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CUPRINS/TABLE OF CONTENTS/TABLE DES MATIÈRES

LISTA ABREVIERILOR

Observaţie: pentru explicaţiile aferente regulilor de compunere a abrevierilor utilizate, modul corect de întrebuinţare dar şi clasificarea în funcţie de proveninţa şi uzul acestora, a se consulta „Ghidul abrevierilor" redacţiei Studia UBB Iurisprudentia[1].

Următoarele abrevieri sunt prezentate în ordine alfabetică:

^ ----------indice [al articolelor de lege];
a.c.----------anul curent;
A.R.P.R ----------Academia Republicii Populare Române (1948- 1965);
A.R.S.R.----------Academia Republicii Socialiste România (1965-1989);
AACR----------*Anglo-American cataloguing rules;*
ABGB ----------Codul civil austriac *(Allgemeines bürgerliches Gesetzbuch*);
acad.----------academician;
ACS ----------*American Chemical Society – (stil de citare);*
AEGRM----------Arhiva electronică de garanţii reale mobiliare;
AIP ----------*American Institute of Physics – (stil de citare);*
alin. ----------alineat;
anon.----------*anonymus* (fără autor);
ANSI ----------American National Standards Institute;
APA ----------American Psychological Association – *(stil de citare);*
arh. ----------arhitect;
ARK ----------Archival Resource Key – *tip de identificator peren;*
art.----------articol;
ASRO----------Asociaţia de Standardizare din România;
B.of.: ----------Buletinul Oficial al R.S.R., partea I nr.;
B2B----------*business-to-business* (contracte);
B2C----------*business-to-consumer* (contracte);
BGB ----------Codul civil german *(Bürgerliches Gesetzbuch*);
c.----------contra;
C.adm. ----------Codul administrativ;
C.cass.----------Curtea de Casaţie franceză;
C.civ. ----------Codul civil 2009: Legea 287/2009, M.of.: 511 din 24 iulie 2009, republicat în temeiul art. 218 din Legea nr. 71/2011

[1] Disponibil în cadrul rubricii *„Author guidelines" (eng,)/„* Îndrumări pentru autori" (ro.) de pe pagina: https://law.ubbcluj.ro/ojs/index.php/iurisprudentia/about/submissions.

în M.of.: 505 din 15 iulie 2011, în vigoare din 1 octombrie 2011;

C.civ.fr.----------Codul civil francez *(Code civil des Français)*;

C.civ.it.----------Codul civil italian *(Codice civilo italiano);*

C.civ.q. ----------Codul civil Québec;

C.civ.v. ----------Codul civil 1864, în vigoare între 01.12.1865-30.09.2011.;

C.com.----------Codul comercial – Codicele de comerţ din 1887, M.of.: 31 din 10 mai 1887, în mare parte abrogat prin C.civ. 2009, începând cu 1 octombrie 2011, cf. art. 230 alin. lit. c) L: 287/2009;

C.cons. ----------Codul consumului: L: 296/2004, M.of.: 968 din 4 decembrie 2006, republicată în M.of.: 224 din 24 martie 2008;

C.fam. ----------Codul familiei a fost adoptat prin L: 41953, B.of.: 1/4 ianuarie 1954, intrat în vigoare la 1 februarie 1954, modificat şi completat prin L: 4/1956, republicat în B.of.: 13/18 aprilie 1956 şi abrogat, prin art. 230 lit. m) din L: 71/2011, la data intrării în vigoare a L: 287/2009 privind Codul civil (1 octombrie 2011);

C.m. ----------L: 53/2003 – Codul Muncii–, M.of.: 72/5 februarie 2003, republicat (în temeiul L: 40/2011), M.of.: 345/18 mai 2011;

C.pen. ----------Codul penal, L: 286/2009 privind Codul Penal, M.of.: 510 din 24 iulie 2009, în vigoare din 1 februarie 2014 cf. art. 246 L: 187/2012;

C.pen. 1864 ----------Codul Penal 1864, promulgat şi publicat la 30 octombrie 1864, în vigoare din 30 aprilie 1865 până la 17 martie 1936;

C.pen. 1968 ----------Codul Penal 1968, L:15/1968, B.of. 79 bis din 21 iunie 1968, în vigoare din 1 ianuarie 1969, abrogat prin art. 250 L: 187/2012.;

C.poc.pen.sl ----------C.proc.pen. sloven;

C.proc.civ. ----------Codul de procedură civilă, L: 134/2010, publicată în M.of.: 485/15.07.2010;

C.proc.civ.v. ----------Codul de procedură civilă vechi, „Codicele de procedură civilă", republicat în M.of.: 45 din 24 februarie 1948, cu modificările şi completările ulterioare;

C.proc.pen. ----------Codul de procedură penală, L: 135/2010 „privind Codul de procedură penală", M.of.: 486 din 15 iulie 2010, în vigoare din 1 februarie 2014 cf. art. 103 din L: 255/1013.;

C.proc.pen.1864 ----------Codul de procedură penală 1864, M.of.: din 2 decembrie 1864, în vigoare din 30 aprilie 1865, abrogat prin. „Codul de procedură penală" din 1936, M.of.: 66 din 19 martie 1936.;
C.proc.pen.1936 ----------Codul de procedură penală 1936, L: 472/1936: „Codul de procedură penală", M.of.: 66 din 19 martie 1936, în vigoare cf. art. 663 (în parte de la data publicării, în parte din 1 ianuarie 1937), abrogat prin art 1 din L: 31/1968 „pentru punerea în aplicare a Codului de procedură penală al Republicii Socialiste România", B.of.: 47 din 13 noiembrie 1968.;
C.proc.pen.1968 ----------Codul de procedură penală 1968, L: 29/1968 „privind Codul de procedură penală", B.of: 145 din 12 noiembrie 1968, în vigoare din 1 ianuarie 1969, abrogat prin art. 108 L: 255/2013 „pentru punerea în aplicare a Legii nr. 135/2010 privind Codul de procedură penală şi pentru modificarea şi completarea unor acte normative care cuprind dispoziţii procesual penale", M.of.: 515 din 14 august 2013.;
C.proc.pen.fr. ----------Codul de procedură penală francez;
C.proc.pen.it ----------Codul de procedură penală italian;
C.proc.pen.nl----------Codul de procedură penală olandez;
CA ----------Curtea de Apel (urmată de abrevierea judeţului n.r.);
CAB ----------Curtea de Apel Bucureşti;
cap.----------capitol;
cart.jud.----------carte de judecată;
CC ----------Curtea de Conturi;
CCJ----------Curtea de Casaţiune şi Justiţie (1861[2]-1925)/Curtea de Casaţie şi Justiţie (1925-1949);
CCPCJ----------*UN:Commission on Crime Prevention And Criminal Justice;*
CCR ----------Curtea Constituţională a României;
CD----------compact disc
CD-1970----------Culegere de decizii ale Tribunalului Suprem pe anul 1970, ed. Ştiinţifică şi Enciclopedică, Bucureşti;
CDP ----------Caiete de Drept Penal;
CE ----------Consiliul Europei;
CEDO ----------Curtea Europeană a Drepturilor Omului/Convenţia Europeană a Drepturilor Omului;
CETS----------Council of Europe Treaty Series (Seria de Tratate a Consiliului Europei) (194 *et seq.*).;
CF ----------Cartea Funciară;

