JOURNAL OF PUBLIC ADMINISTRATION, FINANCE AND LAW

EDITORIAL BOARD

CONTENTS

PUBLIC ADMINISTRATION

THE INTEGRITY OF LOCAL ELECTED OFFICIALS FROM THE PERSPECTIVE OF THE NATIONAL INTEGRITY AGENCY

Mihai Cristian APOSTOLACHE
Petroleum-Gas University of Ploieşti
mihaiapostolache5@yahoo.com

Abstract: *The need for a public life dominated by integrity has determined the Romanian legislator to take a series of normative acts that have established the defense instruments for the integrity standards and the institutions responsible for using these tools. As a part of the Romanian public sector, local public administration must be characterized by a high level of integrity, a prerequisite for quality administration, leading to increased public confidence in the local administration act. The local elected officials must strictly comply with the legal regime governing conflicts of interest and incompatibilities, otherwise they risk being declared incompatible or in conflict of interest. In Romania, the administrative authority ensuring the compliance of local elected officials with the legal provisions on incompatibilities and conflicts of interest is the National Integrity Agency. The article deals with the issue of the integrity of the local elected officials from the perspective of the autonomous administrative authority.*
Keywords: *integrity, local elected official, National Integrity Agency, local public administration, administrative procedure.*

Ackonledgment: *This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resourses Development 2007-2013*

PREAMBLE

Integrity in public life not represents not only a condition for the proper functioning of the administrative mechanism, but also a necessity claimed by the citizens and the European institutions. The higher the level of integrity in the public spheres in general, and in public administration in particular, the higher the confidence of citizens in public institutions and authorities, the easier public decisions are applied. A low level of integrity leads to institutional corruption and, automatically, to deviation from the mission of public authorities and institutions to serve public interest, the rule of law, as well as to decreasing public confidence in the institutions that represent the pillars of the state and of constitutional democracy. Corruption is the phenomenon that erodes the confidence of Romanians and Europeans in the whole Romanian institutional system (Hosu, Deac and Morosanu, 2012, 81).

The need to increase the level of integrity in local public administration has determined public decision makers to adopt a normative framework that establishes a series of standards of integrity, as well as institutions and instruments meant to ensure the compliance with these standards. Integrity and public accountability must be encountered on all levels of public administration. As argued in the literature (Nicholls, Daniel,

Bacarese, and Hatchard, 2014, 48), one of the key factors in developing public integrity standards and the reduction of corruption is the combat against conflicts of interest and incompatibilities. In our country, the authority supervising the compliance with the legal regime of incompatibilities and conflicts of interest, including for local elected officials, is the National Integrity Agency (ANI). This authority was established by Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency and aims to ensure integrity in the exercise of public positions and dignities and to prevent institutionalized corruption. The normative act mentioned is completed by Law no. 176/2010 on integrity in the exercise of public office and dignities, amending and supplementing Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency and amending and supplementing other normative acts, as well as Law no.161/2003 regarding certain measures to ensure transparency in the exercise of public dignities, public positions and the business environment, to prevent and sanction corruption.

THE LEGAL NATURE OF THE NATIONAL INTEGRITY AGENCY, ITS ROLE AND DISPOSED SOLUTIONS

The National Integrity Agency is an autonomous administrative authority with legal personality, which operates nationally as a unique structure and acts in accordance with the principle of operational independence (Article 13 of Law no.144/2007). Therefore, the National Integrity Agency is not a jurisdictional institution, but an independent administrative authority that performs an evaluation of the declarations of assets, data, information and economic changes occurred, of the interests and incompatibilities for those persons specifically provided by law.

This category also includes local elected officials. Local elected officials, as stated in Law no.393/2004 on the status of local elected officials, are local councilors, county councilors, mayor, mayor of Bucharest, deputy mayors, president of county council, vice presidents of county council and the village delegate. With regard to the village delegate, the literature (Apostolache, 2015, 70) held that its legal status is similar to that of other elected officials, but with some specific features conferring an atypical character.

Even if the legislator has defined it as an administrative authority, the National Integrity Agency has been often viewed as a judicial body. In this respect there are many exceptions of unconstitutionality against various articles of Law no.144/2007 or Law no.176/2010. The authors of the exceptions of unconstitutionality have argued that ANI is an institution that "states the law"; therefore, it is a jurisdictional body, which leads to a breach of the principle of separation of powers. Despite these considerations, the Constitutional Court has developed an extensive case law (See in this respect Decision of the Constitutional Court no. 495/2014; Decision of the Constitutional Court no. 663 of 26 June 2012; Decision of the Constitutional Court no. 415 of 14 April 2010; Decision of the Constitutional Court no. 1606 of 15 December 2011; Decision of the Constitutional Court no. 1042 of 11 December 2012) which held that the National Integrity Agency does not carry out jurisdiction activity, it is an administrative body undergoing evaluation activity

for declarations of assets, data, information and economic changes occurred, interests and incompatibilities of the persons covered by the law, without conducting a trial activity. To substantiate this conclusion, the Court states that the judicial function is characterized by establishing the power of the jurisdictional body to resolve, through an authoritative decision res judicata, a conflict on the extent of individual rights and to dispose, under the law, restrictive measures. The judicial activity is exercised only upon request in a formal procedure prescribed by the law. Whereas the Agency is responsible for checking, ex officio or at the request of a natural or legal person concerned, and does not rule invested decisions res judicata, but provides reports that are reflected in the evaluations of facts or situations with legal significance and whose purpose entitles a referral to courts of law or, where appropriate, to other competent institutions and authorities to order the measures provided by the law.

In exercising its attributions, the National Integrity Agency may dispose the following legal solutions: to notify the competent court and request confiscation of a part of the acquired wealth or a certain asset, if the integrity inspector finds that there are obvious differences between the wealth gained while in office and the revenues achieved in the same period, or the acquisition of a share in wealth or of certain specific assets is unjustified (Article 46); to notify the criminal prosecution institution if there is evidence or reasonable grounds for committing an offense under criminal law, or the competent fiscal authority to determine the respective tax obligations, according to the law (Article 46); to notify the competent authorities if the integrity inspector finds a conflict or a situation of incompatibility (Article 46); to classify the work (Article 5 paragraph 7); to find and punish offenses under Law no.144/2007 (Article 56).

THE ADMINISTRATIVE PROCEDURE TO VERIFY INCOMPATIBILITIES AND CONFLICTS OF INTEREST FOR LOCAL ELECTED OFFICIALS, THE NATURE AND CONTENT OF THE EVALUATION REPORT

Law no.176/2010 establishes procedural rules regarding the evaluation of incompatibilities and conflicts of interest, these rules implying the existence of an integrity inspector (a public servant with a special status) who is randomly assigned a case and who has several procedural instruments to determine whether or not a person is in a state of incompatibility or conflict of interest. The evaluation activity is performed during the exercise of the public positions or dignities and within 3 years after their termination.

The evaluation work is performed based on the following principles (Article 8 paragraph 3 of Law no.176/2010): legality, confidentiality, impartiality, operational independence, timeliness, good administration, the right to defense, and the presumption of lawful acquisition of wealth.

The category of the persons evaluated by the integrity inspector includes local elected officials. Law no.215/2001, Law no.393/2004 and Law no.161/2003 establish the positions and activities incompatible with the quality of local elected official, as well as the situations where a local elected would be in a conflict of interest. Starting from the provisions of these normative acts, the integrity inspector checks whether the local

elected official held a position or a quality considered by the law to be incompatible, or whether by their conduct, the local elected official violated the provisions regarding the conflict of interest. Following this examination, the integrity inspector prepares an evaluation report, which has the legal nature of an administrative act and which may be appealed before the administrative court. If a local elected official is found in a situation of incompatibility or conflict of interest, the evaluation report includes this finding; otherwise the integrity inspector makes a report stating that the person concerned, following the evaluation, has not violated the regime of incompatibility and conflict of interest. In the evaluation report we find the following elements (Article 21 paragraph 3 of Law no.176/2010): the descriptive part of the facts; the point of view of the person assessed, if expressed; the evaluation of the elements of conflict of interest or incompatibility; conclusions.

After having completed the evaluation report showing that the local elected official assessed is or has been in a state of incompatibility or conflict of interest, the integrity inspector shall submit this report within 5 days after completion to the local elected official subject to evaluation, and, depending on the findings, to the prosecuting and disciplinary authorities. From the analysis of the legal text, we observe that the legislator has set the 5-day period only for the report stating the incompatibility or conflict of interest. If the report certifies the absence of the incompatibility state or conflict of interest of the local elected official, the legislator has not provided such a period, stating only that it will be forwarded to the person who was subject to the evaluation.

Article 22 of Law no.176/2010 provides for the right of the person subject to evaluation to challenge the evaluation report of the conflict of interest or incompatibility before the administrative court within 15 days from its reception. If the local elected official does not challenge the evaluation report, the National Integrity Agency notifies, for the evaluation report of the conflict of interest, within 6 months, the Prefect, in case a mayor or a president of county council is concerned, or the local council or county council, in case a county councilor or a local councilor is concerned. At the same time, administrative court can be notified with the purpose of annulling the documents issued, adopted or drafted by breaching the legal regime of the conflict of interest.

If the evaluation report of the incompatibility is not contested within the period provided by the law, the Agency shall notify the same institutions mentioned above to trigger the disciplinary proceedings, and it may notify, within 6 months, the administrative court to annul the documents issued, adopted or drafted by breaching the legal provisions regarding incompatibilities. As an example, we mention the Order of the prefect of Dâmboviţa County on the confirmation for the termination of the mayor mandate from Gura Ocniţei commune, Mr. Diaconu Gheorghe, or the Decision of Bacău County Council on the confirmation of rightful termination of the mandate as county councilor for Mr. Petru Marius Danciu (http://www.integritate.eu/Files/Files/Acte%20de%20constatare/OrdinAlPrefectuluiJudDambovita.PDF;
http://www.integritate.eu/Files/Files/Acte%20de%20constatare/HotarareCJBacau_156_3

0092009_PrivindConstatIncetariiDeDreptMandatCJ_AlDluiDanciuPetruMarius.PDF, accessed on 23 May 2015).

According to Article 25 paragraph 3 of Law no.176/2010, the action of the local elected official that consisted in the incompatibility and conflict of interest represents the grounds for dismissal. Moreover, Law no.393/2004 regarding the status of local elected officials stipulates incompatibility as one of the ways to rightfully terminate the mandate of local elected officials (Article 9 paragraph 2 letter b) for local and county councilors, respectively Article 15 paragraph 2 letter b) for mayor and president of the county council). We consider it necessary that Law no.393 /2004 also include the conflict of interest as one of the rightful ways to terminate the mandate of local elected officials, in order to correlate the provisions of this legislation with those under Law no.176/2010. The action of the local elected official that violated the regime of incompatibility or conflict of interest constitutes misbehavior to the extent that it does not contain the elements of an offense. The penalty is the termination of mandate, to which is added the prohibition to hold any public position or office for a period of 3 years from the date the penalty is applied. The disciplinary sanction is also performed if the evaluation report of the National Integrity Agency was communicated to the prosecuting authorities. The penalty can be imposed within maximum 6 months from the date of the final evaluation report, according to the legal provisions. If the incompatibility cause has ceased before the notification of the Agency, the disciplinary sanction can be applied within 3 years from the termination of the incompatibility cause, unless the law provides otherwise.

In the case of local elected officials, the provision contained in Article 25 paragraph 2 is applied, according to which "the person who held an eligible position, can not occupy the same position for a period of 3 years after termination of mandate." Regarding the meaning of the phrase "the same position", in order to eliminate any political, doctrinal or jurisprudential interpretations and to meet the requirements (These requirements result from the case law of the European Court of Human Rights – case Rotaru vs. Romania (2000); case Sissanis vs. Romania (2007). relating clarity, precision and predictability in the law, the Constitutional Court stated in Decision no.418 (Published in the Official Gazette of Romania, Part I, issue 563 of 30 July 2014) of 3 July 2014 that it shall be interpreted by the will of the legislator to ensure integrity in the exercise of public positions, for which the respective phrase refers to any eligible position listed in Article 1 of Law no.176/2010, not only to the position held at that time by that local elected official. For example, a person who held the position of local or county councilor and who was found in a state of incompatibility or conflict of interest can no longer hold, for a period of 3 years from termination of mandate, any other eligible position (senator, deputy, mayor, president of county council etc.). According to the Court, another interpretation would allow local elected officials who have violated the regime of incompatibility or conflict of interest to circumvent the law and the penalty provided and to occupy another eligible position, which would be unthinkable in a state of law.

In relation to these issues, it should be noted that, at parliamentary level, there are attempts to change the legal framework of integrity in order to eliminate some positions or situations that generate incompatibility or conflict of interest for local elected officials

and to establish a new interpretation of the phrase "the same position" in Law no. 176/2010, which unfortunately, will undermine the integrity of the current framework of integrity.

Considering the above, it appears that the violation of the legal regime of incompatibility and conflict of interest leads to sanctions both on the persons and on the documents issued, adopted or drafted by them. Thus, local elected officials lose their mandate and are deprived of their right to occupy an eligible position for 3 years starting with the application of the sanction, and the legal or administrative acts concluded directly or through intermediaries, breaching the legal provisions regarding the conflict of interest, become null and void. The action of stating the nullity of the acts is introduced by the National Integrity Agency even if the person no longer holds that position. The court has the power to rightfully state the absolute nullity and to restore the parties in the former state.

CASES OF LACK OF INTEGRITY OF LOCAL ELECTED OFFICIALS NOTED BY THE NATIONAL INTEGRITY AGENCY

Since its establishment until today, the National Integrity Agency has found, either ex officio or upon notification, the violation of the legal regime of incompatibility and conflict of interest by a considerable number of local elected officials. From 2008 until the end of 2014 (The activity report of the National Integrity Agency for 2014, http://194.1.169.9/A.N.I/Rapoarte-şi-audit.aspx- accessed on 23 May 2015) there have been assessed 1010 cases of incompatibilities and 451 cases of conflicts of interest (252 administrative conflicts of interest and 199 criminal conflicts of interest), a significant number being those of local elected officials. The normative framework of integrity was violated by local officials through acts affecting the regime of incompatibility, facts and deeds that take the form of administrative conflict of interest or, worse, criminal conflict of interest.

According to the 2014 activity report of the Agency, 238 (143 local councilors, 64 county councilors, 38 deputy mayors, 33 mayors, 2 general councilors – The General Council of Bucharest Municipality, 2 vice presidents of county councils, 1 president of county council) local elected officials were declared permanently incompatible, and for 52 (25 local councilors, 10 county councilors, 9 mayors, 2 deputy mayors, 6 presidents of county councils) the evaluation reports on conflict of interest of administrative nature remained final (following unappealed or irrevocable decisions courts), and for 4 (2 mayors, 1 deputy mayor, 1 local councilor) were prepared indictments following the indications of the National Integrity Agency concerning the perpetration of criminal acts.

To better understand how the evaluation of incompatibilities and conflicts of interest is completed by the Agency for local elected officials, we present some cases of local elected officials who were drafted reports of incompatibility or conflict of interest by the Agency inspectors.

In the Evaluation report no.5852 (http://www.integritate.eu/A.N.I/Rapoarte-şi-audit.aspx, accessed on 23 May 2015) of 12 February 2014, the National Integrity Agency has determined that Maior Andrei, mayor of Crişeni commune, Sălaj County, did

not comply with the legal provisions regarding the judicial regime of conflicts of interest. The conflict of interest has been generated by signing and approving, as the mayor of Crişeni, several administrative acts, namely certain provisions of employment and individual labor contracts for his son who worked as councilor of the mayor of Crişeni. Also, from the evaluation activity there resulted indications about the possible abuse of mayor Maior Andrei of the provisions of Article 301 of the Criminal Code of Romania.

Through the Evaluation report no.6988 (http://www.integritate.eu/A.N.I/Rapoarte-şi-audit.aspx, accessed on 23 May 2015) of 20 February 2014, the National Integrity Agency established that Ţărdea Fănică, local councilor in the local council Tulnici, Vrancea County, violated the legal regime of incompatibilities and conflicts of interest because, during his office as local councilor, the company he administered and where he was the only shareholder, signed contracts of services with the Commune hall of Tulnici, thus violating the provisions of Article 90 of Law no. 161/2003 on certain measures to ensure transparency in the exercise of public dignities, public positions and the business environment, to prevent and sanction corruption.

By the Evaluation report no.9269 (http://www.integritate.eu/A.N.I/Rapoarte-şi-audit.aspx, accessed on 23 May 2015) dated 07 March 2014, the National Integrity Agency has determined that Lazăr Constantin, mayor of Poiana Sibiului commune, Sibiu County, violated the legal regime of conflicts of interest because he signed, during his mayor mandate, a lease contract with his son and a concession contract with his daughter. Thus, Lazăr Constantin did not respect the legal regime of conflicts of interest because the Local Council of Poiana Sibiului commune, Sibiu County, represented by the mayor, has entered into a lease with the mayor's son and a concession contract with a company where the mayor's daughter was the administrator, and mayor's son the sole shareholder, violating the provisions of Article 70, 71 and 76 of Law no. 161/2003 on certain measures to ensure transparency in the exercise of public dignities, public positions and in the business environment, to prevent and sanction corruption, in conjunction with Article 75 of Law no.393/2004 on the status of local elected officials. However, the contracts mentioned and the patrimonial benefit realized by the mayor for his son and daughter by signing the two contracts are indications of a possible breach of Article 301 paragraph 1 of Law no. 286/2009 on the Criminal Code.

According to the Evaluation report no. 12029 (http://www.integritate.eu/A.N.I/Rapoarte-şi-audit.aspx, accessed on 23 May 2015) of 20 March 2014 prepared by the National Integrity Agency, Nechifor Ioan, county councilor within Vaslui County Council, violated the law regarding the incompatibility regime because, after the validation of the county councilor mandate, he did not resign within the period prescribed in Article 91 paragraph 1 sentence I of Law no. 161/2003, and did not terminate the contract of works between Vaslui County Council and the company he managed and where his son was the sole shareholder. Through his action, the person assessed did not comply with Article 91 paragraph 3 sentence I of Law no. 161/2003 concerning certain measures to ensure transparency in the exercise of public dignities, public positions and in the business environment, to prevent and sanction corruption, in conjunction with Article 90 paragraph 1 of the same law.

By the Evaluation report no.12058 (http://www.integritate.eu/A.N.I/Rapoarte-şi-audit.aspx, accessed on 23 May 2015) of 20 March 2014, the National Integrity Agency determined that Aurel Lesuc, mayor of Tudora commune, Botoşani County, violated the law regarding the regime of incompatibilities, as he concurrently exercised the position of mayor and the position of representative of the administrative-territorial unit Tudora in the General Meetings of Shareholders of the local interest company Nova Apaserv S.A. Botoşani. Through his act, the mayor of the commune Tudora violated the provisions of Article 87 paragraph 1 letter f) of Law no. 161/2003, as well as Article 91 paragraph sentence I 3 of the same law.

A final example is the Evaluation report no.12082 (http://www.integritate.eu/A.N.I/Rapoarte-şi-audit.aspx, accessed on 23 May 2015) of 20 March 2014 prepared by the National Integrity Agency which results in the fact that Lina Cătălin Vasile, local councilor in the Local Council Aninoasa, Argeş County, violated the legal regime of incompatibility, simultaneously holding the position of local councilor and the quality of individual employee with labor contract in the body of the mayor of Aninoasa commune, Argeş County. Through his action, the local councilor violated the provisions of Article 88 paragraph 1 letter c) of Law no.161/2003.

CONCLUSIONS AND PROPOSALS

Even if integrity is essential to good administration, practice has shown numerous violations of the rules regarding incompatibilities and conflicts of interest by local officials. These cases are highlighted by the evaluation reports prepared by the National Integrity Agency in its role as guardian of the integrity criteria established by law. It is important that the integrity rules be known and followed by all local elected officials, otherwise we risk a local public life dominated by lack of integrity and numerous cases of lawful termination of mandates as a result of the violation of the legislation on incompatibilities and conflicts of interest. Even if the normative framework of integrity complies with the European legislation on the matter, we consider it necessary to rethink the legal provisions regarding the ownership, for example, by a mayor, of both the quality of mayor and that of member of the administration board of an educational institution, or both the quality of mayor and that of administrator of a private entity that has not carried out, during the mayor mandate, commercial acts, but which, by current regulation, generates a state of incompatibility. In our view, there should not be considered an incompatibility situation the case in which a person owns simultaneously an unpaid position in a management structure, such as the administration board of a pre-university educational institution or as an administrator in a company with no activity .

Finally, we believe that certain provisions of Law no.161/2003 should be related to regulations from the field of local public administration, with regard to the beginning of the incompatibility state, the lawful termination of the mandate of local elected official or the procedure of declaring the incompatibility.

References:

[1] Ioan Hosu, Mihai Deac, Marius Mosoreanu, *Relaţia dintre autorităţi locale şi cetăţeni. Interacţiuni şi percepţii*, Transylvanian Journal of Administrative Sciences, 1(30)/2012, p. 81
[2] Nicholls, QC, C., Daniel, T., Bacarese, A. and Hatchard, J., *Corruption and Misuse of Public Offic*e, Oxford: Oxford University Press, 2011 cited in Cynthia Carmen CURT, *Standarde de integritate publică privind aleşii locali. Sancţionarea conflictului de interese administrativ*, Transylvanian Journal of Administrative Sciences, 1(34)/2014, p. 48
[3] Mihai Cristian Apostolache, *Delegatul sătesc-un ales local cu statut neclar* in Journal of Public Law, issue 1/2015, p. 70
[4] Law no. 144/2007 on the establishing, organization and functioning of the National Integrity Agency, published in the Official Gazette of Romania, Part I, issue 359 of 25 May 2007
[5] Law no. 176/2010 regarding integrity in the exercise of public positions and dignities, amending and supplementing Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency, as well as amending and supplementing other normative acts, published in the Official Gazette of Romania, issue 621 of 2 September 2010
[6] Law no. 161/2003 regarding certain measures to ensure transparency in the exercise of public dignities, public positions and in the business environment, to prevent and sanction corruption, published in the Official Gazette of Romania, issue 279 of 21 April 2003
[7] Law no. 393/2004 on the status of local elected officials, published in the Official Gazette of Romania, Part I, issue 912 of 7 October 2004
[8] Law no. 215/2001 on local public administration, republished in the Official Gazette of Romania, Part I, issue 123 of 20 February 2007
[9] Decision no. 418 of 3 July 2014, published in the Official Gazette of Romania, Part I, issue 563 of 30 April 2014
[10] Decision of the Constitutional Court no. 663 of 26 June 2012, published in the Official Gazette of Romania, Part I, issue 596 of 21 August 2012
[11] Decision of the Constitutional Court no. 415 of 14 April 2010, published in the Official Gazette of Romania, Part I, issue 294 of 5 May 2010
[12] Decision of the Constitutional Court no. 1606 of 15 December 2011, published in the Official Gazette of Romania, Part I, issue 106 of 9 February 2012
[13]http://www.integritate.eu/Files/Files/Acte%20de%20constatare/OrdinAlPrefectuluiJudDambovita.PDF; http://www.integritate.eu/Files/Files/Acte%20de%20constatare/HotarareCJBacau_156_30092009_PrivindConstatIncetariiDeDreptMandatCJ_AlDluiDanciuPetruMarius.PDF, accessed on 23 May 2015.
[14] The Activity Report of the National Integrity Agency for 2014, http://194.1.169.9/A.N.I/Rapoarte-şi-audit.aspx, accessed on 23 May 2015
[15] http://www.integritate.eu/A.N.I/Rapoarte- şi-audit.aspx, accessed on 23 May 2015

STRATEGIC PLANNING FOR REGIONAL DEVELOPMENT ON THE BASIS OF THE CONCEPT OF "POINT OF GROWTH"

Viktor BONDARUK
Odessa Regional Institute of Public Administration of National Academy of Public Administration, Office of the President of Ukraine
Odessa, Ukraine
vbondaruk@yahoo.com

Ivan KOMAROVSKIY
Faculty of Economics and Business Administration,
"Alexandru Ioan Cuza" University, Iași, România
komivan.ua@gmail.com

Abstract: *This study analyses determinants of the concept of "points of growth" at regional level as the basis for strategic planning of local development/. In accordance to definition of concept and characteristics of strategic planning of local development, the basic issues of preparation of strategic plan, its place in the general system of the main types of local development plans were examined. Been determined the basic stages of the strategic planning process of local development based on the concept of "growth pole".*
Keywords: *FDI, "Growth Poles", regional development, strategic planning*

INTRODUCTION

The issue of local economic development planning is one of the priorities for local public administrations in Eastern Partnership countries, including Ukraine and Moldova. As the basis of relevant programs approach based on identifying and promoting "Growth Poles" can be laid (François Perroux, 1955). Its theoretical foundation is neoclassical growth theory, formulated (James E. Meade, 1951) and further developed in the works (Robert M. Solow, 1956) and (Trevor Swan, 1956)**.**

The task of determining the possibility of laying the concept of "point of growth" in the basis of strategic plan is usually the responsibility of local public administrations, which then use it in the relevant programs of local economic development. The specific features of such programs are:

- determining the direction and priorities of local development;
- prolonged nature of practical implementation (both the strategy and development programs);
- capability to assess the effectiveness of the strategy using quantitative and qualitative indicators;
- reflection of application of "point of growth" concept by localization of business;
- possibility to adapt the main provisions of strategy and development programs to external changes.

Therefore, implementation in local public administrations work the methodology of strategic planning for local economic development using the concept of "point of growth" is important and promising area for the research. At the same time, the strategic planning process of local development itself as an integral component of public administration certainly should include appropriate control mechanisms.

THEORETICAL BASIS OF STRATEGIC PLANNING FOR LOCAL ECONOMIC DEVELOPMENT BASED ON THE CONCEPT OF "POINT OF GROWTH"

The issue of strategic planning and public administration local economic development based on application of the concept "point of growth" considered in works (John B. Parr, 1999), (John B. Parr, 1973), (Morgan D. Thomas, 1975).

In (Blakely E., 1994) and (Local Economic Development / World Bank, 2003) noted that the development of strategic plan should also take into account the application of relevant mechanisms of public control. Such mechanisms should be designed to achieve specific goals identified in local development strategies. The list of local development governance mechanisms can consist mechanisms such as economic, legal and motivational those are means of targeting of public administration on the progress of the regional economic development. In this case the scheme of governance mechanisms shall include: goals, decisions, influences, actions and results, which must be reflected in the relevant model (Blakely E. , 1994), (Local Economic Development/ World Bank, 2003), (Trousdale, William, 2003).

As for the definition of strategy development, modern approaches to the implementation of the concept of "point of growth" consider two options:

- initiation of "point of growth" on the basis of target state funding (state development program);
- the definition of "point of growth" as a result of market concentration of resources, existence of the necessary infrastructure, consumer market, etc.

Outside the differences in these approaches, they are based on general model of local economic development, theoretical ground of which are the theory of growth poles and development centres (François Perroux, 1955) and the international division of labour. This approach allows determining such a pole of gravity factors of production, which will provide the most effective use and as a result, the formation of local "point of growth".

STRATEGIC PLANNING AND MANAGEMENT OF "POINT OF GROWTH" BY LOCAL PUBLIC ADMINISTRATIONS

Any strategic planning process and its implementation on the basis of respective program - a set of logical relationship and items such as strategy goals, management objects and links between them, practical activities using appropriate methods of influence, material and financial resources, organizational potential etc. Taking into account all these factors encourages public administration body to make management

decisions. Since the factors of strategic planning have economic, social and legal framework, mandatory constituent elements for the strategic planning process are the system of public administration and set of legal rules regulating their function and local development.

One outcome of practical implementation of the strategic planning process of local development is the current strategic plan. The content and process of preparing such a plan must meet the following requirements:

- strategic plan - a document defining the framework for business, government and the community for operational decisions taking into account the adopted development priorities of the region (in the "point of growth");
- sense to develop a strategic plan exists only when all parties interested participate in joint activities, which should begin in the interests of the local economy and society, and the result is strategically important for the future of local residents;
- in the strategic plan timing of long-term vision and concrete ongoing actions are combined. Included positions are such that in most cases should be carried out in real time with the assistance of necessary resources.

There are different approaches to the goals and objectives of the Strategic Plan. Strategic Plan can become the organizing pivot around which will be grouped all the planned activities under the program of local economic development. They interact on a certain hierarchy that is defined by the main types of plans for local economic development, Figure 1. Itself plan can carry out at the same time respective functions for program planning, including:

- determining the order of monitoring program by phases and deadlines, financial resources, organizational and management capabilities of direct and indirect effects, etc.;
- distribution of competence and responsibility for implementation of the plans included in the program of economic development between local and state authorities.

THE POLITICAL COMPONENT OF STRATEGIC PLANNING

The process of strategic planning of local development usually starts with political decision. That is why putting a question about beginning of the strategic planning of "point of growth" has no sense until the pending appropriate political decision. Reasoning from the fact that a local authority always politically rational there is a possibility to define two approaches to the development of the strategic plan and related development programs.

The first is a "rational" model of strategic planning and decision-making, which provides coherent approach to making decisions. Usually it includes the following steps: goals defining; developing of related strategy and action plan; direct project activities.

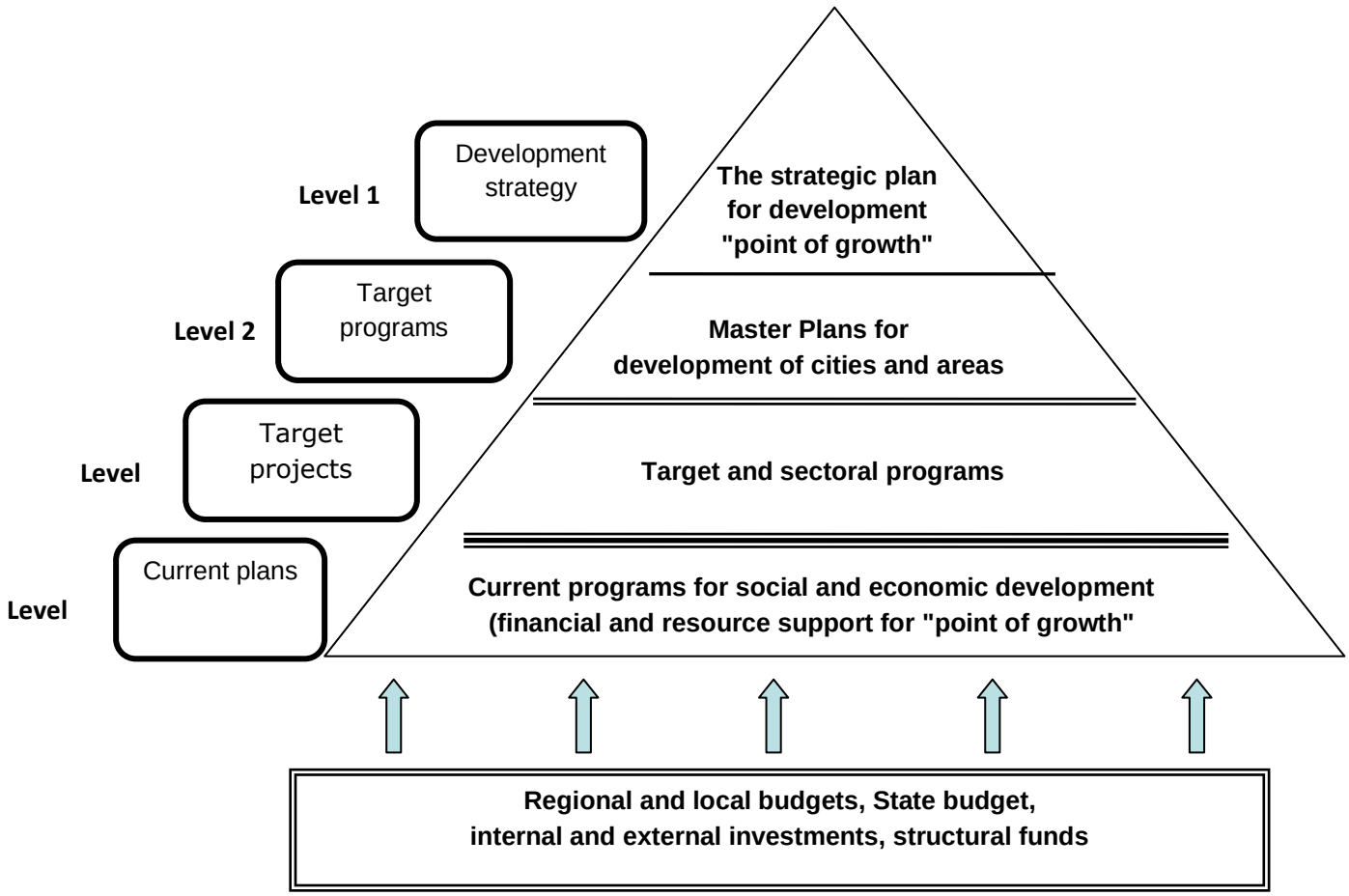


Figure no.1 The strategic plan for implementing the concept of "point of growth" in the relationship system for the main types of local development plans.

A feature of this model is the assumption that the fragmented environment with the division of powers inherent in the system of public administration already exists consensus on goals, strategies, programs and actions needed to ensure its sustainable development. But in practice, this assumption is rarely acknowledged.

The second alternative is a political model of strategic planning. It should begin with a review of issues related to the definition of "point of growth", including goals, methods, timing, location, political benefits, etc.. In realization of attempts to settle controversial issues there are options appear for strategies and programs which are inherently politically rational, acceptable with the consent of all involved groups of influence. Such various strategies and programs, even if they do not mean a full consensus, at least would testify to certain level of agreement between them.

Identification and harmonization of matters which are strategic for local development, underlying the strategic planning process, is the subject of political consensus, with the objective of identifying and solving within the strategy. Considering

that practically all decisions on local development always adopt with a political way it can be argued that such planning is preferred.

In this case, increased public attention allows to get as a result an optimal solution on the principles of combination of pragmatic and political components (content and process).

The stages of strategic planning.

Usually as the basis for any strategic planning process serves so-called cycle of strategic changes. This is a repeating and dynamic process that causes quite orderly, transparent and effective approach to achieving the strategic goal, Figure 2.

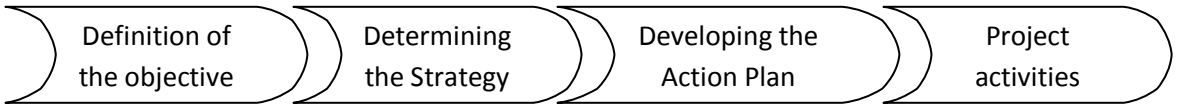


Figure 2. The rational model of strategic planning.

Generally following stages of the strategic planning of local development based on the concept of "Pole of growth" can be identified, Table 1.

Table no.1 Stages of the strategic planning based on the concept of "Pole of growth»

	Stage	Contents of stage.
1	Initiation of strategic planning process	Political decision to develop a strategic plan and determine its format in accordance with the objectives, available resources and specific features of the social environment
2	Stakeholders involvement	Identification and involvement of all parties interested in the implementation of the strategic planning process, who can support the process and provide the implementation decisions taken
3	Evaluation of the current state of the environment	Body of public management evaluates its internal strengths and weaknesses and the external environment with a view of potential opportunities and threats (SWOT-analysis methodology)
4	Determination of strategic direction and main objective	Formulation of values, vision and mission. Must be wide but clearly defined, which reflects the goal of public administration body existence
5	Defining the problems	On the basis of evaluation of environment transition to identification of problems that need to be addressed
6	Setting priorities	Setting priorities and determine the most important and most urgent issues
7	Developing goals, tasks, performance indicators	Setting goals and interim steps (which are quantifiable). Finally performance indicators are developed that allow to establish an important link between objectives, actions and tasks set out in the strategic plan as well as program and activities funded from the budget
8	Working out strategies to achieve the objectives	Developing the Action Plan, which describes the adopted strategy and activities for its implementation, related costs, responsibilities, priorities and timeframes within which public administration body reaches strategic goals
9	Approval of Strategic Plan	Persons who take political decisions should formally approve the strategic plan to ensure further policy and budgetary decisions are

		taken in the context of the plan
10	Implementation of Strategic Plan	The strategic plan should be the basis on which current budget, the development budget and other activities related to financial planning are elaborated and carried out by the authorities of public administration
11	Monitoring of the achievement of strategic objectives	During strategic planning, assessment serves as feedback. It completes the cycle from planning to implementation

CONCLUSIONS

Proposal for laying the basis for strategic planning of local development concept of "point of growth" implies a combination of functional and situational principles, presentation of objects and subjects of administration as the whole organizational structure. This approach allows considering the possibility of changes in the conditions of management system, ensuring its flexible response to changing external environment by switching to alternatives. Meanwhile, the use of political model in the development of strategy, allows optimizing budget and resource support for "point of growth"and its compliance with the expectations of local people.

References:

[1] Blakely E. Planning Local Economic Development. – Thousands Oaks, Ca, USA: SAGE Publications, 1994.
[2] Local Economic Development. Primer A. Developing and Implementing Local Economic Development
[3] Strategies and Action Plans / World Bank. – Washington, D.C., 2003.
[4] Perroux, François (1955): Note sur la notion de poles croissance. Economic Appliquee, 1 & 2:307-320 (Translated by Mette Monsted, (1974).
[5] Perroux, François (1950): Economic space: theory and applications. QuarterlyJournal of Economics, Vol. 64: 90-97.
[6] Robert M. Solow (1974) The Economics of Resources or the Resources of Economics. *The American Economic Review* Vol. 64, No. 2, Papers and Proceedings of the Eighty-sixth Annual Meeting of the American Economic Association (May, 1974), pp. 1-14
[7] John B. Parr (1999) Growth-pole Strategies in Regional Economic Planning: A Retrospective View Part 1. Origins and Advocacy. Urban Stud June 1999 vol. 36 no. 7
[8] John B. Parr (1973) GROWTH POLES, REGIONAL DEVELOPMENT, AND CENTRAL PLACE THEORY. Regional Science Volume 31, Issue 1, pages 173–212, January 1973
[9] Morgan D. Thomas (1975) GROWTH POLE THEORY, TECHNOLOGICAL CHANGE, AND REGIONAL ECONOMIC GROWTH. Regional Science, Volume 34, Issue 1, pages 3–25, January 1975
[10] Robert M. Solow, (1956) A Contribution to the Theory of Economic Growth, The Quarterly Journal of Economics, Vol. 70, No. 1. (Feb., 1956), pp. 65-94. *Web page*. Retrieved from http:// www.links.jstor.org/sici?sici=0033-5533%28195602%2970%3A1%3C65%3AACTTTO%3E2.0.CO%3B2-M
[11] Trevor Swan (1956), ECONOMIC GROWTH and CAPITAL ACCUMULATION, Economic Record Volume 32, Issue 2, pages 334–361, November 1956
[12] Trousdale, William. Strategic Planning for Local Economic Development. The Manual. Volume I: Concepts & Process / UN-Habitat and Ecoplan International Inc., 2003.

