even conceived, these days without the involvement of the businessmen from around the world.

In such context it is relevant the list with the offences that are circumscribed to the phenomenon of the business criminality, as it was stated by the European Committee on Crime Problems:

- offences regarding the forming of the cartels;
- frauds and abuses done by the multinational corporations;
- access by fraud or misappropriation of financial funds given by the state or by the international organizations;
- offences in the I.T. domain (I.T. criminality);
- the establishment of false societies;
- forgery in the business account and the violation of the legal duty to keep the business account;
- frauds which are affecting the commercial status and the registered capital;
- frauds against creditors (bankruptcy, intellectual and industrial property violations);
- offences against consumers;
- disloyal competition;
- fiscal offences;
- corruption;
- offences concerning the stock market and bank;
- offences on the exchange rate of a currency;
- offences against the natural environment.

Once the actual offensive against some components and segments of the business criminality started (against tax evasion, smuggling, corruption) different aspects were revealed, some astonishing in their proportion. It was enough, for instance, to be discovered important, more or less, frauds concerning the destination of the subventions given within the Common Market [193], in the activity of the producers and of the exporters of food and agricultural goods, to start a rigorous analysis which revealed huge frauds done in this field in Italy, but only during the years 1985-1996, after complex investigations and inquiries, the true dimensions and the real face of the mob organizations were unveiled, of which the authorities haven't been spoken for three or four decades.

In Germany and in the other states of the European Union, only now, after more than twenty years, it is spoken about the role of the organized crime in the illegal migration of the Turkish, Arabian, Romanian, Serbian citizens, in the name of the right of the citizens to free circulation, with the encouragement from the legal authorities.

As a result, it can be stated that these criminal constructions are builder and developed, in their vast majority, on the interest and with the support of the state's

[193] Teodor Mrejeru, Dumitru Andreiu, Petre Florescu, Dan Safta, Marieta Safta, *The tax dodging*, Tribuna Economica Publishing House, Bucharest, 2000, p. 46-49.

authorities, their genesis must be searched inside the perimeters of the power circles.

This state of facts determines the authorities not to reveal the real dimensions of the criminality but in troubled times. Each and every new government is only preoccupied to reveal and prove just how corrupt was the prior government, refusing to accept the fact that different aspects of the business criminality and of the organized crime will be perpetuated and will intensify, sometimes even to much higher levels.

The excessive politicizing of the activities demanded by the fight against criminality is the fundamental cause for the weak response to the danger that the criminality poses, the element that determines the strong consolidation of it in the present society.

In this type of climate that is on a friendly ground the structures that work in the business criminality field established for them, developed and perfected a redoubtable management, which features maximum effectiveness, rigorous specialization, cutting-edge logistics, superior by far to that of the law enforcement. In this matter are relevant the allegations that Giovanni Falcone, the famous Italian judge assassinated by the Cosa Nostra in May, the 23-rd, 1992, made:" The mob is a logical world, more rational and more adamant than the state itself. The mob is an articulation of power, a metaphor for it, but also pathology of power. The mob is an economic system, an indispensable component of the global economic system. The mob develops due to the state and adjusts its behavior according to the state".

The financial product of the illegal affairs done by the groups of the organized crime has massive dimensions. The dirty money that circulate, practically on plain sight, constitutes the oxygen that provides strength to the perpetrators which are near or even in the core of the power structures that guarantee and cover up their criminal activities.

The analysts of the business criminal phenomenon warn on the fact that significant funds resulted from the illegal affairs are pumped into organisms and political administrative structures, in order to keep these structures in power and to be able to guarantee the success of the criminal organizations in the vastness of the dirty business initiated.

The main target for these organizations is that of making the structures which are competent to fight them inoperative, inefficient and sometimes even that of paralyzing these structures.

Many years ago, the fusion of the elites took place in Romania too: the underworld elite and the public life elite. These two elites act against law and order, in the degrading perimeter of immorality, affairs on false pretences, luxury and debauch.

The agents of these elites own restaurants, casinos, profitable business, fashion firms, hotels, luxurious cars, media trusts, television posts and substantial bank accounts overseas.

It is, without question, clear to most common people that helplessly witnesses this spectacle, that in the area overtaken by the organized crime,

professionals in trade, investments, finance and banking act in a perfect coordination with the power agents.

The major illegal affairs cannot be initiated, conducted and perfected in the absence of a partnership between the local organizations and those that act in other states[194].

The money laundering most often takes place in several different states at the same time, sometimes even in different areas of the world. This is why the international cooperation through the judicial institutions such as the extradition, the rogatory commission, foreign definitive decisions' enforcement, distrain and confiscation of objects resulted from criminal acts done in other states, as well as new methods of cooperation between the national agencies from different states.

Only the existence of a common body of laws can help the institutions from different states in their effort to efficiently cooperate in this matter. Nevertheless, the international institutions that are competent in this field – Europol, Interpol, Eurojust – are outmost important.

[194] Viorel Florescu, *Banking and budgetary law*, Bucharest, 2006.

THEORETICAL AND PRACTICAL ASPECTS REGARDING CONTRAVENTIONS STATED BY LAW NO 143/2000 REGARDING THE PREVENTION AND THE REBUTAL OF THE ILLICITE DRUG TRAFFICKING WITH THE ADJUSTMENTS BROUGHT BY LAW 522/2004

Legal adviser **Marius Mandra**

Abstract:

In order to respond to the social needs the regulators in the drug department have been widely debated in the doctrinaire plan have been emitted several theories regarding their juridical treatment, especially the prohibition theory, the theory of reducing risks , the disincrimination theory, and the controlled legislation theory.

In Romania the rebuttal of traffic and illicit use of drugs has been regulated by law 143/2000, law that has been completed and modified by law 169/2002, law 39/2003 and law 522/2004. considering the fact that this law has been interpretated in several articles and monographies we will eliminate to the modifications that appeared because of the modification of the law522/2004.

The first novelty brought by this law consists of the title's modification, changing the search aim from a repressive to a preventive one. This way, the law's title regards the prevention and rebuttal of traffic and illicit consuming of drugs, opposing the old titulature which referred only to the phenomenon's rebuttal.

In practice, the use of drugs has three forms: experimental use of drugs, recreational use of drugs and use of drug problem, the last two being of our interest. The recreational use represents the illicit use of drugs as attribute of modern life and of the relaxation and it is characterized by the absence of addiction.

Key words: contraventions, law, prevention, drugs.

In order to respond to the social needs the regulators in the drug department have been widely debated in the doctrinaire plan have been emitted several theories regarding their juridical treatment, especially the prohibition theory, the theory of reducing risks , the disincrimination theory, and the controlled legislation theory.

A. Prohibition that along history has been applied to tobacco, alcohol, and lately to drugs is based on the fact that the retrenchment of the offer through a general interdicting abuse, production and commerce under the threat of penal punishment. This theory is based on several fundaments.

Firstly, the moral fundament is born from the social- religious practices, abstinence

being a virtuous act of resisting pleasures. Another fundament is the epidemical one among the collectivity. The supporters of this theory say that toxic- mania is a contagious disease which can spread from the drug consumers (the sick ones) to other members of the society. Other theses which support the idea of prohibition is the one of climbing, according to which any light drugs consumer will finally end up consuming stronger drugs.

B. The theory of reducing risks is based on a pragmatically Anglo-Saxon doctrine which can be defined as the sum of all individual and collective actions, medical and social which regard to minimize the negative effects brought by the illicit drugs consumption. This theory has several fundaments too. Firstly the medical one: from abstinence to substitution, which is based on the fact that not all consumers can refrain themselves from is as the law requires and is preferable to reduce he risks than can affect their health-HIV, overdoses, any sort of abuse, hepatitis. There have been initiated actions of giving free syringes or substituting drugs with methadone as a substitute and as a first step to rehab.

The medical fundament is followed by the social one which regards the social introduction of the drug addict.

C. Disincrimination has regarded both the sum of any nature actions which regard drugs , which is unacceptable and also only the part which refers to the drug consumption being under the power of the penal law.

D. The final theory, the one of controlled legalization regards a system which wants to replace the actual prohibition, which refers to drugs through a settlement of production, commerce and consumption, in order to limit abuses which harm the society. This theory doesn't modify the product's characteristics, it still being dangerous for the public health and for the society also, but consumption moderation and realizing the consequences can decrease he negative effect, also we can add the economical factor through controlling a special market and bringing it to the legal zone. The most known model which is trying to practice this theory is the Dutch one, which permits the consumption of cannabis in coffee-shops specially built. The effects of the incriminating laws don't apply to all types but only to illicit drugs. A short classification of drugs divides them in three categories: recreational drugs (tobacco, alcohol), utility drugs (pharmaceutical products, chemical products) and illicit drugs (heroine, cocaine) each categories having its own classification.

In Romania the rebuttal of traffic and illicit use of drugs has been regulated by law 143/2000, law that has been completed and modified by law 169/2002, law 39/2003 and law 522/2004. Considering the fact that this law has been interpretated in several articles and monographies we will eliminate to the modifications that appeared because of the modification of the law522/2004.

The first novelty brought by this law consists of the title's modification, changing the search aim from a repressive to a preventive one. This way, the law's title regards the prevention and rebuttal of traffic and illicit consuming of drugs, opposing the old titulature which referred only to the phenomenon's rebuttal.

In practice, the use of drugs has three forms: experimental use of drugs,

recreational use of drugs and use of drug problem, the last two being of our interest. The recreational use represents the illicit use of drugs as attribute of modern life and of the relaxation and it is characterized by the absence of addiction. The consumers of problem drugs are the persons who illicitly consume drugs and who, to their actions of social or economical nature attract the attention of the decision factors of a state and to whom the preventive measures are destined.

These distinctions between the consumer of drugs and the addicted person determined that the past regulators didn`t contain a coherent sanction ting treatment. Through the modification elaborated by the man of law, he situation has been improved by the consumer's type classification. This way, by the letter H of the article describes the consumer as being the person who administrates or accepts to have administrated his drugs, in an illicit way, through swallowing, smoking, injecting, inhaling or other ways, through which the drug can reach the organism was introduce letter H which shows that by an addicted consumer we define the consumer who, as cause as the repeatedly administration of drugs under the necessity or need presents physical and psychical consequences according to medical and social criteria.

Furthermore, the man of law added several paragraphs to the article and has modified the content of others in order to respect the demand of the law 143/2000 regarding the submission of consumers to some measures of medical nature. In the letter H reference is made to the existence of an integrated program of assistance to consumers and addicted consumers consisting of all health services and psychological and social assistance services in an integrated way and coordinated to drug consumers, to medical units, psychological and social public, private and mix. At letter H is mentioned an integrated assistance circuit of consumers and drug addicted consumers and that consists of all integrated assistance programs assured to consumers and addicted consumers in order to improve the state of health in the sense of physical, psychological and social wellbeing of the person.

The therapeutically programs which represents all services and medical measures and psychological integrated individualized by evaluation, organizing, observing, and continuous adoption to it, addicted consumers in order to interrupt the use, eliminate psychic or physical addiction or reducing risks associated to use referred at letter I has replaced the rehabilitation cure and medical treatment existing in the old formula. Through Law 522/2004 have also been introduced letter L, M, N which adds to the regulators mentioned the psychological and social program, the description of therapeutically circuit and also the evaluation modality to which the measures motioned to be applied.

The undercover investigator's institution was modified, the present text showing that undercover investigators are policemen chosen to make, with the authorization of the prosecutor special activities in order of gathering data considering the existence of the contravention and the identification of the author and the following act under another identity but the real one, given for a determined period of time, their activity not being limited anymore to the cause they were working at. Considering the fact that, under the drug possession aspect of

high risk for personal use , the old regulators didn't distinguish the punishment, the man of law understood the different social danger levels, by modifying in this way the content of the first article from law 143/2000 which , at this time, the punishment are separated between drug possession for personal use(jail from 6months-2 years or fine) high risk drug possession for personal use(jail from 2-5years).Novelty items brought by law no 522/2004 regarding the modification of law no 143/2000 find themselves in the new formulas in article 18-19 where they talk about special confiscation measures and about the destruction of the confiscated drugs. According to alin.3 art 17 the sums resulted from the recovering of the confiscated items and confiscated money according to align 1-2 represent incomes of the state budget and are put in separate accounts in the state budget. Regarding the confiscated drug destruction, align 3-4 art 18, say that the drug destruction takes place periodically through incineration and other right methods by a authorized commercial society in front of a committee formed from a representative of the prosecutor near the High Court of Cassation and Justice of the Ministry of Environment and Water Management, the National Antidrug Agency, a specialist from the central specialized formation in preventing and rebuttal of illicit consumption and traffic of drugs from the General Inspectorate of the Romanian Police and the manager of Body Crimes Room of the same unit. Costs of destruction of drugs are paid by the owner or the person from whom they were raised.

The first to harmonize domestic legislation to the EU has made available a penal mechanism and a penal process by which consumers addicted to drugs which committed criminal offences may be applied along with the penalty deprivation of freedom, and medical measures under the law conditions, but also the possibility of applying only the medical measures without applying deprivation of freedom penalties.

Legislator's intervention in this regard appears in art 19, 19(1), 19(2).

In this way according to art 19, if a consumer is sent to jail for committing another crime besides the one settled in art 4 the court may include this in a therapeutically system developed in the jail system.

Art 19(1) shows that in case of committing the crimes settled in art 4, the prosecutor says that in 24 hours from the beginning of the penal tracking the evaluation of the consumer by the preventing evaluation and antidrug conciliation center in order to include it in the integrated circuit assistance. After receiving the evaluation report made by the prevention, evaluation and antidrug conciliation center after a medical expertise in five days time, the prosecutor stays with the suspect's agreement his including in the assistance program for the drug consumers.

If the suspect was preventively arrested, this sentence can be revoked or replaced with another measure. In all cases the penal tracking is continued due to the Penal Procedure Code.

Art 19(2) states that if until a moment of the pronunciation of the verdict, the defendant respects the protocol of the program for assisting drug consumers the

instance can apply no punishment or postpone the punishment. In case the applying of the punishment is postponed the court settles in its decision the date when it will decide upon the sentence, but the interval of time cannot be more than two years added to the program for assisting drug consumers. The time period between the decision's pronunciation and the date settled by the court according to align 2 is considered period of probation for the defendant. If the defendant refuses being included in such a program, he is under the power of the Penal Code or Penal Procedure Code. If in the period of probation, the defendant respected the program, the court cannot apply any punishment. If the defendant doesn't respect the assistance program, the court can postpone one more time applying the punishment for the same date and reinsuring it in the integrated circuit for assisting drug consumers or applying the punishment sated by the law.

The new articles introduced (19-1 and 19-2) settle the consumer1s situation which commits the contravention of owning high risk or medium risk drugs for personal use and is a special case of applying art 108 and 109 from the new Penal Code in the domain of renouncing at the punishment and postponing the appliance of the punishment, therefore, as we can see, it is not necessary for all the conditions shown in the Code to be fulfilled.

The last modification brought to law 143/2000 through law552/2004 refers to art 26-29 which mention the institutions and their role in prevention and rebuttal of traffic and consumption of illicit drugs and also the measures against illicit drug consume. Art 26 states that central specialized institutions in preventing and rebuttal f traffic and consumption of illicit drugs from the General Romanian Police Inspectorate, General Romanian Border Police Inspectorate, the Public Ministry and national Customs Authority send to the National Antidrug Authority data regarding prevention and rebuttal of traffic and consumption of illicit drugs, chemical essential substances, toxic chemical inhalers necessary to elaborate studies, synthesis and analysis form fundamenting their strategies of politics fighting drugs.

For the same purpose the Health Ministry, the Work Ministry, Social Solidarity and Family and the Ministry of Education, and also public and private certified institutions to held programs and activities for preventing the illicit drugs consumption send the data asked by the National Antidrug Agency under the law's conditions.

The mentioned institutions can receive, on request, centralized data by the National Antidrug Agency regarding drugs, chemical essential substances, toxic chemical inhalators, including yearly reports, synthesis and analysis.

As for the measures against the illicit drug consumption, art 27 states: drug consumption , found under national control, without medical prescription is forbidden on the Romania territory.

The person that consumes illicit drugs found under national control can be included with his agreement in a program for assisting drug consumers. The agreement is stated by signing a document according to the regulation of applying the present law.

Establishing the psychological program and socially individualized is made by the center of prevention, evaluation, and antidrug counseling based on psychological and social evaluation and according to the medical exam's results solicited to a medical unit according to the criteria stated in the regulator of applying the present law.

Establishing the therapeutically individualized program is according to the practice protocols, elaborated by the Health Ministry through its special structures and the medical college from Romania.

The medical units, where therapeutically programs for addicted consumers take place, send the prevention, evaluation and antidrug counseling necessary data in order to maintain the program's continuity based on a medical report. The therapeutically and psychological program take place integrated, therefore the consumer and the addicted consumer could benefit from medical, social and psychological assistance concurrently and continuous, with respecting the human and patient rights according to the law.

Art. 28 states that psychological and social programs are elaborated by the National Antidrug Agency in cooperation with the Ministry of Health, Ministry of Work, Social Solidarity and Family, the Ministry of Justice and can take place in authorized centers with open or closed regime, public, private or mixed.

The expenses caused by the consumer's evaluation and by the progress of the psychological and social programs are supported by the state's budget through the National Antidrug Agency budget and , if afforded by the incriminated person, by his family, or by a private organism respecting the conditions established by the common order of the Ministry of Internal Affairs, the Health Ministry and the Public Finances Ministry. The expenses caused by application of the therapeutically program individualized for insured people through the social health insurance system are supported by the Health Insurance Houses from the Unique Fund of Social Health Insurance for the affections that come from drug consumption and through the health programs of the Ministry of Health and the prophylaxes programs of the National Antidrug Agency. Depending on its material possibilities, the drug consumer, his family, and private organisms can partially or integrally handle the costs of the evaluation services and the expenses caused by the participation in psychological and social programs, at the prices and obeying the conditions established through the president's of the National Antidrug Agency decision with the approval of the involved ministries.

The amounts cashed in by the prevention, evaluation and counseling antidrug center represent extra-budget incomes of the National Antidrug Agency with permanent title and are used for financing programs of traffic and illicit drugs consumption prevention. The unused amounts are reported at the end of the year with the same destination.

The minister of justice and the minister of health will establish through common order the medical and educational measures or the programs which will be applied upon the drug consumers in jail.

In order to protect the drug addict, in law 29 the man of law brought some

special mentions. Personal data of the drug addicts included in the assistance program for the consumers and drug addicts benefit from confidentiality according to the present laws. Central data base of the consumers included in the therapeutically circuit, is held by the Romanian Drug Observatory and the toxic-maniacs from the National Antidrug Agency, in the codified unique register regarding drug consumers based on data communicated by the Ministry of Health, and other institutions which coordinate therapeutically, psychological and social programs and also by the authorized public and private centers.

The Ministry of Health has access to data from the stated evidence through the give institutions.

The person upon have been applied the measures of art 27 and 28 will have a nominal certificate issued or an electronic codified card which will have mentioned the eminent institution , that person's id ,period of time, object ad result of treatment, the reason for ending it, the health state at the beginning and ending of the program .All data referring to the people under the assistance for consumers and if the drug addicts will be destroyed after 10 years after finishing the medical surveillance program. For people that took part several times in the program for drug consumers and addicts the data will be destroyed 10 years after finishing the last period of medical surveillance.

With all the adding and notifications shown above, the Romanian man of law has re-updated the number of substances which will be nationally controlled.

The modifications of law 143/2000 brought through law 522/2004 have entered into force three months after being published except art 19(1) and 19(2), these starting to produce effects at the same time with entering into force of the Penal Code.

With the already existing stipulations in this domain, as shown, in the future our country's legislation and not only, regarding the globalization process will have to take in consideration some elements which have already appeared as social phenomena or exist and are left unregulated properly.

From this point of view, we consider that in the future our country's legislation should take into consideration the following:

a) Circulation and national supervised consumption of drugs already in Holland is well-known the aspect of "freely " consumption of some light drugs which are given under some conditions and in some special places,
b) Improvement of the juridical situation of the consumer , him being sentenced in the Romanian society , while, at international level he is regarded as a victim, being supported for resocialising (where the situation asks is)and for abandoning of the drug consumption
c) Regulation of legal needs: traffic, cigarettes, alcohol, food being known that some manufactures use different substances in the finished product or increase the concentration of those substances that create the consumer's addiction to that product.

MODERN SYSTEMS USED IN THE PROCESS OF TURNING TO ACCOUNT TRACES IN THE CASE OF CRIMINAL OFFENCES IN THE BUSINESS FIELD

Ph. D Lecturer **Elena-Ana Mihuț**
AGORA University, Oradea
emihut@univagora.ro
emihut2005@yahoo.co

Abstract:

In forensic investigation, traces are studied starting with the way they were formed, the aspects they take on, continuing with the methods and technical means of searching, recording and collecting them from the crime scene and finishing with their examination under laboratory conditions and with the conclusions of the forensic specialist.

The complexity and variety of criminal offences committed in the business field, the manner and means used by the perpetrator while carrying out a criminal activity determine the presence at the crime scene of various categories of traces.

Thus, biological traces, hand prints, foot prints, sometimes lip or teeth prints, or traces left by fire arms can be found at the crime scene.

In the article we have discussed the automatic system AFIS PRINTRAK BIS and the system IBIS.

Key words: forensic investigation, hand prints, automatic systems.

I. Introductory notions. The interaction between man and his environment results in the most diverse traces that may be useful in determining the time or the succession of certain events, as well as determining the human behavior in the process.

In forensic investigation science and practice, traces are studied in all aspects, starting with their process of formation, the aspects they take on, continuing with the methods and technical means of searching, recording, collecting them from the crime scene, finishing with their examination under laboratory conditions and with the conclusions of the forensic specialist[195].

From the point of view of forensics, the notion of trace is of a rather concrete nature, having two meanings.

In a broad sense, traces represent the very diverse changes that might occur in the environment, as a result of the action of persons who have crossed the area where the crime was committed. These changes include, for instance, the appearance or disappearance of certain objects, the appearance on the surface of

[195] I. Mircea, *Forensics,* Lumina Lex Publishing House, Second Edition, Bucharest, 2001, page 56.

these objects of certain characteristics, the transformation of certain objects into others, of a different quality[196].

Other authors define traces as: ”all material elements whose form is determined by the committing of a criminal offence“[197] or ”any change occurring in the conditions of committing a criminal offence, as there is a cause-effect relationship between the crime and its material reflection“[198].

In a restricted sense, a trace represents the reproduction of the exterior structure of an object on the surface or in the volume of the object with which it came into direct contact[199].

A definition of the notion of trace must take into account the variety of traces at the crime scene, but without being too abstract ”a single, simple mention that a trace is any change occurring at the crime scene“[200], or too complex, which would make it difficult to interpret. Therefore, in order to consider the changes as traces from the point of view of forensics, they must: be useful to the forensic investigation through at least one of their features or qualities, without other more concrete conditionings, and there must be a cause-effect relationship between the crime and the alteration produced[201].

Throughout the years, specialty literature has operated several classifications of traces:

- by the factor generating the traces, they are: traces left by a human being, traces left by animals, vegetable traces, traces left by objects and traces created by certain phenomena;
- by the aspect of the traces, they are divided into form traces and material traces;
- by the plasticity of the recipient object, they are divided into surface traces and depth traces;
- by the action of the recipient object as reported to the object generating the trace, they are static traces and dynamic traces;
- by the way they are perceived, they are visible traces or not visible traces.

Other authors classify traces according to the way they are formed into three categories, as follows: traces of reproduction, traces represented by objects or various substances and traces produced through arson and explosions which may be sub classified according to various criteria.

II. Automatic systems used in the field. The complexity and variety of criminal offences committed in the business field, the manner and means used by

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[196] S. A. Golunski, *Forensics,* Scientific Publishing House, Bucharest, 1961, pages 82-83.
[197] C. Suciu, *Practical Treatise on Forensics,* Didactic and Pedagogical Pulishing House, Bucharest, 1972, page 200.
[198] E. Stancu, *Treatise on Forensics,* Third Edition Revised and Enlarged, Universul Juridic Publishing House, Bucharest, 2004, page 99.
[199] I. Mircea, in the work cited, page 56.
[200] Idem page 56.
[201] Elena – Ana Mihuț, *Persons' Identification by the Traces of Their Papillary Landscape*, Lumina Lex Publishing House, Bucharest, 2004, pages 10-11.

the perpetrator while carrying out the criminal activity determine the presence at the crime scene of various categories of traces.

Thus, biological traces, hand prints, foot prints, sometimes lip or teeth prints or traces left by fire arms can be found at the crime scene.

A. Traces left by the papillary pattern

An accurate way of individualizing a person is to identify him/her by his/her papillary pattern. Dermal papilla form ridges and are separated by depressions[202], which give very different shapes to the papillary pattern.

In order to identify a person according to a papillary pattern, it is necessary first of all to determine the area it belongs to: the palm or the finger, and then, taking into account the fact that the papillary pattern on the last phalanges is very diverse, a classification of these patterns should be operated.

Besides the shape particularities of papillary patterns, whose contribution in the process of identification is restricted to establishing the type or group to which a person's finger belongs, the fingerprint also contains a series of characteristic marks or details liable to allow the definite identification of the individual[203].

In order to establish the identity of the perpetrator, crestoscopy and poroscopy[204] are also used, as well as the automatic systems AFIS PRINTRAK BIS.

AFIS (Automated Fingerprint Identification System) identifies the details of fingerprints, relates them to a classification and codifies the details (the identification points or elements) for the established purpose.

In order to automatically classify the traces and to codify the details, AFIS converts the information received into numerical or binary data.

Once an identification card has been scanned, the image processor automatically renders a letter or a symbol for every fingerprint. The respective letter or symbol represents a classification that uses symbols.

The image processor may easily classify the central areas of the fingerprints which are big and clear. When the central areas are very small, automatic classification is much more difficult.

For this reason, the image processor inserts a reference classification of symbols for the respective fingerprint. Another reason is that sometimes a fingerprint involves characteristics belonging to two types of symbols. If this is the case, the image processor provides a reference classification for the second type.

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[202] L. Ionescu, D. Sandu, *Forensic Identification,* Scientific Publishing House, Bucharest, 1990, page 23.

[203] E. Stancu, in the work cited, page 123.

[204] As a branch of dactyloscopy, crestoscopy is the recently developped science which includes methods of identifying persons on the basis of the individual feaatures of the papillary ridges taken isolatedly, not as part of the papillary pattern, and poroscopy is another branch of dactyloscopy which studies the shape of the pores, of the orifices of sudoriparous glands present in the palms of the hands and in the sole, its practical efficiency consisting in the comparison of pores by shape, position and number, which results in making up groups in a configuration that does not change, see C. Suciu, in the work cited, page 235.

After passing the descriptor filters and the Rule of the 16 items, the details of the fingerprints in the card index are sorted out once again in the database and sent for comparison.

The details of the fingerprint that is being searched are compared to the details of the fingerprint in the card index. The identification scores are consolidated and organized from the largest to the smallest and printed as an identification report.

Papillary traces examined in the AFIS system will be necessarily taken from the tangible proof for the evidence, the sheet, the negative film bearing the image of the trace by the metrical standard.

The papillary impressions are examined in the AFIS system necessarily in life-size, from the following supports: decadactylar fingerprint records, paper for those transmitted in electronic format). The processing of papillary impressions transmitted through fax is prohibited.

Among the new benefits provided by these automatic systems, I would like to mention the following:

1. The operating system Windows – with all the benefits it provides as reported to the old system UNIX (easy access, operating speed, etc.).
2. The implementation and comparison of palm impressions and traces.
3. More possibilities for collecting and processing impressions and traces (filter gamma, gab or etc.).
4. Much quicker connection with the Internet WEB on a national level (also, the possibility for international connection).
5. Through the software created, the expenses of beneficiaries are reduced, making it much more accessible and easy to operate with.
6. The details of the traces and impressions can be magnified on a much larger scale as reported to the old system.
7. More types of files, images (BMP, JPG, etc.) can be imported.
8. The trace can be visualized three-dimensionally.
9. The diagrams of several fingers can be produced.
10. A group of papillary traces can be searched for.
11. It automatically issues on demand comparative reports (comparative drawing boards of the trace and the impression).
12. Once the impressions have been implemented in the system, the data regarding the civil status of the persons are also inserted (the old system had only a data base containing the images of the respective traces and impressions, while the civil status data were stored in a different data base in another system).

B. Forgery of documents.

From a forensic point of view, keeping in mind the extent of the perpetrator's action, forgery can be classified into: total forgery and partial forgery.

With partial forgery, the perpetrator's activity does not aim at adulterating the entire content of the document, but the action aims at granting it effects that are totally different from those the initial document had.

Total forgery is also known as counterfeiting, consisting in the fact that the document is affected entirely.

As a rule, a forgery is achieved through: removing, covering, adding, cutting up and reconstituting a text, imitating writing or the signature, applying false seals or stamps.

Forgery by removing a text is done by resorting to mechanical and chemical means[205].

Mechanically, the text is removed through an action of deletion, either by scraping it by means of sharp instruments or by erasing it with bread core or with a rubber.

Forensic examination of partial forgery performed by removing a text follows two stages: determining the place from where the text was removed and reconstituting the text removed.

Forgery by adding a text consists in adding certain marks or words to the existing text.

In this case, the perpetrator aims either at altering the content of the entire document or just at changing the meaning of certain sentences.

The forensic investigation of forgery committed by adding a text follows several stages:

- the examination of the graphic characteristics regarding the logical content of the writing, the distance between words and between lines, the text topography, general changes, the way the writing is placed on different supports when starting to write and when making the additions, the use of a different writing instrument or of a different writing position;

- the examination of the writing material by determining the physical and chemical properties of the writing material;

- establishing the chronological order of performing the intersecting routes.

Forgery by imitating writing, disguising writing and by copying

The imitation of writing consists in the reproduction of graphic characteristics specific to the writing of another person. Forgery committed by free imitation and by servile imitation has several common elements. Among these, there are the appearances in the imitated writing of certain characteristics specific to the writing of the imitator, the ignorance of the way of putting down diacritical and punctuation marks.

In the case of servile imitation, there is a lack of naturalness and spontaneity in the writing, a low writing speed, increased pressure, retouch of certain letters, interruptions and route resumption.

If it is a free imitation, the writing displays a certain spontaneity, a uniform handwriting, trembling, interruptions, retouching.

Disguise is a deliberate alteration of handwriting done for the purpose of subsequently contesting it. The action of the forger aims at altering the graphic

[205] I. Mircea, in the work cited, page 188.

elements of the writing, altering the dimensions of the writing, imitating the printing or left-handed writing.

Forgery performed by copying the writing or the signature

It can be achieved by:

a) copying through pressing, achieved by means of a sharp instrument, the forger following the outline of the authentic writing;

b) copying through transparency, which consists in superposing a sheet of paper on the writing used as a model, followed by the drawing of graphic marks;

c) copying by means of copying paper. For this purpose, between the authentic writing and the sheet of paper on which the copying is done a copying paper is interposed, the route of the original writing being followed by means of a writing instrument with a sharp point.

Among the elements that prove the forgery there are: discontinuities in tracing graphic marks, lack of connection between certain graphic marks, variations in the thickness of hachure or existence in the mass of the paper of certain micro-traces of the copying paper.

Forgery committed by covering a text, forgery committed by cutting up and reconstituting a text, as well as other categories of forgery

The forgery by covering a text is achieved by hachuring with the same substance as in the writing, or by creating ink spots or spots of other substances on the writing. The covered writing is highlighted by infrared radiation examination, by investigating traces of pressure and by roentgenography. The highlighting of the covered writing by means of these radiations can only take place if the substance used in order to cover the text responds to infrared radiations and the writing material is opaque.

Forgery achieved by means of copiers and of the computing technique

Photocopiers are devices that reproduce the image of the writings, functioning on the basis of the electrostatic phenomenon and of the phenomenon of photo-conductibility[206].

The main ways of achieving partial forgery are by altering the validity term of writing, by partial or total replacement of the text in the authentic writing, by transferring the impressions of a stamp or of a signature from the authentic writing on the forged one.

Types of polychromic copiers include in their competence three toner cartridges, each of them containing different colors[207], through the mixing of which any color in the visible light spectrum is obtained.

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[206] Any photocopier has the following main components: a light source, usually a laser radiation; a barrel with electro static properties; one or several toner deposits, V. Berchesan, in the work cited, page 143.

[207] Any copier uses, in order to obtain the positive copy of a polychromic image, two procedures: the additive procedure, using the fundamental colours, blue, green, red, while the substractive procedure uses composite colours, azure, yellow, and magenta, Idem page 143.

The reproduction of a writing with the help of the computing technique is achieved by means of a scanner, a computer and a printer. The graphic features of the writing that is reproduced are rendered by dots, the number of dots depending on the scanning resolution. Thus, in a microscope examination, one will notice both the dotted aspect and the indented content of the images.

Printers are of several types:

- inkjet printers use as a writing material warmed ink, projected on paper in the form of drops;

- with laser printers, the printing of graphic marks is achieved by applying on the paper microscopic toner particles;

- thermal transfer printers are based on the impact between a ribbon film and a warmed body. The reproduction achieved by a thermal transfer printer renders colors either in the shape of horizontal or oblique lines or as colored dots[208].

C. Traces left as a consequence of using fire arms

In judiciary ballistics, there is the IBIS system (Integrated Ballistics Identification System), interconnected with other similar systems in Europe, allowing us to determine certain circumstances in which the crime was committed, thus facilitating the quick solving of cross-border criminal offences committed with fire arms.

The system is composed of the correlation server and the data concentrator, the autonomous station capturing images (2D), the cartridge cases shot which are transmitted to the system – Brass TRAX, the computer with a specialized software – Match Point+ - which allows the interrogation of the data bases in the central server and the performance of comparisons for the purpose of identification.

The records and the central IBIS data base within the judiciary ballistics laboratory have as an object:

- ammunition elements resulted from experimental shootings with lethal fire arms legally owned by natural persons and legal entities in Romania;

- ammunition elements resulted from experimental shootings with lethal fire arms, used in crimes committed with unidentified fire arms;

- ammunition elements resulted from experimental shootings with lethal fire arms illegally owned or found/abandoned on the Romanian territory.

[208] Idem pages 146-148.

PARTICULARITIES OF THE INFORMATICS CRIMINALITY INVESTIGATION

Ph. D Lecturer **Elena-Ana Mihuț**
AGORA University, Oradea

emihut@univagora.ro
emihut2005@yahoo.com
Senior Criminalist **Ioan Truta**
CLPE (Certified Latent Print)
Boston Police Department
rtment, Latent Print Unit
trutai.bpd@cityofboston.gov

Abstract:

Informatics criminality represents the social phenomenon characterized by the committing of criminal offences in the field of informatics. This category includes very different criminal offences, some of them being incriminated in certain states of the world while others are not. The computer provides a new object and a new tool for criminals.

Taking into account the complexity and variety of criminal offences in the field of informatics, as well as the rapidity of changes occurring in the field of Information Technology, forensics computing relate to the way in which the crimes were perpetrated.

Key words*:* informatics criminality, digital evidence, investigation.

I. General Considerations. The appearance of the first computers, more than half a century ago, caused a real change in human society. The progress of computer systems and the development of the Information Technology field led to an easy and quick access to various information stored and transmitted by computer systems. These days, there is no field of activity that is not at least partially dependent on computers.

Today, a significant part of the interaction between individuals, between individuals and public institutions or the business community relies on the use of networked computers and communication technology.

The computer is a very important criminogenic factor, as it provides the networked computers criminals with a new object — information, as well as with a new tool. The Internet, computer networks, embedded systems of data create new

opportunities for criminals to achieve their goal by committing computer related crimes.

By the nature of computers, data can be stored, transferred, used and manipulated through long-distance contact. Thus, criminal offences in the field of informatics are different from the classical ones through several characteristics, among there are:

- the cross-border character, as the number of countries involved in this phenomenon is constantly increased, while the legislations are different. The international investigation of these activities, inquirers rely on the system provided by the Interpol, based on the national points of permanent contact, as well as on other connections with specialized international bodies.

- anonymity, as the perpetrator may be anywhere in the world;

- credibility, the perpetrator being able to create the appearance of a legal and honest business;

- rapidity, the data being transmitted almost instantly through information systems[209].

The notion of computer related criminal offence was present for the first time in the legislation of USA, where the authorities traced out a series of violations of the legislation in this field.

Informatics criminality may be divided into three categories:

- criminal offences where the computer is the target;
- criminal offences where the computer is the tool;
- criminal offences where the computer contains digital evidence related to other criminal activities[210].

II. Particularities of the forensic investigation in the case of committing criminal offences in the field of informatics. In order to determine the circumstances in which the crime was committed, the connection between various perpetrators, it is necessary to identify the devices used in the criminal activity, their location, the information, the hardware and software as a result of committing the crime and the perpetrator[211].

Taking into account the complexity and variety of criminal offences in the field of informatics, as well as the rapidity of changes occurring in the field of Information Technology, forensic computing relate to the way in which the crimes were committed.

With a view to facilitating the disclosure of the circumstances and conditions in which the criminal activity was carried out, it is recommended to follow Standard Operation Procedures (SOP): identifying the incident, preparing the investigation, formulating the approach strategy, securing, collecting, examining, analyzing, presenting and returning evidence.

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[209] See Ioana Vasiu, L. Vasiu, *The Prevention of Informatics Criminality*, Hamangiu Publishing House, 2006, pages 71-72.

[210] See Gh. Alecu, A. Barbăneagră, *Criminal Regulation and Forensic Investigation of Criminal Offences in the Field of Informatics*, Pinguin Book Publishing House, Bucharest, 2006, pages 24-25.

[211] See Ioana Vasiu, *Informatics Criminality*, First Edition, Nenuia Publishing House, 1998, page 18.

The results and documentation obtained from the expertise achieved in the case in question must be correct and provide as much information as possible to allow another forensic examiner competent in the same area of expertise, to be able o identified what has been done and reach the same results independently. Thus, it is important that the data regarding the source of provenance of the evidence should be clear — which involves their authenticity, credibility and integrity. Also, the forensic tactics activities must proceed from the general rules applicable in any forensic investigation[212], starting from examining the entire crime scene to the examination of digital evidence. The applicable rules are as follows:

- the investigation must be performed as soon as possible;
- all existing evidence must be collected;
- the investigation must be performed in detail, taking note of all the particularities of the existing evidence;
- the integrity of all pieces of evidence must be ensured. For this purpose, the investigation team must include, beside crime scene investigation, computer forensic specialist in the field of computer science, so that the investigators can take special measures of protection in order to collect, preserve, transport and examine these pieces of evidence.
- the pieces of evidence must be conserved in special conditions, so as to avoid their contamination while being manipulated.

Digital evidences by their nature are fragile and can be easy alter, damage destroyed or compromised by improper handling or examination, they are not visible latent — investigation equipments and specific software being required in order to make them available, tangible and usable. The digital pieces of evidence must be searched, discovered, collected and examined by forensic specialists with an adequate preparation in this field. Examination is best conducted on a copy of the original evidence. The original evidence should be acquire in a manner that protects and preserve the integrity of the evidence.

Digital evidence includes informatics related evidence, digital audio, and digital video evidence, evidence produced, stored or transmitted through mobile phones, digital faxes, digital photo cameras, etc. These pieces of evidence have the following particularities:

- the way of storing, processing or transmitting them by means of an informatics system;
- their latent form of presentation.

Beside the digital evidence, in the case of investigating criminal offences in the field of informatics, attention is also paid to other categories of traces which may be

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[212] See E. Stancu, *Treatise of Forensics,* Third Edition Revised and Enlarged, Universul Juridic Publishing House, Bucharest, 2004, pages 600-601; I. Mircea, *Forensics,* Lumina Lex Publishing House, Second Edition, 2001, Bucharest, pages 232-233; Elena-Ana Mihuț, *Forensics. Forensic Technique and Tactics,* Publishing House of the University of Oradea, 2006, pages 202- 206; L. Cârjan, *Treatise of Forensics,* Publishing House Pinguin Book, Bucharest, 2005, pages 461-463.

found on the crime scene. For instance, latent prints, material and biological traces or remainders of objects found on the crime scene may be emphasized. In order to emphasize traces of reproduction in a latent state, it is not recommended to use magnetic powder because magnetic fields can be formed which might contaminate the digital evidence.

The tactical activity of hearing the persons involved will take place in accordance with the Code of Criminal Procedure and with the rules of forensic tactics. As a characteristic feature, we are mentioning the fact that the attention of the investigators will be channeled towards establishing the identity of all persons who have access to the place that is being investigated, who have used the respective device or who have knowledge about the use of and the data stored in the informatics system.

In case the perpetrator is present during the performance of the investigations or of the search the investigation team will carefully analyze his/her verbal and non-verbal behavior. At the same time, he/she will not be permitted to approach the computer. If he/she insists in giving help in order to shut it down, he/she will be requested to mention orally and in writing which are the operations he/she intends to perform, but without allowing him/her to perform them.

The forensic specialists and experts who will perform the technical and scientific findings, the expertise necessary in the case will be notified about the steps that the perpetrator would have wanted to execute in order to shut down the computer.

Also, if the case requires it, the performance of search–warrants might be ordered, and, if it is the computers that are going to be searched, this should be specifically mentioned.

As a consequence of performing the search warrants the authorities may take over any electronic equipment that might store traces of an electronic nature such as: computer memories, data storage devices, any other electrical, electronic or magnetic supports, such as the floppy disk, the hard-disk, the ZIP disk, optical disks (CD-ROM, CD-RW, DVDs), magnetic tapes, printer memories, cartridges of thermal printers or of matrix printers, memory cards, hand-held computers, electronic agendas, pagers, magnetic tape or digital report phones, cell phones, phone agendas, the last phone calls made, audio messages recorded on phone machines, digital cameras or video cameras, photography films, microfilms, negatives, photographs, papers with handwritten notes, drawings, drafts, etc.

Thus, the number, type and location of central processing units, the operating system, as well as the existence of environments for producing spare copies will be taken into account.

