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BRIEF COMMENTS ON THE CONCEPT OF JUDICIAL AUTHORITY JURISDICTION UNDER ARTICLE 6 OF COUNCIL FRAMEWORK DECISION NO. 2002/584/JHA REGARDING THE EUROPEAN ARREST WARRANT

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ABSTRACT:

Article 6, paragraph 1 of Framework Decision 2002/584/JHA provides that the issuing judicial authority is the judicial authority of the Member State competent to issue a judicial decision in accordance with the law of that State for the purpose of surrender on the basis of the European arrest warrant to another EU Member State.

The Court of Justice in Luxembourg, by its recent case-law, held that the notion of issuing judicial authority does not concern the prosecutor's offices in a Member State which are at risk of being subjected, directly or indirectly, to individual orders or instructions by the executive power in the context of adopting a decision on the issuing of the European arrest warrant.

The effects of this judgment are mandatory for all Member States and require clarification from the Member States affected by the ECJ ruling regarding the nature of the European arrest warrant authority, even a possible intervention by the legislature in these EU Member States, to facilitate the settlement of cases of arrest in full agreement with the principles of mutual recognition and mutual trust of judgments in the European area.

KEY WORDS: judicial cooperation, mutual recognition principle, European arrest warrant, issuing judicial authority, judicial decision

1.PREMISE

The European arrest warrant is a judicial decision issued by the competent judicial authority of an EU Member State for arrest and surrender to another Member State of a requested person for the purpose of carrying out a criminal prosecution or trial or for the execution of a custodial sentence or detention.[1].

This enforceable judicial decision is based on the principle of mutual recognition and trust and is the cornerstone of judicial cooperation with a view to building the European area of freedom, security and justice[2].

The Framework Decision on the European arrest warrant reflects a philosophy of integration in a common judicial area and is the first legal instrument adopted to ensure concrete recognition of mutual recognition of judgments.

[1] See Article 1 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, in OJ L 190/1 of 18 July 2002 as amended by Council Framework Decision 2009/299/JHA on the strengthening of the procedural rights of individuals and the promotion of the application of the principle of mutual recognition to decisions given in the absence of the person concerned from the process, publ. in OJ L 81, 27 March 2009, p. 4.
[2] Objective set out in Recital 5 of Decision 2002/584/JHA, p.3.

Decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority in the Member State in which the requested person was arrested will have to make the decision to surrender it[3].

The European arrest warrant is executed on the basis of the principle of mutual recognition and trust, but also with respect for fundamental human rights and legal principles enshrined in Article 6 of the Treaty on European Union (TEU)[4] and Articles 5, 6 and 8 of the Convention European Law of Human Rights (ECHR)[5] and Article 47 of the EU Charter of Fundamental Rights (CDFUE)[6].

The Framework Decision on the European Arrest Warrant, as it emerges from both the Strasbourg[7] and Luxembourg case-law, is deficient in the respect for human rights and fundamental freedoms, although there is no risk of human rights violations in judicial cooperation procedures between Member States, because they are party to the ECHR and are required to comply with the provisions of the Union Treaties and the CFSP, the latter having the same legal value as the Treaties.

In a brief review of the legal texts on fundamental human rights, we observe that legal protection under EU law is more extensive than that conferred by the ECHR, since it guarantees the right to a judicial authority, namely to appeal to a judge, we will develop this issue in the following sections.

The Court of Justice of Luxembourg (CJEU) has enshrined this right as a general principle of Union law[8].

2. ESTABLISH THE COMPETENT JUDICIAL AUTHORITY TO EXECUTE THE EUROPEAN ARREST WARRANT

Article 1 paragraph 1 of the Framework Decision provides that the European Arrest Warrant is a "judicial decision", which must be issued by a "judicial authority".

According to the provisions of Article 6 of Framework Decision 2002/584/JHA, "the issuing judicial authority is the judicial authority of the issuing Member State competent to issue a European arrest warrant in accordance with the law of that State" (paragraph 1).

Framework Decision does not explain the notion of "judicial authority. Therefore, the sphere of judicial authorities that can issue European arrest warrants differs from one Member State to another, which is why the issue has been forced by the European courts.

Before analyzing the case-law of the CJEU, a judicial body with jurisdiction over the unitary and autonomous interpretation of Union law in all Member States[9], it is necessary to make brief reference to how to determine the competent judicial authorities to issue a European arrest.

Criminal procedure acts, which are extremely varied in their subject-matter, are entrusted in the Member States to judicial bodies or to the judiciary, as the case may be.

Generally, the diversity of these organs is a manifestation of the complexity of the criminal process[10]. This variety of judicial bodies, in relation to established competence and the administration of justice in each Member State, has created difficulties in interpreting the notion of judicial authority competent to issue a European arrest warrant. In some EU

[3] See Recital 8 of the 2002/584/JHA Decision, p.4.
[4] See I.Gâlea, Treaty of the European Union. Comments and Explanations, Ed. C.H.Beck, Bucharest, 2012, p. 20 et seq.
[5] Rome, 4 November 1950, ratified by Romania through Law no. 30/1994, publ. in Of. J. nr.135 of May 31, 1994.
[6] CDFUE of 7 December 2000, adopted in Strasbourg on 12 December 2007, publ. in OJOE C Series, no.326 of October 26, 2012.
[7] See ECHR, dec. of 21 February 1975, Golder v. United Kingdom, dec. of 4 December 1979, Schiesser v. Switzerland, dec. of 23 October 1990, Huber v. Switzerland, V.Berger, Jurisprudence of the European Court of Justice of the Homme, Sirey, Paris, 5, 1996, p.315 et seq. ; CJEU: dec. of 10 November 2016, Poltorak C-452/16 PPU, EU: C: 2016: 858 paragraphs 33 and 35; dec. of 10 November 2016, Kovalkovas, C-477/16 PPU, EU: C: 2016: 861 paragraphs 34 and 36, etc.
[8] For the first time in C-222/84, Johnston, www.europa.eu.
[9] For details see M. Patraus, European Institutional Law. University Course, Ed. Pro Universitaria, 2018, Bucharest, p.233 and 236-237.
[10] See G.Stefani, G. Levasseur and B.Bouloc, Penal Procedure, 17-e, Ed.Dalloz, Paris, 2000, p.34.

Member States a clear separation between judicial functions[11] has taken place, with only judges being able to issue European arrest warrants, but in other Member States the nature of the issuing authority is different[12] for the European arrest warrant.

In the legal doctrine[13], the right to the intervention of a judge accompanied by the jurisdictional guarantees of the criminal proceedings make this right not to remain at the ideal stage to which any system of law tends, but to become an effective right. The guarantee of intervention of a member of the judicial authority is expressed by recourse to a judge or court[14].

According to Article 5 of the ECHR para.3 any person arrested or detained as provided in Article 5 para.1 let. c)[15] be brought promptly before a judge or other officer authorized by the law to exercise judicial power and shall be entitled to be sued within a reasonable time or released in the course of the proceedings.

Article 5 (3) ECHR refers structurally to two distinct aspects: the first hours after the arrest, when the person concerned is before the administrative judicial authorities or the prosecutor, and the period before the trial eventually before a criminal court[16].

In the initial phase of deprivation of liberty, the rights of the arrested person have to be protected by a judicial review that is carried out promptly automatically by a judge or other magistrate[17].

According to the Strasbourg Court, if the arrested person is not brought before a judge or authorized magistrate there is a violation of the Convention[18].

The magistrate is not to be confused with the judge, but in order for a magistrate to be considered a judge, he must fulfill certain conditions for the person in custody, a guarantee against arbitrariness or unjustified deprivation of liberty[19]. On the one hand, the judge or another authorized magistrate has the duty to obey the accused who must be brought before the judicial authorities, and on the other hand, the judicial authority is obliged to *ex officio* examine all matters relating to detention, finally taking a final decision on it.

At the same time, the judge or magistrate with jurisdictional powers must enjoy independence in relation to the executive and with the parties and impartiality[20].

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[11] For example, in Romania, according to the provisions of Article 88, paragraph 3, letter a-c of Law no. 302/2004, modified by the Law no. 236/2017, republ. in M.Of., Part I, no. 937 / 14.12.2017, the European Arrest Warrant is issued: at the stage of criminal prosecution, by the judge of rights and freedoms appointed by the President of the court to whom the jurisdiction to adjudicate the case; by the President of the Chamber, in the preliminary-order procedure; in the trial phase, by the judge appointed by the President of the first instance; in the execution phase, by the judge appointed by the President of the enforcement court. The provisions of Law no. 302/2004 regarding the international judicial cooperation in criminal matters are in full agreement with the provisions of art. 203 paragraph 3 Criminal procedure code.

[12] At present, in 17 Member States, the prosecutor is the issuing authority for the European arrest warrant. For example: in Austria, the prosecutor is the one issuing the European arrest warrant, but only in the case where the issue was authorized by the court. There are legal provisions in this Member State that allow the Ministry of Justice to instruct prosecutors in concrete cases, but given that it is the court which decides to issue the European arrest warrant, Austria considers that it fully respects the provisions of Article 6 of the Framework Decision 2002/584/JHA. There are Member States where only prosecutors issue a European arrest warrant and can receive instructions from the Ministry of Justice - Germany, Estonia, France, Denmark, Croatia. In other Member States there are certain features: Lithuania can be classified as issuing judicial authority) and Bulgaria, Finland, Greece (as regards warrants issued for the purpose of prosecution), Belgium and Luxembourg (as regards warrants for execution), Latvia and Portugal, Sweden (the prosecutor is independent of the executive) , Italy (in - service training judge) criminal prosecution, prosecutors being independent of the executive power).

[13] See S.Guinchard, M.Bandrac, X.Lagarde and M.Douchy, Droit processuel. Droit commun et droit compar du du process, 2-e, Ed.Dalloz, Paris, 2003, p.291-420 apund Gh.Mateuţ, Treaty of criminal procedure. The general part. Volume I, Ed. H. Beck, Bucharest, 2007, p.255.

[14] Gh.Mateuţ, op.cit., p.256.

[15] To conduct before a court because that person is suspected of having committed an offense or committing or fleeing after committing them.

[16] See D.Bogdan, Preventive Arrest and Detention in ECHR Case Law, Ed. Hamangiu, Bucharest, 2008, p.109 et seq.

[17] ECHR dec. of May 22, 1984, De Jong, Baljet and Van den Brink v. the Netherlands.

[18] ECHR dec. of March 11, 2008, Varga v. Romania, October 3, 2006, McKay v. The United Kingdom.

[19] ECHR dec. of December 4, 1979, *Schiesser v. Switzerland.*

[20] ECHR dec. of 28 October 1998 Assenov v. Bulgaria; Article 14 (1) of the International Covenant on Civil and Political Rights; Article 6 (1) of the ECHR.