URBAN DEVELOPMENT IN SOUTHERN COUNTIES OF ROMANIA

Dragoş Valentin DINCĂ
Faculty of Public Administration,
National University of Political Studies and Public Administration
Bucharest, Romania
dragos.dinca@public-research.ro

Cătălin Daniel DUMITRICĂ
Faculty of Public Administration,
National University of Political Studies and Public Administration
Bucharest, Romania
catalin_dumitrica@snspa.ro

Abstract: *Romania is divided in administrative terms in counties, cities (some cities have municipality status) and communes. In the southern part of Romania there are 7 counties (Mehedinti, Dolj, Olt, Teleorman, Giurgiu, Calarasi, Constanta) bounded by the Danube and the Black Sea (Constanta). These counties are very heterogeneous in terms of development, although natural conditions are very similar. There are 45 cities and municipalities, with a wide variety of numerical dispersion (-3 fewest in Giurgiu, most -12 - Constanta county). In the period September-November 2013 data from 45 cities we collected (a total of 265 indicators covering the entire socio-economic local lifetime) from official sources: the prefecture institutions, local government, the National Institute of Statistics, county employment agencies, the National Office for Trade Register). Through this paper we intend to analyze part of the data collected to identify and compare the action of local authorities and the degree of development of the seven counties in terms of urbanization and the development of local public services in the major urban settlements of each county - municipalities. Such analysis performed allows us to draw conclusions about the relationship between local public services, administration actions and urban development.*
Keywords: *urban development, public services, counties, municipalities, towns*

1. SUSTAINABLE URBAN DEVELOPMENT

"The word sustainability (supporting) has its roots in Latin, subtenir meaning "to stem / retain" or "support from below". A community must be supported from the bottom-by the current and future inhabitants. People need to take care of their community"(Muscoe, M, 1995).

The first definition of sustainable development appeared in the report of the World Commission on Environment and Development entitled "Our Common Future" (Brundtland, 1987): "the development that seeks to meet the needs of the present without compromising the ability of future generations to meet their own needs". Since the Commission was chaired by the Prime Minister of Norway, Dr. Gro Harlem Brundtland, it remained known as the Brundtland Report. This concept has crystallized over time, over many decades, in in-depth international scientific debates and it got political meanings in the context of globalization. Sustainable development has become an

objective of the European Union since 1997, when it was included in the Maastricht Treaty and the 2001 during the Summit of the Goetheborg the Sustainable Development Strategy of the European Union was adopted. The Report "Our Common Future" can be considered the starting point of a global partnership constituting a political turning point for the concept of sustainable development.

Sustainability refers to the ability of the society to operate continuously in the future, without leading to resource depletion, with three major key components: environment, society and economy. The concept of sustainable development is the result of an integrated approach of policy and decision makers' factors, in which the environment protection and long-term economic growth are seen as complementary and mutually dependent. Social factors determine certain attitudes towards the environment, with consequences on affecting pressures on ecological systems. But this is neither the starting point nor the end of the conceptual development process.

Urban sustainable development also involves choosing appropriate ways of organizing cities to meet the target needs interested in urban development. It is believed that sustainable urban development has reached its finality when the business community and the citizens are satisfied with the economic-urban social environment, when the expectations of visitors and investors are met (Kotler et al., 2002). Urban sustainable development is an indispensable element in strategies for economic development of cities, contributing to setting the overall vision of the strategy. It helps cities meet several objectives (attracting new national / international companies, strengthening industrial infrastructure, tourism development etc.) while the need to maintain or decrease public spending and to face competition for attracting new investors.

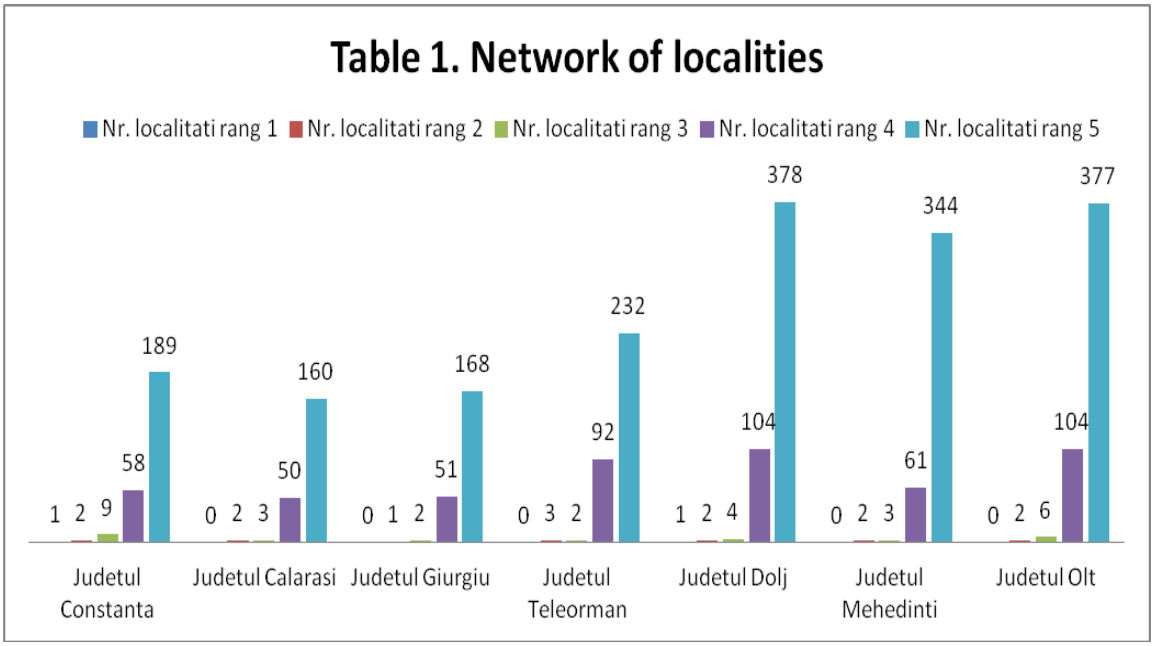
The main goal of urban sustainable development is the extraction of activities with potential beneficial effects for the community and maximizing the satisfaction of target market segments. The central thesis of urban sustainable development is that, despite internal and external forces with which they are struggling, communities have the ability to improve their relative competitive positions.

In conclusion, urban sustainable development is a process in which different purposes and strategies are interfered and reconciled of various actors and the interests are balanced.

2. ADMINISTRATIVE TERRITORIAL UNITS ANALYZED

In the Southern part of Romania there are seven counties (Mehedinti, Dolj, Olt, Teleorman, Giurgiu, Calarasi, and Constanta) that have in common the delimitation of the Danube and proximity to Bulgaria.

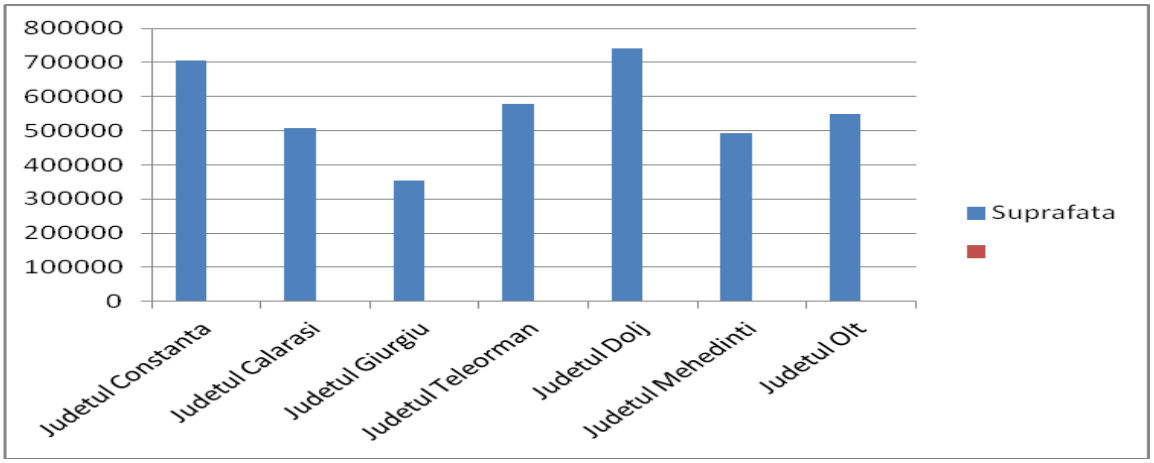
From the point of view of the network of localities, the situation is the following:



Authors: the authors

It is observed that counties in the South West have a greater number of localities, with no correlation between this indicator and the surface. Thus, Constanta County is the second in terms of area, but it has the lowest number of localities, but the largest number of cities and municipalities and the largest population.

Table no.2 Counties in southeastern Romania



Authors: the authors

Urban settlements of the 7 counties under review are:

- Mehedinti County
- Drobeta-Turnu Severin
- Orşova

Dolj County

- Craiova
- Băilești
- Calafat

Olt County
- Slatina
- Caracal

Teleorman County
- Alexandria
- Roșiori de Vede
- Turnu Măgurele

Giurgiu County
- Giurgiu

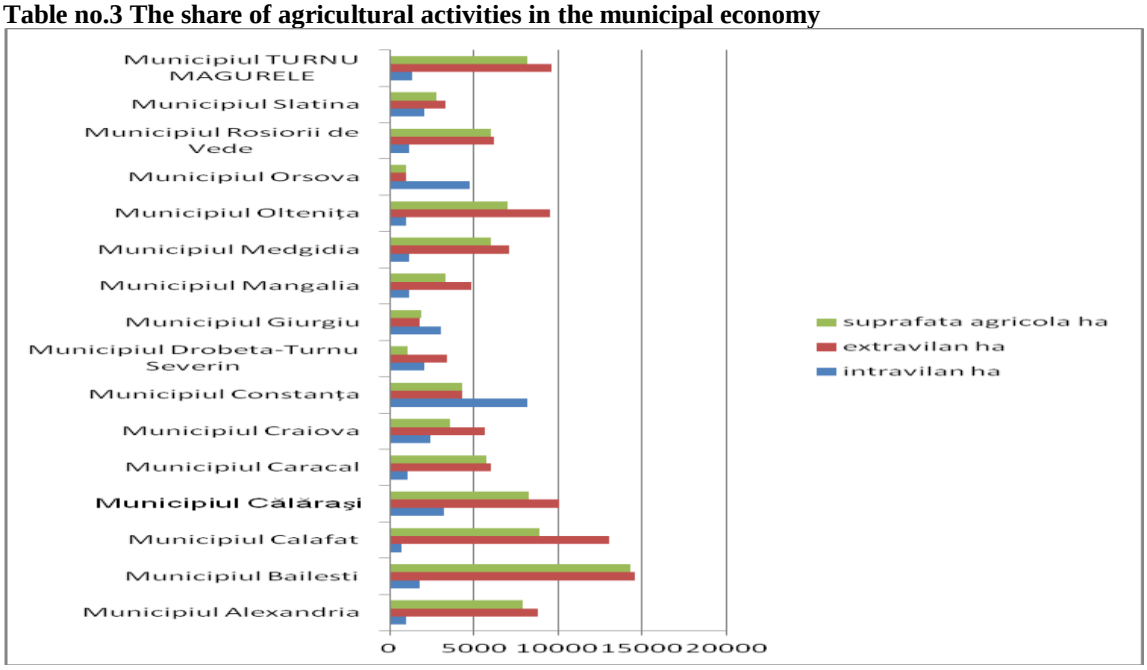
Calarasi County
- Călărași
- Oltenița

Constanta County
- Constanța
- Medgidia
- Mangalia

3. ANALYSIS OF THE AREA AND POPULATION OF THE 16 MUNICIPALITIES

Surface observation of the 16 municipalities finds evidence of large discrepancies. Bailesti is the municipality with the largest area, but most of it is used for agricultural activity. In general it is found that cities in southern Romania have an important surface dedicated to agricultural activity and extended unincorporated areas. Only Orsova (due to geographical location), Giurgiu (due to neighboring localities) and Constanta have higher urban areas than unincorporated areas. This observation leads to the conclusion that agricultural activities have an important share in the economy of the analyzed municipalities.

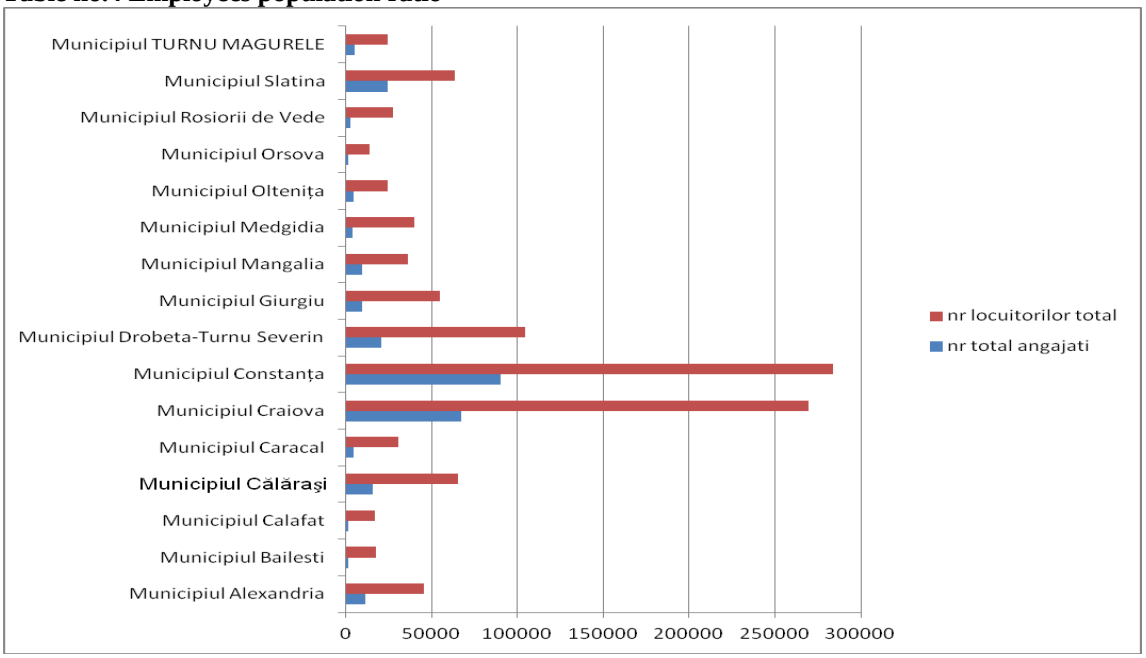
Table no.3 The share of agricultural activities in the municipal economy



Authors: the authors

In terms of population, there are two major urban centers - Constanta and Craiova. Orsova has only 14,000 inhabitants. The report however notes that the total population - number of employees ratio is significantly higher in Slatina (2.56) compared to Bailesti (11.86).

Table no.4 Employees population ratio

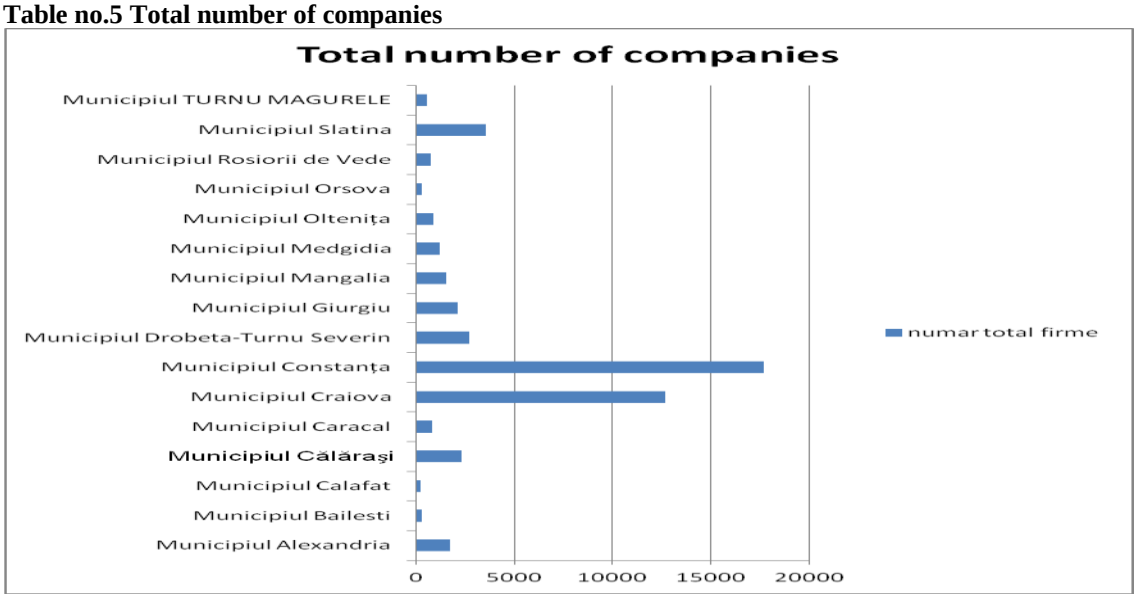


Authors: the authors

4. ECONOMIC ACTIVITY

Observing the indicator "Number of companies" leads to the conclusion that in Craiova and in Constanta there are more economic agents than in the other 14 cities combined. In Bailesti there is one company for 57 people and in Constanta there is one for 16 people.

Table no.5 Total number of companies



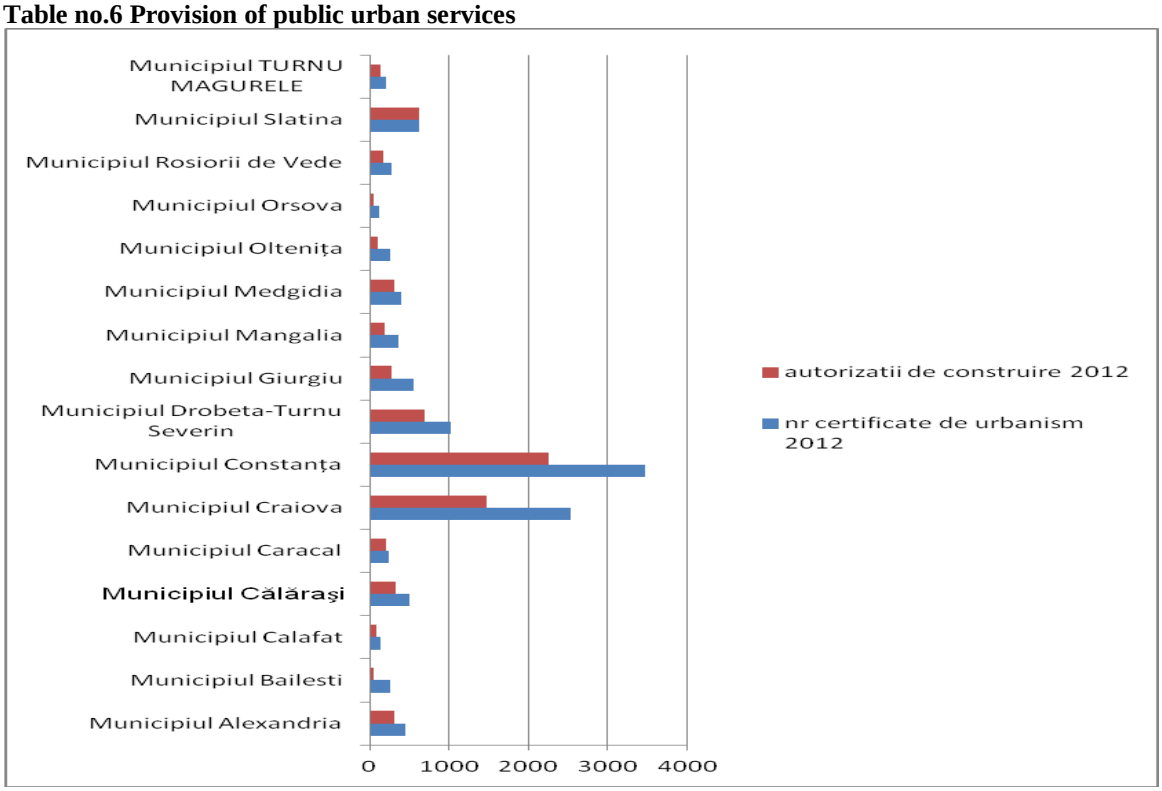
Authors: the authors

5. PUBLIC SERVICES IN THE ANALYZED MUNICIPALITIES

5.1. Urban Planning Services

Dynamics of observable building activity in the analyzed municipalities by the number of building permits issued by local authorities is directly proportional to the intensity of economic activity. Large cities are expanding even more through building activities.

Table no.6 Provision of public urban services

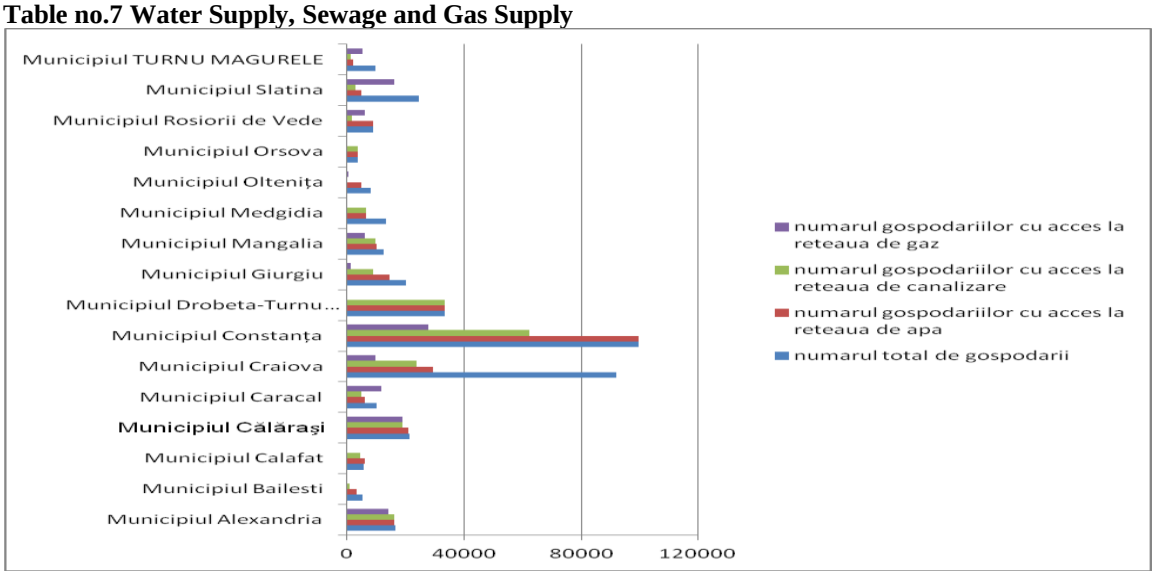


Authors: the authors

5.2. Water Supply, Sewage and Gas Supply

In all analyzed municipalities, there are water supply and sewage treatment services, but they cover only partially the city area. In Calafat and Turnu Magurele there are no local strategies for the development of these services. In Orsova, Bailesti and Calafat there is no gas supply network.

Table no.7 Water Supply, Sewage and Gas Supply

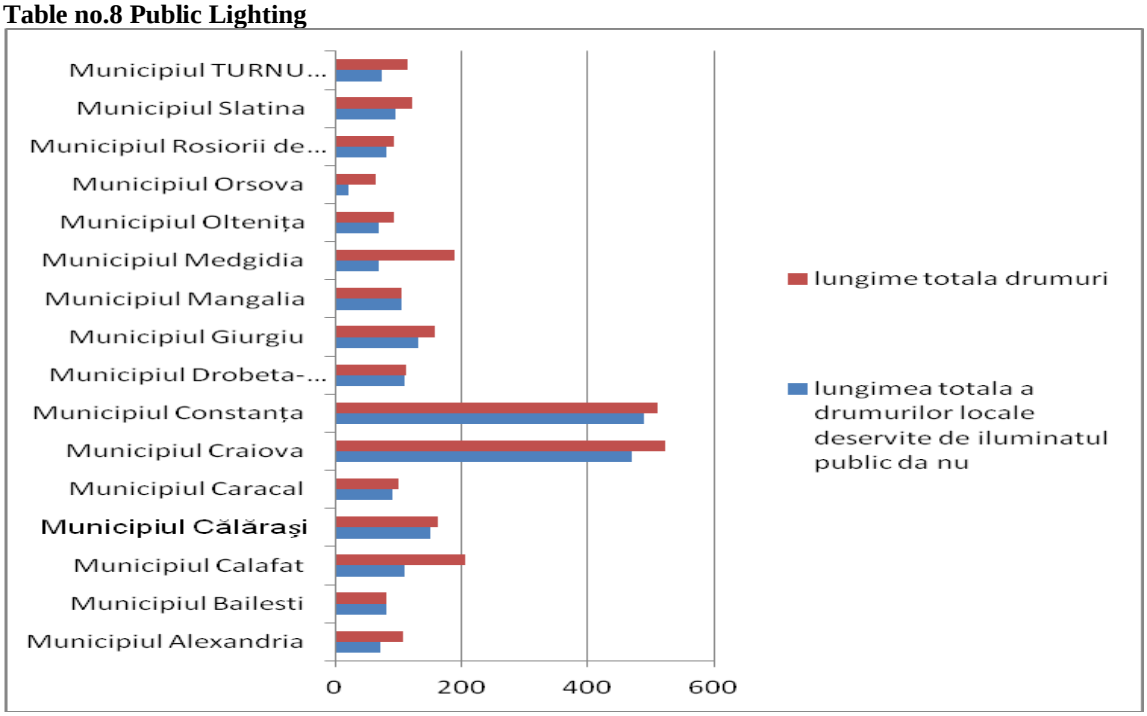


Authors: the authors

5.3. Public Lighting

Public lighting is present in all analyzed municipalities, and the service covers only partially the cities territory. In Medgidia, Calafat and Orsova public lighting covers less than half of the total length of public roads.

Table no.8 Public Lighting

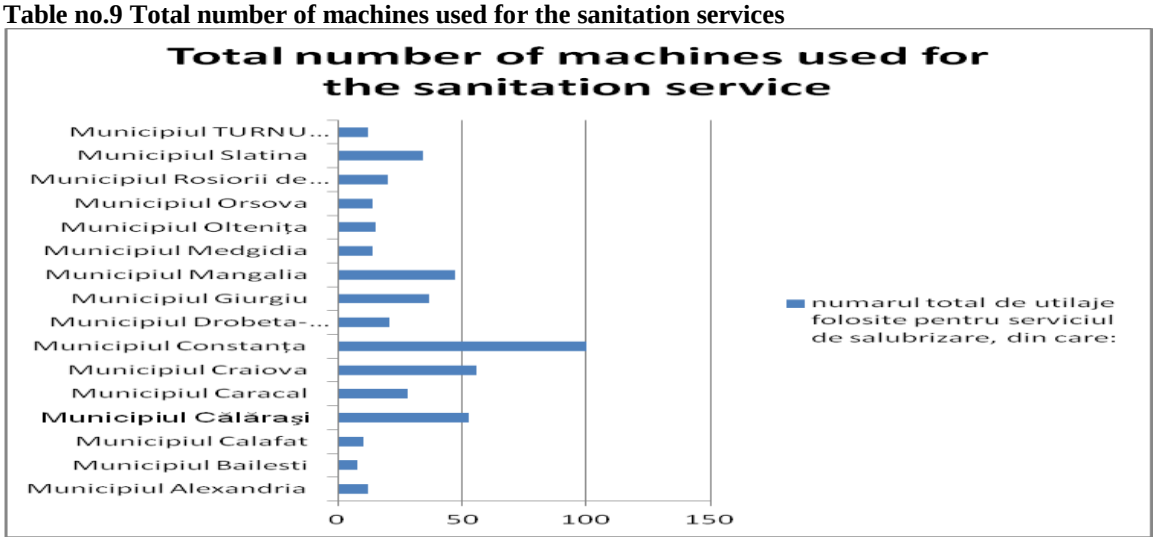


Authors: the authors

5.4. Sanitation and Emergency Services

They are the largest of the services analyzed, with general access. And in terms of the equipment used there is a balance to the population, but not with municipalities' area.

Table no.9 Total number of machines used for the sanitation services



Authors: the authors

5.5. Analyzed Strategies for Developing Public Services

	There is a strategy for developing road infrastructure	There is a development strategy for sanitation service	Existence of a performance audit for electricity service	Existence o f a strategy for the development of electricity services	Existence of a strategy for development of water supply services	Existence of a strategy for development of sewage service
Alexandria Municipality	No	No	No	No	Yes	Yes
Bailesti Municipality	Yes	Yes	No	No	Yes	Yes
Calafat Municipality	No	No	No	No	No	No
Călărași Municipality	Yes	Yes	No	Yes	Yes	Yes
Caracal Municipality	Yes	Yes	No	No	Yes	Yes
Craiova Municipality	No	No	No	No	Yes	Yes
Constanța Municipality	No	Yes	Yes	Yes	Yes	Yes
Drobeta-Turnu Severin Municipality	Yes	Yes	No	Yes	Yes	Yes
Giurgiu Municipality	No	Yes	No	No	Yes	Yes

Mangalia Municipality	No	Yes	No	No	Yes	Yes
Medgidia Municipality	Yes	Yes	Yes	Yes	Yes	Yes
Oltenița Municipality	Nu	Yes	Yes	Yes	Yes	Yes
Orsova Municipality	No	Yes	No	Yes	Yes	Yes
Rosiorii de Vede Municipality	No	Yes	No	No	Yes	Yes
Slatina Municipality	No	No	No	No	Yes	Yes
Turnu Magurele Municipality	Yes	No	No	No	No	No

Authors: the authors

CONCLUSIONS

The localities network in the 7 analyzed counties is disproportionate between counties in the West and the East. But it is noted that in the same development region the situation is balanced (similarities among Dolj, Mehedinti, Olt counties and among Teleorman, Giurgiu, Calarasi counties).

Large cities play the role of development centers, the the most developed counties being the ones in which localities rank 1 exist - Constanta and Dolj. Here there is the largest number of companies, employees, but also population. However there is a proportional ratio between population, number of firms and number of employees.

Municipalities in southern Romania and thus counties to which they belong have an economy based on agricultural activities but agriculture support services developed by local authorities are nonexistent. Although they have municipality status, these localities have a rather rural structure in majority.

Localities like Bailesti, Orsova, Rosiori de Vede don't have features, services and behavior of a municipality, the analyzed indicators suggesting rather a closeness to rural settlements. Implicitly, counties including them are predominantly rural, with an economy based on agricultural activities.

There is an uneven development between urban settlements analyzed, the trend of widening disparities between developed and poor cities/counties. The dynamics of the construction or expansion of public services suggest this issue. Urban services exist but they are unevenly distributed and accessible only to a part of the observed municipalities' population.

References

[1] Law 350/2001 land-use and urban planning published in the official gazette 373 of 10.07.2001;
[2] Law 544/2001 published in the official gazette nr. 663/23 October 2001;
[3] Population census 2011;
[4] General agricultural census 2012;
[5] Statistical data provided by the NTC, INS, county councils, municipal authorities;

THE NIGERIAN PUBLIC SERVICE AND SERVICE DELIVERY UNDER CIVIL RULE

Samuel O. OYEDELE
Department of political science, university of Ilorin
Pmb 1515, Ilorin, Kwara State Nigeria
Samolaoyedele@gmail.com

Abstract: *This paper examines the ability of the Nigerian Public Service to effectively manage public affairs. The paper highlighted the critical importance of Public Service delivery to the citizens in a timely, honest and effective manner under civil rule. The paper however discovered that government reform adopted to improve service delivery has not changed the public service for the better as nation-wide service failure persists. What is responsible for this is the failure of a recent public service delivery reform called Service Compact with All Nigerians (SERVICOM) to achieve its objectives. This is because of unsustained political will over time. Its operations are limited and uncoordinated. The paper infers that the tenets of SERVICOM should be widely publicized, coordinated and given "Legal teeth" to make it effective.*
Keywords: *Service delivery, Civil rule, Servicom, Public Service Reform, Renewal Programme.*

INTRODUCTION

The public service of any country stands out as the major machinery of government for the formulation and implementation of public policies. It does this by translating the plans and programmes of government into concrete public goods and services for the use of the citizenry. Since public bureaucracy is primarily concerned with public administration, the management of public affairs therefore rests heavily on it. Whatever the system of government in practice in a country, the public service is designed to be the prime mover of the social and economic development of a nation.

One of the challenges of government and of course the legitimate expectation of the citizens of a developing country such as Nigeria is the ability of the public service to properly direct their aspirations towards improving the general welfare of the citizens. This is because the primary responsibility of government is to deliver services through its public service effectively and promptly to citizens at affordable prices, particularly now that the country is under civil rule following the wind of democracy which has blown over countries of the world.

However, the ability of the Nigerian public service to effectively and the working hands of government has had to service various regimes and administrations (Mimiko, 1999) and efficiently manage public affairs and ensure prompt and quality service delivery had always been called into questioning over the years. Consequently, a number of far-reaching reforms on its structure and personnel management aimed at improving its performance have been put in place by the Nigerian government since its inception. Indeed, the Nigerian public service as the most critical instrument of the modern state its efficiency has been put to test and it has undergone series of socio-economic, structural

and political transformation, courtesy of the political leaderships of this country at one time or the other. Under the present civilian government, a number of strategies have also been adopted to improve the delivery of services to the citizens. It is however, doubtful if these reform efforts have changed the public service for the better. One aspect of the major strategies designed to improve service delivery is SERVICOM.

The main focus of this paper is therefore on SERVICOM and public service delivery in Nigeria. The first section examines the critical importance of Public Service Delivery to the citizens of any country. The second section reviews the public service reforms in Nigeria under the current civilian government. The third section examines the level of public service delivery in Nigerian while the last section is the concluding remarks.

THE CRITICAL IMPORTANCE OF PUBLIC SERVICE DELIVERY

In Nigeria and other developing countries of the world, the government usually has the major responsibilities for the maintenance of stability and the promotion of rapid economic and social development. These responsibilities of government have become more compelling in Nigeria today in view of the harsh economic climate and the highly deplorable conditions of living of most Nigerians. Government agencies are therefore designed for the realization of these responsibilities. This is why the public service of any nation is often regarded as the live-wire or nerve-centre of the state structure. The civil service is the operational arm of government charged with the analysis, implementation and administration of public policy. It is the executive arm of public administration. The public service manages the day-to-day affairs of the state by administering public services and back stopping government operations (Kyarinpa 1996).

Indeed, the civil service has been rightly described by the former head of the Nigerian civil service, Mr. Stephen Oronsaye as the bridge between the government and the governed, stressing that an inefficient public service, therefore constitutes a barrier between the government and the people (The Nation September, 28, 2010). The importance of the public service can be seen in the fact it gives effect to the policies and decisions of the government of the day whose responsibility it is to administer the affairs of the state.

As the machinery of government, it has the traditional duties to collaborate with any political party that wins the election or is on power, whether or not it agrees with the tendency and views of government as they relate to policies for the effective identification, formulation and implementation of public policies and legislation designed for the good of the citizenry. To a large extent therefore, the efficient and effective performance of the public service determine greatly, the level of development and stability of a nation's administration system (Naidu, 2005). This is why every government in developed and developing countries of the world acknowledge that the achievement of its social and economic development objectives depends on effective public services (Nti, 1996).

The public service of any country performs certain distinct and crucial functions. It provides a number of social services to the people of a country. Such services include

transportation, communications, supply of water, roads, education, health, housing, power, public enterprises and other public utilities in the interests, of socio-economic justice. It also formulates and implements laws and policies of government. By so doing, it remains the essential instrument for translating laws into reality. The public service provides continuity when governments change in a country. It survives even revolutions and coup d'états (Naidu, 2005). It is in the light of the crucial role of the public service to deliver social services to the citizenry that we need to examine the critical importance of effective service delivery in Nigeria.

As noted above, the public service is the main machinery of government for the implementation of public policies and decisions. It therefore follows that the primary responsibility of government is to deliver, promptly and efficiently, quality services to its citizens at affordable prices. Indeed, service delivery is the "raison d'etre" of the public service. Fundamentally, the ability of a government to legitimately tax and govern people is premised on its capacity to deliver a range of services required by its population which no other player will provide. In other words, government owes its existence and its legitimacy to the fact that there are services in which the possibility of market failure is great (Olowu, 2008).

The goods and services that are usually provided by government are known as public goods. This category of goods and services require exclusion, jointness of use or consumption, and not easily divisible. They are usually consumed jointly and simultaneously by a large number of people and difficult to exclude people who do not or cannot pay. Public goods are also usually allocated through decisions made by political, process and considerations. By its nature, service delivery in Nigeria has variously been described as "chaotic" "epileptic" "unsatisfactory" "shoddy", "deplorable", "sensitive", "inflexible", "non-cost effective" and so on and has been characterized by such negative attitudes and traits as insensitivity towards customers and their complaints, lateness; absenteeism, needless delay and red-tapsm; palpable negligence, inexcusable incompetence, unbridled corruption, favouratism, lackluster performance and a general lackadaisical attitude to work (Okon, 2008). By its nature therefore, public service delivery is crucial to a greater percentage of a country's population.

In view of the critical importance of public service delivery to the citizens of any country, the need for effective delivery of these categories of services cannot be over-stressed. This is why public service delivery should also be accessible, high in quality and be effectively delivered. The government is therefore faced with the challenge of providing basic public services to which each citizen is entitled in a timely, fair, honest, effective and transparent manner. However, over the years, public service failure or ineffective delivery of such services has always been the order of the day in many developing countries of the world.

This has also become the concern of many of these countries today. In order to effectively address this challenge, it has become imperative for governments to adopt strategies that will increase citizen participation in decision making on how public services are provided. This is why the pressure toward greater citizen involvement in decision making in government has compelled governments everywhere to seek to

increase the quality of government services at a time when the available resources for delivering services have declined (Olowu 2005).

A REVIEW OF PUBLIC SERVICE REFORMS IN NIGERIA

In the light of the numerous weaknesses associated with the Nigerian public service over the years, reform is long overdue if it would be in the direction of making service delivery more customer friendly, more output and consumer-driven than power and privilege-driven (Okon 2008). Successive governments had embarked on a number of administrative reforms to address these problems. Essentially, administrative reforms are based on a deliberate attempt to change both the structure and procedures of the public service involved in order to promote organization effectiveness and attain national developmental goals (Quah, 1988). In a developing country such as Nigeria, it is pertinent to carry out administrative reforms in order to develop public service structures that will most efficiently and effectively facilitate the implementation of government policies and programmes as well as provide a veritable communication cannel for mobilizing mass support for such policies and programmes. This is intended to bridge the gap between policy formulation and policy implementation in the running of public affairs (Abubakar, 1992). Indeed, the "inevitability" of the public service in the management of public affairs can be taken for granted. However, what cannot be taken for granted is the capacity of any given public service to efficiently and effectively "deliver the goods". The constant need by government to "move" and to have the public service move along with it or even ahead of it often provides one of the strongest basis for administrative reforms (Abubakar, 1992). In short, the cardinal goal of reform, if it must satisfy the yearnings and aspirations of the public, must improve service delivery at minimum cost in the age of globalization characterized by international competitiveness (Okon, 2008).