cf. ----------*confer,* se foloseşte în loc de „vezi”, însă alegerea uneia dintre cele două abrevieri se face unitar, de-a lungul întregului material. Întrucât în domeniul juridic „v” este utilizat alternativ pentru *versus* în abrevierea unor cauze, din jurisdicţii străine, propunem adoptarea abrevierii [cf.] în loc de „vezi”.;
CJCE ----------Curtea de Justiţie a Comunităţilor Europene;
CJUE----------Curtea de Justiţie a Uniunii Europene;
CODATA-ICSTI----------Committee on Data of the International Science Council – International Council for Scientific and Technical Information;
com. ----------comuna;
conf.univ. ----------conferenţiar universitar;
Constituţia României-----Adunarea Constituantă: „Constituţia României”, M.of.: 233 din 21 noiembrie 1991, în vigoare în urma aprobării ei prin referendumul naţional din 8 decembrie 1991. Modificată şi completată prin L: 429/2003, M.of.: 758 din 29 octombrie 2003, republicată în M.of.: 767 din 31 octombrie 2003;
coord. ----------coordonator;
CPJC ----------Culegere de practică judiciară;
CS ----------Curtea Supremă (1949-1952);
CSE----------Council Of Science Editors – *(stil de citare);*
CSJ ----------Curtea Supremă de Justiţie a României (1991[3]-2003[4]);
CSM ----------Consiliul Superior al Magistraturii;
CSR----------*corporate social responsability*;
D-L: ----------Decretul-Lege nr.;
D:----------Decret al Consiliului de Stat al RSR nr.;
d.Hr. ----------după Hristos;
dec.adm. ----------decizie administrativă;
dec.civ. ----------decizie civilă;
dec.pen. ----------decizie penală;
dir.----------coordonator al unui volum colectiv;
DOI----------*Digital online identifier – identificator peren;*
DPO ----------*data protection officer.*
dr. ----------doctor (prin tradiţie se păstrează punctul de final);
E.g./e.g. ----------*exempli gratia;*
ECHR: ----------European Court of Human Rights;
ECLI:----------European case law identifier – *identificator peren;*
ECU ----------European currency unit (1979-1999);
ed. ----------editură sau ediţie;

ELI: ----------European legislation identifier – *identificator peren;*
eng.----------englez, limba engleză;
et al.----------*(et aliae/et alii)* și altele, și alții*;*
et seq. ----------*și următoarele (pagini, numere etc.);*
etc.----------*et cetera;*
ETS----------European Treaty Series (Seria Tratatelor Europene (1-193);
Eur. Comm'n H.R. Dec & Rep. Collection of Decisions of the European Commission on Human Rights;
Eur. Ct. Hr. ----------European Court of Human Rights (Reports of Judgements and Decisions);
Eur. H.R. ----------European Human Rights Reports;
fr. ----------francez, limba franceză;
FRAD ----------Functional Requirements for Authority Data;
FRBR----------Functional Requirements for Bibliographic Records;
FRSAD ----------Functional Requirements for Subject Authority Data;
gr. ----------grec, limba greacă;
GTS----------grupuri transnaționale de societăți;
H:----------hotărârea nr.
HCCH----------*Hague Conference on Private International Law;*
HCGMB----------Hotărâre de consiliu general al Municipiului București;
HCL ----------Hotărâre de consiliu local;
HCM ----------Hotărâre a Consiliului de Miniștri;
HG:----------Hotărârea de Guvern nr.;
hot. ----------hotărâre judecătorească;
HTML----------*HyperText Markup Language;*
i.e. ----------*id est* (aceasta înseamnă);
i.f.----------*in fine;*
ibidem (ibid.)----------Se utilizează pentru a indica o referință bibliografică precisă, utilizată în nota imediat anterioară, pentru o retrimitere, la aceeași pagină.;
idem (1)----------alineatul (1) al articolului deja citat;
idem (id.) ----------Se utilizează pentru a indica o referință bibliografică precisă, utilizată în nota imediat anterioară, pentru o retrimitere, la o pagină diferită.;
IEEE ----------Institute of Electrical and Electronics Engineers – *(stil de citare);*
ILFA----------International Federation of Library Associations and Institutions
infra----------mai jos;
ing. ----------inginer;
INML ----------Institutul de Medicină Legală „Mina Minovici”;

ISBD ----------International Standard Bibliographic Description;
ISBN ----------International Standard Book Number, - *identificator peren;*
ISC ----------International Science Council;
ISMN----------International Standard Music Number – *identificator peren;*
ISO ----------Organizaţia Internaţională de Standardizare/standard al asociaţiei;
ISRC----------International Standard Recording Code – *identificator peren;*
ISSN----------International Standard Serial Number – *identificator peren;*
it. ----------italian, limba italiană;
î.Hr. ----------înainte de Hristos;
ÎCCJ----------Înalta Curte de Casaţie şi Justiţie;
JN ----------Justiţia Nouă, revista;
JO/JOUE----------Jurnalul Oficial al Uniunii Europene;
Jud. ----------Judecătorie(a);
jud. ----------judeţul;
L: ----------Legea nr.;
L: 71/2011 ----------Legea nr. 71/2011 pentru punerea în aplicare a Legii nr. 287/2009 privind Codul civil, publicată în M.of.: 409/10.06.2011;
L.S. ----------locul sigiliului;
LCA----------Legea contenciosului administrativ;
lect.----------lector;
lit. ----------litera;
loc.cit.----------*loco citato;*
LRM----------Library Reference Model A conceptual Model for Bibliographic Information;
M.of. ----------Monitorul Oficial al României, partea I;
MARC----------MAchine-Readable Cataloging;
MC ----------CEDO, Marea Cameră;
MDA ----------Mic dicţionar academic;
MEC----------Ministerul Educaţiei şi al Cercetării;
MLA----------Modern Language Association *(stil de citare);*
mun. ----------municipiul;
n. ----------nota/ă de subsol (din propria lucrare, din lucrarea citată);
n.a. ----------nota/ă din lucrarea care se citează (observaţia, completarea autorului/creatorului);

n.n. ----------nota noastră (a autorului care scrie – observaţia, completarea);
n.r.----------nota redacţiei;
N.Y.----------New York;
NISO ----------National Information Standards Organization;
nr ----------număr;
nr. ----------numărul;
O: ----------ordin (de ministru) nr.;
OECD ----------*Organization for Economic Co-operation and Development*;
OG: ----------Ordonanţa de Guvern nr.;
OMJ: ----------Ordinul Ministrului Justiţiei nr.;
op.cit. ----------*opus citatum, opere citato*; [de evitat, a se înlocui cu titlu scurt n.r.]
OUG: ----------Ordonanţa de Urgenţă a Guvernului nr.;
p. ----------pagina;
passim ----------în diverse locuri (de evitat întrucât citările trebuie să fie precise);
pct. ----------punctul;
pen.----------penal(ă);
pg. ----------paragraf;
pp. ----------paginile;
PR ----------Pandectele române, revista;
proc.pen.fr----------Codul de procedură penală francez;
prof. univ. ----------profesor universitar ;
Ptk. ----------Codul civil ungar *(Polgári Törvénykönyv)*;
PUD ----------Plan urbanistic de detaliu;
PUG ----------Plan urbanistic general;
PUZ ----------Plan urbanistic zonal;
R: ----------Regulament nr.;
RDA ----------Resource Description and Access – *standard de citare;*
RDC ----------Revista de Drept Comercial;
rep. ----------republicată (legea);
RFDA ----------*Revue Française de Droit Administratif;*
RGPD ----------Regulamentul (UE) 2016/679 al Parlamentului European şi al Consiliului din 27 aprilie 2016 privind protecţia persoanelor fizice În ceea ce priveşte prelucrarea datelor cu caracter personal şi privind libera circulaţie a acestor date şi de abrogare a Directivei 95/46/CE (Regulamentul general privind protecţia datelor), JO L 119/1 din 4 mai 2016.
RLU ----------Regulament local (de urbanism);