Article 5 (4) ECHR uses a different notion, the "court", meaning that it is an independent decision-making body in relation to the executive and the parties but also impartially in the trial of the arrest.

Prosecutors are not, in the opinion of the European Court of Justice[21], independent magistrates and parties since they can not validly control pre-trial detention or detention insofar as they are susceptible to pursuing the arrested or detained person which might alter their impartiality. Therefore, regarding the members of the Prosecutor's Office, there are no objective appearances of the circumstances of the decision to hold, within the meaning of the provisions of Article 5, paragraph 3.

Taking into account that the surrender procedure based on a European Arrest Warrant must be assimilated to extradition[22], both procedures having the same effect, under Article 5 (1) (f), it is permissible, *inter alia*, to verify the legal basis of arrest, the detention of a person against whom the European arrest warrant is underway. However, the European arrest warrant must not be confused with preventive arrest[23]. As regards the European arrest warrant, detention must be accompanied by the communication of sufficient information to the person subject to the European arrest warrant and the conditions of arrest on the basis thereof are set out in Articles 2, 6 and 8 of Council Framework Decision 2002/584/JHA.

3. INTERPRETATIONS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION CONCEPT OF JUDICIAL AUTHORITY ISSUING A EUROPEAN ARREST WARRANT

Article 19 (3) (b) of the TEU and Article 267 of the Treaty on the Functioning of the European Union (TFEU) regulates the procedure of prior communications, referred to in the doctrine[24] as "the crown jewelery" a procedural mechanism by which national courts, have engaged in a direct dialogue with the Court of Justice of the European Union (CJEU) on the field and the way in which Union law is applied, being also the main means of modeling the relationship between national and community law systems[25].

The decisions of the CJEU on the interpretation of primary and secondary law are mandatory not only for the referring court but also for the other courts in the Member States, and national judges are obliged to interpret the provisions of Union law similarly to the Court[26].

Regarding the European arrest warrant, the Luxembourg Court has, over time, been called upon to give a preliminary ruling on the interpretation of Article 6 (1) of Framework Decision 2002/584/JHA[27] in several cases[28], which the referring courts have doubts as to whether the prosecutor at a prosecutor's office in a Member State fulfills the requirement of independence and that of the role in the administration of criminal justice.

The Court has initially[29] established that the term "judicial authority" is not limited to designating only judges or courts of a Member State, but must even be interpreted broadly, including authorities involved in the administration of criminal justice in the Member States without ministries or police services that are part of the executive power.

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[21] ECHR, dec. of 4 December 1979 Schiesser v Switzerland and dec. of 23 October 1990, Huber v. Switzerland.
[22] See recital 11 of Decision 2002/584/JHA, p.4.
[23] See M. Patraus, Reflections on Criminal Law Issues, as set forth in Article 5 of the European Convention on Human Rights, in the volume of Studies on ECHR jurisprudence, National Institute of Magistracy, Bucharest, 2003, p.85 et seq.
[24] See P.Craig and G.Burca, European Union Law - comments, jurisprudence and doctrine, 4th Ed. Hamangiu, Bucharest, 2009, p.576.
[25] Ibidem, p.578.
[26] See M. Patraus, op.cit., p. 336.
[27] See above, ptc. 2
[28] CJUE: dec. of June 29, 2016, Kossowski C-486/14, EU: C: 2016: 483, dec. of 10 November 2016, Poltorak C-452/16 PPU, EU: C: 2016: 858; dec. of 10 November 2016, Ozcelik C-453/16 PPU, EU: C: 2016: 861, dec. of 10 November 2016, Kovalkovas, C-477/16 PPU, EU: C: 2016: 861, dec. of 27 May 2019, OG and PI C-508/18 and 82/19 PPU, EU: C: 2019.
[29] CJUE: dec. of 10 November 2016, Poltorak C-452/16 PPU, EU: C: 2016: 858; dec. of 10 November 2016, Kovalkovas, C-477/16 PPU, EU: C: 2016: 861.

This interpretation is in line with the provisions of Article 82 paragraph 1 (d) TFEU on judicial cooperation in criminal matters, which must be cooperation between the judicial or equivalent authorities of the Member States in matters of prosecution and enforcement of judgments.

Recently, the CJEU has explained the notion of "issuing judicial authority" of the European Arrest Warrant stating that Art. Article 6 (1) of Framework Decision 2002/584/JHA should be interpreted as meaning that this phrase does not concern the prosecutor's offices in a Member State which are at risk of being subjected, directly or indirectly, to an individual instruction by the executive, a minister of justice, when deciding on the issuing of a European arrest warrant[30].

In the present case, the applications for a preliminary ruling were made in connection with the execution in Ireland of two European arrest warrants issued by the Prosecutor's Office attached to the Regional Court in Lübeck, Germany, for the purpose of prosecuting against OG - a Lithuanian national residing in Ireland, respectively by the Prosecutor's Office in Zwickau, Germany for the purpose of prosecution against PI-Romanian national.

Under Irish law, judicial authority means that the judge, magistrate or any other person authorized by law performs the same or similar tasks as those performed by a court[31].

Under German law, officials in the Prosecutor's Office have the obligation to observe the official instructions received from their superiors[32] and the Federal Minister of Justice in their relationship with the Federal Attorney General and the Federal Prosecutors, in relation to all the officers of the Prosecutor's Office in the country concerned, the highest official in the prosecutor's offices attached to the higher regional courts in relation to all the officers of the Prosecutor's Office attached to that court have the power to supervise and to issue instructions[33].

The Irish court in its reference for a preliminary ruling has stated that, in relation to the provisions of German law, it has serious doubts that the German Prosecutor's Office, which belongs to a hierarchical structure depending on the Minister of Justice, fulfills the requirement of independence in order to be qualified as a judicial authority within the meaning of Article .6 of Framework Decision 2002/584/JHA.

The Irish Supreme Court and the Irish High Court have decided to suspend the cases and address the Court of Justice with a set of 5 preliminary questions regarding the participation in prosecution of criminal justice, their independence and objectivity, respectively whether the German Prosecutor's Office is a judicial authority within the meaning of Article 6 (1) of Framework Decision 2002/584/JHA.

The CJEU has shown that the principle of mutual trust between Member States and the principle of mutual recognition have a fundamental importance in Union law as they allow the creation and maintenance of an area without internal frontiers[34]. The principle of mutual recognition applies to Article 1 paragraph 2 of the Framework Decision, which enshrines the rule that Member States are obliged to execute any European arrest warrant on the basis of this principle.

The arrest warrant constitutes a judicial decision within the meaning of Article 1 (1) of the Framework Decision, which requires it to be issued by a judicial authority, as the Court pointed out in its previous case-law[35].

In the Ozcelik case[36], the Court held that the public ministry's confirmation of a national arrest warrant issued by the police, which is the basis of the European arrest warrant,

[30] CJEU: dec. of 27 May 2019, OG and PI C-508/18 and 82/19 PPU, EU: C: 2019, parag. 90.
[31] Article 33 of the Irish Law of 2003 on the European Arrest Warrant.
[32] Art.146 of the German Judicial Organization Act.
[33] Art.147 of the German Judicial Organization Act.
[34] See paragraph 43 of the preliminary ruling.
[35] CJUE: dec. of 10 November 2016, Poltorak C-452/16 PPU, EU: C: 2016: 858; dec. of 10 November 2016, Kovalkovas, C-477/16 PPU, EU: C: 2016: 861.

falls within the notion of "judicial decision" and its existence or mandate of national arrest must be indicated in the European Arrest Warrant form, in accordance with the provisions of Article 8, paragraph 1, letter c of Framework Decision 2002/584/JHA.

Under the principle of procedural autonomy, Member States may designate the competent judicial authority to issue a European arrest warrant, but the meaning and scope of these notions can not be left to the discretion of each Member State.

The Court has held that this concept requires an autonomous and uniform interpretation in the European area, requiring it to be determined by reference to the terms of Article 6 (1) of the Framework Decision, the context in which it forms part, and the objective pursued by the Framework Decision.

At the same time, the Court underlined that one of the objectives of Framework Decision 2002/584/JHA is to ensure a system of free movement of judicial decisions in criminal matters, those prior to sentencing sentences and final sentences in an area of freedom, security and justice.

Therefore, to the extent that the European Arrest Warrant facilitates the free movement of prior and subsequent judicial decisions, it must be considered that the authorities which under national law are competent to adopt such decisions may fall within the scope of the Framework Decision.

An authority, such as the Prosecutor's Office, which has the power to prosecute a suspected person who has committed an offense for the purpose of bringing it before a court, is involved in the administration of justice in a Member State, is Germany.

Regarding the independence of the courts, the referring courts in Ireland have shown that they have serious doubts that the German Prosecutor's Office, which belongs to a hierarchical structure, depending on the Minister of Justice, fulfills this condition.

When a European Arrest Warrant is issued for the purpose of arresting and surrendering the person prosecuted to another Member State for the purpose of prosecution, it must have received procedural guarantees and fundamental rights protected by the judicial authority of the issuing Member State[37].

The European Arrest Warrant system includes a two-level protection of the procedural rights and fundamental rights to be enjoyed by the intended person. Issuing a European arrest warrant is likely to impair the right of freedom of the requested person under Article 6 of the CDFU and the protection implies the adoption, at least at one of the two levels, of a decision that meets the requirements inherent in judicial protection effective.

If the law of the issuing Member State attributes the power to issue a European arrest warrant to an authority which, although participating in the administration of justice, is not a judge or a court, the national judicial decision on the arrest warrant on which the European arrest warrant is based must to meet such requirements. It ensures that the decision to issue a European arrest warrant for the purposes of prosecution is based on a national procedure subject to judicial review and the person sought has been granted guarantees against arbitrariness or unjustified deprivation of liberty.

Consequently, the Court concluded that the "issuing judicial authority" as referred to in Article 6 (1) of the Framework Decision is the entity that performs this function objectively, independently without being exposed to the risk that its power of decision would be the subject of external orders or instructions, in particular from the executive branch, and the authority which takes the decision to issue the European arrest warrant has the task of ensuring a second level of protection, even when that mandate European arrest warrant is based on a national decision pronounced by a judge or a court.

The Court stressed that although the decision of the German Prosecutor's Offices to issue a European Arrest Warrant may be the subject of an appeal by the person pursued in the competent courts, given that a possible individual instruction is allowed to the Minister of

[36] CJUE, dec. of 10 November 2016, Ozcelik C-453/16 PPU, EU: C: 2016: 861.
[37] CJUE, dec. of 1 June 2016, Bob-Dogi, C-241/15, EU: C.2016: 385, point 56.

Justice on the occasion of the issue of the European arrest warrant these prosecutors are at risk of being influenced by the executive power and therefore do not appear to fulfill one of the requirements imposed to qualify as an issuing judicial authority within the meaning of Art. 6 paragraph 1 of the Framework Decision.