To this extent, between 1954 and 1999, the public service generally in Nigeria has witnessed at least, seven major civil/public service review Commissions. These were the Gorsuch Commission in 1954, the Mbanefo commission in 1959, the Morgan Commission in 1964, the Elwood Commission in 1966, Adebo Commission in 1971, the Udoji Commission in 1974 and the 1988 reforms. In addition to this, at the return of the country to civil rule in 1999, the government has also embarked on another round of reforms in the civil service. All these reforms were embarked upon to further enhance the efficiency of the Nigerian public service. The reform from 1999 to 2007 under the civilian government of President Olusegun Obasanjo called the public service Renewal Programme is in focus here.

THE PUBLIC SERVICE RENEWAL PROGRAMME AND SERVICE DELIVERY (1999 – 2007)

This was a public service reform effort widely described as about the most comprehensive and far-reaching in the history of the Nigerian public service reforms. This reform was necessitated by the need to address the crisis in public management

which led to serious deterioration in the quality of governance in the country brought about by several years of military rule. Thus, on assumption of office on 29 May, 1999, President Obasanjo in his inauguration address identified the following aspects of the crisis his administration inherited as inefficiency in the delivery of social services; insensitivity to general welfare; indifference to the norms guiding the conduct of public officials and rampant corruption. According to the President;

'Nigerians have for too long been feeling short-changed by the quality of public service, government officials became progressively indifferent to propriety of conduct and showed little commitment to promoting the general welfare of the people and public good. Government and all its agencies became thoroughly corrupt and reckless. Members of the public had to bribe their way through in Ministries and Parastatals to get attention and one government agency had to bribe another government agency to obtain the release of their statutory allocation of funds' (Inauguration speech by President Olusegun Obasanjo delivered on May 29, 1999.

Specifically, the reform programmes cover the following areas:

i) Public Service Reform – This was to be implemented at three fronts namely, the general staff audit and pay roll clean up; restructuring of Ministries, Departments and Agencies/Parastatals and cross-cutting service wide changes.

ii) Pay Reform – In order to improve public sector working condition, the national minimum wage was raised from N250 per month to N5,500 per month with effect from 1st May 2000.

Integrated Payroll and Personnel Information System (IPPIS). This IT – enabled facility was put in place to establish a reliable and comprehensive database for the public service, facilitate manpower planning, eliminate record and payroll fraud, facilitate easy storage, update and retrieval of personnel records for administrative and pension processes and staff remuneration payment with minimal wastages and leakages.

Public Expenditure Management Reform - This is a change in Government's budgeting and financial management philosophy and operation leading to firm policies, economic growth and management orientation, time discipline and predictability in resource allocation and funding releases.

Monetization of Fringe Benefits: As a way to reduce the cost of government and to eliminate or reduce sources of waste and leakages, this policy quantified in monetary terms, those fringe benefits provided for government workers as part of their conditions of service.

Pension Reform – This is a pension reform aimed at eliminating the problems associated with the pension scheme. This Pension Scheme is contributory, fully funded by both the employer and employee and based on individual accounts that are privately managed by Pension Fund Administrators with the pension fund assets held by Pension Assets Custodians.

Anti – Corruption: This necessitated the establishment of the Independent Corrupt Practices and Other Related Offences Commission (ICPC) and other measures to plug loopholes in the public service and expose and penalize corrupt officials and other citizens.

Statistical System Reform and Strengthening - This had to do with the development a medium - term master plan for the National Statistical System. The institutional platform for statistical management was removed from the old bureaucratic federal office of statistics into the professionalized National Bureau of Statistics.

SERVICOM: Meaning, Origin and Rationale – This aspect of the reform has to do with public service delivery, which is the focus of this paper. This service delivery or SERVICOM Reform emanated from a technical assistance provided by the British Government through the DFID to the Federal Government (Olaopa 2008). According to a SERVICOM office publication, in view of government's concern for the poor quality of public service as well as the evils of inefficiency and corruption which have combined to constitute impediments of effective implementation of government policy, a report was commissioned by government to review service delivery in Nigeria. This included the institutional environment for service delivery, a reflection on people's views and experience of services and to draw roadmap for service Delivery Programme. A special Presidential Retreat subsequently deliberated on the report after which the President and the Ministers entered into SERVICE COMPACT WITH ALL NIGERIANS (SERVICOM) its core provision says: "we dedicate ourselves to providing the basic services to which each citizen is entitled in a timely, fair, honest, effective and transparent manner".

THE OBJECTIVE OF SERVICOM

The singular objective of SERVICOM is to meet the challenge of nation-wide service failure as depicted in the diagnostic survey which had the following conclusion:

a. Government services were not serving the people;
b. Services were inaccessible, poor in quality and indifferent to citizen needs.

As the engine of the Federal Government's service delivery initiative, SERVICOM was to:

Make the Ministries, departments and Agencies more customer focused in their service delivery procedures and processes;

Heighten public awareness about damaging effects of service failure to the Nigerian society.

Promotion attitudes by which citizens would recognize the need to challenge service failure as their civic rights as well as their civic responsibility. (SERVICOM office 2009).

SERVICOM seeks to introduce the "Customer orientation" through a "service compact with all Nigerians; (SERVICOM) The pact was adopted by President Obasanjo, the Federal Executive Council and representatives of civil societies in March, 2004 as part of the initiative to-orientate the Nigerian public as service users to demand quality services as a matter of right, and service providers to deliver on agreed standard under contractual obligations that are formalized in the SERVICOM charter.

Under the charter, each Ministry, Department, Agency and Parastatals has a Ministerial SERVICOM unit. The SERVICOM unit is responsible for spear heading the strategy for SERVICOM compliance through a review and monitoring mechanism that

relies on SERVICOM Index. There is also in place a customer Grievance Redress mechanism reinforced by the publishing of each Ministry or Departments performance.

Service delivery orientation has also provoked a role of state redefinition which revolved around a functional review that seeks to deregulate public service monopolies through delivery innovations and introduction of other delivery modes as franchising, outsourcing, management contracting, commercialization and sometimes outright privatization (Olaopa 2008).

Under SERVICOM, the civil service is expected to provide the basic services to which each citizen is entitled in a timely, fair, honest, effective and transparent manner. SERVICOM implementation has involved training, workshops, seminars and retreats for senior officers in the public service in order to sensitize this supervisory category of staff to the new orientation for the civil service. Sanctions are to be imposed on public servants who fail to discharge their functions in accordance with established practice.

SERVICOM is based on five fundamental principles:

Conviction that Nigeria can only realize its full potential if citizens receive prompt and efficient services from the state.

Renewal of commitment to the service of the Nigerian Nation

Consideration for the needs and rights of all Nigerians to enjoy social and economic advancement.

A vow to deliver quality services based upon the needs of citizens.

Dedication to providing the basic services to which each citizen is entitled in a timely, fair, honest, effective and transparent manner.

In addition to the principles of SERVICOM, it has provided the following opportunities for both the civil service and the public servant. First, it is another opportunity for public servants in Nigeria to rededicate themselves for selfless service to their clients with courtesy and with grace. Second, it presents another opportunity for repositioning the public service for more effective service delivery. Third, now that the general public has been, or is about to be sensitized about its right to insist on qualitative service, and complaint – redress mechanisms abound, public servants will increasingly be conscious that public rating of their individual performance would form part of their performance evaluation.

EVALUATING NIGERIA'S PUBLIC SERVICE DELIVERY

Public sector service delivery in Nigeria has recorded a history of woeful failure and disappointment, particularly in the public enterprises sub-sector such as Power Holding Company of Nigeria, NITEL, NIPOST, NRC, NNPC etc (Okon, 2008). Similarly, the Nigerian civil service has often come under heavy criticism for poor organization, planlessness, over-staffing, indiscipline, red tape and secrecy, insensitivity, rigidity and over centralization, apathy, incompetence, corruption and favouritism, rudeness and high-handedness, laziness, truancy and malingering (Adamolekun, 1986). In the same vein, the political Bureau set up by the government in 1986 observed that goals and aspirations of the public service were not properly directed towards improving the general welfare of Nigerians and it had rather mainly served the interest of the

bureaucrats and those of capital accumulation of private, local and foreign companies (Political Bureau Report, 1987).

Consequent upon these obvious weaknesses of the entire public service in Nigeria, numerous public service reforms were carried out during the several years of colonial and military regimes to the present civilian government. In evaluating the Nigeria's public service delivery, the focus of this paper is on the reform of the civil service under public rule known as the public service Renewal Programme of the Obasanjo civilian administration. Although the SERVICOM is a program targeted at attitudinal aspect of Nigeria's public life, geared towards service delivery and predicated on customer satisfaction, its success in ensuring qualitative transformation of the lives of the Nigerian citizens is in doubt.

CHALLENGES OF SERVICOM

A number of lapses are inherent in the SERVICOM programme itself. Although the idea of SERVICOM was well conceived as a way to make the civil service transform into a service whose watchwords must be efficiency, effectiveness, competence and utmost commitment to service delivery to the people, a number of obstacles can be identified on its way to achieve its set objectives. One major obstacle to its success is the presence of obvious weaknesses in its implementation.

For instance, the then head of a Technical Team Secretariat on the implementation of the reform, Dr. Tunji Olaopa noted that there was really no baseline data that could elicit the "public" perception of the State of the Federal Civil Service as at 2003, and therefore, no benchmark for measuring the impact of the reform programmes being implemented on service delivery and overall system improvement in time series (Olaopa, 2008).

Another problem confronting its implementation has to do with the low level of publicity given to the reform efforts. The programme embarked on a massive public awareness campaign to sensitize the public on its rights to good service delivery in 2006. The opportunities provided by SERVICOM which guarantees the right of the citizens to be served right and promptly is not widely known to many citizens. Today, a large number of the Nigerian citizens do not know the details of what SERVICOM has for them especially their right to question service failure. This is partly due to the limited scope of SERVICOM. This is because SERVICOM's implementation is not extended to all tiers of government, but rather to only Federal Ministries, Departments Agencies and Parastatals. This has made it difficult for the citizens to be demanding in respect of the quality of services implementation they enjoy.

Moreover, SERVICOM reform effort has remained largely ineffective as a result of lack of continuity in the spirit and commitment to make it transform the lives of the citizens. This is because the programme was just gathering momentum on the eve of the Obasanjo administration's departure (Okon, 2005). The administration of Jonathan which succeeded Obasanjo has so far not shown any reasonable level of sustaining the momentum of its commitment to SERVICOM. Perhaps, this is due to the fact that reforms usually fail because of their attachment to reform. The risk that one has seen in

current reform programme implementation is the deleterious effect of personalizing of innovations through self attribution of every positive achievement on reform (Olaopa, 2008).

Moreover, delay in budget implementation constitutes another challenge to the effective implementation of SERVICOM. Although the programme requires that there should be inspection and supervision of Ministries, Departments Agencies and Parastatals and that the public should insist on their right to be served right, these bodies do not receive their budgetary allocations in good time in most cases. Hence, the inspection and supervision to ensure proper provision of services become difficult.

Another critical challenge to the effective implementation of SERVICOM programme is the low level of compliance with its tenets. For instance, public servants who do not operate according to the provisions of SERVICOM have not been sanctioned in any way in order to ensure strict compliance. There are no laws enacted to give legal teeth to enforce strict compliance by civil servants who do not comply. Till date, no public officer has been sanctioned or prosecuted by any law court or similar Agency for non-compliance with the provisions of SERVICOM.

Perhaps, this is because SERVICOM was not established by any law that includes sanction overall, the reform has remained ineffective to a large extent. This is closely related to the issue of collapse of infrastructures in the country. This important national issue has not been properly addressed since the inception of the civilian government. Eight years after, and after spending several billions of dollars on the power sector for instance, the country could not generate more than 3,000 megawatts of electricity. Similarly, eighteen years after the Federal government established the National Housing Funds, the scheme has been adjudged incapable of addressing the housing problems of Nigerian workers (The News Magazine Nov. 29, 2010).

CONCLUDING REMARKS

This paper examined the critical importance of effective public service delivery to the people of Nigeria. The paper however discovered that public service delivery in Nigeria has remained largely ineffective during the several years of and military rule. In order to address this issue, the civilian government of President Obasanjo instituted a reform programme which included service delivery or SERVICOM reform with the aim of "service compact with all Nigerians".

The service delivery reform was designed to make the public service truly a tool for the promotion, growth, stability and development of democracy. However, as noted earlier, the good intentions of this service delivery reform effort have been largely unrealized as service delivery is still ineffective and inefficient. Indeed, the mission statement of the reform to serve as the strategic vehicle for all the efficient coordination communication and monitoring of government policies and programme, implementation across the arms and tiers of Nigerian government in the best tradition of political and public service loyalty has remained a mirage.

A number of issues have been raised as constituting constraints to the implementation of the reform. Apart from the issue of service delivery, the different

reforms are still disjointed and required a more integrated approach for them to achieve the overall objective of system's rejuvenation. The implementation progress report and critique show that the reform has a strong political will behind it, but it is still largely incoherent and uncoordinated (Olaopa, 2008). This is still true of the reform today. Recommendations suggested that, in order to make the reform effective enough to ensure speedy and qualitative public service delivery, the Jonathan government should ensure continuity of the reform by sustaining the momentum of the commitment to the principles and objectives of SERVICOM.

As it is now, the enthusiasm and the high expectations placed on SERVICOM appears to have dropped significantly. This has been demonstrated in the very low publicity and public enlightenment of the SERVICOM reform to effectively sensitise the public on the need to, as of right, insist that they should be served right. In the final analysis, efficient and effective public service delivery is at the center of the social contract binding successive but transient political office holders to the Nigerian electorate (Okon, 2008). The National Orientation Agency should therefore be mandated and properly equipped to embark on nation-wide public enlightenment and publicity on the tenets of SERVICOM. Moreover, the present limited scope and coverage of SERVICOM should be expanded from its present abode at the Presidency to cover all tiers of government in the country.

Furthermore, the government should endeavour to give "legal teeth" to the implementation of the SERVICOM in order to make it effective. Public servants who contravene the principle of SERVICOM should be sanctioned under the law by a law court. The National Assembly should enact a law in this regard. This is necessary because as at today, there is no report of any civil servant who have been punished for non-compliance with the provisions of SERVICOM.

In order to ensure proper implementation of SERVICOM, the public must be more demanding in respect of the quality of services they enjoy, and they must pressure government to develop mechanisms for monitoring the effectiveness of the services being delivered by the various Agencies. They should encourage the government to adopt measures that increase the citizens' input in the formulation and implementation of policies on public service delivery (Adamolekun, 2005).

Public Private Partnership should also be adopted by the government to increase efficiency in the area of public service delivery.

REFERENCES

1. Abubakar, H.I., (1992) The Philosophy and Rationale for Civil Service (Re-Organization) Decree No 43, 1988 in Yahaya, A.D and Akinyele, C.T. (Ed) New Trends in Personnel Management. A Book of Readings. ASCON, Badagry, Lagos.
2. Adamolekun, L. (1986) Politics and Administration in Nigeria Spectrum Books Ibadan
3. Adamolekun L. and Kithinja, K., (2005) Public Administration Reforms in Public Administration in Africa Main Issues and Selected Country Studies Ladipo Adamolekun (ed).
4. Ayeni, J., (2007) Perspectives and Reflections on Nigerian Civil Service Reforms Servcon and Smedcon Communications Ltd Abuja

5. Kyarinpa, G.E., (1996) Customer Service As An Element of the Ugandan Civil Service Reform Programme in African Journal of Public Administration and Management, Vol v-Viii Nos 2.
6. Naidu, S.P. (2005) Public Administration: Concepts and Theories. New Age Int New Delhi.
7. Nti, J. (1996) Civil Service Reform Priorities and Strategies: An overview of African Experience.
8. Olaopa, T. (2008) Theory and Practice of Public Administration and Civil Service Reforms in Nigeria. Spectrum Books, Iabdan.
9. Okon, E. (2008) PUBLIC Service Reforms and the concept of "Service Compact with all Nigerians" (SERVICOM) in Nigeria Beyond 2007: Issues, Perspectives and Challenges. Saliu, H.A. et al (ed).
10. Olowu, D. (2008) Public Service Delivery in Public Administration in Africa. Main Issues and Selected Country Studies Adamolekun L. (ed). Safari Books, Channels Island. United Kingdom.
11. Obasanjo, O. (1999) Inauguration Speech, May 29.
12. Onofrei, Mihaela, and Lupu Dan. The dimension of public administration in central and Eastern European countries in the current financial crisis. *Transylvanian Review of Administrative Sciences* 6.29 (2010): 109-124.
13. Political Bureau Report, (1987) Federal Ministry of information, Lagos
14. Quah, S.T. (1988). Administration Reform: A conceptual Analysis in the Philippines Journal of Public Administration vol. xx No 1 cited in Nze, F.C. "Administrative Reforms in Two Political Cultures: A comparative Study of Nigeria and the U.S. in the Nigerian Journal of Public Affairs, Vol XII No 1.
Newspapers
15. The Nation Newspaper, Sept – 28, 2010.
16. The News Magazine, Nov 29, 2010.

BOOK REVIEW

Carmen SAVULESCU
National University of Political Studies and Public Administration
Bucharest, Romania
csavulescu@snspa.ro

Lucica Matei, Cristina Sandu, Mihaela Violeta Tuca. (2014). Social responsibility and social enterprise. An integrated approach, LAP LAMBERT Academic Publishing, 168 pages, ISBN-10: 3659591254, ISBN-13: 978-3-659-59125-9.

The book "Social responsibility and social enterprise. An integrated approach" addresses to professors and students, specialists and practitioners in the area of social building the local and regional communities, providing a comparative pillar in view to approach the topic of social responsibility.

Lucica Matei (1956-2014) was Professor and Jean Monnet Chair Holder at the Faculty of Public Administration of the National University of Political Studies and Public Administration, prestigious professor researcher, appreciated in the national and international academia due to her outstanding outcomes. Her expertise was acknowledged in public management and public services, European administration, local development, public and nonprofit marketing. She published as author or editor over 22 books at Romanian or foreign publishing houses. "Social responsibility and social enterprise. An integrated approach" represents her last book. At the same time, she was author or co-author of over 100 articles focused on her areas of expertise. She was member of several editorial teams of prestigious foreign journals, as well as coordinator of thematic series: "Science of Administration and Public Management" (Economica Publishing House, Bucharest), "Jean Monnet Handbooks" (Economica Publishing House, Bucharest), "Administrative Studies and Public Management" (Shaker Verlag, Germany). Her outstanding career of professor and researcher represents an example for the young generation.

The social responsibility of public or private actors becomes increasingly an important topic revealed by the European Union strategic documents. The forms of expression are more diverse in the old or new EU Member States. However, the social enterprise represents the easiest and omnipresent tool of implementing the social responsibility. In this context, the current paper achieves an integrated approach of those two concepts and realities - social responsibility and social enterprise – focusing both on presentations of the theoretical and normative framework and on relevant comparative aspects from various European countries, including the South-Eastern European states. The book valorises the authors' expertise, acquired in the framework of the Doctoral School of Administrative Sciences in the National University of Political Studies and Public Administration in Bucharest.

The book provides an overview of a diversity of approaches on social responsibility and social enterprise, conceptualizing the specific contributions of public

management and marketing. The book is structured into five chapters, relevant to the topic, namely the Social Economy - A world of social values and sustainable relations, Theoretical debates on Social Responsibility and Social Enterprise, Managerial and marketing approaches, Implementing Social responsibility, Mapping the good practices of Social Enterprise.

The relevant study of literature, the legislative analysis and comparative analysis on forms of organization and functioning of social enterprise in the public systems in UK, France, Italy, Romania, Bulgaria, Croatia, Serbia, aim to highlight patterns and typology of social enterprises as well as public marketing instruments.

The design concept, content and structure of the chapters support a focused research approach, in which the information is integrated into a coherent context, well-organized in accordance with the final purpose and the research program.

In the first chapter the authors, through a vast effort of analysis and synthesis, present the relevant characteristics and descriptions of the social economy and correlation with sustainable development issues.

The second chapter aims at substantiating the relevance of social responsibility for the public administration. According to the authors, the social responsibility redefines and amends the governmental agenda interacting directly with the processes of implementing New Public Management and inducing the specific objectives for the reform strategies of the public administration.

The analysis continues in the third chapter with presenting the managerial and marketing approach specific to public administration in the promotion and implementation on social responsibility and social enterprise.

The forth chapter focuses and deepens the analysis for only one instrument, namely the ISO 26000 management standard. The authors justify this option through the fact that the mentioned instrument is suitable for the public administration and the existence of a precedent of implementing public administration of the European Union. The chapter demonstrates also the capability to offer good practices examples from the researched field of public administration from Romania.

The research in the fifth chapter presents the social enterprise models and their setting in the cross-sectors model. The authors manage to analyse and conduct the comparative study, which provides a complex research feature, innovative in the approach of the specific topic of economic, social, legal domains, having as support the public sector's theories of public management and public marketing.

The book "Social responsibility and social enterprise. An integrated approach" offers a concise and relevant documentation material for academia and students, specialists and practitioners from public and private spheres facing broader or more specific issues of the sustainable evolution of the public sector, overcoming the financial crisis and involving the public administration as an actor in promoting social responsibility and developing the social enterprise.

FINANCE

TYPES OF ENTERPRISES - MAIN RISK AND IMPACT FACTORS SPECIFIC TO THE COMPLEX BUSINESS AREA

Gabriel Ionel DOBRIN
"Drăgan" European University
Faculty of Economic Sciences
Lugoj, Romania
gabrieldobrin.ued@gmail.com

Abstract: *All the progress achieved in various fields of activity (technology, communication etc.) considerably diminishes its distribution time and distance. A consequence of this fact is the market globalization phenomenon, in the context of local peculiarities conservation and maintenance. Currently, even small enterprises are involved in international business. In other words, the internationalization process is not only specific to large important enterprises any more. As for the amplitude and complexity of the business field, this requires a high level of investment of professional and creative resources, as well as a close-to-reality forecast of its main effects. On an international level, business is the collection of commercial transactions which take place between two or more countries. Private companies take part in such transactions with the purpose of gaining profit, while government authorities may or may not pursue this goal. Thus, most enterprises, regardless of their size, are deeply affected both by international competition and by all the events taking place at the level of world economy.*
Keywords: *enterprises, typology, business, risk, criteria, small and medium-sized enterprises, performance, management, internationalization.*
Jel classification: *F23, L20, M21.*

1. INTRODUCTION

At present, it has been approved that, from an economic point of view, a profitable business can turn unprofitable because of changes in the initial environment. Risk may have as approach a company's inability to adapt in real time and at the lowest possible cost to market changes. From this point of view, the investment risk is generated by the high instability of the business environment, as well as by the company's incapacity to react in time and with low costs in order to counteract this trend.

Company management approaches the notion of risk both from the point of view of gaining profit and from the point of view of possible losses. So, the risk may be a real drawback for any economic activity development in good conditions. Unless this major impact is controlled, the decision-making process is hard, because there is a decrease in business volume and also the company must suffer certain smaller or larger damages. The attempt to eliminate or even diminish the risk's negative effects is based on the company's development of an efficient activity.

2. RESEARCH OBJECTIVES AND METHODOLOGY

The main research objectives of this article are:

- Presentation and analysis of basic criteria for defining and grouping companies;

- Short analysis of small and medium-sized enterprises as main „motors" of global economy development;
- Interpretation of the „risk" notion's meanings, specific to the complex business field.

The research methodology used in issuing this article is based on the empiric analysis of company „behavior", at the same time emphasizing the „presence" of a risk which comes with any business that takes place on a national, as well as on an international level.

3. BASIC CRITERIA FOR ENTERPRISE DEFINITION AND GROUPING

There are multiple criteria for the definition and grouping of enterprises:

- Form of organization;
- Use of production factors;
- Property subjects;
- Field of activity;
- Cover area etc.

1. According to the form of ownership, multiple types of enterprises can be defined (N *et al*., 1999), such as:

- Private companies – their main characteristic is that their entire patrimony belongs to either one single person or one single group of people. This type of company appeared since early times and, as society developed, its diversity increased.
- Current realities make possible the existence of multiple private companies all over the world (hundreds of millions of companies). They cover a wide range of parameters and functions.
- Private companies have the following basic characteristics: the establishment and operation decision belongs entirely to the entrepreneur, as well as the ownership of the minimum required funds necessary to establish it, the economic and social risks which derive from the development of the company's activities are completely assumed by the entrepreneur etc.

If we consider the number of capital owners, private enterprises can be divided into two very important categories:

- The individual company, which patrimonial belongs to a single individual, is presently the most commonly used for small and medium-sized enterprises;
- The group company, which patrimonial belongs to at least two persons. Some of the most frequent forms of group companies are: the family company, the corporate company, the joint stock company.

The patrimony of the family company is in the common property of a certain family's members. This type of enterprise is small and often the family members are not only its owners, but its employees as well. In this environment, there are strong cooperation and solidarity relationships.

The corporate company is created with the participation on several individuals who, in the past, had performed similar activities, in similar conditions, and who freely expressed

their will to cooperate. These persons, through the act of company constitution, become co-participants in the management activities.

The most frequent form of private group enterprise used on a large scale in contemporary economy is the joint stock company. From a patrimony point of view, the capital splits in a high number of parts, each part having its own face value called a stock.

Owing a significant number of stocks gives the owner the right of property over a certain part of the enterprise. Through stock market transactions or through direct sell – buy transactions, the right of ownership can be given over an important part of the company.

State companies – are characterized by the fact that the entire patrimony of the enterprises belongs to the state. The constitution and operation of state enterprises depend exclusively on the will of the state decision factors, according to each country's laws. (R, 1993)

Mixt companies – is a combination between private and state enterprises. Often, these take the form of joint stock companies, where the state becomes one of the most important stockholders. Its fundamental characteristics are tightly connected to the percentage of stocks owned by the state. The profile of mixt companies is very close to the profile of private enterprises, differing from one branch of economy to another and from one country to another. If we study carefully the division of companies according to their form of ownership, it is clear that, while companies increase in size, the percentage of private enterprises decreases; at the same time, the percentage of state companies, as well as of mixt companies increases. On the other hand, if the size of societies decreases, then there is an increase of the percentage of private companies, as well as a significant decrease of the percentage of state and mixt companies.

Although small and medium-sized enterprises are more frequent in the field of economy and at the level of economic sectors, they have lower percentages if we refer to a certain set of indicators which comprises: turnover, gross profit, number of employees.

2. In Romania, according to the law, companies are divided into two main categories: autonomous administrations and trading companies.

Autonomous administrations are organized and operate mainly in the national economy's strategic branches – weapons industry, energetic industry, mining and natural gas exploitation, post-office and train transportation. (…)

Most state enterprises turned into trading companies. These are established in order to perform economic actions, they are legal persons and take the following forms:

- Unlimited company, whose social obligations are guaranteed with the social patrimony and with the unlimited and common responsibility of the partners;
- Limited partnership company, whose social obligations are guaranteed with the social patrimony and with the unlimited and solidary responsibility of the partners; the partners are only responsible up to the point of their input convergence;
- Partnership limited by shares company, whose corporate funds are split in shares and the social obligations are guaranteed with the social patrimony and with the unlimited and solidary responsibility of the partners; the partners are only obliged to pay for their stocks;

- Joint stock company, whose social obligations are guaranteed with the social patrimony; stockholders are only obliged to pay for their stocks;
- Limited liability society, whose obligations are guaranteed with the social patrimony; partners are only obliged to the payment of social parties. (N *et al.*, 1999)

3. Another important classification of enterprise types is their size. It must be said that there are multiple parameters which can be used to asses a company's size, but the most frequent one is the number of employees. Its main advantage is the easiness of obtaining information and also the possibility to use it for comparison regardless of economy branch or country.

Both in the European Union and in Romania, companies are divided into:

- Microenterprises, which have up to 9 employees;
- Small-sized companies, with 10 to 49 employees;
- Medium-sized companies, which have between 50 and 249 employees;
- Large companies, with over 250 employees.

In the Romanian economy, the evolution of small and medium-sized enterprises is tightly connected to multiple causes and to the existence of certain conditions:

- The absence of this sector before the year 1989;
- An adequate legislative frame for the constitution of small and medium-sized enterprises;
- The benefits offered when starting a business;
- The acceleration of national economy privatization;
- The increase of the reorganization phenomenon specific to state companies.

The size of an enterprise is a heterogeneous complex of micro-economic and organizational components, which is approached in different ways. If we refer to the structure configuration and the organizational dimension of a company, these can be influenced by:

- The division of work and the specialization of the performed activities;
- The standardization which refers to the company formalization procedures;
- The extension phenomenon specific to procedures, rules and written communications;
- The structural organization of the enterprise, meaning its general configuration;
- The traditionalism of the enterprise.

Basically, the most important dimensions of a company refer to:

- The structure of company activities;
- Concentration of the specific authority;
- Workflow coordination and control;
- The sizing process of company activities.

The different size of societies can influence: the appearance of dependency relations or domination relations between different enterprises, relations between decision-makers and subordinates, the companies' efficiency degree etc.

If we analyze in detail the size of an enterprise, we can explain at large the competitively differences between various categories of companies. So, there is an ideal organization size, where the long term medium cost increases, and decreases in the

opposite situation. In other words, a company's ideal size implies a detailed knowledge of the market capacity, taking into account mainly the dimension of the demand and the situation of sales at a certain moment in time.

Also, the different company sizes can lead to obtaining the same goods for different prices and this means issuing a thorough analysis of both competitively factors and profitability factors present in each organization. The conclusion of these previous facts is that a company's organizational structure differs according to the company's size.

4. SMALL AND MEDIUM-SIZED ENTERPRISES - „MOTORS" OF GLOBAL ECONOMY DEVELOPMENT

In the context of a modern market economy, it is absolutely necessary that small, medium-sized and large enterprises are able to coexist in a rationally proportional balance, each of them having advantages, as well as disadvantages. They generate most of the national income and, at the same time, ensure workplaces for the population.

There are generally various approaches for the definition of small and medium-sized enterprises; these approaches consider different meanings of enterprise sizes and also of the main existing ways of expression and quantification. For example, the Georgia, Atlanta Institute of Technology performed analyses in 75 countries and compiled a synopsis of 50 definitions of small and medium-sized enterprises, which was adopted by the World Bank. (W B, 2010)

In our opinion, the different approaches in defining S.M.E.'s can be grouped as shown in Table 1: (N, 2001)

Table 1 Main types of approaches for the definition of S.M.E's

Current number	Approach categories		
	Criteria	Name	Main characteristic
1.	Economy cover area	General	They set the same S.M.E.'s definition criteria for all economy branches.
		Differential	They set different S.M.E.'s definition criteria, according to their field of activity (industry, commerce, transportation etc.).
2.	Number of used indicators	One-dimensional	They define S.M.E.'s based on a single indicator, most often the number of employees.
		Multidimensional	They define S.M.E.'s based on multiple indicators; the most commonly used are the number of employees, turnover and authorized capital.

Source: Nicolescu, 2001

During the last several years, the general tendency is to approach small and medium-sized enterprises from a general and one-dimensional perspective. This means that the definition of small and medium-sized enterprises is done according to the

„number of employees" indicator, regardless of the branch and the field of activity. This kind of approach is specific to most European countries and is also practiced in Romania.

Nevertheless, the previous approach also has a series of disadvantages, the most important one being the lack of austerity. The fact that the advantages which derive from the use of the previously-mentioned criteria are more important than its disadvantages allows it to be used on a large scale. In this respect, the following advantages can be mentioned:

- It is easy to use;
- It's periodical quantification in official statistics;
- The economic factors' impossibility to change the company size;
- The possibility to compare companies to one another, even if they belong to different branches and economic fields.

Small and medium-sized enterprises have a series of characteristics which reflect their reduced size and its consequences as regards the embedded activities being designed and made operational. Thus, according to a group of prestigious specialists who issued, under the aegis of U.N.I.D.O., a reference paper in the field of S.M.E.'s their defining characteristics are those in Figure 1. (N, 2001)

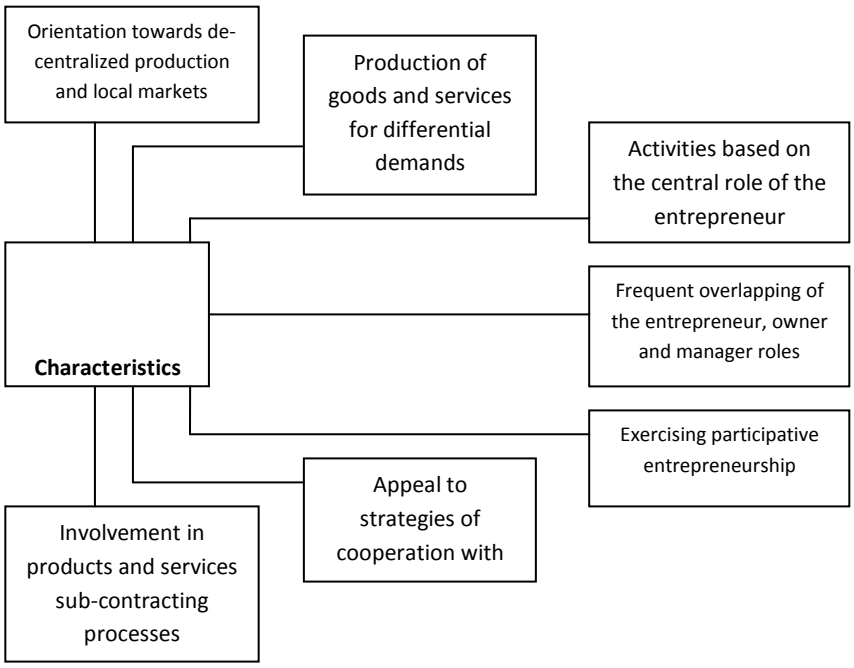


Figure 1: The dominant characteristics of small-sized enterprises

Another extremely important characteristic adds to the previously-presented ones, that is the high flexibility of small and medium-sized enterprises. This flexibility is mainly due to:

- The small size of small and medium-sized enterprises;
- The entrepreneur's permanent contact with the relations within the company and outside it;

- A favorable climate for organizational innovation and change processes.

So, there are multiple factors which can directly influence the activity performed in small and medium-sized enterprises.

Thus, Japanese professor Tanaka (T, 1998) considers that these factors are:

- Technological innovations;
- Changes in the structure of raw materials;
- Changes which refer to the market demands;
- Changes in the labor force offer;
- Commerce liberalization and globalization;
- Evolutions of the fund sources regime;
- The context of national economy and the internationalization process.

Specialists, among which American professor Bruce Kirhhoff (K, 1998) have determined the major impact of certain variables or factors on activities performed by small and medium-sized enterprises. Based on a thorough analysis of 179.136 S.M.E.'s, he established 6 main factors on which a company's survival depends, as results from the information in Figure 2. The factor with the highest impact on the company's evolution and survival is the entrepreneur's strategic options or choices with regard to the economy branch of the company, the offered goods and/or services, the size of the organization etc. (N, 2001)

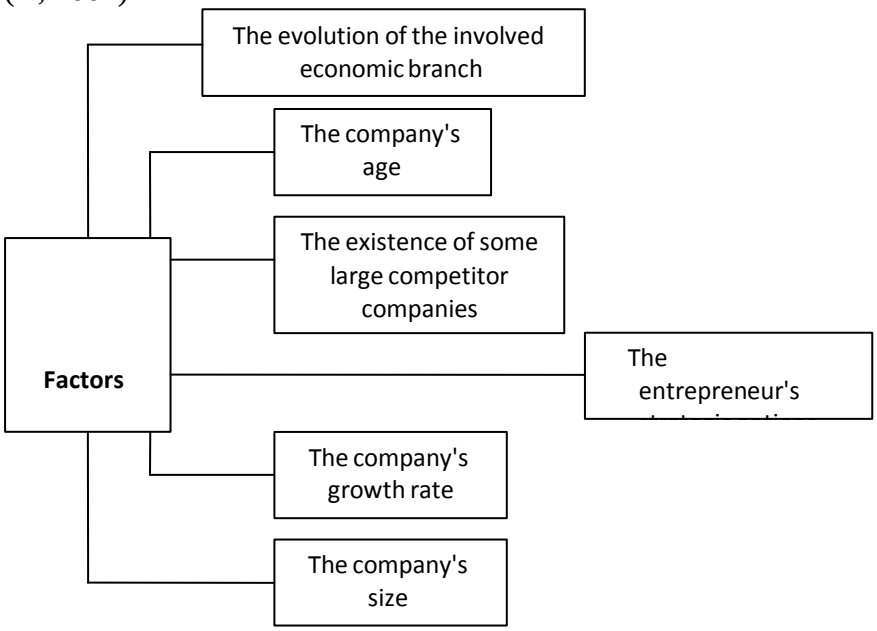


Figure 2: The main factors on which an S.M.E.'s survival depends

The typology of small and medium-sized enterprises is a very important theoretical and practical element, so there is an entire range of types according to the involved variables.

The famous consulting company Arthur & Little recently established a new small and medium-sized enterprises typology, Table 2, according to the nature of their activities and innovation and knowledge requirements: (N, 2001)

Table 2 Types of S.M.E.'s

Current number	Type	Definition (characteristics)
1.	Companies based on new technologies	Companies which continuously use advanced technologies in certain fields, characterized by rapid technological progress.
2.	Companies focused on market niches	Companies which successfully turn to profit value added specific to market niches.
3.	Technological leaders companies	Enterprises which, due to their performances, become leaders in a certain sector, promoting their own products.
4.	Companies which develop in (joint) partnership	Enterprises which act as subcontractors, taking part in new products design.
5.	Classic subcontractor companies with good performances	Companies which use subcontractors in order to produce goods usually designed by others.
6.	Resilient companies	Enterprises which reacted successfully, recovering after suffering due to market challenging conditions.
7.	Reactive companies	Enterprises of the previous type, which did not manage to recover.
8.	Passive, „calm" companies	Enterprises which follow their traditional course, without many changes and development.
9.	Companies on the verge of survival	Low performance companies which feel their existence is threatened.

Source: Nicolescu, 2001

Thus, two economy specialists, S. Birley and P. Westhead (B *et al.*, 1990), have established eight classification criteria for small and medium-sized enterprises:

- The company's longevity;
- The form of property;
- The company management's origin;
- The organizational structure;
- The production potential;
- The industry to which the company belongs;
- The product – market relation profile;
- The company's site.