The entire forensic investigation on the crime scene and the tactical activities performed in the case are recorded through: a minute drawn up while the activities are being carried out, making sketches, taking the photographs required by the case, starting from the overall image to setting the screen of the computer (for this purpose, photographs of reference, sketches of main objects and of the details will be

made), emphasizing reproduction traces in a latent state, collecting evidence, audio and video recording.

The investigating team must be provided with equipments and instruments specific to the investigation in the field of informatics, data storing environments, in a sufficient quantity and of a superior quality, in order to allow the copying of these data from the informatics system that is being investigated.

Special forensic kits are used to search, discover, record and collect digital evidence. The investigating team must be provided with kits specific to the forensic investigation of criminal offences involving an electronic system or equipment. Besides these special kits for collecting electronic traces, the investigators must have on the crime scene other equipments, such as:

- antistatic bags for packaging electronic components;
- various cables (serial, parallel power supply, USB, adaptor etc.);
- tongs for cutting wires, special screwdrivers, lanterns;
- floppy disks, compact flashes, memory cards;
- packing boxes, self-adhesive labels, and markers.

The examination and analysis of digital evidence are performed on faithful copies of the original evidence so that the original is kept intact, thus ensuring the possibility for third parties to check the results. It is recommended that the entire process of copying should be recorded in detail, mentioning the equipments, programs and storage environments used.

CONSIDERATIONS REGARDING TO THE CONTROL OF THE COMBATING OF THE DISCRIMINATION OF THE NATIONAL MINORITIES

Assistant (Judge) **Loreley Emese Mirea**
University of Oradea
Juridical Sciences Faculty
loreley_mirea@yahoo.com
Lecturer **Diana Cîrmaciu**
University of Oradea
Juridical Sciences Faculty
diana.cirmaciu@rdslink.ro

Abstract:

It is recognized the fact that the protection of the persons who are part of a national minority is treated, in the period of the National Society, in the first place as a law of equality, of indiscrimination.

The bill of O.N.U., signed in 1945, established as objective of the Organisation in article 1 paragraph 3 „ the promotion and encouragement of the respect of the fundamental rights and freedom of all mankind, without distinguishing race, sex, language or religion"; this idea is also resumed in the content of article 55, in the chapter referring to the international economical and social cooperation.

Key-words: discrimination, victim of a discrimination, prerogative, The National Council for Combating Discrimination.

Motto: *„ I have a dream, namely that one day this nation will rise and will live according to the real meaning of his beliefs: this truth one can naturally understand: all men are equal. I have a dream, namely that one day on the red hills of Georgia, the sons of the former slaves and the sons of the former owners will stay together at the table of brotherhood... I have a dream that my four children will live one day in a nation where they won't be judged for the colour of their skins, only for their character." – Martin Luther King – I have a dream*

The attempt of the conceptual delimitation of the notion national minority will have as a result the designation of a group of persons, who belong to a state, persons, who: have their residence on the territory of a certain state and are it's citizens; who maintain old, firm and long-lasting bindings with this state; who present specific ethnical, cultural, religious and linguistic characters; who are enough representative, even if they not so numerous as the rest of the population of

that certain state or of a certain region of the state; who are animated by the desire to maintain their common identity, mostly their culture, traditions, religion and language.

This way one can outline the following definition for a person who belongs to a national minority, namely that it is a person who „ belongs to a group which exists on the territory of a certain state and has the citizenship of that state, representative, but numerically inferior, distinct from the majority through some special characteristics like ethical, linguistically, religious characteristics and who exercises his rights individually together with the other members of the group to which he culturally belongs"[213].

The desire for indiscrimination is so deeply inlaid in the heart of every men and so painfully felt by a population which is oppressed for a long time, that the individual wish to be judged for his own character and nut for the colour of his skin or other criteria remains vein today the basic idea for all who fought for combating discrimination.

The principle of indiscrimination represents a general principle of the E.U.'s legislation, The Bill of Human Rights of the E.U. declared it solemnly in December 2000 in the article 21, paragraph 1, stating that: *„Any discrimination based on any criteria like sex, raise, colour, ethnicity or social origin, genetically characters, language, religion or beliefs, political opinion or any kind of opinion, membership in a national minority, propriety, birth, disability, age or sexual orientation is forbidden."*

One can find the same principle in the article 13 of the CE Treaty, in the Directive of the Council No. 2000/43/CE regarding to the racial or ethnical origin and in the Directive of the Council No. 2000/78/CE regarding to the treatment by the employment[214] and by the employment or professional relations.

By UNO it was closed the CERD, an International Convention to eliminate every form of racial discrimination, having the instrument the CERD Committee to apply the convention. In the same time the European Convention for Human Rights, which has as an integrated part the practice of European Court for Human Rights,

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[213] C.Jura, *Human rights. National minorities rights*, C.H.Beck Publishing House, Bucharest, 2006, p.17.

[214] In this case we can remind the Instruction No.1 from 05.03.2003 referring to the obligations of the employers or their representatives as of the authors, creators of publicity and the representatives of these regarding to the conditioning through an article or contest to occupy a function, as for the publication of these articles too, published in the Official Monitor of Romania No. 235 from 07.04.2003. According to article 1 of the instruction: " the employers or the representatives of them who announce a free job through publicity or public message, whatever the communication method is which makes possible the transfer of the information, they have the obligation, according to the principle of the equality of the citizens, to exclude advantages or discrimination, to assure a free way for all persons in the process of the employment, without any difference, exclusion, restriction or advantage, based on race, nationality, ethnicity, language, religion, social category or belonging to category, age, sex or sexual orientation, respectively on the beliefs of the candidates, only in some cases established by the law."

which consecrates and protects the principle of indiscrimination through article 14 and Protocol 12, confirmed also in Romania in 2006.

Together with these we can also mention the Frame-Convention regarding to the protection of the national minorities, signed in Strasbourg on 01.02.1995, through which the states engage themselves for the followings:

- they must guarantee for every person who belongs to a national minority the right to be equal in front of the law and must guarantee legal protection;

- they must promote some conditions, which allow for the persons belonging to national minorities to maintain and develop their culture so they can maintain the essential elements of their identity, namely religion, traditions and their cultural patrimony;

- they must make some moves to protect those persons which can be victims of threats or of discriminative actions, hostility or violence, because of their ethnical, cultural, linguistic or religious identity;

- etc.

As an internal law, the O.G. 137/2000[215] establishes the prevention and the sanction of all forms of discrimination.

From the corroboration of the earlier mentioned regulations results a definition of discrimination, which can exists under the form of a direct discrimination or under the form of an indirect one.

Thus to discriminate presumes to treat different two persons or two situations, when there is no relevant distinction between them, or contrary, to treat identically two situations, which in fact are different.

The article 2 paragraph 1 of the actualized O.G. 137/2000 defines discrimination as: *"any distinction, exclusion, restriction or advantage, based on the race, nationality, ethnicity, language, religion, social category, beliefs, sex or sexual orientation, age, disability, chronic non-contagious illness, infection with HIV or the belonging to a not-preferred category or any other criteria, which has as goal or effect the restriction or elimination of acknowledgement, of use, in equal conditions, of the human rights and rights for freedom recognized by the law, in the domain of politics, economy, society, culture or in any other domain of public life."*

From this complex legal definition one can deduce the conditions of discrimination, which are the following:

1. the existence of a *differential treatment;*
2. the differential treatment is expressed by *distinction, exclusion, restriction or advantage*;

[215] Govern Order no.137 from 31.08.2000 regarding prevention and punishment of all discrimination forms republished in the Official Monitor of Romania No. 99 from 08.02.2007.

3. the existence of *exclusion criteria*, like ethnicity, nationality, race, language, the belonging to a minority, etc;
4. the differential treatment must have *as goal or effect the trespass of some fundamental rights, recognized by the law*.

The direct discrimination is regarding to the situation when *a person is treated not so favourably as another in a similar situation*, based on any criteria in case of which the discrimination is forbidden. It is important to notice that only when the situations are identical or similar a comparison can be made.

Even though when the situation of two persons is identical the Directive establishes some exceptional situations, when the discrimination is allowed, like: positive actions, some established employment requests, reasonable adaptation for the persons with handicaps and there are some exceptions referring to the age too.

The indirect discrimination appears when *a foresight, a criterion, a practice apparently neuter creates a not advantageous situation for certain persons belonging to a protected category in comparison with other persons*. Also in the case of indirect discrimination are some exceptions accepted, but only when these are justified by a legitimate goal, and the methods used to obtain that goal are adequate and necessary.

This way the exceptions must be every time viewed rigorously, for example the expectation of the knowledge of a certain foreign language is justified when a person wants to become a teacher of literature or grammar, but this expectation is a discriminative one when the person applied for a physical job.

The state authority in the domain of discrimination is The National Council for Combating Discrimination[216], a Council, an autonomous juridical person controlled by the Parliament, who can guarantee the respect and application of the principle of indiscrimination.

The Council is an independent authority, responsible for the application and control of the legal foresights in the domain of indiscrimination, which elaborates and applies public politics in this matter.

This way the competences of The Council are the followings:

- suggests the institution, in the terms of law, of some actions and special measures for the protection of not favoured persons or categories, who are in an unequal situation in comparison with the majority of the citizens because of his social origin or handicap, or when a person is confronted with rejection and is marginalized and doesn't feel the equality of chances;
- suggests for the Government projects of normative actions in his domain of activity;

[216] Govern Decision no.1194 from 27.11.2001 regarding the organisation and functioning of the National Council for Discrimination Control published in the Official Monitor of Romania no.12.12.2001.

- gives an expert opinion for the projects of normative actions which have as object the exercise of rights and freedom, in equal conditions and indiscrimination;
- collaborates with the public authorities in charge to harmonize the internal legislation with the international norms in the matter of indiscrimination;
- collaborates with the public authorities, juridical persons and private persons to assure the prevention, the sanction and elimination of any form of discrimination;
- receives petitions and notifications about the trespass of the normative conditions referring to the principle of equality and indiscrimination, from private persons, non-governmental organizations which aim to protect human rights, from other juridical persons, public institutions, the Council analyze these and adopts proper measures and communicates the responses in the legal terms;
- collaborates with the non-governmental organizations which aim to protect human rights;
- organizes national programs and campaigns in order to realize its aims;
- elaborates, prints and distributes in the country and abroad publications, reports and informational materials about indiscrimination;
- initiates and organizes seminars, colloquies, debates, symposiums, preparing sessions, round tables and other programs about combating discrimination.

The Council effectuates any other duties established by the Government or by the Parliament through normative documents regarding to the prevention, sanction and elimination of any form of discrimination.

In the same time through article 20 of the O.G.137/2000 any person who feels himself/herself discriminated can make a notification by the Council in a term of 1 year after the discriminative action, or after the date when the person realized it, and in case when after the researches made by the Director College of the Council, it is established the existence of discrimination, this will make a decision through which the consequences of the discriminative act can be eliminated, it will establish the reestablishment of the situation and it will apply a contravention sanction according to article 26 from the same normative document. The decisions of the Directive College can be attacked according to the law.

One of the most delicate aspects is to prove the discrimination. Because of this aspect the legislator adopted a middle solution, because the foresights of article 1169 of the Civil Code can't be in totality applied, article that says that who makes a proposal in the front of the law, must prove that, and there is no way to reverse *ab initio* the duty to prove it, but that person who invokes a discrimination must prove the existence of some facts which can show that it was a direct or indirect discrimination, and the person which was complaint must prove the indiscrimination, so the evidences accepted are wider as in the Civil Code and the Code of Civil Procedure.

Thus, according to the European legislation article 20 paragraph 6 of O.G. 137/2000 establishes that the interested person has the obligation to prove the existence of some facts which allow to assume the existence of a direct or indirect discrimination and the suspected has the duty to prove that his actions constituted no discrimination, there can be invoked in the front of the Director College any kind of evidences, inclusive audio and video recordings or statistical dates.

The NCCD practice regarding to the discrimination of minorities covers a large amount of problems. Some recent solutions will be presented in the following lines.

The National Council for Combating Discrimination (N.C.C.D) withheld after the notification Romani Criss against External Minister Adrian Cioroianu, as result of some affirmations about the deportation of the delinquents to the desert, because the Council has previously pronounced his opinion in this case. This way before the notification was made by Romani Criss, the Council had publicly sentenced the declaration of the External Minister Adrian Cioroianu, considering that this creates a degrading, humiliating and offensive atmosphere in some communities.

A similar case was the notification of Romani Criss against Prime Minister Călin Popescu Tăriceanu who affirmed at a meeting with Prime Minister Romano Prodi: "The Internal Ministry will send a team formed by five police officers, who will help to catch the Rom delinquents in Rome. These Rom people commit every possible crime from robbery and prostitution to organized crimes and drug traffic."

According to the decision of the Director College from 17 July 2007, after the audience of the concerned parts, it was considered that the notified actions don't accumulate the constitutive elements of discrimination, as it is established by O.G. 137/2000, with two votes against, which have formed a separate opinion, among them the opinion of the president Asztalos Csaba. According to the separate opinion the indication of the ethnical belonging of some accused persons is discrimination according to article 2 paragraph 4 and article 15 of the O.G. 137/2000 regarding to the prevention and sanction of any discriminative action. In this situation the declarations of the complainer can affect the dignity of the persons who are belonging to the Rom community.

Regarded to the explicit content of the declaration of the prime minister, the separate opinion considered it well-grounded.

Another notification of the College was by M.G. and the Armenian Union from Romania about the affirmation of the President of Romania, Mr. Traian Băsescu, from 09.09.2007, once he get out of the Central Military Hospital, when he stated that doctor Mircea Ghemigian is "a good Armenian". In this case the Director College had made an audience of the parts on 11 October 2007 and through the decision from 15 October 2007, after some debates had decided with 6 votes against 1, that the notified action doesn't accumulate the constitutive elements of discrimination, as it is established by O.G. 137/2000. However the Director College made a request for the whole political class and for all who form public opinion, that they must promote a non-discriminative behaviour and

language, even in their political debates and that they must have an attitude against the eventual trespasses of the principle of equal chances.

In another case the Director College of the National Council for Combating Discrimination was notified by the Civic Hungarian Union regarding to the declarations of Mr. Dan Voiculescu, the President of the Conservatory Party, made in Târgu-Mureş on 11 June 2007, about the initiation of the law project which foresees the compulsoriness of learning Romanian, which can be sanctioned with the lost of the citizenship. The Director College had made an audience of the parts on 15 January 2008 and according to the fact that the statements were made in the member quality of the Romanian Parliament and in the quality of President of a party, these representing a political position in conformity with the point of view expressed by the Conservatory Party, it was in unanimity decided with votes that the declarations of Mr. Dan Voiculescu are in the limits of the right of the free word and are realized in the frame of a legislative initiative, a right stated by the Constitution of Romania. Considering these aspects, the notified actions don't accumulate the constitutive elements of discrimination, as it is established by O.G. 137/2000, republished.

From the earlier mentioned cases results that the problematic of the discrimination of minorities is an actual one, the application of legislation in this domain is just the first step, which must be followed by creating a mentality according to this, beginning with the education of the children and ending with the education of the highest political class.

Further, we think, that Romania must continue to make some steps in the domain of combating the discrimination of the national minorities, must continue to apply the principle of the respect for diversity, of the integration approach, all these being the interests of this country.

We must eliminate the hate, the extremism – phenomena which generate violence and which can undermine the stability and security of a country.

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5. www.romanicriss.org.

JUDICIAL ASPECTS ON MONEY LAUNDERING

Ph. D Lecturer **Georgeta Modiga**
DANUBIUS University of GALATI

Abstract:

"Dirty" money – a notion as innovating as it is unclear. Mainly, it is used by criminal organizations, or by other subjects, as a means of getting some income and not paying taxes. It is difficult to trace "dirty" money, because it takes different shapes, and the destructive force of the "dirty" money circuit is called money laundering.

The notion itself of "money laundering" is relatively recent in the judicial vocabulary, but the need of hiding the nature or the existence of criminal, or at least doubtful income, already appears in the 20th century.

"Dirty" money destroys the honest business, corrupt the state institutions, create a favorable environment to develop corruption and organized crime, thus endangering the entire economic system of the state.

The problem of money laundering has been approached, in an organized way, in the contents of the United Nations Convention against the illicit drugs traffic, which has been adopted on December 20th of 1988 in Vienna, in the context of raising the awareness of the international community for fighting the drugs traffic. The signing parties of this convention, being aware that the illicit traffic is a means of considerable financial earnings, which allow criminal organizations to penetrate and corrupt the state structures, the lawful commercial and financial activities, as well as the society at all its level, adopted the first measures of stopping the actions of recycling the funds that came from the drug trade.

Key words: juridical aspect, money laundering.

"Dirty" money – a notion as innovating as it is unclear. Mainly, it is used by criminal organizations, or by other subjects, as a means of getting some income and not paying taxes. It is difficult to trace "dirty" money, because it takes different shapes, and the destructive force of the "dirty" money circuit is called money laundering.

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traffic, which has been adopted on December 20th of 1988 in Vienna, in the context of raising the awareness of the international community for fighting the drugs traffic[217]. The signing parties of this convention, being aware that the illicit traffic is a means of considerable financial earnings, which allow criminal organizations to penetrate and corrupt the state structures, the lawful commercial and financial activities, as well as the society at all its level, adopted the first measures of stopping the actions of recycling the funds that came from the drug trade.

In a very short time, the sources of dirty money as well as the possibility if recycling it extended and thus important income coming mainly from activities of the subterranean economy are infiltrated in the real economy.

Both national and international normative acts kept the term of "money laundering", this being used more frequently than the expression "legal income obtained in an illegal way".

Thus "money laundering" is just a slang used not only in the common language, but also in the judicial one. So we mustn't give a direct interpretation of the term, in the way that only money can be legalized, and this made some states stipulate in their legislations the term "legalizing income obtained in an illegal way".

Of course, money laundering is not a new activity, the tendency of hiding the illicit origin of some money and of giving an apparent legality and implicitly honesty and respectability to its owners, has old origins. We can mention in this context the merchants and the moneylenders of the Middle Ages, which, in order to hide the interests gained for their loans, in a time when the Catholic church had forbidden the money lending, appealed to a various range of financial tricks which correspond greatly today to the funds recycling techniques. The term of money laundering began to be used in the 1920s, when in the USA some criminal groups (the very well known are Al Capone and Bugsy Moran) opened laundries and car wash shops with the role of washing "dirty money", in order to justify the money that came from different criminal activities. Probably, this is where the term of "money laundering" came from (washing the money) which in time gained a judicial consecration. Describing the danger of money laundering, some considered that this was the heart of the organized crime, this is what makes it exist.[218]

Nowadays, fast-food shops, casinos and trading companies that use cash are used to this purpose. Money laundering is a complicated process that takes several stages and implicates many people and institutions. Recycling the funds is a complicated process by which the income from a criminal activity is transported, transferred, transformed or mingled with legitimate funds, for the purpose of hiding the provenance or the right of ownership over those profits[219]. The necessity of recycling money comes from the urge of hiding a criminal activity. It is the most

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[217] Dr. Florescu Viorel, Banking and Exchange Law.

[218] Rance Pierre, de Baynast Olivier, *L'Europe judiciaire. Enjeux et perspectives*, Paris, Dalloz, 2001, p.89.

[219] Nicolae Cristis, *Tax Dodging and Money Laundering*, Hamangiu Publishing House, Bucharest, 2006.

dangerous component of the underground economy and it contains: production activities, distribution and use of drugs, arms trafficking, nuclear material trafficking, auto theft, prostitution, human trafficking, corruption, blackmail, money forging, contraband etc.

Criminal activities such as the trafficking of drugs, arms, nuclear material are a reality we can notice quite often through sensational news bulletins, but behind these activities huge amounts circulate generating real financial economic flows.

Lately people have become more and more aware that it is essential to fight organized crime, that criminals must be stopped, as often as possible, from making legitimate the results of their criminal activities by transforming their "dirty" fund into "clean" ones.

The ability of laundering the results of criminal activities through the banking-financial system is vital for the success of criminal operations. Those involved in such activities need to exploit the facilities offered by the world financial sector if they want to benefit from the results of their activities. To this purpose, using the financial-banking system leads to undermining the individual financial institutions and finally the entire financial-banking system. At the same time, the growing integration of the world financial systems and the elimination of the barriers in the capital free moving increased the ease of money laundering and complicate the tracking process.

"By money laundering one understands the masking of the illegal provenance of some sums of money and of other earnings through organized crime activities in the financial-economic circuit. The purpose of money laundering is to make secret the real source of earnings in the illegal trade so that the third beneficiary appears "clean", unaffected by his previous activities."

Money laundering is the process or the complex of actions by which criminals try and sometimes succeed in hiding the origin and the real possession of income that comes from their illegal activities[220].

According to Law nr.656/2002 of preventing and sanctioning money laundering, as well as of setting up measures for preventing and fighting the financing of terrorist acts[221], by money laundering one can understand:

"a) the exchange and transfer of goods, knowing that they come from committing crimes, in the purpose of hiding or dissimulating the illegal origin of these goods or in the purpose of helping the person that committed the offence from which goods come from to elude pursuit, judging and executing the punishment;

b) the hiding or the dissimulating of the real nature of provenance, location, disposition, circulation or property of the goods or the rights over these, knowing that the goods come from committing offences;

[220] Mihai Paraianu, *The Parallel Work Market*, Expert Publishing House, Bucharest, 2003, p.65.
[221] Published in the Official Gazette, Part 1 nr.904, 12th of December 2002.

c) getting, owning or use of goods, knowing that they come from committing offences" (art.23)

In order to enjoy the fruits of their offences, whether it is drug trafficking, arms trafficking, contraband, fraud in the financial-banking system, the criminals must find a way to dissimulate the illegal nature of their earnings and to get it into the flow of legitimate business.

If successfully, this activity allows the maintain of control over this income and eventually offers a legitimate cover-up for the source of income.

Money laundering is a process by which one can give an appearance of legality for some profits illegally obtained by some criminals which, without being compromised, benefit in the end from the obtained sums.

It is a dynamic process, in three steps, which need mainly the movement of funds directly obtained from offences; secondly, hiding the tracks to avoid pursuit; thirdly, to make the money useful to the criminals by hiding again the occupational and geographic origin of the funds.

There is not only one method of laundering money. Methods can vary from buying and selling a luxury object (for example a car or a piece of jewelry) until the passing of the money through a complicated international network of illegal businesses and "shell" companies (companies that exist mainly only as legal entities without having business or commercial activities). Initially, in the case of drug trafficking and other offences such as contraband, theft, blackmail etc, the funds obtained are usually cash that needs to enter somehow in the financial system[222].

The traditional banking operations of constituting deposits, as well as the money and crediting transfer systems offer a vital mechanism for the money laundering, especially in the initial phase of introduction of cash in the banking system.

The most conclusive presentation of the money laundering phenomenon is made with the help of a model in three stages. According to it, the money laundering is divided in placing, stratification (masking, wiping of the tracks) and integration.

Placing

-represents "getting rid", literally, of the cash physical removal of initial income derived from an illegal activity

Stratification

-is the process of moving the funds between different accounts to hide their origin separating the illicit income from its source by creating some complex layers of financial transactions meant to deceit the control organs and to ensure anonymity

[222] Guide of Suspicious Transactions, The national office for preventing and fighting money laundering p.7.

Integration

-moving the funds thud laundered through legal organizations supplying an apparent legality to the riches accumulated in a criminal manner.

If the process of stratification is successful, the schemes of integration will place the results of the laundering back in the economy so that they will reenter the financial system as normal and "clean" business funds.

The three steps can be constituted in separate and distinct stages. They can also appear simultaneously, or, more commonly, they can overlap. The way in which the basic steps are used depends on the laundering mechanisms that are at the disposal and on the requirements of the criminal organizations.

During the money process certain vulnerable aspects have been identified, aspects difficult to avoid by those who launder money, and thus easy to recognize, respectively:

-the entering of cash in the financial system

-crossing cash over state borders

-transfers in and from the financial system.

Basic rules for money laundering

a) **Anonymity**[223] – is one of the rules of money laundering by which the transaction with values obtained from offences must resemble other legal transactions from the environment or the place where they happen. Essentially, the cash must leave no trace to lead to its origin. In the economies where cash is often used for acquisitions of small or big value, disposing of it represents no risk to the criminal. Yet, in most countries, almost all transactions of big amounts are not made with cash, but by using other forms of payment (checks, bank note, credit cards), that is why spending or depositing large sums of money creates suspicions.

That is why criminals have created varied techniques and ways of inserting cash in the financial system, such as:

-structuring, which is the division of large sums into small sums and their depositing by several persons into different bank accounts or using the respective sums for acquiring other payment instruments, such as bearer bonds or payment order;

-contraband with cash, simply by illegally exiting the country with large cash amounts and entering another country with less strict rules, usually by couriers or by hiding the quantity on cargo boats;

-mixing illegal funds with those coming from a legal cash business, sums which are deposited together.

b) **Speed** – the rapid circulation of values, so that they can't be traced. Once the cash entered the financial system, whether it is in the country of origin or not, the launderer can use the advantages created by the IT progress, the modern

[223] Dr. Nicolae Lupulescu, *Money Laundering and Financing Terrorism*, p.9.

methods of transmitting money to put them rapidly in circulation. The electronic banking transfers can move large sums of money almost anywhere in the world in just a few minutes, without the need of its holder to go to the bank or to involve the bank's employees.

c) **Complexity** – By spreading his funds in more transactions and the speed of these operations, the launderer makes the work of the investigators difficult or even impossible to trace the money. The transfers from one account into several located in other countries and the ulterior redirecting from those countries create a complex electronic multinational circuit, which makes it difficult to trace by the investigating organs.

d) **The secret** – In spite of the fact that the banking secret has a legitimate purpose and a commercial justification, it can lead to the appearance of financial paradises, which offer protection to criminals, worldwide there are approximately a million anonymous corporations which impose strict financial secret and defend foreign investors from investigations and judicial enquiries.

Techniques of dissimulating the illegal origin of income

- **over evaluating the price of a good** through an invoice of greater value than its real one or through a partially or totally fake invoice;
- **fake commercial transactions** introduced into a legal business through: cash transactions from one currency into another repeatedly and fast, using multiple bank accounts, the repeated opening and shutting down of these accounts, electronic bank transfers from the account of a legal person into the account of a natural person, external transfers of big values using multiple monetary instruments, banking checks or travelers' checks, credit operations, investments, constituting fake guarantees etc;
- **the method of the returned loan.** Part of the funds transferred illegally abroad come back in the form of a loan to the criminal or to the company he controls. This operation is followed by the return of that loaned sum, to which you add the interests agreed by the parties and eventually penalties for being late, which lead to greater and greater sums, which thus enter the legal circuit;
- **insurance policies**, through frequent change of the beneficiary, paying bigger bonuses than the normal ones and later requiring its reimbursement towards a third person, receiving the insurance bonus through brokers or financial intermediaries from offshore centers which don't respect the advertising or evidence rules, because they are not obliged by contract.

Systems used in money laundering

a) **Off-shore destinations.** The off-shore destinations are countries or territories, often islands or a group of islands, which accept fictive (dummy) companies, used as simple postal boxes, areas with elastic regulations on control of currency exchange and great freedom about taxes, and which offer at the same

time, almost with no exception, an impenetrable banking secret and many freedoms to private companies.

The moment the money is transformed in a form that can be transferred or with which one can make contraband, they are often transferred to an off-shore center.

This system offers real practical advantages that criminals know. First, the funds are placed in geographic areas protected by jurisdictions that do not admit the influence of the jurisdictions where the profit was obtained. By the implication of another jurisdiction, there appear more legal and financial barriers in the way of the investigating organs, both under the aspect of obtaining and under that of using the evidence in court. Second, there are still many countries that facilitate getting money from the outside no matter of the source or of the transfer mode, money that can enter directly and discreetly in the conventional banking system, so that there is no obligation of paying taxes, no evidence of social capital, no agreement of double imposing, no obligation of book-keeping, no administrators or registered shareholders, the people who have the power in the company are not known, the identity of the real beneficiary is not known etc. Usually, the owners of the companies do not reside in the countries where they started their companies; these people are represented by commissioners who get their instructions by coded means established before.

Financial paradises are one of the most common and used procedures for fraud and tax avoidance at international level.

b) **The shell companies.** Essentially, the shell companies are those existing only on paper. The documents of setting up the company can contain a valid bank account and something more than the names or the address of the lawyer or agent that takes care of setting up the company, the commissioner and maybe a few shareholders.

These are the companies that have no independent assets or their own commercial operations and they are used by their owners to develop their business or to maintain control over other companies. A shell company is registered in the country where it is started, but it is not posted on the stock market and does not operate on its own. Since shell, companies are not illegal, the money launderers, the tax dodgers and those financing terrorism can relatively easily convert and use them in order to hide the source of the illegal income. These companies are easy to set up and can be connected to other shell companies in the world. If a shell company is set up in a jurisdiction with strict legislation on keeping the banking secret, it is almost impossible to identify the real owners or administrators of the company that is why it is impossible to follow the illegal funds that are returned to the real beneficiary.

A technique used successfully by criminals is the setting up of shell companies in order to sell their shares to “external investors”. These ‘external investors” are in fact middle men used by the money launderers. The acquiring of the shares is done with the necessary legal documentation and the money thus enters legally in the possession of the criminals.

Usually, setting up shell companies is done not by owners, but by agents which select the jurisdictions that offer the advantages of a quick set up, low registration costs, minimal clauses or which look for those geographic areas that facilitate the appearance of "tube" companies, locations where no information on the owner is needed or forbid the disclosure of such information.

c) **The using of free-lancers.** Lawyers, notaries, accountants and other free-lancers do a significant number of activities in the support of their clients, organizing and administrating their financial and commercial businesses. Before anything, they offer assistance to natural and legal persons in field such as investment, setting up companies, administration, management, optimizing their fiscal situation and other legal operations. Moreover, the legal consultants prepare, and if necessary, gather the documentation needed to set up commercial companies. In many situations, for substantial material benefits, such professionals can be directly implicated in developing specified financial transactions, like for example keeping funds or paying the acquisition price or selling real estate. Some of these professionals end up being specialized in identifying some commercial companies or off-shore locations for using them in money laundering schemes, producing the entire specialty documentation necessary, which offers an appearance of legality to the businesses.

Essentially, the free-lancers used as intermediaries have the knowledge and the competence that can be used by criminals in order to transform their illegal profits into legal income.

d) **The alternative systems of transmitting the money.** The alternative systems of transmitting money fast (SAT) allow the money to circulate around the world without using the conventional banking system. SAT can be used for legal and illegal purposes and can exist in different forms. Usually evidence of each transaction is kept, but these can be made in dialect, shortened or through a language unfamiliar to investigators and that's why it can be difficult or impossible to interpret.

Due to obvious reasons, SAT is an attractive system and it is used on a large scale by networks of organized crime and by dangerous criminals. SAT is used not only to launder income obtained from offences, but also to avoid taxes and custom obligations. There is also concern at an international level that SAT can be used easily for financing terrorism. It is estimated that in Europe there are thousands of SAT bankers, most belonging to Asian communities, and their clients are ordinary people and not criminals.

There are three characteristics of the Internet that together tend to aggravate certain conventional risks of money laundering:

- easy access through internet
- the contact between client and institution is depersonalized
- the rapidity of the electronic transactions.

f) **Companies with nominal deeds and bearer bonds.** The shareholder certificates are documents that prove the priority right over the company. In most

countries, the shareholder is registered and any share transfer towards another person must be registered in an official register. Yet, some jurisdictions offer the possibility of owning or transferring the shares in a form of "carrier "share.

These carrier shares give more rights of ownership of the company than the actual owning of the shares. With these carrier shares there is no registration on the shareholder and the person who physically has the shareholder certificate is the owner of a part of the company accordingly. That's why the real owner of the company may not appear in any evidence of the companies or in any government statistics. When the identity of the shareholders is not registered the emission and transfer of shares, the right of ownership is anonymous. Such companies represent excellent means for receiving, owning and transferring a fortune anonymously, without the interference of financial control or judicial organs.

g) **The use of non-profit organizations.** Non-profit organizations gather hundreds of billions of dollars annually from donors and distribute this money – after paying their administrative costs – towards beneficiaries. Both their administrative expenses, and the amount and necessity of the expenses of the beneficiaries can be exaggerated and difficult to appreciate their utility. The using with dishonesty of the non-profit organizations for money laundering and for financing terrorism is a frequent method used by the networks of the organized crime, many times these entities being especially created for this purpose. This problem drew the attention of GAFI[224], G8 and The United Nations, as well as that of the national authorities in several regions.

Measures of protection against the money laundering phenomenon at *an international level*

The most efficient solution in the matter of money laundering at an international level is, first, the international cooperation[225] and the control systems and uniform regulations inside each country. The international money laundering is based on the exploiting, through subtle financial operators, of the differences between financial and banking regulations of the countries in the entire world.

The international money laundering has considerable negative effects on the world economy through: the deterioration of the efficient national economies, the slow corruption of the financial market and the reduction of the public trust in the international financial system, increasing the risks and the stability of the system, which all lead to the reduction of the growth rate of the world economy.

To counteract the phenomenon, several **measures** have been taken:

The Convention of the United Nations against the traffic of drugs and other psychotropic substances, adopted on the 20th of December 1988 in Vienna. It stipulates: the seizing of goods obtained through offences, the

[224] The Group of International Financial Action.
[225] D. Daianu, R. Vranceanu, Romania and the European Union, Polirom Publishing House.

extradition of the authors of the offences linked to drug trafficking, mutual judicial assistance between countries involved, intensifying the cooperation between states;

The Convention of the European Council on the laundering, pursuit, retaining and seizing of products obtained through offences[226], opened for signing on the 8th of November 1990, in Strasbourg;

The Directive nr 91/308/EEC of the Council of the European Community on the using of the financial system for the purpose of money laundering, adopted in Luxemburg on the 10th of June 1991; this directive represents the source of inspiration for the laws of fighting money laundering, which have been adopted by almost all states, whether they are members of the European Community or they are in talks to become members;

The Group of Financial Action in the Field of Money Laundering (GAFI)[227] is an intergovernmental organism that develops and promotes policies of fighting money laundering; it is currently made up of 26 countries (financially strong countries from Europe, North America and Asia) and 2 international organisms;

The EGMOND Group (the first meeting of the group in1955 in the EGMOND Palace-Aremberg in Brussels, where 24 states and 8 international organizations took part); at present the group has 48 members and its purpose is the international cooperation between national agencies specialized in the international fight against money laundering (between the members of the group there is exchange of financial information about money laundering, based on agreement memoranda (bi or multilateral).

According to the International Monetary Fund published in 1996, the money laundered on the financial markets top 2% of the world raw internal produce. So, money laundering is an activity that is done for the purpose of giving an apparently legal statute to some illegal income. As a starting point in the regulating, on an international level, of the concept of "money laundering" one must take into account, before anything, the UN Convention adopted on the 20th of December 1988 in Vienna against the illegal trafficking of drugs and psychotropic substances. This qualified money laundering as an independent offence structure.

The deficiency of the 1988 Convention is that it incriminates only the legalization of the income obtained through one source – the drugs trafficking. This definition is thus restrictive, because money laundering can have as purpose the dissimulation or the putting in circulation of funds obtained through other illegal activities (forgery, corruption, organized crime etc), as against the illegal drugs trafficking.

Demanded by the exigency of time and in order to get rid of the deficiencies of the 1988 Convention, there has been elaborated the Convention on money laundering, the tracking, the sequester and the confiscation of the income obtained through criminal activities, signed in Strasbourg on the 8th of November 1990. The

[226] The White Book 2002, The Ministery of Public Finances (Exchequer).
[227] Dan Grosu-Saguna, *Treaty of Financial and Fiscal Law*, All Beck Publishing House .

latter was preceded by a conference (Oslo, 17th-19th of June 1986), where European Ministers of Justice examined the penal aspects on the drugs abuse and trafficking, including the need to fight against toxic mania by throwing out of balance the drugs market, often linked to organized crime in general and even to terrorism, through measures like freezing and confiscating the products of this traffic. As a consequence, there has been created a small Committee of experts which, during its mandate, had to examine the applicability of the European conventions on the tracking, holding and seizing the products of the crime and to elaborate a proper European judicial instrument in the matter. The Convention's project was elaborated during nine meetings of the small Committee during October 1987-April 1990.

One of the Committee's tasks is to facilitate the international cooperation about mutual help for the purpose of investigating, tracking, holding and seizing the product of any type of crime, especially the serious crime, and mainly crime linked to drugs, arms traffic, terrorism, children and women traffic and other crimes that bring fabulous income. Another major objective of the Convention is the creation of an instrument that would force the states to introduce in their internal legislation efficient measures to fight serious crime and to deprive the criminals of the product of their illegal activities. The internal law differs greatly from one country to another and sometimes it does not give the crime related services the necessary authority to fulfill these objectives internally. That's why the small Committee considered it necessary for the member states to make similar their internal legislations and to adopt efficient measures in order to track crimes. This doesn't mean that the states' legislations must be harmonized, but that they should, at least, be able to find the most efficient means of cooperation.

Even more, during the preamble of the 1990 Convention, it was underlined that fight against criminality can have results only if the states that don't sanction the money laundering adopted legislative measures for punishing these crimes. the Convention demands that the parties adopt measures that might be necessary to consider crimes, in their internal law, the activities related to money laundering. Unlike most of the conventions related to the international cooperation on crime, elaborated in the European Council, this Convention Does not include the word "European" in its title. This omission expresses the point of view of its authors who considered that this instrument should be equally open for signing for the states that share the conceptions of the member states of the European Council, without being members of this Organization.

The Strasbourg Convention is a first international act that sketches the essence of money laundering by defining it in the 6th art.:

"a) the conversion or the transfer of goods, if the person delivering them knows the goods are an income obtained through criminal activity, for the purpose of hiding or concealing the illegal origin of the goods or of helping the people involved in committing the main offence to elude the judicial consequences of these acts;

b) hiding or concealing the nature, the origin, the place, the disposing, the movement or the real property of the goods, or of the relative rights about which the author knows they constitute income obtained through crime activity under the reserve of the Constitutional principles and of the fundamental concepts of his judicial system;

c) the acquisition, the holding or the use of goods about which the one that acquires, holds or uses them knows that, the moment he receives them, they constitute income obtained through crime activity;

d) the participation to one of the offences, established according to the present article, or any association, understanding, attempt or complicity by offering assistance, help or advice in view of committing them. "

From this point of view, the Strasbourg Convention widens considerably the sphere of sources of obtaining the illegal income, than that of drug trafficking stated by the Vienna Convention in 1988. In fact, the rest of the international acts, regional or internal, that appeared after the 1990 Convention on the matter of money laundering, reproduce, more or less, its stipulations. The material element of money laundering, understood in the sense of the 1990 Convention, has three forms or modalities mentioned at letters a), b), and c), and the provisions at letter d) are not, in fact, an independent form of the offence, but materializes the cases susceptible to responsibility, no matter the degree of participation or the criminal stage.

As far as the turning illegal of the actions indicated in the Convention doesn't contravene the principles and the fundamental concepts of the judicial system of the state ratifying this, it has to incriminate the indicated actions. Prescriptions about instituting penal responsibility for money laundering are stipulated also in the *Convention on Transnational Organized Criminality* in Palermo in December 2000.

Turning illegal the launder of income obtained through offences appears in art.6 of the Palermo Convention, according to which "it is considered penal condemnable the following acts when committed intentionally:

i) the conversion or transfer of goods, if it is known that they are income obtained from offences, for the purpose of accumulating or disguising the criminal source of these goods or for the purpose of offering help to any person who participated in committing the main act, so that he can elude responsibility for his action;

ii) the hiding or disguising the real character of the source, the location, the disposing, the movement, of the over the goods or of their belonging, if it is known that they are income from offences.

Provided the respect of the basic principles of the judicial system:

i) the acquisition, possession or use of the goods, if at the moment of obtaining them it was known they were income from offences;

ii) the participation, association or agreement for the purpose of committing any offence, recognized according to the present article, the attempt of committing, as well as the complicity, instigation, help or giving advice on committing them."

While making an analysis of the stipulations of the Palermo Convention, we will underline that by "initial act" we understand any law violation that results in obtaining profit, in comparison with which can be committed the acts mentioned in art.6 of the Convention.

Although the term "any law violation" is used in art.2 of the Convention, yet in the text the term "offence" is used. That is, initially the Palermo Convention widened considerably the source of illegal income, as against the Strasbourg Convention for which the initial act would be the offence. According to the Palermo Convention as well, the offences committed outside the jurisdiction of a certain state will constitute a primary act on condition it can be condemned penal also according to the internal legislation of the state where the respective article is done and applied if it had been committed there. So, with this stipulation, the principle of the double incrimination of the primary act is confirmed, out of which comes the criminal income that will afterwards be legalized.

At the same time, besides the mentioned conventions, given the recent development that contributes to the amelioration of the awareness and cooperation at international level in the fight against corruption, including through the actions of the United Nations, the World Bank, the International Monetary Fund, the World Trading Organization, the United States Organization and the European Union, in the European Council there has been adopted The Penal Convention on Corruption, which in art. 13 incriminate the money laundering obtained through corruption offences. According to it, "each part adopts legislative measures and other measures necessary to establish as penal offence, according to its internal law, the acts mentioned in the Convention on money laundering, tracking, seizing and confiscating of the goods obtained through criminal activity, art.6*1 and 2, in the conditions mentioned in it, when the main offence is one of the offences established in art.1-12 of the present Convention, as far as the Part did not formulate reserves or declarations regarding these offences or does not consider these offences as serious offences, in comparison to the legislation on money laundering."