4. CONCLUSIONS

CJEU in interpreting the notion of "issuing judicial authority" within the meaning of Art. 6 paragraph 1 of Framework Decision 2002/584 / JHA, as amended by Council Framework Decision 2009/200/JHA of 26 February 2009, examining whether the Public Prosecutor may be the issuing judicial authority of the European Arrest Warrant, took into account *inter alia* the following essential elements:

- participation in the administration of criminal justice[38] (the prosecutor has the power to prosecute a suspected person who has committed an offense in order to bring it before a court and/or has a key role in the conduct of criminal proceedings and/or has the power to order the referral);
- the objectivity[39] (the national status of the prosecutor must establish objectivity in the execution of the criminal instruction, that is, it takes into account all incriminating and decriminalizing elements);
- independence[40] (the legal position of the prosecutor in the national legal order must give him guarantees of independence from the executive power, without the risk of being subjected to an individual instruction from the executive power);
- the appeal[41] (the prosecutor's decision to issue the European arrest warrant must be the subject of an appeal that meets the requirements inherent in effective judicial protection).

If, by its previous case-law, the Luxembourg Court had exhaustively interpreted the notion of judicial authority, including the authorities involved in the administration of criminal justice in the Member States, without ministries or police services, which are part of the executive power, by that judgment, makes a similar interpretation to that of the Strasbourg Court, pointing out that the judicial authorities issuing a European arrest warrant must provide institutional and judicial safeguards for criminal proceedings to any person arrested or detained in full compliance with fundamental human rights.

The effects of this decision are binding all Member States and require clarification from 17 Member States on the nature of the European Arrest Warrant Authority, even a possible intervention by the law of these EU Member States, for the application of EU law and the interpretation of normative acts in line with the CJEU case law, in order to facilitate the settlement of arrest warrant cases in full compliance with the principles of mutual recognition and mutual trust in judgments in the European area.

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I.Gâlea, Treaty of the European Union. Comments and Explanations, Ed. C.H.Beck, Bucharest, 2012;

[38] See paragraphs 29-42 and 50-63 of the dec. of May 27, 2019, GO and PI C-508/18 and 82/19 PPU, EU: C: 2019.
[39] See paragraphs 51, 73 of the dec. of May 27, 2019, GO and PI C-508/18 and 82/19 PPU, EU: C: 2019.
[40] See paragraphs 51-52, 73-74 of the dec. of May 27, 2019, GO and PI C-508/18 and 82/19 PPU, EU: C: 2019.
[41] See paragraphs 53, 75 of the dec. of May 27, 2019, GO and PI C-508/18 and 82/19 PPU, EU: C: 2019.

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Commission Communication, Manual on the Issuance and Enforcement of a European Arrest Warrant in OJ C 335/01 of 6 October 2017;
ECHR jurisprudence;
CJEU jurisprudence.

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VIEWS ON THE OFFENCE OF HUMAN TRAFFICKING

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ABSTRACT

In the international background of the current period, Romania is included in the "Balkan Route" of illegal migration, which influences all the main areas of society, including the security of the state and that of its citizens.

One of the main issues in the last decade, at national and international level, is the human trafficking, linked to the illegal migration, which is constantly increasing.

Human trafficking is an offense which affects human rights, with profound economic and social interference, due to the mobility and perceivable advantages of the phenomenon.

Until 2014, human trafficking was provided for by law 678/2001 regarding the prevention and control of human trafficking, but with the entry into force of the New Criminal Code this offense was covered by the same code, provided by art. 210.[1]

KEY WORDS: *human trafficking, security, phenomenon.*

INTRODUCTION

The phenomenon of human trafficking is not an isolated phenomenon,specific to our country; it has an international and cross-border characterand is part of what we call organized crime.

The concept of trafficking is not new and was first used in the 16th century as a synonym for trade; therefore this term has no negative connotations. However, towards the 17th century, trafficking began to be associated with the illicit or illegal sale of goods.

Although initially trafficking was largely understood as the sale of drugs and weapons in the 19th century, this term also included the trading of people considered goods and sold in slavery.

This slave trade was outlawed towards the end of the 19th century. At the beginning of the 20th century, the term "trafficking" often referred to the "white slave trade", which was the cross-border movement of women and children for prostitution purposes. Only in the late 1990s trafficking was associated with the prostitution and sexual exploitation of women and children.

Prostitution is considered one of the oldest "jobs in the world". Myths or historical testimonies show that in ancient times prostitution was not only eradicated but even encouraged for various purposes.[2]

It should be noted that a number of important UN documents have referred to the prohibition of human trafficking. We can enumerate the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), The

[1] Romanian Criminal Code – Special Section – Title VII – Trafficking and exploitation of vulnerable people
[2] M.Focault ,*The History of sexuality* , vol. 3 , Univers edition, Bucharest , 2005 , p.57.

International Covenant on Economic, Social and Cultural Rights (1966), the Council of Europe Convention on Action against Trafficking in Human Beings (2005).[3]

Romania not only complied with all these international documents, but also adopted a law in accordance with them, being able to effectively control this phenomenon.

In this respect, among the adopted internal regulations we mention: Law no. 678/2001 regarding the prevention and control of human trafficking[4] *and the Regulation on the application of this law, approved by the Government Decision no. 299/2003*[5]*, Law no. 682/2002 on the protection of witnesses*[6]*, Law no. 39/2003 regarding the prevention and control of organized crime*[7]*, Law no. 211/2004 regarding certain measures for insuring the protection of victims of this offence*[8]*, Law no. 272/2004 regarding the protection and promotion of child rights*[9] *and Law no. 302/2004 regarding the international legal cooperation in criminal matters*[10].

By Government Decision no. 1584/2005 was established the National Agency against Human Trafficking[11]*; the need to establish this unit was required by the magnitude of human trafficking, which is a cause for concern for most of the world's states.*

ANALYSIS OF THE HUMAN TRAFFICKING OFFENCE

The legal framework of the human trafficking offense is provided in the Criminal Code - Special Part - Title VII - Trafficking and exploitation of vulnerable people, art. 210.

The special legal object represents the social relations whose development is conditioned by the meeting of the human freedom and rights, dignity, physical integrity or health against the exploitation and transformation of the person into a source of gain.

The material object is the body of the trafficked person for exploitation[12].

The active subject can be any responsible person. In the worse version, the active subject is qualified, having the status of civil servant.

The passive subject is the trafficked person for the purpose of exploitation. The passive subject can be any person, woman or man. When the passive subject is a person under the age of 18, the offense transforms, from human trafficking into trafficking of minors.

The material element of the objective side is in the form of a plurality of alternative actions which can be accomplished by five distinct ways, namely recruiting, transporting, transferring, housing and receiving a person.

The first way of committing a trafficking offense is the recruitment action.

Recruitment means the action of attracting, persuading potential victims of human trafficking for the purpose of their exploitation.

Recruitment methods and techniques vary according to the degree of vulnerability of the victim, the level of training, material status, life experience, all speculated by traffickers. Therefore, the main recruitment means consisted of: Promoting honest and well paid jobs in

[3] C. Barsan, *European Convention of Man's Rights. Remarks on articles, vol. I, Rights and freedom, All Beck ed., Bucharest,* 2007, p.139.
[4] The Official Gazette of Romania no. 783 from 11th of December 2001
[5] The Official Gazette of Romania no. 206 from 31st of March 2003
[6] The Official Gazette of Romania no. 964 from 28th of December 2002
[7] The Official Gazette of Romania no. 50 from 29th of January 2003
[8] The Official Gazette of Romania no. 505 from 4th of June 2004
[9] The Official Gazette of Romania no. 557 from 28th of June 2004
[10] The Official Gazette of Romania no. 594 from 1st of July 2004
[11] The Official Gazette of Romania no. 5 from 4th of January 2004
[12] I. Lascu, *Indictments regarding human trafficking,* in RDP (Criminal Law Magazine) no. 3/2002, p. 65.

developed countries, made directly by the trafficker or by relatives close to the victim; advertisements in newspapers on highly attractive job offers abroad; ads by matrimonial agencies, where victims, especially women, are attracted to marry with foreign citizens[13]; through the Internet, usually through social networks.

The second way to commit a human trafficking offense is transport.

Leading involves transporting trafficked persons from one place to another, either domestically or abroad, with different means of transport, for the purpose of exploitation.

The transport operation may be organized by the person recruiting the trafficked person, other persons or traffickers.

The third way of committing a trafficking offense is the transfer action.

In ordinary language, transfer represents something that moves from one place to another, both fictitious and material[14]. For the purposes of the offense, transfer means the transfer of human trafficking between traffickers through the sale, exchange, hiring, assigning or other illegal transactions for the purpose of the person's exploitation.

Victims realize that they have been sold only when they are dispossessed of their identity documents, taken in isolated and permanently supervised places where they are not informed, are not allowed to come into contact with others, and are subjected to dehumanizing treatments making them vulnerable and easy to exploit.

The fourth way of committing a human trafficking offense is the housing action. Housing means installing, setting up, temporarily arranging a trafficked person in a house or in a location with the same destination (motel, hotel, camping) for the purpose of exploitation. The last way of committing the offense is the receiving action, which is accomplished by taking over the trafficked victim by another trafficker following the purchase, exchange or other similar means for exploitation.

For the existence of the offense, with regard to the material element of the objective part, in any of the five ways analyzed, the following conditions must be met:

A - EXPLOITATION OF A PERSON

According to art. 182 of the Criminal Code, the exploitation of a person means:

a) requiring the person to execute a job or to perform services in a forced manner.

b) keeping the person in the state of slavery or other similar procedures of deprivation of liberty or servitude.

c) forcing the person to perform prostitution, pornography in order to produce and broadcast pornographic materials or other forms of sexual exploitation.

In the case of human trafficking, victims are first recruited in different forms and ways, after which they are forced to prostitute or willingly accept this because they are threatened, beaten, left without money, without documents, in a foreign country where they do not know the language, and no other person to help them, so they eventually agree to prostitute. Traffickers take all the money they earn from this activity.

"Pornography" means the act of adults, as well as materials that produce or disseminate such acts.

d) requiring the person to practice begging.

(e) removal of organs, tissues or cells of human origin, unlawfully.

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[13] Gh. Mateuț, V.E. Petrescu, N. Ștefăroi, A. Prună, C. Luca, *Human trafficking. Offender. Victim. Offence.* Social Alternative Association ed., Iaşi, 2005, p. 41.

[14] *Romanian Explanatory Dictionary*, II[nd] ed., EnciclopedicUnivers ed., Bucharest, 1996

These forms of exploitation involve the trafficking of victims by traffickers, as they are caused by the constraint of committing different offences in the interest of trafficked people[15].