ROIIJ 2005----------Regulament din 2005 de ordine interioară al instanţelor judecătoreşti, CSM, H: 387/2005 pentru aprobarea Regulamentului de ordine interioară al instanţelor judecătoreşti, M.of.: 958/28 octombrie 2005;
ROIIJ 2015----------Regulament din 2015 de ordine interioară al instanţelor judecătoreşti, CSM, H: 1.375/2015 pentru aprobarea Regulamentului de ordine interioară al instanţelor judecătoreşti, M.of.: 970/28 decembrie 2015;
ROIIJ 2022----------Regulament din 2022 de ordine interioară al instanţelor judecătoreşti, CSM, H: 3243/2022 pentru aprobarea Regulamentului de ordine interioară al instanţelor judecătoreşti, M.of.: 1254 şi 1254 bis/27 decembrie 2022;
ROLINeST----------Romanian Library network science & technology;
RRD----------Revista Română de Drept;
RRDP ----------Revista Română de Drept Privat;
s.a.----------fără autor - în construcţia referinţelor;
S.C. ----------Societate Comercială;
s.d.----------fără dată;
s.l. ----------fără loc;
s.n. ----------fără titlu – în construcţia referinţelor;
s.n. ----------sublinierea noastră;
s.n.s.----------fără editură cunoscută – în construcţia referinţelor;
S.R.L.----------Societate cu Răspundere Limitată;
S.S. ----------cu semnătura sa;
Sec. ----------Secţia (unitate administrativă, oficială, deci primeşte majuscula).;
sec. ----------secţiune;
Sec.cont.adm. ----------secţia de contencios administrativ;
sen. ----------sentinţă;
SR ISO ----------standard românesc ce transpune un standard ISO;
STAS ----------STAndard de Stat];
sub. ----------subliniere;
SUBB Iurisprudentia-----Studia Universitatis Babeş-Bolyai Iurisprudentia;
supra----------mai sus;
SZGB----------Codul civil elveţian;
ş.a.----------şi alţii, şi altele; [de preferinţă: *et. al.* n.r.]
ş.a.m.d. ----------şi aşa mai departe; [de preferinţă: etc. n.r.]
T ----------Tribunal [se adaugă, fără blanc, abrevierea judeţului *e.g.: TCJ, TB etc.* n.r.];
t. ----------tomul;

t.n.----------traducerea noastră (a autorului/autorilor);
tc.----------turc, limba turcă;
th. ----------teză de doctorat (citată în dactilogramă);
tit. ----------titlul;
TReg.----------Tribunalul Regiunii;
TS----------Tribunalul Suprem (1952-1991);
TUB ----------Tipografia Universităţii Bucureşti;
UAT ----------unitate administrativ-teritorială;
UBB ----------Universitatea Babeş-Bolyai;
UNICODE ----------Universal Coded Character Set;
UNIDROIT ----------International Institute for the Unification of Private Law;
UNODC----------Organizaţiei Naţiunilor Unite:Biroul Naţiunilor Unite pentru Droguri şi Criminalitate *(United Nations Office on Drugs and Crime);*
URI----------Uniform Resource Identifier – identificator peren;
URN----------Uniform Resource Name – identificator peren;
var. (ist.)----------variaţiune şi istoric (arhaism);
vol. ----------volumul;
vs [fără punct] ----------*versus*;
Y.B. Eur. Conv. Hr. -------Yearbook of the European Convention on Human Rights.

Listă îngrijită şi actualizată, în baza principalelor abrevieri utilizate în paginile revistei, de:

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ARTICOLE

TRANSPARENCY OF BUSINESS-TO-CONSUMER TERMS ON ATTORNEY FEES, IN CONTRACTS CONCERNING LEGAL COUNSELLING SERVICES

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Abstract. The study examines the issue of establishing the unfair nature of clauses in legal assistance contracts between a lawyer and a consumer, prefiguring the payment of lawyer fees based on an hourly rate, as this criterion was highlighted in the jurisprudence of the CJEU, especially in the judgments pronounced in case C-395/21 and in case C-335/21. The emphasis is placed on the requirement of transparency of the costs of legal advice services in relations with consumers, in the light of the recital according to which, although the adhesion clauses are unchallengeable according to article 4, 2nd para. of Directive 93/13 if these terms concern elements of the price of services or products supplied to the consumer, those contractual provisions remain included in the analysis of unfairness in situations where they have been stated by the *proferens* in excessively technical language or when resorting to evasive and non-transparent provisions.

Key-words: consumer, legal counselling, B2C services, non-transparent content, attorney fees, unfair terms.

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I. Introduction

Providing legal services to consumers who request legal advice while acting outside their professional activity[1] may raise several practical interrogations, since these services are subsumed to the category of intellectual services subject to the provisions of consumer law, particularly those provisions repressing unfair contractual B2C terms. In the B2C relations between the lawyer and natural persons acting for extra-professional purposes, the exigencies of transparency remain central to the debate on the prerequisites of eliminating unfair terms, in a context in which certain contractual provisions elaborated by the *proferens* and accepted by the *adherens* in the absence of any optional negotiatory framework might present a disturbing non-transparent nature. Are the contractual provisions on legal services in B2C contracts subject to challenge in terms of unbalanced nature[2], from the perspective of the provisions of Directive (EC) 93/13, with the amendments brought by Directive (EU) 2019/2161? Could the consumer request the removal of a clause stipulating the payment of attorney fees using an hourly rate, without containing transparent criteria based on the amounts due by the consumer are established?

The taxonomy of B2C adhesion contracts encapsulates the criterion of the significant disequilibria generated between the contractual parties, as emphasized in a landmark decision of the CJEU, pronounced in case C-

[1] Juanita GOICOVICI, „Consumatorul aparent și profesionistul veritabil: frontierele (volutele) noțiunii de «consumator»", în Adriana Almășan, Ioana Vârsta, Cristina Elisabeta Zamșa (coord.), *In honorem Flavius Antoniu Baias. Aparența in drept*, Hamangiu, București, 2021, vol. 2, pp. 727-752.

[2] Juanita GOICOVICI, *Dreptul relațiilor dintre profesioniști și consumatori,* Hamangiu, Bucharest, 2022, pp. 172-176.

537/13[3], the reasoning of which was restated in the alignment of the recitals of the CJEU decisions in cases C-335/21[4] and C-395/21[5].

In case C-395/21, the Lithuanian consumer paid in advance the sum of EUR 5600 for the legal advice services covered by the five B2C agreements concluded with an individual law firm, each of those contracts containing the clause at issue that the fees were set at EUR 100 per hour of legal consultations provided to the client, while stipulating that certain amounts will be paid immediately after the consultations had been provided, calculated according to the number of hours of consultations involved. The dispute was caused by the consumer's refusal to pay the amounts mentioned in the invoices issued by the law firm; subsequently, a legal action has been brought before courts against the consumer for an order to pay the amount of approximately EUR 10,000 (more precisely, EUR 9900) invoiced for legal advice and the amount of approximately EUR 200 as expenses incurred in the context of enforcement, increased by annual interest in the amount of 5% of the due fees. This claim partially admitted by the court of first instance, for approximately 6500 euros. Congruently, the appellate court (Supreme Court of Lithuania), which was the referring court, highlighted a pair of issues on which it requested the interpretative intervention of the CJEU, relating to the requirements of transparency of the clauses in contracts for the provision of

[3] CJEU, C9, BIRUTĖ ŠIBA VS. ARŪNAS DEVĖNAS, C-537/13, of 15.I.2015, ECLI:EU:C:2015:14, online: https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:62013CJ0537&qid=1703415477562.

[4] CJEU, C9, VICENTE VS. DELIA, C-335/21, of 22.IX.2022, ECLI:EU:C:2022:720, online: https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:62021CJ0335&qid=1703415856504.

[5] CJEU, C4, D.V. VS. M.A., C-395/21, of 12.I.2023, ECLI:EU:C:2023:14, online: https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:62021CJ0395&qid=1703416001139.

legal services (i), while also requesting clarification on the effects when admitting the unfairness of a clause fixing the price (or the cost) of legal services (ii).

The referring court's first concern was centred on a possible exclusion of this type of claim from the substantial scope of Directive 93/13 on unfair terms and of Directive 2019/2161, in particular considering that it related to the issue of fixing the price component, which would have excluded it *outright* from the category of adhesion clauses eligible for the control of unfairness, except if it had presented a non-transparent and ambiguous wording for the consumer, which would have repositioned the disputed terms in the categories of contractual provisions subject, and not exempted from judicial control on unfairness, from the angle of application of article 4, 2nd para. of the revised Directive 93/13.

Saliently, in case C-395/21, the dilemmatic nature of the assessment of the unfair nature of the litigious terms related to the apparently insurmountable difficulties raised by the possible return to the previous situation, posterior to the inactivation of the litigious terms with retroactive effect, given that the retroactivity in declaring the voidance of unfair terms[6] (or in establishing their *inter partes* unenforceability) would be impossible to reconcile with the irreversibility of the effects already produced, consisting of the providing of legal advice services from which the consumer has benefited and which, by their nature, are exempt from the category of reversible effects of judicial actions. This irreversibility of the services of an intellectual nature provided to the consumer (while applying attorney fees the amount of which has been established in a non-transparent manner) could attract an

[6] Paola IAMICELI, „The «Punitive Nullity» of Unfair Terms in Consumer Contracts and the Role of National Courts: A Principle-Based Analysis", *Journal of European Consumer and Market Law*, vol. 12, n. 4, 2023, pp. 142-150.

undesirable effect, of unjust enrichment of the consumer, implying an unfair situation towards the professional who has already provided those services.