Through primary offence, the Convention implied the corruption offences: active or passive corruption of the national public agents, corruption of the members of the national public assemblies, corruption of the foreign public agents, corruption of the members of the foreign publish assemblies, active and passive corruption in the private sector, corruption of the international officials, corruption of the members of the international parliamentary assemblies, traffic of influence. In fact, this doesn't mean that the range of primary offences is restrained, in comparison to the acts mentioned in the 1990 Strasbourg Convention, but it comes to materialize their sphere in the case of corruption offences. The authors of this Convention considered that, given the proven tight relations between corruption and money laundering, it is of utmost importance that this Convention includes as an offence the laundering of the product of corruption. Still, if a country considers that some of these offences are not "serious" according to its legislation on money laundering, it will not be forced to modify the definition of laundering, so that the

content itself of the notion "money laundering" is similar to that mentioned in the Strasbourg Convention.

Back to the definition of the notion, one can say that this handling of the money through different transactions, in order to erase their sources and origin, has been recognized almost unanimously also on a regional scale in the world or by the member states of some international organizations.

Under the principle stating that laundering capital obtained through any serious offence must be considered penal act in the member states of the European Union also, under the care of the European Economic Council of the European Union, there has been elaborated *The Directive 91/308 on the 10th of June 1991 on preventing the use of the financial system for the purpose of laundering money.* The reason for adopting this Directive is the fact that the using of the credit institutions and of the financial institutions to launder capital risks to gravely compromise the solidarity and the stability of these institutions, as well as the stability of the system in general, which would also lose the public trust.

In the terms of the Directive, laundering money means the following behavior, when committed on purpose:

-the transformation or the transfer of a property, knowing that the property is obtained through a criminal activity or through an act of taking part in such an activity, for the purpose of hiding or disguising the illegal origin of that property;

-the hiding or the masking of the real nature, source, placing, movement, rights or possession linked to the property, knowing that the property is obtained through a criminal activity or through an act of taking part in such an activity;

-the acquisition or use of a property knowing that, when receiving it, that property is obtained through a criminal act;

-the taking part, the association to committing or attempts to commit, as well as the act of helping, facilitating or giving advice to someone for the purpose of committing any of the actions mentioned in the in the above paragraphs.

As a consequence, the Directive took over the definition offered by the 1990 Convention. One difference would be that, in order to express the primary act, the Directive uses the expression "criminal activity". This shouldn't mislead and make us believe that the goods undergoing the legalization process can be obtained from a wider range of acts, than just from offences, like the 1990 Convention indicates. In art.1, the Directive defines through a criminal activity an offence defined in the sense of art.3 *1 letter a) of the Vienna Convention. According to the Directive's prescriptions, the money laundering exists as such even there, where activities that generated the property to be "laundered" have been committed on the territory of a member state or on that of a third country. The Directive 91/308 CEE has been modified through the Directive 2001/97/CE of the European Parliament and of the Council on the 4th of December 2001, which sought to bring up-to-date some stipulations. Thus, these amendments look to widen the ban on laundering not just the income obtained from drug trafficking, but equally from all serious offences (including fraud on the community budget), including those of the organized crime or of the international terrorism acts. Besides, some stipulations of

the Directive affect also the non-financial activities and professions (such as that of the notary, lawyer, on casinos etc).

More generally, but expressing the essence of laundering illegal capital, it is formulated the definition in art.2 letter1) of the *Model-Law of CSI to combat the legalizing (laundering) of income obtained on illegal ways* from the 8th of December 1998, according to which the "legalizing" (laundering) of income, obtained on illegal ways comprises deliberate actions to give a legal character to the possession, use or disposal of income obtained knowingly on illegal ways. This definition doesn't have a casuistic character, so it remains valid for any case where an apparently legal character has been given to some goods. The model-law doesn't talk about legalizing the source of income, but about the legalizing of the rights over the goods; those of possession, use and disposal as elements of the right of property. In fact, the definition is correct, because by trying to justify the right to posses, use or dispose of a good, implicitly one must give an apparently legal character and the its provenance.

For these reasons, we believe that it is not possible to legalize only some patrimonial rights, without legalizing the source that lead to their appearance. What the stipulations of the model-law underline is the fact that the means through which the material element of money laundering would express itself would be the financial operations, as intended actions with its varied ethnic of operating presented in art.2 letter 3) of the model-law. We don't consider it to be a very successful formula of exhaustive presentation of the types of financial operations, because any such act that is not mentioned in the law, risks not to be considered a financial operation and not to be responsible for the money laundering. At the same time, as subject that commits the act of legalizing illegal capital appear the organizations that perform financial operations (the crediting organizations, the investment funds, the insurance companies, the organizations registering the right over goods, the stock markets and other institutions that undertake the activity of receiving, alienating, acquitting, transferring, transporting, delivery, exchange and safe keeping of the goods), and there are also the institutions that practice gambling. What is welcome in the defining of the model-law resides in the express enunciation of the intentional character of the committed acts, and this eliminates any doubt on the form of the guilt with which the act is committed, unlike the legislations of other countries, where even imprudence is accepted.

At the same time, inside the CSI, *the model-Penal Code* has been elaborated and recommended, adopted in the 7th session of the Interparliamentary Assembly of the Member-States of the CSI on the 17th of February 1996. Already in the nominated project, the money laundering has been given a concept, in art.258, not as type of criminality, but as offence, which is an act of penal responsibility that has the casuistic character of legalizing illegal income, being formulated based on its forms of manifestation. We must notice that the project doesn't actually use the term "money laundering", but the expression "legalizing income obtained on illegal ways", that is the authors of the project considered it unjustified to use a jargon in the text of a normative act (fact presented at the beginning of this paragraph). So,

the dispositions of this article project incriminates "the concealing or the disguising of the illegal sources and of the nature, provenance, location, dislocation, movement or of the real belonging of the money or goods or rights over goods, obtained knowingly on illegal ways, just like the use of this money or of other goods while performing entrepreneurial activities or other economic activities. This has been considered in the project as an offence of medium gravity. In the present notion there is also another new form which has been considered as a manifestation of the money laundering - that of "using money or other goods in performing entrepreneurial activities or other economic activities". This modality raises multiple questions. What if, for example, some income obtained knowingly from evasion, is invested later in a business for the purpose of getting benefits, will it thus come to giving a legal statute to it? How is justified, in this case, the illegal provenance of the goods? We consider that in such a case, indeed, the purpose of disguising the movement or the belonging of the money can be reached, on one condition: that this economic activity itself is legal; contrary to that, its investment in an illegal activity wouldn't lead to legalizing illegal means, so it wouldn't constitute the act of laundering money.

As far as establishing the frame of the primary offences from which results the illegal income that can later be subject to laundering, an important role had the *regulations of the Group of International Financial Action*. In the 40 recommendations on capital laundering, elaborated under the care of GAFI, it was mentioned that "each country must be preoccupied with incriminating the act of funds laundering, but not only the funds coming from drug traffic, but also those from committing all the other serious offences that generate important income.'.

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THE CRIMINALITY RATE REGARDING THE DRUGS ILLICIT TRAFFIC AND CONSUMPTION

Ph. D lecturer **Cristina Octovescu-Frăsie**
"Nicolae Titulescu" Faculty of Law and Administrative Sciences
University of Craiova
otocris@yahoo.com

Abstract:
In this study we analyze the evolution of the drugs consumption and the rapport between drugs and criminality. After the definition of drugs, the study presents a general image of the illegal drugs consumption all over the world. In the last part, we insist on the results of a study made in Romania, in 2007 that is focused on the rapport between drugs and criminality.

Key words: drugs, crimes, traffic, consumption, law.

1. Conceptual delimitations

Since the Antiquity people had known about the healing or toxic power that some plants or the isolated products from them had. In the 3rd century B.C., Aristotle's student Teofrast, mentioned in his work the opium that he called „me conium", a name that is still used nowadays[228].

The Greek doctor Heraclidae, in the 2nd century B.C., was prescribing opium as a remedy for the bite of the poisonous snakes. The pharmacologist Pedaniu Dioscoride (1st century A.D.) mentioned about the preparation of the poppy seeds syrup named „diacodion"[229].

The drugs have appeared since ancient times, from the period when the Dacians and the Romans lived came proofs that certain herbs were smoked for their aphrodisiac and hallucinogen properties, as for example the Indian hemp.

The Romanian Explicative Dictionary shows that "the drug is a vegetal, animal or mineral substance used to prepare medicaments or as a narcotic"[230].

The specialists from this field define "*the drugs*" as natural or synthetic substances used by the consumers for their influence on the mind, the

[228] N. Stan and D. Tefas, *The Alkaloids*, The Medical Publishing House, Bucharest, 1962, p. 5.
[229] L. Goodman and A. Gilman, *The basis of pharmacology and therapeutics*, The Medical Publishing House, 2nd edition, 1960, p. 199.
[230] *The Romanian Explicative Dictionary*, Bucharest, Academy Publishing House, 1975, p.282.

psychotropic action, as stimulants or sedatives for the mental activity that modify the sensations and perceptions[231].

According to the definition given by The World Organization of Health, the drug is "any substance that, once it is introduced in a living organism, modifies the perception, the humour, the behaviour or the cognitive and motrical functions".

Caballero Francis classified the stupefacient in three major categories[232]:

a) The central nervous system' depressive products: alcoholic drinks; benzodiazepines[233]; barbiturates and other substances used as soporifics[234]; solvents and inhaled gases[235], substances that reduce the pain[236]: opiates and opioids[237].

b) Products that stimulate the central nervous system such is: cocaine, tobacco, caffeine, ecstasy.

c) Products that perturb the central nervous system: hallucinogen substances[238] and cannabis.

2. Short presentation regarding the consumption of illicit drugs in the world

The consumption of drugs is a world-wide problem and we can obtain a good perspective on this problem' relative dimension in Europe, by comparing the European statistics with the information received from other countries. At this point, the difficulty is in the fact that only in few parts of the world there is comprehensive and solid information. USA, Canada and Australia can serve as relevant comparisons regarding the estimations of the drug consumption prevalence in the last year. The United Nations Office that fights against drugs and crime (UNODC) estimates that the prevalence of the opiates abuse from those countries is, roughly speaking, similar with that from the European Union, varying between 0,4% and 0,6%; Canada has a lower prevalence and USA a higher one. The estimated consumption of cannabis is, on average, considerably lower in the European Union than in the USA, Canada and Australia. As regarding the stimulant drugs, the levels of the ecstasy abuse are, broadly speaking, similar at the world level, although Australia reports high levels of prevalence and, as concerning the amphetamine use, the prevalence is higher in Australia and USA than in Europe and Canada. The cocaine consumption prevalence is higher in USA and Canada than it is in the European Union and in Australia. The lack of comparable data makes heavier to evaluate the impact of

[231] H. Ardelean, *Drugs and drug addicted people*, Oradea, Europrint Publishing House, 2001, p. 4.
[232] F. Caballero, *The right of the drug*, Sallo Publishing House, Paris, 1989, p. 18.
[233] For example: diazepam, nitrazepam.
[234] For example: phenobarbital.
[235] For example: toluene, butane.
[236] For example: morphine, heroine.
[237] For example: methadone.
[238] For example: LSD.

the drug consumption on health in the different countries, although a prudent comparison of the estimated number of the HIV infections, newly discovered and associated with the consumption of injectable drugs from 2005 suggested, for Australia, Canada and The European Union, an average of less than 10 cases in a million people and for USA an average of about 36 cases in a million people[239].

Nowadays, EODP collaborates with The World Organization of Health (WOH) to create the statistic data to collect the indicators regarding the health in penitentiaries. The general principle according with the convicts should have access to medical care just like the free people is not respected, in many countries referring to the persons that have drug problems. Not only that those convict persons have drug problems, but the specialized studies show that, seldom, the drug consumption takes place in the penitentiary. The lack of services addressed to penitentiary drug consumers gives birth to the fear that in this way it is lost the intervention chance for reducing, in the future, the drug consumption and the criminal behaviour and that, because of this reason, the progress registered in the health area realized in other centres could be undermined by the lack of services from penitentiaries[240].

3. **The European Monitoring Centre for Drugs and Drugs Addiction (EMCDDA)[241]** was created in 1993 and has its central department in Portugal (Lisboan).

Ten or twenty years ago, Europe didn't have the possibility to analyze the drug related problems. Because the deficiency of data regarding the drug consumption in each country, at the European level there was no available information concerning the drugs, drugs addiction and their consequences, in order to realize a comparative study.

Thus, it was impossible to trustfully discuss about the patterns and the tendencies of the drug consumption on the EU territory. The European Monitoring Centre for Drugs and Drugs Addiction was created to change this situation.

Its purpose was that to offer to the European Union and its member states a real image on the problems regarding the drugs in Europe and a background that would give support in the drug problem. Now, EMCDDA offers to the decisional factors the basis of scientific proofs that they need for elaborating the strategies and laws regarding the drugs and it helps the professionals and the researchers to identify the best methods and new fields for the analysis.

The main goal of the agency's activity is that to compare the data regarding the drugs from the European Union. In order to fulfil this target

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[239] *The report regarding the drugs situation in Europe*, The European Monitoring Centre for Drugs and Drugs Addiction, 2007, p.11.
[240] *Ibidem*, p.12.
[241] For further details see http://www.emcdda.europa.eu.

EMCDDA is basing on a network of almost 30 national monitoring centres for centralize and analyze the national information according to the standards and to the common instruments of collecting data. The results of the national monitoring process are transmitted to EMCDDA and then registered in The Annual Report regarding the situation of drugs in Europe.

In the monitoring process of the actual situation regarding the drugs, EMCDDA shows a permanent attention on the new appeared drugs and the emergent tendencies. Because the production of cocaine and heroine touched the highest levels from history, being recorded annually over 7 000 deaths among the European citizens because of the overdoses, the constant monitoring is being imperative.

4. The Law nr. 143/2000 regarding the fighting against the traffic and the illicit consumption of drugs modified and completed with The Law no.522/2004[242].

The illegal cultivation, production, fabrication, experimentation, extraction, preparation, transformation, offering, offering for sale, sale, distribution, delivery with any title, sending, transportation, procuring, buying, owing or other actions regarding the risk drug circulation, is punished with jail from 3 to 15 years and with the interdiction of some rights. If the anterior deeds have as object some high risk drugs, the punishment is jail from 15 to 25 years and the interdiction of some rights. (2nd art)

The act of illegally introducing or taking out of the country and also the import or export of risk drugs will be punished with jail from 10 to 20 years and the interdiction of some rights. If the anterior provisioned facts are referring to the high risk drugs, the punishment is jail from 15 to 25 years and the interdiction of some rights. (3rd art)

In the case that someone illegally cultivates, produces, fabricates, experiments, extracts, prepares, transforms, buys or has risk drugs for his/her own consumption, it is punished with jail from 6 months to 2 years or fine.(4th art)

The placing at somebody's disposal, willingly, in any circumstances, of a building, house or any other place where the public has access, for the illicit consumption of drugs or the permission of the illicit consumption in such places is punished with jail from 3 to 5 years and the interdiction on some rights.(5th art)

The prescription of high risk drugs, intentionally, by the doctor, without it being necessary from the medical point of view, is punished with jail from 1 to 5 years. With the same punishment is penalized someone in case of intentionally giving or obtaining high risk drugs, according to prescription given in similar conditions or a falsified prescription. (6th art)

[242] Was published in The Official Gazette, the 1st Part, no. 1155 from 07/12/2004.

Illegally giving high risk drugs to a person is punished with jail from 6 months to 4 years. (7th art)

The delivery for consumption of toxic chemical inhalants to a minor is punished with jail fro 6 months to 2 years or with fine. (8th art)

The production, the fabrication, the import, the export, the offering, the sale, the transportation, the delivery with any title or sending, procuring, buying or owing precursors, equipments or materials for using them to illicitly cultivate, produce or fabricate high risk drugs, is punished with jail from 3 to 10 years and the interdiction of some rights. (9th art)

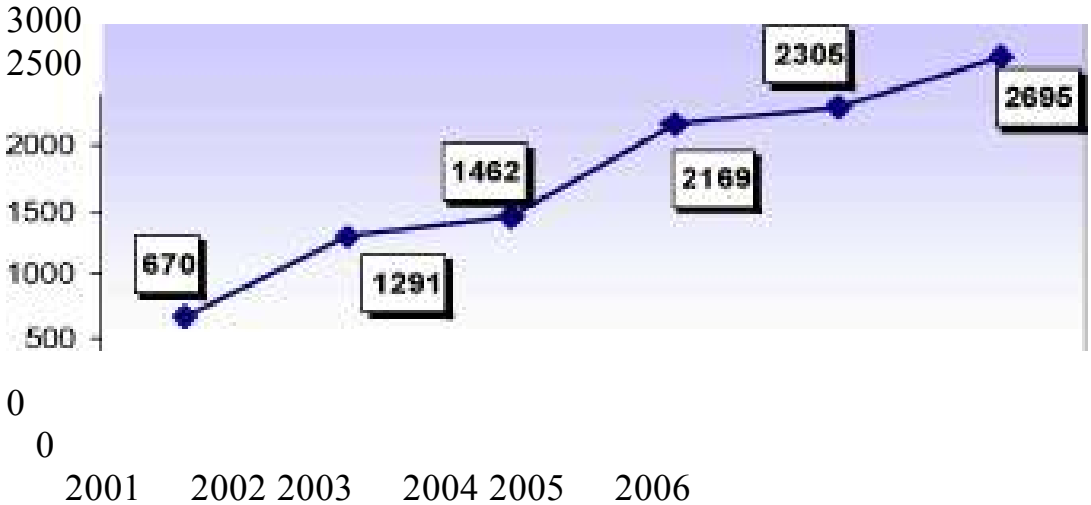
5. The study referring to the criminality rate regarding the drugs illicit traffic and consumption in Romania[243]

Starting with The Convention and The Protocol regarding the Opium (concluded at Geneva in February 1925), Romania adhered and ratified all the important international conventions which's purpose was to control and limit the consumption of illegal drugs. The last significant international document that Romania signed in this respect is *The United Nations Convention against the Illegal Traffic of Narcotics and Psychotropic Substances* (1988).

During the year 2006 were observed 2.936 offences against the law that contain incriminations regarding the drugs and the precursors, from which 2.695 crimes are referring to the fact sanctioned by The Law 143/2000 regarding the prevention and the combating of drugs illicit traffic and consumption, with the ulterior modifications and additions. They represent 91.8% from the total of committed crimes related with the policy of drugs and precursors.

Can be noticed an ascendant tendency regarding the number of constant crimes in this entire period.

Diagram[244]: The evolution of crimes number in the drug policy recorded between 2001 and 2006



[243] The source: *The national report regarding the drugs situation in 2007*, Romania. New evolutions, tendencies and information concerning the European interest subjects, pages 59-60.

[244] *The source: The Criminal Record, Statistics and Operative Accounts Department from The Romanian Police General Department.*

According to the statistics, can be noticed the fact that the urban society is still the most affected environment by the crime of drug illicit traffic and consumption. Thus, in 2006, the percent of offences made in the city was 93.3% (2.514 crimes), confronted by the country area where was registered only a 6.7% (178 crimes).

From the 2.695 crimes registered, the highest percent, of 53.76% is represented by the operations of buying and owning drugs for the personal consumption (the 4th art.), and 41.78% is referring to cultivating, producing, sale, distribution, buying and illegal owing of drugs (the 2nd art.). The difference of 3.6% is represented by the operations of introducing or taking out of the country of drugs and also the import or export of risk and high risk drugs and 0.86% represents other penal facts stipulated by law.

The phenomenon of criminality regarding the drugs illicit traffic and consumption in 2006 could be observed in all the country's districts, the number of offences recorded against the Law nr. 143/2000 is varying according to the modifications appeared on the traffic routes and to the request of drugs on the illicit market, but also according to the quality of measures taken by the anti-drug organizations, both on the national frontier and inside the country, mostly in the urban area. Thus, Bucharest is on the first place with 1.301 crimes, followed by the districts: Ilfov – 130 crimes, Iaşi – 122 crimes, Timiş – 96 crimes, Arad – 64 crimes, Alba – 63 crimes, Prahova – 62 crimes, Satu Mare – 59 crimes, Constanţa – 59 crimes, Braşov – 52 crimes and Mehedinţi – 51 crimes.

Among the factors that favour the criminal phenomenon in the mentioned areas can be enumerated: the great amount of young people in the university centres, the placing of some centres at the national frontier, the opportunities offered by dealers in ports, The Black Sea littoral area or the residential districts from the big cities with a high risk of criminality.

In Bucharest the evolution of this phenomenon on the analyzed statistic indicator keeps an accelerated growth dynamic, in 2006 being registered with 374 more crimes confronted by year 2005 and with 898 more crimes confronted by the referential year 2001 (222.8%).

Besides the offences committed against the policy of illicit drugs, in 2006 were also recorded 96 other offences at the precursors' regime (The Law 300/2002), 57 offences connected with The Law 39/2003 regarding the prevention and combating of organized criminality, 15 offences of money laundering and 73 offences connected with the dispositions of The Penal Code (offences associated with the drug illicit traffic and consumption).

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www.emcdda.europa.eu

THE PRINCIPLES AND GENERAL RULES OF THE INTERNATIONAL JUDICIAL COOPERATION IN CRIMINAL MATTERS

Attorney **Oana Mihaela Pop**

Satu Mare Bar

e-mail: pop_oana_ro@yahoo.com

Abstract:

The globalization and, especially the expansion of transnational organized crime have raised a series of new problems for the international criminal systems. The opening of national borders, the freedom of movement, the freedom of merchandise and services trade as well as the continuous development of communication methods have brought a new dimension to these threats, hence a tight international cooperation in criminal matters between the member states, along with the police cooperation has become an efficient means to react to the aforementioned phenomenon.

The continuous and sustained efforts undertaken at international level by the United Nations Organization (the UN) in order to promote the international judicial cooperation have culminated, during the Eight UN Congress in a series of principles and guiding lines for the prevention and fight against organized crime and terrorism, establishing the necessity for several basic treaties in the field of international cooperation in criminal matters. These principles were adopted by the Romanian legislator within the dispositions of the Law no. 302/2004 as modified and amended by the Law no. 224/2006.

Key words: rules, judicial cooperation, criminal matters.

1.1. The preeminence of the international law

The principle of the preeminence of the international law is incident in several branches of the law, and is best represented in the field of international public law. Related to the report between the national and international law – the subject of the matter – the theory of the preeminence of international law appeared after the 1st World War and expresses the idea that the international law establishes in fact the limits of the national legal system competence. There are, of course, several arguments to this point. The recognition of the superiority of conventional legal norms over the national ones is a fact consecrated by practice through arbitral decisions as well as international jurisprudence. Also, the nonconformity between the internal legislation of a state and its international obligations engages its international liability.

The legislator has regulated a special case of applicability of the principle according to the provisions of the 4th art., par. 2 of the Law no. 302/2004 as

modified and amended by the Law no. 224/2006 concerning the international cooperation in criminal matters, stating that along with the international treaties, the statutes of international criminal courts may be considered as a fundament of the international cooperation in criminal matters, granting them with judicial strength of particular international instruments. We must state that these international instruments may be used as means of international cooperation only in the case where an international criminal court or a international organization have competence, following a special procedure. We must emphasize that according to this legal provision, in the place of a state – either soliciting or solicited – we may find international criminal courts or another international organization. In conclusion, we discover several new subjects involved in the international criminal cooperation, other than the states or the judicial authorities, as they are defined by the 2nd article of the law.

Moreover, art. 24^1 of the aforementioned law prescribes as a mandatory reason for the refusal of a extradition the situation where: "*the request is filed in a case found on the role of extraordinary courts, other than those constituted through pertinent international instruments, or concerning the execution of a sanction decided by such a court*". The general rule of the preeminence of the international law is still in force, through the provisions of the following paragraph of the legal text, that states: "*...the provisions of the present law can be enforced accordingly, in case it will prove necessary*", respective in non regulated situations.

Unlike the internal legal system, whose main source is the law, considered as an act issued by a single state, the sources of the international law reflect the willpower of more subjects of international law, respective states, concerning the creation of mandatory international obligations. In order to determine the sources of the international law we must accept that the international law is the mean by which the states, based on their common agreement create new international norms and develop, clarify or confirm the already existing norms in order to regulate their cooperation.

1.2. International courtesy and reciprocity

Regulated by our legislator as principles of the international cooperation in criminal matters, the international courtesy and reciprocity become veritable international cooperation instruments as described in the 5thart. of the Law no. 302/2004 as modified and amended by the Law no. 224/2006. As a consequence, as long as the Romanian government as the solicited state and the soliciting state are not contracting parties to a international convention, or such a convention was not ratified by the two states according to the international legal principles, the judicial cooperation can take place in virtue of the international. Certain procedures must be fulfilled in order to find the applicability of the international courtesy. Hence, it is necessary for the soliciting state to transmit a request through the diplomatic channels to the solicited state's authorities concerning the reciprocity, and in case the reciprocity is confirmed in writing, the international cooperation in

criminal matters may be initiated. The Romanian legislation, establishes the competence of the Ministry of Justice whenever Romania is the soliciting state, according to the provisions of art. 6 of Law no. 302/2004 that states: "*for each case, whenever it is deemed necessary, upon motivated request from the competent Romanian authority*."

All the aforementioned lead us to the conclusion that the two rules are interdependent during enforcement. The Law no. 302/2004[245] prescribes in it's art. 5 par. 2 the legal framework where the two legal principles may be invoked, establishing that in these situations, the common law for the Romanian authorities as solicited state is the present law.

As previously argued, within the international cooperation in criminal matters, according to the Romanian legislation the international courtesy becomes applicable only when there exists "*written reciprocity insurance*" from the soliciting state. Nevertheless, exceptional situations may occur, prescribed by the law, when the reciprocity is no longer necessary. At a closer analysis of the legal text – respective the article 5 par. 3 of the Law no. 302/2004 as modified and amended – it is clear that the exceptional situations may occur only when it is dealt with a request for international assistance in criminal matters and not with a request for international cooperation. As a consequence, when upon such a request "*the international assistance in criminal matters proves to be necessary, due to the nature of the criminal act, or due to the need to fight against severe forms of criminality; or it may contribute to the improvement of the defendant's or convicted person situation or to its social reintegration or it may serve to clarify the judicial situation of a Romanian citizen*" the reciprocity an the insurance of reciprocity are not mandatory. The legislator restricts the applicability of these exceptional legal provisions, with its forms: international rogatory commissions; videoconference hearings; hearings in the soliciting state of the witnesses, experts and prosecuted persons; notification of procedural acts drafted or filed in a criminal case, criminal records and other forms of international judicial assistance prescribed by the law. Per a contrario, for the rest of the international judicial cooperation in criminal matters forms, except the international judicial assistance, respective: the extradition; the surrender upon an European arrest warrant; the transfer of proceedings in criminal matters; the recognition and execution of sentences and other documents; the surrender of the convicted persons; the judicial assistance in criminal matters; and other forms of international judicial cooperation in criminal matters, the international courtesy and reciprocity are two cumulative conditions.

On a closer analysis of the three exceptional situations where the reciprocity is not necessary in the event of a request for international judicial assistance, we bring forth an argument in favor of the current legislation, respective the fact that the three cases show the characteristics of emergency situations. In the first

[245] Modified and amended by the Law no. 224/2006 published in the Official Monitor part I, no. 534/21.06.2006 and the G.E.O. no. 103/2006, published in the Official Monitor part I, no. 1019/21.12.2006.

situation the law refers to the necessity of the request due to the:" *nature of the criminal act or the need to fight against certain severe forms of criminality*". It is noticeable that the legislator does not clarify the nature of the criminal act, but it prescribes it as an alternative to the need to fight certain "*severe forms of criminality*". We can deduct from the context the fact that the "*criminal acts*" that do not require reciprocity must belong to "*the severe forms of criminality*" like the organized crime, terrorism, drug traffic, etc. It is understandable that in the quest for a solution to prevent or to fight the severe forms of criminality, the mere international courtesy must suffice in order to compel with the specific procedures of the international assistance.

The following two exceptional situations, respective the request for international assistance only based on international courtesy in the cases where: "*it or it may contribute to the improvement of the defendant's or convicted person's situation or to its social reintegration*" and "*it may serve to clarify the judicial situation of a Romanian citizen*" are somewhat similar, in the sense that they focus on the person and not on the criminal act. Every time a defendant's or a convicted person's situation may be improved at a certain moment, its social reintegration may be easier to realize or the personal situation of a Romanian citizen may be clarified, the principle of reciprocity is no longer needed, the international courtesy being sufficient. We find that in regulating these exceptional situations the Romanian legislator has taken into consideration the social, humanitarian side of the prosecution, with its two functions, respective the sanction and the prevention.

All of the above exceptional cases represent a viable, logical alternative created by the legislator to the more complicated form of international cooperation that is the judicial assistance.

It must be noticed that at the European level, the community legislation has stipulated since October 1999, during the European Council meeting in Tampere – Finland – that the *reciprocity* represents *the corner stone* of the judicial cooperation between the member states of the European Union, including the international judicial assistance in all its forms. During a comparative analysis of the other forms of the international judicial cooperation which prove to be more complex and more difficult to realize from the perspective of the procedures involved, then those stipulated by the 5th article par. 3 of the present law, it is easy to understand why the starting point of the extradition forms and the European arrest warrant is the principle of reciprocity.

1.3. Applicable law

The stipulations of the 7th article of the law no. 302/2004 as modified and amended by the Law no. 224/2006 are clear and they represent the natural consequence of the fact that at a national level any request addressed to the Romanian authorities in the areas regulated by the present law will be subject to the national criminal procedure rules. The present basic rule in the field of international cooperation in criminal matters may be assimilated to the principle of the

territoriality, since the criminal or criminal procedure rules from another state can never be applied on the Romanian territory according to the Romanian legislation. As a consequence, as long as the law does no dispose in an express manner that foreign criminal norms may be applied, according to article 7 of the present law, the Romanian authorities will only apply the Romanian criminal procedure laws during the analysis of any request submitted by foreign judicial authorities.

The content of article 146 of the law no. 302/2004 as modified and amended stipulate a practical situation, but from a mirror perspective of article 7 aforementioned, in the sense that the rules of international cooperation in criminal matters create the possibility for the Romanian authorities to apply the **rule of the conversion of the conviction** through a judicial sentence, in the specific situation where the nature of the sanction and its duration are compatible with the Romanian legislation. This judicial operation is realized through the **adaptation** of the sanction to the **Romanian legislation** following imperative legal provisions, characteristics in case of surrender of persons.

1.4. Non bis in idem

„Non bis in idem" is a **veritable law principle** found in most criminal or constitutional legislations and in the international jurisprudence and it signifies what the Romanian legislation calls "the authority of a previous sentence". It is a judicial concept that finds its origins in the Roman law system, and it is called in the common law systems *double jeopardy*. At a regional level all member states of the European Council, including the majority of the European states and all the members of the European Union are members of the European Convention for the Protection of Human Rights and Fundamental Freedoms which state in the 4th article of the Seventh Protocol the rule **non bis in idem**: „*No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."*

The rule that states that no one may be convicted twice for the same crime is general and based on a humanitarian principle, with two basic effects. The positive effect implies that a criminal sentence may be executed and the negative effect prevents a new prosecution against the same person for the same criminal act. A second prosecution is still possible when it is based on new elements, adding to those from the first prosecution[246].

In the international cooperation in criminal matters, the principle *non bis in idem* is consecrated by article 54 of the Convention for the enforcement of the Schengen Agreement[247]. According to the respective article *no person may be prosecuted in a member state for the same criminal acts for which he was sentenced in another member state*. A sentence issued by a court of law after the

[246] Gheorghiță Mateuț, *Criminal procedure - treaty. General part. Volume I*, C.H. Beck Publishing, Bucharest, 2007, pages 719-720.
[247] Published in JO L 239 of 22.09.2000, page 13.

Public Ministry decided to initiate the criminal prosecution only based on the fact that the person is prosecuted in another member state for the same criminal acts, without analyzing the fond of the matter does not constitute a definitive sentence, according to the article 54 of the Convention. If such a sentence were considered definitive, any concrete possibility to inflict a punishment in any member state would be extremely difficult, coming against the finality of the dispositions of the 6th Title of the European Union Treaty[248].

Considering the disposition "*the same criminal act*", The European Court of Justice stated in the Van Esbroeck[249] affair that the only relevant criteria according to article 54 is the identity of the material acts, understood as a series of concrete circumstances found in inextricable relation[250].

The principle *non bis in idem*, as stipulated in article 10 of the law no. 302/2004 as modified and completed by the Law no. 224/2006 limits the forms of international cooperation in criminal matters to three situations, as it follows. As long as in the Romanian state or any other state a criminal case was tried for the same criminal act, and the respective trial ended through a final decision of acquittal or dismissal of charges, either by a definitive sentence of conviction to a punishment that has already been executed, of was subject to a exoneration or amnesty in whole or on the part that was not executed, the international judicial cooperation it is not admissible. It shows, that from the start no request concerning the extradition, the European arrest warrant, the transfer of proceedings in criminal matters; the recognition and execution of sentences and other documents; the surrender of the convicted persons; the judicial assistance in criminal matters; and other forms of international judicial cooperation in criminal matters will be admitted. These situations are understandable and predictable. It is understandable that as long as a person was acquitted or the charges were dismissed based on any legal grounds, or as long as the person has executed the punishment it can no longer be prosecuted or tried for the same criminal act. But the law only makes a distinction in what concerns the judgment and the execution of a criminal sentence and does not mention the criminal prosecution where, according to the criminal procedure rules a solution of acquittal or dismissal of charges may occur. In such circumstances we are bound by the provisions of article 11 paragraph2 corroborated with article10 of the Criminal procedure Code, which indicate expressly when the acquittal or the dismissal of charges is applicable[251].

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[248] Case no. C-469/2003; *Criminal procedure v. Filomeno Mario Miraglia. Decision form 10.03.2005*, Judicial Courier magazine no. 5/2005, pages 50-51.

[249] Case no. C-436/2004 – www.curia.europa.eu.

[250] Corina Sabina Munteanu, *The European arrest warrant. A judicial instrument capable to replace the extradition.* Criminal law notebooks no. 1/2007, pg. 106.

[251] During judgment the court issues a sentence of acquittal when: - the criminal act does not exist; - the act does not fall under the incidence of the criminal law; - the act does not have the degree of peril of a criminal act; the criminal act was not perpetrated by the person which s on trial; - the act lacks one of the constitutive elements of a crime; - we are in the presence of a case where lacks the criminal character of the act.

The law concerning the international cooperation identifies some of the situations prescribed by article 10 of the Criminal Procedure Code as reasons of acquittal or dismissal of charges in case of a request for extradition or surrender based on a European arrest warrant. Article 32 stipulates that: "*the extradition will not be granted when, according to both the Romanian legislation and the legislation of the soliciting state, the criminal prosecution may be initiated upon prior criminal complaint from the victim, and the victim opposes to the extradition*"; article 35 stipulates that: "*the extradition will not be granted when the prescription of the criminal liability or the prescription of the execution of the punishment has come to term according to the Romanian legislation or according to the legislation of the soliciting state*"; article 36 stipulates that: "*the extradition will not be granted for crimes which were amnestied in Romania, if the Romanian authorities were competent to prosecute the respective crimes according to its criminal legislation"* and article 37 stipulates that: "*the exoneration granted by the soliciting state prevents the admissibility of a request for extradition, even if all other conditions are fulfilled."*

In the same order of business, article 88 par. 1 of the Law stipulates as mandatory refusal reasons for the execution of a European arrest warrant, amongst others, the situations where the Romanian authorities have relevant information that show that "*the person was tried for the same criminal acts by a member state, other then the emitting state, granted that, in case of conviction, the sanction was already executed, or was in course of execution, or the prescription of the punishment intervened, or the crime was exonerated or amnestied, or subject to another cause of non-execution; - when the crime for which the warrant was issued was amnestied according to the Romanian legislation, if the Romanian authorities are competent, according to the internal legislation, to prosecute the respective crime."*

The rule stipulated by the first paragraph of article 10 of the Law no. 302/2004 as modified and amended by the Law no. 224/2006 it is not general. The second paragraph of the 10 of the above mentioned law indicates that in case of a assistance request for the revision of a definitive sentence for one of the reasons justifying a extraordinary way of appeal against a sentence according to the provisions of the Criminal Procedure Code, the principle *non bis in idem* has no effect. One more time the law concerning the international cooperation in criminal matters regulates an exception only in case of an assistance request and not in case of cooperation, exactly like the dispositions of article 5 par. 3 of the same law. In this specific case the legislator stops at the term assistance, without any

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During judgment the court issues a sentence of dismissal of charges when: - it lacks the criminal complaint of the victim, the authorization or the seize from the competent organ or another condition stipulated by the law, necessary for the prosecution to take place; - the amnesty, prescription, the death of the defendant or the radiation of the commercial person intervened; - the complaint was withdrawn or the parties reconciled in case of crimes where these circumstances prevent criminal liability; - the criminal liability was replaced; - there is a reason which prevents punishment; - the rule of double jeopardy applies.

specification weather it concerns the international judicial assistance or the assistance in general. It is extremely important from the point of view that if we deal with assistance in general, according to the doctrine we must include the international judicial cooperation, but if we deal with the international judicial assistance we must exclude the other forms of international judicial cooperation in criminal matters.

We find that the legislator should have been more specific, and should have used the term international judicial assistance. Nevertheless, we conclude that the interpretation of the exceptional cases stipulated by the second paragraph of article 10 of the law no. 302/2004 modified and amended by the law no 224/2006 leads exactly to the conclusion that the legislator referred to the international judicial assistance. In conclusion we refer to revision as an extraordinary way of appeal that can be submitted against a definitive sentence. The cases of revision are stipulated expressly by article 394 par. 1 of the Criminal Procedure Code and the situations where each case is applicable are provided by the paragraphs 2, 3 and 4 of the same article. In the present scenario, the only revision reason that can prevent the efficiency of the double jeopardy rule in case of a request for international judicial assistance, refers to the situation where: "*new facts or circumstances were discovered, facts or circumstances not known by the court during the trial of the case*" if it refers to "*facts or circumstances that can prove that the sentence of acquittal, dismissal of charges or conviction is unfounded.*" The proof that a sentence of acquittal, dismissal of charges or conviction is unfounded determines the admission of the revision, followed by the annulment of the definitive sentence and by a new sentence, contrary to the initial solution.

As a consequence a sentence of acquittal or dismissal of charges will be issued instead of conviction, or the vice versa a sentence of conviction instead of acquittal or dismissal of charges[252]. I the end the theory of double jeopardy cannot be applied in such circumstances.

A second exception from the rule non bis in idem is offered by the dispositions of the article 10 par. 3 of the law concerning the international judicial cooperation in criminal matters. In any situation where an international treaty – signed or adhered to by Romania – contains favorable dispositions in what concerns the principle *non bis in idem,* the dispositions of the present law will be replaced by the treaty. It is a natural conclusion, in light of the dispositions of the Romanian criminal law which stipulate the principle of the "applicability of the more favorable criminal law" – article 13 of the Criminal Code. But again, the law concerning the international judicial cooperation in criminal matters is lacunaria, in exemplifying situations that may prove favorable in rapport with the principle non bis in idem.

[252] Grigore Theodoru, *Criminal procedure - treaty*, Hamangiu Publishing, Bucharest, 2007, page 87.

1.5. Confidentiality

Another basic rule of the international judicial cooperation in criminal matters is the one of confidentiality of all requests and of the documents attached to the request. A simple reading of the legal text shows that the confidentiality is not mandatory and must be requested according to the traditional principle of international judicial cooperation by the soliciting state from the Romanian authorities as solicited state. We can find the areas where "*confidentiality is mandatory, as long as it is possible*", respective in the areas regulated by the present law together with the annexed documentation. In the end, the confidentiality is rather optional – mandatory as long as it is possible – for the Romanian authorities. Nevertheless, considering the area of application, specifically the prevention and the fight against severe forms of criminality, the confidentiality is not left at the disposition of the solicited state – in our case the Romanian state – the optional character being left at the disposition of the soliciting state. As long as the Romanian authorities finds that there are no sufficient resources in order to maintain the confidentiality of the requests for cooperation and of the annexed documentation, is compelled to notify this situation to the foreign state, which will decide weather it will accept or not the situation.

The rule also applies, in a certain measure, in the inverse situation, where the Romanian state is the soliciting state. For example, in case of international judicial assistance, according to article 173 of the law no. 302/2004 as modified and amended by the law no. 224/2006, in virtue of the principle of the "specialization of a rogatory commission" *the soliciting Romanian authorities will only use the documentation and information received from the solicited state with the object to fulfill the object of the rogatory commission*.

As a practical application of the principle[253], the law prescribes that in the event of international frauds, the banks are subject to the obligation of confidentiality in what concerns the information transmitted towards the soliciting authorities, as well as the ongoing criminal investigation, as a condition of the international judicial assistance, form of the international judicial cooperation in criminal matters. In parallel we find this feature in the Romanian legislation concerning the criminal procedure, which stipulates that the criminal prosecution is secret, in order to create optimal conditions for the criminal investigation, and to allow the criminal trial to reach its purposes.

[253] According to article 187^{14} section II, chapter II title VII *Other dispositions concerning the judicial assistance, applicable in relation with the member states of the European Union* of the Law no. 302/2004 as modified and completed by the Law no. 224/2006.

THE DEFICIENCIES OF THE INFORMATION OFFERED BY THE PRESENT FINANCIAL SITUATIONS REGARDING THE HUMAN RESOURCES

Candidate to Ph. D **Cristina Liliana Popa**
AJOFM of Mehedinți
popacristinal@yahoo.com

Abstract:

In the attempt to harmonise the Romanian accountancy system with the International Accountancy Standards was noticed that some reglementations are easily assimilated, but some are not yet to be applied – like the ones from IAS 19 or IAS 26. So we have from theoretical point of view some issues – which solving those will bring to tremendous advantages for the practical aspects of these problems.

Key words: deficiencies, information, financial situations, human resources.

Referring especially to the period after WWII, in the Western Europe it is noticed a constant pressure coming from the employees (actually theirs unions) regarding the accounting information.

Also, referring to the information made available by accountancy The International Accounting Standards Committee, it recognise employees as one of the seven categories of users, underlining their concern towards the company's lucrative ness, but also towards its stability, together ways and levels of remunerations, pension advantages, bonuses, periodic stimulations etc.