B- THE ACTIONS INCRIMINATED IN LAW MUST BE COMMITTED IN ONE OF THE FOLLOWING WAYS:

a) Threat - This means that a victim feels that he/she or others close to him/her will have serious consequences if he/she does not respond to the traffickers' demands.

For example, victims are threatened with the death, mutilation, kidnapping of a family member. Legal practice has shown that even violence can be a threat to the victim: the breaking of ties with the destruction of things by the victim, the violent destruction of property in front of the victim; all of which have an intimidating effect on the victim and are likely to destroy and exert a strong moral constraint on the victims[16].

b) Violence - Violence was defined as any form of physical aggression used against a person consisting of acts of attack, immobilization, association, including damages to the nature of the offense provided by article 193 of the Criminal Code[17].

c) abduction represents the action of traffickers to take the victim out of his/her environment, either by force, by attracting and depriving him/her of freedom.

d) fraud - Fraud is the action of traffickers to mislead the victims of human trafficking in order to gain advantages in violation of their rights.

e) deception - is the presentation as true of a false act or as a liar of a true action by the traffickers of the victim. For example, promises to victims of paid jobs abroad in connection with their training, extremely accessible working conditions, marriages with rich foreigners.

Immediate result. The action of the active subject must result in a state of danger that has been created for the relations regarding the freedom of the person, meeting the rights of the person, the physical and psychic integrity of the person and which is accomplished by the incriminated activity itself.

Causality report. There must be a causal link between the perpetrator's action and the immediate result; this is accomplished by the very act describing the act of incrimination.

Regarding the ***subjective side*** of human trafficking, this is generally done in the form of direct intent.

Therefore, in all the ways of existence of the material element for the offence of human trafficking, the law requires the existence of a specific purpose of the offence, namely the exploitation of the victim, as being an essential condition, whether the purpose pursued was accomplished or not.

In the situation of achieving this purpose, there is a real offense race between human trafficking and the offence which forms the purpose of exploitation (for example: promoting prostitution - article 213 of the Criminal Code), of course, if both the trafficking activity and the subsequent exploitation activity is done by the same person.

There is also an appeal in the interest of the law in which the supreme court established the relationship between the offence of human trafficking and promoting prostitution in the regulation prior to the adoption of the current Criminal Code.[18]

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[15] Gh. Mateuț, V.E. Petrescu, N. Ștefăroi, A. Prună, C. Luca, *Human trafficking. Offender. Victim. Offence.* Social Alternative Association ed., Iași, 2005, p. 58.

[16] I. Gârbuleț, *Human trafficking*, UniversulJuridic ed., Bucharest, 2010, p. 52

[17] G. Antoniu, *Remarks in the Criminal Code. Special section.* ȘtiințificășiEnciclopedică ed., Bucharest, 1975, vol. I, p. 191

DISTINCTIONS BETWEEN HUMAN TRAFFICKING AND PROSTITUTION

According to art. 213 of the Penal Code, paragraph 1 "Determining or facilitating the practice of prostitution or obtaining patrimonial benefits from the practice of prostitution by one or more people shall be punished by imprisonment from 2 to 7 years and the prohibition of exercising certain rights."

In the same article, par. 2 states that "If the determination to start or continue to practice prostitution was made by constraint, the punishment shall be imprisonment from 3 to 10 years and the prohibition of exercising certain rights."

A first distinction between the two offenses is the generic legal object.

The offense of human trafficking has as its generic legal object the right to freedom of will and action pertaining to each person.[19]

In the case of the offense of promoting prostitution, the socially protected value resides precisely in the good morals in the relations of social coexistence and illicit insurance of livelihoods.

The second distinction between the two offences is based on the material element of the objective side. In the simplest form, the offense of promoting prostitution is carried out under the aspect of the material element of the objective side, by the following means: determining, facilitating the practice of prostitution, or benefiting from prostitution, ways that the offence of human trafficking does not regulate.

In the case of promoting prostitution, it is not necessary to carry out constraints on the victim or to subject them to pressure from a person who has gained authority over him/her, except for the means of constraining to practice prostitution.

The third distinction between the two offences takes into account the subjective side. In this respect, the offence of human trafficking is committed with purpose-oriented intent, and in the case the offence of promoting prostitution, the offense can be committed with a direct or indirect intention, the purpose or the action is not interested in the existence of the will, and can only be considered at the legal individualization of the punishment.

One last distinction is that the offense of promoting prostitution is investigated by the criminal investigation bodies under the supervision of a prosecutor working in the prosecutor's offices attached to the courts, while the offence of human trafficking is within the competence of the prosecutor within the Department of Investigation of Organized Crime and Terrorism Offenses, specialized unit created within the Public Ministry, with attributions throughout the country for the control of organized crime and terrorism.

CONCLUSIONS

Even if the level of education of the population is ascending, poor social-economic conditions lead to the adventuring of people in the unknown by pursuing a better living, where they fall prey to the action of traffickers.

We believe that greater media promotion of ways to prevent human trafficking would be helpful. Also, implementing programs in schools and presenting ways to seize victims of traffickers would make the percentage of human trafficking to decrease.

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[18] ICCJ , United Sections, Dec. no.XVI from 19th of March 2007,appeal in the interest of the law on the application of criminal provisions of art. 329 from the Criminal Code and art. 12 and 13 from Law no. 678/2001 regarding the prevention and control of human trafficking, in the Official Gazette of Romania no. 542 from 17th of July 2008.

[19] I. Gârbuleț, *Human trafficking*, UniversulJuridic ed., Bucharest, 2010, p. 53

It is true that prostitution is one of the oldest trades in the world and is regulated in a wide variety of ways, ranging from punishment to complete legalization, it could be more easily controlled by increasing the activity of competent bodies and re-educating the people practicing this profession so that they can carry out other activities to ensure their everyday living.

These preventive methods could reduce both the number of people who become the prey of this immoral act and the work of the designated people to deal with these cases.

The emotional and psychological impact on people who become victims of human trafficking and implicitly of involuntary prostitution / pornography is so powerful that it requires a long period of mental recovery and social rehabilitation of both the victim and his / her family.

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NULLUM CRIMEN SINE LEGE

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ABSTRACT: *This article discusses the issue of one of the most important Latin expressions that establish at the level of general principle that no crime exists outside the law.*

The purpose of the criminal law being the defense against the offenses of the right order, ensuring this order implies a strict respect of the principle of legality.

Part of the principle of legality, the legality of incrimination, was formulated among the first, by the Beccaria in Dei delitti e delle pene and proclaimed also in the Declaration of Human and Citizen Rights (1789).

Subsequently, the principle of legality of incrimination was passed in most criminal codes and even in some constitutions.

The Romanian penal code emphasizes that the incriminations can only take place by law, not by other normative acts.

In our law, crime is the sole basis of criminal liability.

The second part of the principle of legality stipulates the legality of the punishments, so that, the crime being the only theme of the criminal liability, at the time of the commission the sanction must also intervene. Only when the sanction intervenes, it must be taken into account in particular that by sanctioning the offenders and the way in which the punishments are enforced some fundamental rights of the person are restricted, such as: freedom of movement, enshrined in all democratic constitutions, free development of the personality of the man and of his participation in the social and economic life, in the family life, the interruption of the professional activity and not lastly the affectation of his dignity. Therefore legality is a fundamental principle of criminal law: the criminalization can only take place through a law, and the sanction only if it is provided by law.

KEYWORDS*: crime, Criminal Code, fundamental principle, incrimination, law*

INTRODUCTION

From the summary of the classifications and statements given by the criminal law theorists regarding the fundamental principles of criminal law, it is determined that the principle of legality is of the utmost importance because under this sign stands the entire edifice of modern criminal law.

The principle of legality is unanimously considered to be one of the fundamental principles of the European Union, included in the law of all European states and in the international treaties in criminal matters, which explains the very small number of the judgments of the Court regarding this aspect.

The principle of legality is a unanimous principle also admitted in the criminal doctrine of Romania, which expresses the rule that the entire activity in the field of criminal law is carried out on the basis of the law and in accordance with it[1].

The principle of legality has an absolute character.

1.1 LEGALITY

From the fundamental principles provided by criminal law, some have been proclaimed since ancient times.

The great philosophers of antiquity, Socrates, Plato and Aristotle, who influenced to the greatest extent Western legal thinking, made clear references to the problems of law and force, proclaiming, without any doubt, the rule of law.

Also, Beccaria states: „only the law can determine the penalties corresponding to the crimes and this authority can be held only by the legislator, who represents the whole society brought together by a social contract. Every citizen must know in which situation he is guilty and in which situation he is innocent".

The criminal law, as a form of expression of the law, represents a set of norms that stipulate what facts constitute offenses, the sanctions that can be applied to the offenders and the measures that can be taken in case of committing these facts.

Because the legal norms establish a well-determined conduct whose non-compliance attracts sanctions from the courts, the necessity of their elaboration, adoption and promulgation through a special procedure at the level of the legislative bodies was imposed[2].

The legislator, in the rule of incrimination describes the crime and at the same time provides a sanction for that fact, drawing a line between the criminal and extra-criminal illegal acts.

In this way, it separates the field of the facts that constitute offenses from those that are subject to the extra-penal norms or which are allowed by law.

These limits of demarcation can not be exceeded in any way, neither by the way of extending the incrimination on other facts not included in the description from the criminal law, nor by the way of the interpretation of the criminal law[3].

Only the criminal law can determine the facts that constitute crimes and attract the criminal liability of a person as well as the sanctions that apply to those who commit crimes.

Incrimination and punishment can only be the work of the legislator.

What provide to the crime the criminal offense is its provision in the norm of incrimination or, in other words, the criminal nature of the crime depends on the will of the legislator and not on the objective reality[4].

Criminal law means any provision that regulates social defense relations.

The term „criminal law" is used in its usual legal sense, as a normative act containing provisions of criminal law.

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[1] C-tin. Mitrache, C. Mitrache, *Romanian criminal law. General part,* Bucharest, Universul Juridic Publishing House, 2006, pg. 44

[2] F. Ivan, *Criminal law. General part*, Romanian University Press Publishing House, Timişoara, 2001, pg. 21

[3] V. Dongoroz, S. Kahane, I. Oncea, I. Fodor. N. Iliescu, C. Bulai, R. Stănoiu, *Theoretical explanations of the Romanian Criminal Code*, Vol. I, Second Edition, Romanian Academy Publishing House, All Beck Publishing House, Bucharest, 2003, pg. 36

[4] F. Ivan, same refference, pg. 21

By criminal law we can say that we understand all the provisions that refer to the conditions of incrimination and punishment and to the conditions for taking criminal responsibility contained in:

- the penal code, as a general basic law in criminal matters, where the majority of the norms of general and special criminal character are included;
- special criminal laws;
- criminal provisions from non-penal laws.