The tertiary plan of the dilemma brought before the CJEU referred to a possible reduction by the court of the level of the legal counselling fees (based not on its visibly exaggerated, exorbitant, or disproportionate nature in relation to the object of the litigious case, but based on the non-transparent criteria, which remained unexplained when issuing the consent to adhesion agreement). The intervention concerned the services that the consumer benefited from in the form of services of legal advice and whether such a reductive intervention of the court would not compromise the deterrent effect[7] of article 7, 1st para. of Directive 93/13. Saliently, the argument was based on the assertion that, if professionals could rely in advance on a moderate intervention by the courts, in the sense of partially 'amputating' the effects of the unfair term, while *pro parte* maintaining its effectiveness (for example, by reducing the amount of fees and tariffs charged by the service provider under the litigious terms), professionals would manifest disinterest in avoiding or not resorting to unfair terms[8] and instead professionals would engage in distorted contractual conduct[9], resorting *prima facie* to unfair

[7] Juanita GOICOVICI, „Aprecierea caracterului abuziv al clauzelor contractuale în cazuistica recentă a CJUE şi impactul acesteia asupra jurisprudenţei naţionale: schimbări palpabile sau implicare secvenţială", *Analele Ştiinţifice ale Universităţii Alexandru Ioan Cuza din Iaşi, seria Ştiinţe Juridice,* vol. 66, n. 2, 2020, pp. 47-64.

[8] *Ibidem.*

[9] Juanita GOICOVICI, „Faţetele bunei-credinţe a profesionistului în evaluarea clauzelor abuzive din contractele de credit încheiate de consumatori", în Adriana ALMĂŞAN, Flavius-Antoniu BAIAS, Bogdan DUMITRACHE, Ioana VÂRSTA, Cristina Elisabeta ZAMŞA (coord.), *In honorem Corneliu Bîrsan. Ius est ars boni et aequi*, Hamangiu, Bucureşti, 2023, vol. II, pp. 497-528.

clauses without fear of other sanctions. The *proferens*[10] would thus rely on the tempering effects of these clauses, due to the judges' intervention and, for obvious reasons, such reasoning would undermine the preventive and deterrent effect of Directive 93/13, which postulated a general prohibition on resorting to disequilibrated terms in B2C adhesion agreements.

II. Assessing the disequilibrated nature of B2C terms based on the unfitting to the exigences of transparency

A. Clauses addressing the ancillary elements of the onerous counterpart

National courts' mission in establishing the unfair nature of contractual terms is portrayed using a preliminary criterion of selection, since, as a general principle under European Consumer Law, clauses referring to price conditions or to the core elements of the onerous object of the B2C contracts remain outside the perimeter of the analysis on 'significant imbalance' caused to consumer through inserting the litigious clause. Basically, for the terms which fall within the concept of 'object of the contract' (Article 4, 2nd para. of Directive 93/13), previous jurisprudential benchmarks have been set by the CJEU, who estimated that the assessing of the disequilibrated nature might be applied to these clauses which determine patrimonial benefits, and which describe the onerous nature of the B2C contract. Congruently, clauses that have an ancillary connection to those defining the onerous segments cannot be included in the 'main object of the contract', as illustrated, in particular, by the CJEU's decision in the *Andriciuc*

[10] Lucian BERCEA, „Contractul de adeziune. O analiză structurală şi funcţională a standardizării contractuale", *Revista Română de Drept Privat*, n. 4, 2020, pp. 367-372.

case[11], and also by the CJEU's judgment of 22 September 2022, in case C-335/21, *Vicente*[12]. Thus, when the litigious term consists in the price clause, which relates to the remuneration of legal services, based on an hourly rate, the mentioned clause, which establishes the fees and indicates the criteria for establishing their rate, is one of the clauses which remain definitory for the onerous nature of the agreement. This relationship being characterized precisely by the providing of the onerous nature of legal services, is, consequently, related to the 'main object of the contract', as described in Article 4, 2nd para. of Directive 93/13, amended by Directive 2019/2161 and remains outside the juridical assessment, except for the cases in which the litigious terms present an untransparent format.

In case C-335/21, salient questions have been raised concerning the classification of the litigious terms and the CJEU panel retained that the clause agreed between the lawyer and the consumer, which provides for the payment of fees in the event that the client withdraws from the judicial proceedings initiated while being represented by the lawyer or concludes an agreement without the knowledge of the law firm, is not to be considered as included under Article 4(2) of Directive 93/13/EEC, due to the fact it is not the main clause relating to the onerous elements, respectively to the price and it is rather a term referring to additional or ancillary onerous components, such as the penalties applicable to certain types of consumer conduct. In our opinion, although the conclusion remains adequate, these terms must be seen as eligible for judicial assessment of the unfair nature; yet, the judicial control might merely approach the transparency of the B2C penalizing term, since, although ancillary to the main price elements, it remains a marginal

[11] CJEU, C-186/16, EU:C:2017:703, paragraphes 35 and 36.

[12] CJEU, C-335/21, EU:C:2022:720, paragraphe 78.

component of the onerous nature of the B2C contract on legal counselling services.

Relevancy was recognized to the fact that, in case C-335/21, the consumer approached the law firm after reading a promotional text by means of an advertorial not mentioning the 'penalization for withdrawal' clause; one may conclude that the interested person was merely informed on the price of the legal services, while the penalty clause was not explained to the consumer. Therefore, it was not established that the consumer was aware of the penalty clause applicable for withdrawal from the judicial procedures before signing the contract on legal counselling services.

B. Clarity and intelligibility of the litigious clause using the 'average consumer' standard

In terms of assessing the clarity and intelligibility of the litigious clause, one must observe that, if that clause determines the lawyer's fees by reference to a scale of a bar association, which lays down different rules applicable, without any reference to that clause being made in the context of prior disclosure, using the average consumer' epitome, the question arises as to whether that clause can be regarded as plainly intelligible[13]. The reference therefore focuses on the classification of the clause within the scope of

[13] *Idem*, paragraphe 23.

Directive 93/13/EEC[14] (i), its clarity and intelligibility[15] (ii), as well as the possible classification of dishonest B2C practices[16] (iii).

Concerning the withdrawal clause, it has been retained that the insertion of the mentioned clause in the B2C contract on legal counselling services, without being mentioned in the commercial offer or in the prior information delivered to the prophane party, constitutes a concealment of significant information influencing the consumer's assent to enter the contractual relationship (ii).

While assessing the content and accessibility of the withdrawal clause, the CJEU panel retained that the clause referred to a scale of the local Bar Association[17] not disclosed to the consumer. Basically, both the main arguments concerned the interpretation of the rules on misleading commercial practices between the lawyer and the client, such as the terms

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[14] COMMISSION DES CLAUSES ABUSIVES (France), „La clause de tarif horaire des honoraires d'avocat relève de l'objet principal du contrat. CJUE, 12 janvier 2023, affaire C-395/21 – D. V.", online: https://www.clauses-abusives.fr/jurisprudence/la-clause-de-tarif-horaire-des-honoraires-davocat-releve-de-lobjet-principal-du-contrat/.

[15] COMMISSION DES CLAUSES ABUSIVES (France), „La clause qui se limite à fixer un tarif horaire de l'avocat n'est pas compréhensible pour le consommateur. CJUE, 12 janvier 2023, affaire C-395/21 – D. V.", online: https://www.clauses-abusives.fr/jurisprudence/la-clause-qui-se-limite-a-fixer-un-tarif-horaire-de-lavocat-nest-pas-comprehensible-pour-le-consommateur/.

[16] COMMISSION DES CLAUSES ABUSIVES (France), „Si la clause fixant les honoraires de l'avocat est abusive, le juge peut exonérer le consommateur de son obligation de paiement. CJUE, 12 janvier 2023, affaire C-395/21 – D. V.", online: https://www.clauses-abusives.fr/jurisprudence/si-la-clause-fixant-les-honoraires-de-lavocat-est-abusive-le-juge-peut-exonerer-le-consommateur-de-son-obligation-de-paiement/.