Considering the approach, economists J. Clicha and P.A. Julien considered that the main types of small and medium-sized enterprises are:

- Traditional;
- Entrepreneurial;
- Administrative.

Other authors, like O.F. Collins and D.G. Moore, greatly emphasize the innovation degree of S.M.E.'s, dividing them into:

- Innovative;
- Mimetic;
- Repetitive.

According to J. Fillion (F, 1997), the evolution dynamics criterion divides S.M.E.'s into two types:

- Classic;
- „Comet" type.

In the category of traditional small-sized companies there are, usually, two sub-categories or types:

- Companies which have a single entrepreneur, while the other employees, regardless of their kinship with the entrepreneur, are in the position of performers, without special implication in the company's management;
- Family companies, where the entrepreneur is practically the entrepreneur's family, made up of at least 2 persons, who virtually participate in managing the company's activities; this generates multiple and complex entrepreneurial and management relations. In these companies, there are frequent conflict situations, also generated by family relations meeting with company relations; certain models for facilitating the solving of these conflicts have been issued. Some of these models are: Kopelman, Greenhouse and Connolly and also Stoner, Hartman and Arora. (N, 2001)

In contemporary times, there is great focus on small and medium-sized enterprises which activate in „high-tech" top sectors. According to a piece of research, small and medium-sized enterprises from the mentioned sectors can be structured as such:

- S.M.E.'s which activate in „high-tech" and mass-media sectors and which are prone to performing their activities on the internet, at the same time considering the latest discoveries;
- S.M.E.'s established by self-employed entrepreneurs, which focus on using the opportunities from the services sector, as well as electronic commerce;
- S.M.E.'s embedded in the structure of large companies.

Specialists consider that the three types of small and medium-sized enterprises previously mentioned are the base of the European Union's development, ensuring it both its functioning and its performance.

Presently, a new type of small and medium-sized enterprise gradually shapes up, that is the knowledge-based enterprise, which combines some essential features like:

- Predominance of intangible assets;
- Inclusion of activities which require a wide range of knowledge;
- Use of labor force with a high degree of specialization;
- Speedy development of company research and development activities;
- Use of the latest technological discoveries in the field;
- An offer of goods and services which can be exported;
- The goods and services offered by the company have a relatively short life spam.

Regardless of characteristics and types, S.M.E.'s have – like any other company – a triple dimension:

- Instrumental, which refers to the economic aspects that, in the end, reflect in the company's practicality and efficiency;
- Socio-political, which mainly reflects the organization's relation and decision elements, where divergent aspects are especially important;

Cultural-reflexive, expression of behavioral values, in fact of the organizational culture which manifests in the company and greatly affects the content and form of manifestation of the previous two dimensions and, implicitly, the performances of S.M.E.'s. (F *et al.*, 1997)

So, small and medium-sized enterprises are companies of relatively small dimensions, but which have a complex variety and a high degree of performance, which ensures the growth of a country's socio-economic performances.

5. THE MEANINGS OF THE TERM „RISK" IN THE COMPLEX BUSINESS FIELD

In the business field, the notion of risk is associated to deprivation of goods (tangible goods and intangible goods), as well as to the company's potential benefits. It is the situation in which the possibility of an unexpected deviation from the expected, predicted or hoped for result manifests.

If we analyze the risk from a business perspective, then it is somewhat different from the general risk. The performance of a business also involves the existence of risk in its purest form, because, in this field, the risk is tightly connected to earnings, to reward.

The notion of risk was and will always be an ongoing preoccupation for different specialists who analyzed this phenomenon. Thus, plenty of theories, concepts, instruments, methods and models appeared which are meant to „facilitate" the transition from abstract to concrete. Nevertheless, it can be said that, for some entrepreneurs, all these tools are too little known and applied, unlike strong companies which have the power to successfully apply them. The specialty economic literature tries to roughly delimit the correct behavior of such an entrepreneur, on the background of an uncertain and risky environment. In the economic environment, „threats" may appear at any level and may be highly varied. In these difficult conditions, each potential entrepreneur must make sure that the performed activity implies as small risks as possible. The first step which they need to take is to identify the risk's emergence and manifestation process. The basic idea is that any entrepreneur must know their business very well, as well as the main characteristics of the environment with which it permanently interacts. This step seems to be the easiest step in a company's struggle with the unforeseen, because most of the risks can be identified long before they actually occur.

The next step is much more difficult, focusing on the assessment of risk occurrence odds and also on the thorough analysis of the major consequences involved. All the observations made along the way and the adjustments that can be made afterwards will become concrete by the correct appreciation of this phenomenon's odds of happening (objective probability).

The major problems occur when the evolution in time of these complex phenomena is forecast. The entrepreneur cannot wait for too long, so that they have the full informational collection at hand, because they are in urgent need for present objective probabilities, not future ones. The correct and real time assessment process of risk occurrence probability and also of their intensity is very complicated and, as a consequence, the help of real specialists in the field is necessary. Nevertheless, also they

need concrete and complete information in order to accurately assess the particular nature of the risk and also its level of predictability.

In the context of risk assessment, the fact that it is seldom that specialists, when analyzing a phenomenon perceived as random, have different opinions is not neglected. Based on their own research, one of them might say that there is no <<reason for concern>> - meaning that either the risk occurrence odds are very small or that the effects of a possible occurrence are not assessed as severe. Another expert, studying the same risk, may say that, on the contrary, the issue should cause concern. The results of this type of difference of opinions are plenty everywhere and do not support the public opinion's trust in the field of economic education. There are usually three types of public reaction to these contradictions between specialists; these are:

An economic agent very little familiar to the problems that are the object of polemics, a person often called a <<profane>>, will decide that they cannot rely on the judgment of any specialist and that those alone can find the best answer to the respective issues. As a consequence, they will act according to their own point of view and the results will be seen in time.

Another economic agent, from a second category of reaction, may choose to join the opinions of the expert who backs up their own point of view on the discussed issues. In this way, the individual remains the prisoner of their own level of knowledge and rejects beforehand any valid argument which the other specialist may bring.

At last, a third category is that of economic agents who listen to more opinions in the field, so that, before they form an opinion about the phenomenon, they have already gathered enough information and they have formed a broad vision on the phenomenon. (D, 2006)

It is easy to see that being in the last of these categories is the way to possible success. It should not be overlooked that, when some entrepreneurs can call for the help of specialists in this field, they should not appeal to them willingly. The main reason for this is not only the frequent disputes among specialists, but also a certain approach focused on the „study of perception", which considers both the psychological and the emotional factors. These factors have a strong impact on the economic behavior of individuals, like many psychologists, such as Slovic, Baruch, and Fischhoff, emphasized. These psychologists analyzed the reactions of certain subjects to different types of risks which can appear in everyday activities. They concluded that, numerous times, certain individuals perceive the risk completely different from specialists in the field. Major problems appear when an insufficiently informed individual is put in the position to make major decisions for the company in a risky and unstable environment.

For a long period of time, the scientific community chose to ignore the public perception of risks, as long as the forecasts led to objective conclusions – although sometimes difficult to understand by non-specialists. For this reason, people became less confident with experts and their prognoses especially that the communication of results was not always done in a clear language, but in a difficult to understand manner. (…) It is obvious that the public's low awareness regarding certain risks and the people's lack of trust in experts makes most of the <<profanes>> avoid those actions which they perceive as very risky. (…) Apparently, there is a social stigma associated to some technologies,

places and products which the public perceives as being hazardous, even though, in most cases, scientific evidence suggests no reasons for concern. There is definitely the need for an appropriate publicity of information's and for including the psychological and emotional factors in the risk analysis process. Research shows that regular people have difficulties processing information from experts regarding risky events and this makes it necessary to establish a common language for the two parties, in order for data communication to be made efficiently. (D, 2006)

In some economy dictionaries, the total risk which appears in an economic activity is surprisingly assimilated to the corporate risk, which definitely comprises the common „vision" of two important risks: the financial risk and the economic risk. Other dictionaries refer directly to the concept of profit, which is considered the synthetic expression of a company activity's efficiency. Hirschey and Pappas consider that the business risk is the „chance" to lose, which is directly associated to the management decision. Economist Petru Prunea considers that the business risk manifests within the growth process specific to the company. A higher profit can be obtained through:

- The qualitative increase of assortments;
- Offered products and services diversification;
- Increasing the company's production capacities;
- The use of advanced technologies.

6. CONCLUSIONS

According to the Investment Electronic Encyclopedia, the business risk is the risk which can make a company unable to fulfill its permanent and growing cash-flow needs to cover its operating expenses. Consultancy Company McGladery defines the risk as the event or action which has a great impact and side effects over the company's stability. Both the company's capacity to fulfill its own objectives is influenced, as well as the go-live means of management strategies.

Therefore, it is easily noticeable that, although there is a wide range of opinions, all of these have in common the idea that the rise and manifestation of a risk is a source of potential problems for any company (problems come from the difference between the actual result and the expected result).

It is necessary, for the performance of a company's activities, that the manager issues and applies coherent, functional and efficient strategies, with the purpose of achieving the set goals. In other words, there is a complex relation between strategy and objective from the „risk" concept point of view.

The idea of total risk is fundamental in order to reflect the notion of business risk. It must be said that an entrepreneur's „opportunity" is directly influenced by their permanent preoccupation for the analysis and management of risk in its whole complexity.

The great development of economic activities, permanent novelties which make all risks even more diverse, as well as the multiple ways in which these manifest call for the need of scientific specialty research generalization.

References:

[1]. Birley, S.; Westhead, P. (1990) *Growth and performance contacts between types of small firms, vol. I*, Strategic Management Journal.
[2]. Dobrin, G.I. (2013) *Economy and risk evaluation in the business world*, "Lucian Blaga" University Publishing House, Sibiu.
[3]. Druică, E. (2006) *Risk and business*, C.H. Beck Publishing House, Bucharest.
[4]. Fillion, J. (1997) *Entrepreneurship: Managers and small business owner managers in EC*, Working Paper, no. 97-02.
[5]. Frank, H.; Luejer, M. (1997) *Reconstructing development processes*, International Studies of Management, vol. 27, no. 3.
[6]. Kirhhoff, B. (1998) *Mythes and facts about firm survival*, Renaissance of SME's in a Globalized Economy, Verlag KMU.
[7]. Nicolescu, O. (2001) *Small and medium-sized enterprises management*, Economic Publishing House, Bucharest.
[8]. Nicolescu, O.; Verboncu; I. (1999) *Management*, Economic Publishing House, Bucharest.
[9]. Russu, C. (1993) *Management*, Expert Publishing House, Bucharest.
[10]. Tanaka, M. (1998) *Changing world and small business – Pressing problems survival and development*, Renaissance of SME's in a Globalized Economy, Verlag KMU.
[11]. World Bank (2010) *Employment and Development of Small Enterprises*, World Bank Publishing House, Washington DC.

CASH-FLOW SUSTAINABLE GROWTH RATE MODELS

Alin Constantin RĂDĂŞANU
Alexandru Ioan Cuza University, Iaşi

Abstract*: The internal funding of a company is limited by the ability to generate enough cash-flow from operational activities. External funds aimed at growth are associated with increased risks and with the need to have investment projects. Recent research has shown that the spread of the financial crisis is associated with excessive external funding aimed at stimulating the growth of businesses. The limitations of external funding are well-known: capital market funding determines unwanted costs and changes in the ownership structure, while bank funding determines costs that erode operational margins. In the light of the above, it can be said that, in most circumstances, growth should be financed using internally-generated funds. Using the sustainable growth rate, managers and investors can establish whether their plans for increasing revenues are realistic and whether they are based on actual operational and financial performance.*
Keywords: *sustainable growth rate; Cash-flow determined models; Churchill and Mullins Model; Hamann Model;*

1. GENERAL CONSIDERATIONS

One of the important aspects of working capital management is planning for funding the growth of current assets at the same time the sales grow, as the company develops. For this reason it is very important for the entrepreneur to know what the sales trends are and to know their effects on the company's working capital.

In close connection to the concept of working capital we have the notion of sustainable growth rate, which can be applied to a company, to a line of products, a market segment or a distribution channel.

A sustainable growth rate is in fact a growth rate that can be funded from the sales made in the circumstances of a habitual credit policy. Each time the business growth rate is superior to the sustainable growth rate it is necessary to inject additional capital, and this is a need that must be planned for in advance.

The sustainable growth rate is the maximum growth rate that company can sustain without increasing its financial leverage. (Campbell 2004).

A cash-flow based sustainable growth rate is the rate at which the company must maintain its sales so that its cash-flow remains constant (Hamann 1996). The sustainable growth is the percentage of annual growth of sales that is in agreement with the company's established financial policies (Higgins 1977).

The sustainable growth rate is the maximum growth rate a company can have while all its financial parameters are constant (Firer 1995).

The sustainable growth rate is the maximum growth rate a company can have without receiving any capital from investors or any long-term loans (Ross, Westerfield & Jordan 1995 and Snyman 1999).

The sustainable growth rate is the possible growth rate that can be obtained by setting four variables: profit rate, dividend distribution rate, debt rate and ROA, in the absence of increases in equity (Ross, Westerfield & Jaffe 1996). The sustainable growth rate is the maximum percentage of sales, assets or profit growth when the financial and operational parameters are in agreement with the management objectives and with the expectations of the market (Zantout 1990). The sustainable growth rate is the rate at with the company can sustain growth from the generated sales without requiring additional funding (Churcill & Mullins 2001).

The growth rate is the maximum percentage of sales growth that can be achieved based on operational target, on debt and on the dividend distribution rate (Van Horne 1997).

Sustainable growth is a growth of the need for capital that is funded using the company's own capital (self-financing) as well as borrowed capital in such a way that the leverage and the debt rate are not changed (Ion Stancu, Onofrei and Lupu).

Growth sustainability was developed as a measurement for determining the percentage by which a company can increase sales in the context of maintaining a set of financial policies. If sales grow at a higher rate, then certain objectives of the financial policies will not be attained and the financial stability of the company will be affected negatively (Higgins).

If a company develops faster than the sustainable rate growth, it will develop financial needs that cannot be met. According to Platt&Platt, this type of financial problem is the source of 47% of bankruptcies.

A growing company had an increased need for funding its working capital, both in order to develop its production facilities and for expenses. It is therefore necessary to reach a balance between cash generation and cash use (Churchill & Mullins). Churchill and Mullins developed the concept of self-financed growth rate, which is the growth rate a company can sustain without needing to resort to external funding sources. When a company limits its growth to the level of this rate, the growth won't generate cash-flow problems.

Higgins believes that companies have various ways of compensating for the growth of sales over the sustainable rate. They may increase their equity, reduce the level of dividend payments, may resort to external funding or implement cost-reduction programmes. It may happen that these options cannot be implemented for practical reasons. It may happen that the market does not react to the increase of equity, that the payment of dividends cannot be reduced, or that the company is a young one, one that has never paid dividends before. External funding may come at high cost or some companies may not be able to attract external funding. As a consequence, the company will have to decrease its current growth rate. Higgins advises managers to plan any sales increase the way they would manage any other part of the business.

Chan, Kaceschi and Lakonishak (2003) have studied the expectations for companies to maintain high growth rates. They have shown that companies with exceptionally high growth are few and far between. Only 10% of companies grow by more than 18% per year over a period longer than 10 years.

Starry and McGauchey (1998) define rapid-growth industries as those with growth rates of over 20%. Their opinion is that such growth within industries cannot be sustained because when a competitor enters a thriving industry, growth will no longer be favourable for the rest of the companies. Interest for new products disappears when markets are flooded with similar products. Starry and McGauchey's hypothesis is that top performers are those companies that position themselves in new areas, with a new potential for development. They define high growth as being above 10.5% per year, average growth as being between 5 and 10.5% per year, and low growth as less than 5% per year on a five-year period.

A "Fortune Global 500" analysis made by the *Center for Organizational Excellence of St. Galen's University* in Switzerland in cooperation with ten companies points out the main growth factor as being the sustainable growth rate and the secondary factors being the markets and the management capacity.

The analysis underscores that fact that the companies that grow within the limits of the "growth corridor" perform better than other companies, even though the latter may grow faster than the former.

The "growth corridor", defined as the interval between the minimum growth yielded by competitive growth and the maximum growth yielded by the maximum sustainable growth rate, allows managers to see how fast and how healthy their companies can grow.

Company performance and growth sustainability are two of the many indicators monitored by various stakeholders, managers and investors. These indicators assist in the operational management of the company.

Many studies have been carried out in the context of sustainable growth, approaching areas such as sales, profit and capital structure. The research was expanded using cash-flow based analyses.

The biggest difference between the sustainable growth rate and the cash-flow sustainable growth rate concerns the definition of sales-generated cash and cash flow generated by the operational activities. The cash generated by sales is the cash that is reinvested in the growth of the company in agreement with the sustainable growth rate. As this cash is not obtained immediately, the cash-flow sustainable growth rate is a better measurement of sustainable growth.

When the percentage of sales growth is lower than the cash-flow sustainable growth rate, cash-flow is generated from operational activities. When the sales growth is higher than the sustainable growth rate, the cash-flow from operating activities will be negative. This will show that the internal funds required for working capital are not sufficient and that external funding is needed. This leads to the questions: what would be a good procedure for ensuring sustainable performance in companies when using the sustainable growth rate? And if such a procedure exists, in the case where the sustainable growth rate is exceeded by income/revenue growth, which indicator becomes the most relevant in the case of specific circumstances?

As Churchill & Mullins show, the advantage of using the sustainable growth rate is that it helps provide a framework for short-term decision-making concerning:

- cost reduction;

- changing the profitability ratio;
- working capital management;
- changing the cash conversion cycle.

What matters most is not how fast a company can grow its business, but instead the route taken by this company towards this target.

The increase of competitiveness requires innovative means for optimising resources and without managing the working capital companies cannot achieve sustainable growth.

The performance of a company in terms of growth can be measured by referring to the values reached the previous year. In certain cases, financial indicators can be used to measure de efficiency of operations, assets and own capital.

According to Higgins (1997), return on equity and the dividend distribution rate provide financial managers with an important instrument for analysing growth rates and they can be used for comparing the performances obtained through the use of a certain set of financial policies.

The growth of working capital can be measured by the changes undergone by: cash, stocks, short-term receivables and payables. These variations show the requirements for working capital. It is important to maintain a balance between generating enough cash-flow and the necessary working capital for the company. This balance is then an indicator for the kind of growth the company can sustain without needing to resort to external funding.

2. SUSTAINABLE GROWTH RATE BASED UPON A CASH FLOW MODELS

In order to find the sustainable growth rate, literature presents two categories of models: traditional models based on capital structure (debt:equity determined models) and cash flow-determined models.

In the first category we include the models developed by the Boston Consulting Group: Zakon (1968), Spraakman (1979), Ulrich and Arlow (1980), Johnson (1981), Higgins (1984), Lewellen and Kracaw (1987), Firer (1995) and Ross (2003).

Bearing in mind that company growth is also limited by the generated cash-flow, the newer models developed by Hamann (1996) and Churchill and Mullins (2001) use cash-flow as a factor that limits sustainable growth rate.

Hamann's model (1996) is developed starting from the assumption that cash flow from operating activities is the most important source of cash.

In this context, operations-generated cash-flow may be defined as follows:

$$CFO = EBIT + \text{non-cash items} - \text{interest} - \text{taxes} - \Delta NCC{:}WC - \text{dividends}$$

$$EBIT - \text{interest} - \text{taxes} = PAT$$

$$CFO = PAT - \Delta NCC{:}WC = 0$$

$$PAT = \Delta NCC{:}WC$$

where:

PAT = Profit after taxation

CFO = cash from operating activities

EBIT = profit before interest and taxes

ΔNCC:WC = changes in non-cash components of working capital;
The formula underlines the need to control the components of working capital, stock management and the credit policy in order to have a sustainable growth of cash-flows.

The model involves:

Calculating the net profit after tax (PAT)
Considering g = the sales growth for year x+1
In the situation in which the ROA, the weight of overheads in sales and the tax rate remain constant, the profit equation fort the year x+1 can be written as follows:

$$PAT_{X+1} = Sales * (1 + g) * PAT/sales_x$$

Calculating the activity periods for components of working capital cycle

$$WCC = Inventory * \frac{12}{Sales} + Receivables * \frac{12}{Sales} - Payables * \frac{12}{Sales}$$

Calculating the changes in working capital

$$WCC = \frac{Sales}{12}(Inventory_{x+1} + Receivables_{x+1} - Payables_{x+1}) - \frac{Sales_x}{12}(Inventory_x + Receivables_x - Payables_x)$$

Given the fact that the components of the cash conversion cycle remain constant ($Inventory_{x+1} = Inventory_x$, $Receivables_{x+1} = Receivables_x$, $Payables_{x+1} = Payables_x$), the equation becomes:

$$\Delta NCC:WC = \frac{(Sales_x(1 + g) - Sales_x)}{12}(Inventory_x + Receivables_x - Payables_x) = \frac{g * Sales_x}{12}(Inventory_x + Receivables_x - Payables_x)$$

Calculating the sustainable growth rate when cash from operating activities is zero or when $PAT_{X+1} = \Delta NCC:WC_{X+1}$

$$(Sales_x(1 + g) * PAT/Sales_x) = \frac{g * Sales_x}{12} * (Inventory_x + Receivables_x - Payables_x)$$

The equation above shoes that:

$$CFO = PAT - \Delta NCC:WC$$

$$PAT * (1 + g) = g * \frac{Sales}{12} * WCC$$

$$g = \frac{PAT}{(\frac{Sales}{12} * WCC - PAT)}$$

It follows that the longer the cash conversion cycle, the lower the sustainable growth rate for a given level of sales and of profit after tax.
Assuming that in the year x+1 the cash conversion cycle will increase, the sustainable growth rate will drop.
The formula sustainable growth rate was obtained based on the the general cash flow format:
Cash from operating activities – Cash to investing activities + Cash from financing activities = 0
In the case where in the year x+1 the shareholders wish to have dividends paid, the equation becomes:

$$PAT_{X+1} = Sales_x * (1 + g) * PAT/Sales * (1 - d)$$

where d = dividend retention rate
In the case where in the year x+1 the working capital will increase and an equity increase is also made, the equation becomes:

$$PAT * (1 + g) * (1 - d) - \left(\frac{Sales}{12} * (1 + g) * WCC_{t+1} - \frac{Sales}{12} * WCC_t\right) + \Delta SC = 0$$

where:
$WCC_{t+1} = working\ capital\ cycle\ in\ period\ t + 1$
$WCC_t = working\ capital\ cycle\ in\ period\ t$
$\Delta SC = share\ capital\ increase$

The model also works when investing activities will be introduced. The model must be adjusted when borrowed capital is made because the interest will affect cash flow from operating activities.

The model proposed by Churchill and Mullins (2001) focuses on cash-flow management in generating a sustainable growth rate. According to them, a sustainable growth rate is the growth rate that can be achieved using operational means, without divestment and without external funding.

They identify three important factors in achieving sustainable growth:

- the operating cash cycle expressed in number of days (length of immobilization in stocks and receivables);
- the value of the cash tied-up in each operating cash cycle;
- the value of the cash generated during each cycle.

The operating cash cycle (OCC) includes the period of time in which financial funds are tied up in inventories as well as other working capital before payment is received from the services rendered.

OCC = Days inventory held + Days Sales outstanding

The funds required in order to fund the operating cash cycle are essential in calculating the sustainable growth rate, because the values of the cost of sales and of the other fixed and variable expenses are different:

$$Tied - up\ funds\ cost\ of\ sales = \frac{Tied - up\ funds\ (in\ days)}{OCC\ (in\ days)} * \frac{Cost\ of\ Goods\ Sold}{Net\ Sales}$$

$$Tied - up\ funds\ other\ expenses\ = \frac{Tied - up\ funds\ other\ expenses\ (in\ days)}{OCC\ (in\ days)} * \frac{Other\ expenses}{Net\ Sales}$$

The sustainable growth rate is influenced by the following four factors:

- profitability ratio. An increase of profitability ratio determines the generation of internal funds, with direct impact in achieving growth;
- asset turnover ratio. An increase of the net asset turnover ratio causes an increase of sales generated per asset unit. This decreases the need for assets based on the increase of sales, which results in the increase of the sustainable growth rate.
- financial policy. An increase of the total debt means additional resources and an increase of the sustainable growth rate.
- dividend policy. An increase in retention rate determines the growth of capital and implicitly the sustainable growth rate.

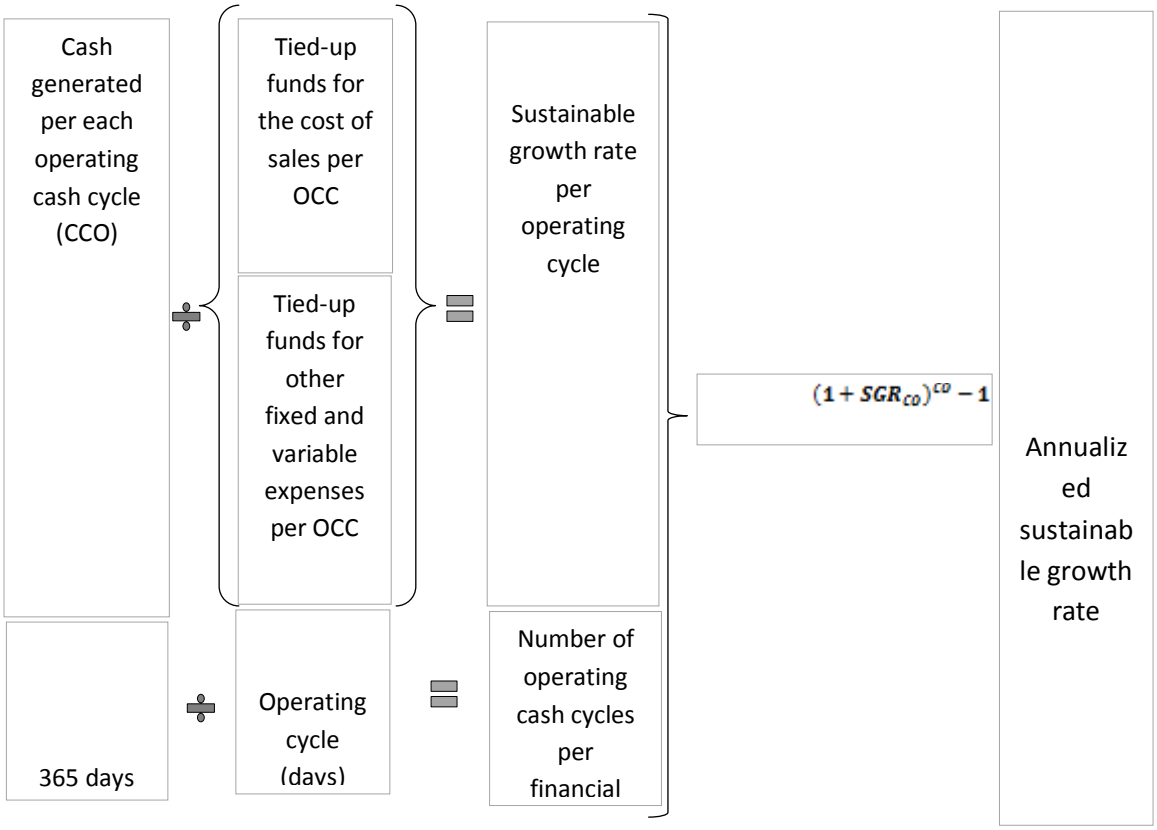


Figure 1: Calculating the sustainable growth rate according to the Churchill and Mullins model (Source: Hofman, E. / Maucher, D. /Piesker, S./ Richter P. *Ways Out of the Working Capital Trap*)

The Churchill and Mullins model allows the calculation of the growth rate based on the funds generated from current operational activities, as well as on the factors that contribute to and influence growth. The model provides a working instrument for making decisions from a management perspective through common operational and financial strategies, by commensurating their impact on the company's ability to fund growth.

The sustainable growth rate can be calculated for various types of companies, irrespective of size, for each business unit or for each market segment. The calculations can be made using both historical data and forecast data. This model for finding the sustainable growth rate can help managers understand the consequences of their decisions through a "What If"-type planning. The model can be used by manufacturing, distribution, retail and service companies.

3. CONCLUSIONS

Even though companies need to have a minimum of growth in order to perform well in the long term, too big a growth can generate problems. The danger lies in overshooting one's financial capabilities, as well as of one's management and market limitations.

Monitoring the current situation and the progress of a company by mapping the sustainable growth rate helps managers make sure that deficient resources are allotted in an efficient manner.

The models that rely on operational cash-flow highlight the need to control the elements of the working capital the models proposed by Churchill & Mullins and by Hamann can become useful tools for making decisions from a managerial perspective and help in understanding the consequences of management decisions in an organisation.

The sustainable growth rate serves as an element for setting a growth target using internally-generated funds. This rate can be increased by influencing its determinants. Potential actions may be categorized as follows: shortening the net operating cycle (by reducing the day's inventory held, decreasing the day's sales outstanding and increasing the day's payables outstanding), reducing the cost of sales and of overheads, and increasing the margin for sales.

An increase of turnover above the value of the sustainable growth rate will generate a scarcity of funds, and the company will need to resort to bank financing, changing its debt equity and thus creating financial costs. On the other hand, a turnover below the rate of sustainable growth will lead to a waste of available resources, thus generating opportunity costs.

References:

1. Churchill, N.C. / Mullins, J.W. (2001): How fast can your company afford to grow? *Harvard Business Review 79 (5)*, p. 135-143.
2. Hamman W.D. (1996): Sustainable growth: A cash flow model. Investment Analysts Journal, 43 Winter, p. 57-61
3. Hofman, E. / Maucher, D. /Piesker, S./ Richter P. (2011): Ways Out of the Working Capital Trap. Empowering Self-financing Growth Through Modern Suplly Management, *Springer-Verlag Berlin Heidelberg*, p.7-12.
4. Fonseca M.M. / Ramos C.G./ Tian G.T.(2012): The Most Appropriate Sustainable Growth Rate Model for Managers and Researches, The Journal of Applied Business Research, 28 (3), p. 481-499
5. Higgins, R.C. (1977): How much growth can a firm afford ? *Financial Mangement, 6 (3)*, 7-16
6. Onofrei, Mihaela, and Dan Lupu. "The modeling of forecasting the bankruptcy risk in Romania." *ECONOMIC COMPUTATION AND ECONOMIC CYBERNETICS STUDIES AND RESEARCH* 48.3 (2014): 197-215.
7. Raisch S. / VonKrogh G (2007): Navigating a path to Smarth Growth. *MIT Sloan Management Review 48 (3)*, 65-72

THE MANAGEMENT OF BUSINESS OBJECTS IN ECONOMIC APPLICATIONS

Danut-Octavian SIMION
"Athenaeum" University of Bucharest, Romania
danut_so@yahoo.com

Emilia VASILE
"Athenaeum" University of Bucharest, Romania

Abstract: *The paper presents the advantages of the management regarding business objects in economical applications through SOA technologies. These business objects usually represent entities like clients, orders, resources, data access objects and services used in the logic of the economic applications. The economical flows are very important within these kind of applications because are dependent of each other so a good management leads at an increase of productivity and the profit. SOA (Service Oriented Architecture - Architecture-based software services) through the software architecture involves distributing application functionality into smaller units, distinct - called services - which can be distributed over a network and can be used together to create applications for business. Large capacity that can be reused in different applications such services is a characteristic of software architectures based services. These services communicate with each other by sending information from one service to another. SOA offers distributed programming and modular programming for the Business Tier that is represented by business objects and services that allow to store data and to define the business logic of applications.*
Keywords: *SOA technologies, Economic applications, Management process, Business Tier, Business objects, UML diagram, Java.*

INTRODUCTION

The management activity involves a good organization of business flows that are implemented in economical applications. In these applications The Business Tier manages all the business objects that represent entities like products, customers, orders, data access objects and services used in the logic of the economical applications. A better management of these objects relies on a good design and a rigorous implementation through SOA technologies which is independent from operating systems platforms and can integrate business objects in various economical applications. SOA (Service Oriented Architecture - Architecture-based software services) is a type of software architecture that involves distributing application functionality into smaller units, distinct called services, which can be distributed over a network and can be used together to create applications for business [2], [5]. Large capacity that can be reused in different applications such services is a characteristic of software architectures based services. These services communicate with each other by sending information from one service to another. SOA is a flexible and standardized architecture that contributes to better connect various applications and facilitates the exchange of information between them. SOA unifies business processes by structuring large applications into a collection of smaller

modules called services. These applications can be used by different groups of people both within the company and other partners.

USING SERVICES IN SOA BUSINESS MODELS

Web applications for business help business development for companies that adopt these technologies in companies that are in various formats can be used in an integrated way. Current technologies are oriented data types existing within companies, including those older technologies, DBMS from previous generation, unstructured data, old applications which do not meet current standards. The main contributions of IT are finding new ways to access different types of structured data in databases and presenting various ways to develop Web applications using SOA technology.

These new types of applications lead to the development of companies by allowing several users to access shared within their different collections of data, but are possible and open for business Internet users. For building Web applications, the first step is to identify how to structure data: structured, semi-structured or unstructured. Structured data found in databases are managed by DBMS's, semi-structured data files are in XML files and unstructured data that are in the Office file types. Very important for the business is when the management of the company knows the amount of data that is present in companies and to inventory main compartments that produce documents and to establish key information flows [1], [4].

SOA Services are not associated functional units that are not call to each other embedded in them. Typically implemented features that most people would recognize as such service such as completing an online application for an account, view a form or a bank statement or placing an order online ticket online. SOA Services have implemented their code how they talk to each other, the protocols in Service-Oriented Architecture. Almost every software vendors advertise their products as being based on a service-oriented architecture (SOA), but not everything that is advertised as "SOA" is service-oriented.

SOA is an approach to software development for organizations, so that software processes are separated into services which are then made available and can be found in a network. Each service provides functionality that can be adapted to the needs of an organization, hiding the implementation details of the ins and outs. SOA addresses the complexity, inflexibility and not weaknesses of existing approaches in design processes, workflow and integration applications. SOA can ease the integration of diverse environments found in many organizations. SOA facilitates collaboration and information sharing throughout the organization and with external partners. By exposing business processes, SOA helps in choosing the best ways to improve operations. SOA provides the ability to support a business model that goes beyond the organization. Collaboration improves SOA facilitates complete business processes and improves operational effectiveness [3], [6].

SOA allows customization of business processes without modifying source code. SOA makes the system processes for the business organization to be a matter of configuration, not customization. This means that when it's time for the update to a new

version, this is much easier than if there were scattered in the implementation customization. Another benefit of SOA is that it provides the ability to streamline business processes, which in turn promotes agile management thereof. SOA provides a way to make business processes more transparent, so that it can be customized and optimized to come to better meet customer demands for reduced response time, while maintaining high quality and credibility. And, perhaps most importantly, SOA keeps the complexities of application-to-application integration and business-to-business, significantly reducing costs and raising technology to a business level.

SOA SERVICE ORIENTED ARCHITECTURE

SOA allows activating all services on a large scale IT systems. The only way to achieve the objectives of reducing IT costs and improve the efficiency and visibility is through rapidly assembling these services into modular and flexible business applications. Oracle SOA Suite 11g enables the construction, deployment and management of SOA in easy way, using the best technology open, integrated and powerful in this area.

• Simplified and productive development of a set of unified and easy-to-use tools enhances developer productivity; promote collaboration between developer's reuse of assets and IT

• Scalability and excellent performance, real-time processing of events at very high speeds, along with the most scalable Application Grid in the field, to provide performance and reliability

• Management and monitoring unified a unified structure for events and services and full traceability between applications ensures full security and control

SOA Suite Architecture hot-pluggable type helps lower costs on business by re-type lower upfront IT investments and assets, without taking account of (OS, application server, etc.), it runs without regard to the technology that is built. It is easy to use, reuse-oriented, provides tools and applications development unit provides end-to-end management lifecycle and further reduce development and maintenance costs. Businesses can achieve improved efficiency and agility through rules, automated business processes using Oracle SOA Suite. His ability to deliver real-time trends and analysis of high-level virtualization lifecycle and end-to-end allows rapid development both in their predictions and in certain high-priority issues [1], [5].

SOA Suite provides capabilities for:

• Design of SOA composite applications that come from disparate applications and services;

• Connect to any source virtual date technologies (messaging, databases, etc.), partner applications using a single connection framework that includes adapters, gateways include B2B and pre-integration with Data Integration Suite;

• Routing, transformation and virtualization services through a highly scalable tool called Oracle Service Bus;

• Orchestrate and automate builds with BPEL Process Manager;

• Agility to build specific logical blocks through outsourcing, using Business Rules;

• Performs real-time detection of specific patterns through multiple data streams and time windows using Event Processing;
• Gain real-time visibility into operations and increase performance of business processes, along with the ability to respond to specific situations, using Business Activity Monitoring;
• Consistently and reliably secures all the application-specific security policies and the framework for development through global policy manager in Enterprise Manager;
• Run composition SOA applications through a unified infrastructure that is constructed over web Server, but is also hot-pluggable and can run alternately on middleware level;
• Manages and monitors all previous components integrated through a single console;
• Attach an extended framework to manage, discover and promote the reuse of services in addition providing a tighter control through advanced outbuildings and superior amenities for impact assessments;
Service Bus is designed to connect, mediate and manage interactions between heterogeneous services, legacy applications and multiple instances of enterprise services throughout the network services. SOA provides unparalleled Quality of Service (QoS) through a policy-based service virtualization, service pooling capabilities for high-volume SOA projects.