The Criminal Code has two parts:

- The general part (corresponding to the norms of the General Part of the Criminal Code) which contains rules regarding the criminal law and its application, crime and offender, criminal sanctions and criminal liability.
- The special part (corresponding to the norms of the special part of the Criminal Code and of special laws) which contains rules that establish the concrete content of each particular offense as well as the sanctions that apply to these crimes.

Special criminal laws are those laws which provide for certain offenses or which regulate the criminal liability of persons who have a certain quality, or which regulate certain areas of social life: the law on combating trafficking and illicit drug use, the Law on the prevention and sanctioning of acts of corruption.

1.2 THE LEGALITY OF THE INCRIMINATION

According to art. 2 of the Criminal Code, "the law provides for the facts that constitute offenses, the penalties that are applied and the measures that can be taken in case of committing these facts".

The offense is a fact prohibited by law which is sanctioned by the legislator by drawing to criminal liability.

The offense consists in committing the act of conduct that is prohibited by the norm of incrimination.

The concrete fact must be related to an incrimination rule, to a legal model in order to be assigned the crime character.

It was argued in the doctrine[5] that, in a certain way, the norm of incrimination creates, from a legal point of view, the crime; it confers this quality on the concrete crime, only by reference to the norm and insofar as the features of the concrete crime coincide, they overlap those of the legal model[6], a fact cloaks the legal offense and can be subject to criminal sanction.

It has been stated[7] that the law is an act of legal creation.

A fact is not a crime unless the norm incriminates and sanctions it.

"With the help of the incrimination norm, the legislator achieves its objectives of criminal policy; the criminal norm includes the requirements that the company formulates regarding the behavior of the recipients of the norm. Any change in the criminal policy of the state takes place through changes brought to the incrimination norm (disincrimination, incrimination of new facts, modification of the content of some incriminations, etc.)"[8].

[5] G. Antoniu, *Reflections on the structure of the incriminating norm*, in R.D.P. no. 3/1998, pg, 9
[6] V. Dongoroz V., *Criminal law*, Bucharest, Tempus Society Publishing House & Romanian Association of Criminal Sciences, 2000, pg. 211
[7] G. Antoniu, same refference, pg. 9
[8] Idem

1.3 THE CRIME INCRIMINATED

The legislator at the time of elaboration the criminal law will first of all, have to describe the fact that he understand to incriminate.

He must show the dangerous action, that is to say the active intervention of the individual, that is to say a dangerous activity that is prohibited by law, or the inaction characterized by the passive attitude of the individual, manifested when the law requires him to carry out a certain activity and he abstains to fulfill it.

The action can consist in a single act (for example a hit), in several acts, identical (several repeated hits in the same circumstance) or in several different acts (for example, a hit and a shot).

The means of accomplishing the illicit action are very varied, in some cases using the energy of the agent; in others, the action takes place by means of instruments, forces, inanimate or inanimate objects.

„Inaction is the opposite of the action, so the attitude, the negative behavior: the perpetrator remains in passivity, does not act as he was obliged. In order for the inaction to be criminally relevant, there must therefore be a legal, conventional or natural duty for the perpetrator to act in a certain way[9]".

Committing the act or inaction incriminated must produce a dangerous consequence.

The dangerous consequence is that negative modification of the surrounding reality that the committed act has produced or is likely to produce and which finds its expression in the danger, injury or threat of the social values defended by the criminal law[10].

The material act must be finalized by a result, an effect, a consequence, which is practically the external form of manifestation of the criminal action or inaction, revealing its purpose.

In social life, any cause necessarily produces an immediate, direct consequence.

Thus, between the criminal action or inaction and the socially dangerous consequence there must be a causal link, a link from cause to effect.

Although the law does not expressly provide for the causal link between the conditions of existence of the crime, this link is a constituent element of the content of any crime.

In addition to the illegal action or inaction, the socially dangerous follow-up and the causal relationship between them, in the commission of an offense may also be provided circumstances related to the place, time, manner and means used in committing it.

Although, in any crime, the dangerous action or inaction as well as the psychic attitude with which they were committed appear, they cannot be viewed separately from the person of the perpetrator and from the social values harmed or endangered.

Seen from a logical point of view, an offense is made up of certain elements identified and defined in the criminal law.

All the elements of the crime form the content of the crime.

In the Criminal Code in force, the notion of crime in general has received, within a legal norm a precise formulation: it is the act provided by the criminal law committed with guilt, unjustified and imputable to the one who committed it.

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[9] V. Dongoroz, same refference, 2003, pg. 108

[10] A. Boroi, *Criminal law. General part. Under the New Criminal Code*, C. H. Beck Publishing House, Bucharest, 2010, pg. 166

The Declaration of Human and Citizen Rights of August 26, 1789 proclaims that „people are born and remain free and equal in rights. Social distinctions can only be founded on the common utility ”(art. 1).

The law „must be the same for all, whether it defends or punishes„ (art. 6) and „no man can be accused, arrested or detained except in the cases determined by law, according to the procedure provided by it„ (art. 7).

Universal Declaration of Human Rights „no one will be convicted for actions or omissions that did not constitute when a criminal act was committed in accordance with international or national law„ International Covenant on Civil and Political Rights adopted in 1966 „Nobody will not be convicted for actions or omissions that did not constitute a criminal act, according to national or international law, at the time they were committed„ and the Convention for the Protection of Human Rights and Fundamental Freedoms outlines the international framework in which two fundamental principles are found. of criminal law: the principle of legality of incriminations and punishments and the principle of equality before the law.

Taken from the national constitutions of the signatory states, these principles receive constitutional value.

1.4 THE PRINCIPLE OF LEGALITY

The principle of legality is expressly provided in the Romanian Criminal Code:

„Art. 1. - (1) The criminal law provides the facts that constitute offenses.

(2) No person shall be penalized for a crime that was not provided for by the criminal law at the time when it was committed”.

This principle is the basis of criminal liability.

Only when a person knows what is allowed by law and what is forbidden can he act freely, he can adopt the attitude he wants towards the law freely.

From this principle some authors[11] see four consequences:

„- reservation of the regulation in criminal matters exclusively to the criminal law;

- express and precise determination of criminal acts;

- non-retroactivity of criminal law and

- prohibition of analogy in criminal matters”.

Other authors[12] refer to this principle as a guarantee for respect for human rights.

According to theprinciple of legality, the activities carried out by forensic experts involved in criminal investigations may only be ordered, performed and exploited in compliance with the provisions of the Criminal Procedure Code. However, the tactical methods applied and the technical-scientific means used during their deployment must also be based on the rules of forensic science set out in best practice guides, which are not detailed in the legislation but are applicable in the matter.

CONCLUSIONS

The principle of the legality of the incrimination expressed by the Latin dictum nullum crimen sine lege imposes the necessity for the crime to be incriminated in a legal text.

[11] V. Pasca, *Course on criminal law. General part with the amendments of the new Criminal Code*, Bucharest, Universul Juridic Publishing Housepg. 32

[12] E. A. Iancu, *The Contribution of Forensic Science to Establishing the Truth in Criminal Proceedings*, în Athens Journal of Law -Volume 5, Issue 4, pg. 459, DOI: 10.30958/ajl_v5i4

The legality of the incrimination is a strong guarantee of respecting the rights and freedoms of the citizen who cannot be held responsible for behavior that is not provided for in the law as illegal.

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CONSIDERATIONS IN REGARDS TO THE PROTECTION OF PERSONAL RIGHTS GRANTED AFTER THE PERSON'S DEATH

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ABSTRACT

The present article aims to discuss the extent to which the protection granted to personal rights can exceed the life of a person and, if so, to determine whether the rights that come within the meaning of private life as governed by Article 8 of the European Convention of human rights can be protected consecutively to the person's death.

KEY WORDS: *protection, personal rights, human rights, jurisprudence, reputation, deceased person, memory.*

INTRODUCTION

In this regard the European Court of human rights has already confirmed the principle that Article 8 rights were non-transferable when it refused a universal legatee to pursue an application lodged by the immediate victim in the case of Thevenon v. France[1].

In another decision the Court did not find sufficient reasons to depart from its established case-law and argued that the applicant does not have the legal standing to rely on his grandfather's rights under Article 8 of the Convention because of their non-transferable nature.[2]

This being said, it seemed that the Court had a solid jurisprudence which established a temporal limit of protection for the private life: the death of the person. After this moment, any injury to the memory of the deceased was regarded as a violations of the rights of relatives that were alive.

[1] See Thevenon v. France Dec. no. 2476/02, 28 June 2006. In Thevenon v. France, mr Yahi an universal legatee of the plaintiff although a close friend of the deceased was denied locus standi on the bases that rights guaranteed by Articles 5 and 8 of the Convention are eminently personal and non-transferable
[2] *Yakovlevich Dzhugashvili v. Russia*, App. no. 41123/10, (dec.) 9 December 2014, §§ 23-24

But the Court seems to depart from that opinion, in Genner v Austria given the fact that it has found that there was no violation of the right to freedom of expression, in respect to sanctioning allegations that threatened the respect of private life of a deceased individual[3].

GENNER VERSUS AUSTRIA

In *Genner* The Court has found that Article 10 § 2 enables the reputation of others – that is to say, of all individuals – to be protected. The right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life. An attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life[4].

Not wanting to set aside the well-established precedents, the Court emphasized that dealing appropriately with the dead out of respect for the feelings of the deceased's relatives falls within the scope of Article 8 (see with further references *Hadri-Vionnet v. Switzerland,* no. 55525/00, 51, 14 February 2008, *Editions Plon v. France*, cited above § 46 and *Putistin v. Ukraine*, no. 16882/03, 33, 21 November 2013)[5] and under art. 10 regardless of the forcefulness of political struggles, it is legitimate to try to ensure that they abide by a minimum degree of moderation and propriety, The reputation of a politician, even a controversial one, must benefit from the protection afforded by the Convention (*Lindon, Otchakovsky-Laurens and July v. France*, cited above, § 57). Moreover, a clear distinction must be made between criticism and insult. If the sole intent of a particular form of expression is to insult a person, an appropriate sanction would not, in principle, constitute a violation of Article 10 of the Convention (*mutatis mutandis Kincses v. Hungary*, no. 66232/10, § 33, 27 January 2015

But then the hole argumentation of the decision revolves around the rights of the deceased person, the Court stating that it agrees with the government that the interference did pursue the aim of the protection of "the reputation or rights of others", namely those of L.P. and the close members of her family – in particular her husband – which constitutes a legitimate aim within the meaning of paragraph 2 of Article 10 (see, *Editions Plon v. France*, cited above, § 34).