[17] COMMISSION DES CLAUSES ABUSIVES (France), „Le déséquilibre significatif ne peut en principe être caractérisé du seul fait du défaut de transparence. CJUE, 12 janvier 2023, affaire C-395/21 – D. V.", online: https://www.clauses-abusives.fr/jurisprudence/le-desequilibre-significatif-ne-peut-en-principe-etre-caracterise-du-seul-fait-du-defaut-de-transparence/.

penalizing[18] the client for withdrawing from the initiated judicial procedures[19].

According to recital (41) in case C-335/21, the debate was also centred on whether the litigious clause penalizing the consumer for withdrawal from judicial proceedings must be seen as a 'compensation clause' or as a 'penalty clause' the possible unfair nature of which would be subject to national courts' control. However, even if a penalizing clause were to be considered eligible for judicial examination, since the 'penalty for withdrawal' clause relates to the predominant onerous aspects of the contract, it was necessary to examine whether it satisfied the requirements of transparency towards the consumer. In that regard, the CJEU panel observed that the 'penalty for withdrawal' clause was placing the consumer in the position of evasively anticipating the economic consequences of the unilaterally withdrawal from judicial procedures.

III. Formal exigences applicable to the formation of legal counselling contracts

The legal definition extracted from article 4 of Directive 93/13, amended by Directive 2019/2161 captures the fact that, in the economy of unfair terms, the lack of direct negotiation of the contract, the professional's breach of the exigences of lawful conduct and the existence of a consistent

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[18] Patrick LINGIBÉ, „Avocats: le contrôle des clauses abusives d'une convention d'honoraires", published on 31.X.2022, online: https://www.actu-juridique.fr/professions/avocats-le-controle-des-clauses-abusives-dune-convention-dhonoraires/.

[19] Nicolae-Horia ȚIȚ, „Încuviințarea executării silite a debitorului consumator-exigențe europene, realităţi naţionale", *Analele Ştiinţifice ale Universităţii Alexandru Ioan Cuza din Iaşi, seria Ştiinţe Juridice*, vol. 66, n. 2, 2020, pp. 91-110.

imbalance[20], on either the patrimonial or the procedural part, are decisive elements in evaluating the unfair nature[21] of the litigious clause[22]. The EU legislator defined[23] the two elements, from which one presents subjective components (consisting in the coercion[24] to which the professional resorted, in the latter's capacity of *proferens,* and the malicious intent of the professional), corroborating objective elements, such as: (a) the circumstances under which the unbalanced formation of contract occurs; (b) the objective, economic or procedural effects of the term drafted by *proferens* (the significant, disproportionate imbalance disadvantaging the consumer, as *adherens*).

Under the Romanian legislation, according to the amended version in force from July 1st, 2024 of article 121 of the Statute of the legal profession of attorney, the formation of legal counselling contracts is based on the consensually exchanged wills, as a guiding principle which is postulated without differentiating according to the taxonomy of contracts concluded between professionals (B2B contracts) or between the individual law firm / associated lawyers and consumers. In terms of formal exigences, the commented statute is mentioning the validity of the contractual version

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20 Claire-Marie PÉGLION-ZIKA, *La notion de clause abusive. Étude de droit de la consommation*, L.G.D.J., Paris, 2018, pp. 84-92.

21 *Ibidem.*

22 Riccardo SERAFIN, „The Court of Justice on Unfair Terms and Supplementation of the Contract: How Far Is Too Far?", *Journal of European Consumer and Market Law*, vol. 12, n. 4, 2023, pp. 150-158.

23 Mónika JÓZON, „Judicial governance by unfair contract terms law in the EU: Proposal for a New Research Agenda for Policy and Doctrine", *European Review of Private Law*, vol. 28, n. 4, 2020, pp. 909-930.

24 Juanita GOICOVICI, *Dicționar de dreptul consumului*, C.H. Beck, București, 2010, pp. 128-136.

recorded in a document under private signature, electronic signature or in an integral digital format which is requested exclusively for *ad probationem* reasons. Moreover, by specifying the validity of a verbal commitment, the commented text reinforces the consensual valences of the contracts for the providing of legal counselling. In our view, the first element which fragilizes the effectiveness of the commented statutory text lies in the absence of any differentiation according to the B2B or B2C nature of the contractual relationships, which, in our opinion, remains an omission that undermines the importance of the informative formalism imposing on the professionals a duty to expressly insert, in writing or on durable digital support, specific clauses that clarify for the consumer the onerous implications of the contractual commitment.

IV. Dual assessment: eliminating the litigious unfair terms *versus* the suppression of unfair commercial practices

Faced with the issue of finding a possible infringement of the standards of lawful conduct, by the *proferens*, in the context of resorting to untransparent contractual terms, thus infringing the prohibition of introducing unfair terms[25] in B2C contracts, but also of a possible infringement of the prohibitory norms on unfair B2C practices, the CJEU panel retained in the second paragraph of the judgment delivered on 22 September 2022, in case C-335/21, an affirmative answer to the question on the pertinency of the dual qualification, in relation to the possibility of

[25] Mónika JÓZON, „Unfair contract terms law in Europe in times of crisis: Substantive justice lost in the paradise of proceduralisation of contract fairness", *Journal of European Consumer and Market Law*, vol. 6, n. 4, 2017, pp. 157-166.

cumulating the two legal repressive mechanisms[26] for the same non-transparent act or conduct of the professional (the qualification as an unfair clause, respectively the qualification as a B2C unfair practice), specifying that the insertion of a clause providing for a financial penalty should the client withdraw from the judicial proceedings entrusted to the lawyer, represent both a resorting to unilaterally-drafted unfair terms and an unfair B2C practice. The litigious clause referring to the scale of a professional association and not being mentioned in the B2C offer or in the informative note send to the consumer, could be eliminated by the decision of national courts, on grounds related to its untransparent content. Simultaneously, on grounds related to the unfairness of such B2C practices, this type of conduct may be described as a misleading commercial practice, prohibited in B2C relations.

Professionals' compliance to the requirements of professional diligence is assessed in terms of assessing the reasonableness of the measures taken by the professional to disclose pertinent information[27]. While the professional is not expected to engage in exorbitant efforts, the professional is not allowed to manifest an inexcusable negligence or an intentional malice in B2C relationships. Nevertheless, in almost all litigious contexts, the professional would be facing the irrebuttable presumption of knowledge in the field of its activity (presuming the possessing of an acceptable level of specialized skills). As mentioned in the previous paragraphs, the fact that the professional neglected to provide relevant, essential information remains

[26] Juanita GOICOVICI, „Multiple-Party, Multi-Claim Litigation and Permissive Joinder – Perspectives on the Consumer Law", *Studia Universitatis Babes Bolyai Iurisprudentia*, vol. 63, n. 4, 2018, pp. 35-63.

[27] Charlotte PAVILLON, Benedikt SCHMITZ, „Measuring Transparency in Consumer Contracts: The Usefulness of Readability Formulas Empirically Assessed", *Journal of European Consumer and Market Law*, vol. 9, n. 5, 2020, pp. 191-200.

unjustifiable; instead, it can be perceived as an aggravating circumstance. It remains important to observe that the rebuttable presumption of culpable omission, at the antipode of the principles governing the proving of illicit conduct under the provisions of 'classical' Contracts law, resorts to the rule according to which the consumer vulnerability[28] is assessed by using the 'average consumer' standard, and the professional's omission to deliver pertinent information clarifying the economic reverberations for the consumer would be treated as the expression of malicious conduct[29] or of inexcusable negligence[30].

V. Typologies of 'significant imbalance' caused by the effects of the unfair terms and legal treatment of evasive clauses

The taxonomy[31] of B2C terms causing ostensible imbalance between the professional and the consumer includes the terms generating a direct economic imbalance[32]. The 'significant imbalance' may also take the form of indirect economic imbalance[33], particularly in the case of clauses that circumvent the legal provisions on statutory compensation. Imbalances in the allocation of contractual risks or imbalances of responsibility[34] (such as imbalanced liability) are also included in the category of 'significant imbalances' caused using unfair B2C terms.

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[28] Lucian BERCEA, *op. cit.,* pp. 371-372.