Most of this information is available in the social balance sheet. In the study of the different existing models of social balance sheets from various countries we have to start with **France,** the first country to adopt, starting with 1978, as a mandatory demand for all the companies with more than 300 employees to conceive the social balance sheet[254], on annual basis, disregarding the company's form or domain of activity, with the following exceptions:

- The public services and administrations – the state is not interested to subdue its own services to additional obligations;

[254] R. Danziger, Bilant Social**,** *Encyclopedie de gestion*, vol. l, cited work, pages 246-247.

- all small and middle size companies – exactly the ones that seldom use other instruments of social management – therefore especially those that could put the information revealed by the social balance sheet to the best use. That's why the unions asked for the lowering of the 300 employees' threshold to a 50 employees' threshold, exactly the minimum number of employees needed to develop an independent union.

Although, we can notice that the present form of the social balance sheet not stimulate enough the unions (because of its effective utility) to really does the further development of the legal frame as a top priority goal.

Most of time the top managers consider the company committee (ain not approves the social balance sheet and is the main beneficiary) as an extension of the union, and the social balance sheet analysis is regarded as a possible source for demands – this, in turn, makes the managers reticently and sceptically.

Actually the social balance sheet is regarded more like an administrative formality. Some measures for a sudden change can be taken: different models for social balance sheet, adjusted to the different realities, or putting the social information in a larger frame, showing in the same time the global situation, the financial capital's performances together those of the human resources[255].

The management and the employees' representatives, in agreement, can make adjustments and modifications of the indicators, in order to a better reflect in one the specific realities. New indicators can be, therefore, conceived, but is forbidden not to compute the ones mandatory by low. The content and the computing method are mandatory, the companies can make slight adjustments – like changing the age intervals. This makes difficult con compression social balance sheets from company to company – a thing that it is not at all encouraged.

Almost 80% from the information needed for the social balance sheets are taken from fiscal and social statements made by the companies even from before 1978.

The law does not make mandatory any control procedure or certification of the social balance sheet by some independent expert. There is only one sanction that regarding the conceiving of the social balance sheet entirely.

Thus its publication is mandatory and restricted, being transmitted to:

1. the company's management;
2. unions;
3. shareholders;
4. labour inspectors;
5. all the employees, on request.

As long as its public aspect is not fully enforced issues appear

especially when comparisons are made, on sector or economy-wide levels.

[255] Idem 1.

The balance sheet remains in the first place a starting point in the management-union talks. In the second place it serves to make the information more transparent, and, not lastly, it helps to plan and develop the social area of any company.

We can also add that even if the emphasis was put on the social side, that has to be correlated with the financial side – the financial accountancy, and, in perspective, on another level, we have to correlate it to the anticipated management. We can enumerate some directions for possible improvements:

- to consider the annual evolution of the company, its profile, the evolutions in the economic branches, the development of subsidiaries, competitor merges etc.
- the full description and evolution of the work-environment, strongly connected with the growth rate of the company;
- to acknowledge better the social environment inside and outside the company;
- the correlation of the social environment with the management;
- using other indicators – like raw figures, especially in production;
- using unified indicators, allowing inter-branches comparisons;
- describing the work-station through the required qualifications, accordingly to the company's specific;
- using forecast situations regarding the technological progress in order to foresee the needed additional skills, the professional career etc.

The incomplete social balance sheets, inaccurate or not made on time are not plainly liabilities, but, of course, the personnel's representatives and other recipients will notice the partial or inaccurate aspect of the document, that will be a true sanction for the manager's reputations.

In **Denmark** the modifications brought to the financial balance sheet in March 1999, with the obligatory character of the publication of the data regarding the human resources increases the emphasis on the measurement of such indicators.

Because we are live in a society of information and knowledge, human and other immaterial assets are become increasingly important. The human resources are regarded as an important part in the total assets of a company, and don't forget about the companies that have interests in the human resources market. Being a developing economic sector, its methods, forms of presentations, evaluations also develop in a continuous manner.

In Romania, as we speak, there is no pressure front the employees/unions against the companies on issues like production, profitability or publication of social information. The unions in Romania are pulled back by the union experience before 1989, therefore being some distance away from the true notion of "union". The only pursued interests are getting some advantages for the employees (most times starting negotiations from completely unrealistic positions), and, sometimes even more important, getting political/financial advantages for the union's leaders.

The employers are not regarded as a partner, but as enemies, and the profitability and the overall financial situation of the company is of no interest whatsoever – not even the middle and long term economic previsions. As in many other areas the unions are hampered by the leader's unproffesionalism and corruption. In such conditions is no wonder that the legal frame for the social balance sheet is missing. Another phenomenon that affects the unions is their leader's migration, on the union-politics or union-business routes, many so called "leaders" regarding the union as nothing more than a way to achieve personal welfare.

In the situation that another the Romanian companies will be forced to make a social balance sheet, parts of the data required can be taken from the financial accountancy, from:

1. Account 641 "Expenses with personnel wages"
2. The added value
3. 112 account "Bonus from profits"
4. 645 account "Expanses with insurances and social protection"
5. Note 8 from the financial balance sheet. Information about the employees, administration staff, top and middle management personnel;
6. Basic documents like pay sheets, attendance book, medical certificates, notes coming from low-level managers etc.
7. Were we can find them, the information offered by the internal management accountancy should be priceless.

To those above we can also add:

1. Information regarding professional trainings:
    - Number of hours/attendant;
    - Number of attendants form total number of employees;
    - Overall cost of the trainings – and eventual legal subsidies (like the ones given by the 76/2002 Law regarding the unemployment insurances and the incentives to occupy the workforce)
    - Number of types of trainings made (initiation, specializations, qualification etc)
    - Correlations between professional training expenses and eventual direct effects on work efficiency and productivity;
2. Information about the health on the workstations:
    - Work accidents
    - Medical leaves;
    - Professional disease leaves;
    - Health checks, made on the company's demand;
3. Security on the workstation:
    - Work accidents;

- Days on hospital;
- Trainings in accident prevention;

4. Benefits:
    - Premiums
    - Stimulants;
    - Study bonuses;
    - Study leaves;
    - Other premiums.

We think that it shoed be taken as examples the French and Danish types of social balance sheets – those countries already have a sizeable experience in this domain. Once again, we must underline some of its functions:

1. *Information supplier.* In this role the social balance sheet acts in the areas were it is available. Therefore, there is an internal and an external availability. The social balance sheet is aimed for three categories of beneficiaries:
    - *Personnel representatives* – one periodic, annual document replaces scattered, randomly available data;
    - *Employees* – the social balance sheet takes the place of a fragmented, with "uncharted territories" information;
    - *External beneficiaries,* especially shareholders.

On the macroeconomic level, however, the most important beneficiary should be the stat itself, with his specialized structures: The Ministry of Economics and his subordinates agencies responsible for the management and destination of the funds required to the different adjustments that could be taken on the workforce market. A vision, a single and solid project in the workforce market policies (here including aspects like wages, ways to encourage employments, ways to encourage professional trainings etc.) are absolutely required in the contemporary environment.

2. *Management tool.* Although it was not envisioned with this role, it helps to identify and solve various social issues – therefore the social balance sheet is one important tool in the social management of a company. The social balance sheet offers an accurate diagnosis of the strong and weak points in the social subsystem of a company. The weak points discovered should be tackle in a coordinate manner, in a global strategy regarding the social management. The social management system has a succession of instruments, tools that so can be used in a focused manner. Overall indicators offered by the social balance sheet can be split in order to achieve structural indicators or dynamic indicators. Analysing those new indicators could lead to new solutions. Thus, if 40% of the personnel attended trainings regarding safety on the workstation, and the accident rate decrease from 3% to 2%, we can safely conclude that there is a strong relation between the measures taken at the end result.

The accountancy only offers a quantitative dimension of the cost of a social dysfunction – like the absence of one worker from his workstation. Absences, but also shortcuts in the proper technological process increase the production cost – such issues can be traced to a bad management of the human resources. The social balance sheet identifies with the aid of some indicators these shortcomings. The absences, for example, we have additional costs and losses – with supplementary payments, underused of the nominal production capacity, absences management etc.

There is always the issue of the so-called "hidden costs" in the area of social politics. These costs have to be included in the costs/gains analysis in the investments. For example, if we eliminate night -shifts in a company this will lead to a 7000 monetary unit's investment and gains of 2300 monetary units. But those are only raw figures, considering only the economies made by eliminating the additional wages for the night-shifts and the reduction of the maintenance personnel. For a proper analysis other "hidden advantages" should be taken into consideration – like increased productivity, less absentees etc.

3. *Prognosis and anticipation instrument.* If the social balance sheet is made pertaining, in an unitary manner, and with a proper public character (complete and mandatory) it can be analysed in dynamic. So trends, structural evolutions, even functions can be identified in order to better understand of phenomena that govern this area of interest.
4. *Tool for scientific research.* The wide availability of large number of social balance sheets in a national economy could lead to important advancements in theoretical researches for a number of disciplines, like accountancy, human resources management, financial analysis, marketing etc.

For now, however, there are some impediments that at least delay the implementing of such reglementations in order to make the social balance sheet a mandatory document. First of all the unions/employees show no interest for it. As we already stated, the unions are not interested in a trade-union fight based on scientific, logical arguments, and where the unions don't exist, the employees have such a weak position that cannot put any pressure on the employers in order to make such documents. This is a perceivable phenomenon even where the state is the employer. If one party is clearly not interested, the other one is not far away. Not even the employers don't realize the advantages (some direct, but most of all indirect) that a social balance sheet could bring to a company.

Where the beneficiaries are lacking the vision the state should imply and adopt the necessary measures – even if unpopular and in a coercive manner. The dissensions and the political climate in our country, the weak support of the Government in the Parliament make such measures impossible, at least in the near future.

In the attempt to harmonise the Romanian accountancy system with the International Accountancy Standards was noticed that some reglementations are easily assimilated, but some are not yet to be applied – like the ones from IAS 19 or IAS 26. So we have from theoretical point of view some issues – which solving those will bring to tremendous advantages for the practical aspects of these problems.

INSURANCE FRAUD

Junior Lecturer **Elena Popa**
„Dunărea de Jos" University, Galați
neculaelena2003@yahoo.com

Abstract:

The present article aims at proving that the Insurance fraud has a significant number of facts antisocial of economic and financial nature that have been little discussed although they the cause of serious damages to the insurance companies.

Insurance fraud is a phenomenon extremely harmful that is to be met in the Romanian insurance companies as well as in other countries in the European Community, Canada or USA. The real problem with this issue is that it does not get enough attention, being a very serious one, although not as frequent as other forms of economic and financial criminal acts.

In the fight against insurance fraud, the insurance companies have to conjugate their efforts into detection and neutralization of policyholders of bad faith in their attempt to frame or to produce, intentionally, insured events, as well as into actions of removing the causes generating fraud, more precisely into drafting and adoption of control methodologies specific to each insurance company, creating new departments specialized in combating fraud in the insurance.

Keywords: insurance, fraud, injury, precedent

The word comes from the Latin fraus-fraudis, being seen as the act of bad faith committed to obtain a profit. In the legislation in force in the insurance, fraud is not defined, and the specific facts of insurance that constitute the crime of fraud are not described.

With the U.S. and the European Union this activity is regulated nationally by specific laws and structures specialized in investigations and control, in Romania, currently, there is no legal regulation on the concept of insurance fraud, a definition of facts constituting crimes in this area, no database on people who intentionally produce damage insurance, nor bodies and institutions specialized in combating this phenomenon.

A large proportion of the payment of compensation for the risks insured is represented by events produced intentionally or by staging, known among general practice insurers as the insurance fraud.

Insurance fraud encompasses all crimes committed in a period in the security system on the national territory. The offense is "the fact that is assumed to be a social peril guilty as provided for criminal law". It also implies committing any of the facts that the law punishes as crime consumed or as an attempt and participation in the commission as author, instigator or accomplice.

In the concept of fraud insurance covered all human behaviors prohibited by criminal law which affect the security system.

Typically, the stages of an insurance fraud are:

- preparation of fraud to obtain insurance
- claiming the insurance for a fake injury
- Exploiting illegal insured damage
- committing them deliberately.

In the area of specialty is known more criteria for the classification of fraud, among which we mention:

A). After the number of people involved in committing the fraud:

1. Individual simple fraud - in which case the derogatory claims more than his due[256]

2. complex fraud, which may be:

- Internal fraud - in which case the derogatory cooperate with representatives of insurer

- External fraud - in which case the derogatory collaborate with individuals or with representatives or officials of institutions, this collaboration can be direct and indirect [257]

3. influence through fraud - in which case representatives of the various organs of the state
intervene, directly or indirectly.

B). After the type of insurance:

1. Fraud produced in the optional insurance, among which are mentioned: damages of accidents, auto thefts and fraud insurance products in the maritime transport.

2. Fraud produced in the motor vehicle liability insurance mandatory

Another classification can be:

1. actual fraud - are all criminal acts committed on the territory within a specified period of time
2. apparent fraud - include all offenses in the security system signaled by the criminal justice system and registered as such
3. fraud laws - are all criminal acts for which they pronounced judgments, condemning remaining final.

In the case of voluntary insurance and liability, the insurance contract is a contract of indemnity (of compensation). Under this contract, the insured or injured person (in case of liability insurance) is compensated for an injury resulting from insured events unfolded. Under these circumstances, the insured person is not supposed to obtain a benefit from this event.

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[256] For example, somebody claims the total painting of the vehicle although the findings should be part of a painting of elements of the property damage, or claims the replacement of a bench in a situation when the findings that should be repaired are located respectively ş.a.

[257] Improper framing of facts, made intentionally or in ignorance.

According to this principle (to repair the injury), the policyholder/derogatory is reinstated in the accounts which he had an advance of damage. So the basic concept of insurance is to compensate for losses incurred, not obtaining a profit.

In practice, however, following profit-making, fraud is frequently done in insurance.

The facts on the intentional production of the risks insured or staging of events which is insured risks (fire, theft, traffic accidents, etc.) are covered generic and sanctioned by the Criminal Code.

Thus, the deed of making incorrect statements on the conditions, the conclusion of the insurance and real production claims, to present data on the unreal insured risk, to provide undue compensation, over compensation, to submit false documents on the purchase of parts needed to repair, to prepare estimates for repairs inconsistent with reality, etc. often take forms of crimes by deception, forgery, use of false or abuse in the service when they are perpetrated by employees of an insurance company or by the finding bodies.

Insurance fraud are generated and favored by numerous factors such as economic and financial, legal and psychosocial factors including: the forms of organization and regulation of the legal business, insufficient funds, external and internal controls, business, public opinion, insufficient legal regulation etc. At the same time, insurance frauds are amplified and diversified by the abuses, shortcomings and negligence which are manifested in the work of insurance companies in determining damages and payment of damages.

In the insurance companies in Romania are recorded cases of complicity in acts of deception committed by the insured persons, preparation of bogus documents (invoices, contracts, arrangements for payment) and appropriating the money for these, committing abuses, corruption and negligence in handling records of injury and payment of damages.

In many cases, insurance fraud is favored by employees of insurance companies, in breach of willfully, by negligently laws and regulations relating to contract administration and insurance, or by mistreatment records of damage.

At the conclusion of insurance contracts and policies either they do not comply with the conditions of the insurance, or inspections of risk on the integrity and value of properties insured, and capacity payment are not carried out, or the insurance company carries out inspections of risk to other goods (bearing the identification of properties insured) than goods insured.

In many cases the insurance risk is concluded only after the damage is done, or the value of goods insured is over-exaggerated without analyzing the effectiveness of contracts to be concluded.

At the same time, payments of undue compensation and insurance fraud are favored by complicity and failure by the inspectors of damage insurance, rules and methods for handling files of damage, through the adoption of technological solutions without complying with the instructions in force, such as: replacing damaged parts that can be easily repaired; payment of compensation for uninsured

risks; the misuse of wear coefficients; payment of equipment not included in insurance; risks insured or committed before the conclusion of assurance.

The most common frauds are those related to the intentional production of risks insured, such as: staging of thefts; overestimated damage; preparation of findings and technical expertise inconsistent with reality; presenting unreal estimates of repair and labor; optional insurance to a value greater than the real value of the property; insuring additional equipment at a very high value; insuring a vehicle without informing the insurer about the existence of problems on the property, etc.

There are frequent attempts to fraud insurance companies by inflating the damage and making the required compensation for the risks insured higher than they really are (risks being caused by fires, floods, landslides and other phenomena that affect the construction and other goods).

In these forms of insurance there are numerous cases of presentation, by insurance policyholders or beneficiaries, of invoices and false accounting documents on the purchase of goods and spare parts. Sometimes it even happens that these false documents are issued by "ghost" companies. Usually, for the cast are presented invoices and receipts without valid tax, issued by companies not validated to the Office of National Trade Register or firms that do not have such activities as object of their activity.

It is also of common practice the conclusion, using fraudulent means, of optional insurance contracts for cars brought from abroad that, for various reasons, can not be registered in circulation and are then intentionally ignited and burned completely to seek civil damages from the insurance risks.

For the preparation of insurance contracts are given to inspection of risk, cars registered in circulation, having the same color, type and brand with unregistered cars. In statements and insurance contracts, with the complicity or negligence of employees of insurance companies, identification data (series chassis and engine) of unregistered vehicle in movement are recorded, after which they are involved in the events insured.

Other times, cars that can not be registered, which are in an advanced state of wear and risks covered by insurance products intentionally, for which contracts have been concluded by insurance, are repaired, sold and put into circulation in place of legally registered cars.

Met in practice the presentation of another vehicle to the insurer, the real car (to be insured) is already damaged or stolen, but unreported to the police or already received compensation from another insurance company. Another common practice is insuring a vehicle (for usually with high value) that will then be sold by the owner of a wreck (similar vehicle damaged already) at a price much lower, without documents, after which follows the declaration of the insured vehicle theft; or insurance for failure or damage existing (hard to view at the inspection of risk) for the benefit of future repairs.

Some frauds, with particular consequences for insurers, are committed by business partners of insurance, service sites and auto insurance intermediaries.

Abuses are often committed in car services such as: deception or other criminal acts related to reality and fairness of repairs made to damaged vehicles of insured risks; production of bogus documents for the replacement and repair of auto parts and subassemblies; estimates of labor inconsistent with reality; higher prices than those under laws, etc. Higher prices than those agreed by the conventions concluded with insurance companies, supply lines and added undue commercial for auto parts used to repair vehicles, etc. are pretended to be charged by these units.

In recent years, cars thefts have an upward course, many of which are committed by organized groups of criminals through skills and methods difficult to detect. In Romania gangs of criminals have begun to organize, based on the model of mafia criminal groups, with the main concern in marketing abroad the stolen cars. Each member of the organization is specialized in a particular activity: tracking and stealing of the car, preparing false documents or false registration numbers, transporting and exploiting the vehicles. At present, to protect the car, there is no alarm system that can not be disabled by gangs of criminals. There is a preference in stealing either luxury cars, which are sold abroad, or domestic origin cars, which are dismantled and sold piece by piece.

Often, stolen cars are returned to the market after the successful amendment of the chassis or by changing benches, windshields, engines, etc.

There are frequent cases when cars are sold by owners either to the criminals or to persons of good faith, after which they are reported to the police and insurance companies as stolen by unknown authors. Most times, cars sold are removed from the country with the complicity of policyholders, by networks of traffickers, specialized in this area and they are recovered in other European countries.

Many luxury cars, stolen abroad, introduced in the country, are assured CASCO and then destroyed to make the staging of events provided. In general, they destroy vehicles under international tracking or fold under seizure.

Many thefts of cars are registered in police records with unknown authors. For stealing cars, criminals used ingenious modes of operation, special instruments made particularly for the appropriate types of vehicles to be stolen.

In the insurance of motor vehicles there are frequently committed thefts by dismantling and selling of motor vehicles. These are cases of intentional production of road accidents followed by partial or total ignition of vehicles, preparation of the minutes of finding inconsistent with reality, and the presentation of fictitious documents for procurement of parts or overstated repair estimates.

Important damages are paid by insurance companies on the basis of the minutes drawn up by employees of the police, inconsistent with reality (i.e. changing the date of production of the accident or changing the guilt of individuals involved) and on the basis of prior agreements, between those involved the events, on the task of determining guilt of the person who holds the insurance policy of compulsory auto liability. Sometimes, the guilt of persons involved in such events is determined or suggested, contrary to the dynamics of road accidents, even by police workers or even by the employees of the insurance company.

Insurance losses generated by such practices will be even higher by the introduction of constant settlement on the insurance market, when guilty persons involved in light traffic accidents is to be established by policyholders and insurance companies.

Another widespread method of committing fraud in auto insurance is the approval and opening of several cases of damage with several insurance companies to the same car accident. Thus, concluding such policies of insurance liability requires more than one insurance policy for the same vehicle, followed by the declaration of the event to the police departments of different localities, thereby achieving multiple damages from several insurance companies. Typically, in these cases, direct repair of damaged car is requested.

In the case of insurance of goods during transport, the most encountered fraud is represented by acts of deception in connection with the reality of the risk insured and the damage caused, or committing intentional road accidents followed by total or partial destruction of goods transported, as well as cases of presentation of bogus documents on the amount of transported goods, etc.

In the work of insurance intermediaries (agents, legal persons and brokers) violations of rules concerning the conclusion of insurance contracts are recorded. Such violations are: no insurance risk inspections, after the claims (antedating the insurance document), non-submitting the insurance premiums within limits (the intermediary must comply with a deadline of reporting and filing documents, insurance) or appropriating them, without justifying documents received from branches, as well as fake delivering of the slips from branches, and receiving undue commissions, etc.

One of the most dangerous and serious fraud committed in the insurance constitutes an intentional distortion of financial reporting and misappropriation of assets.

Fraudulent financial reporting is performed by distortion, falsification or deliberate omission of values or presentation of false information in the financial statements. It consists of manipulating or altering accounting records and documents, their erroneous interpretation, intentional omission of events, transactions, and technical reserves of injury or other significant information, or by intentionally applying the wrong accounting policies related to assessment, recognition, presentation or description of information.

Most of the time, reporting and distortions of economic and financial situations are evaluated by factors leading to conceal actual results and performance indicators, to obtaining undue advantage materials, to complying requirements of the insurance market, maximizing revenue as a result of performance management, influencing perceptions of performance and company profitability, etc.

Embezzlement of assets entails acquiring company assets by employees (alone or in collusion with others inside and outside the company), through a variety of ways. The most common ways of committing crime is the issuance of receipts and other bogus documents, the acquisition of physical assets or intangible assets, payments for fake goods and services, the use of assets for personal purposes, etc.

In practice, to prevent and combat fraud in the insurance involves, in addition to knowledge favored causes and ways of manifestation of fraud, investigation and verification of claims on the reality of their production, the extent and size of the damage and the legality of the payment of compensation required.

Investigation of the main events is provided in analyzing the contents of damage files, checking facts and dynamics production risks insured, reality and the authenticity of documents presented for determining the correct compensation and the guilty persons, measurement and research on the spot, consultation documents and carrying out technical surveys or otherwise, collections of information, making pictures and hearing of witnesses, etc. All these run, preferably, on the spot, as soon possible after the commission claims.

In analyzing the content of files and damage assessment data contained in papers and documents are prepared to respect the methodologies of finding claims of products, rules of organization and to resolve the damage files and regulations specific to each type of insurance issued by insurance companies. At the same time, it aims to checking if those recorded in printed documents were made without changes and erasures, if they crossed the minutes of finding in the boxes that have not been completed (in order to avoid further additions), if these entries are signed by people involved in events, etc.

When checking for the reality of damage, for the fairness of acts and legality of the prepared damages, there will be particularly analyzed the cases of damage to be found that the notices of injury were made late, records of finding are made superficial or incomplete, there are contradictions between the acts in the dossier on the date the damage occurred, the date of approval, the dynamics of the event, and any other suspicions.

It will be checked whether parts bought for cars of foreign origin repair were purchased from the companies mentioned in the bill and the prices recorded in the documents will be identified with the Trade Registry firm designated in the bill, aiming to prove whether the repair bills submitted by policyholders or harm were not issued by "ghost" companies or by ones to have changed the activity meanwhile.

Insurance fraud, a phenomenon particularly harmful, is not to be evident only at insurance companies in Romania, but in all the countries of the European Community, Canada, USA etc. It registers remarkable growth in terms of frauds, thefts and trafficking of insured cars.

Studies of these countries shows that policyholders believe that it is immoral to be overstated a claim that is acceptable and to obtain a profit from a claim, even if it is legal. Over 50% of interviewed people in studies in Britain have not found anything wrong with a coin fraud to obtain compensation from insurance.

In the U.S. and some Western countries of the European Community it is considered normal for the policyholders to receive undue compensation for the reason that they have paid for years to fund insurance. This moral concept is known in the literature as "compensation culture". In fact, most citizens of these countries

do not consider a fraud that tries their peers and sometimes succeed in obtaining the insurance compensation unwarranted.

Sometimes, in situations in which policyholders have received "satisfactory" compensation by fraud, they constitute opinion formers, and give directions to colleagues, friends, neighbors who record damages for insured risks, how to proceed for redress bigger. Moreover, once they committed fraud and they have not been discovered and punished, since a precedent was created, people who have received overpayments persist in the commission of other cases of fraud.

It often happens to lose sight of the fact that insurers are financially affected by the amounts paid without a real cause and that the financial effect, caused by fraud, is to be recovered, in the following years, by increasing the premium of insurance that will be paid by all the policyholders.

Therefore, here it is a picture of how harmful the insurance fraud can be, how big is the impact of the insurance risk factor on economic and financial losses and how important is knowing the problem in order to organize the necessary self protection and the fight against insurance fraud.

Awareness and combating fraud will heavily depend on the solutions adopted at the insurance companies, the accuracy of the concept determined by control structures created, on the methods and means used and the financial resources allocated for this purpose.

In Romania, the work to combat insurance fraud is left (unlike other countries) only on account of insurance companies.

In the U.S., the fight against insurance fraud is a federal issue, it is led and coordinated by the Directorate of the investigations into insurance in the FBI and the Division for the Prevention of Fraud in Insurance, founded by the insurance companies. The European Union operates with the European Committee Insurance to develop strategies and laws to prevent fraud.

In the absence of comprehensive regulations and specific security measures, combating fraud does not deliver the results that the insurance market would like. Most cases asked to the prosecution of persons who have committed crimes in insurance have been removed from the track due to the lack of knowledge of the scope and forms of crime manifestation, lack of specific regulations on insurance fraud and gaps in existing legislation and in some rules of insurance.

On the legislative, the basic concern of the insurance companies should be the development of standards to define and incriminate distinctively the activities within the scope of insurance fraud and the creation of bodies to coordinate activities to combat fraud at the national level. In the absence of specialists, however, frauds are hard to detect even if they are a common practice.

Uncovering fraud implies joint efforts of removing the causes generating fraud of all insurance companies (in the country and abroad) in the detection and neutralization of bad faith policyholders who are trying to frame or to produce, intentionally, events and assured action. It requires the elaboration and adoption of control methodologies specific to every one of the insurances, the creation of specialized departments in combating fraud at insurance companies. Meanwhile,

the fight against insurance fraud requires adoption in Romania, a suitable law for the insurance market after accession in the EU.

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COMPARATIVE STUDY REGARDING THE DELINQUENT CRIMINAL AND CIVIL RESPONSIBILITY

Candidate to Ph. D lecturer **Laura-Roxana Popoviciu**
AGORA University, Oradea
Sub-inspector **Nicolae-Călin Popoviciu**
IJPF Bihor

Abstract:
The common life confronts us with many conduct deviations that are not equal as importance and in a way or another, break what is considered to be the ordinary course of things.

Whatever the shape of these human deviations, the reaction is identical: when a conduct deviates from its normal course, it provokes sanctions, when the general accepted rules are violated then appears a kind of responsibility for this inappropriate behaviour.

Consequently, the social responsibility implies the social sanctioning of the behaviour that was chosen by the individual, in the case of nonconformity between his conduct and the social norms.

Among the different types of the social responsibility, the juridical responsibility is the most important, because it is based on the violation of the law.

Not any human conduct is relevant by a juridical point of view, only that that is set under the incidence of the juridical norms. Also, the juridical responsibility has as main characteristic, the possibility to apply, if the case, the state's constraint.

Among the most important types of juridical responsibility we mention the delinquent criminal and civil responsibility. There are many similarities and also differences between the two.

Key words: comparative study, delinquent criminal, civil responsibility.

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Among the most important types of juridical responsibility we mention the delinquent criminal and civil responsibility. There are many similarities and also differences between the two.

1. Both civil and criminal responsibilities are components of the juridical responsibility that is also a part of the social responsibility. The two types of responsibility appear after the accomplishment of certain refutable deeds by certain individuals.

- *The civil responsibility* is a type of juridical responsibility that consist in obligations that grave a person to repair the prejudice caused to another person by its deed or, in cases stipulated by the law, the prejudice that is responsible for[259].

- *The criminal responsibility* is a fundamental institution of the criminal law, being a type of the juridical responsibility that consists in the obligation of the offender to suffer a criminal sanction, a punishment, after committing an infraction.

2. – *The criminal responsibility* is ruled by the norms of the criminal law.

The criminal responsibility can not be established equally for all the offenders, because the individuals that violate the law are different, and the deeds that are committed are not similar. For this reason, it is necessary to proceed to the individualisation of the criminal responsibility and to the establishment of the criminal sanctions according to general and obligatory criteria:

- The dispositions of the criminal code, general part, if there are no exemptions from the special laws;

- The limits of the sanction settled by the special part, according to which the court of law establishes the actual punishment, limits that will not be over passed only in the cases that are expressively stipulated by the law;

- The degree of social danger of the deed, meaning that the content of the infraction and also the situations, the external circumstances and the legal content of the infraction that give the deed a real social danger;

- The delinquent, its psychological and physical development, the family and social behaviour, the manner in which the persons acted, the infraction perseverance;

- The circumstances that attenuate or engrave the criminal responsibility: attenuating or engraving circumstances, relapse, a series of infractions, intermediary plurality and the continuous infractions.

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[258] I. Ceterchi, I. Craiovan, *Introduction in general theory of law*, All Publishing House, Bucharest, 1993, page 105.

[259] C. Turianu, Gh. Stancu, *Civil law cours. Real rights. The general theory of obligations*, Universitara Publishing House, Bucharest, 2006.

- *The civil responsibility* is stipulated by the norms of the civil law (art.998 – 1003 Civil Code) that focuses on a principle that corresponds both to ethical and social equity requests, and also to certain requests of the juridical security: the principle of the civil responsibility for the illegal deed that causes prejudices[260].

According to art.998 Civil Code, „ any deed done by individuals that lead to a prejudice of another individual, obliges the person that has committed the error to reparation".

Excepting the responsibility for its own deed, art.1000-1002 institutes the responsibility of certain categories of persons for the illegal deed that is accomplished by another person, the responsibility for the prejudices caused to the goods or animals found in the juridical guard of certain persons and the responsibility of the owner for the prejudices caused by the ruin of certain buildings that belong to him.

Art. 1003 focuses on the solidarity character of the responsibility of the persons that can be blamed for causing the prejudice.

3. Distinctively to the criminal law, the civil law recognises two types of responsibility: delinquent civil responsibility and contractual civil responsibility.

The delinquent civil responsibility composes the common law of the civil responsibility (due to this fact, when we refer in this paper to the civil responsibility we refer to this type of responsibility), while the contractual civil responsibility has a derogatory character.

When the obligation starts from a contractual relation between two parts, the responsibility is contractual, when it starts from a deed that leads to a prejudice by an illegal deed, we talk about delinquent responsibility[261].

4. – *The criminal responsibility* is a sanction that is specific to the criminal law that consist in the obligation of the offender to be submitted to a criminal sanction, a punishment as a consequence to the fact that he has committed an infraction[262].

So, the criminal responsibility is the conflict juridical relation of constraint that requests for specific rights and obligations of the participants, meaning the state - as the owner of the law to submit to criminal responsibility and the offender - that must be sanctioned for the infraction that is committed, constrained to face the punishment[263].

The criminal law sanctions are the punishments, educational measures (applied to the underage) and the safety measures.

Consequently, the specific sanction of the criminal law is the punishment.

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[260] C. Stătescu, C. Bârsan, *Civil law. The general theory of obligations,* All Educational Publishing House, page 121.

[261] C. Turianu, Gh. Stancu, *Civil law cours. Real rights. The general theory of obligations*, Universitara Publishing House, Bucharest, 2006.

[262] V. Mirişan, *Penal law. The general part,* Lumina Lex Publishing House, Bucharest, 2004, page 248.

[263] Idem.

Regarding the physical forms, the punishments have a strictly personal character, representing a mean of re-education and a measure of constraint that interdicts certain rights.

Due to this strictly personal character, the punishments have as consequence the fact that their appliance and accomplishment can not be done only as long as the person that committed the actions is alive[264]. We even talk about the punishments having a patrimonial character, like fees.

- *The delinquent civil responsibility* is a sanction that is specific to the civil law, applied for the illegal deed that causes prejudices, following the re-establishment of the subjective rights that were violated by these illegal deeds that brought prejudices.

This is a civil sanction having a character of repair, without being in the same time a punishment. Even though, at its historical origin, it was considered a punishment, during its evolution it reached the status of individual sanction, only with the purpose of repair[265].

Distinctively to the criminal responsibility that is applied in to the individual that has committed the illegal deed, with the purpose of re-education and sanction, the delinquent civil responsibility is a civil sanction that is applied to the benefit of his patrimony.

If the offender has deceased, the obligation is transmitted to its followers[266].

If it had considered being a punishment, it would not be transmitted on to the followers of the person that has committed the illegal deed[267].

5. The two types of responsibility both *delinquent civil responsibility and the criminal responsibility* accomplish the specific function of the law in general, meaning the educational-prevention function that starts form the fact that any illegal deed is to be sanctioned.

The delinquent civil responsibility is a repairing function that is represented by the will to compensate, in the charge of the offender[268].

The criminal responsibility accomplished a function of constraint towards the person that has committed an infraction..

6. – *The criminal responsibility* is established on the principle of the legal incrimination, according to which this responsibility is taken only for those deeds that are expressively stipulated as infractions, the punishments and the measures that are applicable must be expressively stipulated by the law[269].

- In the case of *delinquent civil responsibility* the obligation to repair the prejudice starts with every illegal deed that causes prejudices[270].

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[264] C. Stătescu, C. Bârsan, same referrence, page 123.
[265] C. Stătescu, C. Bârsan, same referrence., page 123.
[266] Idem.
[267] Ibidem.
[268] C. Stătescu, C. Bârsan, same referrence, page 124.
[269] C. Stătescu, C. Bârsan, same referrence., page 127.
[270] Idem.

The civil legislation institutes a responsibility principle for every deed of this kind, without actually describing each deed[271], similarly with the criminal law, that defines each infraction by law.

7. Both *delinquent civil responsibility* and *the criminal responsibility* are consequences of an illegal deed that violate certain social values that are protected by the law[272].

For this reason, it seems that both types of responsibility intervene while an illegal conduct is manifested, meaning an action or a non-action that comes against the juridical norms, committed by a person that has the capacity to respond for its actions[273].

So the deed is a product of a human action or a non-action that means that the simple decision to approach an inappropriate conduct is not considered being an act.

8. An important criterion of distinction between the two types of responsibility is that that while the *civil responsibility* is based on the idea of repairing a prejudice that is brought to a certain subject, the *criminal responsibility* is based on the idea of punishing the person that has committed the infraction[274].

The criterion of distinction must not be considered as being absolute, because the idea of punishment is not completely foreign to the civil responsibility, as the idea of repairing a prejudice is not completely foreign to the criminal responsibility[275].

For this reason, there can be cases of civil responsibility in which the obligation of repairing the prejudice can be completed with a fee having a sanctioning role[276].

9. The two types of responsibility, *delinquent civil responsibility* and *the criminal responsibility* intervene as a consequence of a harmful result of the illegal conduct that provoked certain damage to the society or to one individual.

This harmful result, in the case of the criminal responsibility is called a socially dangerous consequence and in the case of the delinquent civil responsibility is called prejudice.

The harmful result allows us to appreciate the degree of social danger of the deed.

In order to involve the criminal responsibility, the incriminated action or non-action must produce a dangerous consequence.

The dangerous consequence is the negative modification of the environment produced by the deed or that is possible to be produced. Harming, endangering or

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[271] Ibidem.
[272] C. Stătescu, C. Bârsan same referrence, page 127.
[273] I. Ceterchi, I. Craiovan, same referrence, page 105.
[274] C. Stătescu, C. Bârsan, same referrence, page 126.
[275] Idem.
[276] Ibidem.

threatening the social values that are protected by the criminal law represents these consequences[277].

The socially dangerous consequence can be represented either in a state of danger - in this case the social value is threatened by its existence- and the social relations created around it; due to this value, the relations do not unfurl normally [278].

In the civil matter, the prejudice represents the harmful result, of patrimonial or non-patrimonial nature, touched in any way by any kind of deeds, the rights of individuals and the values that are protected by them. This result, according to the civil law, attracts the obligation for repair from the responsible individual[279].

10. Both types of responsibility, the civil and the criminal responsibility is based on the guilt of the person that has committed an illegal deed, even if this guilt is only an intention, negligence, or imprudence[280].

For the criminal responsibility, the type of guilt represents a key element, for the description of the illegal deed as infraction, and also for the actual appliance of the criminal punishment[281].

A deed that was committed intentionally will be punished differently than a deed committed by negligence or imprudence, for example homicide or murder in the first degree[282].

In the case of the delinquent civil responsibility, the influence of the responsibility is not conditioned by the type of guilt of the offender that must repair entirely the prejudice caused by the illegal deed[283].

The guilt represents a type of dangerous psychological attitude of the offender towards the deed he committed and its consequences.

Concerning the involvement of the criminal responsibility, the guilt is expressively previewed in the art 17 Criminal Code and must be synchronised with art.19 that describes the types of guilt.

Art. 19, first alignment Criminal Code, does not define the notion of guilt, but its content describes that the deed is committed with guilt when it involves intention or culpability.

According to art.19 first letter, the deed is committed with intention when the offender:

- predicts the result of its deed, this result being the purpose of the deed
- predicts the result of its deed even though he did not follow it, accepting the possibility of its existence.

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[277] Gh. Nistoreanu, A. Boroi, *Penal law and procedure law*, Third Edition, All Beck Publishing House, page 18.
[278] Idem.
[279] C. Turianu, Gh. Stancu, same referrence, page 177.
[280] C. Stătescu, C. Bârsan, same referrence, page 127.
[281] Idem.
[282] Ibidem.
[283] C. Stătescu, C. Bârsan, same referrence, page 127.

The intention can have different shapes:

- direct intention
- indirect intention

In the case of the culpability, the author does not predict the antisocial result of its deed, if he proved to be handy, able, attentive, (even though he could have been), the infraction could not have been produced[284].

The culpability has also two shapes:

- the culpability with prevention (ease)
- the simple culpability (negligence)

From an historical point of view, the civil guilt as a juridical institution has its origin in the Roman system of civil responsibility which sanctioned the civil delinquency that produced damage to the patrimony of another person, either by negligence or intention[285].

The Romanian Civil Code has taken the idea of distinction between the intentional types of guilt and the non intentional types of guilt, but does not give special meanings to the degree of guilt[286].

As a principle, there is a responsibility even for the easiest guilt. There are matters where the guilt, in the shape of intention can produce special effects in the field of responsibility[287].

In the Romanian civil law, the subjective side of the deed is expressed in a series of terms like: "guilt", "culpability", "mistake", a variety of concepts that lead to certain confusions that were actually put into attention by the majority of author in the civil law[288].

If the criminal law presents the guilt as intention - the fundamental type or guilt, general and basic, the infractions are committed with intention and only by exception by guilt or intention, the civil law does not retain this kind of rule.[289]
First of all due to the fact that in the civil law does not function the concept „nullum crimen sine lege", the state can not undertake the whole sphere of the illegalities in the civil law, and then because the related illegalities are committed mostly by imprudence or negligence[290].

In the civil law, the guilt in the shape of intention appears always in the same time and as infraction in an intentional shape, but also in the case of deeds that belong to the contractual field, when the debtor, with bad will, does not accomplish its contractual obligations[291].

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[284] G. Antomiu, Ş. Daneş, M. Popa, *The penal code for everybody,* Juridica Publishing House, Bucharest, 2002, page 56.
[285] I. Romoşan, *The guiltyness in romanian civil law,* All Beck Publishing House, Bucharest, 1999, page 8.
[286] I. Romoşan, same referrence, page 9.
[287] Idem.
[288] I. Romoşan, same referrence, pages 19, 20.
[289] I. Romoşan, same referrence, page 21.
[290] Idem.
[291] Ibidem.

11. The criminal law describes the degree of the guilt as having a great importance influencing the punishment, the civil law describes the civil responsibility as being submitted to other principles like:

1. the civil responsibility can be taken under consideration even for the smallest guilt

2. independently on the seriousness of the guilt, the author of the illegal deed must entirely repair the prejudice and the quantum of the fees is established depending on its degree, not according to the seriousness of the guilt[292].

12. In the criminal law, the legal authority selects by the incrimination norm the deeds that represent infractions, making a description of both objective and subjective side of the infraction. It is possible that the same deed to affect both social relations protected by the criminal law and those that belong to the repair of the civil prejudice.

The same situation can contain civil and criminal guilt, but sometimes the criminal guilt can lack; this fact rises further the problem of repairing the civil prejudice. But the civil prejudice will not be repaired, if there was not retained the civil guilt of the author.

This kind of situation imposes with necessity to solution the relation between the civil and the criminal guilt[293].

13. Regarding the capacity of the persons called to respond for their illegal deeds, in both cases the responsibility is involved only if the person that has committed the illegal deed, was conscious[294].

From a juridical point of view by acting consciously we understand the capacity of the individual to be aware of the socially dangerous character of the deed and to manifest its will, capacity, in relation with the actual deed that was committed[295].