To illustrate a Business model that uses SOA it can be used the following example:

Implementing a Business model with SOA.

```
public class Ex_SOA
  implements SOA.SessionBean {

    public void setSOASessionContext(
       SOASessionContext sessionContext)
    throws SOAEJBException, SOARemoteException {
    }

    public void SOAejbRemove()
    throws SOAEJBException, SOARemoteException {
    }

    public void SOAejbActivate()
    throws SOAEJBException, SOARemoteException {
    }

    public void SOAejbPassivate()
    throws SOAEJBException, SOARemoteException {
    }

    public void placeSOAOrder( Order1 order ) {
       Order1Service pas1 = new Order1Service();
       pas1.placeOrder( order );
    }
```

```
    public void addSOAAccount(Account1 account) {
       Company1Service cas1 = new Company1Service();
       cas1.addAccount(account);
    }

    public void createSOACompany( Company1 company) {
       Company1Service cas1 = new Company1Service();
       cas1.addCompany(company);
    }
 }


public class SOACompany1Service {

     public void addSOACompany(Company1 company) {
        SOACompany customer1 = new SOACompany(company1);
     }

     public void addSOAAccount(String company,
       Account1 account1) {
    throws SOAAccountException {

       Company1 company1 = null;
       if (company1 == null)
          throw new SOAAccountException(
            "SOACompany_Id: " + companyId + " don't exist");

       Account1 account1 = new Account(account1);
       company1.addAccount(account1);

       SOAAccountManager1 accountManager1 = null;
       accountManager1 = getSOAAccountManager(company1.getCode());
       account1.addSOAAccountManager(accountManager1);

       EmailSOAService email1Service =
          new Email1Service();
       email1Service.notifyAccountSOAManager1(accountManager1,
          account1);
    }
 }

public class SOAOrderService {

     public SOAOrderService() {
     }

     public void placeSOAOrder(Order1 order1)
     throws SOAAccountException {
        Company1 company1 = null;
       Account1 account1 = null;

       String companySOAId = order1.companySOAId;
```

```
        String accountSOAId = order1.accountSOAId;
        Company1 = getSOACompany(companySOAId);
        Account1 = company1.getSOAAccount(accountSOAId);
        Order1 order1 = new Order1(order1);
        CalculateDiscount1(company1, account1, order1);

        account.addSOAOrder(order1);
        AccountSOAManager accountSOAManager =
           Account1.getAccountSOAManager();

        EmailSOAService emailSOAService =
           new EmailSOAService();
        emailSOAService.notifyAccountSOAManager(accountManager1,
           order1);
     }
     public void calculateSOADiscount(Company1 company1,
        Account1 account1, Order1 order1) {
     }
  }

  public class SOAOrder {
     String orderSOAId;
     Collection lineItems1;

     public void addSOALineItems( LineItem1[] lines1 ) {
        for( int i = 0; i < lines1.length; i++ ) {
           lineItems1.add( lines1[i] );
        }}}
```

SOA BUSINESS OBJECT

When there is little or no business logic in a business operation, applications will typically let clients directly access business data in the data store. A SOA presentation tier component such as a command helper or JSP view, or a business-tier component can directly access a SOA Data Access Object. In this case, there is no notion of an object model in the SOA business tier. The application requirements are fulfilled by a procedural implementation [2], [6].

In SOA applications that do not use EJB components, the business-tier components such as SOA Business Objects and other services are implemented as Java Objects. Though these objects are local objects, it is recommended to avoid exposing them directly to the SOA clients because that exposure introduces coupling and dependencies between the business clients and these business tier components. Even in applications that do not use Business Objects, it is recommended to encapsulate business logic in the SOA business tier instead of embedding it in interfaces or clients. SOA Application Services provides a central location to implement business logic that encapsulates Business Objects and services. Implementing the business logic, extrinsically to the Business Objects, is a one way to reduce redundancies among business objects. With an SOA application service, it can be encapsulated this higher-level business logic in a separate component that uses the underlying SOA business

objects and services. SOA application service is also used to provide a central business logic implementation layer even if it is not using business objects in applications. SOA application services can include all the procedural business logic required to implement different services in applications and can use SOA Data Access Objects when necessary to deal with persistent data. In non-Java business objects applications, where it is needed to reduce redundancies and dependencies between the presentation-tier components and business-tier components such as SOA business objects and other services, SOA application services provide that intermediary function between the these two tiers. A SOA application service exposes a finer-grained interface than an interface service. SOA application services provide the background infrastructure for interface service. These interfaces become simpler to implement and contain less code because they can delegate the business objects processing to SOA application services. SOA application services contain business logic and service interfaces that typically do not contain complex business logic [1], [2], [5].

SOA business objects encapsulate and manage business data, behavior and persistence. SOA business Objects help separate persistence logic from business logic. SOA business objects maintain the core business data, and implement the behavior that is common to the entire application or domain. In an application that uses SOA business objects, the client interacts with the SOA business objects, which manage their own persistence using one of the several persistence strategies. SOA business objects implement a reusable layer of business entities that describe the business domain. A SOA business object implements a well-defined business domain concept and includes business logic and business rules that apply to that domain concept. Higher-level of business logic that operates on several SOA business objects is implemented in a service layer, using SOA application service and session interfaces, to isolate the object model from clients.

Implementing a SOA business object

```
public class Ex_SOAbo {
   private SOAboCustomer_data customerSOAbo_data;

   // Contact Info SOA bo is a dependent SOA business object
   private ContactInfo_SOAbo contactInfo_SOAbo;

   public CustomerSOAbo(CustomerSOA_data customerSOA_data) {
     // validate SOA Customer Data values
     this.customerSOA_data = customerSOA_data;
   }

  public ContactInfoSOAbo getContactInfoSOAbo () {
     if (contactInfoSOAbo == null)
        contactInfoSOAbo = new ContactInfoSOAbo(
        customerSOAdata.getContactInfoSOAdata());
     return contactInfoSOAbo;
  }}

public class ContactInfoSOAbo {
```

```
 private ContactInfoSOAdata contactInfoSOAdata;

 public ContactInfoSOAbo(ContactInfoSOAdata contactInfoSOAdata) {
   this.contactInfoSOAdata = contactInfoSOAdata;
}
public SOAboAddress_data getSOAboAddress_data () {
   return contactInfoSOA_data.getSOAboAddress_data();
}}
```

CONCLUSIONS

Using SOA (Service Oriented Architecture - Architecture-based software services) in organizations / companies ensure a high level of integration of data and services widely used in enterprise applications. SOA-based applications are the type integrator, using the latest technologies in IT field and provide improved business processes, workflows, provide trends and analysis of business, communicate real-time data processing results and not least help IT staff in companies to implement best software solutions embodied in web based applications that can be easily used and managed. SOA unifies business processes by structuring large applications into a collection of smaller modules called services. The solution offered by SOA architecture is a high-level enterprise solution that is based on the latest technology and provides IT support business processes and a high degree of data processing and information to leading decision making in business while real. The management activity for economic applications involves a good understanding of the business flows and a rigorous implementation of the business objects according to the specifications. The SOA business tier provides the objects for the integration tier and represents the results from the clients requests that are also processed according with the business logic of the applications [3], [5]. The objects for business and the business flows are the most representative components of the SOA business tier and they work together on a Java SOA platform through classes, interfaces, services and data types definition, so the design and implementation of those is very important [1], [2]. SOA applications are more adaptive and robust if it is built on a business logic that implements the basic design and implementation according with the UML diagrams.

References

[1] Binildas A. Christudas,"Service Oriented Java Business Integration", Packt Publishing, 2011;
[2] David Sprott, Lawrence Wilkes, "Understanding Service-Oriented Architecture", CBDI Forum, 2010;
[3] Debu Panda, "An Introduction to Service-Oriented Architecture from a Java Developer Perspective", O'Reilly Publishing, 2012;
[4] Douglas K Barry, "Service-oriented architecture (SOA) definition", Barry & Associates, Inc, 2011;
[5] Kim Topley, "Java Web Services in a Nutshell" , O'Reilly Publishing, 2012;
[6] Thomas Mattern, Dan Woods, "Enterprise SOA: Designing IT for Business Innovation", O'Reilly, 2009;

[7] URI: http://javaworld.com/javaworld/
[8] URI: http://www.packtpub.com/service-oriented-java-business-integration/
[9] URI: http://www.sun.com/software/javaenterprisesystem/
[10] URI: http://www.manageability.org/

FROM THE CLASSICAL FINANCE TO THE BEHAVIORAL FINANCE

Titus SUCIU
Transilvania University of Braşov
titus_suciu68@yahoo.com

Abstract*: This paper represents a starting point in the presentation of thethree types of stock-market analysis: the technical analysis, the fundamental analysis and the behavioral finance. The fundamental analysis consists in the assessment of the financial and economic status of the company, together with the context and macroeconomic environment where it activates. The technical analysis deals with the demand and supply of securities and the evolution of their trend on the market, using a range of graphics and charts to illustrate the market tendencies for the quick identification of the best moments to buy or sell. Behavioural finance takes into account the human factor, through the perception, own evaluation and emotional elements, which are involved into taking and undertaking an investitional decision. The theory looks at the irrational human tendency to quickly achieve profits by selling the title and to postpone accepting losses by preserving the asset. Investors focus on the likelihood that their decisions might trigger gains or losses as compared to the status quo which is set based on prevailing personal perception rather than on the impact of this decision on the entire portfolio. The fusion between classical financial analysis and behavioural finance can help investors and financial analysts to better understand the market mechanism of functioning as well as the investment behaviour of the stakeholders to this process.*
Keywords: *behavioral finance, fundamental analysis, technical analysis, volume analysis, investor*

1. INTRODUCTION

Everyone cannot beat the market…simply because everyone is the market. But that does not preclude the possibility that some investors, utilizing more sophisticated approaches than the public at large, can earn above average returns on their investments. The first step in building a successful investment strategy is to learn as much as possible about where in general are headed.

Game theorists call the stock market a *positive sum game* because in the long run the market rises and in aggregate, all invertors make money. An old Wall Street adage goes, *don't tell me what to buy, tell me when to buy it.* In fact, what and when are two sides of the same coin- both essential to a successful investment strategy.

The paper aims at giving an overview of the link between classical and behavioral finance. We are aware that such an approach cannot possibly be covered in a comprehensive manner within one paper. That's why we intend to highlight the progress of finance as study subject by mirroring the theory of efficient market and the prospect theory, the fundamental analysis, technical and volume analysis and essential the role of behavioral finance in the investor's decision taking on what to invest in.

2. THE EFFICIENT MARKET HYPOTHESIS

The theoriy of modern behavioural finance suggests that all information existing on the market are quickly and fully incorporated into the price of a financial title. Acoording to the key concept of the theory, the idiviadual investor hardly has any chance to beat the market. The Efficient Market Hypothesis- EMH- cannot explain why certain types of shares tend to perform better than others from the investment point of view. Estimating the investment placement în these shares based on the yearly yield is therefore incomplete. If the profitability of the investment were adjusted to the associated risk, there would be a substantial change in the scale of invstment attractivity. Luis Bachelier was the first to launch the idea that all past, present and even future events are already reflected into the current market price. In 1965 professor Eugene Fama introduced the hypothesis of the random movement of prices, which was later on to become the Efficient Market Hypothesis .

Fundamental analysis helps to the process of rendering the market more effective only when it identifies, processes and incorporates into the the current price any change in the information relevant to the previous forming of the price. EMF, în its strong form concludes that the current price of the title is supported by all the publicly available information- the weak form, but also of the private, nonpublic data, the semistrong form. Even if today's technological advance diminishes the relevance of the private information, it becomes paradoxically more and more difficult for the players on the market to issue logical presumtive judgments about the future trend of a stock exchange listings.

40 years after the Hypothesis was introduced, investors have not reached yet any compromise regarding the validity of both hypotheses and of their contents. From the practical side, investors are interested în the relevance of the EMH each time they are trying to identify a certain market trend by using a certain technical analysis, or an under or overevaluated share by using fundamental analysis, or whenever they decide to place fixed capital into a passive mutual fund or to follow a general stock excahnge index.

If investors recognized the infallibility of EMH, they would avoid active portfolio management, în favor of the passive one, and they would not support the continous fluctuation and tradeoff process, necessary to maintaining an effective market.

According to the EMH, the price of an asset reflects al the relevant and available information at that moment: financial, economic, sectorial, political and social environment, and most importantly, the investor's feeling towards the respective title. (Braşoveanu, 2011)

3. FUNDAMENTAL ANALYSIS

Fundamental analysis presumes security prices are based on the intrinsic value of the underlying company. The fundamentalist believes that with time, stocks will move up to minimize the disparity between their present value and their perceived intrinsic value. Thus, fundamental analysis presumes the future prospects of a security are best analyzed through a proper assessment of the intrinsic value of the underlying company.

In pursuit of value, the fundamentalist collects, analyzes, and models company information, including earnings, assets, liabilities, sales, revenue, and other information required to evaluate the company. Assumptions of the fundamentalist include a belief that markets are not completely efficient and that all necessary information is available to the public, but the company may not always be efficiently priced. Overall, fundamentalists are concerned with what the price should be according to their valuation models.

A turning point in the popularity of technical analysis occurred in the mid-1930s. The Securities Exchange Act of 1934 created the Securities and Exchange Commission (SEC), which was broadly empowered to legislate and regulate the industry. Any attempts to manipulate the market now met with swift and harsh penalties. These reforms provided much needed regulation of the markets and regulation of publicly traded companies. In 1934, about the time of these reforms, Graham and Dodd at Columbia University released *Security Analysis,* now considered the Bible of fundamental analysis. The approach promised that adequate returns and safety could be achieved via a thorough analysis of the underlying company. Through such analysis, they argued that one could identify the "intrinsic value," or true worth, of a company. Graham and Dodd discounted the importance of the short and intermediate movements of the markets. Instead, they advocated owning stocks as long-term investments, not in timing the market (Dormleiler, 2011).

While price can be observed with certainty, no one can ever be sure what constitutes true value. Although it may be difficult to determine current value, in the light of hindsight it is clear that price does tend to revolve around it. Several indicators have been developed which purport to measure value. (Fosback, 1992)

4. TECHNICAL ANALYSIS

Technical analysis is the study of the market through its creators, the investors. Therefore, the focus of technical analysis is the behavior and motivations of investors observed primarily through their own actions. It is imperfect people who determine market prices, not highly perfected valuation models. However, the technician does not deny that the pursuit of value is a primary source of market movement. Yet, the technical perspective deems that market price is formed by the collective opinions of market participants pursuing value. Thus, in the mind of a technician, price is less about company facts and more about investors' feelings and perceptions concerning those facts. In the exchange markets, prices are determined by what one party is willing to pay and another is willing to accept. Therefore, price is ultimately the end result of a battle between the forces of supply and demand, manifested through the actions and behaviors of investors.

Price represents all that is known, feared, and hoped for by the market. It is through the diagnostics of price, volume, and other technical metrics formed by the actions and sentiments of market participants that the technician gauges stock performance.

The technician's objective is to develop an understanding of the behavioral forces producing price (such as supply and demand). The core aspects of the technician include

believing that the markets are efficient at discounting even future developments, price moves through trends, investors are both logical and emotional creatures, and past behaviors tend to repeat themselves more so when enough time has elapsed that the behaviors have been forgotten.

A string of individual price bars drawn in sequence creates the chart's trend. A price bar contains six key pieces of information: the open, the high, the low, the close, the change, and the range.

The open—The opening value is the first trade of the day. It represents the position clients want to be in at the beginning of the day. After the investors have time to review the markets overnight, the open represents the desired position of investors to begin the day.

The high—The high is the highest point the stock traded during the session. The high is the furthest point the bulls were able to advance the stock higher before sellers regained control to push the stock back down. The high represents a stronghold for sellers and a resistance area to buyers. There is one exception. When the stock closes on the high, it did not encounter any real resistance from the sellers. The buyers just ran out of time.

The low—The low is the lowest point the stock traded during the session. The low is the furthest point the bears were able to force down the stock before buyers regained control to push the stock up. The low represents an area where enough supportive demand existed to prevent the price from moving lower

The close—The close is the last price agreed between buyers and sellers ending the trading session. It is perhaps the most important piece of information of all financial data. The close is the market's final evaluation. The close represents investors' sentiments and convictions of investors at the end of the day when the books are closed. The closing price is the first price the majority of investors desire to know.

The change—The change is the difference from close to close. This is the difference of the closing value one day versus the closing value the next day. When this difference is positive, it tells us that demand is outweighing supply. When this difference is negative, it tells us that supply is increasing beyond demand.

The range—The range is the spread of values within which the stock traded throughout the day. The range spans between the bar's highest point and the same bar's lowest point. It is measured from the top of the bar, where resistance set in, to the low, where support came in. The wider the range, typically, the easier it is for the forces of supply and demand to move the stock price (Dormleiler, 2011).

5. VOLUME ANALYSIS

When securities change hands on the auction markets, the volume of shares bought always matches the volume sold on executed orders. When the price rises, the upward movement reflects that demand has exceeded supply or that buyers are in control. Even the most casual investor knows what matters about a stock—price. You are taught early on to buy low and sell high. The evening news tracks the major indexes as if they were horse races, so most people naturally believe that a higher close is good news and a

lower close is bad; yet you are left none the wiser about navigating your own finances by knowing this daily result. Price surely matters. But this is a market. Waiting for the final number on a given day or week tells you what happened but not why or, more importantly, how.

Volume as a general term describes the amount of a given tradable entity (for example, shares of stock, commodities contracts, options contracts) exchanged between buyers and sellers. If volume is high, more units of a security have changed ownership. If it is low, then fewer units have changed hands.

There are several categories of volume to examine:

- Market volume (trading volume)— The number of shares exchanged between buyers and sellers during a given period of time, typically a day.
- Total volume (exchange volume)—Describes the entire volume of all issues traded on an exchange, such as the New York Stock Exchange.
- Index volume—The cumulative sum of the volume traded in all of the components of an index, such as the Dow or the S&P 500.
- Total trades—How many transactions occurred within the trading session.
- Dollar volume—The value of all the shares traded over the course of the trading session.
- Float—The number of shares owned by the public available for exchange.
- Average volume (typical volume)—Computed as a moving average, which will smooth the peaks and valleys to show a more representative view of typical volume over a predefined period of time. Average volume enables the technician to discern whether volume is increasing or decreasing relative to the past. In short, is the mall fuller this Saturday compared to every Saturday in the past year—or relatively empty?

A trade produces only two pieces of information: the price and price's neglected sibling, volume. Perhaps the least appreciated piece of the puzzle, volume represents fertile ground for technical analysis. Proficiency in volume analysis is a rare skill. Properly understood, though, volume analysis can provide its practitioner with the power to peer deeply into market mechanics. Volume is a literal illustration of the power behind the forces of supply and demand. Volume is understood as the validation of price, the source of liquidity, the substantiation of information, the fulfillment of convictions, the revelation of divergent opinions, the fuel of the market, the proponent of truth, and the energy behind the velocity of money (Dormleiler, 2011).

Volume cannot be properly understood without price any more than price can be adequately assessed without volume. Independently, both price and volume convey only vague market information. However, when examined together, they provide indications of supply and demand that neither could provide independently. Some serious misconceptions among investors exist about how the market functions. According to common perception, the market should be fairly easy to understand. Why does the market go up? The market goes up because there are more buyers than sellers, and the market goes down because there are more sellers than buyers (Suciu T, 2013).

5. BEHAVIORAL FINANCE

Investors are creatures of emotion; they remember the price they paid for a stock and this can influence their decisions of when and at what price to sell it. Investors also tend to allow themselves to be caught up in the market atmosphere of the moment, be it greed, panic, fear or apathy. All those fundamentalists looking at the same factors at the same time tend to move prices to extremes. Thus prices tend to move in trends and trend following has a valid theoretical basis. The reason for great sustained bull market trends is plethora of optimistic earnings reports which emerge after an economic upswing is in progress. Investors tend to jump aboard those issues exhibiting the greatest fundamental improvement and bid them up to greater extremes. Such situations offer profit opportunities to technicians trading with prevailing price trends. At the same time they ultimately spell down, both for the fundamentalists who bought stocks at the high and for the not inconsiderable number of technicians who bought earlier for purely technical reason but then stay with the fundamentals at the peak.

It is also important to bear in mind that the indicated degree of diversification applies to the common stock portion of an investors portfolio regardless of how small a portion of an investors portfolio regardless of how small a portion of his total assets are invested in common stocks. For example, an investor with half of his assets in bonds, one-quarter invested in real estate and the balance in common stock should still hold a minimum of 20 stocks in his portfolio (Fosback, 1992).

As these public information are available to all participants active on the market and as there is no way to foresee when and how other relevant informtaion might appear, as well as how the players might react to this new piece of information, the investor cannot actually measure the future trend of the price. Moreover, as soon as the information becomes public, a sofisticated investor may handle and interpret it în a private way so that public information may turn into a private one.

Behavioral finance takes into account the human factor, through the perception, own evaluation and emotional elements, which are involved into taking and undertaking an investitional decision. The Nobel prize for economics în 2002 awarded to professors Daniel Kahneman and Vernon Smith set Behavioural finance among the Social and economic sciences. They developed the financial Prospect theory which evinces the psychological processes underlying the financial investment decision as well as the differences between these processes when individual portfolio is in the field of gains and losses. The theory looks at the irrational human tendency to quickly achieve profits by selling the title and to postpone accepting losses by preserving the asset.

The prospect theory changes the notion of usefulness of the utility theory with that of value. Utility is defined only în terms of net worth, while value is defined în terms of gains and losses related to a reference point. Potential gains and losses, even if of equal magnitutde, do not have the same impact on the decision. Losses produce more psychological discomfort than do amotional gains satisfy by at least 2.25 more, as it has been proven empirically. The prospect theory suggests that investor's utility functions significantly depend more on the value changes than on the effective value of the portfolio.

Smith and Kahneman submit that that human decisions taken in a financial context are mentally and cognitively limited, because of the cognitive mainstraming trend. People show little interest în the purpose of their decisions over the final position of the assets portfolio.

Investors focus on the likelihood that their decisions might trigger gains or losses as compared to the status quo which is set based on prevailing personal perception rather than on the impact of this decision on the entire portfolio. Decisions can be seen either as a loss or as a gain, hence the importance of the way past performance or likely output of the decision is described and framed. According to the prospect theory, people tend to reach again the zero profaitability degree (break even point). Losses can be indefinitely maintained, în the hope of a change to the better that might eventually occur, reversing the loss trend into the profit one, and reaching the break even point. Both from the psychological and the accounting vantage point, loss is considered as unachievable until the very moment of sale.

In the Behavioural finance approach, the efficient portfolio is not the one optimizing the relationship between the standard deviation and profitability, but the one that can best manage and accommodate the lients'personal investing objectives.

The scientific approach of Behavioural finance is based on the finance classical concepts, to which it adds the interest on how investor implements them în practice. The influence of the psychological factor expresses în the way investor thinks and behaves. The new finance theories try and enlarge the classical theories by adding elements of information socializing as the analysis submitted by behavioural finance.

Even when share prices progress according to a random walk movement, the market is not deemed to be effective. Although approaches connected to the formal side of operations accurately reflect the market behaviour, they do not equally identify the sociological and the psychological influences on the logic according to which shares evlauations form, which lay at the basis of transatctions carried out în an economically reasonable manner, în individual and institutional portfolios.

However, Behavioural finance submits that judgment, decision and logis are not ifaillible, but are submitted to changes and individual interpretations, different at the moment of their communication to the public and thus, such a past is no longer of use în forecasting the subsequent one (Braşoveanu, 2011).

If the fear of the unknown prevents most people from bearing risks, so does the fear of failure. Any activity in which there is a likelihood of failure is risky. Just as fear of uncertainty and fear of failure goes through in the brain, distorting perception and inhibiting action. Where a loss is signalled, fear will be triggered. Each decision taking requires weighing strengths and weaknesses. Some focus almost only on positive results, while others concentrate on the negative ones.

By analysing the answers given by the brains of various persons, researchers have identified a neural fingerprint making the difference between the cold–blooded and the cold feet. A part of the brain associated with processing physical stimuli, the secondary somatosensory cortex had an increase in activity with the very fearful when they were informed on the waiting time. Hyperactivity in this network of brain areas can trigger the

impulsive and irrational behaviour, at least when it comes to the fear of something unpleasant.

Lo and Repin analysed reactions of investors to instable events (price deviations, price trend reversals and price volatility). They rated businesspeople into either having or not experience, in order to see whether experience has any impact on the individual's autonomous reactions to the market events. Researchers discovered surprising correlations between the physiological reactions and the market trends. Both with non experienced and with the experienced businesspeople blood pressure increased with the maximum volatility of an asset.

Instability was measured as the difference between the highest and the lowest price, over a short period of time, and it was calculated as a fraction of the average price. It was connected to the variation of the asset on short term. The increase of the blood pressure appears much before the respective instable event. This may indicate that the bodies of the business people respond to the market stimuli, preceeding the large-scale event and which will then materialize into price variation. This observation reveals the possibility for the brain to take over the subtle signals from the market, those that cannot be found in the trend analyses.

Lo found strong links between positive and negative moods and the daily performances. People are happy when they make money and unhappy when they lose it. These correlations were the strongest for the weakest of businesspeople. They would allow their own feelings influence the perception they have on values, and trouble their decision-making process (Berns, 2010).

CONCLUSIONS

Graham recommends the defensive investor to follow the rules below when selecting the stock: the adequate dimension, solid financial status, uninterrupted payment of dividends over the last 20 years, no loss during the last 10 years, the increase by at least one third of the profit per stock over the last 10 years, the price no higher than 15 times the average profit for the last 3 years (Graham, 2010).

Investment behavior is closely linked to perceived risk associated with the investment. The conventional economic approach copes with risk of outcomes by assuming a maximization of the expected utility. Kahneman and Tversky (1979) expand this model by proposing four key features in their prospect theory of choice under uncertainty:

- Reference point: outcomes are assessed relative toa reference point which often is the status quo but can be manipulated by the framing of a decision.
- Risk attitude: general risk aversion for gains and risk seeking for losses.
- Loss aversion: losses loom larger than gains.
- Non-linear decision weights: over-weihting of small probabilities relative to highly probable events and under-weighting of outcomes that are merely probable in comparison with outcomes that are certain.

These features enable the prediction of a large number of biases and deviations from economic theory that are observed in laboratory studies of decision/making (Otto, p.10).

Investments might be correctly managed în an effective strictly rational mix of economic decision mix, but also with perception, emotion and empathetic understanding of the other investors' financial behaviour. Solutions proposed by behavioural finance have specific practical apllications, which can help optimizing the process of distribution of financial assets within and effective investment management. Improving this process may assist the financial decision by undertaking better managed risks.

As human behaviour is however, generally reactive and not proactive, it appears more difficult to be forecasted according to the strictly quantitative provisions of the classical financial analysis. Within this context, the fusion between classical financial analysis and behavioural finance can help investors and financial analysts to better understand the market mechanism of functioning as well as the investment behaviour of the stakeholders to this process.

The human capacity to process, understand and undertake the huge volume of information and stimuli assaulting it, is limited. Decisions that individuals take daily are contained by personal circumstances, by time, psychological, emotional, social factors, and they are rarely based on reasonable economic logic criteria.

The risk is within us. If we over estimate our ability to really understand an investment or to come out clean after a dramatic price period, it doesn't matter what our portfolio contains or what happens on the market. In the end, the financial risk does not lie in what types of investments have we done, but in what type of investor we are. For this, there are five types of investor profiles: very conservative, conservative or moderate, balanced, growth oriented and dynamic or aggressive. Practically, the last two are suitable for a stock market broker.

REFERENCES

1. Berns G.,: *Iconoclastul*, Ed All Educaţional, Bucureşti, 2010
2. Braşoveanu L. O. (coordinator),: *Piaţa de capital,* Ed ASE, Bucureşti, 2011
3. Dormeiler, G., : *Investing with volume analysis*, Pearson Education Inc, 2011
4. Fosback; N. G., : *Stock market logic. A sophisticated approach to profits on Wall Street*, Dearborn Financial Publishing Inc., 1992
5. Gheorghiu A., :*Diagnostic bursier*, Ed Victor, Bucureşti, 2011
6. Graham B.,: *Investitorul inteligent.Manual complet de investiţii în acţiuni subevaluate*, Ed CH Beck, Bucureşti, 2010
7. Lupu, Dan, and Mircea Asandului. CONSIDERATIONS ON THE RELATIONSHIP BETWEEN EXCHANGE RATES AND STOCK MARKETS IN EASTERN EUROPE IN TIME OF CRISIS. Transformation in Business & Economics 13 (2014).
8. Otto P. E;.,: *Cognitive Finance. Behavioral Strategies for spending, saving and investing*
9. Suciu T., :*Elements of Stock market analysis*, Bulletin of the Transylvania University of Braşov, vol 6(55) No 1-2013, Series V, Economic Sciences, ISSN 2065-2194, pp. 153-160.

A COMPARATIVE APPROACH TO CORPORATE GOVERNANCE SYSTEMS IN TERMS OF CORPORATE GOVERNANCE CODES OF EMERGING MARKETS

Georgeta VINTILĂ
The Bucharest University of Economics Studies
Bucharest, Romania
vintilageorgeta@yahoo.fr

Raluca Georgiana MOSCU
The Bucharest University of Economics Studies
Bucharest, Romania
moscu.raluca@yahoo.com

Abstract: *In Romania, the principles of corporate governance apply only to large private or public companies, due to lack of information, transparency, poor training of managers, legislative incoherence. The research has as purpose some international comparisons on common principles existing in Romania's Corporate Governance Code and in other codes of developed or developing countries (Great Britain, France, Germany, Austria, Italy, Spain, Portugal, Greece, Belgium, Sweden, Denmark, Bulgaria, USA), with additions of principles / recommendations existing only in codes of developed countries.*

INTRODUCTION

The research carried out begins with a brief comparison between the corporate governance codes of some developed or developing countries, to observe whether the principles of corporate governance in Romania are assorted with international principles. The main features analyzed were the administration system used - single or dual, composition and structure (existence of non-executive members, independent members) control systems, general manager's duality functions (CEO) and Chairman of the Board of Directors, representation of employees, managers, shareholders in the Board. Concurrently it was analyzed the presence and role of committees / advisory boards - nomination, remuneration or audit committee. Comparative analysis was performed for 14 countries (Great Britain, France, Germany, Austria, Italy, Spain, Portugal, Greece, Belgium, Sweden, Denmark, Bulgaria, and USA) that have adopted the Continental / Anglo-Saxon model or the German corporate governance model.

REGULATIONS OF GOVERNANCE CODES AND STATISTICAL RESULTS

The general framework of corporate governance should promote transparency and efficiency of financial markets, to protect and respect the interests of investors, to ensure equal treatment of all shareholders, including to minority shareholders, to ensure transparency of information relating to the financial statements, profitability, the company's management and not lastly a proper monitoring of business management. Organization for Economic Cooperation and Development (OECD) argues that corporate

governance principles should be respected because they have an impact on performance, on the integrity of the market and because it provides incentives for participants in the capital market, because it promotes the existence of transparent and effective markets (OECD, 2004).

2.1. The management system

There are two characteristics in any governance model which outlines the interactions and relationships between the management structures parties:
The Board of Directors composition
The management organization constituent.

Between the objectives of party it must be mentioned ***the composition and constituent of the management systems***, no matter whether we speak about USA or of Europa. The management system may be classified as it follows:
Unitary system: the Board of Directors is the only management structure. Executive and non-executive members compose a single management forum.
Dual system: two different committees, a Supervisory Board (the strategic direction of the company) and a Directorate (they are involved in the operative company's business). The dual system shows a clear distinction and separation between the supervision functions and of the monitoring one, on the one hand, and executive functions, on the other hand (Rosenstein, & Wyatt, 1990) The unitary system combines both functions, although some models of governance, however, provide a degree of separation of these functions.

Therefore organizational structures may be divided in two groups:

1. Those countries where the dual system is required, it is specified in the law, and it applies to companies of a certain size (Austria, Germany, Denmark).
2. Those countries where the unitary system is the base system: UK, Belgium, Spain, Italy, Sweden, Bulgaria, Romania, France, Greece, Portugal, USA. In this group of countries mentioned, the unitary and dual system coexists, but unitary system is the most common structure.

2.2. Management structures' composition

Board composition refers on the one hand to the existence of executive members (internal) or non-executive (outside). The Board of Directors composition will ensure a balance between executive and non-executive members and a significant number of independent members so that no person or group of persons can dominate the decision-making process of the Board.

Therefore a summary of the provisions laid out for the 14 countries, by the balance between executive and non-executive members so that no person or group of persons can dominate the decision-making process of the Board of Directors, understanding:
More than half of the Board's members are non-executive members - *Germany, Belgium, Italy, UK, Portugal, Spain, Denmark, Austria, Bulgaria, Romania, and USA.*
More than one third of the Board members are non-executive members – *Greece.*
More than two thirds of non-executive members: France and Sweden.

Non-executives should bring independent ideas, to be involved in strategic issues, performance issues, human resources, including the appointment of directors, and standards of conduct.
Concurrently the Board will provide a ***sufficient number of independent members***:
More than half of the Board's members are independent members – *France, Germany, Great Britain, Greece, Sweden, Denmark, Portugal, Austria, Bulgaria, Romania, and USA.*
More than a third of Board of Directors members are independent members – *Belgium, Italy, Spain.*
More than a fourth – Portugal, Greece.

Board composition must create gender, age, general skills and knowledge and experience diversity (Jensen & Meckling, 1976) . Hence about the structure and composition of the Board are countries like France, Belgium, Germany, Sweden, Denmark or Austria specifying in the principles of corporate governance issues within a relationship between men and women, as members of the company's management. To increase the percentage of women in management positions and implicit gender diversity in leadership positions in some countries around the world, and in Europe in particular, on the recommendation of the European institutions have introduced female managers in governance structures (MEMO / 11/124 and Europe Strategy 2020). According to the report of the European Commission - Europe Strategy 2020 on gender equality, legislation establishes that at least 30% of the management team members must be women by 2015, and 40% by 2020.

2.3. Representative in Board of Directors

This paper aims to identify various representatives on the Board of Directors, be it employees' representatives (with different test cases for the practice of the 14 analyzed governance codes) or representatives of shareholders or management.

Representation of employees

The existence of the employees' representatives on the Board of Directors presents notable differences for different governance models (Figure 2). Many European countries that have a dual leadership structure give employees the right to speak. In Austria, Germany, Denmark, France and Sweden, companies of a certain size (limits vary from country to country) are required in legal to have a specified number of employees' representatives on the Board (Randoy, et al. 2006). In Austria, in an enterprise, the employees' representatives have the right to select one third of the members of the Supervisory Board (as opposed to half in the companies in Germany). In France and Belgium, the employees' representatives are entitled to attend meetings of the Board, but not to vote (Aste, 1999). In Southern Europe or in the UK, employees' representation on the Board of Directors does not exist, situation present also in the USA.

The shareholders representation

A second significant difference in the composition of the Board is related to the representation of shareholders. In Continental Europe because there is a majority

shareholder, so a concentration of ownership demand and / or of voting power, and we can say that there is a legal framework advantageous to the representation of significant shareholders in the Board.
In the USA and Great Britain the representing of shareholders in Board is limited or nonexistent (Rezaee, 2009, Holderness & Sheehan, 1988). Dispersed shareholder that characterizes most companies gives a very poor representation, symbolic and even non-existent on the Board.
In the non-executive members there may be representatives of minority shareholders, major banks, state, institutional investors and other representatives who are not shareholders.

Management representation
Management is another group of interest holders, whose presence in the Council vary greatly in European corporate governance models.
The dual management system restricts the role and the influence of management within management structures. In dual system (there are separate committees for management and supervision with different members) management team is not represented on the Supervisory Board (Donaldson & Davis, 1991). The combined system prevailing in most of Northern Europe, the presence of management in the Board is very limited, often to the Chief Executive. In Sweden the governance code stipulates that the Chief Executive should be the only executive to join the Board.

2.4. Separation of functions of the Board' chairman and of general manager

Influence of management on the Board reaches its peak when the CEO is also chairman of the board. Conversely, when the Chairman of the Board is a non-executive member, the Council management influence is reduced. This is the governance models that describe an Executive Committee (Directorate).

USA and Great Britain, although they have similar structures of ownership, they have a different representation profile on the Board. In the UK, Chairman of the Board must be independent of the executive team (he is non-executive) or by any shareholder. In the USA it is desirable that the Executive Manager to fulfill the functions of chairman of the board (Felton, 2004). In the United States the Chairman of the Board a member also of the management team, is prone to favor executives "friendly". In the UK, Chairman of the Board is an independent member, not related with the management team and as such has the inclination to favor other independent members who can assist and help the careful supervision of company's management.

Companies that have separated the two functions have concluded that it was not profitable, as the new CEO had to organize changes encountering non-collaboration from the Chairman. Similar problems have occurred even though it was renounced to the chairman position in favor of the CEO one, as the current board of managers will continue to see the CEO, as the right leader of the company or CEO does not accept orders from the new chairman. So the problem of separating the roles of CEO and Chairman of the Board of Directors still seems one unresolved, and the existence of duality or conversely separation of roles can have both rather positive effects on the

performance of listed companies (Finkelstein & D'Aveni, 1994, Lipton & Lorsch,1992). Both theoretical and empirical studies are not conclusive about the best solution: the positions of CEO and Chairman of the Board of Directors to be held by one person or two different people. In our country, regulators and investors recommended separation of CEO and Chairman have become stronger and furthermore. The study's conclusions do not provide a clear answer to the question of the early research.

2.5. Nomination, remuneration and audit committee

A good practice of corporate governance is the existence of advisory committees: Nomination Committee, to carry out the selection process and make recommendations to the Board on the appointment of executive and non-executive members, the remuneration committee, which reviews, reports, advise, makes recommendations and assists the Board of Directors in fulfilling its duties and responsibilities relating to remuneration policy and, in particular, advises and monitors remuneration, bonuses and benefits of members of the Executive Committee, the Audit Committee, which reviews, reports, advise and assists the Board in fulfilling its duties on internal control, compliance and auditing, as well as on the quality and performance of accountants and internal auditors of the company, the veracity of financial information.

From the sample consisted of 14 countries which were selected to observe that the most majority have established regulations regarding the establishment of three committees, with slight differences in the composition (Figure 4):

Corporate governance models suggest other mechanisms and authorities in the areas of audit / control. Thus:

Portugal and Italy require a Board of Auditors, whose power exceeds that of the audit committee. Board of auditors monitors the management company's members; company's management, internal control, accounting system practiced and if it complies with the law, and serves to protect the interests of shareholders.

Furthermore it is proposed the implementation of a High Committee – for the supervisory of code governance application in France and of a Compliance Committee as part of the audit committee, in Spain, which are designed to check whether companies comply with corporate governance codes.

For other countries such as Great Britain, France, Greece, Austria, Bulgaria it is recommended the introduction of a code of ethics for members of management structures, by which they are obliged to respect the rights of shareholders and to ensure their fair treatment, before accepting the position, so that the manager must ensure that he is familiar with general or specific obligations in relation to this position (Gillan, 2006). In particular, they should familiarize themselves with the laws and regulations of the company.

CONCLUSIONS

The importance of corporate governance is given by implementing clear management structures for ensuring fair treatment of all shareholders, including the minority, through transparency of communications to them, an active and effective

communication. It is necessary for the corporate governance to bring principles and recommendations regarding the rights of other involved parties - stakeholders. It is necessary for any company that wants to respect the principles of corporate governance to oversee through the Board or Supervisory Board, the executive management, rigorous and transparent to elect board members of Supervision Board / Board and Audit, Nomination and Remuneration Committees and to resolve conflicts of interest, related-party transactions. All these recommendations, principles needed to protect shareholders, to maximize the value of shareholders' wealth, to create a positive image on the capital market in order to bring stability in attracting financing through capital markets.