Furthermore considered that the press release which was issued on the day after the minister`s unexpected death, is a fact that intensified ,the impact of the words used and

[3] The applicant, Mr Michael Genner, an Austrian national worked for the association "Asyl in Not", which offers legal and social support to asylum seekers and refugees. On 31 December 2006 the then Federal Minister for Interior Affairs, L.P., died unexpectedly of an aneurysm at the age of 55 and the next day the applicant published a statement on the association's website entitled "One less. What's coming now?" and stated "The good news for the New Year: L.P., Minister for torture and deportation, is dead.", criticizing in harsh terms the activity of the minister stating that she was a desk war criminal just like many others there have been in the atrocious history of his country. G.P., the late Minister's husband, filed a private prosecution (Privatanklage) for defamation against the applicant and the association. On 19 September 2007 the Vienna Regional Court convicted the applicant of defamation. The decision was upheld by superior Courts

[4] Genner v. Austria §31-32. Furthermore, The Court has reiterated the relevant principles which must guide its assessment and identified a number of criteria in the context of balancing the competing rights (see *Von Hannover (no. 2)*, cited above, §§ 109-13, and *Axel Springer AG v. Germany* [GC], no. 39954/08, § 90-95, 7 February 2012). The relevant criteria thus defined are: contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication, and, where appropriate, the circumstances in which the statement was made (see *Print Zeitungsverlag GmbH v. Austria*, no. 26547/07, § 33, 10 October 2013 and *mutatis mutandis Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 93, 10 November 2015).

[5] Genner v. Austria §35

applicant's statement published within the immediate period of her family's grief and was likely to cause considerable damage to the late Minister's reputation[6].

Timing of the impugned statement was considered to be a relevant circumstance in the case and was taken into consideration when balancing the conflicting rights under Article 8 and 10. The Court found the statement[7] an expression of satisfaction with the sudden death of L.P., the applicant made the day after the person had passed away, and the Court stated that to express insult on the day after the death of the insulted person contradicts elementary decency and respect to human beings, and is an attack on the core of personality rights**.**

Given this considerations, we can argue that a change in the Court`s view is possible. We cannot agree that the balance between articles 8 and 10 of the Convention reflects the interpretation already endorsed in *Putistin v Ukraine* referring to the living relatives` rights to be protected against distress or identity injury.

In *Genner v. Austria* the Court takes into consideration the attributes of the deceased person (that she was a former minister, a public person) and the degree of intrusiveness in her private life to check the balance. Given the fact that the relatives themselves cannot claim they were public figures, the standard would have been set higher than the Court has set them if the rights involved were that of the relatives.

The fact that the Court takes into consideration the deceased person itself (the public figure check) makes us think that the Court has seen this matter as a conflict between two rights: the freedom of expression of the plaintiff and the right to private life of the deceased.

Although this could be regarded as an expansion of the rights of a person after his or hers death, the provisions of article 8 does not prohibit such a protection against harmful activities, once the person is dead.

The nature of the problem from our point of view is a procedural one and it relates to the notion of being the victim of an alleged violation of the article 8. But this problem should be solved under the article 34 of the Convention and whether or not we are prepared to allow a dead person the quality of victim (and/or plaintiff) in front of the European Court of Human Rights.

The material right however is not affected by the death of the person. It`s right to have his image protected falls within the protection set out by article 8 and does not diminish or perish after his death.

To resort to a fictitious construction in which we see the damage brought to the image of the dead person through the perspective of his relatives right is more laborious then actually admitting that the right itself survives the factual existence of the person.

CONCLUSIONS

[6] Genner v. Austria §41

[7] In regard to the content of the applicant's statement, the Court considers that the applicant did not discuss the subject matter in a general and substantial manner but immediately launched a personal attack on the late Minister. He first of all expressed satisfaction about her death, suggesting that no decent human should feel grief about her passing away, and then continuing by comparing her to high-ranking Nazi officials who had committed atrocities and war crimes during the Second World War by calling her a desk war criminal ("*Schreibtischtäterin*"). It is true that in the statement published on 9 January 2007 in the newspaper "Der Standard" the applicant apologised to the family of L.P. for his statement, but even before this Court he insisted that the comparison of L.P. to Nazi war criminals had been correct and justified. The Court, however, considers that, even if regarded as value judgements, such serious and particularly offensive comparisons immediately after L.P.s death demand a particularly solid factual basis. In this respect the Court considered that the applicant did not make any distinction between the person of L.P. and the politics she stood for from his point of view.

The image of the person has to be protected even after his death, and the fact that we need someone -for instance the relatives- to pursue that protection from a procedural point of view does not mean that the right itself has to be exercised on behalf of these persons.

Therefore we argue that some rights of the deceased person may be protected under Convention provisions even after his death. Rights such as the right to have his image, memory or reputation protected and other rights that enter in effect after the deceased person's death such as the right to be buried - in a certain place or in a certain religious ceremony - can be the subject of protection under article 8 or 9 of the Convention, even after death, and still be regarded as the rights of the deceased not the rights of the relatives of the deceased.

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4. *Von Hannover (no. 2);*
5. *Axel Springer AG v. Germany* [GC], no. 39954/08, § 90-95, 7 February 2012;
6. *Print Zeitungsverlag GmbH v. Austria*, no. 26547/07, § 33, 10 October 2013;
7. *mutatis mutandis Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 93, 10 November 2015.

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DIGITAL MARKETING REGULATIONS

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ABSTRACT

The General Data Protection Regulation (GDPR) is a European law which grants rights regarding an individual's personal data. Having been adopted in April 2016, its enforcement became effective as of 25th May 2018.

This article aims to highlight who should do this, what exactly they should do and how to do it. Learn about the scope of GDPR in digital marketing, the definition of a personal data breach, the rights of data subjects, incident response under GDPR and more.

KEYWORDS: *digital marketing, relational marketing, online advertising, consumer rights, GDPR*

INTRODUCTION

Over the last two decades, we have witnessed a true explosion of marketing research with regard to the impact of the Internet and of related technologies on consumers and on the way in which markets operate. The increase in the level of knowledge held by consumers, access to information, and instant communication are also factors that result in an almost total transparency of companies' offerings at global level. The developments observed in the marketing literature regard the emphasis placed on the analysis of internet surfing behaviours nd the peculiarities of computer-mediated environments (CME) (MacInnis, 2011[1]; Yadav, 2010).[2]

The concept of "digital marketing" is different from the concept of "marketing" (American Marketing Association), being considered not as a subcategory of classical marketing, but as a separate branch. There are four key interactions in the digital environment: consumer-company interactions, company-consumer interactions, consumer-consumer interactions, and company-company interactions (Yadav & Pavlou 2014)[3]. The research of consumer-company interactions focuses on consumer behaviour in the context of interacting with companies in the digital environment. Research on company-consumer interactions focuses on the strategies and tactics of companies that interact with consumers in the digital environment.

[1] MacInnis , D. J. , (2011) , *A Framework for Conceptual Contributions in Marketing* , Journal of Marketing
[2] Yadav M.S., (2010) , *Marketing in Computer-Mediated Environments: Research Synthesis and New Directions* , Journal of Marketing
[3] Yadav, M.S., Pavlou, P.A. , (2014), *Marketing in Computer-Mediated Environments: Research Synthesis and New Directions* , Journal of Marketing

Research on consumer-consumer interactions consists in the analysis of the behaviour of consumers who interact with other consumers in the digital environment. Research on company-company interaction focuses on a company's strategies and tactics in the context of interacting with other companies in the digital environment.

DIGITAL MARKETING AND RELATIONAL MARKETING

There is a general consensus that digital environments have had a significant impact on the manner in which a trader reaches the consumer at present.

Digital media refers to electronic media that disseminate information in digital formats.

This includes any media available by means of your computer, smartphones, or other digital devices.

The Internet is a prominent place of digital marketing and online advertising is a form of promotion that uses the Internet for the explicit purpose of transmitting marketing messages.

The Internet has become the fastest means of advertising of this decade. Advertising agencies spend hundreds of millions of dollars to place their ads on high traffic websites. According to research, when people read online advertising, they are more likely to purchase online. An advertising banner on the Internet might balance the playing field between large and small companies (Smith, 2009).[4]

The increase in online advertising is in response to the growth in the number of consumers who use the Internet to buy and sell goods and services. Such exchange of goods is referred to as electronic commerce or e-commerce.

In a report on e-commerce drawn up by the Organization for Economic Cooperation and Development (OECD), the financial crisis which began in 2008 has stimulated global e-commerce sales, as consumers have looked for ways to reduce spendind. E-commerce is expected to grow in the US, and in Europe and developing countries the growth will be even faster (Schulman, 2008). The annual growth of e-commerce is expected to increase to 28%, while certain individual countries have even higher growth rates. In India, for example, the growth rate of e-commerce was estimated at 51% per annum (Marvist Consulting, 2008).

Online reviews are a way to personalize a relationship and they range from personal reviews from other customers to personalized recommendations provided by engines or referral systems.

Recommended systems are sources of information that provide consumers with personalized information (Ansari, Essegaier, & Kohli, 2000).[5]

Such systems use an information filtering technique in order to formulate product recommendations that are most likely to be of interest to the user.

Traders will benefit from recommendations addressed to online consumers, especially if the source concerned provides personalized recommendations.

Consumers focus more on the source of the recommendation than on the type of website on which the recommendation appears (Senecal & Nantel, 2004).[6]

[4] Smith, T. , (2009) , *Marketing communications: A brand narrative approach*

[5] Ansari, A., Essegaier , S. , Kohli, R. , *Internet Recommendation Systems* , Journal of Marketing Research

Consumers' online reviews provide a source of reliable information for consumers and, therefore, a valuable potential for sales.

Since online peer reviews can be very beneficial to a company, traders should determine what motivates consumers to write such reviews.

Consumer-generated ads, podcasts, and blogs are on the increase with the help of websites such as YouTube, V-Cam and Google Video.

Companies are becoming interested in the mobility of consumer-generated content as a digital marketing tool.

Organizations are proactively trying to induce consumers to spread the word about their products (Godes et al., 2005)[7]. Providing consumers with a place of affirmation has become a business in itself. In return for consumer-generated content, certain organizations pay money, grant points, or offer some other form of acknowledgement (Chatterjee, 2001)[8], so we may be speaking of relational marketing.

Relational marketing means a strategy for selecting and maintaining clients; it involves a business philosophy that puts the client at the centre of attention throughout all processes; success is possible only if there is a leading team, suitable organizational strategies and culture acting simultaneously.

It is also a process of implementation of a strategy that puts the client at the centre of attention, which, as in a "chain reaction", determines the redefining of all functional activities, thus involving new work processes that are only possible by using information technology.

Relational marketing may be considered an extension of the concept of service provision to a continuous process that is, at once, an art and a science consisting of the collection and use of information about the client, in order to induce a certain degree of fidelity in the latter and a process of orientation of the entire company outwards, towards clients, which presupposes an understading of clients' needs and conducting processes within the company so as to develop and maintain relationships with clients that would turn them into permanent clients.