[29] Juanita GOICOVICI, *Dreptul relațiilor (...)*, pp. 134-137.

[30] *Idem*, pp. 138-141.

[31] *Idem*, pp. 172-173.

[32] *Idem*, pp. 174-175.

[33] *Ibidem.*

[34] *Idem*, pp. 176-177.

The legal counselling services contract may take the form of a letter of commitment indicating the legal relationship between the lawyer and the addressee of the letter, including legal services and fees, signed by the lawyer, and sent to the client. If the client signs the letter under any express mention of acceptance of the content of the letter, it acquires the value of a legal assistance contract. Congruently, the legal assistance contract might have been tacitly concluded should the consumer had paid the fee mentioned therein, the payment of the fees usually having the meaning the acceptance of the contract by the consumer, in which case the date of conclusion of the contract would be the date mentioned in the B2C contract. The legal counselling contract may exceptionally also be concluded in a verbal form, in which case the written version of the contract or the 'durable medium' version will be drafted as soon as possible and delivered to the consumer; divergent interpretations of the B2C contract would be addressed under the principle of 'favourable interpretation' enounced in article 77 of the Romanian Code of consumer rights, all evasive terms being interpreted in favour of the consumer, as *adherens*.

Conclusions

Addressing the unfair terms on attorney fees, from the angle of the non-transparent content could be pivotal for eliminating clauses causing a significant imbalance between parties, such as the clause penalizing the consumer for withdrawing from judicial procedures. Firstly, the litigious clause which gives rise to lawyer's right to fees by simply referring to a scale of a bar association, while the latter sets out different rules applicable without any reference to the clause on the establishing of the value of fees in the

commercial offer delivered to the consumer, would represent a dishonest B2C practice penalizing the consumer for ignoring the attorney's opinion and not to desist of his/her own accord from the judicial procedure the consumer has entrusted to the lawyer, under a financial penalty.

As emphasized in case C-335/21, the inserting in a B2C contract of a 'penalty for withdrawal' clause might create disproportionate advantages for the *proferens* to the detriment of the *adherens*. Thus, the national courts can examine the clause which refers, for the calculation of the contractual penalty that it provides, to the scale of the professional order of lawyers, the content of which would be difficult to access for the consumer prior to emitting his/her consent and that would create difficulties for the consumer in understanding its financial reverberations, This reasoning is pertinent particularly if that clause were to be applied, that the consumer would be obliged to payment of a contractual penalty that may reach a significant amount, of even disproportionate consequences for the *adherens*.

Corroborated to retaining the voidance of the 'penalty for withdrawal' clause, providing for a penalty to be paid should the consumer withdrew from the judicial procedures entrusted to the lawyer might represent a species of illicit and unloyal commercial conduct in B2C relations. Nevertheless, it is worth noting that national courts may resort to the rebuttable presumption of malicious conduct, reversing the burden of proof, and allowing the consumer to be exempted from proving the maleficent intention of the professional, on the latter being incumbent the burden of proof on the legitimacy of professional's omissive conduct which (under certain economic or procedural circumstances) might represent an B2C illegal commercial practice.

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ARTICOLE

FIDEIUSIUNEA SIMPLĂ ȘI CEA SOLIDARĂ – O VEDERE DE ANSAMBLU

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Motto: „Il faut distinguer entre le cautionnement simple [...] et le cautionnement solidaire ..."[1]

Rezumat: Lucrarea noastră pune în lumină fideiusiunea simplă şi pe cea solidară. Ea este împărţită în nu mai puţin de patru porţiuni. Prima parte constă în nişte cuvinte introductive. Cea de-a doua se concentrează asupra fideiusiunii simple; aici sunt avute în vedere beneficiile de discuţiune şi de diviziune. Partea a treia are de-a face cu fideiusiunea solidară. Finalul este format din extrem de scurte concluzii.

Cuvinte cheie: fideiusiune simplă, fideiusiune solidară, beneficiu de discuţiune, beneficiu de diviziune.

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[1] L. AYNES, P. CROCQ, A. AYNES, Droit des sûretés, 16e édition, LGDJ, Paris, 2022, p. 77.

THE SIMPLE SURETYSHIP AND THE SOLIDARY SURETYSHIP – AN OVERVIEW

Abstract: Our paper highlights two types of suretyship: the simple one, and the solidary one. The current work is divided in no less than four parts. The first part consists of some introductory words. The second portion focuses on the simple suretyship; this is where the benefits of discussion and division are taken into account. The third part deals with the solidary suretyship. Our research ends with some very brief conclusions.

Keywords: simple suretyship, solidary suretyship, benefit of discussion, benefit of division.

Cuprins

I. Vocabule de început

1. În principiu, fideiusiunea este simplă[2]. Într-adevăr, în regulă generală, fideiusiunea este simplă, pentru că angajamentul solidar al fideiusorului cu debitorul principal este o excepţie[3]. Fideiusiunea solidară este, în drept, excepţională: ea presupune o convenţie specială[4]. În fapt, fideiusiunea este, foarte des, solidară, întrucât fideiusiunea simplă nu este „simplă" pentru creditor[5]. Distincţia dintre fideiusiunea simplă şi cea solidară revelează un anumit divorţ între practică şi lege[6]. În practică, fideiusiunea simplă, adică non-solidară, este rarisimă[7]. Stipulaţia de solidaritate îi permite creditorului să crească eficacitatea garanţiei, în aceea că ea este exclusivă de anumite

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[2] L. AYNES, P. CROCQ, A. AYNES, *Droit des sûretés*, 16e édition, LGDJ, Paris, p. 77 („*En principe, le cautionnement est simple*").

[3] V. KARIM, *Les cautionnements en droit québécois. Les cautionnements en droit civil. Les cautionnements prévus dans le Code de procédure civile. Les cautionnements dans les contrats de construction*, 2e édition, Wilson & Lafleur, Montréal, 2022, p. 49, nr. 166 („*En règle générale, le cautionnement est simple puisque l'engagement solidaire de la caution avec le débiteur principal est une exception*").

[4] L. AYNES, P. CROCQ, A. AYNES, op.cit., p. 77 („*Le cautionnement solidaire est, en droit, exceptionnel : il suppose une convention spéciale*").

[5] L. AYNES, P. CROCQ, A. AYNES, op.cit., p. 77
(„*En fait, le cautionnement est très souvent solidaire, parce que le cautionnement simple n'est pas « simple » pour le créancier …*").

[6] J. FRANÇOIS, *Les sûretés personnelles* [Droit civil (sous la direction de Ch. Larroumet), tome VII], Economica, Paris, 2004, p. 34, nr. 47 („*La distinction du cautionnement simple et solidaire révèle un certain divorce entre la pratique et la loi*").

[7] J. FRANÇOIS, op.cit., p. 34, nr. 47 („*En pratique, le cautionnement simple, c'est-à-dire non solidaire, est rarissime*").

mecanisme protectoare prevăzute de legiuitor în favoarea fideiusorului[8]. Astfel, de fiecare dată când este în măsură s-o facă, anume, dacă fideiusiunea este convenţională, creditorul îi cere fideiusorului un angajament solidar[9].

Diferenţele între fideiusiunea simplă şi fideiusiunea solidară poartă esenţialmente asupra efectelor garanţiei[10]. Fideiusiunea simplă conferă două avantaje, în comparaţie cu fideiusiunea solidară: beneficiul de discuţiune şi beneficiul de diviziune[11]. Bineînţeles, fideiusorul simplu îi poate opune creditorului ce-l urmăreşte beneficiile de discuţiune şi de diviziune[12].

Studiul nostru va continua cu prezentarea fideiusiunii simple (*infra.*, nr. 2-4). Apoi, lucrarea de faţă va zăbovi asupra fideiusiunii solidare (*infra.*, nr. 5-9). Finalul va consta în foarte scurte concluzii (*infra.*, nr. 10).

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8 Ph. SIMLER, *Cautionnement. Garanties autonomes. Garanties indemnitaires*, 5e édition, LexisNexis, Paris, 2015, p. 94, nr. 86 („*La stipulation de solidarité permet au créancier d'accroître l'efficacité de la garantie, en ce qu'elle est exclusive de certains mécanismes protecteurs prévus par le législateur au profit de la caution*").