Romania, in order to accelerate the implementation of corporate governance, has been involved in round-table discussions that led to the Stability Pact for South - East Europa and White Paper on Corporate Governance in South Eastern Europe, as the foundation of corporate governance model.

I believe that the principles of corporate governance set out in the OECD (Organization for Economic Cooperation and Development) are provided as standard, but each country should define its own code of corporate governance, according to the specific culture of economic, organizational, property system, state intervention in the economy, financial and capital market etc.

REFERENCES

[1] Aste, L.J., (1999). Reforming French Corporate Governance: A Return to the Two-Tier Board? T*he George Washington Journal of International Law and Economics*, 32, 1-72.

[2] Davis JH, Schoorman D, Donaldson L., (1997). Toward a stewardship theory of management. *Academic Management Rev,iew* 22(1):20–47.

[3] Donaldson, L., Davis, J., (1991). Stewardship theory or Agency theory: CEO governance and shareholder returns. *Australian Journal of Management*, 16 (l), 49-64.

[4] Felton, R., (2004). How to separate the roles of chairman and CEO.*The McKinsey Quarterly*, No. 4.

[5] Finkelstein S, D'Aveni RA., (1994). CEO duality as a double-edged sword: how boards of directors balance entrenchment avoidance and unity of command, *Academic Management Journal*,37(5):1078–108.

[6] Gillan, S. L., (2006). Recent developments in corporate governance: An overview, J*ournal of Corporate Finance*, 12(3), 381-402.

[7] Holderness, C., Sheehan, D., (1988). The role of majority shareholders in publicly held corporations: An exploratoryanalysis. *Journal of Financial Economics*, 20, pp. 317-346.

[8] Jensen, M., Meckling, W., (1976).Theory of the firm; managerial behaviour, agency costs and ownership structure., *Journal of financial Economics*, 305-360.

[9] Lipton M.,Lorsch J.W., (1992). A Modest Proposal for Improved Corporate Governance. *The Business Lawyer* 48, No.1 (November 1992).

[10] Lorsch, J. W., MacIver, E.,1989, Pawns or potentates: the reality of America's corporate boards. Boston: *Harvard Business School Press.*Main şi Johnston

[11] McConnell, John J., Henri Servaes, (1990). Additional Evidence on Equity Ownershipand Corporate Value. *Journal of Financial Economics* 27, 595-612

[12] Rezaee, Z. (2009), Corporate Governance and Ethics. J*ohn Wiley & Sons*, Inc, USA.

[13] Rosenstein, S., Wyatt, J. G. (1990). Outside Directors, Board Independence and Shareholders Wealth,.*Journal of Financial Economics*, 26 (2), 175-191.

[14] Randoy, T., Thomsen, S., Oxelheim, L., (2006). A Nordic Perspective on Corporate Board Diversity. *Nordic Innovation Centre*, Oslo.

[15] Shleifer, A., Vishny, W., (1997). A survey of corporate governance.,*Journal of Finance*, 737-783. Van den Berghe, L., Levrau, A., (2004). Evaluating boards of directors: What constitutes a good corporate board? *Corporate Governance: An International Review,* 12, pp. 461-478.
[16] Weir C, Laing D., (2001). Governance Structures, Director Independence and and Corporate Performance in the UK, *European Bussines. Review.,* 13(2): 86-95.
[17] Austrian Code of Corporate Governance (Revised July 2012), Austria, July 2012
[18] Bucharest Stock Exchange Corporate Governance Code, Romania, 22 January 2009
[19] Bulgarian Code for Corporate Governance, Bulgaria, February 2012
[20] Cadbury Report (The Financial Aspects of Corporate Governance), United Kingdom, 1 December 1992
[21] Código de Buen Gobierno, Spain, 26 February 1998
[22] Corporate governance code of listed corporations (Revised June 2013) June 2013
[23] Corporate governance for Belgian listed companies (The Cardon Report), Belgium, December 1998
[24] Corporate Governance Policy, Sweden, 26 October 2001
[25] German Corporate Governance Code as amended 13 May 2013, Germany, 13 May 2013
[26] Greenbury Report (Study Group on Directors' Remuneration), United Kingdom, 15 July 1995
[27] Hampel Report (Final), United Kingdom, January 1998
[28] Principles of Corporate Governance 2012, USA, 27 March 2012
[29] Principles of Corporate Governance, USA, May 2002
[30] Principles on Corporate Governance in Greece: Recommendations for its Competitive Transformation, Greece, October 1999
[31] Recommendations on Corporate Governance Portugal, November 1999
[32] Report & Code of Conduct (The Preda Code), Italy, October 1999
[33] Statement on Corporate Governance, USA, September 1997
[34] The 2009 Belgian Code on Corporate Governance, Belgium, 12 March 2009
[35] The Combined Code: Principles of Good Governance and Code of Best Practice, United Kingdom, May 2000
[36] The Nørby Committee's report on Corporate Governance in Denmark, Denmark, 6 December 2001
[37] Vienot I Report France, June 1995
[38] Vienot II Report, France, July 1999
[39] http://www.oecd.org/corporate/oecdprinciplesofcorporategovernance.htm

LAW

CONSIDERATIONS ON THE THEFT OFFENSE IN REGULATION OF NEW CRIMINAL CODE AND ASPECTS OF COMPARATIVE LAW

Monica BUZEA
Alexandru Ioan Cuza University of Iaşi
Iaşi, România
The Faculty of Juridical, Social and Political Studies, Dunărea de Jos University of Galati
Galaţi, România
monicabuzea@yahoo.com

Abstract: *Known as one of the most common crimes encountered in all times and in all legislation, the crime of theft was changed following the entry into force of the new Criminal Code in order to adapt on the one hand the contemporary realities in which the object and how commit, and the perspective offered by the criminal provisions of other states.*
Keywords: *theft, criminal code, comparative law*

Acknowledgement*: This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resourses Development 2007-2013".*

1. INTRODUCTION

Known since the classical era of Roman law concept of theft, furtum was defined as the taking of another's thing, with the intention of winning (Hanga V., Jacotă M., 1964, pp.334). Under Title II of the Romanian Criminal Code, entitled "Offenses against the patrimony" through a group of similar crimes Romanian Penal Code of 1936, the first chapter deals with the offense of theft, the main act of the category aimed at theft of goods.

And other European criminal codes stipulate the offense of theft, included in different categories as diverse classification criteria are used, for example in the French Criminal Code, adopted by Law no. 92-683 of 22 July 1992 and entered into force on 1 March 1994, with subsequent amendments, is in Book III entitled "Crimes and offenses against property" title "Misappropriation of goods"; Italian Penal Code is contained in Title XIII entitled " Offenses against the patrimony " in the category with violence against property or persons; the German Penal Code of 1871, as amended, is contained in Section 19 - "Theft and taking of goods"; the Spanish Penal Code, adopted in 1995, by Law 10/1995, published in the Spanish Official Gazette no. 281 of 24/11/1995, is contained in Title XIII "Offenses against patrimony and against the socioeconomic order"; Netherlands Penal Code, under Chapter XXII "Theft and robbery"; the Belgian Criminal Code adopted in 1867, with subsequent amendments, under Title IX "Offenses

and delicts against property"; Criminal Code of Kosovo, entered into force in 2004, under Chapter XXIII "Crimes against property".

2. THE BASIC FORM OF THE OFFENSE OF THEFT

With regard to the offense of theft, for the simple form, the new Penal Code has kept the contents of the previous Criminal Code, is maintained and punishing the offense committed by the holder of the asset belongs wholly or in part against the one who has possession or legitimate detention of goods. Changing made had in consideration the material object by including electricity, to avoid discussions existing judicial practice (C. Voicu, et. Al, 2014, pp. 376).

The sanction provided is milder than that of the previous Criminal Code, with limits between six months and three years or a fine, beside 1 to 12 years in prison.

As we mention, the French Criminal Code, under Chapter I of Title I define in the art. 311-1 a simple theft as fraudulent stealing of thing that belongs to another, assimilated form of energy theft under Article 311-2.

In art. 624 of the Penal Code Italian incriminated the offense of theft, assuming that the theft of movable good witch belongs to another man's and causing a property damage, unlike Romanian legislation for the specific purpose of obtaining a profit for himself or for another. Is incriminated also the stealing electricity or other energy with economic value.

German Penal Code § 242 punished in a similar way Romanian law, the offense of theft as taking without right of a movable in the possession of another person, with intent to get it for himself or give it a third parties. Similar Romanian Criminal Code, crimes provided by § 289 refers to the unlawful taking of a good deed that the person steal illegally, his moveable property or other person in favor of the owner of the property, from a usufructuary, a Pawn creditor or if another person has the right to use or retain the object.

In the Spanish Penal Code, art. 234 is sanctioned theft as a person who, to obtain a benefit, take another's movable property without the consent of their owner, and the owner who steal being penalized a movable found in legitimate possession of a person, causing injury to him or to a third, according to art. 236.

Unlike the Romanian Criminal Code, Articles 237-242 in the Spanish include forms of theft committed with violence. The definition of this offense or act of one who, to make a profit, take possession of movable property belonging to others using force to accede to where they are, violence or intimidation of persons, indicate the two situations envisaged the use of force to achieve a good or on the person.

The concept of force does not coincide with grammatical meaning, it is irrelevant whether they are used directly to acquire goods or if the idea of taking is posterior, for example when after climbing a hurdle, to recover a ball that fell, the authors take and some goods (Cuesta, 2010, pp. 151).

In the current discussions on the robbery committed by exercising violence over the asset continues to keep its currency, based on interaction with the injured person's

body (Bodoroncea G. et. Al, 2014, pp. 477), which is regulated at European level and sanction situations aggravated forms of theft, such as for example the Italian Criminal Code, the Criminal Code of Kosovo (Buzea M., 2014, pp.263-268).

3. AGGRAVATED THEFT

It is provided in art. 229 amendments set by legislators are considering giving up some aggravating circumstances, such as by committing two or more persons, against a person who was unable to express their will or to defend, a public place during a disaster, theft an act that serves to legitimize or identification, with the argument that they are embodied with the same content or similar one legal category of aggravating circumstances provided for in art. 78 Criminal Code.

Like new aggravating circumstances were foreseen committing the disablement of alarm or surveillance system, since many properties are equipped with such systems and the committed by trespassing or professional office, on which there non unitary jurisprudence in relation to its absorption in case of committing theft, burglary or escalation (Explanatory Memorandum to the new Criminal Code, pp. 28-29).

Has been dropped also at the criminalization of the offense of theft committed in a public place, considering that it does not show a high degree of social danger and that it would shall lead to forfeiture of almost all situations as qualified forms of the offense of theft (Cioclei, 2011, pp.64). Not stipulates punishment as a form of theft that has produced qualified serious consequences.

For all forms qualified penalties are reduced compared to the current regulation, and theft committed in the circumstances provided for in paragraph 1 to 1-5 years to 1-12 years in the current regulation, and theft committed in the circumstances provided for in paragraph 2 2-7 years to 3-15 years in the current regulation, and theft committed in the circumstances provided for in paragraph 3 to 3-10 years to 4-18 years in the current regulation.

By comparison, other legislation criminalizing same or similar qualified forms with the existing Romanian criminal law (Penal Code. Italian - theft committed by entering into a building or in another place intended, in whole or in part, private housing, if the author is carrying weapons or drugs without using them, if the act is committed by a person disguised or simulating an official capacity or by a person entrusted with a public service; French Penal Code: theft committed in a place that is serving as a home or used or intended for storage of money, values, goods or materials agent being introduced into these places through cunning, burglar or escalation; theft committed in a common vehicle for transport of persons; theft preceded, accompanied or followed by acts of destruction, degradation or deterioration, theft committed by a person who voluntarily hides his face in whole or in part to avoid being recognized) or features (for example, the Penal Code Italian- the use of violence or the use of things any other fraudulent means, the act skillfully; French Penal Code - theft committed by a person holding the public authority responsible for providing a public service, while exercising or during performing their functions or services or who falsely attributed such quality; theft preceded, accompanied or followed by violence against neighbor, punished more

severely when he caused a disability, it resulted in the death of the person, torture, barbarity, theft or committed on the grounds of belonging or not belonging, real or alleged, victim to an ethnic group, a race, a particular religion or their sexual orientation, committed theft in schools or education, or entering students out or very close to this moment).

4. THEFT FOR THE PURPOSE OF USE

The legislature chose the alternative of incrimination in a separate article, namely 230, theft for the purpose of use, milder sanction than the one committed with the purpose of acquiring unjustly. In addition to how existing in the previous legislation, the theft of a vehicle for the purpose of unjustly use (sanctioned however with a lesser penalty, reduced by one third compared to that provided for the simple or qualified form), was introduced a new variation by using a communication terminal which belong to other or an electronic communications terminal, unjustly connected to a network, if there was a loss.

As regards theft for the purpose of use of a vehicle, similar regulations are contained in the German Criminal Code, § 248 lit. b, which provides the offense consisting of unauthorized use of a vehicle, i.e. the act of one who takes a vehicle or bicycle use, without the consent of the rightful person, which seeks to prior complaint.

And article 244 of Chapter IV of the Spanish Criminal Code penalizes theft or use without authorization of a motor vehicle or motorcycle stranger, with no intention to master it, if the property is returned within a period that not exceeding 48 hours, without a penalty imposed that may be equal to or greater than the penalty imposed for the definitive acquisition of the vehicle. If restitution is not performed in the term provided, the act is sanctioned offense of theft or theft with use of violence, as appropriate.

Thus, contrary to Romanian legislation, the Spanish set certain criteria to make the distinction between theft in the base form and theft of use, respectively within 48 hours and includes the situation in which a person uses a vehicle received in custody for repairs, that law does not find a previously qualified as an act of appropriation (Cuesta, 2010, pp.157-158). Under the new Romanian Criminal Code, this last variant constitutes the offense of breach of trust, provided in art. 238, the new way of committing crime by using, without authorization, a good entrusted under a title for a particular purpose.

In the second new introduced hypothesis, arguments considered by the legislature aimed at problems in the judicial practice in order to resolve controversies, starting with the illegal connection of a telephone network and a cable network at an internet network, regarding qualification of energy concept with economic value, in terms of an increase numerical value (Explanatory Memorandum to the new Criminal Code, pp. 28-29).

From this perspective, in terms of electricity theft and others analogous, Spanish criminal law is among the most detailed, with provision in art. 255-256 Spanish Criminal Code offenses committed in this way, punishable can`t be greater than or equal to that provided for the definitive acquisition of the property.

Throughout the French Criminal Code there is a distinct criminalization of the theft of use, it is considered as a form of burglary, estimating that, temporarily, the holder

behaved towards good as would have been the owner (D. Auger, 2005, pp.46), but was distinct incriminated stealing electricity.

Considering the absence of an objective criterion in order to delimit the scope of use of that appropriation, examining only the existence of the subjective criterion of the restitution intention of the good, legal doctrine has proposed the waiver of the provisions article 230 Criminal Code (D. Dinu, MK Guiu, 2015, pp.136-154)

5. THEFTS PUNISHED AT THE PRELIMINARY COMPLAINT AND RECONCILIATION

In article 231 Criminal Code provided for thefts between family members, in the sense of article 177 of the Criminal Code, by a minor against the tutor or the person who lives with person or hosted by the injured person, which are punishable only upon the complaint of the injured person.

The provisions of other European legislation containing special provisions, however limited, unlike Romanian law to a more restricted category appreciated as minor thefts, e.g. Italian Criminal Code penalizes at the preliminary complaint the theft of the use and theft of common property, provided by article 627, which refers to stolen goods of the part owner, the coheir or the partner from the things common property and the German Penal Code provides that where goods, subject to theft or appropriation offenses provided at article 242 and article 246, have a reduced amount, criminal proceedings shall be initiated only upon prior complaint, if the prosecuting authority not deems it necessary to intervene to protect public interests.

Regarding the offenses provided by article 228, article 229 para 1, para. 2 letter b, c and article 230 of the Criminal Code, reconciliation of the parties removes criminal liability.

From this perspective the report and the new concept of Romanian legislator on individualization of criminal judicial punishment, reflecting the harmonization of European legislation, following the consecration of new institutions, abandonment of the application of the punishment and the continuance of the application of the punishment and the principles of humanism and individualisation of criminal law and personalization of the criminal sanctions (R. Panaite, 2014, pp.689-695), reveals that for the offense of theft the enforcement regime is more gentle, with application including to a reconciliation institution for most of the forms provided.

References

[1] Auger D. (2005), *Droit de propriété et droit pénal*, (pp.46) Presses Universitaires D` Aix-Marseille, Faculté de Droit et Science Politique;

[2] Bodoroncea G, Cioclei V., Kuglay I., Lefterache L.V., Manea T. Nedelcu I., Vasile F.M. (2014), *Codul penal.Comentariu pe articole (*pp.477*)*, Location: C.H. Beck, Bucureşti, 2014;

[3] Buzea M. (2014), *Protecţia penală a posesiei* (pp. 263-268), Location: C H Beck, Bucureşti;

[4] V. Cioclei (2011), *Drept penal. Partea specială. Infracţiuni contra patrimoniului* (pp.64), Location: C H Beck, Bucureşti;

[5] Duică D., Guiu M.K., Aspecte controversate privind infracţiunea de furt, *Revista Dreptul 1/2015*, pp. 136-154;
[6] Expunerea de motive a Proiectului noului Cod Penal, http://www.just.ro/Portals/0/Coduri/Coduri_230609/CP%20-%20GUVERN%20-%20Expunere%20Motive%20-%2011.06.2009_FINAL.doc;
[7] V. Hanga, M. Jacotă (1964), *Drept privat roman* (pp.334), Location: Editura Didactică şi Pedagogică, Bucureşti;
[8] J. M. Luzón Cuesta (2010), *Compendio de derecho penal. Parte especial (*pp. 151; pp. 157-158), Location: Dykinson S. L., Madrid;
[9] Panaite R. (2014), Noua concepţie a legiuitorului penal român privind individualizarea judiciară a pedepsei-expresie a armonizării legislaţiei penale române cu legislaţiile europene, *Uniformization of the law- legal effects and social, political, administrative implications, International Conference Proceedings* (pp. 689-695). Location: Hamangiu, Bucureşti.
[10] C. Voicu, A.S.Uzlău, R. Moroşanu, C. Ghigheci (2014), *Noul Cod penal. Ghid de aplicare pentru practicieni* (pp.376), Location: Hamangiu, Bucureşti;

THE RIGHT TO A PRIVATE LIFE AND THE FORMS OF PROPERTY VIOLATION IN COMMON LAW

Smărăndiţa-Elena CIUDIN-COLŢA
Faculty of Law, "Alexandru Ioan Cuza" University of Iaşi
Iaşi, Romania
smarandaro@yahoo.com

Acknowledgement*: This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resourses Development 2007-2013*

Abstract: *A major part of the legal provisions regarding servitudes is originated in the contractual approaches, established by the middle of XIX-th century in England and in the United States of America, when people attempted to avoid the onerous rules concerning the transfer of property rights. This document approaches the tight connection between servitudes, as limitations of property rights` exertion, the right to a private life and the forms of trespassing and nuisance. Although the latter ones, as forms of interfering with property rights, appear to be similar, they are characterised by several elements that distinguish one from the other. The fact that, in certain cases, the matter of public interest is being raised in order to justify a private activity, that interferes with a private property, represents a challenge for the courts, as they are in a less comfortable position when to decide the person who will have to bear the losses.*
Keywords: *servitude, real covenants, equitable servitudes.*

1. PRELIMINARY CONSIDERATIONS ON THE NOTIONS OF "REAL COVENANTS" AND "EQUITABLE SERVITUDES"

Denominations such as "easements", "real covenants" or "equitable servitudes" are used so as to design the category of interests specific to the "servitudes", which offer to the holder "the right of using or averting the use of a property, property that he does not manage and he does not possess" (e.g.: the right to cross the neighbor's field).

Some theoreticians assess servitudes as representing non-possessory interests related to the property, explaining this argument by reference to the situation of the railway companies or those whose object is pipe fitting, and which succeed to establish their itineraries through the acquirement of such servitudes.

The distinction between possessory and non-possessory interests is based on the general or special nature of the interest manifested by the holder. Therefore, the rented properties constitute an example of possessory interests regarding the property, as the rent involves a general right of user, while servitudes, as non-possessory interests, involve a particular right of user, specially determined or limited [1].

Most of the servitudes recognized by the common law system were rather affirmative than negative.

In the English law, the negative servitudes were limited to five types: light, air, lateral support, subjacent support servitudes and servitudes regarding the discharge of an artificial watercourse. Affirmative servitudes are those who let visible signs on the property while negative servitudes do not let such marks, situation which can determine displeasing surprises regarding the legal situation of the field to the subsequent purchasers.

It is assessed that the limitation of the category of negative servitudes is due to absence of a recording system of such servitudes in England.

The denomination of "real covenants", in Romanian "promisiuni reale", has its roots in the promises regarding the "land is real property", promises inserted in the contracts signed between the parties.

"Equitable servitudes", in Romanian "servituţi în echitate", denomination used by the English High Court of Chancery, known as "the Court judging in equity", originates from the civil law tradition and to a smaller extent from the common law system, designating certain rights offered to a person, of using the field that he does not manage and he does not possess.

The term of "servitude" is used nowadays so as to designate both "real covenants" and "equitable servitudes", the term deriving from the civil law and not from the common law.

Nowadays, there are a lot of common points between the two notions, their merger into one concept only, that of "servitude" being preferred.

2. THE RIGHT TO A PRIVATE LIFE

"The right to confidentiality" or "the right to intimacy" are notions hard to define.

The common law system hardly acted with regard to the definition of the notion of "private life", so that the instances were inevitably influenced by the provisions of art 8 of the European Convention on Human Rights, "the right to respect for his private and family life", according to which "1. Any person has the right to respect for his private and family life, for his home and correspondence. 2. The involvement of a public authority in the exercise of this right is only admitted if stipulated by the law and it constitutes, in a democratic society, a necessary measure for the national security, the public safety, the economic welfare of the country, the defense of the order and the prevention of the criminal acts, the protection of the health, ethics, rights and freedoms of the other" [2].

The most significant incursion with regard to the definition of the right to a private life, in the United Kingdom of Great Britain, is represented by "Calcutt Report" of 1990 [3], which, even if it concerned first of all the right to self-determination of the media, a key role was occupied by the question regarding the violation of the right to a private life. This right was defined as representing the antithesis of what is "public", respectively the aspects regarding the individual dwelling, family, religion, health, sexuality, "legal and financial business" of the individual. The French laws adopt, in general, this approach.

Calcutt Report defined the right to a private life as representing individual's right of being protected against any intrusion in his life or in his own business, or in his

family's business, intrusion which can be performed through direct fixed means or through the publication of information.

On the historical axe of transformation of the legal rule, the English laws do not stipulate special protections for the right to a private life. Such protection was accidentally granted by means of the actions sanctioning trespass, nuisance, denigration or passing off.

3. "TRESPASS TO LAND"

"Trespass to land" represents an insubstantial interference in the possession exercised by a person on a field.

We must notice that, for historical reasons, the prejudice is attached to the possession and not to the property right on the field, the intrusion having to be direct.
For instance, if a person throws stones on a field belonging to another person, the former commits "trespass", but if the same person allows the growth of the branches of his trees on the neighbor's field, this situation is called "nuisance" and the prejudice has to be proved.

"Trespass to land" was one of the first actions appearing in the common law system. Several cases reaching before the Courts and regarding trespass to land presented disputes between neighbors. Such cases which regarded mostly property bordering, could involve several legal complications, especially in the existence of older assignments, situations classified as being extremely time consuming.

It is deemed that, in case of trespass to land, the prejudice produces *per se,* so as the claimer is not obliged to prove the prejudice to the field, being essential the fact that such violations are deemed to be intentionally produced by the defendant.

There are several forms of trespass to land: through the entrance to the field belonging to another person, through remaining on the field and through placing objects on such field.

In all this cases, there is no legal ground for the manner of acting.

3.1. Trespass to land, exercised through the entry without having the right

The smallest violation of the border between the properties shall be deemed sufficient so as to retain a trespass, such as, for instance, placing one hand on a window or supporting a ladder from the wall belonging to another person (*Westripp v Baldock* [1938] 2 All ER 799) [4].

This form of trespass can also be committed through the abusive exercise of the right of entering on another property. Therefore, a person who used the road for other purposes than passage is deemed to have committed a violation of the property right, exercised by his holders, on the subsoil.

The entry on another property can be performed above or through the subsoil of the concerned field, but also through the above-ground space concerning the field.
The notion of "land" is defined, according to the Law of Property Act 1925, as being the "Land of any tenure, mines and minerals, corporeal and incorporeal hereditaments").

It includes any building or elements attached to the field, the above-ground space concerning the field and the subsoil.

With regard to the above-ground space, it was deemed, in the case *Kelsen v Imperial Tobacco Co Ltd* [1957] 2 QB 334, that the defendant committed trespass as he allowed the display of a high dimension advertisement interfering with claimant's property, at soil level and immediately above soil level.

3.2. Trespass through remaining on the field occurs when the right of entry in that location ceases.

Within these conditions, the refusal or the omission of leaving the field constitutes "trespass".

If the person entering on someone else's property is empowered by an authority, according to the law, and if he abuses from the granted capacity, he shall be treated as a "trespasser" from the moment in which he entered to that particular property (*The Six Carpenters Case* (1610) 8 Co Rep 146).

This type of violation is deemed "trespass *ab initio*" and it does not apply if the defendant entered with the permission of the occupant, even if he did not have the authority conferred by the law.

3.3. The third form of "trespass" concerns placing different objects on someone else's field.

In the case *Holmes v Wilson* (1839) 10 A & E 503, the defendants built a bridging so as to prevent the submergence of a road.

For its performance, it was necessary to use claimant's field, the latter suing them and recovering his prejudice. Nevertheless, the defendants did not eliminate the bridging, so they were sued again. Even if they stated that the action is prescribed, their defense was not taken into consideration, as it was deemed that it was a continuous violation, which persisted over the entire duration of the work on claimant's field.

This action – "trespass to land" belongs only to the person possessing the field.

The granted concession right, e.g. for building a construction shall not be a sufficient proof of the possession, which justifies action promotion. The holder of the field shall not bring the action of trespass while the possession belongs to the tenant.

4. "NUISANCE"

Defined as a property violation too, the notion of "nuisance" is used for the situations in which this property violation is indirectly performed. There are three types of such actions: statutory nuisance, public nuisance and private nuisance.

With regard to the first category, statutory nuisance, a number of actions based on such violations was created through different statutes, mostly *ad hoc*, and they generally appeared as a pressing social need. Several actions of this type were created through the Public Health Acts of 1845 and 1875, or through Clean Air Act of 1956, Control of

Pollution Act of 1974, respectively Clean Neighborhoods and Environment Act of 2005, the latest containing provisions regarding environment quality improvement.

Such actions are made available to the local authorities, who intervene when the injured persons formulate a complaint with regard to the prejudices suffered and which can be the result of the noises or noxae.

The public nuisance has the nature of a crime.

The Court defined the public nuisance as representing that violation affecting the reasonable comfort and life quality of a category of the subjects of His Majesty, the activities of the defendant being therefore classified.

The common feature between the public nuisance and the private nuisance is deemed to be the requirement for the observance of the comfort and life quality degree.

The private nuisance designates those situations of illegal interference with the right of a person of using and enjoying of his field or any right in relation to the previously mentioned person. We talk about a continuous, illegal and indirect interference with another person's right of enjoying of his field, the proof of the prejudice being necessary.

The temporary construction works can lead to nuisance, but the constructors shall not be responsible if they prove that they have taken all the measures so as to avoid causing prejudices to the neighbors.

We must notice that, if the prejudice is mostly the consequence of a high degree of "sensitivity", characteristic to the property of the claimant and to a smaller extent the consequence of defendant's attitude, we assess that no nuisance is committed.
Nevertheless, if the normal use of the field was affected by the activities developed by the defendant, the action shall be admitted.

In the case *McKinnon Industries v Walker* (1951) 3 DLR 577, a culture of orchids was affected by the smoke resulted on the neighbor's field, and, even though the plants were unusually delicate, the claimant won motivating that inclusively the common plants, in those circumstances, would have had the same destiny.

So as to establish the existence of a prejudice, the claimant must prove a substantial interference in his right of using and of enjoying of the field, case in which the Court shall enforce the equity criterion, taking into account at the same time a range of elements, such as: interference duration, sensitivity degree of claimant's property, public utility nature of the activity developed by the defendant or the dishonesty of the defendant.

5. CONCLUSIONS

With regard to the invocation, by the defendant, of the public interest reason, which would justify the development of his activity, besides the prejudice caused to the claimant, the traditional opinion is that the public interest is irrelevant in the private rights matter and, as a consequence, it shall be ignored.

On the other hand, the modern opinion launched in this matter is more nuanced, so that the Court will have to decide the existence or absence of a nuisance, taking into

account the public utility. In such cases, it is essential to establish the person who shall bear the losses.

Consequently, in order to establish the existence of a prejudice, the claimant must prove a substantial interference in his right of using and of enjoying the field, case in which the Court shall enforce the equity criterion, taking into account, at the same time, a range of elements, such as: interference duration, sensitivity degree of claimant's property, the public utility nature of the activity developed by the defendant or the dishonesty of the defendant.

References

[1] Siegel Stephen (2012), *A Student's Guide to Easements, Real Covenants and Equitable Servitudes. Third Edition* LexisNexis, retrieved from https://books.google.ro/books?id=T_loAxRR0XUC&printsec=frontcover&hl=ro&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

[2] European Convention of Human Rights, retrieved from http://www.echr.coe.int/Documents/Convention_ENG.pdf.

[3] Cooke John (2009), *Law of Tort. Ninth Edition*, Pearson Education Limitated, England.

[4] Harpwood Vivienne (2009), *Modern Tort Law- Seventh Edition,* Routledge- Cavendish, Taylor& Francis Group, London and New York.

EXPENDITURES OPERATING: AN EU MODEL ON NATIONAL SCALE

Ioana Maria COSTEA
Alexandru Ioan Cuza University of Iasi, Romania, Faculty of Law
Iasi, Romania
ioana.costea@uaic.ro

Abstract: *Our study assures an overview of the legal framework for operating public expenditure at national level through the European model. The legality of public expenditures depends on the budgetary framework, and on the procedural steps to commit and execute a budgetary credit. The mechanism of expenditure operating is the core of the administrative system, involving management, finances, and public procurement procedures, as well as accounting and auditing.*
Keywords: *public expenditure, commitment, validation, authorisation, payment*

1. INTRODUCTION

The CVAP (commitment, validation, authorisation, payment) procedure is the core of public operating expenditure. The procedure has a budgetary background and specific legal steps. Monetary and patrimonial aspects are rigorously contained in legal framework. The expenditure, as a vital dimension of any patrimony gains in public institutions a significant degree of formalism, with prior and post supervision due to the public source of the finances.

European legal framework is assured by Regulation (UE, Euroatom) 966/2012 on the financial rules applicable to the general budget of the Union, and Commission Delegated Regulation (EU) no 1268/2012 on the rules of application of Regulation (EU, Euratom) no 966/2012 of the European Parliament, and of the Council on the financial rules applicable to the general budget of the Union. National legal framework is given by Law no 500/2002 regarding public finances, and Law no 273/2006 regarding local public finances, with secondary regulations such as Ministry of Public Finance Order no 1792/2002.

These three legal sources create a model for expenditure operating, with common procedural steps. The influence of the European regulation is seen in budgetary legal framework, but also in secondary legislation as procurement legislation, public function legislation. All these legal patterns and limitations tend to ensure a unique model of legality and economy as budgetary aspects are of public interest.

Any expenditure has a legal basis given by budgetary provision and opening of the budgetary credit (Şaguna, 2012, p. 99). The premise of every expenditure is the budgetary credit, "*an authorisation to expend (a legal notion), not to be mistaken for available funds (a material notion)*" (Saidj, Albert, 2006, p. 68). Therefore, the two dimensions are independent and correlate differently to the calendar of incomes (Bene, 2011, p. 21) and the calendar of expenditures.

Law no.500/2002 defines budgetary credit as the maximum limit up to which payments can be authorised and made in the budget year for legal commitments from that budgetary year and/or previous budgetary years. Therefore, the expenditures' dimension of the budget is an aggregate of budgetary credits: a sum dedicated to an annual or multiannual contractual commitment (work contract, sale contract, employment contract) or unilateral actions (scholarships, allowances, co-financing in EU grants). According to article 84, Regulation (EU, Euroatom) no 966/2012, commitments are individual (both beneficiary and amount are known), global (one element, the beneficiary or the amount is unknown) or provisional (intended for European Agricultural Guarantee Fund or administrative expenditures). Budgetary credits are a limited permission given to a specific executive institution. These credits are implemented by the appointed authorising officers for a specific objective, for a maximum amount, and for a certain period of time (Şaguna, 2013, p.100).

Operating expenditures consists in putting the budgetary credits into effect. The procedure is governed by a series of strict rules. The principle of special destination states that the purpose of the approved budgetary credit must be respected and cannot be changed except as provided by law. According to the principle of annuality, the approved budget shall be authorised for the budget year. Budget appropriations approved for a main credit cannot be transferred and used to finance another main credit. Budgetary credits approved in a chapter cannot be used to finance another chapter (Fanu-Moca, 2013, p. 30).

The main activity of the authorising officers is to operate expenditures, according to quarterly planning and management decisions.

2. THE PRELIMINARY PROCEDURE

Expenditures evolve from a written dimension to a material one. The expenditure depends on the opening of the budgetary credit namely the individualisation of the sum to be spent by the authorising officer for/on a certain destination, followed by money transfer. Public money is collected continuously mainly from taxation and deposited in specific accounts for every budget. Depending on expenditure's time schedule correlated to the collected revenue, the accounts of each public institution will be funded (Fanu-Moca, 2013, p. 18). Public Finance Ministry allocates budgetary credits and authorises transfers for main authorising officers; at their turn, the main authorising officers following the administrative hierarchic structure distribute sums at the disposal of secondary and tertiary authorising officers.

Amounts approved for the budget can be used only after credits opening and allocation of funds to public institutions' accounts. Main authorising officer submits to the Public Finance Ministry a written demand to open credits. Approval is granted within budgetary limits settled in the forecasted destinations according to budgetary classification. The latter is featured in correlation with the degree of usage of previously available funds, the collection of revenues, and with budgetary possibilities for financing the budget deficit. After opening the budgetary credit, authorising officers receive amounts of money indicated in the budget, which they are authorized to spend. However,

to ensure budgetary balance, the Government may set limits on monthly expenditure, enabling correlation with the rate of revenue collection (Șaguna, 2013, p. 100).

3. THE CVAP PROCEDURE

The main procedure assures the effective expenditure of the sums individualised in the previous stage. Effective expenditure introduces a value needed in order to insure a public service. The actual expenditure is contained in a legal act, with patrimonial effects, through which a public institution is debtor for a sum, and eventually creditor for an obligation (to receive a good, a service, work, a certain non-patrimonial behaviour).

Public expenditures go through four phases: commitment, validation, authorisation, payment, a pattern confirmed by article 84, par.1 Regulation (UE, Euroatom) 966/2012, article 52 Law no.500/2002, and article 54 from Law 273/2006. These procedures aim to let the public institution use public funds to obtain goods or services, and integrate them in the public service which it strives to provide.

Procedurally, expenditures operating are a highly regulated procedure, in contradistinction to the civil law, where a patrimonies-holder can spend through any legal act with minimal formalities.

3.1. Commitment of expenditures

In the commitment phase, expenditure has both a budgetary and a legal dimension. In order to avoid deficit, budgetary commitment reserves the necessary appropriation of funds destined to cover the subsequent payments and honour legal commitments. Budgetary commitments, according to the awareness of public expenditure elements (creditor, amount, due date) are categorised as individual, global and provisional. The dynamics between provisional and global expenditures is a source of information for the financial preventive control agent in order to establish the actual dimension of expenditure and provide data for future budgets.

Legal commitment is the act whereby the authorising officer enters into or establishes an obligation which results in a charge. Legal commitment generates or establishes a patrimony obligation towards an external person resulting from delivering a good, a works' performance, a service's provision or executing a legal obligation form which results from laws, Government decisions, international agreements or court orders in the limit of budgetary commitments. So, legal commitment can have contractual, legal or judiciary sources (Fanu-Moca, 2013, p.51).

Authorising officers conclude acts (legal commitments), regarding to various legal subjects or regarding various legal subjects, generating legal rapports, which contain patrimony obligations in relation to budgetary funds (budgetary commitments).

All legal commitments are bound to strict regulatory procedures: preventive financial control, previous existence of budgetary commitment, limited funds and limited contractual amendment.

Firstly, the main legal commitment is assured by administrative contracts, concluded under the Govern Emergency Ordinance no.34/2006 and categorized as: public procurement contracts, public works concession contracts and service concession

contracts. Public procurement contracts are extremely important in the budgetary procedure and sustain the administrative framework; they ensure effective exchange between monetary resource and goods or services insured by public authorities. They provide infrastructure for public services: for example, building and equipping a hospital, a highway construction, equipping libraries.

The process of assigning and selecting contractual partners, along with the specific form of the contracts are governed by specific law provisions. (Niculeasa, 2011, p.74). Public procurement contract has three forms: purchase of goods (finding common regulation in the sale or supply contract), purchase of services (with species such as a work contract, tenancy or lease, mandate or other representation contract) and purchase works (construction contract). By definition, these contracts are governed by *ad validitatem* formalism, namely written form, even model contracts (FIDIC), unlike civil regulation, which is governed by the principle of where the rule is concordance and freedom of will.

Such agreements are concluded only by undergoing a tendering procedure, as established by the law provisions meant to render a public contract validly concluded. According to article 18 of G.E.O no.34/2006, procurement procedures are: a) the open procedure, or the procedure to which any interested economic operator is entitled to submit a tender; b) the restricted procedure, or the procedure in which any economic operator is entitled to submit candidacy, but only selected candidates will be entitled to submit a tender; c) competitive dialogue, or the procedure in which any economic operator is entitled to submit candidacy and whereby the contracting authority conducts a dialogue with the admitted candidates in order to identify one or more solutions capable of meeting its requirements, on the basis of which the final offer will be drawn; d) negotiation, a procedure by which the contracting authority carries consultations with selected candidates and negotiate contract terms, including price, with one or more of them; e) call for tenders, namely the simplified procedure whereby the contracting authority requests tenders from several operators (Niculeasa, 2011, p.81).

Tendering procedure in any of its forms is public, transparent and competitive. Grounds for contracting are given by documentations, made public on national (SEAP) or European (TED) platforms. Specific legal measures ensure access of economic agents to public contracting on the basis of free competition, transparency, equal treatment, confidentiality and impartiality. These regulations do not apply on civil contracts, where contractors' freedom allows preferential agreements, within theory of fraud limits.