Considering the biological and psychological characteristics of the minor, the Criminal Code stipulates that the minor that has not reached the age of 14 does not have a criminal responsibility can not be able to act consciously.

The minor between 14-16 years has a criminal responsibility if it is proven that the deed was committed consciously, it is considered to exist a relative lack of judgement: the minor that has reached the age of 16, has a criminal responsibility, being considered to be aware of his actions[296].

The proof of judgement must be done for each case, by the judiciary authorities.

This is established using the medical expertise and the social investigation, with complex investigations in order to understand the conduct of the minor in the

[292] I. Romoşan, same referrence, page 24.
[293] I. Romoşan, same referrence, page 28.
[294] I. Romoşan, same referrence, page 31.
[295] A. Boroi, *Penal law. The general part*, C.H. Beck Publishing House, Bucharest, 2006, page 123.
[296] A. Boroi, same referrence, page 128.

family, at the job, in entourage, that could lead to the conclusion that he could not be aware of the dangerous character the deed he committed[297].

Certain domains of law (civil law, procedural civil law), make the distinction between:

- usufruct capacity
- exercise capacity

- *The usufruct capacity* is the ability of the subject to have rights and obligations, starting with the birth of the individual and ceasing at its decease.

The rights of the child are recognised at the moment of its conception, but only if it is born alive.

- the exercise capacity is the ability of the individual to exercise its rights and to assume its obligations, committing personally juridical deeds.

Regarding the exercise capacity we distinguish:

- the restricted exercise capacity of the minor that has reached the age of 14, presuming that he has no sufficient life experience and judgement in order to have a full exerciser capacity.
- the full exercise capacity starts from the day the person becomes aged.

Consequently, in the case of *civil responsibility* the minors that have reached the age of 14 tare presumed to work with judgement, having a restricted exercise capacity, the minors that have not reached this age will not responds by a civil point of view and the individuals that have reached the age of 18 will respond from a civil point of view if they were not set under the interdiction of the law, presuming that there is a full exercise capacity.

15. The criminal responsibility is always established by the decision for the court of law.

Excepting certain cases stipulated by the law, when the criminal action can be started only at the prior complaint of the affected part, the main principle in the field of the criminal responsibility is that that the documents that are necessary to the unfurl of the criminal trial are accomplished[298].

In all the situations, the state is present at the establishment of the criminal responsibility, even when the criminal action is started at the complaint of the affected part.

In the case of the *delinquent civil responsibility*, the parts can by their own and without the intervention of the court of law, reach to an agreement regarding the way of repairing the prejudice that was caused by the illegal deed. The court of law intervenes only at the request of the victim, if the author of the illegal deed will not repair the prejudice willingly[299].

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[297] A. Boroi, same referrence., page 123.
[298] C. Stătescu, C. Bârsan, cited work, page 128.
[299] Idem.

GENERAL ASPECTS AND PARTICULARITIES OF THE OFFENCES IN THE BUSINESS FIELD

Candidate to Ph. D lecturer **Laura-Roxana Popoviciu**
AGORA University, Oradea
Candidate to Ph. D assistent **Viorina-Maria Judeu**
AGORA University, Oradea

Abstract:

The paper having the title General aspects and particularities of the offences in the business field shows a particular interest in the field of business delinquency, phenomenon that tends to extend more and more nowadays. The development of the economy based on private property sets up a juridical frame where the real and loyal economy should become a very profitable and real one in the same time. The offences regarding the business field are noted in the special part of The Criminal Code and in special laws and in laws that are not specific to the Criminal Law but the ones that contain offences stipulations. This subject presents an interest because of the up following consequences but also for the subsequent consequences. The financial delinquency changes the business environment by severe impact that it has on the loyal concurrence and is also associated with corruption. The economic and financial delinquency is not a specific phenomenon to the Romanian society, but is an undesired consequence of the economy globalization among the provenience and the corrupt money, the informatics domain is also very searched by the offered in the business field because together with the newest technologies some new forms of delinquency appear.

Key words: business offences, business delinquency, financial delinquency, loyal concurrence, criminality economics phenomenon.

The business offences, named in the speciality literature as "business delinquency" represents a very important field of the delinquency phenomenon. This is why the legislator interfered and incriminated the anti-social deeds, the ones that damage the social business relations.

It is necessary the setting up of a penal constraint in this field starting from the fact that he significance of any penal regulation consists of only one characteristic: the measures to be taken in order to punish and to intimidate the offenders.

Any violation of the juridical regulation is sanctioned considering the fact that through the offence the only cause of the penal responsibility are severely violated the most important social rules.

The passing to an open market economy based on the free initiative and private property is a complex process that imposed the necessity of setting up a juridical frame where the economy to become a reality.

The development of such an economy determined also the development of a criminal environment as the offences in the business field, nowadays we can talk about the business criminal law phenomenon.

The offences regarding the business field are noted in the special part of The Criminal Code and in special laws and in laws that are not specific to the Criminal Law but the ones that contain offences stipulations.

This subject presents an interest because of the up following consequences but also for the subsequent consequences.

Form the researchers study there can be drawn some characteristics of the business criminal law phenomenon:

1. the low percent of the business offences that are discovered and sanctioned, and we can say here that the black number of the criminality, this means the difference between the real offences and the discovered one by the competent authorities, is higher then the general average of the criminal phenomenon[300].
2. we can deal with a classification of the business offences regarding the field where are infringed the law rules

The most important and severe consequences are because of the infringement of the rules regarding the:

- the commercial units, because the commercial unit is a juridical fundamental institution of law, absolutely necessary for the development of the economical activities inside an open market economy

This is built for an economical and productive purpose, and when this purpose is defalcated by the ones in the law can be produced a lot of severe consequences for the ones that connect with these commercial units.

Now, in Romania, the general juridical frame of regulating the commercial units is Law 31/1990 regarding the commercial units.

With this law there was an important reform for the commercial units that before 1989 disappeared completely from the economy, the only ones that were admitted were the mixed commercial units with foreign business partners. [301]

The law 31/1990, the law of commercial units stipulates in its content a series of actions that are qualified by the legislative as being offences and these are grouped into three categories[302] regarding the specific of the rules that are infringed:

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[300] M. A. Hotca, M. Dobrinoiu, *Offences from the special laws*, I[st] Vol., C.H Beck Publishing House, Bucharest, 2008, page 2.

[301] M. Costin, C. A. Jeflea, , *The comercial societyes of personnes*, Lumina Lex Publishing House , Bucharest, 1999, page 3.

[302] M. A. Hotca, M. Dobrinoiu, cited work, page 453.

- the offences on the commercial units foundation or regarding the economical situation of these ones
- the offences that are made by the measures of the leading staff
- the offences made by the emission of actions and obligation certificates

The procedure of insolvency regulated by Law 85/2006 where is disputed the judicial re/organization of a debtor that is unable to pay and also the procedure of bankruptcy. The legislative novelty promoted by this law refers to the introduction of a simple procedure applicable to the traders, physical persons that develop actions in an individual way or family associations, but also other juridical persons that develop economical activities or other debtors that are in the situations that are noted in the law. [303]

The deeds that are incriminated as offences in the Law 85 are noted in art.143-147 in the law: the simple bankruptcy and the fraudulent bankruptcy, the offence of fraudulent administration, the offence of dilapidation, the offence of an inexistent debt registration, the offence of refusing to present the necessary information and documents.

- The Register of Commerce because the traders, before starting the trade, as well as other authorized persons, individual, family or juridical companies, that are noted expressly in the law, before these to start the activity, have the obligation to ask for the matriculation in the Commerce Register, and during the actions or at the end of the trade or any activity to ask for the notes to be written in the same register mentions regarding the documents and the deeds that are required by the law.
- The accountability of the commercial units because the company is obliged to organize and to lead its own accountability
- The financial and fiscal field, because the existence of the state is dependent by the participation of the liable to pay the duties, physical and juridical persons in order to form the public funds, and the obligations to participate to these funds are formed by the Constitution of Romania, the purloining from this is being considered an offence

The financial delinquency changes the business environment by severe impact that it has on the loyal concurrence and is also associated with corruption.
The economic and financial delinquency is not a specific phenomenon to the Romanian society, but is an undesired consequence of the economy globalization among the provenience and the corrupt money, the informatics domain is also very

[303] S. Angheni, M. Volonciu, C. Stoica, *The comercial law,*4*th Edition,* C.H. Beck Publishing House, Bucharest, 2008, pages 245, 246.

searched by the offered in the business field because together with the newest technologies some new forms of delinquency appear.

Unfortunately, the internet does not make any exception and the situation is aggravated by the fact that the internet generates continuous flux of information, products and services that cross in a very rapid way the internal and external borders of the European Union.

According as the electronic devices become more and more accessible for everybody, the offences in the informatics domain develops and diversifies very rapidly, over crossing the traditional way of committing offences or counterfeiting.

So, the legislator and the entities to apply the rules are almost disarmed when dealing with the multiplication of the illegal contents and the explosion of the piratical phenomena.

1. Another particularity of the offences in the business field that is determined by the way that, in difference of the offences committed in other fields where, usually, the negative consequences are easily estimated, in this field, the damages are very hard to be found and estimated, because there are many cases when the offences remain to be undiscovered, people having a high level of tolerance towards these then the offences that submit violent actions.
2. The business field offences over crossed for a long time now the internal borders of countries and from here we can note the tendency of people to involve in these offences, sometimes having a powerful impact for and towards agencies in many countries in the same time. We can talk here about the criminality phenomenon in the business field at a national level, but we can also extend this phenomenon to the international level. The proportion of this phenomenon determined numerous international organizations to gather and to get involved in the fight against the criminality deeds in the field of international business. The evolution of the contemporary society underlines the fact that even if there are many measures to be taken against this phenomenon and there are many specialized institutions of social control against these deeds of delinquency and criminality, in many countries the deeds become more and more present and also these diversified their field of actions, becoming more and more popular in the fields like: finance, banks, fraud, blackmail, bribery and corruption.
3. The criminality in the business field involves negative consequences that affect both the public and the private sectors. First of all, this represents a social problem whose manifestation methods and the solutions to be found presents a high interest for the social control bodies like: the police, the justice system and the administration, but also the large public.
4. The offence in the business international and national affairs have a lot of causes
5. The criminality in the business field and the organized offences are deeply connected to the commercial society that is legally build and constituted,

the one that develop its activity obeying the existing rules, for several reasons these can take some measures that are not according to the law and to convert its initial objective in an non legal one, or a criminal group and constitute itself in a legal organization having as purpose to hide its true objectives, these being to commit offences[304]. By researching the different actions in the business fields the control bodies have discovered enormous well build networks of organized criminality.

6. A specific particularity of these offences regards the established purpose by committing these actions like: gaining money and other financial acts, from there being affected the security of the economical system of a country, the loyal concurrence, the patrimony that is so necessary for a person or for an economical organization.
7. The fight against this criminality in the business field involves a large number of institutions, an important role in changing the attitude towards these offences have also the civil society.
8. Regarding the sanctions for the criminal deeds in the economic field, a specific aspect refers to the fact that the sanctions with prison and penal fines predominate, for the physical persons and the classical punishments for the juridical persons.

So, we may conclude that the phenomenon of criminality in the business field is a part of the entire criminality phenomenon and presents a series of specific particularities, being underlined the fact that in economic and social crisis situations this phenomenon takes extension.

[304] C. Voicu, A. Boroi, *The penal law of business*, C.H. Beck Publishing House , Bucharest, 2006, page 9.

COMPUTER CRIME - A THREAT TO THE INFORMATIONAL SOCIETY

Ph. D. professor **Ioan Radu**
Economic Studies Academy of Bucharest
Ph. D lecturer **Minodora Ursăcescu**
Economic Studies Academy of Bucharest
Ph. D lecturer **Cleopatra Şendroiu**
Economic Studies Academy of Bucharest
Ph. D lecturer **Mihai Cioc**
Economic Studies Academy of Bucharest

Abstract

In the modern society, the types of crimes stipulated by the law extend globally under a new form: cyber crime. The evolution of this phenomenon is directly proportional with the development of the informational technology and communication, increasingly used by individuals.

Through its particularities, the informational society and knowledge represent a completely new model of organizing the human society. In this context, the legal issues of the new type of economy are difficult, even though they are based on concepts and institutions that have proven their validity over time.

This article is trying to bring more attention on the phenomenon of cyber crime, from the international and domestic legislative point of view and also in terms of the danger that it represents for all the public or private organizations, which will become more vulnerable in circumstances where no one will develop concerns regarding the security of their information.

Key words: new economy, computer crime, cyber crime, IT vulnerability.

1. Introduction

The last decade of the twentieth century was forecasting a global tendency in the evolution of society, represented by the transition from post-economy information and knowledge. After nearly 20 years from these forecasts belonging to famous authors[305], we face today the realities and challenges of the globalization phenomenon, facing the conjunction of three simultaneous revolutions: the

[305] J.Naisbbit, *Megatendinces*, Politica Publishing House, 1989.

technological revolution which, due to the new IT & C technologies, has virtually erased the notions of time and space, the geographical revolution, which generates new markets for financial organizations and the financial revolution, which generates international capital flows, based on a trans-national network.

This new era in which global competition reaches all areas (economic, political, financial, social etc.) is practically based on the role of primary information, knowledge and processing technologies and their management.

The "new economy" based on the Internet, e-business and e-commerce marks a new progress in the evolution of humanity, but, at the same time, it generates new means of economic crime, which represent a major challenge, along with chemical, bacteriological or nuclear weapons.

One of these means often reflected in studies of the European Commission or the Organization for Economic Cooperation and Development (OECD) is **computer crime.**

Not very frequent during the'80, the abuses with criminal purposes related to new information technologies and communication practices now rapidly penetrating the database of various organizations or the public institutions. An international **computer crime** may take various forms, from illegal intrusions into networks or private information pending the destruction of information systems and strategic importance of national security.

In the same time, the use of IT tools & C operations in commercial banking, military, etc. provides opportunities for all organizations, but also to those who participate to the informational fraud.

In this context, along with a series of actions that may be initiated by the organizations in the direction of ensuring an effective security informatics system, an international and also national role is held by the legal system and legal framework which will have to change the manner in which classical crimes are addressed in the present criminal justice.

2. Various approaches regarding the concept of Computer Crime

The notion of Computer crime regards sociological aspects and a concept that allows grouping of the various types of crimes carried out based on computer. There are some theoretical debates in the field of the international law, in an attempt to define the exact terms, such as "cyber crime", "science delinquents", "piracy".

The concept of computer crime has known a large number of approaches, as a result of its development. The various forms of computer crime can be divided in two categories[306]: on the one hand, it brings together the cases in which systems are subject to actions reprehensible (unauthorized access to data or software resources), and on the other hand the activities carried out based on technology and the Internet, via cyberspace (Cyberspace).

[306] Quéméner M., *Cybercriminalité: défi mondial et réponses*, Economica Publishing House, 2008.

The phenomenon known as the computer crime has a different approach on the European continent, compared to the U.S. In the 1982, the OECD was the first international organization that had concerns regarding this phenomenon, setting-up a working group and submitting a list of actions reprehensible as a basic minimum of crimes, which could represent computer crime. Some of them relate to:
a) data and / or software introduction, alteration or deleting, made intentionally in order to commit an illegal transfer of funds or other securities;
b) data and / or software introduction, alteration or deleting, made intentionally in order to stop the normal functioning of informational systems and telecommunications ;
c) violating the exclusive rights of ownership of a product which is protected, with the intention of holding and / or make various transactions with the product[307].

In Europe, the concept of computer crime is revealed through several definitions, such as:

- French Ministry of Interior[308]: Computer crime covers all criminal offences that are likely to be committed in telecommunications networks in general and networks that share a certain type of protocol TCP-IP.
- United Nations[309] (UN): Computer crime refers to any illegal behaviour occurred in operations aimed to electronic security systems and the data processed.
- Federal Office of Swiss Police[310] - Computer crime is a new form of crime-related technology and modern offences committed mostly by using informational tools.

It should be mentioned that none of these approaches are complete. The approach that belongs to the French Ministry of Interior regards only the crime oriented to the telecommunications networks, ignoring those committed to the informational systems or generated directly through the functioning of informational networks. Also, the definition proposed by the United Nations uses the term "illegal behaviour", which has different meanings for each state (behaviour can be considered illegal in a state and legal in another).

In the United States, the definitions adopted for this notion are different from one state to another or from one police department to another. According to the Criminal Code of the State of California[311], Computer crime is having access or intentionally allow access to any network in order to:
a) conceive or carry out a plan to make a fraud;
b) purchase money, goods or services for the purpose of a fraud;
c) alter or destroy systems or data networks.

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[307] OCDE, *La fraude liée à l'informatique: analyse des politique juridiques*, Paris, 1986.
[308] Ministerul de Interne francez http://www.interieur.gouv.fr.
[309] Congresul ONU, *Crime preventing and delinquency treatment*, Vien, April 2000.
[310] *Rapport d'analyse strategique*, October 2001.
[311] California's Penal Code, section 502.

The Criminal Code of Texas[312] is more specific and more drastic in the sense that a criminal offence is the access to a computer network or a system without the consent of their owner.

Regardless of these different approaches, the notion of Computer crime refers to the software tools and the hardware as means of committing a crime. From a legal point of view, solving the crimes addressed to networks and informational systems has at least three major obstacles:

- anonymity of those who made the crime;
- the volatile nature of the numerical information that is an obstacle in the search of evidence;
- trans-national nature of criminal behaviour.

3. Legislative ideas for setting-up a legal framework for the informatics crimes

Based on a wide range of phenomena, globalization may be possible primarily due to the considerable progress made in the field of informational and communication technologies (ICT) that currently allow companies to seek mechanisms for the development processes of production, distribution, marketing and the financial global infrastructure. In this context, the role of the law became extremely important and a good part of the legislation should be adapted to particularities, opportunities and threats which generate the informational society and knowledge.

During the '80s, the phenomenon of Computer crime has been reviewed by a committee of experts from the Council of Europe, which adopted in September 1989 a Recommendation R (89) 9 on crimes committed via the computer[313]. This document had an impact on all EU Member States towards the introduction into their legal systems of appropriate sanctions on numerous charges related to the unauthorized access or interception of informational systems, data or software. These recommendations inspired a Belgian law which deals with more specific issues of procedure in the field of Computer crime.

In 2000, the Council of Europe published an international convention on Computer crime[314], which defined the criminal law in the EU Member States which were invited to register in order to incriminate some crimes such as illegal access to resources software, losing the integrity of data or informational systems, science fraud and falsification.

Since 2000, based on the development of technologies based platforms for Internet e-commerce, e-business, e-government, certain concerns of the Council of Europe and the Organization for Economic Cooperation and Development (OECD) have been directed towards the accurate definition of the illicit behaviour on the Internet.

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[312] Texas's Penal Code, section 33.02.

[313] Recommandation R (89) 9, Edition de Conseil de l'Europe, Strasbourg, 1990.

[314] Projet no. 22 REV.2, Octobre 2000.

Another important phase for the Computer crime was in November 2001, when Budapest signed an agreement with the Council of Europe Convention on Cyber crime. Other countries in the European Union also joined this project. Being an important initiative in the legislative field, the Budapest Convention regarded mainly the following aspects:

- Harmonization of the criminal elements provided by national criminal laws in terms of science.
- Granting the necessary criminal laws at national level for the prosecution of these crimes, as well as those where there was electronic evidence.
- Developing an efficient and international cooperation in preventing the Computer crime.

In Romania, the legal framework for Computer crime has been regulated before the accession to the European Union, as a primary condition and as an urgent necessity required by the rigors and the information society. Therefore, Romanian law has Title III ("Preventing and combating Computer crime") of Law no. 161 of 19.04.2003 on measures to ensure transparency in the dignity of public functions and in business and to prevent and punish corruption. Also, with Law no. 64 of 24.03.2003, Romania signed the European Convention on Cyber crime, adopted in Budapest in November 2001.

There also were a number of regulations in the field of informational and electronic communications before 2004, which regarded the electronic signature[315], the legal distance contracts[316] and e-commerce[317]. However, of all the laws in this area, the most important - both legally and practically - is the Law no. 161/2003, which in Title III above, includes a set of 7 crimes, in accordance with the Council of Europe Convention on cyber crime.

In many cases, the phenomenon of Computer crime transcends the national borders. In this context, the Romanian legislation includes in Chapter V of Title III of the Law nr.161 / 2003 the rules on international cooperation in criminal matters on Computer crime. In this way, the international cooperation may consist in international judicial assistance for criminal matters, ID Lock, seizure and confiscation of instruments, conduct joint investigations, informational exchange, technical assistance for the collection and analysis of information and training of the specialized staff[318].

As a conclusion, the danger represented by the social, economical and political aspects of the informatic crimes is a global one. Because of this fact, there are distinct branches in the criminal legislation, reflecting new forms of crimes based on the modern technology.

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[315] Law no.455 /2001.
[316] Govern Order no.130/2000.
[317] Law no.365 from 7 June 2002.
[318] Law no.161/2003, Official Monitor, part I, no.279/21.04.2003.

4. The IT vulnerability of the various organizations and their security policy

The development of new informational technologies and communication and the frequent use of the Internet have a major impact on all the organizations, in terms of developing new strategic opportunities and increasing their level of flexibility and adaptability to the requirements of a competitive, dynamic, uncertain and unpredictable environment.

On a society based on economical information and knowledge it is important for the organizations to be aware of their vulnerability to the various risks related to technological development. Due to the high level of activities computerization and electronic communications, there are also huge technological risks.

Beyond the actions that the organizations should undertake in order to manage the risk information, a crucial role is played by the law through legislation promoted in this field, defining the facts of the crime. Thus, in Romania, according to Law nr.161/2003, cyber crime includes four categories of crimes:

- Crimes against confidentiality and integrity of data and informational systems (illegal access to a computer system, illegal interception of a transmission of data, altering data integrity, disruption of the systems functioning, development of illegal operations or programs.
- Informatic crimes (false information; science fraud).
- Crimes related to the content (production, distribution and possession of material relating to child pornography, with sentences propagation of racist and xenophobic nature).
- Crimes linked to the attainment of intellectual property rights and other related rights.

However, at the level of an organization, the majority of the existing risks are related to the use of Internet technology. Here are some of the "undesirable" events which can occur in a public or private organization, which use different technologies for communication and data processing in cyberspace:

- Attacking or blocking network systems. This type of attack is the "injection" on the organization of a code that allows the closure of the security systems of the entire network, transferring its control to other surveillance systems. Sometimes these codes can be identified and eradicated through appropriate antivirus programs, but there are situations where such attacks may trigger a major block of the network and consequently a disruption of the entire business.
- "Piracy" on the Web site of the organization, meaning alteration of its content and diversion of address to another site. It is a type of crime that can bring to an organization considerable damage, affecting both its image and the responsibility.

- Usurpation of identity of a partner organization, counterfeiting or diversion of electronic signature flows or financial information.

One area in which the cyber crime is very high is represented by the electronic commerce. There is a global development of organizations that had a real and competitive advantage in implementing the technologies of the Informational trading, but unfortunately also had an increase of the crime rate. The most important issues regard the methods of online payment. Credit cards of the customers who participate in electronic commerce have often bee the target of unauthorized attacks (hackers) also have used counterfeit credit cards, through which payments were made without the required coverage account.
The organizations using the electronic commerce are unable to identify the persons who have committed these crimes and therefore cannot begin a criminal procedure against them. In addition, because of the "borderless" e-commerce, in the event of a conflict, there are important issues of law in each state.

In the field of e-commerce, the security of the information requires the setting up of protocols and procedures at international levels. Legal instruments should be identified regarding the informational security system, in order to find and punish accordingly the authors of such crimes.
In terms of the consequences of these aggressions, they may be reflected in three main categories:

a) the consequences related to the loss of data, requiring often significant costs for their recovery.
b) the consequences related to loss of network control.
c) the consequences related to the diversion of funds or financial alteration of the organization's image.

Although the phenomenon of Computer crime is growing globally, the results of the surveys were represented by a worrying understatement of the information vulnerability. In terms of IT security, the organizations have not adopted the right measures to prevent the risks and, moreover, the managers interviewed on this matter said that they had little knowledge of the management risk and information security. Also, the issue of informatics vulnerability is still a taboo subject for many organizations that have been victims of Computer crimes and for that reason they do not want to emphasize such events, in order to avoid too much attention for their company.

Uncertainty associated with the use of information network technologies and IT & C force companies to adopt a global approach for the informational management risks, which should take into consideration, on one hand, the accelerated rate of the technological progress, and, on the other hand, the specific legal and social environment aspects. In the era of digital economy, science criminality (e-crime) requires efficient measures to be taken (e-secure).

Informational security, although it is often considered „The Cinderella" of the Informatics, it does not bring an immediate gain which can be booked and has no effect on investments in the means of ensuring the network security and the needed informational systems. However, we believe that developing an appropriate IT security policy has at least the same importance as the environmental policy of an organization.

The objective of the IT security policy consists in creating the managerial, organizational, methodological and legal environment able to prevent risks arising from information technology and communication, and to ensure the protection against informational crimes.

The IT security policy provides at the same time the rules necessary for the protection of information resources and communication, taking into account all the interests of the organization and those of the existing users. The organizations show interest in ensuring information security given to particular risks arising from the internal and the external factors, such as: unauthorized access to information resources, unlawful removal of data or equipment, vandalism regarding science, natural hazards affecting the infrastructure of information and communication organization.

A non-exhaustive approach to security policy structure of science developed at the organization leads us to the following basic components that should include:

1. How to use the informational resources and the access to users - regards those informational resources and communication of the organization that are intended solely to be used in a professional context. The right to personal use is allowed by the specific rules and procedures, depending on the particularities of each resource (email, fax, telephone, Internet access).

2. How to control - aims to ensure the use of informatics and communication in a spirit of respect for the rules of protection, which guarantees the confidentiality, integrity and availability of all the information.

3. Measures in case of violation - violation of informatics and communication resources of the organization may be the effect of actions carried out voluntarily or gross negligence of the rules established in the IT security policy.

Taking into account the presence of informatics resources at all levels within the organization, the scientific and legal security in this area is absolutely essential. The decision to use the extensive informational technology and communication in the organization should be doubled by an appropriate policy in this area, and an arsenal of legal framework, coherent and well-founded.

5. Conclusions

The phenomenon of Computer crime is not the result of some spontaneous realities, but the product of a long economical development, based on the evolution of informational technology and communication. This new form of crime is reflected at an exponential level and is very difficult to be properly evaluated. The main difficulty that the legislature is facing is that the IT crimes occur mostly in cyberspace (Internet). The approach of all these incidents is ambiguous and is reflected in a global vision, which makes even more difficult to group the crimes committed, based only on their legal nature and on how many damages they did.

The Internet offers the possibility of committing various crimes, from primary Computer crime to the organized one, without being able to define any limits for these illegal actions, to know what generated them or to have the profile of the persons involved. As a result, facing these new realities, it is necessary to adapt the legal system to the current technological evolution and to consolidate a new legal branch – the informatic law.

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LEGISLATION ON TRAFFICKING AND CONSUMPTION OF ILLICIT DRUGS IN THE NETHERLANDS

Ph.D Lecturer **Valentin Radu-Sultanescu**
„Alexandru Ioan Cuza" Police Academy,
Bucharest

Abstract:

Most European countries have ratified the Single Convention of 1961 together with the Additional Protocol of 1972 and the Convention on Psychotropic Substances of 1971. But ratification of the Convention of 1988 has raised a much more difficult issue. The text calls for the adoption of a repressive policy against the consumption and trafficking of drugs. Or, most European countries are calling for a more moderate approach. It is especially the case of the Netherlands, often presented as a model of drug use legalization, but at the same time a model of tolerance of cannabis trade. Even if this policy has indisputably known some success, it is not devoid of reproval. The case of Spain shows that a disorganized, anarchic, legalization can have as many regrettable effects as the excessive ban.

The Netherlands' original position in Europe and among the international community is renowned. It is based on a tolerant and liberal approach to drug abuse problems. An approach that continues to attract criticism despite the positive health results.

Key words: traffic, consumption, drugs, illicit.

1. Brief History of Dutch law in matters of trafficking illicit drugs

Dutch legislation has its origins in the opium law of May 12th 1928[319], which banned all operations relating to narcotic drugs, except for authorized operators and solely for medical uses. The law applies to: cannabis, products containing opium and cocaine, all of which are classified as narcotic drugs and substances. Possession, manufacture, trafficking, importing and exporting drugs are acts punishable by the same penalty: 4 years in prison or a fine. The law remains almost inapplicable. In the period between 1936 and 1960, only 38 convictions are handed down by courts[320].

On the other hand, another law dated June 28th 1958, on medicines, governs the prescription and the release of pharmaceutical products. This law provides for moderate penalties of 6 months of imprisonment to which they can add a fine for

[319] Opiumwet law of 12 May 1928, STB. 167, as amended at the end by the law of 6 November 1997.
[320] HAMEP, National Report of the Netherlands, Drug abuse and its prevention, Rev. Ed. Int. Dr. Pen., 1973, p. 409.

any violation of its provisions. By the decree of April 7th 1971, these provisions have been extended for amphetamines, whose import and export are more rigidly punished[321].

Dutch authorities have launched indeed an overall reflection of the danger created by the consumption of various prohibited or legalized substances. In 1972, a government report, which reviewed the situation and the risks of drug use[322], proposes as criteria to ban or legalize drugs the risk to which society is exposed through drug consumption. This principle allows the distinction between *strong drugs* (heroin, cocaine, LSD, amphetamines), and *mild drugs*, mainly cannabis and its derivatives. For these products, the report takes into account a legal and controlled distribution by the state, which will set the prices and the maximum percentage of THC (between 1% and 5%). The advantage of this social control can be, according to the authors of the report, the removal of the illegal circuit and counter-culture which is associated to it, particularly in the case of young people. Inconvenience would be the increasing number of potential consumers. The string of events will, however, deny these projections.

The Opium Law of 1976 is the very base of the applied Dutch law. In its turn, the Law is based on two fundamental distinctions between consumption and trafficking on one hand, and between the drugs that pose an *unacceptable risk* and other drugs on the other hand. The priority of the penal action is the fight against strong drug trafficking at the international level. Possession of drugs with the purpose of consumption determines the deliverance of insignificant penalties. In practice, consumers are no longer subjects to prosecution. Even the trade of cannabis in small amounts is allowed, at the beginning in institutions receiving young people, from the "domestic suppliers", and later in "coffee shops".

This liberal policy will allow the suppression of the AIDS epidemic through the 1980's. The Netherlands have indeed developed, instead of repression, acts of prevention, care and social support. 95% of the funds dedicated to the fight against drugs will be allocated to health and social actions[323]; a situation diametrically opposite to that of prohibitive countries like France or the U.S..

This controlled distribution of strong drugs aims at the socio-medical maintenance chronicle drug abuse individuals considered ill[324]. In a first phase, a program of methadone distribution with no conditions or time limits, allows the heroin addicts to depend less on the illegal outlet market. In the second phase, the controlled distributions of heroin are experimented.

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[321] Legal texts provide the imprisonment of 6 years and a fine of 100,000 greenfinch.

[322] Wergroep banners, Actergronden en Risico's van drugsgebruik, La Haye, 1972.

[323] Silvis, Hendricks and Gilmore, use Drugs and Human Rights in Europe, W. Pompe Institute for criminal law and criminology, Ultrecht University Publishing House, 1992.

[324] Dutch legislator thinking has transcended the prejudices related to the problem consumer. It can be noted that it does not focus on how a person got addicted but that the addiction is pulling him out of his normal limits, it turns him into a sick person towards which states has the obligation to recover.

The Netherlands have played a crucial role in defining the policy of „risk reduction", politic resumed much later by other European countries[325]. They are also at the origins of the rules of changing the syringes and the policy of "substitution". Since 1982, the city of Amsterdam has launched into a local program of morphine distribution to registered heroin addicts[326]. Prescribing methadone was then generalized and the *heroin distribution program* is extended to several cities. The ones concerned through this program are consumers are with minimum age of 25 years, dependent on heroin for at least 5 years and who have already been submitted to programs of replacing heroin with methadone for at least a month, with doses between 50 and 60 milligrams per day. Controlled distribution subsequently implies free distribution, under the control of medical authorities, of fixed quantities, provided that those involved will not consume from the black market.

The ideas that stood at the basis of these decisions were quite interesting. Municipal authorities did not have the ambition to win but only to reduce the harmful effects of drug trafficking - imprisonment, violence, disease. However, the authorities' choice to "reduce the risks" to the detriment of criminal punishment has had positive effects on the limitation of the contamination with AIDS virus for the drug addicts.

Netherlands reaction was a little harsher, as a result of international criticism, but only in the matter of fighting against international drug trafficking, in a closer collaboration especially with the neighboring countries.

2. Tolerated consumption

Drug consumption is not so harshly punished in the Netherlands. Like in the United States, *the sole possession for the purpose of consumption is incriminated*. The penalty depends on the substance possessed. Possession for the purpose of personal consumption of strong drugs appearing on the list I, is punishable by one year in prison and a fine. But the same offense is punishable with only a month of imprisonment and a fine if the drugs are "light" and they appear on the list II[327]. This alleviated penalty concerns the tranquilizers, barbiturates and cannabis in quantities of less than 30 grams.

Possession for the purpose of consumption of a quantity equal to or less than half a gram, the equivalent dose of strong drugs and 5 grams of mild drugs is left outside incrimination, the owner receiving just a warning from the police. If one exceeds these amounts, the penalties can theoretically reach up to 2 months of

[325] Reducing risk is one of the four fundamental theories of combat and prevention of trafficking of illicit drugs

[326] DERKS, The Amnsterdam Morphine-dispersing experiment, The Netherlands Institute of Mental Health Publishing House, December 1985 – study.

[327] The list contains 2 Section II, Section A) comprises, since 2 July 1993, barbiturates and tranquilizers and section B) includes cannabis and its derivatives.

imprisonment for strong drugs and just a fine for mild drugs[328]. However, in practice, the consumer is not subject to any criminal prosecutions. Not even the cultivation of cannabis, although it is introduced in drug trafficking, is not punishable if it is intended to ensure personal consumption[329].

3. Banned consumption

Drug consumption is tolerated in the Netherlands provided that this offense does not prejudice a third party. Is the assumption of drunk driving. The Road Code does not distinguish between intoxication caused by alcohol and that caused by drugs but it considers it only a crime and it justifies the withdrawal of the driving license.

A more important issue is the suppression of crimes associated with drug use. The court may in general postpone the application of the penalty[330] provided that the subject in question is submitted to treatment. The convicted is proposed an alternative to imprisonment, in the form of a drug rehabilitation program in a closed environment. The duration of treatment can not exceed the conviction handed down.

A new draft law which should be adopted in the near future provides, under the title of criminal punishment, the forced rehabilitation of delinquent drug addicts that have several relapses for a period not exceeding two years. The nature of the criminal offenses will not constitute determinative criteria to justify the deliverance of a certain measure, but rather, the *frequency* of the crimes committed. However, we could be reserved towards the effectiveness of this type of treatment.

In the case of offenders sentenced to imprisonment, several ways of care are provided during the detention. Programs like „drug free zone" are developing within the prisons and a more elaborate medical treatments is available for addicted users[331]. Finally, we will state that possession of drugs in prison justifies detention in an isolated area on a period which may not exceed 40 days[332].

Another problem which had to be resolved was that of fighting against drug tourism. This struggle takes many forms, as required by the Convention for implementing the Schengen agreements, which states that each member country should take the necessary measures in order not to be an obstacle for more repressive policies implemented in another Member State, and especially expected by the local authorities in an attempt to marginalize a large part of these tourists. Cooperation with countries of origin of these tourists is increasingly close. More

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[328] For possession of a quantity of less than 5g of the drug, the police can give the one in question even a simple advertisement. As the quantity increases law provides for proportional diversified fines.

[329] The statement provides punishment with only an advertisement for growing 5 feet of land with hemp. For growing between 5 and 10 feet of land a fine of 50 greenfinch / foot is proposed, knowing that prosecutions will be made only if public order is disturbed.

[330] Solution proposed also by the Romanian legislator by the new Penal Code, whose enforcement was postponed several times.

[331] Article 47 of Gevangenismaatregel.

[332] Silvis, Hendricks and Gilmore, read works, p. 125.

actions have been undertaken in collaboration with the French authorities in order to control transit axes between the two countries: the rail links and motorways[333]. As for the foreign drug consumer, he shall be forbidden to enter that territory[334]. In case his conduct should disturb public order, the ban may be accompanied by immediate expulsion[335].

This new concern translates the care Dutch authorities to provide guarantees to the international communities regarding drug trafficking.

4. Illicit drug trafficking

The opium law defines more criminal offenses in the fight against trafficking. The first of these is the possession of narcotic drugs for the purpose of sale. The notion of possession is used in a very broad background in Dutch law. There is no need for the concerned subject to actually hold the drug, it is sufficient for him to control it[336]. Thus, the offense exists if the drugs are found in the vehicle[337] or in the dealer's home[338]. However, this definition of possession, is not applied in the case of the owners or managers of bars that intentionally allow the development of traffic in their place, thus the facility of the consumption of narcotic drugs by the supply of a place is not incriminated. The provision applied in 1996 makes the difference between possession of drugs for purpose of consumption, the purchase for personal consumption, heavy traffic and the organized criminal network. In practice, the punishment is applied depending on the quantity of drugs seized and in the case of a sale of small quantities of drugs the duration of the illegal action is taken into account.

In addition to possession, the opium law condemns *production, distribution, transportation, import and export* of all drugs. The attempt to these crimes be punished and, since 1985, preparatory actions to commit these crimes are assimilated to attempt. The attempt, as well an offense, has an intentional character and is punishable only in the case of preparations for strong drug trafficking[339]. The penalty applies even if the action takes place outside the borders, once the traffic is committed in the Netherlands, this measure is taken not to favor international traffic before the national one[340]. And finally, under the influence of the international community, the acts of "money laundering" and trafficking of precursor have also been incriminated.

The penalties for various offenses are compiled according to the nature of drugs and the acts committed. Import and export of strong drugs are the most

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[333] See the bilateral police cooperation of 20 April 1998, Akkoord bettreffende samenwerking op het Gebied police van veiligheid en tussen de regering van de Franse en Republick of regering van Nederland, 1998, nr.81, p. 5.
[334] 21 Vreemdelingenwet (law on sanctions against foreigners).
[335] Article 100, 4 Vreemdelingenbesluit (regulations on punishment of foreigners).
[336] Supreme Court, Sept. 15. 1985, op., P. 822 - case law.
[337] Supreme Court, Sept. 15. 1986, op., P. 359 - case law.
[338] Supreme Court, 17 June 1980, op., P. 579 - case law.
[339] Article 10a Opiumwet.
[340] Article 13, sec. 3 Opiumwet

harshly punished: 12 years of imprisonment along with a fine. For sale, transport, production and distribution the penalty is 8 years in prison and only 6 years for attempt to any of these crimes and for money laundering and trafficking of precursors. In conclusion, possession of strong drugs in purpose of trafficking is punishable by merely 4 years of detention. The same penalty applies for import and export of light drugs. Imports and exports therefore attract a penalty of 3 times less, in the case of cannabis, but not of strong drugs. National traffic and possession of cannabis in amounts greater than 30 grams is punishable by 2 years of detention and a fine, while the same facts involving amounts of less than 30 grams, are punished by only one month in prison and a fine. But these penalties are generally only theoretical and they very rarely happen to be applied.

However, some aggravating circumstances are provided. Thus, in the case of crimes committed in relapse, the maximum penalty is increased by a quarter in the case of strong drugs and by a third for light drugs. If drugs are sold to people with disabilities, a minor or a person with mental impairments, the stipulations provide the requirement of the punishment superior to that provided for most offenders. The same principle applies if traffic takes place near a school or a hospital.

5. Tolerated drug trade

In drug trafficking, certain acts are tolerated in the Netherlands, either because these acts participate in the policy of "reducing risks", or because they are considered less serious offenses. The first category includes the so-called "injection rooms" or "consumption rooms". The stipulation of 1996 tolerates these places where consumers can inject themselves the drug on condition that the place does not provide drugs and does not cover traffic. The objective is to avoid social isolation of the consumer and strong drug consumption in public places, with all the health risks that are involved both for consumers and for the inhabitants. Nine Dutch cities[341] have installed „ rooms for consumption."

The second category includes real traffic offenses for which indulgence represents the consequence of legalizing the drug use. Since the government has already allowed the consumption of cannabis, it also had to allow the means to achieve it: cultivation and sale. Thus, the cultivation of cannabis, even if in the criminal law it appears along with other offenses of drug trafficking and is liable to the same punishments, in reality it is considered as consumption. Cultivation of 5 feet of land is not subject to any punishment and growing 5 to 10 feet of land is punished with a fine of 50 greenfinch per leg. Moreover, consumers are never punished, even if large quantities are involved, as long as they do not sell the stuff and not disturb the peace. Regarding the sale of cannabis, it has been gradually allowed since 1978.

[341] Amsterdam, Arnhem, Heerlen, Maastricht, Nijmegen, Rotterdam, Terneuzen, Ultrecht and Venlo.

The stipulation of the enforcement of the opium law 1978, tolerates, indeed, discreet sale of cannabis by "domestic suppliers"[342]. Domestic provider means a person who sells cannabis or its derivatives in a reception center for young people, with the approval of the center's leadership, and who is allowed to supply only ordinary customers. As long as this supplier does neither show any open sale and nor instigate it, he is tolerated by the police and the justice, even if he commits reprehensible acts.

An important step was made by recognizing the "cafés". Their number should be around 1200-1500. These commercial institutions operate as bars but they also sell cannabis. By tolerating them, the authorities aim to prevent young people from discovering stronger drugs, thereby artificially separating the market of mild drugs. By offering the opportunity to sell light drugs without a care, providing that certain rules imposed in the interests of society are complied with, the situations in which the consumer is in direct contact with more harmful drugs are avoided.