The goals of relational marketing are to attract, satisfy, retain and improve the relationship with consumers.

In order for these goals to be achieved in optimal conditions, a privacy policy must be put in place, and organizations have the interest of keeping their website and clients' financial information secured, and this is where the General Data Protection Regulation (GDPR) intervenes.

UNDERSTANDING GDPR AND ITS IMPACT

The General Data Protection Regulation (GDPR) is a new privacy-protection regulation which became active and applicable as of May 2018. It was initiated by the European Union, but has an enormous impact on traders around the world.

The term "personal data" is the access way to the enforcement of the General Data Protection Regulation (GDPR). The General Data Protection Regulation applies only if data processing relates to personal data. The term is defined in Article 4(1)(1). Personal data is any information that is related to an identified or identifiable individual.

In fact, such fines may be up to 4% of the annual global turnover or 20 million euros, whichever of the two is greater. GDPR defines personal data to a great extent. A very large number of marketing users are used in order to provide the working definitions of PII or

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[6] *Senecal*, S. and *Nantel*, J. (*2004*) The Influence of Online Product Recommendations on Consumers' Online Choices. Journal of Retailing

[7] Godes, D. , (2005) , *The Firm's Management of Social Interactions* , Marketing Letters

[8] Chatterjee, P. (2001), *Online Re views – Do Consumers Use Them?,* ACR 2001 Proceedings

Personally Identifiable Information. PII is not the same as personal data. GDPR expands the definition of personal data in order to include certain quite common non-PII items, such as anonymous IDs and cookies.

So, wherever you are, if you simply have a website that could be accessed by someone from within the European Union, or if you have a web analytics tool or a modern tracking tool installed, GDPR applies to you, too. If this comes as a shock, you are not alone. Forester predicted that 80% of all companies would not comply with the GDPR in 2018. And, since this has technically been the law for over two years, before the date of implementation, any period of grace or leniency is hard to justify.

As a marketer in today's reality, the simple fact is that you collect, store and use personal data as a matter of course. GDPR means that you will need to take additional steps to ensure compliance, especially when it comes to any of you interacting with an EU country. And while the GDPR is there to protect European residents currently, other regions of the world are developing their own rules and regulations which are likely to adopt many of the same provisions.[9]

A lot of people see this as a wake-up call urging them to adopt a conservative approach that will help protect them to a greater extent in the future. Keep in mind that GDPR also applies to all your suppliers and technology partners. If you use almost any digital marketing technology anywhere in the marketing or advertising stacks that allow for digital ad targeting, for example, you will be responsible for ensuring that your personal data is compliant, as it flows from one system to another and from one seller to another.

The General Data Protection Regulation (GDPR) imposes new rules on EU organizations and on those that offer goods and services or that collect and analyze data related to persons present on the territory of the EU, regardless of their geographical location.

The major changes brought about by GDPR in digital marketing regard personal privacy, control and notifications, transparent policies and training.

Personal privacy is imperative, so individuals have the right to access their personal data, to correct personal data errors, to delete personal data, to oppose personal data processing, and to export personal data.

As far as control and notifications are concerned, organizations will have to: protect personal data by using the necessary security, notify authorities about any personal data compromise, obtain the consent for data processing, and preserve the details of any personal data processing – transparent policies.

On the other hand, organizations are required to: provide details that are relevant to data collection, detail the processing needs, define data retention and deletion policies.

Organizations must resort to training in order to educate people how to deal with privacy issues and to educate employees, audit and update data policies, hire a Data Protection Officer (if necessary), and create and manage contracts with vendors that are aligned with the GDPR.

All companies, whether large or small, which collect data will have the obligation to comply with the GDPR. They will have to inform consumers whenever they want to collect data and get their explicit consent in this respect and, if their data policy changes in any way, the process must start all over again and the consent must be renewed.

[9] https://gdpr-info.eu/issues/personal-data/

Therefore, any organization must request consent, which means that:

- it has verified that consent is the best legal way to allow the processing
- it has made the request for consent separately from the terms and conditions
- it has asked users to explicitly opt-in
- it has not used pre-ticked boxes or another type of default consent
- it uses language which is clear, simple and easy to understand
- it specifies why it wants the data and what the data will be used for
- it offers granular consent options for independent processing operations
- it clearly names organizations and possible third parties
- it tells users that they can withdraw their consent
- it ensures that users can refuse to give their consent
- it does not use consent as a prerequisite for providing the service
- if it offers online services directly to children, it must seek to obtain consent only if it has an age verification system and a way to obtain parental consent.

After the request, the organization registers the consents by:

- keeping records of consents – when, where, who gave the consent
- keeping records of all things communicated to the users at the time of obtaining the consents.

The security and privacy of information is important, clients expect that if they provide detailed personal information and financial information, it should be safely stored, therefore, organizations are required to:

- regularly verify consents to ensure that the relationship, the processing and the goals have not changed in the meantime
- have well-defined processes in order to refresh the consents if needed, including for parental consents
- create some privacy dashboards, if needed
- facilitate the method for users to withdraw their consent at any time, and communicate such method
- act according to requests for withdrawal of consent as soon as possible
- not sanction users who wish to withdraw their consent.

CONCLUSIONS

Digital technologies are quickly changing the environment in which businesses operate. Digital technologies reduce asymmetries between clients and sellers in significant ways. The analysis of interactions between digital technologies and environmental elements begins by examining how consumer behaviour changes as a result of gaining access to a variety of technologies and devices, both in online and mobile contexts. We focus on how this affects the acquisition of information in terms of quality and price, the search process, the expectations of clients and the implications concerning them.

In the same way, companies have to deal with search engines as collaborators and platforms that compete with other companies in acquiring clients. Thus, we also analyze the research regarding search engines and interactions between clients, search engines, and companies. Finally, we examine the interactions of digital technologies with different contexts in terms of geography, confidentiality/privacy and security, regulation and piracy, as well as their implications in terms of digital marketing (contextual interactions).

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UNION REGULATIONS ON PASSENGER RIGHTS IN CASE OF FLIGHT CANCELLATION, REFUSAL AT BOARDING OR LONG DELAY OF FLIGHTS

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ABSTRACT:

The European Union is a "supranational governance" structured by its well-defined institutions. The decision-making triangle formed by the Commission, the Parliament and the Council legislate in agreement or consultation, covering the whole picture of policies developed at EU level and implemented at Member State level. Among the most important developed policies, it is necessary to mention the freedom of movement of the Union nationals, freedom of movement of goods and services, judicial cooperation in criminal matters, etc. Freedom of movement implies a series of segmental rights, such as the right to temporary or permanent residence, the right to work, to travel and study, etc. The Union law system identifies legal instruments to regulate the rights of passengers traveling within the Union, from the Union to a third country, or arriving in the territory of a Member State irrespective of the type of transport, air, rail, water or road.

At present, in the field of air transport we identify Regulation no. 261/2004 on the right to compensation and assistance to passengers in the event of refusal of boarding and cancellation or long delay of flights, which is part of a comprehensive package of legislation aimed at protecting consumers in general across the European Union.

KEY WORDS: *refusal to board, cancel flight, trip, flight operator, booking.*

INTRODUCTION

Regulation No 261/2004[1] *of establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights originated from the need for a uniform interpretation of the relevant Union legislation in the matter, a Union standard of protection for citizens.*

From the legislative package in this field, together with the above-mentioned Union Regulation and subject to the analysis in the present document, the Regulation (EC) no. No 2027/97 of the Council of 9 October 1997 on air carrier liability in the event of accidents e[2]*, as amended by Regulation (EC) (EC) No 889/2002 of the European Parliament and of the Council*[3] *and the Convention for the Unification of Certain Rules Relating to International Carriage by Air, also called the Montreal*[4] *Convention. 889/2002 is the EU legislative*

[1] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) 295/91.
[2] JO L 285, 17.10.1997.
[3] JO L140 30.05.2002
[4] The Convention for the Unification of Certain Rules for International Carriage by Air, known as the "Montreal Convention", was signed in Montreal on 28 May 1999. The European Union is a contracting party to the Convention and some of its provisions have been transposed into legislation Union by Regulation (EC) No. (EC)

instrument serving a double purpose: on the one hand, the alignment of EU legislation on the liability of air carriers to passengers and their luggage to the provisions of the Montreal Convention, to which the EU is one of the contracting parties, and, on the other hand, extending the application of the Convention rules to air services offered in the territory of a Member State. They are added to Directive (EU) 2015/2302 on Travel Packages and Associated Travel Formulas, which became fully applicable on 1 July 2018.

I. IDENTIFYING AND ANALYZING THE EVENTS FROM WHICH AIR PASSENGERS' RIGHTS ARE RECOGNIZED UNDER REGULATION (EC) NO. 261/2004

As a first, step approach, it is necessary to identify the categories of beneficiaries for which the provisions of this rule are incidental.

a) Passenger-beneficiaries categories. Beneficiaries of the rights recognized and guaranteed by this normative act are:

i) passengers departing from an airport located in the territory of a Member State;

ii) passengers departing from an airport located in a third country to an airport located in the territory of a Member State, except in cases where they have received allowances or compensation and have received assistance in that third country, provided that they have a confirmed reservation for that flight or, if the time is not indicated, no later than 45 minutes before the published departure time[5]. Article 3 (1) (a) of the Regulation does not apply to a return journey where passengers originally departing from an airport located in the territory of a Member State return to that airport on a flight operated by a non-EU carrier departing from an airport located in a third country.

iii) passengers holding tickets issued by an air carrier or tour operator under a customer loyalty program or other commercial program.

The provisions of the Regulation do not apply:

1) in cases where a package of tourist services is canceled for reasons other than cancellation of the flight [6];

2) passengers traveling free of charge or at a reduced rate which is not available directly or indirectly to the public, such as special gifts offered by air carriers to their own staff;

3) Multimodal journeys involving multiple modes of transport under a single transport contract.

b) *The cancellation of a flight* constitutes a first event giving rise to the rights recognized in Articles 7, 8 and 9 of this Regulation.

In order to make a meaningful analysis of the consequences of canceling a flight, it is necessary to clarify the term "flight". Thus, the concept of "flight" is not defined in the introductory part of the union norm, it was subsequently clarified by the CJEU, the Union Court ruling in this respect. In particular, in Case C-173/07, Emirates Airlines, ECLI: EU: C: 2008, the Court found that a voyage involving a take-off flight and a return flight cannot be regarded as a single flight. The concept of "flight" within the meaning of the Regulation should be interpreted as consisting essentially of a single "unit" even if the departure and return flight are subject to a single reservation, which is intended to leave an airport outside the EU (for example, in a third country) and traveling to the EU if the flight is performed by an air carrier licensed in an EU Member State (EU carrier).