The tendering process has an objective outcome, as public procurement contracts will be concluded with the entity submitting the best offer; both public and private interests are served, as public entities spend the minimum amount for maximum benefits and private entities have unlimited access to contracting.

Secondly, legal commitments take the form of employment contracts or administrative acts of appointment. These legal commitments ensure personnel expenditure operating, including a series of legal rapports, through which a natural person provides a lucrative activity for a public institution. For some domains of public intervention, the legal form is a labour contract, ensuring personnel in medical care, education, social assistance. Legal rapports are governed by Law no.53/2003 regarding

Labour Code, with sector regulation as Law no.95/2006 regarding the reform in medical sector or Law no.1/2014 regarding education.

For the core administration, the legal form is appointment as a civil servant in accordance with Law no.188/1999 on the statute of civil servants. These provisions are applicable to any public entity presidential administration, ministries, special services, any territorial public function. For certain services and public functions are organized by law specific legal forms: magistrates, soldiers, dignitaries.

In all these hypotheses, the budgetary mechanism is identical; natural persons are part of a bilateral legal rapport, with successive performance, in which, as consideration for their work, receive a salary, remuneration, compensation from budgetary resources.

These procedures also require advertising and transparency in the selection of staff, usually done on a competitive basis. The peculiarity of these ratios derives, on one hand, from the nature of the work performed and, on the other hand, from the payment regulation. In the public system, remuneration shall be made in legal limits under Law no 284/2010 regarding the unitary remuneration of personnel paid from public funds, and not as an element of the contract negotiation.

Thirdly, in some cases, a public institution assures a public service directly through the remission of a certain amount of money to the beneficiary (scholarship, allowance, compensations). In this context, legal commitment does not correspond to a contract (in the traditional sense, although a form of covenant is generated When the beneficiary applies for the service, the public institution verifies the fulfilment of legal requirements and, where appropriate, decides to grant that benefit by decision of the authorizing officer following an internal selection process or reasoning.

3.2. Validation of expenditures

Validation of expenditure is the operating expenditure phase where the authosiring officer verifies the existence of the creditor's entitlement, determines or verifies the reality and the amount of the obligation to pay, and checks the conditions in which the payment is due, according to article 88 from Regulation (EU, Euroatom) no 966/2012, article 2 par.33 Law no.500/2002 and article 2 par.41 Law no.273/2006. Following this process, the claim on the budget is certain, liquid and due.

Executing the legal commitment will generate patrimonial obligations for the public institution, according to contractual or legal time-flow.

For contractual commitments validation means, firstly, performance by the contractor (goods were delivered, work is delivered etc.) (Tabară, 2009, p.103). Simultaneously with the performance, the contractor shall issue and confirm records that prove fulfilment of its own obligation. Underlying validation of expenditures are documents certifying delivery of goods, performance of works, provision of services (Şaguna, 2013, p. 100). Typically, the document recording the public institution’s obligation is the invoice issued by the private entity (other written evidence could be: reception note, reception minute, time-sheets, minutes of installation and testing based on the nature of the good or service and contract terms). According to the facts of these documents, the authorizing officer will confirm quality and compliance in relation to

contractual conditions. Expenditure validation is give through the mention: *good to pay* made by the authorising officer on documents attesting compliance. Thus, public institution owes a certain, liquid and due obligation (Postolache, 2013, p.72).

For unilateral commitments, expenditure's validation is difficult to distinguish from expenditure's commitment. Once the payment decision is prepared, validation requires supplemental verifications only for successive benefits when each payment is assured, and only if conditions that underpinned this obligation subsist (paying allowance if the child still attends academic formation). If conditions subsist, authorising officers will make the mention *good to pay*, which will lead to confirmation of certain obligations.

A procedural variable is given by the nature of the benefit, singular or repeated. If enforcing *uno ictu* provisions, validation is done at the time of full implementation. If enforcing successive acts, validation will be repeated at every interval of performance (pensions, allowances, utilities bills).

Regarding the certain, the liquid and the due nature of the obligation, a series of clarifications are necessary. The claim of the private entity versus the public entity is certain, meaning that it is certain to be due; this certainty comes from the application of the exception for non-performance reinforced in the budgetary commitments. The budget revenues are forbidden to be spent in advance (with low percentage exceptions), so the performance by the contractor and validation of the conformity of the previously mentioned performance allow the public institution to regard the price as due. Secondly, the claim is liquid, meaning that the precise amount is set. An expense knows several dimensions: provisional estimate in the budget, limited credit opening (90% of previous), and estimate price for the contract concluded by the parties (which may not exceed the budget estimate for opening credit, but that may be below this ceiling). Compared to these estimates, the debt is liquid when supporting documents determine the actual amount of the duty. Equally, the claim is due, since performance may be required.

3.3. Authorisation of expenditures

Authorisation of expenditure is the operating expenditure phase where the authorizing officer instructs the accounting officer by issuing a payment order, to pay an amount of expenditure which the authorising officer responsible has validated, according to article 89 from Regulation (EU, Euroatom) no.966/2012, article 2 par.34 Law no.500/2002, and article 2 par.43 Law no.273/2006. Based on a certain liquid and due obligation, authoring officer issues payment authorisation. Payment authorisation is an act of financial law, a public institution's internal act by which the authorising officer instructs the accounting officer to extinguish financial rapport and draw up payment instruments (Şaguna, 2013, p.101). Payment instruments are the documents that allow Treasury or, in some cases, institution's cashier, to hand over the amount in question. The legal form most commonly used is the order of payment, as the sums are deposited in Treasury accounts and cash payments are limited by law.

3.4. Payment of expenditures

The payment of expenditures is the operating expenditure phase representing the final act, where public institution pays its obligations to third parties, according to article 90 from Regulation (EU, Euroatom) no.966/2012, article 2 par.35 Law no.500/2002, and article 2 par.44 Law no.273/2006. These payments seal budgetary obligations, legally committed, validated, and authorised. Payment transactions are made by transfer from Treasury accounts or in cash. Payment by bank transfer means that public institutions order Treasury to individualize and to transfer sums of money into the beneficiary's account (Postolache, 2013, pp.72-73). In the absence of voluntary compliance, the right holder may use debt enforcement proceedings against public debtors, to obtain performance of the obligation. In the event that legal or contractual deadlines are not respected, public institution interest and penalties are due, according to Law no.72/2013, which offers measures to combat the delay in the execution of the payment obligations of money resulting from contracts concluded between professionals, and between them and contracting authorities.

4. CONCLUSIONS

The highly regulated procedure for operating public expenditures is derogation from general provision. This comes in regard to the patrimonial obligations, in order to protect public interests. Budgetary provisions are implemented under specific regulation and control, so as to assure maximum off economy, efficiency and effectiveness. As the article underlines, the legal backgraound of the procedure has a specific model in the European regulations, which are directly appliable to European expenditures and a source for national regulation.

The CVAP procedure is a model both strong and flexible, as guarantees legality of a variaty of contractual and legal obligations.

References

[1] Bene F.Gh. (2011), *Cod de bune practici în colectarea creanţelor fiscale*, Ed. C.H. Beck, Bucureşti.
[2] Fanu-Moca A.(2013), *Drept financiar public*, ed. a II-a, Ed. Universiul Juridic, Bucureşti.
[3] Niculeasa M.I. (2012), *Legislaţia achiziţiilor publice. Comentarii şi explicaţii*, ed. 3-a, Ed. C.H. Beck, Bucureşti.
[4] Postolache R. (2013), *Drept financiar*, ed. a II-a, Ed. C.H.Beck, Bucureşti.
[5] Saidj L., Albert J.-L. (2007), *Finances publiques*, 5e édition, Ed. Dalloz, Paris.
[6] Şaguna D.D. (2012), *Drept financiar public*, ed. 5, Ed. C.H. Beck, Bucureşti.
[7] Tabără V. (2009), *Finanţele publice şi controlul financiar în administraţia publică locală*, Ed. C.H. Beck, Bucureşti.

A BRIEF GENERAL PRESENTATION OF THE MITIGATING AND AGGRAVATING CAUSES IN ROMANIAN CRIMINAL LAW, IN THE CONTEXT OF SUMMARY COMPARATIVE REGARDS TOWARDS CERTAIN OTHER NATIONAL CRIMINAL LAW SYSTEMS*

Mihai DUNEA
The Faculty of Law, „Alexandru Ioan Cuza" University of Iaşi
Iaşi, Romania
mihai.dunea@uaic.ro

** This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resourses Development 2007-2013*

Abstract: *The present article aims to describe a general scheme of the mitigating and aggravating causes in existence in the present Romanian criminal law system. This topic will be placed into the bigger context of some brief comparative regards towards the (general) mitigating and aggravating causes regulated by certain others national criminal law systems, as they emerged from the presentation of the country reports submitted with the occasion of the 2nd Criminal Law Reforms Congress, hosted by the Faculty of Law from Istanbul University (Turkey), between 30th May and 6th June 2015, with the main theme – "Criminal Law Sanctions: The gap between idea and use", event attended by the author of this article, as (co)representative of Romania.*
Keywords: *reasons (causes) for the mitigation of punishment; reasons (causes) for the aggravation of punishment; Romanian criminal law; comparative criminal law; 2nd Criminal Law Reforms Congress, Istanbul (Turkey), 2015, "Criminal Law Sanctions: The gap between idea and use".*

1. THE GENERAL PRESENTATION OF THE REASONS (CAUSES) FOR THE MITIGATION OR AGGRAVATION OF PUNISHMENT IN ROMANIAN CRIMINAL LAW

The present Romanian criminal law is represented by a relatively new legislation, entered into force on the 1st of February 2014. In what regards the aspect of regulating the mitigating and aggravating reasons influencing the punishment, this new legislation keeps up the general tendency of balancing old provisions (inspired by Romania's own regulatory tradition in the field of criminal law) with new ones, inspired by foreign legislative solutions adopted in certain others national criminal law legislations.

Thus, the new Romanian Criminal Code (in short, the R.C.C.), regulates both general and special reasons (causes) of mitigation or aggravation of punishment. The difference is not only the part of the R.C.C. where they are prescribed (in principle, the general causes being regulated into the general part of the R.C.C., and the special causes being regulated into the special part of the R.C.C.), but also (mainly) their area of

incidence. The general mitigating or aggravating causes produce their specific effect upon the punishment of an indeterminate number of offences (all of them, or main categories, made up of numerous particular offences, different from one another in a number of aspects, besides the common thing that a certain mitigating or aggravating reason is applicable to them), while the special mitigating or aggravating causes produce their specific effect only upon a certain offence, or a small category of offences (bonded together, also, by other reasons than that of a certain mitigation or aggravation cause being applicable to all them).

The general causes of mitigation or aggravation of punishment are subsequently classified into two categories, namely: state and circumstance. The main difference regards their effects upon the punishment. Thus, they constitute (general) mitigating or aggravating circumstances all the reasons of mitigation or aggravation provided by the legislator under this particular classification, or those who can be retained as such by the courts, as a recognized prerogative awarded by the legislator to the judiciary (it comes out that general circumstances can be subsequently classified as legal or judicial ones; the legal ones are compulsory for the court, meaning that the judge cannot reject their observation and their retention, in his decision - apart from the effect that they will produce upon the punishment; the judicial ones are circumstances who's observation and retention, in the courts decision, is left to the motivated discretion of the magistrate - also apart from the effect they will produce upon the punishment; it must be said that only - certain - judicial mitigating circumstances are allowed by the present R.C.C., and no judicial aggravating circumstances may be retained, by difference from Romania's previous criminal legislation).

All the general mitigating circumstances produce the same mitigating effect, no matter if they were retained as legal or as judicial mitigating circumstances. As well, all the general aggravating circumstances produce the same aggravating effect upon the punishment. Those *effects* are as follows:

- In case of retaining *general mitigating circumstances* (no matter if they are legal or judicial ones), the effective punishment for the offence committed will be [mandatory prescription] awarded not between the special limits of the punishment prescribed by the law for that particular offence, but between those special limits reduced by a third (both the minimum and the maximum), with the sole interdiction that, by this reduction, the effective punishment may not be set under the general minimum limit of that certain category of punishment (as prescribed by law); if the prescribed punishment for that crime is lifetime imprisonment (detention for life), the mitigation effect of a general mitigating circumstance will be the exchange of the category of punishment applicable, namely, instead of detention for life, the perpetrator will suffer the application of imprisonment between 10 to 20 years. If more than one general mitigating circumstance is retained by the court, the mitigation effect produced upon the punishment will not be multiple, meaning that no matter how many general mitigating circumstances are being retained in a single case (only one, or several of them), the effective punishment will continue to be set between the same limits (the ones already indicated above), the reduction of these limits not being done separately in relation to each mitigating circumstance retained, but only once (of course, between the new minimum and

maximum limit, the court will be inclined to set a lower effective punishment when more general mitigating circumstances are being retained, then when only one is taken into consideration). In short, it can be said that, in Romanian criminal law, the effect of retaining a general mitigating circumstance (either a legal one, or a judicial one), consists in a mandatory reduction of the punishment [relevant legislation: art.76 and art.2 par.3 of the R.C.C.].

- In case of retaining general aggravating circumstances, the effective punishment for the offence committed may be awarded between the special limits of the punishment prescribed by the law for that particular offence [similar situation with the hypothesis when no aggravating circumstances are retained], and, if the special maximum limit of the punishment prescribed by the law for that offence is not regarded by the court as sufficient, because of the aggravating circumstance in which the offence was committed, than, the court may [optional provision] set an effective punishment higher than the special maximum of the punishment prescribed by law for that offence. In the case of imprisonment, the effective punishment thus set may not exceed with more than 2 years, nor with more than one third (either one of two is smaller) the special maximum of the punishment prescribed by the law for that offence. In the case of fine, the effective punishment thus set may not exceed with more than one third the special maximum of the punishment prescribed by the law for that offence. In either case, by increasing the punishment, the court may not pass over the general maximum prescribed by the law for that particular type of punishment. If more than one general aggravating circumstance is retained by the court, the aggravation effect produced upon the punishment will not be multiple, meaning that no matter how many general aggravating circumstances are being retained in a single case (only one, or several of them), the effective punishment will continue to be set between the same limits (the ones already indicated above), the aggravation effect not being produced separately in relation to each aggravating circumstance retained, but only once (of course, with the respect of the limit of aggravation, the court will probably be inclined to set a higher effective punishment when more general aggravating circumstances are being retained, then when only one is taken into consideration). In short, it can be said that, in Romanian criminal law, the effect of retaining a general aggravating circumstance consists in a optional increase (in a certain amount) of the punishment [relevant legislation: art.78 and art.2 par.3 of the R.C.C.].

According to art.75 par.1 from the R.C.C., *the general legal (mandatory) mitigating circumstances are*: a) committing the offence under the influence of a strong disturbance or emotion, caused by the victim either by violence, by infringement of a person's dignity or by other serious illicit actions (named, by the doctrine, *the provocation excuse*); b) the exceeding of the limits of legitimate defense (an intensive exceeding, meaning that the defense is more aggressive than the attack, and, also, an exceeding not based on powerful emotion / fear caused by the attack, because in such situation, the exceeding of self defense will be non-imputable - meaning that the act will no longer be officially regarded as an offence, according to the regulation prescribed by art.26 of the R.C.C. - and not only excusable - in this case, the act is regarded as an offence, but the perpetrator benefits from this general mitigating legal circumstance); c) exceeding the limits of a state of necessity (also an intensive exceeding, meaning that the

salvation act is more harmful than the danger would have been in it's consequences, if the salvation action would have not taken place, and, also, an exceeding based on the conscience of the supplementary harm thus produced, because in the opposite situation, the exceeding of the limits of a state of necessity will be non-imputable - meaning that the act will no longer be officially regarded as an offence, according to the regulation prescribed by art.26 of the R.C.C. - and not only excusable - in this case, the act is regarded as an offence, but the perpetrator benefits from this general mitigating legal circumstance); d) covering all the material damage caused by an offense, during criminal investigation or trial, until the first hearing, if the offender has not benefited from this circumstance within 5 years prior to committing the crime.

In what regards the last of these general (legal) mitigating circumstances, the law also prescribes o clause of non-application, based upon the type of offence committed. Thus, this last circumstance will not apply in relation to one (or more) of the following offences: offense against the person, aggravated theft, robbery, piracy, fraud committed through computer systems and electronic means of payment, assault, judicial assault, abusive behavior, offenses against public safety, offenses against public health, offenses against freedom of religion and respect due to the deceased, against national security, against the fighting capacity of the armed forces, crime of genocide, crimes against humanity and war crimes, offenses against Romanian state border, offenses against the law on preventing and combating terrorism, corruption offenses, offenses assimilated to corruption offenses, or against the financial interests of the European Union, violation of regulations concerning explosive, nuclear and radioactive materials, drug offenses, drug precursors offenses, money laundering offenses, offenses against civil aviation activities and which might endanger flight safety and aviation security, offenses against witness protection, offenses against bans on organizations and symbols with fascist, racist and xenophobic character and against the promotion of worship of persons guilty of crimes against peace and humanity, offenses relating to trafficking in human organs, tissues or cells, offenses relating to preventing and combating pornography and relating to adoption rules.

According to art.75 par.2 from the R.C.C., the general judicial (optional) mitigating circumstances are: a) the efforts made by offenders to eliminate or reduce the consequences of their offense; b) any other circumstances relating to the committed offense, which reduce the seriousness of the offense or the threat posed by the offender. It is clear that, even if, apparently, the list of judicial (optional) general mitigating circumstances seems to be limited only to circumstances described by the law, in reality, the second general judicial mitigating circumstance, as prescribed, is so loosely formulated that it really gives the court the power to retain (in a motivated manner, but, ultimately, at the discretion of the judge), almost any aspect, with the smallest connection to the act committed or with the person who committed it, as a general mitigating circumstance. Though this decision rest in the courts hands, once retained as a mitigating circumstance, that particular event will produce the standard effect of any mitigating circumstance, namely, the obligation of setting the punishment between the special limits provided by the law for that offence, reduced with one third.

Regarding the general aggravating circumstances, they are as follows (art.77 R.C.C.): a) committing the offence by three or more persons together; b) committing the offence with cruelty or subjecting the victim to a degrading treatment; c) committing the offence by methods or means of a nature likely to endanger other persons or assets; d) committing the offence by an offender who is of age, if he / she was joined by an underage person; e) committing the offence by taking advantage of a clear state of vulnerability of the victim, caused by age, health, impairment or some other reasons; f) committing the offence in a state of voluntary intoxication with alcohol or other psychoactive substances, when such state was induced with a view to committing the offense; g) committing the offence by a person who took advantage of the situation caused by a disaster, of a state of siege or a state of emergency; h) committing the offence for reasons related to race, nationality ethnicity, language, gender, sexual orientation, political opinion or allegiance, wealth, social origin, age, disability, chronic non-contagious disease or HIV/AIDS infection, or for other reasons of the same type, considered by the offender to cause the inferiority of an individual from other individuals.

As it was already indicated, the current R.C.C. does not prescribe anymore the possibility for the court to retain other situations (than these) as general causes of aggravating the punishment. If the judge considered that another situation produces an aggravating effect upon the criminal liability of the perpetrator of some offence, it can not impose a punishment exceeding the special limit prescribed by the law (as it can in case of retaining one or more of these general aggravating circumstances), being able only to apply a more serious punishment between the special limits ordinary prescribed by the law for that particular offence.

Beyond the general circumstances of mitigation or aggravation of punishment, there are also other general provisions regulating criminal law institutions which may produce (optional) or who produce (mandatory) a mitigating or aggravating effect upon the punishment, namely a different effect than the one prescribed in case of the circumstances. Those cases are called by the doctrine "states" of mitigation or aggravation of punishment, and they have, each one, a separate effect provided for by the law in regard to the punishment which is to be set in certain particular cases. They are also general reasons for mitigating or aggravating the punishment, because their effect has the potential ability to be produced in an indeterminate number of cases, in connection to indeterminate (or largely determined group) of offences.

Thus, as *general state of mitigation*, the current R.C.C. regulates the attempt of committing one of the offences for whom the attempt stage of *iter criminis* is both naturally possible and legally relevant (signaled as such by express legal disposition). According to the provision of art.33 from R.C.C., in case of attempt, the effective punishment will be set by the court between the special limits of punishment prescribed by law for that offence, reduced to a half (so, between the half of the minimum and the half of the maximum punishment prescribed by law), without the possibility of descending below the general minimum of the type of punishment (art.2 par.3 R.C.C.). When the attempt is related to a crime for which the law prescribes the punishment of detention for life, the perpetrator will be punished with imprisonment between 10 to 20 years. As an exception (through the doctrine discussed if this is an exception related to

the treatment of attempt, or a case in which the attempt is no longer considered as such, but becomes regarded as a form of offence assimilated to the consumed stage of the offence), art.36 par.3 of the R.C.C. regulates that, in case of a complex incrimination (an offence who comprises in it's legal definition, as part, yet another offence, who may be also committed separately, by its own), if committed by *praeterintention* (a over fulfilled intentional behavior, meaning that the *mens rea* manifest itself by initial intention to produce a smaller harmful result, specific to a certain offence, followed by the production of a more harmful result, by negligence, the whole act being prescribed as such by the law), and if only the secondary (final, more harmful) result is achieved, the punishment will be set between the full special limits prescribed by law, and not between these limits reduced to a half (as in regular cases of attempt). *E.g.*: attempt to robbery, in which case the perpetrator pushes the victim, or hits it slightly, but the unbalanced victim drops to the ground, suffers a hit to the head and dies, and the perpetrator runs without taking any goods; or, the same scenario in relation to a perspective victim of rape, who dies before being raped, because of the hits (normally, non-frightening life hits) produced by the offender in order to subdue her (etc.).

In the former R.C.C. there was regulated yet another general state of mitigation of punishment, namely the state of minority of the criminally liable underaged person, but this case no longer has this legal nature in the current legislation, because the new R.C.C. provides that this type of delinquents may only be criminally sanctioned by means of specific sanctions, named "educative measures", which are a distinct category of criminal sanctions, apart from punishment. Thus, it is no longer possible to regard the minority of criminal offenders as a state of mitigating the punishment, being a correct assessment that it is a state of diversification of the criminal treatment (reaction) against them, in comparison with the situation of offenders who are at age.

As *general states of aggravation of punishment*, the R.C.C. regulates: the continuing offence; the committing of multiple offence before a final courts decision of conviction is passed for at least one of them (committing concurrent offences); the recidivism (the relapse in committing offences, after a final conviction decision for another offence was passed, but only in certain conditions); the intermediate plurality of offences (situation similar to a type of recidivism, but without at least one of the conditions of the recidivism to be checked).

According to art.35 par.1 R.C.C., an offense is said to be continuing when a person commits, at various time intervals but for the realization of the same resolution and against the same passive subject, actions or inactions each having the content of the same offense (*e.g.*: repeated theft, for several nights, in accordance to the same plan, of building materials, from the same construction site). Art. 36 par. 1 R.C.C. prescribes that, in such a case, the penalty provided by law for the offense committed applies for the continuing offense, to which a maximum increase of 3 years can be added up for imprisonment, respectively at least a third in case of fines.

As regards the committing of multiple, concurrent offences, before receiving a final conviction for any of them, the present R.C.C. (art.39) provides several sanctioning systems in case of main punishment, namely: the absorption system, if at least one of the penalties is detention for life; the limited additions system, when all penalties are either

imprisonment or fines (the court will determine a punishment for each offence, and then it will apply the highest of them, to which it will mandatory add a third of the amount / duration of the other penalty / of the sum of the others penalties) – as an exception, the law prescribes that when several penalties of imprisonment have been established, if, by adding to the heaviest penalty a third of the total of all other penalties of imprisonment, the (mathematically calculated) result will go pass the general maximum of imprisonment (set at 30 years by art.60 R.C.C.) with more than 10 years, and for at least one of the multiple offenses the penalty provided by law is of 20 years imprisonment or more, the penalty of life imprisonment can be applied instead (even if it is not even stipulated by the law for any of the offences committed by the perpetrator) – art. 39 par. 2 R.C.C.; the cumulative system, when one / some penalty / penalties consist in imprisonment, and another / others is a fine / are fines (they will both be executed).

In the case of recidivism (according to art.41 par 1 R.C.C., a repeat offense exists when, after a conviction and sentence of more than one year of imprisonment remains final, and before rehabilitation or completion of sentenced term, the convicted individual commits another violation with direct intent or oblique intent - praeterintention - for which the law mandates a term of more than one year of imprisonment), it is necessary to distinguish between two forms: post-conviction recidivism, and post-execution recidivism. In the first case, the relapse in committing offences takes place before the punishment for the first offence is completely executed (or legally regarded as being executed). In such situation, according to art.43 par.1 R.C.C., if, before the previous sentence has been fully served or deemed as served, a new offense is committed and constitutes a repeat offense, the penalty attributed to it shall be added to the time of the previous sentence or the time not yet served from the previous sentence (so, the system of cumulative punishments). On the other hand, is the perpetrator relapses by committing multiple concurrent offences in the same situation, art. 43 par. 2 R.C.C. indicates that if at least one of these is a repeat offense (checks all the conditions for the existence of recidivism), penalties shall be merged as under the stipulations concerning multiple (concurrent) offenses and the resulting sentence shall be added to the time of the previous sentence or the time not yet served from the previous sentence. The same exceptional possibility prescribed in art. 39 par. 2 R.C.C. is also provided by art. 43 par. 3 in case of recidivism (the possibility for the court to apply, in some particular conditions, the punishment of detention for life, instead of that of imprisonment, even if for none of the offences committed the law does not provide such a punishment). Of course, if any of the punishments applied (the first or the second one) is detention for life, the absorption system will become active. In the situation of post-execution recidivism, the newly committed offence takes place after the former punishment was executed or regarded as such, but before rehabilitation (or before the completion of the term of rehabilitation). Art.43 par.5 R.C.C. prescribes that if after the previous sentence has been fully served or deemed as served, a new violation is committed as a repeat offense, the special thresholds for the penalty under the law for the new violation shall be increased by half.

The intermediate plurality of offences represents a situation positioned between the case of multiple (concurrent) offences, and the case of recidivism. In such a case, after a conviction remains final and before the date the sentence has been fully served or

deemed as served, the convicted person commits a new violation and the legal conditions are not met for the state of repeat offense to be declared (art. 44 par. 1 R.C.C.). The similarity towards the situation of multiple (concurrent) offences manifests itself at the level of sanctioning the perpetrator for committing this type of plurality of offences, the legislator indicating that the same rules will be applied here also (art. 44 par. 2).

It is indicated as yet another difference between states of mitigation / aggravation of punishment, and circumstances of the same sort, that (as it was already been indicated), the circumstances produce their specific effect only once, even if more then one has been retained, while the states produce their effect separately, each one, cumulating the mitigating or aggravating effect that they produce not only to the effect of the circumstances, but also to the effect of other states of the same type (this situation mainly interest the situation of multiple aggravating causes).

The R.C.C. provides also some special causes for the mitigation or aggravation of the punishment, whose effects are limited only to one particular determined offence, or a small determined group of related offences. Regarding those institutions, an important topic of analysis refers to the extend of clarity and the degree of correct legal or judicial determination of the proper nature of such special causes, and also to the distinction that separate them (or who should separate them) from other possible techniques the legislature has at disposal in order to express its mitigating or aggravating tendencies. Thus, alongside provisions expressly indicated as "special causes for reduction or aggravation of punishment", there also exists the method of developing attenuated or aggravated forms of some offences (forms who remain legally dependent to the basic particular incrimination whose derivates are), as well as the process of creating some autonomous offences by starting from a certain offence, adding to it mitigated or aggravated constitutive elements, and prescribing the result as some other separate offence than the one from whom it started the alteration process. The current problem in existence, in Romanian criminal law, towards all this methods, is a lack of clear rules and consistency in what regards the reasons why, in particular cases, one of these different paths is preferred by the legislator to the others, and what implications / effects would have been activated if another way would have been chosen; more so, if there are better paths to follow, in separate situation, and what gains or dangers are associated with following one legislative method, and not another one, in various particular cases. Sometimes, the legislators choice is not so clearly indicated, and it becomes the doctrine's and practice's job to determine what the presumptive will of the lawmaker was, choosing from these three alternatives; not always, in such cases, the choice is easy, and not always the effects of choosing one interpretation to another one are similar for all the persons involved in the judicial proceedings.

An important general rule related to all the institutions presented so far is the one regulating the question of priority who is to be stated between all of these various causes for aggravating or mitigating criminal liability. The general rule in this regard is stipulated by art. 79 of the R.C.C., named "*Concurrence between mitigating and aggravating causes*". In regard to the concurrence of (only) mitigating causes, par. 1 states that when two or more stipulations are applicable to one offense, that have the effect of reducing a penalty, the special threshold of the penalty stipulated by law for that

offense shall be reduced by successively applying (firstly) the stipulations concerning attempt, (secondly, the ones regarding) mitigating circumstances and (finally, if they exist, stipulations regarding) special cases for sentence reduction, in that order. Related to the concurrence of aggravating causes, par.2 of art.79 R.C.C. indicates that when two or more aggravating stipulations are applicable to one offense, the penalty shall be established by successively applying the stipulations concerning aggravating circumstances, continuing offense, multiple offenses or repeat offense. By difference to the previous regulation, in this case it is not indicated specifically if the indicated order is compulsory or not. In addition, there is no reference to the place / position of the special cases for aggravation of punishment, though such dispositions are (arguably) provided for by several dispositions from the special part of the R.C.C. (and also, from some special criminal laws). As such, there is some criticism towards the legislative formulation of this provision.

Finally, according to art.79 par.3 R.C.C., when one or more stipulations that have the effect of reducing a penalty, are applicable to one offence, and one or more stipulations that have the effect of increasing a penalty are applicable to the same case, the special threshold of the penalty stipulated by law for that offence shall be reduced according to the rules indicated by par. 1, after which the resulting penalty shall be increased according to rules described by par. 2. So, the mitigation reasons prevail before the aggravation ones, and each produces, separately, but in a specific order, it's own effect upon the punishment.

2. BREIF COMPARATIVE REGARDS TOWARDS THE REGULATION OF SOME MITIGATING AND AGGRAVATING CASES IN CERTAIN FOREIGN CRIMINAL LAW LEGISLATIONS, AS THEY EMERGED FROM THE COUNTRY REPORTS SUBMMITED TO THE 2ND CRIMINAL LAW REFORMS CONGRESS (ISTANBUL, TURKEY: 2015), REGARDING "CRIMINAL LAW SANCTIONS: THE GAP BETWEEN IDEA AND USE"

Between 30th May and 6th June 2015, the Faculty of Law from Istanbul University (Turkey) organized the 2nd Criminal Law Reforms Congress, with the main theme: "Criminal Law Sanctions: The gap between idea and use". The author of the present article attended the event, as (co)representative of Romania. The academic event consisted in representatives of some 30 countries elaborating, submitting, presenting and comparing their national reports upon the topic of criminal law sanctions, as those are regulated in their specific law systems.

As it was expected, apart some dramatic differences (for example, mainly between the European countries and non-European countries, in regard to different legislators attitude towards the regulations of the death penalty), there were to be also observed some close relations between different legislators solutions in resolving the same type of problem. This can be explained not only by the harmonization tendencies brought by the development of international treaties in matters regarding (also) some aspects of criminal law, but also by the legislators tendencies to renew and reform national criminal law systems thru the process of implementing viable and modern

solutions encountered in other national criminal law systems than their own. The openness that is manifested by many present legislators is bringing closer systems of law separated by enormous geographical and cultural gaps, and it encourages the progress that will certainly come by having more and more harmonized legislations worldwide.

This tendency was to be observed also in the field of the legal causes for mitigation or aggravation of punishment, and we will briefly refer to some examples, putting them into connection to the Romanian criminal law system in this matter, as it was depicted above.

Thus, in regard to the mitigating cases regulated by law, most national legal systems regulate the *attempt* either as a particular state with effect of reduction of punishment (either mandatory, or optional), either as a mitigating circumstance, alongside other causes with the same legal status [this it seems to be the case, for example, in Bosnia and Herzegovina – see: Borislav Petrovic, Amila Ferhatovic, *Country report for Bosnia and Hezegovina. Penal law sanctions*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 474]. Sometimes, this status is recognized either also to, either only to [for such cases see: Wlodzimiers Wrodel, Adam Wojtaszyk, Witold Zontek, *Poland country report*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 352] the impossible attempt, which in Romanian criminal law system is not regarded at all as an act capable to attract criminal liability.

Some systems provide (as the former Romanian system) the *minority* of the underaged offender, as a cause of mitigating the penalty [it is, for example, the case of China – see: Shizhou Wang, *Country report of Penal law sanctions in the People's Republic of China*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. II, p. 74], while others impose the same system that is currently in force in Romania, namely, the regulation of a entirely separate type of criminal sanctions as the only kind of criminal reaction towards this particular offenders, reasons for which the minority of the offender may not be still regarded as a reasons of mitigating *the penalty*, but as a cause of differentiating the criminal liability of responsible underaged offenders, by the criminal liability of adults. It appears that such a case can be found, for example, in Poland [Wlodzimiers Wrodel, Adam Wojtaszyk, Witold Zontek, *Poland country report*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 359]. Sometimes, though, the age factor, as reason for mitigating the penalty, is also active in opposite cases, namely of *old age* of the perpetrator; for example, such a motive seems to be usually retained by the Canadian jurisprudence [Nikolai Kovalev, *Penal Law Sanctions. National report on Canada*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 508], and is prescribed to by Norway's legislation, as the case consisting in that "the penalty would be a heavy burden due to advanced age, illness or other circumstances" [Ulf Stridbeck, *Penal Law Sanctions in Norway*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference

Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 564]. In Romania, the law also provides that, if the offender who committed a crime for which the detention for life is stipulated, turns 65 years old before the final sentence is passed, he or she will no longer be convicted to lifetime imprisonment, but to imprisonment for 30 years; at the same age, if turned when executing a lifetime imprisonment, the offender may be released, if he / she had a good behaviour and the punishment is replaced with imprisonment for 30 years, because all the time executed as detention for life it will be deduced from the 30 years of imprisonment into which the penalty is turned to.

Many national criminal law legislations give a special place in regulating the cases of mitigation of punishment to the aspects based on the offenders actions toward *compensating the victim, reducing the impact of the damage* done by committing the offence or coming to an *understanding (between perpetrator and victim)* in regard to the steppes needed in order to reduce the impact of the committed offence upon the victim or it's family. For example, dispositions in this regard are provided in Poland [Wlodzimiers Wrodel, Adam Wojtaszyk, Witold Zontek, *Poland country report*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 353; Davor Derencinovic, Marta Dragicevic Prtenjaca, *Croatia – Penal Law Sanctions*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 441; Byung-Sun Cho, *Penal law sanctions of Korea. An outline of country report of Korea*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. II, p. 160].

An interesting mitigation effect (though kind of exotic for the Romanian legislative landscape, which does not regulate such a case) is given by some legislators to the *consequences produced by committing an offence (especially a non-intentional offence) upon the perpetrator itself, or his close relations*. There is such a case in Poland's criminal law legislation [Wlodzimiers Wrodel, Adam Wojtaszyk, Witold Zontek, *Poland country report*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 353; Davor Derencinovic, Marta Dragicevic Prtenjaca, *Croatia – Penal Law Sanctions*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 442; Ulf Stridbeck, *Penal Law Sanctions in Norway*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 564].

Also, there are often encountered as mitigating circumstances the cases residing in *overstepping the boundaries of self-defence* and *overstepping the boundaries of urgency*, as in Romanian criminal law [Borislav Petrovic, Amila Ferhatovic, *Country report for Bosnia and Hezegovina. Penal law sanctions,* 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 474].

As for the aggravating causes regulated by most legislators, the *recidivism* seems to be a relatively constant reason for resorting either to a longer or more drastic

punishment, either to adopt some other kind of restrictive measures upon the individual who finds himself in such a situation. Sometimes, this actions are mandatory [it is, for example, the case in China – see: Shizhou Wang, *Country report of Penal law sanctions in the People's Republic of China*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. II, p. 76; apparently, a similar situation exist in South Korea - Byung-Sun Cho, *Penal law sanctions of Korea. An outline of country report of Korea*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. II, p. 168], in other legislations they are optional. For example, in Poland, it seems that the sanction for recidivism is the possibility, recognized to the court, to impose a penalty exceeding by half the upper limit of a statutory penalty provided for a certain offence [Wlodzimiers Wrodel, Adam Wojtaszyk, Witold Zontek, *Poland country report*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 352; see also: Ulf Stridbeck, *Penal Law Sanctions in Norway*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 564]; in Italy, the increase can be by half, or even by two thirds [Renzo Orlandi, *Penal Law Sanctions in Italy*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 609]; in Canada (and not only), apparently, previous convictions, as a personal state of aggravation of punishment, is not provided by law, but recognized by the courts, in a jurisprudential way [Nikolai Kovalev, *Penal Law Sanctions. National report on Canada*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 507]. Sometimes, even bad prior conduct (not only previous criminal convictions), possibly deduced even from acquittal decisions, may aggravate an offenders punishment [see: Stephen C. Thanam, Lauren Graham, *Penal Law Sanctions. Country report: United States of America*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. II, p. 39]

Also, many criminal legislations recognise an aggravating effect to other types of committing multiple offences, as it is the case of *concurrent offences* [Davor Derencinovic, Marta Dragicevic Prtenjaca, *Croatia – Penal Law Sanctions*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 443; Ulf Stridbeck, *Penal Law Sanctions in Norway*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 564], but also to some forms of committing a single offence, generally to the *continuing offence*, similar to the Romanian legislator [Davor Derencinovic, Marta Dragicevic Prtenjaca, *Croatia – Penal Law Sanctions*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 443].

There are also some recurrent aggravating circumstances similar to some encountered also in R.C.C., as it is the *committing of the offence by bias, prejudice or*

hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor [Nikolai Kovalev, *Penal Law Sanctions. National report on Canada*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 506], or whether the *crime* was *committed in a particularly dangerous way* [Ulf Stridbeck, *Penal Law Sanctions in Norway*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 563], or whether the *crime* was *committed against a defenceless person* [Ulf Stridbeck, *Penal Law Sanctions in Norway*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 563].

Of course, the aspect indicated above have only the status of examples, the present article being out of proportion as it is. We would like to come back upon the comparative regards topic (that we only began approaching here), into another (future) article. Meanwhile, we hope that the complete (maybe partially reviewed) reports submitted to the Istanbul 2015 Congress on criminal law sanctions will be published, giving us a more documented occasions to continue this line of academic interest in regard to the mitigation and aggravation reasons in comparative criminal law.