The opening of such a "coffee shop" is submitted to the agreement of a tripartite committee composed of representatives of the prosecutor, police and the municipality concerned. In reality, the role of the prosecutor is decisive because his decision not to begin prosecutions in some cases, allows traders to obtain profit. However, for the future, the mayor will have administrative powers to close the premises, which also enables him to oppose the opening[343]. In order to function this "cafe", can not hold a stock of more than 500 grams and must meet several criteria: no advertising, no strong drugs, no public order disturbance, no access or sale to minors aged 18 years, no selling in large quantities (five grams per transaction). But these rules are often avoided. The commercial activities of these places favor the development of competition which makes their number grow[344] and increase consumption. There are special offers for house customers, debt sale is developed, new services are offered such as "blow home". This service, which has been operating for several years in Rotterdam, is inspired from pizza home delivery and involves the same process: a simple phone call to receive a dose of cannabis[345]. Since 1995, authorities began to react to stop these abuses.

6. Critical rating of the Dutch law

The main criticism that can be brought to Dutch policy is that it has not reduced drug use, whether strong or mild. The number of consumers of heroin is estimated at 25,000 reported to a population of 15 million inhabitants[346].

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[342] About this evolving legislative see MANSCHOT. Some comments on legislation and judicial policy in terms of drugs, in the Netherlands, Drug Colloquium documentation: social and political stakes, Milt - Unesco, 26-28 Feb. 1986, p. 8.

[343] The project is known by the name of "law Damocles".

[344] In 1980 there was only 20 such "coffee" and in 1988 have multiplied to 300.

[345] A.C.M. Jansen, Cannabis in Amsterdam - Geography of hashish and marijuana, Lezard Publishing House, Paris 1994, p. 43.

[346] PLANIJE, SPRUIT, MENSINK, Fact Sheet 10 hard drugs policy, Netherlands Alcohol and Drugs Reports, cited paperwork.

Consumption of cannabis, after having dropped during the period 1973-1983, has increased from 1983[347] only to culminate in 1992.

Dutch policy has also failed to reduce any risks related to drug abuse. It is estimated that between 2 and 5% of cannabis consumers require psychological treatment. 5% of placements in the hospitals are related to drug addiction[348]. Halting the dangers associated to abusive consumption of drugs, particularly hard drugs, has not been succeeded.

But we must also acknowledge and have faith in the Dutch policy, because if *it has failed to improve things in the fight against drug use, it hasn't aggravated them either compared to other prohibitive countries*. Drug consumption is at an average level among European countries. The percentage of heroin consumers reported to the population is lower than in France[349]. And, at the same time, the Netherlands were able to establish a genuine medical and health care: between 70 and 80% of dependents are registered in the socio-medical system. This policy is translated into a lower percentage of infestation with the AIDS virus and the improvement of the general health of addicted consumers[350]. Remarkable is the fact that the Netherlands have reached these results without the need to multiply by the absurd, like the U.S., the criminal penalties applied to consumers. This argument should attract adhesion among the democracies concerned by freedom.

Yet the international criticisms on Dutch politics are very harsh. The international community reproaches it with the violation of the Single Convention by organizing or tolerating some illegal circuits of distribution of narcotic drugs without having any medical purpose. The international authority of control over narcotic drugs has not stopped, over time, to present the policy of the Netherlands as being devilish and refuses to recognize the benefic effects. Other European countries favoring prohibition of drug use, such as Sweden and France, exercise pressure on the Netherlands, because its tolerance makes this country an ideal transit place of transit for trafficking dedicated to the whole Europe.

7. Money laundering and confiscation of product infringement

The Netherlands have introduced or amended laws in order to comply with EU directives regarding money laundering, making it more difficult to preserve assets from illegal activities carried on by criminal organizations. The legislation allowing confiscation of assets or amounts derived from illicit transactions entered into force in 1993. However, the result of 5 years (1993-1998) of implementation of measures for confiscation has not met original expectations. Treasury was

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[347] SYLGBING and PERSOON, consumption of cannabis by young people in the Netherlands, BS Publishing House, 1985, Vol.XXXVII, No 4, p. 51.

[348] Ibid, PLANIJIE, SPRUIT, MENSINK, Fact Sheet 10 Hard drugs police.

[349] This proportion is 162 to 200 consumers in 100,000 people in the Netherlands and of 208 consumers in 100,000 people in France. Instead, the prevalence of occasional cannabis is higher in the Netherlands than in France (European Observatory of Drugs and drug abuse, Annual Report, 1996, on the drug problem in the European Union).

[350] In 1988, the rate of contamination of heroin addicts was 30% in the Netherlands and 55% in France, Le Monde, November 3rd, 1988, p. 16.

counting on 112 million Dutch guilders (50 million Euros) but only a fifth of this amount was insured. Prosecutors had difficulties in proving that criminals have gained profits from illegal activities. The courts procedures are long and especially actions against important offenders are difficult to prove.

It can be noted that the Dutch model in the field incriminating illicit drug use is a very indulgent one which does not always respond to the needs of protecting social values. But it is difficult to tabulate as appropriate a model or another, in matters of incriminating trafficking and consumption of illicit drugs. We have presented this model of legislation in order to have a picture about a different treatment that can be applied to the phenomenon brought forward compared with Romanian legislation in the field, which leaves out of incrimination only the consumption, the rest of the operations being sanctioned only if they are carried out without right.

BRIEF HISTORY OF THE EVOLUTION ISSUE OF PROTECTION OF FINANCIAL INTERESTS OF THE EUROPEAN UNION

Legal Adviser **Genica Totolici**

Abstract:

Protecting the financial interests of the European Communities has been a priority for governments and parliaments of the member states since the early 1960s. On August 10, 1976 the Commission submitted a proposal for amending the Treaties establishing the European Communities (TEC) to allow the adoption of common rules on penal protection of the financial interests of the European Communities and tracking and prosecuting violations of these provisions. This proposal has provoked numerous discussions in the '80s.

Thus, in 1983, a committee from the structure of the European Communities Council prepared a draft treaty on the criminal protection of financial interests of these communities. But a common position could not be adopted, due to the objection that criminal law does not fall within the competence of European Communities. The activities of the Committee ended due to numerous opinion disputes. It was indeed premature to raise the issue of criminal protection of certain social values, at Community level, in the conditions in which, at that time, not even the Shengen Agreement on the free movement of people had been approved.

Key words: financial, European Union, criminal law, Shengen.

Protecting the financial interests of the European Communities has been a priority for governments and parliaments of the member states since the early 1960s. On August 10, 1976 the Commission submitted a proposal for amending the Treaties establishing the European Communities (TEC) to allow the adoption of common rules on penal protection of the financial interests of the European Communities and tracking and prosecuting violations of these provisions[351]. This proposal has provoked numerous discussions in the '80s.

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[351] No joce, C222 of 22.09.1976, p. 2.

[352] Dyonisios D. Spinellis, Ten years of efforts for an effective protection of the financial interests of the European Union, in no agon. 25, Dec. 1999, p. 16.

of certain social values, at Community level, in the conditions in which, at that time, not even the Shengen Agreement on the free movement of people had been approved.

But protecting the financial interests of European Communities, gained increasingly higher importance. Thus, in 1988 a special unit of coordination in this field within the General Secretarial of the European Commission[353] was established. It later acquired the name UCFAF (unit coordinating the fight against fraud), representing the Community institution responsible for preventing and combating acts prejudicial to the financial interests of the community[354].

Decision no. 68 / 1988 of the Court of Justice of the European Community in the problem of the "Yugoslav wheat"[355] was an important step forward in promoting the idea of protection of European law, imposing the principle of loyalty based on art.5 of the original Treaty of the European Communities. In accordance with this decision, Member States are required to impose sanctions on individuals who violate the provisions of the Community sanctions identical to those imposed in case of similar violations of the internal law. Not only that sanctions should be imposed the same conditions of substance and procedure as those of the internal law, but must also be effective, proportionate and dissuasive.

This decision has triggered a debate on protecting the financial interests of the European Communities, which had practical consequences. The official authorities were involved to solve the problem. A parallel action of the European Parliament and the European Commission was triggered. A series of internal debates of the Committee on Budgetary Control has led to the publication of a first report in 1991, dropping directions for future action. It was a request to the Intergovernmental Conference to establish a procedure for co-decision in order to implement the administrative and criminal matters in the protection of financial interests of the European Communities. It also addressed a request to the European Commission concerning the submission of legislative proposals on the harmonization of national legislation in this area.

This initiative has had tangible results: The Maastricht Treaty introduced in TEC a new article, 209A, establishing the Member States to assimilate the Community of national interests and to cooperate among themselves and with the European Commission[356]. Thus, two fundamental principles to protecting the

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[353] COM (87) 572 final.

[354] John A.E. Vervaele, fraud Communautaire et le droit penal européen des affaires, Presses Universitaires de France, 1994, p. 122.

[355] ECJ September 21st 1989, Aff. 68/88, Rec. 1989, p. 2965. In this business, the Greek authorities have encouraged selling to the Community Member States of wheat imported from Yugoslavia, as if it were Greek wheat, thus seller benefiting from Community subsidies. See in this regard, Mireille Delmas-Marty, op. cit., p. 104, Sergiu B., cited paperwork,page6.

[356] Diemut R. Theato, Bilan et perspectives en matière de protection des intérêts financiers de l'Union Europeenne, agon no. 25, Dec. 1999, p. 3.

financial interests of the European Communities have been introduced: the principle of assimilation and the principle of horizontal cooperation[357].

In parallel, the Council issued a resolution in November 13, 1991, inviting the Commission to initiate a comparative study on the relevant provisions in the field, to identify the need for the adoption of additional measures. This study lasted for a long time, and was materialized in a summary report prepared by a committee of experts under the guidance of the famous professor Mireille Delmas-Marty. The report referred to the incompatibilities of the law of the Member States in relation to the provisions of the Community obligation, for applying the principle of assimilation, as well as the incompatibilities and gaps in the provisions of these states which were likely to generate discrimination on the treatment of the business environment in the Community. The report was made in a series of 17 recommendations aimed at the purpose of introducing the principle of assimilation and harmonization of national laws. Other reports on administrative and penal systems in Member States and transaction institution in the European Union have been prepared at the initiative of the European Commission[358]. These studies have revealed the disparities between the legal systems of Member States, generating a complex system, unfair and ineffective in the fight against transnational fraud[359].

In the fight against defrauding the budget has contributed in this period the decision of the Court of Justice of the European Communities, which established that it is the competence of the European Commission to impose sanctions such as exclusion from the benefit of subsidies or the imposition of penalties for amounts illegally obtained from the Community budget and which needed to be repaid[360].

This decision, taken in a concrete case, had to be institutionalized. For a homogeneous protection of the Communities' financial interests, the European Parliament adopted in 1994 at the initiative of the budget committee, a resolution that asks the Commission to take specific measures: a legislative proposal to the Council on the harmonization of national criminal provisions for the protection of financial interests Communities and a regulation on administrative penalties.

The reply was quick and comprehensive in terms of administrative sanctions. The possibility of adopting a regulation on protection of EU financial

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[357] Christine van den Wyngaert, Protection <<PIF>> expace et judiciaire EUROPEEN: balance and perspectives al'aube the third millenaire, agon no. 25, Dec. 1999, p. 10.

[358] Refer to the studies conducted at the initiative of the European Commission: Study on the administrative and criminal sanctions in Member States of the European Communities, vol I - national reports, vol II - Synthesis Report, 1994, Comparative study on the protection of the Communities' financial interests , National reports, 1992, report synthesis, 1993, final report - incompatibility between legal systems and measures to harmonize, 1994, the seminar on the legal protection of the Communities' financial interests, Brussels, November 1993, Oak Tree Press, Dublin, 1994 , P. 59-132; transaction in the European Union, 1995; Comparative Analysis of the relationship between Member States on measures taken at national level for fighting fraud and diversion of funds, Report about the application of Article regarding 209A TEC, in November 1995.

[359] D. Spinellis, cited paperwork., p. 17.

[360] ECJ, 27 October 1992, Aff. C240/90, Rec. 1992, I-5383, in Luc Bihain, Editorial, Ch. 2000, No agon. 25, Dec. 1999, page 2.

interests was created, which give a new statute to UCFAF and horizontal regulations to administrative penalties[361].

On the contrary, in matters of criminal law harmonization, the Commission has proposed building a convention under the provisions of Title VI of the TEU. Despite the opposition of the Parliament[362], which considered it necessary to act with the tools available in the first pillar, where the principle of the first served, the compulsoriness and the application of direct acts are important the Convention[363] was drawn up and adopted in 1995, followed by the adoption of two Additional protocols[364]. The PIF Convention includes provisions on the harmonization of the laws of the Member States impeaching fraud affecting the financial interests of the European Communities, determining the penalties applicable, establishing the criminal liability of the persons responsible with control or decision making in a trader's activity. The first protocol impeaches acts of corruption committed by or against the officials of the Community or at a national level, while the second protocol dealt on money laundering, the legal person's responsibility, applying sanctions and procedural provisions[365].

Further reality seemed to do justice to the skepticism expressed by the European Convention on the effectiveness of PIF. Until 2000 Convention was ratified by a total of 4 states, which have not ratified in full the additional protocols as well. In this context, the discussion has moved in the field of judicial cooperation.

At the same time a certain straightness of the fight against the facts that affect the financial interests of the European Communities was enforced. European Commission (through its specialized bodies, UCFAF, followed by OLAF in 1999[366]) generates an increasingly important part in coordinating the efforts of

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[361] Council Regulation no. 2988 of 18 December 1995, joce No. L 312 of 23 December 1995, p. 1-4 on the protection of financial interests of the European Communities. This regulation provides exercise control and enforcement of sanctions on the territory of the Member States in a uniform manner regarding the violation of community with consequent damage to the Communities' financial interests. Moreover, the Council has adopted a regulation in 1996 in order to prevent committing some other deeds. It is the Council Regulation no. 2185 of 11 November 1996, joce No. L 292 of 15 November 1996, p. 2-5 on inspections and spot checks conducted by the Commission to protect the financial interests of the European Communities against fraud or other irregularities.

[362] Diemut R. Theato, cited paperwork, p. 3.

[363] Convention on the Protection of financial interests of the European Communities, joce No. C 316 of 27 November 1995, p. 48. This understanding is the doctrine known as the Convention PIF.

[364] Protocol to the Convention concerning the financial interests of the European Communities, joce No. C 313 of 23 October 1996, p. 2-10; Second Protocol to the Convention concerning the financial interests of the European Communities, joce No. C 221 of 19 July 1997, pages 12-22.

[365] Dyonisios D. Spinellis, op. cit., p. 17.

[366] European Anti-Fraud Office was established by Commission Decision. 1999/352/EC, ECSC, Euratom, OJCE No. L 136 of May 1999, p. 20. OLAF was established as an authority ment to conduct inquiries against defrauding the financial interests of the Community, working as an independent administrative police. Although working in the European Commission, it benefits from a budgetary and administrative autonomy. For details see manual OLAF, the European Anti-Brussels, 2005, ISBN. 92-894-9590-1, p. 13.

Member States for tracking and suppressing these facts[367]. This principle of straightness, introduced by the PIF Council Regulations of 1995 and 1997 in the administrative field, is enshrined in the Treaty of Amsterdam[368], in the new Article 280, which replaces the former Article 209A.

The idea is straightness repeats in a study of a group of researchers who, at the request of the European Parliament and European Commission, drew up a study on protecting the financial interests of the European Communities. Starting from a report regarding the legislative situation in the 15 member states in the mid-'90, researchers have concluded that the principle of horizontal cooperation is not sufficient to protect the financial interests of the European Communities. They concluded that there is a need to take the straightness at a higher level, instituting a European package, with powers of surveillance and research in the entire space community. These ideas are developed in a document which marks a watershed in ideas on the protection of the financial interests of the European Communities, Corpus Juris, a paper that determined stormy debate in the years that followed, which ended, as we see continued with the introduction certain revolutionary provisions in the field of criminal law in the European Constitution. In this document, made public for the first time in 1997 and restructured as a result of discussions in 1999, is further emphasized the principle of territoriality as the cornerstone of the construction of the European Prosecutor Utility. It's no longer the case to improve judicial cooperation between the Member States, but to the whole territory as a single judicial space, where acts of research and tracking is done similar to those carried out on the national territory of the Member States, involving the administration of evidence and the enforceability of judgments courts.

As a result of this study, on the Intergovernmental Conference in Nice, the Commission proposed, for fighting off defrauding the Communities' financial interests and as a remedy for the competence fragmentation in criminal matters in

[367] Christine van den Wyngaert, cited paperwork, p. 10.

[368] According to art. 280, and the Member States combat fraud and other illegal activities affecting the financial interests of the community through measures taken under this article. These measures are a deterrent and provide effective protection in the Member States. Member States adopt the same measures to combat fraud that affect the financial interests of the community as well as those which they adopt to combat fraud that affect their own financial interests. Without bringing attainment to other provisions of the Treaty, Member States shall coordinate their action to protect the financial interests of the community against fraud. To this end, Member States organized together with the Commission a close collaboration between the competent authorities. The Council, acting in accordance with Article 251 and after consulting the Court of Auditors, may adopt necessary measures in preventing and combating fraud that affect the financial interests of the European Communities in order to ensure equal protection in the Member States. These measures do not concern the application of national criminal law or the administration of justice. The Commission, in cooperation with Member States, will present each year to the European Parliament and Council a report on the measures taken to implement this article.

the European area, setting up the European Prosecutor Utility[369]. It was argued that protecting the Communities' financial interests required a specific answer to overcoming the limits of classical judicial cooperation[370]. The contribution presented by the Commission was not approved by the Heads of States and Governments meeting in Nice in December 2000. On the one hand, the Intergovernmental Conference had not had time to examine the proposal. On the other hand, a desire in deepening the practical implications of the proposal was expressed.

As a consequence of the provisions of article 280 TEC, which allows the Community legislator to law to a limited extent in matters of protection of financial interests of the European Commission, the Commission has launched a legislative initiative in this area[371]. But the Board postponed making a decision, considering that at that time such a directive containing criminal provisions was not mandatory. Instead it recommended to the Commission to find the system most suitable for specific of the protected objective, which is represented by the financial interests, while respecting the most demanding exigencies on the protection of fundamental rights.

Taking into account the recommendations of the Intergovernmental Conference in Nice, as well as those of the Council, the European Commission has undertaken in 2001-2003's action plan to protect the financial interests of the Community[372] to adopt a Green Paper[373] to abide to debate specific issues with which Communities are dealing with in the protection of Community's interests. This tool included both incriminations in the field of criminal law and procedural provisions on the establishment of a European prosecutor. Two purposes were pursuit: to clarify ideas on methods of implementing the original proposals, and to induce the challenge of a debate in the circles concerned, taking into account the planned extension of the Union and amendments to the constituent treaties.

Two years of debate led to the drafting of a report that summarized the findings on future actions for the protection of the Community's financial interests[374]. Thus, the Europe prosecutor is a topic on today's agenda of the Union policy. At the meeting in Laeken, the Heads of State and Government have recommended the council to examine the Green Paper on the European prosecutor, taking into account the diversity of legal systems and traditions of Member States. The European Prosecutor has been a matter of interest for the European

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[369] Complementary contribution of the Commission on intergovernmental conference on institutional reforms - Protection of criminal financial interests: a European prosecutor, 29 September 2000, COM (2000) 608.

[370] See in this regard and Dorin Ciuncan, The European Anti-Fraud, in RDP No. 4 / 2003, p. 67.

[371] The proposal for a directive of the European Parliament and the Council on the protection of criminal financial interests of the community, COM (2001) 272 final, joce No. 240 E of 28 August 2001, p. 125-129.

[372] COM (2000) 254.

[373] COM (2001) 715 final.

[374] Follow-up on the Green Paper Criminal law on the protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2003) 128 final.

Parliament[375] and as well, for the Working Group in the field of Freedom, Security and Justice built under the European Convention[376].

Favorable opinions that have appeared in the Green Paper debate and summarized in the report of the Committee on this document, led the introduction of the European Prosecutor Utility in the Constitution[377].

For the protection of financial interests of the European Union, particularly interesting are the art. III - 415, Fighting Fraud[378], which incorporates the provisions of art. TEC 280, with two significant differences: no reference to limiting regulation in the field of criminal law enforcement or national administration of justice is made and legislation instrument to provide law is the law or the European law-framework.

It looks like the direction in which the right policy for the protection of financial community is given by the straightness principle. And in the field of criminal protection, the Community's institutions seem to involve more and more. The horizontal cooperation, still applicable, looses increasingly more ground. Member States seem to gradually give up sovereignty in the application of provisions on criminal matters which are interested in Community Law and have a cross-border character.

It is interesting to follow the debate around the European Constitution. Its adoption will be a watershed in the evolution of the European Union.

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[375] Public Hearing with national parliaments held by the European Parliament on 5 November 2002 highlighted the interest of European parliamentarians on the issue.

[376] Final Report of the Working Group X, the European Convention, CONV 426/02, 2.12.2002.

[377] In art. III-274 of the European Constitution is given a new institutional structure, the Office of the European Prosecutor from Eurojust. The European prosecutor will have the power to investigate, pursue and prosecute people found guilty of committing certain crimes that affect the financial interests of several Member States or the European Union. Founding the Prosecutor's Office, setting and its rules of operation will be achieved by European law, adopted unanimously by the Council, with the assent of the European Parliament.

[378] According to art. III-415, Union Member States fight fraud and other illegal activities that bring attainment to the Union's financial interests by measures taken under this article. These measures are a deterrent and provide effective protection in the Member States. Member States adopt the same measures to combat fraud that affect the financial interests of the Union as well as those which they adopt to combat fraud that affects their own financial interests. Without prejudice to other Constitution, Member States shall coordinate their action to protect the financial interests of the Union against fraud. To this end, Member States organized together with the Commission and a close collaboration between the competent authorities. Law or the European framework-law establishes the necessary measures in preventing fraud which affect the financial interests of the Union and combat fraud, to provide an effective and equivalent protection in the Member States. This is adopted after consultation with the Court of Auditors. The Commission, in cooperation with Member States, will present each year in the European Parliament and Council a report on the measures taken for the implementation of this article.

WAYS TO PROTECT AGAINST FRAUD BY THE BANKS FROM LENDING TO INDIVIDUALS

Ph. D reader ***Victor Troaca***
„Titu Maiorescu" University, Bucharest
e-mail: victor.troaca@brd.ro

Abstract:
Banking companies in Romania have made in recent years an accelerated pace of development of their business in credit in general, and the crediting of individuals in particular. Like any activity with a dynamic and sustained activity of lending to individuals held by the banks is generating risks. In all the risks to which banks are exposed to companies in their lending to individuals are included and the risks of fraud. Such risks can be generated both by internal factors and external factors. Identifying those factors and measures to protect the banks from the risks of fraud are elements to be stressed in this paper.

Key words: bank, credit risk, risk of fraud, measures against embezzlement knowing customers**.**

1. Introduction

One of the components increasingly important activity of banks, is the operations and services for the retail market and in their lending to individuals occupies a significant share, with strong influences of assets acquired by a bank.

Accelerated pace of development of the business of lending to individuals registered by the Romanian banking companies in recent years, was a consequence of several factors, which include: extremely low level that you record these operations in the activity of banks, low volume of loans that record companies banking on their total exposures to the population, low degree of financial intermediation, economic growth and increase capacity default of payment of potential debtors, the banks increased ability to engage in the business of lending to these segment and to manage these risks, the implementation of methods and techniques based credit scoring systems which have allowed a real industrialization of these operations, market requirements, competition on the part of the bank, and on the other side competition that has generated - an entry on the credits for individuals and non-bank financial institutions.

The evolution of the natural development of the credit population by the banks will not stop here. In the years ahead it will continue the expansion, following the trend similar banking markets in the region, close to the stage that we will record these transactions in the EU Member States.

How any activity, especially in banking, is generating risks and business lending to individuals has led, on the one hand the banks involved to adopt procedures more or less adequate volume of such transactions, enabling them an effective risk management, and on the other hand, the regulatory authority to impose specific requirements on conduct of business and prudential supervision.

2. The risk of fraud

One of the risks to which banks are exposed to companies in their lending operations of individuals, is the risk of fraud. This risk can be generated by several factors, of which remember: the accuracy of the internal regulations on business lending to individuals; reliability of the internal procedures for the management of credit, scoring systems used and the levels of access to staff in applications informatics system of supervision of lending activity, the quality of bank staff; criminal activities of individuals or groups of criminals from outside the bank, the activities of criminal groups with ramifications even in the banks, lack of communication systems with state institutions that are able to provide useful information a credit effectively so.

To avoid the risk of fraud on which the banks are exposed in their lending to individuals is necessary protective measures appropriate. These measures may look the part of a banking company in each hand, but also the community as a whole to banking, and on the other hand authorities or institutions of state. It should be noted that the risks of fraud occur primarily in loans whose object is unidentified. Harder will be able to register fraud, for example, loans for housing purchases.

Among the measures identified, which could be considered for the banks to protect against fraud in their lending to individuals, we stop to those below.

2.1. Procedures for early detection of potential fraud risk

The existence of internal procedures pertaining to the operations of banks lending, to be able to detect the possible risks of fraud, is one of the conditions essential for the protection of bank against any risks, including fraud. No doubt that all companies carrying banking business of lending to individuals on the basis of internal rules, but the more restrictive or more of their casual, is one of the elements that are likely to encourage the emergence of the risks of fraud.

Always an identified gaps in general groups of offenders, but the bank staff who leave or who drew even initiate operations of fraud in lending activity are the main cause which generates such risks. The documents required for a credit analysis are fundamental, mainly for loans without a specific destination them, and so-called loans for personal needs, to avoid the risk of fraud.

Also, an internal procedure that would involve analysis of an application for credit by another person, another integrated compartment than the employee who provides the interface with the applicant credit and competence of approval located

in a person other than the two people involved in the relationship client and analysis of documents formalized credit will be likely to lead to a limitation of the risk of fraud.

2.2. The scoring

It is known that lending to individuals today is done on the basis of scoring systems more or less performance. A scoring system designed in such a way as to be able to refer certain inconsistencies or discrepancies between the information entered automatically refer to those involved in credit analysis and approval, and the degree of permissively employee of the bank that is in direct relationship with customers applicants for credit access to opportunities on the application of scoring to be extremely limited, are still so many elements that would be likely to reduce the risk of credit fraud and they can expose a company in the banking business of credit individuals.

2.3. Supervising the operations information related to credit accounts

The existence of systems that do not allow providing loans without the supervision of operation by a person to view the actual documents approving the loan and the credit agreement signed by the parties, are items that cannot miss in any strategy of effective risk management.

Certainly that most banks have such systems of supervision, but it is necessary that this operation should not be done only formally, or high speed because of the many tasks that the person they are executed, but in a totally and utterly responsible and the allocation of time required for such operations.

Through such operations will be avoided and bank fraud arising from the inside, and the lending staff with access to customer accounts, through the payment of fictitious credits, without the existence of documents on behalf of customers of the bank good faith.

2.4. An information system at the level of financial market

To avoid the risk of fraud in the lending operations of individuals, but not only appreciate that there is a pressing need to achieve a level of cooperation actors on the financial market in order, on the one hand the creation of a database with more comprehensive information about individuals who already carried out operations of this market and those that will come with operations in this market. At this time there is a concern in this regard the majority of the banks by creating the Office of Credit, but we appreciate that so far the financial market has not fully hooked up to such a project.

According to latest data provided by the Office of Credit, this system is its databases based on the information supply of 30 banks that have over 98% of the retail market, 7 companies consumer credit and leasing of two companies

A database more complete would enable it to provide the kind of positive information about the financial behaviour of a potential client, and data to reflect the negative aspects of its behaviour, and information about its overall exposure. The possibility that domestic banks can obtain from such an institution rating on a customer or potential customer would be a big step on the way in developing this business segment, and on the other hand to avoid the credit risks and fraud.

2.5. Access to information managed by institutions of the state

Another way that would allow reducing the risks of credit fraud and default to which they are exposed banking companies would be represented by the adoption of a regulation which would allow access to information managed by institutions of the state. The author has in mind here, mainly the possibility that the banks may have access, under certain conditions, the information enabling verification of the items of income that actually presents customers seeking loans, such as:

- validity of an individual contract of employment of the applicant's credit company that issued the document income, the date when it is in force and duration;
- accuracy of the amount of income or revenue included in the documents presented;
- legal validity and taking in the institutions of contracts, under which a credit applicant would collect in future revenue from certain leases and the provision of professional services;
- validity of an identity document on which the bank has some doubts;
- real estate properties available to a customer, etc..

Access information of the banks to such information managed by institutions of the state would be likely to ensure a better knowledge of customers, and on the other hand would discourage attempts and fraud related to lending activity.

The author is agreed that such conduct of the state would be liable on the one hand to bring to light some law-related operations carried out by individuals, and on the other hand, the corresponding increase state revenues.

3. Knowing customers

Knowing the customer is a fundamental principle of banking business of a company entering into relationships with its customers. A bank should not enter into relationships with a client person who does not know a minimum set of information even for carrying out transactions on the account.

There is also an obligation on the banks arising from the regulations issued by the National Bank of Romania in this respect, which set a minimum set of

standards for knowledge of customers, which are clearly functional and in case of lending.

Under this regulation, banking companies operating in Romania are required to adopt policies and procedures for effective knowledge of customers to promote high ethical and professional standards and prevent the use by some bank customers to conduct some kind of criminal activities under the law.

The internal knowledge of the customers of each company bank should consider all banking operations carried out involving the receipt or distribution of funds to customers, including but not restrictive:

- opening of current accounts, deposit, savings, credit card;
- opening accounts record of securities;
- rental tapes of values;
- transactions of securities or other financial instruments, foreign exchange, precious metals, - whose value exceeds 15,000 euros in the equivalent;
- granting of credits and transactions with effect from trade.

It is noted that one of the fundamental obligations of banks operating in Romania, in global efforts for the implementation of effective ***procedures for knowledge of customers***, is developing programs of their own knowledge of the customer to be approved by the board of each banks and known by all staff. In these programs, the banks are required to include at least:

- policies for the acceptance of customers;
- procedures for identifying clients and their employers to the appropriate constituency;
- ways of making and keeping proper records;
- procedures for monitoring transactions through accounts in order to detect suspicious transactions and procedures for reporting them;
- ways of dealing with transactions and / or jurisdictions in which there is no proper regulations in the field proven money laundering;
- training programs of staff in the field of customer awareness.

To enter into relationships ***with their customers, banks are required to identify their identity and at the same time to verify this information, including direct observation of the location when deemed necessary***. The information required that the banks must require their customers individuals are: name and surname, home address, date and place of birth, code number, employer name, the source of funds; specimen signature.

Resulting from the companies that presented bank must show great care operation knowledge of customers, from the opening phase of the accounts of individuals having the legal possibility to refuse opening an account. When a company bank considers that the information presented by a person not satisfactory and has the legal obligation to observe even the location indicated by that person. If there is the legal possibility of a bank to see the location of a person opening the

account, the more such an operation is indicated in cases of suspicious transactions by credit or unconvincing.

In the business of lending to individuals is appropriate that the bank to carry out checks on some elements of the document attesting that the salary of an important document in the operation of credit, such as checking on the website of the Ministry of Finance a few items about the company that issued the document attesting , and even a brief analysis of its financial condition, a phone confirmation of the data contained in the document attesting to the number indicated on the website of the Ministry of Finance, if entered on the document attesting that the salary does not tally with that recorded in the ministry of finance is very appropriate and useful to avoid any risk of lending operation.

4. Conclusions

In pursuit of their joint bank watchers, among the objectives, and ensuring good management of their assets generating revenue. Between these assets include loans to individuals who hold shares increasingly significant assets in the balance sheet of banks.

Achieving this goal by banking companies require the use of appropriate means, methods and techniques, and their undertaking appropriate actions of the most diverse. Among these should be included and concerns for proper management of credit risk and the fraud.

To ensure their protection against internal and external, we appreciate that some of the measures identified in this paper may be the subject of analysis and reflection for both the bank and for some institutions of the state.

THE PROTECTION OF THECREDIT INSTITUTIONS AGAINST MONEY LAUNDERING

Ph. D reader **Victor Troaca**
„Titu Maiorescu" University, Bucharest
e-mail: victor.troaca@brd.ro

Abstract:
Credit institutions, as well as the other institutions integrated into the financial system, are subject more and more to some attempts from the simplest to the most sophisticated, with some most various means and instruments, of their perspicacity and utilization with a view of money laundering of some assets obtained from illegal activities, and also the assurance of funds necessary for terrorism financing, from the part of some groups with abstruse interests. In this context the financial community has to adopt measures meant to protect it from the implication in such actions. The more and more emphasized connection of Romanian financial to those European and international ones, brings upon that the Romanian credit institution should adopt the necessary measures, according to those adopted globally, so that to ensure their security and credibility.

Key words: money laundering; clients; clients 'knowledge; banking control.

1. Global actual context of fight against the money laundering

The preoccupation of the national and international authorities to the insurance of the financial stability and the avoidance of involvement of bank systems in operations of capitals laundering, has stressed out once with the financial-economical globalization and the intensification of some groups attempts to carry out criminal and illegal operations, as well as those intention to use the financial institutions in order to launder the capitals obtained from this kind of operations.

Thus, to avoid using the bank-financial systems in order to launder the capitals got by their potential clients out of criminal and illegal operations and to avoid implicating the banking and financial institutions in such kind of operations, regulations have been adopted both at international and national level, which allow the perfecting of a logistic and some adequate mechanisms, regulating meant to impede the use of the financial institutions in questionable operations of capitals „whitening".

There have been created at international, European and national level competent bodies to deal with the research of the dubious operations, and to

cooperate with the financial institutions, in the common effort to avoid their coming in illegal operations.

A Group of financial action and fight against capital laundering (GAFI) has been created inside the Bank of International Regulations, in order to support the national authorities and financial institutions efforts in their fight against their use in criminal operations and also of financing of such kind of operations. This Group has elaborated two highly important documents used by the credit and financial documents from all over the world, namely: 40 recommendations of GAFI to fight against capitals laundering (2003) and the special recommendations of GAFI - in number of 9, referring to the financing of international terrorism[379]. In order to encourage the world states in the application of the two documents mentioned above, GAFI has elaborated also a methodology of evaluation for national systems of fight against capitals laundering and financing of terrorism (LAB/CFT)[380], that has been agreed by the international financial institutions, including the World Bank and the International Monetary Fund.

The central place of these regulations of fight against the use of financial systems for capital laundering and financing of terrorism is occupied by the responsibility of the financial institutions related to „***clients 'knowledge***". To match the national efforts with those of the international and national financial institutions in establishing the criteria and the clients knowledge mechanisms, the Committee from Basel for banking control has preoccupied and elaborated more recommendations in the field of clients knowledge, addressed to international banking community.

At a European level, the preoccupation for implementation of the recommendations of GAFI, recognized as being the main international body of fight against capitals „whitening" and financing of terrorism[381], has been effected in the adoption by the European Parliament of Directive number 60/October 25th, 2005, regarding the prevention of using the financial system in facts of „whitening" the capitals and financing of terrorism[382]. Such European regulation is applicable to the credit institutions, financial institutions, legal and natural person who exercise professionally, such as: accounts commissaries; accountant experts, fiscal counselors; notaries and other members of independent juridical professions who participate personally or in their clients' name at financial or real transactions or assist their clients in the accomplishment of the transactions stipulated expressly in the Directive; real agents; other natural or juridical persons who effect payment operations bigger than 15,000 Euro and the casinos, as well. Each of the „actors"

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[1] *Duty of diligence of banks on the subject of clientele*, Committee of Bales on the banking control, Bank of International Regulations, October, 2001, page 1, Textbook of intention for payment and of evaluators, FATI/GAFI, February, 2006, page 5.

[2] *Textbook of intention for payment and of evaluators*, FATI/GAFI, February, 2006, page 5.

[1] Directive 2005/60/EC of the European Parliament and of Council of October the 25th, 2005, regarding the prevention of using the financial system for whitening the capitals and financing the terorism, Official Journal of the European Union, l.309 of 25th of November, 2005, page 15.

[2] The same.

implied in the European Directive application have established responsibilities and express statuary obligations in this. At the same time, the obligation of the member states of the European Community is regulated, to create specialized institutions, in which to assure, on one hand, national coordination of fight against money laundering and fight against financing the terrorism, and, on the other hand, the collection of information given by the actors implied in applications of Directive.

Therefore, a specific legislation has been adopted in our country and has also been created, ever since 1999, The National Office for Preventing and Fighting Money Laundering, whose attributions and responsibilities have been actualized back in 2006[383].

2. Recommendations from Basel Committee for bank control referring to clients 'knowledge

At the same time as the growth of the financial operations complexity, of innovation in the bank and financial field, but also as the manifestation of the interest of some groups with criminal and illegal activity to drag the national banking and financial systems and also international into operations of launderings of funds obtained by these operations, the Committee from Basel for banking control inside the Bank for International Regulations has initiated and preoccupied of elaboration for some studies and recommendations about the clients 'knowledge, which have been addressed to international banking society, in order to support it in the adoption of adequate measures to avoid their training in criminal and fraudulent operations .

The Committee from Basel for bank control has published its recommendations in the field of clients 'knowledge (CC) in the framework of three important documents, that reflect the evolution in time for the cautious[384] thinking. The first document «***Prevention of using banking system for laundering funds of criminal origin***» was elaborated and diffused in the year 1988 and comprises the basis ethical principles for clients 'knowledge and encouraging the bank to set up and dispose on the efficient procedures for clientele's identification.

The document was recommending to the banks to apply the principle of refusal for dubious transactions and the cooperation with the authorities implied in the application of the lawfulness.

The second document «***Fundamental principles for an efficient banking control***» was spread in 1997 and comprises a wide analysis on internal control, underlining that the banks should dispose on politics, procedures and rigorous rules of clients 'knowledge. The documents recommended at the same time to the

[3] Law 656 from the 7th of December 2002, for prevention and sanctions of money laundring, as well as setting up some measures for the prevention and fighting gainst financing facts of terrorism, the Official Gazzette of Romania no.904/December the 12th, 2002, with the further modifications. This law abrogates Law no.21/1999 for prevention and punish money laundring.

[4] *Duty of diligence of banks on the subject of clientele*, Committee of Bales on the banking control, Bank of International Regulations, October, 2001, page 4.

control authorities to encourage the adoption of recommendations corresponding to the Group of financial action and fight against capital laundering (GAFI). The document is filled in with recommendations referring to the clientele's identification, as well as the increase of the preoccupations of financial institutions to detect and notify the dubious transactions.

In the year 1999 the document from1997 is completed with the third document named:« Methodology of the fundamental principles», among them there are to be numbered other additional essential criteria. Simultaneously, in 2003 GAFI brings to actuality and develops the former recommendations concerning the problems of fight against capitals laundering and their use to finance the terrorism.

In the year 2001 the Committee from Basel for banking control, through the Group of Work regarding the bank activities over boarders, having as member's great personalities from banking world from nowadays, elaborates and publishes a new document «***Duty of diligence of banks on the subject of clientele***»[385]. A few elements are to be remembered from this document:

- Efforts of the Committee are part of the fight against the funds laundering by means of banking institutions, out of a cautious perspective much wider.
- The recommendations of the Committee are based upon the experience and practices followed in the member states and taking into account the evolution in the caution domain.
- The lack of regulations referring to the clients 'knowledge or their inadequate are meant to expose the banks to serious risks, such as reputation risks, operative risks, juridical and concentration risks.
- All banks must be compelled to dispose on a range of politics, practices and procedures meant to promote to the highest the ethics and professionalism and to prevent from their usage, intended or not, in the framework of criminal activities. In the elaboration of their programmes the banks have to take into account essential elements of risks administration and control procedures, being mentioned: politics of acceptance for the new clients; identification of clientele; a continuous surveillance of accounts and transactions bearing a high risk; risks administration. The recommendation makes detailed references to each of the elements mentioned above.
- The banks have to define their politics and obvious procedures for the new clients 'acceptance.
- The documents underline the fact that the clients' identification represents the key element of CK regulations (clients 'knowledge).
- It is also underlined the role of national control authorities to elaborate their proper programmes in this field, on the basis on CK international regulations.
- The control authorities are responsible to oblige the banks dispose on proper CK procedures and also to pursue their way of compliance.

[1] The same.

- The national authorities are requested to elaborate rules and procedures in accordance with the international regulations in the field of clients 'knowledge in order to assure security and integrity to international and national banking systems.

The conspicuous globalization of entire financial and economical life brings surely about efforts, resources, and more and more sophisticated mechanisms, in order to face the intentions and attempts of coming in of local financial systems and thus the access to the international ones, with a view to capital laundering, come from illegal operations and of assurance of resources necessary for financing the terrorism. Financial institutions are obliged, therefore, to give financial amounts to assure that their systems are a good filter for the identification and stoppage of any access attempt of the potential users with a view to effect some operations such as those of money laundering and the assurance of the financial resources for financing the terrorism.

3. Practice unit on the knowledge and customer knowledge

Like you said and above, the core of avoiding the use of the financial system for money laundering and terrorism sources financed, is knowledge and customer knowledge by the institutions that perform activities of that nature and to get in touch with many customers and very diversified.

The need to harmonize national legislation with international practice in the prevention of money laundering and combating the operations of Grants terrorism, led the Romanian authorities to adopt a special law in this regard and to issue specific regulations[386]. According to these regulations Romanian authority invested by law with responsibilities related to the prevention and combating money laundering is the National Office for the Prevention and Combating money laundering.

Also in this area responsibility back: banks, credit institutions, financial institutions; insurance and reinsurance companies, individuals and legal assistance agreement specialized in legal, notary, accounting, banking, companies who perform activities of gambling, weapons, sale of art objects, precious metals and precious stones, dealers, tourism, post offices and yours; property agents, the state treasury, exchange offices, other natural or legal persons to perform any other activities which involve putting in circulation of values.