Article 2 (l) of the Regulation defines the "cancellation" as the non-completion of a previously planned flight for which at least one seat has been reserved. Cancellation takes

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No 2027/97, as amended by Regulation (EC) No. 889/2002. These rules form part of a set of measures aimed at protecting the rights of air passengers in the European Union, together with Regulation (EC) 261/2004.

[5] Article 3 paragraph 2 letter a of Regulation no. 261/2004

[6] art. 3 paragraph 6 of the Regulation; see also Directive (EU) 2015/2302 on package travel and associated travel formulas

place in principle when the initial flight plan is abandoned and the passengers of that flight join the passengers on a flight that was also planned, but independent of the initial flight. Moreover, in Case C-83/10 Sousa Rodríguez and Others[7], the CJEU has ruled that there must be no express decision by the carrier to cancel that flight for the purpose of the actual cancellation. Similarly, in Joined Cases C-402/07 and C-432/07 Sturgeon and Others[8], the CJEU explains that not always recovering luggage or obtaining a new boarding card is a decisive factor in determining that that flight has been cancelled, thus taking as the only criterion the " objective characteristics of the flight ".

Furthermore, a conceptual differentiation must be made between the notions of "*canceling*" and "*delaying*" of a flight. Jurisprudential views are varied, however, we may note that we are in the presence of a "delay" whenever we notice that the flight number does not change irrespective of the time elapsed between the initial display of the race and the actual flight. However, no assertion of the above-mentioned opinion per a contrario is always a reason for canceling the flight. Thus we come to the conclusion that, for example, a flight may face such a delay that the take-off takes place the day after the scheduled flight and is therefore assigned an annotated flight number (for example, AA 4321 X instead of AA 4321) to differentiate the flight with the same number on that subsequent day. However, in this case the flight could be considered a delayed flight, not canceled.

In practice, the situation is also identified in which an aircraft departs, but for some reason is subsequently forced to return to the departure airport and the passengers of that aircraft are transferred to other flights. We believe that such a situation can be considered the cause of "cancellation" within the meaning of Article 2 (l) of the Regulation. Thus, the fact that the take-off took place, but the airplane subsequently returned to the departure airport without having reached the destination specified in the itinerary, has the effect that the flight, as initially envisaged, cannot be considered.

c) *Refusal to board*. The concept of 'refusal of boarding' refers, on the one hand, to cases of overbooking, and to refusing to board for operational reasons. The situation where a passenger traveling with a pet cannot board because he does not have the necessary documentation for a pet trip can not constitute a refusal to board.

d) Flight delay. Under Article 6 of the Regulation, "flight delay" means any of the cases where an air carrier anticipates a possible delay of a flight beyond the scheduled time of departure as follows:

- two hours for flights over 1 500 kilometers or less;
- three hours or more for all intra-Community flights of over 1 500 kilometers and any other flights between 1 500 and 3 500 kilometers

The CJEU, in its judgment in Joined Cases C-402/07 and C-432/07 Sturgeon and Others[9], held that a delay of at least three hours on arrival confers the same rights in compensation as cancellation. With regard to 'time of arrival', the Court clarified the meaning of the phrase in its judgment in Case C-452/13 Germanwings, ECLI: EU[10], in the sense that the notion of 'arrival time' used to determine the length of the delay suffered by passengers flight if arrival is delayed corresponds to the moment when at least one of the aircraft doors opens, assuming that at that time passengers are allowed to leave the aircraft.

II. PASSENGER RIGHTS IN CASE OF CANCELLATION OF A FLIGHT, BOARDING REFUSAL OR DELAY.

[7] Case C-83/10, Sousa Rodríguez and Others, ECLI: EU: C: 2011: 652
[8] Joined Cases C-402/07 and C-432/07, Sturgeon and Others, ECLI: EU: C: 2009: 716
[9] Joined Cases C-402/7 and C-432/07, Sturgeon and Others, ECLI: EU: C: 2009: 716
[10] Case C-452/13, Germanwings, ECLI: EU: C: 2014: 2141

UNION REGULATIONS ON PASSENGER RIGHTS IN CASE OF FLIGHT CANCELLATION, REFUSAL AT BOARDING OR LONG DELAY OF FLIGHTS

Both cancellation of a flight and refusal of boarding against the passenger's wishes or delay shall entitle him to reimbursement, re-routing or a new reservation at a later date as defined in Article 8 of the Regulation; the right to "service" as defined in Article 9 and, in accordance with Article 5 (1) (c), the right to "compensation" as defined in Article 7.

Right to compensation. According to Article 7, in the event of cancellation of a flight and in case of refusal of boarding against the passenger's will or delay, passengers are compensated in the amount of:

a) EUR 250 for all flights of 1 500 kilometers or less;

b) EUR 400 for all intra-Community flights of more than 1 500 kilometers and for all flights between 1 500 and 3 500 kilometers;

c) EUR 600 for all flights not covered by (a) or (b).

As regards the cancellation of a flight, according to the principle underlying Article 5 (1) (c), compensation must be paid if the passenger has not been informed of the cancellation sufficiently in advance. However, the carrier shall not be obliged to pay compensation if he is able to prove, in accordance with Article 5 (3), that the cancellation is due to *extraordinary circumstances* which could not have been avoided even if all reasonable measures had been taken.

In order to be exempted from the payment of compensation, the carrier must at the same time prove:

- existence and link between extraordinary circumstances and delay or cancellation;;
- the delay or cancellation could not be avoided even though the carrier took all reasonable steps.

In particular, for a better understanding, we can exemplify Case C-549/07, Wallentin-Hermann ECLI: EU[11], in which the CJEU clarified to what extent a "technical problem" that occurs during aircraft maintenance or is caused by the lack of maintenance of an aircraft cannot be considered an 'extraordinary circumstance'. Thus, the Court considers that if an unexpected technical problem is not due to deficient maintenance and is not detected during routine maintenance, such a problem does not fall within the definition of "extraordinary circumstances" when is inherent in the normal exercise of the air carrier's activity. It is a "technical problem" and implicitly qualifies as an extraordinary circumstance, the damage caused to the aircraft by acts of terrorism.

As regards compensation for canceled flights, we specify that claims for compensation are not eligible if the air carrier has notified the passenger at least 14 days in advance.

The Regulation provides that in return for compensation for cancellation of a flight, the airline may offer an alternate flight that must meet certain conditions, namely:

a) if the notification took place less than 14 days but more than 7 days, an alternative flight can be offered which departs no more than 2 hours before and reaches less than 4 hours after the initial flight;

b) if the notification took place less than 7 days, an alternative flight can be offered departing no more than 1 hour before and arriving less than 2 hours after the initial flight.

Right to service in the event of refusal of boarding, cancellation or delay in departure. The right to service exists only as long as passengers have to wait for the redirection, under comparable transport conditions, to the final destination at the earliest possible opportunity. Serving involves the right of passengers to be offered free of charge: a) meals and refreshments directly proportional to the waiting time, b) hotel accommodation if one or more nights of stay are required or an additional stay than that provided by the passenger; c) transport between the airport and the place of accommodation (hotel or other).

[11]Case C-549/07, Wallentin-Hermann, ECLI: EU: C: 2008: 771

The service delivery must be assessed on a case-by-case basis, taking into account the needs of the passengers and "directly proportional to the waiting time", in concrete terms, meaning the estimated duration of the delay and the time of the day (or night) which is the delay. Passengers should therefore not be allowed to take the necessary measures themselves, such as finding and paying accommodation or food, effective air carriers being forced to actively serve the service.

If passengers refuse reasonable accommodation offered by the air carrier pursuant to Article 9 and deal personally with the necessary arrangements, the air carrier shall not be obliged to reimburse the costs incurred by the passengers, except where otherwise agreed between the parties, only up to the amount of "reasonable offer". Passengers can sue the costs occasionally, so they have to keep all receipts and bills for the expenses they incur.

However, according to recital 18 of the Regulation, service may be limited or refused if its performance could cause additional delay to passengers waiting for an alternate or delayed flight. If a flight is delayed late at night but is expected to leave in just a few hours and delays in this case could be much higher if passengers had to be sent to the hotel and brought back to the airport in the middle of the night, should be able to refuse to grant service.

Right to reimbursement. Cancellation of a flight, refusal to board or delay flights provides passengers the opportunity to request reimbursement within seven days of the full cost of the ticket at the purchase price for the unused part or parts of the trip and for the part or parts already made, where flight becomes useless in relation to the passenger's initial travel plan

III. PROCEDURE FOR SETTLING DISPUTES BETWEEN AIR CARRIERS AND PASSENGERS ON LOW-VALUE APPLICATIONS

The passenger in his / her capacity as a plaintiff may request compensation for the above mentioned reasons, the jurisdiction of which is the court having its place of departure or arrival, according to the contract of carriage. In accordance with Article 4 (1) of the Brussels I[12] Regulation, passengers also retain the option of bringing the matter before the courts of the State in which the defendant (air carrier) is based. The Regulation does not set deadlines for bringing actions before the national courts. This issue is a matter for the national legislation of each Member State on prescription, so the deadlines may vary between Member States.

In order to resolve disputes between passengers and the flight operator, the European Small Claims Procedure may be used to obtain compensation for a maximum amount of EUR 5,000.

In the case of this type of action, the request for a summons takes on a standard form which the applicant completes. Following registration at the Registry, the court may notify the complainant of his or her application if information is missing. The petition for legal action once declared admissible is communicated to the party, who has 30 days to answer. After 30 days have elapsed since the time period provided by the defendant to respond to the complainant, the court may request that the evidence be filled in, as the case may be, with the documents or hearings of the parties.

The decision of the court not contested by the defendant will be enforced through the order for payment procedure[13] which is a simplified procedure for the recovery of cross-border pecuniary claims not claimed by the party. The procedure is initiated by the claimant by completing a standard form in which the nature and amount of the claim are inserted. The court shall examine the application and if the form is complete and correctly completed, it

[12] Council Regulation (EC) Regulation (EU) No 1215/2012 of the European Parliament and of the Council ("Brussels I Regulation")

[13] see the provisions of Regulation No 1896/2006 of the Parliament and of the Council of 12 December 2006 setting up an European Order for Payments Procedure.

shall issue the European Payments Notice within 30 days. The order for Payment is notified to the petitioner, who has two solutions, either pays the amount mentioned in the summons as a claimant, or disputes the summons having a 30-day term in which to oppose it. If the defendant does not oppose, the payment order shall automatically become enforceable and shall be transmitted to the executing authority in the executing Member State. Execution is to be done according to the national procedures of the EU Member State in which they have their execution.

CONCLUSIONS

The Union norm, deducted from the analysis, regulates a set of rights related to exhaustively determined situations with the immediate aim of improving the standards of protection, enhancing the rights of passengers and ensuring the performance of the activities of air carriers in harmonized conditions on a liberalized air market.

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