References

[1] Petrovic, Borislav; Ferhatovic, Amila: *Country report for Bosnia and Hezegovina. Penal law sanctions*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I.
[2] Cho, Byung-Sun: *Penal law sanctions of Korea. An outline of country report of Korea*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. II.
[3] Derencinovic, Davor; Dragicevic Prtenjaca, Marta: *Croatia – Penal Law Sanctions*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I, p. 441.
[4] Kovalev, Nikolai: *Penal Law Sanctions. National report on Canada*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I.
[5] Orlandi, Renzo: *Penal Law Sanctions in Italy*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I.
[6] Stridbeck, Ulf: *Penal Law Sanctions in Norway*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I.
[7] Thanam, Stephen C.; Graham, Lauren: *Penal Law Sanctions. Country report: United States of America*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. II.
[8] Wang, Shizhou: *Country report of Penal law sanctions in the People's Republic of China*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. II.
[9] Wrodel, Wlodzimiers; Wojtaszyk, Adam; Zontek, Witold: *Poland country report*, 2nd Criminal Law Reforms Congress "Criminal Law Sanctions: The gap between idea and use" Conference Volume, editor: prof. dr. Adem Sozuer, vol. I.

ACTIONS AGAINST CARTELS

Lucia IRINESCU
Alexandru Ioan Cuza University
Iasi, Romania
lirinescu@yahoo.com

Abstract: *Compliance with competition on a market provides economic progress, consumer welfare and freedom of movement of goods, services and capital. The distortion of competition is most often the natural consequence of concerted practices between organizations, abuse of dominant position of undertaking a merger or state subsidies to the discretion of enterprises.*
Keywords: *competition, anticompetitive practices, cartels*

Acknowledgement*: This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resourses Development 2007-2013.*

WHAT ARE CARTELS?

The provisions of art.101 of the Treaty on the Functioning of the European Union prohibit and declare incompatible with the common market all the agreements between organizations, decisions by associations of firms and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within internal market. Agreements between enterprises, decisions by associations of organizations and concerted practices may be grouped into the concept of the Entente. In our law, the legal regime of ententes is established by art.5 of the Competition Law 21/1996, which is similar to art.101 para. (1) of the Treaty.

The cartels are agreements between two or more economic operators aimed at distorting competition. The notion of understanding is generically used to refer to a cartel and represents any agreement, written or recorded orally, public or secret, regardless of name, between one or more economic operators (Didea, 2014). It is not necessary that the parties will take the form of a contract. The European Court of Justice considered that the cartel may consist of a single action in a series of actions or behavior in a way. For the deal to fall under art.101 para.(1) of the Treaty, it is sufficient that operators should have expressed their common intention to adopt a certain conduct on the market. European case law states that an "anticompetitive agreement", so called generically exists where the parties adhere to a common plan of action, not absolutely necessary to have a written, formal agreement providing, possibly contractual penalties. Such a definition covers even the concept of concerted practice that operates with both national and European law.

Cartels can take many forms, depending on how the willingness is manifested namely actual agreements, decisions and concerted practices Association. The agreement between organizations is based on a concurrence of wills which may consist of a simple commitment, convention or contract caluse concluded in writing or otherwise, expressed or implied, public or secretor even gentleman's agrrement. Agreements can be horizontal, between competing organizations, which are in the same market at the same stage of the economic process (producers, distributors) and vertical, which intervene at different stages (between manufacturers and distributors of the same product). Vertical agreements were considered by Council Regulation no. 330/2010 / EC on the application of art.101 para.(3) of the Treaty to categories of vertical agreements and concerted practices as all those vertical agreements for the purchase or sale of goods or services where those agreements are concluded between non-competing organizations, between certain competitors or by certain associations of retailers it also includes vertical agreements containing auxiliary provisions on the assignment or use of intellectual property rights. The term "vertical agreements" includes the corresponding concerted practices.

Decisions of association is a preliminary manifestation of will by which a trader agrees to group together with other collective entity which shall run only if an agreement is finalized. The concept of concerted practice aimed at "a form of coordination between organizations which, without having reached the stage of an agreement, deliberately substitutes the risks of competition with a practical cooperation between them. Therefore, without entering the category of formal cooperation between organizations as agreements / arrangements, the concerted practices are achieved through coordinated behavior and through direct or indirect contact that replace the independent acting of businesses. We are talking about a conscious, cooperative behavior. In the absence of "coordination" and "cooperation", a behavior made independently, unilaterally, even if it seems to be an effective coordinated action, shall not constitute a concerted practice. As regards the distinction between agreements / concerted practices that have the anti-competitive object and anti-competitive effect which the Court of Justice of the European Union recalls that anti-competitive object and effect are not cumulative conditions, but an alternative to assess whether a practice is prohibited or not is covered in Article 101 (1) TFEU. In addition, it should be noted that, in assessing whether a concerted practice is prohibited by Article 101 (1) TFEU the taking into consideration of its actual effects is superfluous when it proves that its object is the prevention, restriction or distortion of competition within the common market.

SANCTIONS

To be sanctioned, an anticompetitive agreement must meet a number of conditions: to be an agreement between undertakings; have as their object or effect the restriction of competition; affect trade between states or restrict competition in a national market or a part thereof. As a general rule, ententes are void. However, exceptionally, some Entente are not covered by art.101 para.(2) of the Treaty on European Union and Art. art.5 paragraph.(1) of Law no.21/1996, when they meet the following conditions:

➢ contribute to improving the production or distribution of goods or to promoting technical or economic progress, ensuring at the same time, consumers with the resulting benefit of the parties to that agreement, decision or concerted practice;
➢ do not impose on the organizations concerned restrictions which are not indispensable to the attainment of these objectives;
➢ do not give the organizations the possibility of eliminating competition in a substantial part of the products in question.

Art.8 para.(1) of Law no.21/1996 establishes the rule that art.5 paragraph.(1) does not apply to agreements considered to have a minor impact on competition. This is the situation of economic operators that do not exceed thresholds of 10% and 15% as the parties to an agreement are or are not actual or potential competitors, on one of the relevant markets affected by the agreement.
If practices that have the object of fixing prices when selling products to third parties, limit output or sales or sharing of markets or customers, operators will not benefit from the exemption from the law because these agreements are presumed to affect significantly competition [art.8 par.(4) of Law no.21/1996].

Violation of art.5 of Law no.21/1996 and of art.101 of the Treaty on the Functioning of the European Union constitutes a contravention and it is punishable by a fine of 0.5% to 10% of total turnover achieved in the previous financial sanction following facts. If a person participates in fraud at the conception, development or organization of a cartel entails criminal liability of individuals. Criminal proceedings shall be initiated upon referral by the Competition Council. However, there are some exceptions, of those agreements that do not attract sanctions because they produce positive effects in the competitive environment. The exemption conditions of eligibility are detailed in European regulations on the application of art. Paragraph 101 (3) TFEU.

LENIENCY POLICY

Leniency is a facility provided by the competition authorities to economic operators involved in a cartel (Coman, 2011). This implies that enterprises which cooperate with competition authority benefit from exemption from the application of the fine (fine 0) or reduce the fine as appropriate. In this regard, the Competition Council adopted Guidelines on the conditions and criteria for implementing a policy of leniency according to Art.51 para.(2) of the Competition Law no.21/1996.

The Competition Council granted immunity from fines to an economic operator if it is the first to provide evidence allowing the launched of an investigation on a possible cartel and conduct unannounced inspections at the premises of the parties involved and proving a serious breach of competition law. Competition Council verifies that the conditions for obtaining immunity and give the economic operator in writing conditional immunity from fines. Reduction of the fine is granted to an economic operator if it provides evidence to bring a significant added value in relation to those already in possession of the competition authority. Even if a case was granted immunity from fines (fine zero), other participants at the alleged cartel who denounce the cartel may benefit

from reduced fines as follows: between 30 - 50% - for the first, between 20 to 30 % - for the second; more than 20% - to other traders.

For example, the European Commission fined Procter & Gamble, Henkel and Unilever for forming a cartel on the market for laundry detergents. Henkel received full immunity from fines under the leniency program, as it was the first company to provide information about the cartel. Procter & Gamble has benefited from a reduction of 50%, while Unilever a 25% reduction in the fine, because they resorted in turn to the Leniency Notice.

Nationally, the Competition Council first gave immunity to pay the fine by leniency policy to Radio Taxi Company, in the transport market investigations of individuals taxi market in Timisoara. The Competition Council found that 11 dispatch and taxi operators have participated in a cartel on increasing tariffs for passenger taxi. Radio Taxi was the first company to apply the Leniency Notice and denounced anti-competitive practices and therefore received full immunity from fines. The second company reporting the cartel received immunity from fines by 50%.

CONCLUSIONS

The fight against cartels has been and it is one of the main priorities of the competition authorities both at national and at European level. Cartels are hard to identify. They involve most of the time, many businesses located on different levels of the economic process. Therefore leniency policy was introduced.

References

[1] Coman, G. (2011), Competition in the domestic and European law, Bucharest: Hamangiu.
[2] Didea, I. (2014), European competition law, Bucharest: Universul Juridic
[3] http://www.oecd.org/daf/competition/cartels/48948847.pdf.
[4] http://www.consiliulconcurentei.ro/uploads/docs/items/id7082/decizie_taxi_timis-publicare.pdf.
[5] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:193 :0014:0016:EN:PDF.

A CRITICAL ANALYSIS OF WHISTLEBLOWER PROTECTION IN THE EUROPEAN UNION

Ada-Iuliana POPESCU
Alexandru Ioan Cuza University of Iasi, Romania, Faculty of Economics and Business Administration
Iasi, Romania
ada.popescu@uaic.ro

Abstract: *Whistleblower protection is an important anti-corruption instrument. Countries around the world, including European Union member states, have dealt differently, if at all, with systems for protecting public employees who reveal information that leads to corruption investigations and prosecutions. Such systems work best when their legal framework is well articulated and consistently enforced. The success of public sector anti-corruption fight depends on whistleblower protection, especially in countries where public sector corruption is systemic and endemic such as it is in the Eastern EU members. This paper presents an overview of the main whistleblower protection issues in the European Union, including some of the current good practices.*
Keywords *whistleblower protection, public corruption, anti-corruption*

Acknowledgement: *This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resourses Development 2007-2013.*

1. INTRODUCTION

Whether it is in the public or private sector, corruption often is hard to detect. Therefore, inside information is critically important, especially when employees or others who know about corrupt behavior voluntarily provide this information. Their testimony facilitates the investigation and resolution of corruption cases.

However, employees who reveal inside information are vulnerable to retaliation. Without protection from retaliation, many would-be "whistleblowers" will remain silent, thereby depriving anti-corruption investigators of the inside information they need. This is why whistleblower protection must be part of any anti-corruption strategy. Creating such a system, however, is a challenge for any country because effective whistleblower protection requires a well-synchronized legal framework of penal, administrative, procedural and management rules. In other words, protecting whistleblowers and fighting corruption requires harmonizing a variety of interests and means.

Worldwide, some countries have taken the right steps in this direction, but most have ignored the issue. International conventions such as the UN Convention against Corruption (UNCAC) provide the base for whistleblower protection systems since it requires signatory states to evaluate their own legal systems and find ways to improve them. Whistleblower protection systems need constant reevaluation and adjustment. After all, they are complex. To be effective, whistleblower protection systems must establish

adequate channels for reporting corruption, strong protection against retaliation, disclosure mechanisms and remedies for their violation (TIa, Report, 2013, p.6).

Their complexity is but one obstacle; but there are many. For example, sometimes differing understandings or definitions of the term "whistleblower" can be a problem, as can happen when authorities in different countries interact on transnational corruption cases.

Not surprisingly, therefore, the European Union member countries face the same challenge as countries elsewhere. EU members are dealing very differently with the whistleblower protection system since there is no EU legal text to impose standards, limits and deadlines for implementation.

In fact, only four EU members have legal frameworks intended to ensure protection for whistleblowers and their families. The rest are at different stages of implementing a system or have not even started to create one.

2. INTERNATIONAL EFFORTS TO ENSURE WHISTLEBLOWER PROTECTION

During the past decade, international discussions about the establishment of a whistleblower protection system have taken place in politics, academia and civil society. The main argument favoring whistleblower protection was that the protection would encourage transparency in public and private sector, thereby discouraging corruption.

International efforts to promote such a system have been vigorously sustained by some governments, intergovernmental organizations, and NGOs alike. The result has been the creation of international and national legal rules to serve as guides or models for creating effective whistleblower protection systems. For instance, the United Nations Convention against Corruption (UNCAC), the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) and the International Principles for Whistleblower Protection developed by Transparency International provide legal guidance for developing whistleblower protection systems.

Thus, in countries such as the United States, the United Kingdom, Australia, South Africa, and South Korea, legislation directed at corporate corruption and its enforcement have forced companies to collaborate with authorities and to comply with the legal requirements to avoid sanctions. Reference points for public sector whistleblower protection include the Federal Whistleblower Protection Act (1989) in the US, the Public Interest Disclosure Act (PIDA) in the UK, the Public Disclosure Act (PDA) in South Africa, the Act on the Protection of Public Interest Whistleblowers (ACRC) in South Korea, and the Public Interest Disclosure Act of 1994 in Australia.

Article 33 of UNCAC specifically states that any state party to the Convention has the obligation to incorporate in its domestic legal system rules that will ensure protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to authorities information regarding corrupt practices. For signatory states, this provision represents the starting point for whistleblower protection

since Article 32 of the Convention separately covers the protection of witnesses (TIb Report, 2013, p.8).

However, parties to the Convention have poorly addressed this obligation. In fact, no party to the Convention has a flawless whistleblower protection system.

The causes for concern are several. The United Nations and Transparency International have made recommendations and advanced principles on how to create a protection system for whistleblowers. The system must provide the following: a broad definition of "whistleblowing"; threshold qualifications for whistleblower protection; protection for whistleblowers; procedures for disclosing information possessed by whistleblowers; penalties for violations; legislative oversight and administrative processes; and adequate resources and powers for investigations and enforcement.

Confidentiality and anonymity are extremely important. The whistleblower protection system has to ensure that no one will disclose a whistleblower's identity outside the organization where they reported their information without the whistleblower's consent. Besides confidentiality, anonymity is a key aspect of whistleblower protection. However, no system can guarantee whistleblowers complete anonymity because whistleblowers are usually subject to be called as witnesses in judicial proceedings against persons accused of corruption and sometimes disclosing the circumstances of the alleged corruption will provide enough information for others to guess the whistleblower's identity.

The system's institutional design also is vital. National authorities have to make the effort to organize and supervise the functioning of the structures specially created to advise and protect whistleblowers.

Other requirements include specifying the rights and immunities that whistleblowers have; defining a "good faith" disclosure of information; establishing media and other public rights to the information provided by whistleblowers; defining what constitutes a breach of confidentiality or the secrecy of material documents; and setting the amount of compensation or other rewards payable to whistleblowers.

European regional and national whistleblower-protection legislation protection fails to address these issues adequately. Twenty-seven EU member states have ratified the UN Convention; yet, they have not fully complied with its requirements. Moreover, the majority of national whistleblower-protection laws do not satisfy the EU's Charter of Fundamental Rights. And most EU members have ignored the standards and guidelines issued by the UN, the Council of Europe, the OECD and Transparency International. This modest and incomplete compliance is the result of a cumulus of political, social and historical factors that have prevented the creation of whistleblower protection systems. However, in recent years, a few EU members have developed whistleblower legislation.

3. WHISTLEBLOWER PROTECTION'S LEGAL FRAMEWORK AND ITS ENFORCEMENT IN THE EU

The lack of political will remains a critical factor undermining national whistleblower protection initiatives. For example, in 2013, Bulgarian government officials promised to consider whistleblower protection for public and private workers

but no draft law has been forthcoming so far. The same is true in Poland, Lithuania, Spain, Austria and Germany. In these countries, government officials and political party leaders have repeatedly failed to find a need to consolidate whistleblowers' rights. (TIc Report, 2013, p.13)

On the other hand, the Netherlands, Luxembourg, Belgium, Ireland and Greece have slowly moved forward in protecting whistleblowers. This suggests that the barrier to mustering the political will to protect whistleblowers is surmountable.

Overcoming that barrier probably will require changing public perceptions of whistleblowers. In general, the public views whistleblowers not as persons fighting for the common good but as *snitches* or *moles* (France, Portugal) that have an ulterior motive for reporting wrongdoing (Cyprus). Yet, whistleblowers have to be prepared to lose everything, including being fired or forced to retire and, almost invariably, ostracized. Compared to political will, which public pressure can bend, the public's mentality is much harder to change. Educating the public about the benefits of whistleblowers, however, can reshape its perception of whistleblowers. Media plays an important part in this respect.

During the last couple of years, pressure from international organizations, NGOs, civil society, political leaders and the media have forced European governments to change their attitude towards whistleblower protection. It seems that now, more than ever, the times are ripe for EU members' national governments to create or strengthen their whistleblower protection systems. These systems can overcome two major obstacles: whistleblowers' fear of retaliation and their fear that their disclosure of corruption will be futile. Indeed, a comprehensive legal framework and vigorous enforcement is essential to overcome these obstacles.

Transparency International has classified the EU members according to their whistleblower legal framework. According to TI, Luxembourg, Romania, Slovenia and the United Kingdom are the only EU members that have created comprehensive or almost comprehensive whistleblower protection. The rest of the EU members have partial or none-to-very-limited whistleblower protection provisions. Most of these countries have partial provisions. Only a few have none-to-very-limited provisions (Spain, Portugal, Slovakia, Greece, Lithuania, Finland and Bulgaria).

Among the four members that excel in whistleblower protection, the United Kingdom has proven its commitment with a comprehensive legal framework. The Public Interest Disclosure Act (PIDA) is considered one of the best in Europe and in the world. Enacted in 1998, the PIDA covers most employees in the public and private sectors. It even protects contractors, trainees and British workers based overseas. The law requires the employer to prove that any action taken against an employee is not related in any way to his or her being a whistleblower. The persecuted employee can claim not only material damages such financial losses but also moral damages on the grounds of injury to their feelings. (TIc Report, 2013, p.10)

In 2004, Romania passed a law specially for protecting whistleblowers from retaliation. Unfortunately, the Whistleblower Protection Act (Law no. 571/2004) refers only to public employees and, thus, TI ranks it as an "almost comprehensive" legal text. However, it has an innovative provision that gives equal protection to employees who are

disclosing information directly to the media, activists and other third parties instead of their employers.

Slovenia and Luxembourg have passed meaningful whistleblower protection provisions in accordance with international standards. In 2011, Luxembourg public and private sector employees who report corruption, influence peddling and abuse of office benefit from protection against retaliation from their employers. The burden of proof is on the employer, and employees may appeal to a labour court, which is similar to the UK's law.

In 2010, Slovenia opted for an anti-corruption law that covers public and private sector whistleblower protection. The rules follow many international standards that concern confidentiality, internal and external disclosure channels, a broad range of remedies, the burden of proof for employers, pecuniary sanctions for retaliators and special assistance for whistleblowers. (TIc Report, 2013, p.11)

Besides the four comprehensive legal frameworks, the Swedish law stands out because it gives everyone the right to disclose information to the media, including national security information. Employees can make disclosures to third parties after first informing their employers. Anonymous sources are highly protected, even from the government.

The Netherlands has had an independent body, the Commission for Advice and Information on Whistleblowing, since 2012. Its role is to assist whistleblowers from both the public and private sectors, provide information to public and private employers about whistleblowers rules for their risk-management strategy, and assess and promote the whistleblower protection system at national level. The National Ombudsman has the power to investigate complaints of retaliation and to assist whistleblowers financially.

These various laws have been models for other EU countries, some of which have made progress toward their own system. Despite strong opposition, Italy passed its first laws protecting public sector whistleblowers so long as they do not commit libel or defamation. After scandals concerning public health issues, France established specific rules for protecting whistleblowers who disclose information exposing health or environmental risks. In 2013, Belgium passed legal rules protecting whistleblowers.

Still, these EU members and many others have only partially responded to whistleblower protection international standards. For instance, most of their laws do not provide guidance and ample protection to whistleblowers.

Enforcement is also lacking. Even the EU members that have whistleblower protection sometimes fail to enforce it promptly.

The slow pace of EU members in developing a meaningful legal framework for whistleblower protection or their ignorance of the matter mirrors the passive attitude of the European Commission. It continues to postpone the 2013 European Parliament call for a European Whistleblower Protection Program covering both the public and the private sector. (TIc Report, 2013, p.24)

However, we believe that the anti-corruption war has intensified during the last decade, including in the EU, and this will inevitably spur more countries to create a common legal framework for whistleblower protection. The question is not if, but when.

CONCLUSION

Whistleblower protection is a vital anti-corruption instrument. Unless protected, employees will not have the courage to serve the common good by disclosing corrupt practices in the public or private sector.

Unfortunately, European countries, including European Union members, fail to address this matter properly. The majority of EU members do not have in place a national legal framework to ensure whistleblower protection.

Legal models and good practices exist around the world, including among the EU members. However, the absence of political will and public pressure is preventing the majority of EU members from taken the steps in the right direction. So far, their attitude also mirrors the passivity of the European Commission. It remains reluctant to create a European Whistleblower Program that will reform EU legislation and thereby force EU members to comply with international standards and requirements.

International pressure will eventually lead to the creation of an EU legal framework to protect whistleblowers. However, the anti-corruption fight demands action, not delay. We believe that the time to act is now.

References

[1] (a). Transparency International, (2013). *International Principles for Whistleblower Legislation*. Retrieved from http://issuu.com/transparencyinternational/docs/2013_whistleblowerprinciples_en

[2] (b). Transparency International, (2013). *Whistleblower Protection and the UN Convention against Corruption*. Retrieved from http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/ti_report_/ti_report_en.pdf .

[3] (c). Transparency International, (2013). *Whistleblowing in Europe. Legal Protections for Whistleblowers in the EU*. Retrieved from http://issuu.com/transparencyinternational/docs/2013_whistleblowingineurope_en.

[4] Mulcahy, S., (2012), *Money, Politics, Power: Corruption Risks in Europe*, Transparency International Report.

[5] United States Security Exchange Commission, (2014). *Annual Report to Congress on Dodd-Frank Whistleblower Program*. Retrieved from http://www.sec.gov/about/offices/owb/annual-report-2014.pdf.

THE ROLE OF THE ENFORCEMENT OFFICERS AND PUBLIC AGENTS IN ENFORCEMENT PROCEDURES

Nicolae-Horia ȚIȚ
Faculty of Law, „Alexandru Ioan Cuza" University
Iași, Romania
horia.tit@gmail.com

***Abstract**: The article analyses the general rules on the role of bailiff in enforcement proceedings and summarizes the main procedural rules regarding the enforcement body activity. It also analyses the obligation of public force agents to assist the bailiff in enforcement activity, in order to comply with obligations under the enforcement order, respecting the rights of all persons involved.*
***Keywords**: enforcement, bailiff, public force, agents, enforcement order*

Acknowledgement: *This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007-2013.*

1. INTRODUCTION. THE PRINCIPLE OF CARRYING OUT ENFORCEMENT ACTIVITIES ONLY VIA ENFORCEMENT OFFICERS

The new CPC and Law no.188/2000 on bailiffs provide the rule that the bailiffs have complete competence in enforcement procedures. According to art.623 CPC, „enforcement of any enforceable title except those which concern the consolidated budget, European Union budget and the European Atomic Energy Community budget is made only by the bailiff, even if by special laws is provided otherwise". Likewise are the provisions of art.1 of Law no.188/2000.

These regulations are an express consecration of the principle of carrying out enforcement activities only by the bailiff and lead to a repeal of all other contrary provisions that would be covered by special laws. Moreover, the CPC does not allow other exceptions than those expressly covered by it, to which we will refer further. Therefore, even after the entry into force of the new CPC special laws could not derogate from it, establishing special jurisdictions regarding enforcement procedures. Likewise are the provisions of art.7 letter a) of Law no.188/2000 on bailiffs which provide, among the powers of bailiffs, those of "enforcement of civil provisions of enforcement titles" and of art.625 para.2 of CPC, which provides, as a guarantee of the principle of legality of enforcement, prohibition of carrying out enforcement activities by persons or bodies other than those referred to in art.623 CPC.

The bailiff is therefore enforcement body with full jurisdiction in enforcement procedures and may bring out the obligations contained in enforceable titles regardless of their nature. The bailiff has, from this point of view, an intermediate status: although not an agent of the state, being, instead, a freelancer, he performs a function of a public nature, and therefore is an agent of the public force, because it achieves one of the main functions of the state regarding justice (Boroi, 2015).

CPC establishes two categories of exceptions to the rule stated above, relating to situations when the enforcement activities can be carried out by the creditor without the intervention of a bailiff, and enforcement by other enforcement bodies.

With reference to the first case, art.622 para.5 CPC provides that „the sale by the creditor of mortgaged movable property under art.2445 of the Civil Code is to be made after the approval of the court, without the intervention of a bailiff". This special enforcement procedure is regulated by the Civil Code regarding mortgaged movable goods, the creditor acting as an enforcement body, after the approval of the enforcement court. It should be noted, however, that the creditor has only the possibility to sell the movable mortgaged goods without the intervention of a bailiff, but not the forced takeover of goods, whisch can be done only by the bailiff (art.2441 par.1 C.civ.). However, the forced takeover of mortgaged goods can be done by the bailiff without out prior approval from the enforcement court, according to art.2443 Civil Code.

A second category of exceptions to the principle of carrying out enforcement activities only via bailiffs is the one concerning the enforcement of titles regarding debts to the the consolidated budget, European Union budget and the European Atomic Energy Community budget. These debts are subject to the regulation of the Fiscal Procedure Code, and their enforcement is being accomplished through enforcement bodies referred to in art.136 of the Fiscal Procedure Code, namely or by fiscal enforcement officers (art.138 of the Fiscal Procedure Code).

2. THE PRINCIPLE OF THE ACTIVE ROLE OF THE BAILIFF

As noted above, the bailiff has unlimited jurisdiction in the current regulation for performing acts of enforcement, in order to fulfill the provisions of enforcement order. The bailiff is not an agent of the state, but also not a representative of the creditor and its activity is concentrated not only on the fulfillment of the obligations under the executory title, but also on ensuring lawfulness of the enforcement procedure, by complying with the terms and conditions of provided by law and guaranteeing the rights of the parties (creditor and debtor) or other participants in the proceedings (Boroi, 2015).

In this context, we are talking about the active role of the bailiff, which constitutes a general rule applicable to all procedures during enforcement activities. In this respect, art.627 para.1 CPC states that "throughout the course of the execution, the bailiff is bound to have an active role, insisting, by all means permitted by law, to achieve full and with celerity of the obligation under the enforceable title to the provisions of law, the rights of parties and other interested parties". The principle of the active role of bailiff is therefore subordinate to the principle of legality (Durac, 2014).

The active role of bailiff can manifest in many directions. First, it involves performing enforcement activities in the order, conditions and within the limits provided by law, without the need for creditor perseverance to achieve each of them. The creditor is obliged, according to art.646 para.1 CPC, to give to the bailiff effective support to comply, in good conditions of enforcement procedures, placing at his disposal the means necessary for this purpose, and to advance the expenses necessary to perform enforcement activities, but this does not mean that the creditor should ask the bailiff to perform each act of enforcement. On the contrary, once before the application for enforcement is launched and approved, the executor is obliged to conduct ex officio enforcement provisions necessary to comply with the obligation contained in the executory title, he is the one that will require support the creditor, if necessary, that would require advance for the costs necessary to perform acts of enforcement.

There are exceptions to this rule, namely acts of enforcement that the executor will bring out only at the request of the creditor or, where applicable, after obtaining its prior agreement. For example, if the enforcement order was granted interest, penalties or other accessories, without being determined their amount, they will be calculated by the bailiff ex officio (art.628 par.2 CPC).

But if the enforcement order had not been granted interest, penalties, or other such amounts bailiff can update the value of the principal obligation established in money only at the request of the creditor. If the creditor asks for an update of the debt and the enforcement order does not contain any criterion in this respect, the executor will proceed with the update in the inflation rate, calculated from the date the judgment became enforceable or, in the case of other executive titles, the date when the claim fell due until the date of actual payment of the obligation contained in any of these securities (art.628 par.3 CPC).

Another situation, in which the bailiff cannot perform an act of execution ex officio, but only at the request of the creditor, is regulated in relation to the execution of immovable goods. If in the second auction there are no bids, the bailiff can organise a third auction only at the request of the creditor (art.846 par.9 CPC). In this case, the procedural step is not performed ex officio, but at the express request of the creditor, the bailiff is otherwise kept to stop the proceedings in existing state (after the second auction). The first and second auction are made by default, while for the third specific request of the creditor is required.

As noted above, the principle active role covers not only enforcement activities in order to fulfill the obligations under the title, but also preserving the rights and obligations of the parties and third parties. Even if the creditor requires the performance of an act of execution, the bailiff is one that will appreciate over its legality, through the terms and conditions provided by law, and may, if it considers that they are not satisfied, refuse to make that act. In this regard, the bailiff may refuse to carry out enforcement by rejecting the enforcement application (art.666 par.5 CPC), in which case the creditor may file a complaint with the enforcement court (art.666 par.6 second sentence CPC) or refuse to perform acts of enforcement, in which case the creditor may contest the execution (art.712 par.1, last sentence CPC).

Therefore, the active role of executor must be understood not only in the sense of perseverance that he must show in order to fulfill the obligations contained in the title, but also the attention that must be kept for the principle of legality, by the deadlines and conditions for conducting enforcement activities and guarantee the rights of all participants in enforcement activity. For example, based on the provisions of art.672 CPC, bailiff can start the actual enforcement activities only after the expiry of the deadline indicated in the notification served to the debtor, even if the creditor would insist on enforcement activities before the period expires.

Secondly, the active role of the bailiff is manifested towards the identification of assets and incomes of the debtor or the persons having guaranteed the payment for the enforcement of pecuniary claims. The bailiff can, in this regard, obtain information from third persons or institutions on the incomes and assets of the debtor (art.659 CPC). Also, information of this nature may be required to the debtor. In this regard, according to art.627 para.2 first sentence CPC, if deems it in the interest of the execution, the bailiff may request the debtor, under the law, written clarification in relation to his income and assets, including those under the joint ownership, over which it can perform the execution, with the indication of their location. The unjustified refusal of the debtor to appear or to give necessary clarifications and bad faith giving incomplete information attract its responsibility for all damage caused and judicial fine in the amount of 100 to 1000 lei (Article 188 par.2 CPC).

In the same vein are the provisions of art.646 para.2 CPC, according to which the debtor is obliged, under the penalties provided for in art.188 para.2 CPC, to declare, at the request of the bailiff, all his property, movable and immovable assets, including those under the joint ownership or condominium, with the revelation of where they are and all its revenues, current or periodic. Also, the debtor whose assets have been seized is held to notify the executor previous seizure of the same goods and the enforcement officer who applied it, by giving the bailiff a copy of the minutes of seizure (art.646 par.3 CPC). Failure to do so by the debtor may have other consequences in some cases, more serious, not just a fine.

Thus, as a general rule, enforcement of real estate can take place only for the execution of writs of execution relating to claims whose value exceeds 10.000 lei.

By exception to this rule, real estate can be sold for lower claims if the debtor has no other propriety or he has only movable goods that cannot be sold. However, and if the debtor unjustifiably refuses to supply to the bailiff the information regarding his income and assets, or gives the required explanations and evidence in bad faith or providing incomplete information about the existence and value of movable or of income, his immovable goods can also be put out for auction (art.813 par.5 CPC).

Finally, the third element of the active role of the executor in order to comply with the provisions of the enforcement order is to determine the debtor to perform his obligation voluntarily. In this regard, the executor informs the debtor about the consequences enforcement procedures and estimated amount of costs (art.627 par.2 final sentence CPC).

3. USE OF PUBLIC FORCE IN PERFORMING ACTS OF ENFORCEMENT

According to art.626 CPC "the state is obliged to ensure, through its agents, promptly and effectively execution of court decisions and other enforcement titles, and in case of refusal, the injured are entitled to full compensation for the suffered damage."

This regulation does not refer to the bailiffs as they are not state agents, as mentioned above, but to bodies of public force who have an obligation to support and assist the bailiff in the work of fulfilling the obligations contained in enforcement orders. In this regard, the provisions of art.659 CPC, entitled "agents of public force". In short, the police, the gendarmerie or other agents of the public force are required to support the prompt and effective enforcement of all provisions without conditioning this obligation by the payment of money or other type of conduct. This obligation must be accomplished in cases expressly provided by law, as well as whenever bailiff would consider necessary (Boroi, 2013).

The law regulates several situations in which the participation of public force agent in enforcement proceedings is mandatory. For example, in the procedure of indirect enforcement, when the goods are movable, according to art.734 para.1 CPC., the presence of a police officer, a gendarme or other agent of the public force is necessary under penalty of nullity of enforcement activities carried out if the doors of buildings owned by the debtor or third parties are locked and the owner refuses to open them, if they refuse to open rooms or furniture, or the debtor or third party holding the property is missing and there is not any adult, or one does not respond to the bailiffs request to open the doors.

The rule is an application of the general provisions contained in art.680 para.1C proc. civ., which regulates the participation of public force agents if the debtor does not consent to the bailiff entering the rooms where he is domiciled, resident or where a company has its headquarters, in order to enforce a judgment. Art.680 CPC makes an important distinction between the situations where the debtor's assets are to be accessed based on a court order and that of enforcement procedure carried out based on another enforcement order. In the first situation, the law does not require a special authorization from the court of enforcement while in the second, in order to be able enter in a person's domicile, residence or headquarters, the bailiff or the creditor must apply to the enforcement court, in order to obtain a prior authorization from it. The court will decide upon this application urgently, after summoning the parties, including third parties owning the property, by a decision which is not subject to appeal. (art.679 par.2 CPC)

Also, in the procedure regarding the forced surrender of property, eviction from the estate of the debtor, as well as any other person who is occupying it without any right can be done with the help of public force (article 898 par.1 CPC). Where the debtor is missing or refusing to open the doors, the executor must be accompanied by public servants or representatives of the gendarmerie force, if applicable (art.898 par.2 Civil Procedure. Civ.). The participation of public force agents is also provided in enforcement proceedings regarding other obligations to do or not to do (art.908 CPC) and the enforcement of judgments relating to minors (art.911 para.3 Civil Procedure. civ.). Also,

the Civil Code regulates the obligation of public force agents to provide support for forced takeover of mortgaged movable (art.2442 par.3 of the Civil Code).

An important element of principle of public force aid in completion of obligations contained in enforcement orders is the one relating to the seizure of auto vehicles. (art.740 CPC). According to this procedure, the bailiff can order the seizure of that vehicle, mentioning this measure on the registration certificate and the identity card of the vehicle. If this measure may be not be applied for various reasons, the bailiff mentions this in the minutes of seizure, describing the causes that have led to this situation. The bailiff may also institute the seizure of a vehicle based on data obtained from the community public service for driving licenses and vehicle registration, if the debtor is the registered owner of that vehicle.

As a general rule, the vehicle is impounded by applying seals or deposited with a person especially chosen by the creditor. A copy of the seizure minutes is communicated to the road police bodies and tax authorities in the area of which the good is registered, in order to make a notice of this measure in their records. If the vehicle, registration certificate and identity card cannot be impounded when the bailiff ordered the seizure, the minutes shall be notified to the police that can stop in traffic the pursued vehicle pursued. In such a situation, the police can stop in traffic the seized vehicle and hold the registration certificate, identity card, informing the driver that the property is seized and he has to present in a reasonable period of time to the enforcement officer. Also the traffic police has to immediately notify the bailiff who applied the seizure. The entire operation is recorded by the police in a report, including a summary description of the seized vehicle and a copy of that report is submitted to the driver. Both documents and a copy of the report will be sent to the bailiff who has ordered the seizure.

As noted above, the public force agents have to support the bailiff for enforcement of the provisions of the enforcement order without any type of pecuniary or non-pecuniary condition (art.659 par.1, last sentence CPC). The support will be granted without the need for a declaration from the court of enforcement, but on the sole request of the bailiff. According to Art.659 para.2 CPC, "the bailiff will address the competent authority to ensure public force participation, which will have to take emergency measures to avoid delay or prevent enforcement". In other words, the principle of public force competition is closely linked to the principle of fair trial rights. The participation of public force is a guarantee of the accomplishment of the obligations contained in the enforcement order within optimal and predictable time, without which enforcement activity may in some cases be without result (Ghiță, 2014).

In addition to not conditioning the participation in enforcement procedure, the public force agents may not refuse to support the work of the bailiff on the ground that are impediments of any kind to enforcement (art.659 para.3 CPC). The only responsible for eventual irregularities of enforcement acts is the bailiff. The agents of public force cannot verify the conditions for enforcement of the legality of the procedure. Practically, the agents of public force cannot refuse to give their support to the bailiff, even if the refuse is motivated, and cannot rely on motifs or regarding the legality or opportunity of the enforcement procedure. Failing to do so can be punished by fine or damages, under art.188 CPC and 189-191 CPC. However, the application for compensation covered by

art.189 CPC must not be confused with an action for damages referred to in the last sentence of art.626 CPC. The latter is a common law action founded on tort liability of the state in case of refusal to grant support in complying with the provisions of the enforcement order. The action regulated by art.626 CPC is not under the jurisdiction of the enforcement court or its president, but will be subject to the general rules of substantive jurisdiction, depending on the value of the claim brought by the applicant. Also, if the application for compensation based on art.189 CPC will be directed exclusively against the public force agents who refused the support, the action for damages based on art.626 CPC could be brought against the State.

4. CONCLUSIONS

The role of bailiff in enforcement proceedings is decisive: on the one hand, it operates in order to comply with the provisions of the enforcement order, showing active role in this respect; on the other hand, the executor is the guarantor of compliance with the law enforcement proceedings, by protecting the rights of all concerned. This role of the bailiff was stressed as a result of amendments to the CPC by Law no.138/2014, by giving to the jurisdiction of the bailiff the procedure for declaration of enforcement, which was previously in the jurisdiction of the court of enforcement. In implementing acts of enforcement, the bailiff receives the support of public force agents, who may not condition the support and cannot deny it, regardless of the reasons.

References:

[1] Boroi G. (coord.), *Noul Cod de procedură civilă, Comentariu pe articole, Vol. II. Art. 527-1133*, Hamangiu, București, 2013

[2] Boroi, G., Stancu, M., *Drept procesual civil*, Editura Hamangiu, București, 2015

[3] Durac, G., *Drept procesual civil. Principii și instituții fundamentale. Procedura contencioasă*, Editura Hamangiu, București, 2014

[4] Ghiță, D., Reforming the Trials' Procedure in the New Civil Procedure Code, Revista de Științe Politice, no. 44/2014, pp. 148-160.

[5] Oprina E., Gârbuleț I., *Tratat teoretic și practic de executare silită. Volumul I. Teoria generală și procedurile execuționale*, Editura Universul Juridic, București, 2013.