[386] Law no.656 din 7 December 2002, for preventing and punishing money laundering, Official Monitor no. 904/12.12.2002 with the ulterior modifications; Government Decision no.594 din 4 June 2008 regarding the approval of the application regulation of Law no.656/2002 for preventing and punishing money laundering, as for taking some preventing and fighting the financing of terrorism documents measures, Official Monitor no.444/14.06.2008

For credit institutions this is completed, and with a special regulation issued by the regulator, followed by National Bank of Romania[387].

Thus, credit institutions have the obligatorily to have ***knowledge of the internal rules of its customers*** to prevent their use for work and wish to activities aimed at money laundering or sources financed acts of terrorism. These rules must include at least the following elements:

- policy for the acceptance of clients, which establish at least categories of customers that institution proposes to attract, the gradual acceptance and approval of the hierarchical level of acceptance of clients depending on the degree of risk associated category are the types of products and services can be provided for each category of customers;
- procedures for identifying and monitoring framework for their clients to the appropriate customers, and to shift from one category to another constituency;
- contents gauge, measures and simplified measures to their knowledge of customers for each category of customers and products or turnover put these measures;
- procedures for monitoring operations performed by the client in order to detect unusual transactions and suspicious transactions;
- ways to approach of transactions and has clients in or from jurisdictions are not required
- application procedures there's knowledge of customers and to retain evidences about this and that their application is not supervised by an authority;
- drafting and retain evidences which are appropriate, as well as determining access to them;
- procedures and measures for checking the mode of implementation of the rules drawn up and assessment efficiency, including through external audit;
- standards for employment and training programs for personnel in the field of knowledge customers;
- internal procedures for reporting to the authorities

To know its promise customers a institution of credit can use a scale of gradual measures classified standard, further measures and simplified. Thus, the standard of knowledge applies to customers. Status expressly covered, of which remember: a) the establishment of a sex business, and the opening of accounts, b) in carrying out occasional transactions amounting to at least 15,000 euros or equivalent whether transaction domestically through one or more continue which seem to have a link between them; c) when there are suspicions that such operations are aimed at money laundering or sources financed acts of terrorism,

[387] Regulation no.9/3.07.2008 regarding the knowledge of clients for money laundering and terrorism financing, National Bank of Romania, Official Monitor no.527/14.07.2008.

regardless of the amount of operations; d) If there are doubts on the veracity or identifying information already held about the client.

In the standard of knowledge of customers, credit institutions have obligations to identify ***clients as individuals***, though not from these people at least the following information: name and surname and, where appropriate, nickname, date and place of national and society; code number or if appropriate, another item unique identification similar; residence and, if appropriate, meeting, telephone, fax, postal address and electronics; nationality; jobs, name of employer or nature of the activity own; important public function held ; real name of the beneficiary.

Checking the identity of a client when opening the account or making further operations are conducted on the basis of documents of the kind more difficult to forge or obtained about illicit under a false name, such as identity documents issued by a competent official, which includes a photograph of the holder.

With regard to verification of information it can not be documented evidence, they will be checked by the credit institution by any method that allows this, such as direct observation to address through an exchange of correspondence or access number phone provided by the client, by checking information on supplied by the customer listed on various payment invoices submitted to the customer, be its tax or statements of account or access to public information.

As regards the ***legal sense***, their identification, credit institutions have to obtain at least the following information: name, legal form, registered office and headquarters which is the center of leadership and management ,activity statutory, telephone number, fax , Postal address and the type and the nature of the activity run out, the persons who, according to documents constituents and the decision of the statutory, are invested with the driving competency and represent the entity, as well as the powers of their employment entities; real name of the beneficiary, the identity of the person acting on behalf of the client's authorization held in this regard.

Credit institutions also have the obligation to verify the legal existence of entities, and if it is registered in the Register of Commerce or, in another public register, as well as information and corresponding documents of the identity of the person: name and those relating to the nature and limits of empowerment.

The information provided by the client must be verified by any method, to ensure the reliability of such information, such as by obtaining data from the client or from a public register or from both sources, the documents which formed the basis registration or recording them and an excerpt from that day to register by obtaining a copy of the latest audited financial Status by consulting the public or specialized attorney at law, or audit societies, by direct observation of the location or headquarters indicated by exchange of correspondence or telephone access number provided by customer, by obtaining of reference from another institution of credit or public authorities.

Additional measures and the simplified shall apply to transactions that credit institutions carried out with clients after opening their accounts. Scope and

depth is determined by the complexity and the risk of operations in which the bank be involved with a client or another.

Obviously all of these measures may be applied with a staff well prepared and informed in a system and procedures of well-structured and operated within each credit institutions.

4. Conclusions

To ensure protection against any attempts of involvement in illicit continuity meant laundering money or transfers of funds of illicit obtained in order to finance acts of terrorism, credit institutions have the responsibility and at the same time obligatorily to adopt minimum extent in accordance with regulatory requirements.

This phenomenon is present at the international level, and against who have joined the energies of authorities, institutions, regional bodies and international business companies and international companies, especially in the field of banking.

In this context, any measure taken by a credit institution, which can contribute to the identification of possible continuity on the nature of money-laundering and the suppression involved, is successful and contributes to the global effort to eradicate this phenomenon.

SOCIO-JURIDICAL ASPECTS CONCERNING THE SEGMENT OF POPULATION IMPRISONED IN ORADEA PENITENTIARY FOR HAVING TRANSGRESSED THE LAW IN THE BUSINESS FIELD

Candidate to Ph.D Gabriel Tica
Candidate to Ph.D **Ioan Ilea**
Candidate to Ph.D **Dan Lele**
Ministry of Justice
Oradea Penitentiary

Abstract:
The purpose of this paper is to highlight the social profile of delinquents that have committed offences of economic nature. The subjects considered in this paper are persons deprived of liberty that are in the custody of Oradea Penitentiary, having been imprisoned for transgressing the law in the business field. As a research method we have used the analysis of documents: it allowed us to obtain pertinent information concerning the phenomenology of persons condemned for having transgressed the law in the business field.

Key words: law transgression, Oradea Penitentiary, persons deprived of liberty, business.

1. Introduction

This papers aims to underline the socio-juridical characteristics of delinquents that have committed offences of economic nature, starting from the premises that there are some differences of social nature between this category of persons and other delinquents. The subjects taken into consideration when writing this paper are persons deprived of liberty that are in the custody of Oradea Penitentiary, who have been imprisoned for having transgressed the law in the business field. The observation and evaluation of these persons has been made by using the method of document analysis, which provided us with pertinent information concerning the phenomenology of persons condemned for having transgressed the law in the business field.

2. Conceptual framework

The definitions for the economic delinquency are very diverse, since there are differences resulting from the diversity of juridical systems that sanction such transgressions of the law, characteristic of each country in particular.

The Swedish juridical system defines law transgression in the economic field as the sum of actions that are punishable when committed continuously and systematically, with the aim of obtaining financial advantages from outside the legal business background. In Sweden, the debates concerning the economic delinquency refer to the peculation of taxes and other prejudices caused to the state. The victims of economic criminality are the employers, the creditors, the employees, the population, the buyers, the competitors and the state, as well as the society at large (Svensson, p.6).

In the American society, the economic criminality is associated with any non-violent act or illegal activity that involves fraudulency, falsification, receiving, manipulation, abuse of trust, cunningness or illegal gains. (American Bar Association)

The boundary between the economic delinquency and other forms of law transgression is rather vague. The economic criminality refers to a transgression of the law in the economic domain, concerning commercial and industrial activities. There is no single definition that might indicate what the concept of economic delinquency should refer to. However, two categories of law transgression are considered dominant: the one concerning the accounting documents and the one referring to taxes and income taxes. (Jonsson & Persson, p.17)

Theoretical perspectives

The theoretical perspectives upon the causality associated with economic delinquency are very varied.

One of the dominant theories concerning the economic delinquency is the actionist paradigm (Benthan, Tarde), that starts from the idea that the deviant act is the outcome of a certain decision, made after the transgressor has considered more or less seriously the advantages and the inconveniences of the options he or she has chosen. The authors mentioned above try to explain the characteristics of a certain deviant act by identifying the circumstances that might have influenced the evaluation, by transgressors, of advantages and disadvantages that might accompany their decision. This paradigm has been given many names: the strategic analysis, the theory of opportunities, the rational choice perspective, the limited rationality and the economic theory of transgression. (Boudon, p. 463)

Other theoretical approaches begin their explanatory exposition by referring to a corrupt organizational milieu. Thus, a study by Levine has defined the

psychological meanings of understanding corruption as being an attack upon the norms that guide a certain organization. A first question that appears is the following: why does an individual fail to resist the observance of regulations, and part of this failure encompasses the characteristics of corruption: greed, arrogance, a sense of rightfulness, the idea of virtue as personal creed and the impossibility to distinguish between the organizational and the personal aims. The essay emphasizes the moral aspect of the problem and suggests that this moral aspect leads to the interpretation of facts as corruption, as a strong attachment to a primitive moral thinking rather than as a rejection of morality. (Levine, p.724)

Other theoretical perspectives discuss the corporative criminality. From this perspective, researchers analysed even the public support for a sustained resistance to corporation criminality (Unnever). The recent increase in corporative criminality has brought about the question whether the public opinion is worried about the control of a legislation that is not observed in the business field. Using an example from the American context, researchers tried to find out whether the Americans wanted to pass stricter regulations concerning the capital market and were in favour of more severe penal sanctions for the executives of corporations that conceal the real financial situation of their companies. The results have indicated the fact that Americans are in favour of strict regulations against the transgression of the law by corporations. The analysis indicates the fact that among the people in this group there are differences of opinion regarding the public support for politics that control the corporatist criminality. Although both the liberals and the conservatives are in favour of sanctioning the corporatist criminality, the Afro-Americans prove more approving than the whites of stricter and more severe politics regarding the corporatist criminality. In conclusion, the punitive attitude is socially constituted and based upon beliefs that reflect the dynamics of class conflicts and inter-racial relations. (Unnever, p.164)

The research in the field of economic delinquency has also concerned the feminist groups. The studies that analyse the involvement of women in law transgression in the economic field regard the concept “economic” as problematic. The feminine criminality (Davies) is associated with economic benefits, and the feminine criminality in economic terms is considered inadequate in relation to the data it provides. In the re-evaluation of the concept of economic delinquency, the feminist groups demand that this should be understood in terms of situations that favour the transgression of the law, being in a weak relationship with the economic benefits, given the variability of factors such as gender/liberty/invisibility/specificity. This study provides an original feminist reading of contemporary analysis in the field of criminality, markets and the theory of rational choice: it also refers to the economic criticism, of a feminist nature, concerning the attainment of the economic order. The higher purpose of this study is that of illustrating the problems associated with classifications and the economic definitions regarding criminality; it also intends to bring forth the argument suggesting that the concept “economic”, used in criminology, needs a feminist critical re-evaluation. (Davies, p.284)

The explanatory theories concerning the transgression of the law in the economic field are widespread and they focus upon the phenomenon of corruption. An interesting analysis of this phenomenon can be found in an article (Hu & Gunnison) that looks at the corruption characterising the criminality of white collars in China, a country that is well-known for its consistent involvement in the fight against corruption, and especially for the strict punishment (even the capital punishment) of persons guilty of such acts. The nature and characteristics of corruption delinquencies, the legislation in the field and the reaction of justice at such delinquencies is debatable. An evaluation of 1554 legal cases, upon which a judgement has been pronounced between 1986 and 2001, suggests that the delinquencies involving corruption differ significantly from those in which corruption is not involved in terms of the imprisoned persons, the characteristics of the delinquent act and the legal solutions provided by the decisions of law courts. A more careful analysis of the impact of corruption cases upon legal decisions indicates the fact that, irrespective of the way the delinquents have been sanctioned, once condemned, they have been sentenced for a long period of time. The article explains, in a paradoxical manner, the way of treating delinquents guilty of corruption, both before and after the condemnation, and makes reference to the cultural singularity of Chinese expectations with reference to clerks, since they enjoy many privileges and pretend to be exemplary moral persons. The conclusions of the article suggest that the Chinese contemporary legal system is circumscribed by political and cultural structures, especially with regards to the legal sanction concerning corruption acts. (Hu & Gunnison, p.29)

4. Data concerning the Romanian context

Before presenting some data concerning the dimensions of the economic delinquency, we need to mention the fact that the literature dealing with criminology makes a clear distinction between real delinquent acts (the figure that indicates the real dimension of the penal illicit); the discovered delinquent acts (delinquent acts discovered by the social control organisms); and the judged delinquent acts (the delinquent acts that have been judged and sanctioned by law courts). The differences between these categories can be explained by the fact that many delinquent acts are clandestine and never discovered, as it happens with many delinquents. At the same time, some delinquent acts are not given evidence by penal organisms, either because of fear (the revenge of the wrongdoer) and embarrassment, or because of the rather difficult and long procedure of passing legal sanctions. In the economic and financial field we suppose that we can identify some delinquent acts committed by clerks or official persons that are either not discovered, or are not registered and passed legal sanctions upon. These refer to frauds, commercial and financial corruption, counterfeiting brands or patents. In the famous work entitled *The Criminality of White Collars,* E. Sutherland

demonstrated the existence of many illegal acts related to some commercial and financial business in the American society. From his point of view, the economic costs of misappropriations, frauds, counterfeiting products and unjust political business performed by important office holders possibly gets beyond the economic cost of common transgressions of laws. (Banciu, 2004, pp.29-30)

The work of Petre Buneci, entitled "Elemente socio-juridice de control social pe terenul devianței" (Socio-juridical Elements of Social Control in Terms of Deviance), refers to the economic trespassing of the law in Romania during the last decades. Referring to law trespassing in the banking and financial sector before 1990, the author affirms, with a high degree of incertitude, that criminal organizations did not activate in our country, since they were kept in check, given the strictness of co-ordinates on which the economic, accounting, financial and frontier activities could be performed. After December 1989, the criminality in the banking and financial sector has increased in dimensions and intensity, and this sector has become incoherent and nebulous. The multitude and diversity of causative factors have brought about a lack of knowledge, registration and intervention on the part of the judicial system, confirming the hypothesis that states that the real dimension of criminality is considerable, and the real criminality is more extended than the one presented in statistics provided by institutions with anti-delinquent attributions in Romania. (Buneci, 2004, p.169)

With regards to real data concerning the extension of criminality in the field of business, we can say that we do not benefit from a reasonable amount of information, rather that the research and results obtained in this area are few and unsatisfactory. A study that can be considered relevant in the field is that conducted by *Pricewaterhouse Coopers*, concerning the economic delinquency in 2007. The study is entitled "*The Economic Delinquency: People, Organizational Culture and Control*", is published every two years and uses a sample of 5400 companies in the whole world, being the most comprehensive account of this kind. The study is the result of the collaboration with Martin Luther University of Halle-Wittenberg, Germany. The survey indicated the fact that 43% of the respondents at the global level and 36,4% of the Romanian respondents have been victims of one or more economic delinquencies during the last two years. The total of direct losses declared by respondents was of 4,2 billion US dollars at the global level and 13,7 billion US dollars in Romania. The losses were the result of economic delinquencies such as the misappropriation of actives, accounting frauds, bribe and corruption, or the illegal appropriation of intellectual copyrights. According to this study, almost half (which is roughly the same level as in 2005) of the organizations that contributed to the survey declared they have been victims of economic frauds in the last two years. Together with the financial losses caused by frauds, the companies have suffered significant "collateral prejudices" related to their current activity and the success of their business. Among the ones that declared to have been the victims of frauds in Romania, 88% declared collateral prejudices. The opinion poll has indicated the fact that the economic fraud has a universal character

and influences companies of different sizes, from all the continents and the activity sectors.

Even though fraud remains a very difficult problem, the majority of companies are confident that their own controls will limit in the future the risk for fraud. Only 13% of the Romanian respondents (11% at the global level) believe that it is possible to become victims of economic fraud in the next two years. No sector of activity is immune to fraud. Frauds are widespread especially in the assurance sector and in the retail commerce, where 57% of the firms have declared frauds, figure followed by the governmental and the public sector, with 54%, by the financial service, with 46%, by the car-building industry, with 44% representing the percentages at global level). The most frequent types of fraud in each sector of activity vary in terms of the specific characteristics of each sector in particular. The most frequent type of fraud is the theft, mentioned by 23% of the respondents that declared they have been victims of economic frauds in Romania. The infringement of the intellectual property and the accounting fraud have both been declared by 15% of the Romanian respondents, the corruption and bribery by 10% and money laundering by 1%. From the number of *fraud authors* in Romania, 89% are men, their most frequent age being between 31 and 50, and out of whom less than half (47%) have graduated college or had post/graduate studies. About 20% used to be employed by the company they have swindled, 48% being part of the top management, while 83% had been working for more than five years for that particular company. The most frequent *reasons for fraud* are simple – the need and the greed. The opportunities for fraud appear as a result of unsuitable control and of an organizational culture that does not support loyalty, ethics and the observance of rules. According to the poll, the reasons that explained the frauds, mentioned by the Romanian respondents, have included the lack of awareness regarding the gravity of the fraud – 52%, a weak resistance to temptation – 45% and a weak level of dedication for the company – 41%, financial stimuli – 33%, the desire for an expensive lifestyle – 32%. The internal collaboration (with other people committing frauds) has been mentioned in 44% of he cases, the avoidance of management control – 30%, the insufficient number of controls at the company level – 26% and the collaboration with entities from outside the company – 26%. Despite the fact that all the Romanian respondents declared they had implemented at least a control measure aimed to discover and prevent economic frauds, 39% of the fraud cases have been discovered by chance, or due to some external indices – while the most efficient method of control – the internal audit – has represented a method of initial tracking down for only 13% of the declared cases, which emphasizes the importance of a transparent organizational culture that allows the employees to recognise and lay open the incorrect behaviour.

5. Research question

What is the social profile of the person who trespasses the law in the business field?

6. Study design

The evaluated population segment

The population segment that we had in view was that of the imprisoned persons in the custody of Oradea Penitentiary, while the analysis and registration unit will be represented by the condemned persons that execute punishments depriving them of their liberty for actions related to the business field. In identifying these persons we started from penal actions that can be identified in the business field and that are considered delinquencies. The majority of these actions are mentioned in the Penal Code (fraudulency, usury, frauds related to weighing and measuring, frauds concerning the quality of goods, the disclosure of the economic secret, counterfeiting the object of some investigation, the distribution of counterfeited products, disloyal concurrence, disobeying the dispositions regarding the import of remnants and residues); Law no. 161 from 19th of April 2003 concerning some measurements regarding the assurance of transparency in the exercise of public dignities, of public functions and the business environment, the prevention and sanctioning of corruption; the Customs Code; Law no. 87 from 1994 concerning the rebuttal of tax evasion; Law no. 656 from 2002 regarding the measures for the prevention and rebuttal of money laundering.

This study was initiated on the 15th of August 2008. At that date, 606 persons deprived of liberty were imprisoned in Oradea Penitentiary. Out of these, 20 were imprisoned for illegal actions performed in the economic domain. They represent the analysis and registration unit.

The type of research

This study is characterised by the following particularities: the research method is the analysis of documents, more exactly indictments, penal sentences, charge sheets (these being the most trustworthy source of information for the segment of population that present a law degree of trust, given their repeated transgression of juridical norms); the research is not aimed at being a location study, but one conducted at the plan of disseminating the information collected from official documents; we have not interacted with the segment of population under research, since it is generally reluctant to such studies and the data gathered in this way might suffer from consistent

distortions; the qualitative type of analysis is combined with the quantitative type; the gathered data is predominantly transversal, having in view the specific of the trespassing of the law, committed under the aspect of their encounter in a relatively short period of time; we intend to use comparative analyses; we don't intend to obtain results with a high degree of specificity, the aim of the study being rather an illustrative one; we don't focus upon mass phenomena, but rather upon individual cases (20 persons).

Gathering and presenting data

In order to better design the particularities of the social profile of the person condemned for economic and financial fraud, by comparison with the rest of the population imprisoned in Oradea Penitentiary, we aimed to discover and gather data characterising this segment of population, effectual at our reference date, the 15th of August 2008. Thus, in Appendix 1 we presented the structure according to age categories; Appendix 2 – the structure in terms of sex; Appendix 3 - the structure in terms of the delinquency type; Appendix 4 – the structure related to the length of the punishment period; Appendix 5 – the structure in terms of relapse; Appendix 6 – the structure in terms of civil status; Appendix 7 – the structure in terms of education level; Appendix 8 - the structure in terms of religion; Appendix 9 – the structure in terms of the regimen for the execution of the punishment by the imprisoned persons that are in the custody of Oradea Penitentiary.

The data that we consider relevant for the attainment of our objective, respectively design of the socio-juridical profile of people trespassing the law in the business field are: age, gender, the delinquent act, the length of the condemnation, the penal antecedents, the profession, the occupation at the moment of the arrest, the civil status, education, religion, the residence environment and the regimen for the execution of the punishment. After gathering the above-mentioned data, we have devised the table included in Appendix 10.

After considering the penal actions that have been committed by the 20 persons deprived of liberty for having trespassing the law in the business field, we concluded that: 11 persons have put into circulation CEC pages or uncovered bills payable to order; 2 did not mention in the accounting documents certain amounts of money; 1 person received money and put into circulation false receipts; 1 person demanded and received money for VAT return; 1 person delivered products with false invoices and receipts; 1 person did not pay customs taxes; 1 person took from a company bank account a sum of money, by using false documents; 1 person pretended and received money for executing certain works; 1 person did not pay the price of some materials.

7. The interpretation of data

We believe that we can design a double plan socio-juridical profile of persons having committed delinquent acts in the field of business, who are in the custody of Oradea Penitentiary. The first plan reflects strictly the characteristics of this group of persons, while the second one outlines the profile by making comparisons with the social attributes of the entire effective of persons deprived of liberty and found in Oradea Penitentiary.

The socio-juridical profile of the group of delinquents form the business field

We shall outline the "portrait" of the delinquent from the Romanian business field starting from the analysis of information presented in Appendix 1.

As far as their *age* is concerned, these persons are between 29 and 60 years old, the average age being of 41,05 years. It is worth mentioning the age of these persons at the moment of committing the crime - around 34 years - and that the age interval is included in the segment 22-54 years old.

The gender of the persons we had in view is predominantly masculine, only two women being present among this group.

The penal actions of the group we had in view are generally considered frauds (15 cases), the rest being considered more rare penal actions.

The period of punishment is between 3 and 17 years, the media being of 5 years and 8 months.

With regards to the *delinquent antecedents*, most delinquents from the group we had in view (9 cases) did not have penal antecedents, while 6 are recidivists and 5 present penal antecedents.

In terms of *occupation* at the moment of the arrest, the majority of persons (13 cases) had a sort of "parasite" existence, while the others had heterogeneous occupations.

The *civil state* of the persons included in the group we had in view indicates that most of these persons are married (4 cases), 3 are divorced and one is a widower.

In terms of *education*, the delinquents who have trespassed the law in the economic field usually finished the high school (7 cases), while the others have studies close to this level.

The religion of most persons in the group we have referred to is orthodox (14 cases), the other cults having fewer "representatives".

The residence environment of the persons we had in view is largely urban (18 cases).

The regime for the execution of the punishment for the persons who have trespassed the law in the economic field is almost evenly distributed - the open regime (6 cases), the semi-open one (7 cases) and the closed one (7 cases).

The characteristics of persons having committed frauds in the business field, compared with those of the rest of the imprisoned population

We shall compare the characteristics of the segment of imprisoned persons who have trespassed the law in the business field with the ones of the other imprisoned persons that can be found in the custody of Oradea Penitentiary. The data we have obtained can bee observed by visualising and comparing Appendices 1-9 with Appendix 10.

The average age for the persons who have trespassed the law in the economic field is of 42 years old, higher than the average age of the entire imprisoned population (about 34 years old).

The men/women proportion does not present important differences, it being of 10% in the case of the group we had in view, compared with 6,8% in the case of the entire population imprisoned in Oradea Penitentiary.

The penal deed for which the persons belonging to the group we had in view predominantly refers to frauds (15 of the situations), by contrast with the thefts and robberies that represent 60,5% of the criminal acts for which persons execute penalties that deprive them of liberty in Oradea Penitentiary.

The length of the punishment period for the ones condemned for having trespassed the law in the economic field is generally longer, in most cases (13), than 1-5 years. Most persons imprisoned in Oradea Penitentiary are condemned for roughly the same time period.

The structure concerning the *penal antecedents* of persons belonging to the group we had in view presents approximately the same proportions as the total number of persons deprived of liberty in Oradea Penitentiary.

The civil status of persons belonging to the group we had in view differs to an important degree. Among the investigated group, most persons are married, while the rest of the imprisoned persons are mostly unmarried.

With regards to the *education level*, we can observe significant differences between the two "delinquent communities". The ones having trespassed the law in the economic field generally finished the high school, while most of the

other persons imprisoned in Oradea Penitentiary have finished only the secondary school.

In terms of *profession and occupation* at the moment of committing the crime, comparisons are difficult to make, given the diversity among the groups.

We can identify similarities in terms of the *religion* of the subjects, in both cases most persons being orthodox, followed by reformats.

We have observed differences in terms of *residential environment*, since the majority of persons belonging to the group that we had in view come from the urban background (18 out of 20), while the subjects belonging to the second group come mainly from the rural environment (57,5%).

We can observe certain similarities in terms of the *execution regime*, most persons being classified in a semi-open regime, than in the closed and the open regimes.

8. Conclusions

If we were to perform an exercise of the imagination, with the aim of outlining the profile of the person who transgresses the law in the economic field and is imprisoned, we could imagine a man of about 34, that commits a fraud in the business field and risks a punishment with imprisonment for a period ranging between 5 years and 8 months, who does not have penal antecedents, does not have a stable profession and occupation, is married, has finished the high school, comes from the urban environment and is an orthodox. It is clear that such an individual does not exist: it is rather an imaginary construct, made up of the majority of socio-juridical attributes characteristic of those having trespassed the law in the economic field and is imprisoned in penitentiaries.

The person condemned for delinquent acts that have connection with the economic domain differs from other imprisoned individuals by the fact that he or she is older, has fewer penal antecedents, is married, presents a superior education and belongs to the urban environment.

The outlining of such "socio-juridical portraits" can prove beneficial, since it can help many persons obtain a better understanding of the deviance phenomenon in the economic and the financial field; it can also help the segment of population, liable to be swindled by persons who try and manage to transgress the law, to protect themselves.

The literature is rich in papers that approach the measures for preventing fraud in the economic field. Thus, in the work entitled *Preventing delinquency*, M. Cusson specifies the fact that the measures against delinquencies within a

company comprise the actions related to the activity of the employer and the actions that are associated with the security manager. The first category of measures is a matter of managing the personnel and ensuring good accounting actions. It refers to the just and equitable treatment of the staff (the more attached an employee is to the company in which he or she works, the less likely he or she will be to get involved in disloyal actions); to hiring procedures (a system of recruiting the personnel that helps identifying and rejecting the unjust candidates); to accounting and the separation of responsibilities (it is more prudent to hire different persons for the following operations: the written authorisation of buyers, the receipt of goods and the keeping of registers and the inventories (Cusson, pp.170-172). The second category of specific measures refers to the security service (Cusson, p. 173) and includes the following: clear regulations and sanctions (the normative ambiguity favours the theft) and the situational prevention (supervision, checking, ensuring the physical protection and the control of access places, etc.).

A unanimously accepted idea is that the delinquency in general and the delinquency in the economic field in particular cannot be eradicated, but only controlled and reduced by different means. This involves a good knowledge of the deviant phenomenology, obtained by analysing very accurate pieces of research, by the formation and stimulation of specialists that fight against delinquency, and by the existence of a solid legal context, which discourages and severely sanctions the ones who negatively influence the good functioning of society, irrespective of the social sector in which the penal action is committed.

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Appendix 1 -

Age category	Number of persons	Percent
14 – 17 years	3	0,5%
18 – 20 years	40	6,6%
21 – 30 years	234	38,6%
31 – 40 years	207	34,2%
41 – 59 years	115	19,0%
Over 60 years	7	1,1%
Total	606	100%

Appendix 2 - The structure, in terms of gender, of the imprisoned population in the custody of Oradea Penitentiary, at 15.08.2008

Gender	Number of persons	Percent
Masculine	565	93,2%
Feminine	41	6,8%
Total	606	100%

Appendix 3 - The structure, in terms of the type of delinquency, of the imprisoned population in the custody of Oradea Penitentiary, at 15.08.2008

Type of delinquency	Number of persons	Percent
Theft	190	31,4%
Robbery	176	29,1%
Killing	85	14,0%
Rape	33	5,4%
Fraud	28	4,6%
Others	94	15,5%
Total	606	100%

Note: of the 28 condemned persons, 15 belong to the group of 20 persons investigated for having tresspassed the law in the business domain, while 5 can be included in the „others" segment

Appendix 4 - The structure, in terms of punishment length, of the imprisoned population in the custody of Oradea Penitentiary, at 15.08.2008

The punishment length	Number of persons	Percent
0 – 1 years	15	2,4%
1 – 5 years	268	44,2%
5 – 10 years	169	27,9%
10 – 15 years	43	7,1%
Over 15 years	41	6,8%
Other situations	70	11,6%
Total	606	100%

Notă: By „other situations" we mean the cases when a person deprived of liberty is preventively arrested or condemned in a first instance

Appendix 5 - The structure, in terms of relapse situation, of the imprisoned population in the custody of Oradea Penitentiary, at 15.08.2008

Relapse situation	Number of persons	Percent
Without penal antecedents	187	46,8%
With penal antecedents	135	22,3%
Recidivists	284	30,9%
Total	606	100%

Appendix 6 - The structure, in terms of civil status, of the imprisoned population in the custody of Oradea Penitentiary, at 15.08.2008

Civil status	Number of persons	Percent
Married	112	18,5%
Concubinage	223	36,8%
Divorced	31	5,1%
Unmarried	227	37,5%
Widows/Widowers	13	2,1%
Total	606	100%

Appendix 7 - The structure, in terms of education level, of the imprisoned population in the custody of Oradea Penitentiary, at 15.08.2008

Education level	Number of persons	Percent
Illiterate	97	16,0%
Primary school	105	17,3%
Secondary school	215	35,5%
Professional school	86	14,2%
Military school	1	0,2%
High school	85	14,0%
Post-high school	2	0,3%
Graduates	15	2,5%
Total	606	100%

Appendix 8 - The structure, in terms of religion, of the imprisoned population in the custody of Oradea Penitentiary, at 15.08.2008

Religia	Număr persoane	Procent
7th day Adventists	1	0,2%
Atheists	3	0,5%
Baptist christians	14	2,3%
Greek-catholic	19	3,1%
Musulman	5	0,8%
Orthodox	359	59,2%
Penticostal	35	5,8%
Reformed	87	14,4%
Romano-catholic	83	13,7%
Total	606	100%

Appendix 9 - The structure, in terms of the regime for executing the punishment, of the imprisoned population in the custody of Oradea Penitentiary, at 15.08.2008

The regime for executing the punishment	Number of persons	Percent
Open	76	12,5%
Semi-open	289	47,7%
Closed	142	23,4%
High security	18	3%
Non-included	81	13,4%
Total	606	100%

Appendix 10

Table reflecting the main social-juridical characteristics of persons deprived of liberty in Oradea Penitentiary, that have transgressed the law in the business field

No.	Name	Age	Gender	Deed	The year when the delinquency was committed	The punishment period	Penal antecedents	Profession	Occupation when arrested	Civil status	Education	Religion	Residence environment	Execution regime
1.	A.F.A.	33/26	M	PC art.215	2001	10 years	R	No one	No one	Concubinage	12 classes	penticostal	Rural	Closed
2.	A.Ş.	45/42	M	PC art.215	2005	4 years and 6 months	R	Carpenter	No one	Unmarried	9 classes	orthodox	Urban	Open
3.	B.M.A.	32/27	M	PC art.215	2003	9 years and 4 months	R	No one	No one	Married	10 classes	orthodox	Urban	Open
4.	B.A.	41/32	F	PC art.215	1999	3 years and 10 months	F.A.P.	Accountant	Accountant	Concubinage	12 classes	orthodox	Urban	Semi-open
5.	C.F.	49/42	M	PC art.215	2001	3 years and 6 months	A.P.	Welder	No one	Married	10 classes	orthodox	Urban	Open
6.	C.N.M.	35/28	M	PC art.215	2001	8 years and 6 months	A.P.	Cook	No one	Concubinage	11 classes	orthodox	Urban	Closed
7.	G.S.M.	32/27	M	PC art.215	2003	3 years and 7 months	R	No one	No one	Unmarried	12 classes	orthodox	Urban	Closed
8.	G.I.	32/25	M	PC art.215	2001	4 years	A.P.	Carpenter	Woodworker	Unmarried	8 classes	orthodox	Urban	Semi-open
9.	I.G.	58/48	M	PC art.215	1998	10 years	F.A.P.	Engine mechanic	No one	Divorced	10 classes	orthodox	Urban	Open
10.	K.I.	47/39	M	PC art.257	2000	3 years	F.A.P.	Geologist technician	Geologist technician	Widower	12 classes	orthodox	Urban	Open
11.	K.I.	51/46	F	PC art.215	2003	6 year	F.A.P.	No one	No one	Married	10 classes	reformed	Rural	Closed
12.	T.I.	46/41	M	PC art.215	2003	5 years	A.P.	Bar tender	No one	Divorced	10 classes	orthodox	Urban	Closed
13.	T.J.	39/30	M	PC art.215	1999	17 years	R.	Driller	No one	Divorced	12 classes	reformed	Urban	Closed
14.	O.D.	60/54	M	PC art.254	2002	5 years	F.A.P.	Economist	Economist	Married	15 classes	orthodox	Urban	semi-open
15.	B.P.C.	47/37	M	Customs code	1998	4 years and 6 months	F.A.P.	Engineer	Administrator	Married	16 classes	orthodox	Urban	Open
16.	K.F.	42/33	M	L87 / 1994	1999	5 years and 6 months	R	Cook	Worker	Concubinage	13 classes	orthodox	Urban	Closed
17.	R.T.E.	34/26	M	L87 / 1994	2000	3 years	A.P.	Veterinary technician	Driver	Married	12 classes	reformed	Urban	Semi-open
18.	C.I.	29/22	M	PC art.215	2002	3 years	F.A.P.	Mechanic	No one	Unmarried	11 classes	orthodox	Urban	Semi-open
19.	F.A.	36/27	M	PC art.215	1999	4 years and 6 months	F.A.P.	Sanitary monteur	No one	Concubinage	12 classes	reformed	Urban	Semi-open
20.	L.J.R.	33/28	M	PC art.215	2003	4 years	F.A.P.	Locksmith mechanic	No one	Married	13 classes	greek-catholic	Urban	Semi-open

Note:

- The „age" column indicates two values; the first one indicates the current age of the person, while the second one refers to the age when the person committed the delinquency;
- The penal antecedent has been shortened in the following way: F.A.P. – Without penal antecedents, A.P. – With penal antecedents, R – recidivist.
- The regime for executing the punishment is established in the penitentiary after a definitive condemnation to imprisonment has been pronounced; According to Law 257/2006, these are the following: open, from 0 to 1 years; semi-open, from 1-5 years; closed, from 5-15 years; high security, over 15 years punishment; the executional trajectory of a person deprived of liberty allows the movement to a superior or inferior degree of seriousness, in terms of certain criteria: behaviour, attitude towards work, understanding the activities aimed at social re-integration etc.

MONEY LAUNDERING

Candidate to Ph.D Lecturer **Ramona-Mihaela Urziceanu**
AGORA University, Oradea
ramonaurziceanu@univagora.ro

Abstract:

"Money laundering" isn't a new activity, the tendency of hiding the illegal origin of some sums and giving them a seeming legality and honesty and respect to these sums' owners, has old origins. There can be mentioned the Middle Age merchants and usurers who, for hiding the received interests for the loans that they have been giving, under the circumstances in which the Catholic Church had forbidden the usury, they came to a vary number of financial tricks, that correspond, in many of the cases, to the nowadays funds recycling techniques.

Being a complex process, money laundering passes through a lot of levels and involves a lot of persons and institutions. Funds recycling is a complex process through which the incomes from a criminal activity are transported, transferred, changed or mixed up with legitimate funds, for hiding its basis or the property right on those profits. The need of money recycling comes out of the willing to hide a criminal activity. It is the most dangerous element of the underground Economy and consists of: the production, spreading and drugs using activities, weapons traffic, nuclear materials traffic, car steeling, prostitution, flesh traffic, corruption, blackmail, falsifying coins or other values, contraband, etc. The facts, themselves, ask for a juridical stipulation, but analyzing it as a phenomenon, comes out that the social danger known by the society is doubled by an Economic danger, equally bad, even if it is less obvious and studied.

Key words: money laundering, criminality phenomenon, underground economy, drugs traffic, criminal organizations.

Of course "money laundering" isn't a new activity, the tendency of hiding the illegal origin of some sums and giving them a seeming legality and honesty and respect to these sums' owners, has old origins. There can be mentioned the Middle Age merchants and usurers who, for hiding the received interests for the loans that they have been giving, under the circumstances in which the Catholic Church had forbidden the usury, they came to a vary number of financial tricks, that correspond, in many of the cases, to the nowadays funds recycling techniques.

The money laundering term has been used for the first time in the '20's when in the USA some criminal groups (very well known are Al Capone and Bugsy Moran) had opened car or clothes laundries that were for laundering "dirty money", in fact vindicating the money that came from different criminal activities. Maybe, from these activities the name of "money laundering" came out, that, as the tine passed, got a juridical way.

Nowadays, the fast food restaurants, casinos and companies based on cash are used on this purpose. The transparency and the wealth situation of the financial markets are key elements for the well functioning of the Economies, but they can be put into danger throughout the money laundering phenomenon. Obtaining "dark money", mainly from the underground Economy and corruption is, generally speaking, an condemned activity, in all the countries in the world, but the funds recycling process, through the harmless aspect that it gets, can get out of the attention, especially on the hard competition that exist on the international market of capitals.

Money laundering is a complex process that passes through a lot of levels and involves a lot of persons and institutions. Funds recycling is a complex process through which the incomes from a criminal activity are transported, transferred, changed or mixed up with legitimate funds, for hiding its basis or the property right on those profits[388]. The need of money recycling comes out of the willing to hide a criminal activity. It is the most dangerous element of the underground Economy and consists of: the production, spreading and drugs using activities, weapons traffic, nuclear materials traffic, car steeling, prostitution, flesh traffic, corruption, blackmail, falsifying coins or other values, contraband, etc. The facts, themselves, ask for a juridical stipulation, but analyzing it as a phenomenon, comes out that the social danger known by the society is doubled by an Economic danger, equally bad, even if it is less obvious and studied.

The criminal activities, such as the drugs, weapons, nuclear material traffic, are a reality that we often see throughout some breaking news, but behind those activities big sums are moved, that generate real financial Economical waves. An important characteristic of the criminal activity is the organized over frontiers character[389], so that we can conclude with the fact that the main links in the international domain of the underground Economy are those generated by the organized criminality. The aim of all these actions is, obviously, obtaining some important incomes and placing them in the official Economy.

The reasons that are at the basis of the organized criminality can be sometimes political, religious, but even in these cases; it is about an interface,

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[388] Cristis Nicolae, The tax dodging and money laundering, Hamangiu Publishing House, 2006.

[389] Enescu Constantin, Analysis methods of the external commerce, Bucharest, 1993.

the organized crime having in an obvious way overlapping tendencies with the underground Economy giving it an organized character, taking the financial reserves and the opportunities created by other component activities.

Analyzing the other components of the underground Economy, there were situations of which's frame in this structure is made on a limit that depends on a certain conjuncture, the dysfunctions that those activities can generate are minimal and the integration in the official Economy possibilities are real.

In contrast with these situations, the activities that are included in the criminality domain are obviously destructive. The contact with the displaying forms of the official Economy it is enough to amplify Economical lacks of balance[390] and for creating huge costs for fighting against the phenomenon itself or against its effects. Particularly, it is asked for mentioning the sums' transfer operation that are obtained as a result of the criminal activities in the official Economy, activity known as money laundering. The short history of this concept has as basis the growth of the international level drugs traffic and, as a consequence, the money laundering is the operation that follows the sums placing, obtained out of the legal Economic activities.[391] Now, the products as results of crimes laundering need, for hiding their criminal basis, it is linked with a large type of criminal activities. This phenomenon of placing in the official Economy of the money that comes from the criminal activity has gathered in its game main segments of the international financial banking system danger generated by this situation is a major one, even if because of some close interests its minimizing is being tried. The great income of the black money in the official financial circuits can allow the organized criminality representatives to access the main decisions that point the global Economy's functioning.

The consequences of this income of the capital obtained from criminal activities in the real Economy are similar to the pollution's devastating effects for the nature and can have an irreversible effect. Inside the crime activities, the cash is the main trade way. The money laundering strategies involve transactions that through the volume are very profitable and attractive fir the legal financial institutions.

The money laundering leads money from an illegal Economy and places them in investments that are well received in the legal Economy. Those two major elements of the recycling funds process are: hiding illegal incomes and converting them in money, for hiding their origin. The end of

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[390] Drosu-Saguna Dan, Treatis on financial and fiscal law All Beck Publishing House SA, 2001.

[391] Hoanta Nicolae, The tax dodging , Tribuna Economica Publishing House, Bucharest, 1997.

the millennium shows us the special growth of the economical activities that take place in the strong developed countries in Europe, America and Asia. The international economic relations meet an unknown vitality, new countries and economical systems being integrated.[392] There is no doubt the fact that in this unlimited territory of the Economy, an impressive number of illegal activities that get together the thing that is, very often, known as the affairs' criminality phenomenon are being initiated, developed and finished.