9 Ph. SIMLER, op.cit., p. 94-95, nr. 86 („*Ainsi, chaque fois qu'il est en mesure de le faire, c'est-à-dire lorsque le cautionnement est conventionnel, le créancier exige-t-il de la caution un engagement solidaire*").

10 Y. PICOD, J.-J. ANSAULT, *Droit des sûretés*, 4e édition mise à jour, PUF, Paris, 2022, p. 50, nr. 24 („*Les différences entre le cautionnement simple et le cautionnement solidaire portent essentiellement sur les effets de la sûreté …*").

11 A. CUNY de la VERRYERE, V. De MEESTER, *Sûretés & garanties au Grand-Duché de Luxembourg*, 2e édition, Larcier, 2019, p. 42, nr. 58 („*Celui-ci* (i.e., le cautionnement simple; nota ns., A.T.) *confère deux avantages en comparaison du cautionnement solidaire: le bénéfice de discussion … et le bénéfice de division …*").

12 Ph. SIMLER, Ph. DELEBECQUE, *Droit des sûretés et de la publicité foncière*, 8e édition, Dalloz, Paris, 2023, p. 58, nr. 64 („*… la caution simple peut opposer au créancier poursuivant … les bénéfices de discussion et de division …*").

II. II. Fideiusiunea simplă

2. Fideiusiunea simplă îi procură fideiusorului două mijloace de apărare, beneficiile de discuţiune şi de diviziune, care întârzie şi diminuează ceea ce creditorul poate să-i reclame[13]. Sigur, nu strică să fim conştienţi de faptul că fideiusorul este ţinut la toată datoria prin adjuncţiune şi nu prin solidaritate[14]; un asemenea fideiusor este zis simplu[15]. Reţinem, desigur: în fideiusiunea simplă, fideiusorul poate să-i opună creditorului beneficiul de discuţiune şi, în caz de pluralitate de fideiusori, beneficiul de diviziune[16].

3. Beneficiul de discuţiune. Un astfel de beneficiu îşi găseşte consacrarea în varii Coduri civile, precum cel francez, din Quebec, luxemburghez şi român.

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[13] M. BOURASSIN, *Droit des sûretés*, 8e édition, Dalloz, Paris, 2024, p. 238 („*... le cautionnement simple procure à la caution deux moyens de défense, les bénéfices de discussion et de division, qui retardent et diminuent ce que le créancier peut lui réclamer ...*").

[14] M. BOURASSIN, op.cit., p. 88, nr. 126 („*La caution est tenue à toute la dette par adjonction, et non par solidarité*").

[15] M. BOURASSIN, op.cit., p. 88, nr. 126 („*Une telle caution est dite simple*").

[16] P. TAFFOREAU, C. HÉLAINE, *Droit des sûretés. Sûretés personnelles et réelles*, 2e édition, Bruylant, Bruxelles, 2023, p. 82, nr. 92 („*Dans le cautionnement simple, la caution peut opposer au créancier le bénéfice de discussion ... et, en cas de pluralité de cautions, le bénéfice de division ...*").

Art. 2305 alin. (1) C.civ.fr. sună în felul următor: „*Le bénéfice de discussion permet à la caution d'obliger le créancier à poursuivre d'abord le débiteur principal*”[17] (beneficiul de discuțiune îi permite fideiusorului să-l oblige pe creditor să-l urmărească, în primul rând, pe debitorul principal; t.n.).

Art. 2347 alin. (1) C.civ.q. prevede: „*La caution conventionnelle ou légale jouit du bénéfice de discussion, à moins qu'elle n'y renonce expressément*”[18] (fideiusorul convențional sau legal se bucură de beneficiul de discuțiune, cel puțin dacă nu renunță la el în mod expres; t.n.).

Art. 2021 C. civ. luxemburghez este redactat în următorii termeni: „La caution n'est obligée envers le créancier à le payer qu'à défaut du débiteur, qui doit être préalablement discuté dans ses biens ...”[19] (fideiusorul nu este obligat, față de creditor, să-l plătească decât în caz de eșec al debitorului, care trebuie să fie, în prealabil, „discutat” în bunurile sale; t.n.).

Art. 2294 alin. (1) C. civ. român dă de înțeles că „fideiusorul convențional sau legal are facultatea de a cere creditorului să urmărească mai întâi bunurile debitorului principal, dacă nu a renunțat la acest beneficiu în mod expres”.

În ochii unora, fundamentul beneficiului de discuțiune[20] este echitatea[21]. În *2862-3718 Québec inc. c. Provost*, notăm un soi de definiție: beneficiul de discuțiune este un drept conferit fideiusorului urmărit, ce-i

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[17] L. LEVENEUR *(annoté sous la direction de), Code civil, quarante-quatrième édition,* LexisNexis, Paris, 2024, p. 1745.

[18] J.-L. BAUDOUIN, Y. RENAUD, *Code civil du Québec annoté*, 24e édition, tome 2, Wilson & Lafleur, Montréal, 2021, p. 3789.

[19] J. GUILLOT (annoté et commenté par), *Code civil luxembourgeois*, 2ème édition, Legitech, 2022, p. 1034.

[20] Un autor este de părere că beneficiul de discuțiune pare manifestarea cea mai naturală a caracterului accesoriu și subsidiar al fideiusiunii. S. PIÉDELIÈVRE, *Droit des sûretés*, 3e édition, Ellipses, Paris, 2022, p. 116, nr. 159 („*Le bénéfice de discussion semble la manifestation la plus naturelle du caractère accessoire et subsidiaire du cautionnement*”).

[21] J. DESLAURIERS, A. BENADIBA, *Les sûretés au Québec*, 2e édition, Wilson & Lafleur, Montréal, 2018, p. 836, nr. 2475 („*Le fondement du bénéfice de discussion est l'équité*”).

permite să ceară ca creditorul să discute în primul rând bunurile debitorului principal[22].

Creditorul poate să-l urmărească pe fideiusor înaintea debitorului principal, dar fideiusorul poate opune beneficiul de discuţiune printr-o cerere expresă[23]. Acest beneficiu nu operează de plin drept[24]. Beneficiul de discuţiune de care se bucură fideiusorii convenţionali şi legali nu este de ordine publică[25]. Instanţa nu-l aplică din oficiu[26]. În practică, beneficiul de discuţiune este opus de fideiusor sub forma unei excepţii[27]. Beneficiul de discuţiune este o excepţie dilatorie, care trebuie să fie invocată *in limine litis*[28].

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[22] *2862-3718 Québec inc. c. Provost*, (C.S., 1993-04-16), *in* J.-L. BAUDOUIN, Y. RENAUD, *Code civil du Québec annoté*, 24e édition, tome 2, p. 3789 *(„Le bénéfice de discussion est un droit conféré à la caution poursuivie, lui permettant d'exiger que le créancier discute d'abord les biens du débiteur principal …").*

[23] J. DESLAURIERS, A. BENADIBA, op.cit., p. 836, nr. 2476 *(„Le créancier peut poursuivre la caution avant le débiteur principal, mais la caution peut opposer le bénéfice de discussion par une demande expresse").*

[24] J. DESLAURIERS, A. BENADIBA, op.cit., p. 836, nr. 2476 *(„Ce bénéfice n'opère pas non plus de plein droit*"). Totodată, A. GOUËZEL, *Le nouveau droit des sûretés. Commentaire article par article*, Dalloz, Paris, 2023, p. 136, nr. 238 *(„… le bénéfice (de discussion; nota ns., A.T.) ne joue pas de plein droit au profit de la caution …").*

[25] J. DESLAURIERS, A. BENADIBA, op.cit., p. 836, nr. 2476 *(„Le bénéfice de discussion dont jouissent les cautions conventionnelles et légales n'est pas d'ordre public").*

[26] J. DESLAURIERS, A. BENADIBA, op.cit., p. 836, nr. 2476 *(„Le tribunal ne l'applique pas d'office").*

[27] A.-S. BARTHEZ, D. HOUTCIEFF, *Les sûretés personnelles* [Traité de droit civil (sous la direction de J. Ghestin)], LGDJ, Paris, 2010, p. 575, nr. 786 *(„En pratique, le bénéfice de discussion est opposé par la caution sous la forme d'une exception …").*

[28] A. GOUËZEL, op.cit., p. 137, nr. 241 *(„Le bénéfice de discussion est en effet une exception dilatoire … qui doit être invoquée in limine litis …"). In limine litis* semnifică „la începutul judecăţii". I. DELEANU, S. DELEANU, *Mică enciclopedie a dreptului. Adagii şi locuţiuni latine în dreptul românesc*, Editura Dacia, Cluj-Napoca, 2000, p. 155.