The fraud hurts the Economy in its whole, causing huge financial losses; the social stability gets weak, threatens the democratic structures, determines the loss of faith in the economical system, corrupts and compromises the economical and social institutions. Concerned about the affairs criminality problem, the International Community has analyzed the causality and its effects, given as recommendation to the member states to adopt certain measures for limiting it. The diversity of the legislations, linked with the economical-social particularities coming out of the development levels of the European countries and from the other countries, had made it impossible to write a precise definition of the affairs criminality.[393]

Those two dimensions of the affairs criminality are: 1. the national dimension, meaning the sum of the crimes stipulated in the penal or special laws in each country, that are being produced inside the economic and financial system and does not have or involve the foreigner element; 2. the international dimension, meaning the sum of the crimes that are being committed and are being finished with the participation of the foreign element (persons, companies, corporations, banks, etc.). Those two dimensions[394] haven't got and won't have a static character.

Today it is obvious the internationalization of the criminal type affairs, in the most powerful networks of trade, tax dodging, drugs traffic, importing-exporting illegal operations, the partnership for crime has been realized and continuously specialized. The alcohol or cigarettes trade, drugs and weapons traffic can not exist without the participation of the businessmen across the world. In this kind of concept it is relevant the list of crimes registered to the affairs criminality phenomenon, written by the European Committee on Criminal Problems: crimes regarding the coalitions' form; fraud practices and abuses committed by the multinational enterprises; illegal obtaining or defalcating the financial funds allocated by the state or by international organizations; informatics crimes (Informatics criminality);

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[392] Sitaru A. Dragos, International commerce law–, Bucharest, 1996.

[393] Cristis Nicolae, The tax dodging and the money laundering, Hamangiu Publishing House, 2006.

[394] Hoanta Nicolae, The tax dodging, Tribuna Economica Publishing House, Bucharest, 1997.

creating fictitious companies; falsifying the enterprise's balance sheet and defying the account keeping obligation; frauds that come upon the commercial situation and the social capital;
frauds in prejudice of the creditors (bankruptcy, violating the intellectual and industrial property rights); crimes against the consumers (falsifying the merchandises, lying advertising);false competition;
fiscal crimes; corruption; money market and bank crimes; exchange currency crimes; crimes against the environment.

Once the real offensive against some elements or segments of the affairs criminality has been launched (tax dodging, trade, corruption, drugs traffic, etc.), special aspects are being discovered, some of them, through their dimension, being outstanding. It was enough, for example, to discover, more or less accidentally, important frauds regarding using the given subventions, inside the Commune Market, to the producers and the exporters of agriculture and food products, for starting a serious analysis which has shown huge frauds committed in this domain, in Italy, between 1985-1996, after complex investigations and inquests the real dimensions and the real face of the mob organizations has been being framed, about which the authorities haven't said a word 30-40 years.

In Germany and the other states of Western Europe, only now it is spoken about the role of the organized crime in the clandestinely migration of the Turks, Arabs, Romanians, Serbs citizens, etc., after more than 20 years, in the name of the free passing citizens right, the authorities have stimulated this phenomenon. So, it can be affirmed the fact that this criminal edifice are being built and developed in their huge majority from the interest and with the support of the state's authorities. Their genesis has to be searched in the interests of power perimeters. This situation makes the authorities not to reveal the real dimensions of the criminality only in crucial moments.

Every new Government is preoccupied to tell and demonstrate how corrupt was the previous Government, refusing to accept that the aspects of the affairs criminality and of the organized crimes will be extended and will be intensified, sometimes at higher quotes. Giving the activities of fight against the criminality a political characteristic is the main cause of the weak reaction regarding its danger, the element that determines the powerful consolidation of it in the today's society in such a climate, on a favorable field, the structures that make some action in the affairs criminality domain have built, developed and specialized a performing management, characterized by: maximum efficiency, rigorous specialization, ultramodern logistics, that is more superior than the ones owned by the law institutions. There are relevant in this way the affirmations made by Giovanni Falcone, the well known Italian judge, killed by the Mafia at 23rd of May 1992: "Mafia is a logic world, more rational and more implacable than the STATE.

Mafia is an articulation of the power, a metaphor of the power, but even the pathology of the power. Mafia is an economical system, an obligatory element of the global economical system. Mafia is developing because of the state and it is adapting its behavior on it".

The financial product that came out of the illegal affairs that are being done by the organized crime groups has impressive dimensions. Dirty money that goes around, at sight, is the oxygen that gives power to the criminals that are very close or even inside the power structures that guarantee and cover their criminal activities. The analysts of the affairs criminality phenomenon warns about the fact that important funds from the illegal affairs are being injected in political and administrative bodies and structures, for those to maintain in power and to guarantee the criminal groups the success in the multitude of the dirty affairs that are initiated by them.

The aim, the main target of these groups is the one to make inoperative, inefficient and to paralyze the structures that are meant to fight against them. Even in Romania, for a long time, the fusion of the elite has been made: the interlope world's elite and the public life's elite. These fight against the order and law, inside the lowering perimeter of the immorality, bubble affairs, luxury and dissoluteness. The exponents of these elites have in their property restaurants, casinos, profitable enterprises, fashion houses, hotels, luxury cars, buildings that compete with the princely properties, press trusts and TV channels, holiday houses, and, not the least, substantial accounts in foreign countries. It is, so, clear for the ordinary man that watches helpless to this show that in the territory that is taken by the organized crime, professionals from the world of commerce, investments, finances and banks action in a perfect articulation together with power's exponent. High illegal affairs – trade, tax dodging, drugs traffic, money laundering[395], illegal practices in creating some companies etc. – there can not be initiated, put into work and finished without having a partnership between the local groups and their correspondents that are making their moves on other countries' territory.

The international co-operation in the fight against funds recycling

The money laundering crime[396] it is being developed more often in many of the world's countries and geographical regions. That is the reason why the international cooperation through the extradition juridical institutions, executing the final orders made by other states, the sequester and the seizer of the goods that are the result of some crimes done abroad, as well as new co-operation methods between the national agencies of the different

[395] Florescu Viorel, Banking and currency law, Bucharest, 2006.
[396] Mrejeru Theodor, Andreiu Dumitru, Florescu Petre, Safta Dan, Safta Marieta, The tax dodging, Tribuna Economică Publishing House, 2000.

states. Only the existence of a commune legislative rules system can help the institutions from different countries to co-operate in an efficient way in this domain. Also, the international co-operation through the international institutions with prerogatives in this domain (Interpol, Europol, Eurojust, etc.).

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THE ACKNOWLEDGEMENT OF THE MONEY LAUNDERING SUSPICIOUS TRANSACTIONS

Candidate to Ph.D Lecturer **Ramona-Mihaela Urziceanu**
AGORA University, Oradea
ramonaurziceanu@univagora.ro

Preparatory
Sebastian Ganea
AGORA University, Oradea
sebi_ganea@hotmail.com

Abstract:

In many of the cases, the specialists in the financial-banking domain avoid to study thoroughly about the way in which the financial operations that have as a goal money laundering can be acknowledged, thinking that this activity has an investigation nature and could not be compatible with their current attributions. Talking about the operations, every dirty money laundering operation has a typical way of working, that depends on the banking or financial institution that it uses, on the strictness of the procedure rules adopted by this one, on the sums that are directly involved and, mainly, on the experience and intellectual capacity of the involved persons.

Generally speaking, the suspicious nature of a banking operation goes from the unusual way in which it produces, confronting with the economic efficiency criteria, the banking applications and the current activities of one's client.

Key words: money laundering, banking services, suspicious transactions, offshore international activities, gambling, insurances domain.

Usually, the most often banking services that are being used are the ones for accounts opening, deposits, obtaining some loans, funds transfer services, currencies, cheque, etc.. Together with this services that can be considered traditional, but that can be done even through new methods, based on the informatics system, the banks offer boxes for keeping the valuable things, safes, but even business' advising, etc. In the way in which the transactions deviate from the normal course of the economic efficiency criteria, can be doubtable, regarding their real aim.

I. Suspicious transactions from the banking domain

a) Money laundering using cash:

- Unusually big cash deposits owned by a natural person or a company of which's' current business activities would be naturally generated through cheques[397] or other financing instruments;
- Substantial cash deposits growths of a natural person or of a company without an apparently cause, especially if these kind of deposits are transferred afterwards in a short period of time from the account and/or to a destination that can not be associated normally with the client;
- Clients that put cash through a lot of deposit forms in a way in which the sum of each deposit is "insignificant", but the whole of each deposits is important;
- Companies' account of which's transactions – deposits and withdrawals- are being done in cash rather than through debit and credit forms naturally associated with commercial operations (for example, cheques, letters of credit, bills of exchange, etc.)
- Clients that, constantly, lodge or deposit cash for covering banking treats[398], money transfers or other negotiable and easy to sell paying instruments;
- Clients that want to change a big quantity of banknotes with low nominal value for those with higher nominal value;
- Frequently cash exchanges in other foreign currency;
- Branches that do more cash transactions than usually (the statistics of the central bank detect fallacies in the cash transactions);
- Clients of which's deposits contain fake banknotes or forged instruments;
- Clients that transfer big sums of money in or from foreign countries with cash pay instructions;
- Big cash savings using money savings device, avoiding in this way the direct contact with the bank.

b) Money laundering using the banks' accounts:

- Clients that want to maintain a number of personal accounts or accounts managed by the bank, that do not seem to be compatible with the type of their activity, including transactions that involve named persons;

[397] Law nr.21 from 18th of January 1999 for preventing and sanctioning the money laundering.

[398] Mrejeru Theodor, Andreiu Dumitru, Florescu Petre, Safta Dan, Safta Marieta, The tax dodging, Tribuna Economica Publishing House, 2000.

- Clients that have a lot of accounts and feed them with cash, in the case in which the deposits total is a big sum of money;
- Any natural person or company of which's account does not indicate the unfold of some normal activities in the personal or businesses bank operations, but it is used for cashing up or payments of big sums of money[399] that haven't got any aim or obvious connection with the owner of the account and/or his businesses (for example, a substantial growth of the account's hauling time);
- Avoiding the furnish of normal information when an account is opened, furnishing minimal or fake information or, when the opening of an account is asked for, furnishing some information that are being hard to check by the financial institution or needs to much money for being checked;
- Clients that seem to have accounts in some financial institutions from the same place, especially when the bank is aware of the existence of a regularly consolidation process of these accounts, before a petition is delivered for the progressive transmission of funds;
- The concordance between the outgoes and incomes of cash in the same day or in the previous day;
- Supplying the account through cheques that are uttered by thirds in big sums endorsed for the client;
- Getting out big sums of money from an inactive account[400] beforehand or from an account that has just received unexpectedly an important sum from foreign countries;
- Clients that, together and simultaneously, are using different pay desks for doing big cash or currency transactions;
- Using on a higher scale of the money keeping devices;
- Magnifying the operations done by the natural persons. Using the sealed, deposited and withdraw packages;
- The company's representatives avoid contacts with the branch;
- Substantial growths of cash deposits or negotiable instruments (cheques, policies, etc.) of some company or a specialized company, using clients' accounts or inside accounts or the credential ones, especially if the deposits are rapidly transferred between the credential accounts and of the clients;
- Clients which refuse to furnish information that, normally, would qualify them for obtaining credits or other banking services that should be considered important;

[399] Florescu Viorel, Banking and currency law, Bucharest, 2006.
[400] Drosu-Saguna Dan, Treatis on financial and fiscal law , All Beck Publishing House SA, 2001

- The insufficiently use of banking normal facilities, for example, avoiding big interests giving for big sales;
- A high number of natural persons that make payments inside the same account, without an adequate explanation.

c) Money laundering using investments transactions:

- Valuable papers buying for being kept into custody at the financial institution, when this fact does not seem right with the standing (rang, position) of the client;
- Deposit/loan transactions "back to back", with subsidiaries or affiliates of the foreign financial institutions, known as being part of the drugs traffic aria;
- Clients' petitions for investments managerial services (in currency or in valuable papers) where the funds' source is not clear or it isn't appropriate with the client's standing;
- The payment in unusually high sums in cash of the valuable papers;
- Buying or selling of some valuable papers that hasn't got a discernible aim or in circumstances that seems to be unusually.

d) Money laundering through offshore international activities

- Client recommended by a foreign branch, subsidiary or other bank opened in countries where the drugs production or drugs traffic can be prevalent;
- Using letters of credit and other methods of commerce's financing for making money to be in circulation between countries where this kind of commerce is not compatible with client's ordinary businesses;
- Clients that make regularly and important payments, including transactions transmitted telegraphically, that can not be clearly identified as *bona fidae* transactions or receive frequently and important payments from countries that are usually associated with the production, processing or detachment of the drugs, restricted terrorist organizations (fiscal paradise countries);
- Big sold making, inappropriate with the known hauling time of the client's business and subsequently transfers to accounts that are hold in foreign countries;
- Electronically transfers of funds, without explanations, done by the clients as incomes or outgoings or without being passed through an account;

- Frequently demands of trip cheques[401], currency traits and other negotiable instruments that will be uttered;
- Frequently trip cheques payments or currency traits, especially if they come from abroad.

e) Money laundering involving agents and clerks of the financial institutions

- Changes in the clerk's characteristics, for example, wasteful way of life or avoiding to go in a holiday;
- Changes in the agent's or clerk's performances, for example, the seller that sells for cash has remarkable or unexpectedly high results;
- Any business with an agent where the identity of the final beneficiary or of the counter-contest is unknown, against the normal procedure for that kind of business.

f) Money laundering through assured[402] or uninsured loans

- Clients that repay low performance credits unexpectedly;
- The demand of loaning money, having as a warranty actives kept by a financial institution or a third person, where the origin of the actives is unknown or the actives are incompatible with the client's capacity;
- One's client demand to a financial institution for getting or arranging a financing, where the source of the client's financial contribution to the business is not clear, especially where a property is involved.

Together with this possible signals of some transactions that go for the money laundering, in the specialized literature, it is unanimous considered, that the sums' transfer to and from the places that are known as fiscal paradises, conflict or drugs' producer areas, the cash operations, in very big sums, are the most exposed to be considered suspicious transactions.

II. Suspicious transactions those are specific to other domains than the banking one

a) In the capital market:

- Using cash for buying transferable securities[403] or for he payment of the sold ones, instead of discounting without cash

[401] Dauphin Claude, The real practical guide of the fiscal paradises , Tribuna Publishing Houses Group, 1999.
[402] Mrejeru Theodor, Andreiu Dumitru, Florescu Petre, Safta Dan, Safta Marieta, The tax dodging, Tribuna Economica Publishing House, 2000.
[403] Public Finances and Accountability Magazine – no. 3/2003, no. 1/2002, edited by the Ministry of Public Finances.

(transfer), especially when important sums are supposed. This, because the capital market's actors aren't just citizens, that do their payments cash, but they are investors that detain important capitals;

- Turning to good accounts the stocks at a value that isn't according to the market value or the nominal value. There were cases in which the transaction of some actions has been done at a price of over 1000 times in comparison with the nominal or even the market price;
- Buying some transferable securities by entities that are in the fiscal paradises[404], followed immediately by the selling of the bought package to another offshore company, in many of the cases the resell was done in loss.
- Selling the stocks of a person at a very high price (over ten times) related to the market's price, to an artificial person in which the sole associate or that has the majority is the selling natural person. The aim is represented by the decrease of the profit and dividends tax if we talk about the artificial persons;
- Using the same stocks package, through repeated selling, for justifying the supplying sums given from the budget to the collectively fired persons. In this way tens of billions lei were been called in from the budget, when the infusion of capital on the market was just of tens of millions lei.

b) In the buildings market domain:

- Using cash in the building transactions instead of banking discount instruments[405] (banking accounts);
- Buying some lands or buildings at low prices, followed by their immediate selling, but at lower prices. The difference is used for laundering dirty money;
- Buying some buildings that are in a precarious situation and renovating them, suing illegal sums, followed by reselling them at a superior price.
- The elements of suspicion specific to the building's market can be taken into consideration even in the transactions having as objects high value movable goods, such as: cars, yachts, paintings, artistic and numismatic collections, antiquities, etc.

c) In the gambling's domain (casinos):

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[404] Dauphin Claude, The real practical guide of the fiscal paradises , Tribuna Publishing Houses Group, 1999.

[405] Drosu-Saguna Dan, Treatis on financial and fiscal law , All Beck Publishing House SA, 2001

- Using a big cash sum for buying game counters, after which the counters are being given back and the payment for them is being asked using another way than cash, such as: house cheques, trip cheques, pay warrants, pay orders, electronic transfers, etc.;
- Depositing the cash at the casino's house, after which the restoring of the sum is being asked through other paying instruments;
- Asking for some receipts to justify the gained sums;
- Buying some tickets that are not nominal, gaining tickets at different gambling systems or bets houses.

d) In insurances' domain:

- Buying life insurances polices that are of high value, using cash and not using transfer payments;
- Using some high value insurance polices as warranty or collaterally for obtaining a loan;
- The payments of some sums considered to have insurances' title to captive insurance companies (that belong to the insured person) placed in countries that are considered to be fiscal paradises;
- Causing some accidents on some of the goods that are insured at a high value, followed by the indemnification's equivalent value collection.

e) In the financial domain

- Crediting their own company by the associates or stockers with important cash sums, that are being introduced in the bank account or in the trading company's house. This operation is repeated in the cases in which the company constantly works in loss. Then, the following step is the restoring of the credit, sometimes followed by interests;
- Asking for restoring some taxes from the budget for exporting operations that haven't been done or the export was over evaluated in a fake way. In the same way the reimbursement from the budget of the added value tax has been called for in the situation in which the bought products are being constantly sold in loss;
- Asking for exemptions or echelons to the state's budget, when fiscal certificates are being called for allowing them to participate at auctions that are made for buying actives or stocks, inside the process of passing the domains in private possession;

- Although a trading company constantly buys special regime documents, it doesn't hand in the balance sheets and declaration regarding the fiscal obligations (monthly or quarterly);
- Handing in some unreal or fake fiscal declarations, in disagreement with the previous activity of the economic agent or which comes out of other information, for example, the customs ones.

f) In the customs domain

- Using some export under evaluated invoices for repatriating a part of the price, the difference is being deposited in offshore accounts, or over evaluated for introducing in the country illegal money from abroad;
- Using some import under evaluated invoices to pay lower customs taxes or over evaluated for the illegal sums produced in Romania to be transferred abroad.

g) In the currency domain

- Using payments in advance, frequently, without these being justified through the import or reporting;
- Payments in advance are preferred to the letter of credit, a more sure and more efficient way for warranting the imports' accomplishment;
- The payment of some invoices that are the equivalent value of some high value services and without presenting the fiscal certificate remitted by the fiscal authority from the payments beneficiary's country.

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THE FORCED SIGNATURES AND WRITINGS AND CRIMINALISTIC IDENTIFICATION IN ECONOMICAL INFRACTIONALITIES

Ph.D Officer **Hadrian Vaida**,
Criminality Office , IPJ Bihor,
Officer **Şerfezeu Nicolae**,
Criminality Office, IPJ Bihor,
Police Inspector **Moş Călin**,
Fraud Investigation Office, IPJ Bihor

Abstract:

The importance of the signature and the signature' role in the field of the juridical trial is very well recognize. Economical infractionalities represent one of the most important application for criminalistic identification based on morphologic peculiarities of the signature's component in: traced and simulated forgeries, fantasy execution, signature obtained by trickery and disguise signature. We are interested especially to develop possible methods for exactly identification the author of signature and discriminant by documents between similitude and differences, used our cases and experience.

Key-word: forced signatures, criminalistic identification

Theoretical consideration

Expert opinion on handwriting identification developed in the United States and United Kingdom in the latter half o the ninteenth century. Expert opinion on handwriting arose because juries had to struggle with decision on the authenticity of the documentandthusexpert opinion prospered in an environment where there was nothing better to determine the authenticity of the document.The execution of a document can be established by proving the identity of the handwriting or sigature in that document.

In expertise of judicial process we used:

- Examination and analysis of handwritings, signatures, figures, stamps, seals and drymark
- Identification of typewriters

- Linguistic analysis of texts
- Expertise of forged documents made by erasing, chemical text deletion, text addition or removal (in vehicle registration cards, driving licences, passports, identification cards, wills, various contracts, securities etc.)
- Examination of writing material
- Examination of paper

For economical infractionalities by frequency are important:

- Examination and analysis of handwritings, signatures and
- Identification of typewriters

Practical consideration

- Checking of examination object
- The preliminary checking for the suspect handwritings and signature
- The preliminary checking for the comparison handwritings and signature
- Examination of the document that bears the suspect handwritings and signature
- The checking of the additions, erases, modifications on the questioned document
- The investigation of the suspect handwritings and signature
- Specific characteristics and elements reflecting the execution's truth
- The indicators of the authenticity
- The individual elements analysis
- The determination of variability in comparison handwritings and signature
- The comparative investigation
- Directive indicators for the similitude and differences
- Assessment of the comparative examination's results
- Conclusion obtained

Case presentations

Circumstances

In 2004 institutions who work in financiar credit bank and non bank system promotes credit products for physical persons. The try to encourage stuff acquisitions by installments.
Was an hire-purchase system who need like an condition for admission an *income receipt.*
This simplification of the condition for borrow policy conduct to increase the number of economical infractionalities.
In practice, promotes and relatively high frequency of cases when delinquent's complete in fake income receipt, take the credit and never return the money.
First level
Defendant CMC and CT organized an network who function in than period by this priciples.

- Find poor people with low income and education and high level of credulity
- Promise insignifiant money (50-100 RON)
- Realized fake income receipt's for them
- Organized acquisintion using fake income receipt's in market's who adopt this particular credit policy

Second level
Financiar credit bank and non bank system institutions ascertain the situation in 6 month's.
Introduce special rules and norms to be able to confirm the authenticity of person and true income.
Our heroes, CMC and CT developed and organized an new system who involved: stamps, unique record certificate, copies (in fake) by individual work contract and another samples by oficial acts and stamps.

HANDWRITINGS

Photo 1 *Facsimil with writings in doubt from an income receipt (fake); details 12-17 (red colour)*

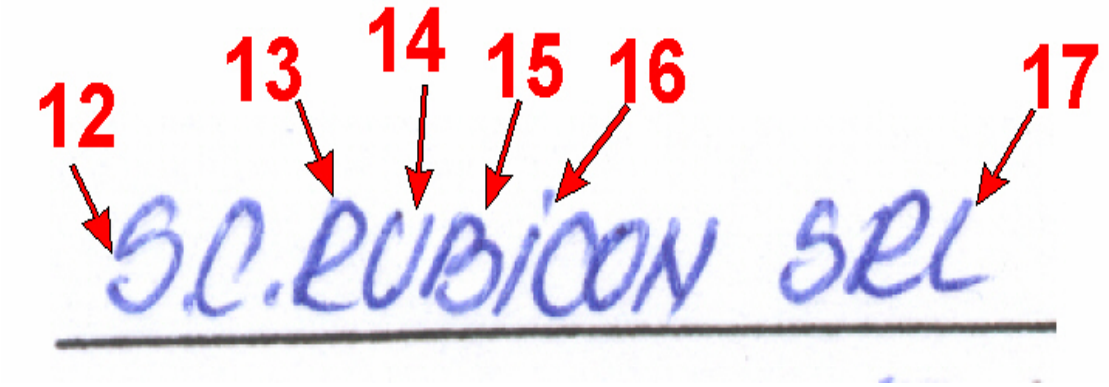
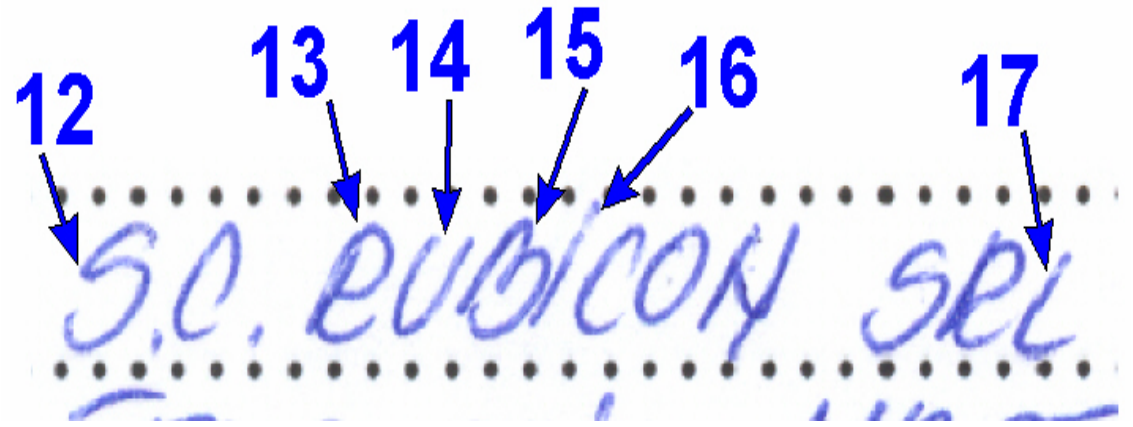


Photo 2 *Facsimil with evidence writings record from CMC; details 12-17 (blue colour)*



Graphoscophic analye (sample)

„... capital letter "S" – sinuous line, superior flat (12);
capital letter "R" - realized by only one movement, double stick, volute and concave foot (13);
capital letter "L" – realized by only one movement,with an half angle conection (17)…"

Photo 3 *Facsimil with writings in doubt from an income receipt (fake); details 1-11 (red colour)*

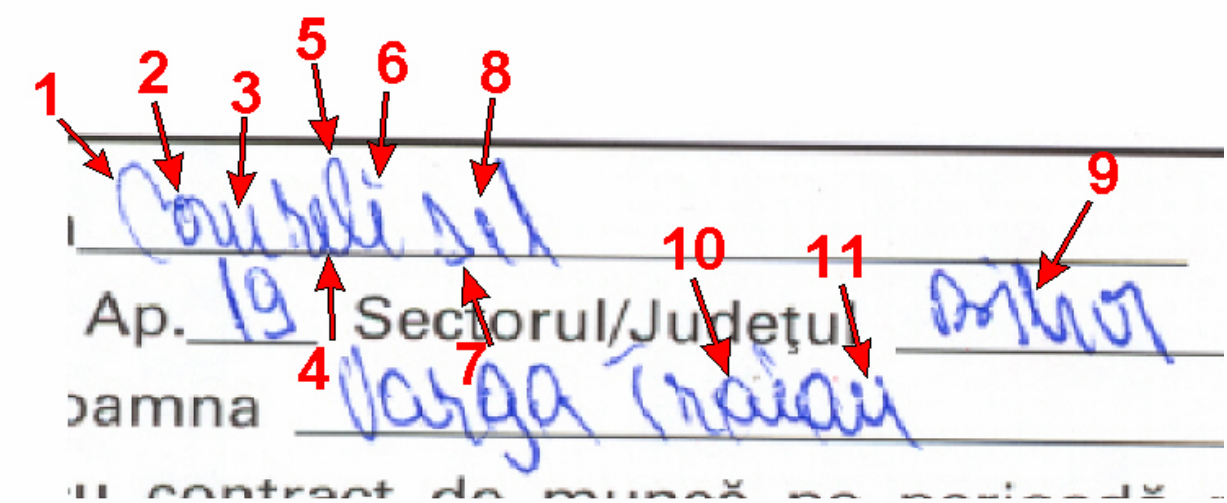


Photo 4 *Facsimil with evidence writings record from CMC; details 12-17 (blue colour*

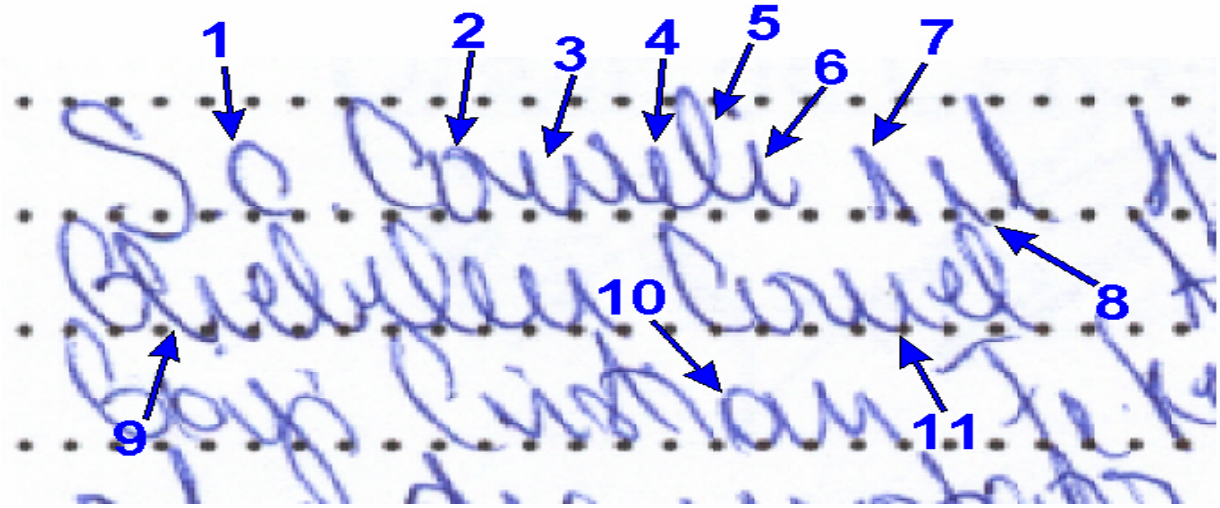
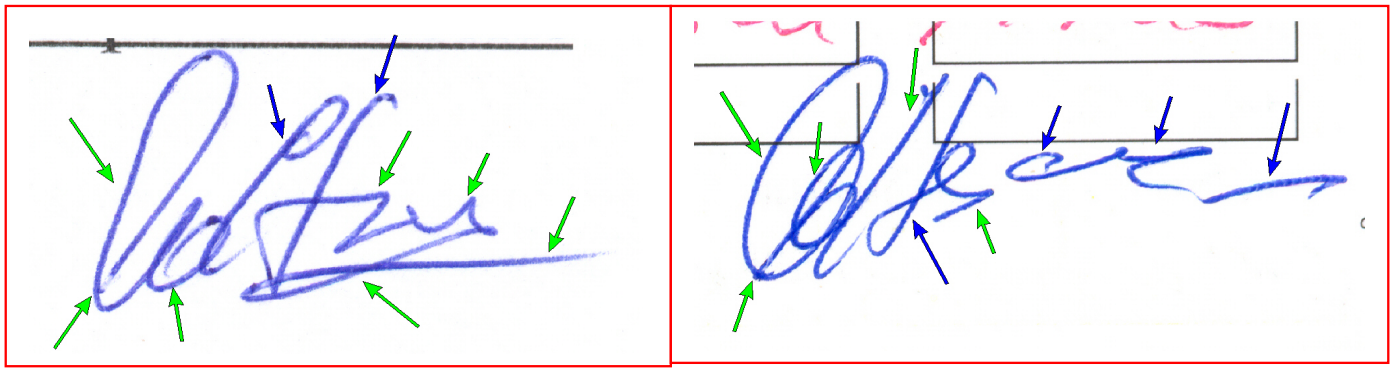


Photo 3 an 4, marked by arrow, letters with particularities that sustain graphoscophic conclusions (identity, author).

SIGNATURE

Disguise signature (partner of CMC, subject CT) and correct interpretation was another important moment in judiciar and criminalistic investigation

Photo 5 *Three disguise signature (the same person, CT who realized signature the last 2 signature, photo, 6)*



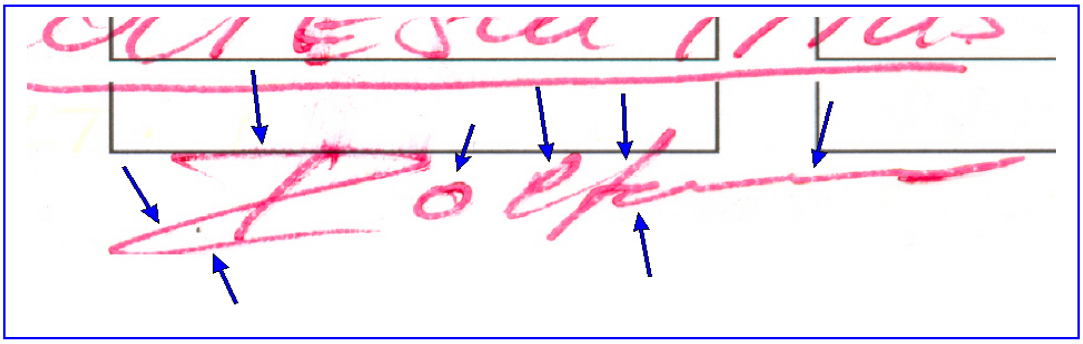
(1) (2)

(3)

With green arrow are marked differences in graphic route (record: inferior start point, curl, oval, left direction sense, internal ending).
Final for the signiture is realized in a different way, horizontal (2) / descendent (1) (3), horizontal curl, underline signiture.

With blue arrow are marked similarities in graphic route (record: minor letter „l"& „t", realized in the same way)

Photo 6 *CT signature take from an declaration and an income receipt*



Conclusions

- Economical infractionality could benefit by vaguely rules and norms established by financiar credit bank and non bank system
- Credulity and benevolence of people without income and low knowledge of financiar and penal system to experienced delinquent
- Technical support well organised including: copies by authentical oficial acts, stamps and contacts permit and sustain an long term delinquent activity
- In case propose for analysis was involved an number of 60 persons and organiyed for two years, started in 2004

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THE NATURE OF LEGAL REPORT BETWEEN THE ADMINISTRATOR AND THE TRADING COMPANY

Candidate to Ph.D **Radu-Gheorghe Florian**

Abstract:

The present study proposes to decelerate the legal nature of the reports born between administrator and the company in the conditions of actual legal regulations but also in the context of the empowerment given to the administrator through the constitutive document.

Key words: company, administrator, legal report

As it is. known in the internal law the foundation and organization of the trading companies is regulated by the law no. 31/1990[406] as common right in trading companies domain, containing general regulations applicable to all trading companies but also special regulations applicable only to one of the five types of trading companies: general partnership company, limited company, joint stock company, joint stock limited company and limited liability company.

Regarding trading companies' operation, the law no. 31/1990 comprises both general specifications applicable to every company and conditions specific to every legal form of trading company and have as object aspects referring to the legal form of the goods brought as contribution in the company, partners' rights to dividends, company's personnel and so on.

The company's personnel benefit of an express and detailed regulation having the mission to state on legal plan the legal person's intention, company's intention.

The social intention is formed within the deliberation committee constituted by the Associates' General Assembly, respectively Shareholders' General Assembly. This intention is put into practice through an execution, administration committee that is represented by administrators. And not at least we identify as part of the company also the censors that ensure the administration control done by the administrators in the name of the company.[407]

[406] Republished in the Official Gazzete, no 1066 from 17.11. 2004.

[407] St.Cărpenaru, Romanian trading law, the 5th Edition, All Beck Publishor, page 208.

The actual study has as an object the study of the legal social relation form born between the administrator and the company as whose administrator is.

In the first place, the question that arises towards the nature of the legal report is to know to whose rules this social relation becomes incident tot. Is this legal report a commercial, a civil or a labour right one?

The importance of the distinction resides especially from different rules contained by the three branches of private law, concerning the birth of legal report, the proof of rights and obligations and the special rules concerning to the development of the reports.

In order to reach a judicious conclusion we will analyze all the three assumptions mentioned above.

In our analyse we need to start from the premise given by the regulations of the art. 72 from the law no. 31/1990 due whom the administrators' obligations and responsibilities are regulated by the aspects referring to the mandate. These reports specific to the mandate contract can be identified in civil, commercial or even individual labour contract domain.

Concerning the civil nature of the reports between the administrator and the company, firstly we can notice that we are in the presence of some contractual reports in which on one hand we have a trading company and in the other hand we have the administrator who can be either a legal person or a natural person.

However we will notice that according to art. 4 from Trading Code, there are presumed as being trading acts, all the contracts and obligations belonging to a tradesman. The legal content of this article, that reflects simultaneously the subjective conception referring to the existence of trade processes, settles in a way this problem establishing a simple presumption that these reports are not civil ones. In these terms, the problem of establishing the civil nature of this legal report it is not longer taken into consideration when the administrator is a legal person.

Secondly, the answer to the question, if this legal report is a civil one or not when the administrator is a legal person, is settled by the conditions of art. 56 Trading Code according to which if an act is a trading one but only for one of the parties, all the contracting parties are submitted to the trading law, except of articles referring to traders and of the cases when the law disposes differently.

Thence even if in the legal report between the administrator and the trading company, the administrator is a natural person, this legal report will not be of civil nature and will not be thereby submitted to civil law.

In the doctrine has been also stated that taking into account the complexity of the administrator's job marked by the requirements of public order, it has being sustained that the idea of the mandate is absorbed by the

larger idea of representing, with the consequence that the report between the administrator and the company wouldn't be a simple mandate, but a mandate with a legal content, similar to the custodian one.[408]

Even the condition of legal report in the case of labour law between the administrator and the company was not characterized by lack of supporters.

Therefore, starting from the idea that the administrator, natural person, is developing a permanent activity designated for the company we can sustain that we are in the case of a labour legal report.

To this idea was objected in the first place that the administrator's job description is given by the legal acts and not by material acts as it happens in the labour contracts' case.

On the other hand we appreciate that the relation of subordination between the employer and the employee is not that characterized in the relation between the administrator and the company as within the labour legal reports. Therefore, even though the administrator role, as an executive organ, is to put in force the partners' decisions taken within the general assembly with the abidance of statutory and legal conditions, yet he has accordingly to articles of law no. 31/1990 certain independence in accomplishing his attributions.

Thereby, according to art. 70 he can execute all the administrative and representation operations in order to fulfil the company's goal, thus allowing him to a fulfil conservation, administrative actions, and even activities regarding company's management. However, legal administration or disposal acts referring to goods incorporated in a value that exceeds half of the book value of the company's assets at the closing date of the legal act must comprised also the associations' general assembly agreement.

What happens if the administrator's activity does not involve only the development of legal acts, but also the development of material acts in the company's benefit? Has he the obligation of signing an individual labour contract with the company?

We appreciate that the administrator, as an individual person, is entitled to perform in the best interest of the company any necessary action in order to achieve the object of activity, without having to sign an individual labour contract, including short-term activities necessary due to the lack of personnel.

To interpret in other way the dispositions concerning labour contract would lead to an excessive formalism, as it requests that even the company's

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[408] D.D.Gerota, Course of trading company, pages 85-86; E. Munteanu, Some aspects regarding legal statute of trading companys's administrators in „Trading company magazine" no. 4/1997, pages 76-82.

leader to have an individual labour contract, even if he is appointed by the associates to perform administration activities for the company.

Or, under the conditions that the law does not stipulate, by administration activities we understand any behaviour that gives value to a patrimony or good, by respecting the principle of company's specific and legal capacity, meaning respecting the limits stipulated in the constitutive document.

In other words, the administrator will be able to elaborate himself the trading documents of the trading company, having a management position and also the right to represent it based on the Mandate contract issued by General Assembly.

The administrator does not need individual labour contract in order to justify his activity within his own trading company, because he is, first of all, the delegate of the associates and he represents the company regarding performing its object f activity.

It is immanent that in administrator's commercial activity to intervene situations that require administrator's prompt intervention, especially because he has a responsibility towards the associates.

Constitutional principles of economic and commerce freedom support the same theory, as long as no normative disposition forbids performing an economic activity by the very administrator himself without individual labour contract, as long as he acts according to a Mandate contract, being delegated by Associate's General Assembly.

As a result, the company could never be the active subject of the contravention stipulated by art. 276 al. 1, letter e from Labour Code and neither the active subject of the offence stipulated by art. 10 al 3 from Law 130/1999 regarding protection measures for persons with labour contract.

Of course, as there is no law to oblige the administrator to have an individual labour contract within the company whose administrator is, the same, if parties agree, they have the liberty to sign between themselves an individual labour contract, except shared profit companies where, according to art. 137, art. 1, al 3 from law 13/1990, signing such a contract is forbidden.

Even in the case that an individual labour contract is signed, the mandate's will to revoke the mandate given to the administrator is not obeyed to the restrictive rules stipulated by labour legislation, because in case of administrator's ademption by general assembly are available the dispositions of art. 56 letter h from Labour Code, that stipulate the termination of the contract as a result of withdrawal of the necessary approvals by competent organisms.

Commercial character of legal report between administrator and a trading company is fully shown by the majority of authors through relating to commercial code.[409]

As sustained in this thesis there are registered the stipulations of art. 4 and 56 from Commercial code which, establishing the commercial presumption of all deeds of a tradesman, on the other side it proclaims the commercial character of legal reports between a tradesman and non-tradesman.

Thus, the administrator's obligations are, first of all, contractual, arising from the mandate given by the associates and which finalizes in the stipulations of Constitutive Document or in the decisions of Associates' General Assembly taken within legal conditions of quorum and deliberation. In this way, the Mandate report does not include only the possibility that mandating names the attorney and fixes the limitations of its mandate, but also the possibility for its revocation under the conditions that element very specific for a Mandate contract, both civil and commercial, *intuitu personae*, is lost.

The content of administrator's attributions is not exclusively given by the social volition expressed through Associates' General Assembly decisions. Therefore, taking into account public interest of legal stipulation of the trading companies, some of the administrator's obligations are stipulated by law. It is the case of the stipulations of art. 72 from Law 31/1990, according to which the administrator's liabilities are stipulated by the special disposals from commercial companies' legislation.

This is the reason for which it was affirmed in doctrine that this double contractual and legal nature of the content of administrator's liabilities defines the position of administrator, but at the same time it also differentiates it from other legal positions.[410]

In conclusion, taking into consideration the legal stipulations, one can affirm that the legal report between the administrator and its company is one of commercial nature, having the legal roots in the existence of a Commercial Mandate Contract. Even if there is nothing to deter this commercial report from being grafted on the idea of an individual labour contract, this does not mean that the rules concerning the mandate do not apply to this legal report, as these rules are reflected in labour legislation as well, as shown previously.

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[409] Claudia Roşu, *Legal nature of legal reports between administrator and a trading company* in „Commercial Law Magazine" no. 4/2001, pg. 80; S. David, F. Baias, *Civil lability of a trading company's administrator* in Law Magazine no. 8/1992, pg. 13.
[410] St. Cărpenaru, op.cit., pg. 226.