Fideiusorul trebuie să-i indice creditorului bunurile susceptibile să fie discutate[29] [art. 2295 alin. (1) C.civ. român]; sigur, este vorba despre bunurile sesizabile ale debitorului principal[30]. Regula se explică prin necesitatea de a evita invocarea pur dilatorie a beneficiului de discuțiune[31].

Fideiusorul poate, în principiu, renunța în mod liber la beneficiul de discuțiune, pentru că acesta nu este instaurat decât în interesul său[32]. În Franța, este admis că renunțarea poate fi expresă sau tacită[33].

Beneficiul de discuțiune nu este întâlnit în situația tuturor fideiusorilor. Acest beneficiu nu-i profită, *e.g.*, fideiusorului care a renunțat expres la un astfel de drept în convenția de fideiusiune[34]. Un alt exemplu de fideiusor privat de beneficiul de discuțiune este cel judiciar[35] [art. 2294 alin. (2) C.civ. român]. Soluția referitoare la fideiusorul judiciar este justificată de

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[29] A.-S. BARTHEZ, D. HOUTCIEFF, op.cit., p. 580, nr. 796 *(„La caution doit indiquer au créancier les biens susceptibles d'être discutés").*

[30] É. LAMBERT, *Le cautionnement (art. 2333 à 2366 C.c.Q.*), Éditions Yvon Blais, 2011, p. 172 *(„Lorsque la caution invoque le bénéfice de discussion, elle doit indiquer au créancier* ***les biens saisissables du débiteur principal*** *…";* s.n.).

[31] A.-S. BARTHEZ, D. HOUTCIEFF, op.cit., p. 580, nr. 796 *(„Il s'agit d'éviter l'invocation purement dilatoire du bénéfice de discussion").*

[32] A.-S. BARTHEZ, D. HOUTCIEFF, op.cit., p. 578, nr. 793 *(„La caution peut en principe librement renoncer au bénéfice de discussion, puisque celui-ci n'est instauré que dans son seul intérêt").*

[33] A. GOUËZEL, op.cit., p. 137, nr. 239 *(„Il est admis que la renonciation peut être expresse ou tacite …").* De asemenea, pentru renunțarea tacită, S. PIÉDELIÈVRE, op.cit., p. 116, nr. 160 *(„La renonciation (au bénéfice de discussion;* n.n.) *peut être tacite ; elle résulte du fait de se laisser poursuivre").*

[34] É. LAMBERT, op.cit., p. 170 *(„… le bénéfice de discussion ne profite pas: - à la caution qui a expressément renoncé à ce droit dans la convention de cautionnement …").*

[35] Ph. THERY, Ch. GIJSBERS, *Droit des sûretés*, LGDJ, Paris, 2022, p. 95, nr. 93 *(„La loi refuse le bénéfice de discussion à la caution judiciaire …").*

autoritatea hotărârii judecătoreşti care ordonă furnizarea unui fideiusor: executarea sa nu trebuie să fie suspendată prin excepţia de discuţiune[36].

Dacă este admis, beneficiul de discuţiune are ca efect suspendarea procedurilor[37]. În măsura în care discuţiunea nu a permis de a-l dezinteresa în totalitate pe creditor, acesta este în drept să-şi reia urmăririle contra fideiusorului[38]. Atunci când creditorul întârzie urmărirea, el răspunde faţă de fideiusor, până la concurenţa valorii bunurilor indicate, pentru insolvabilitatea debitorului principal survenită după indicarea bunurilor sesizabile ale datornicului [art. 2295 alin. (2) C.civ. român]. Altfel zis, creditorul va suporta consecinţele neglijenţei sale de a urmări un debitor solvabil în tot sau în parte[39]. Dacă, spre exemplu, creditorul întârzie să acţioneze şi debitorul videază (*i.e.*, goleşte) un cont-creditor de 50.000 de euro care ar fi putut fi urmărit, obligaţia fideiusorului va fi diminuată cu atât[40].

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36 Ph. SIMLER, op.cit., p. 561, nr. 539 *(„La solution est justifiée par l'autorité du jugement qui ordonne la fourniture d'une caution : son exécution ne doit pas être suspendue par l'exception de discussion").*

37 M. BOUDREAULT, M. LACHANCE, *Les sûretés*, 5e édition, Wilson & Lafleur, Montréal, 2022, p. 500, nr. 885 *(„Lorsqu'il est admis, le bénéfice de discussion a pour effet de suspendre les procédures").*

38 P. TAFFOREAU, C. HÉLAINE, op.cit., p. 83, nr. 96 *(„Si la discussion n'a pas permis de désintéresser totalement le créancier, celui-ci est en droit de reprendre ses poursuites contre la caution").*

39 Ph. THÉRY, Ch. GIJSBERS, op.cit., p. 95-96, nr. 94 *(„Autrement dit, le créancier supportera les conséquences de sa négligence à poursuivre un débiteur solvable en tout ou partie").*

40 Ph. THÉRY, Ch. GIJSBERS, op.cit., p. 96, nr. 94 *(„Si, par exemple, le créancier tarde à agir et que le débiteur vide un compte créditeur de 50 000 euros qui aurait pu être saisi, l'obligation de la caution sera diminuée d'autant").*

4. Beneficiul de diviziune.

Art. 2306 alin. (1) C.civ.fr. arată: *„Lorsque plusieurs personnes se sont portées cautions de la même dette, elles sont chacune tenues pour le tout”*[41] (dacă mai multe persoane s-au făcut fideiusori ai aceleiași datorii, fiecare este ținută pentru tot; t.n.). Alin. (2) al art. 2306 continuă: *„Néanmoins, celle qui est poursuivie peut opposer au créancier le bénéfice de division”*[42] (cu toate acestea, cea care este urmărită poate să-i opună creditorului beneficiului de diviziune; t.n.).

Art. 2349 C.civ.q. stabilește următoarele: *„Lorsque plusieurs personnes se sont rendues cautions d'un même débiteur pour une même dette, chacune d'elles est obligée à toute la dette, mais elle peut invoquer le bénéfice de division si elle n'y a pas renoncé expressément à l'avance”*[43] (dacă mai multe persoane s-au făcut fideiusori ai aceluiași debitor pentru aceeași datorie, fiecare dintre ele este obligată la toată datoria, dar ea poate invoca beneficiul de diviziune, dacă n-a renunțat la el în mod expres, în avans; t.n.).

Art. 2025 C.civ. luxemburghez semnalează: *„Lorsque plusieurs personnes se sont rendues cautions d'un même débiteur pour une même dette, elles sont obligées chacune à toute la dette”*[44] (dacă mai multe persoane s-au făcut fideiusori ai aceluiași debitor pentru aceeași datorie, fiecare astfel de persoană este obligată la toată datoria; t.n.). Mai departe, art. 2026 alin. (1) al aceluiași Cod civil specifică: *„Néanmoins chacune d'elles peut, à moins qu'elle n'ait renoncé au bénéfice de division, exiger que le créancier divise préalablement son action, et la réduise à la part et portion de chaque caution”*[45] (totuși, fiecare dintre ele poate, cel puțin dacă n-a renunțat la beneficiul de diviziune, să ceară ca creditorul să-și divizeze în prealabil acțiunea și s-o reducă la partea fiecărui fideiusor; t.n.).

Art. 2297 C.civ. român menționează că „atunci când mai multe persoane s-au constituit fideiusori ai aceluiași debitor pentru aceeași datorie, fiecare dintre ele este obligată la întreaga datorie și va putea fi urmărită ca atare, însă cel urmărit poate invoca beneficiul de diviziune, dacă nu a renunțat în mod expres la acesta”. Observăm că art. 2297 C. civ. face vorbire despre „cel urmărit” care poate utiliza

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[41] L. LEVENEUR *(annoté sous la direction de), Code civil*, p. 1746.

[42] L. LEVENEUR *(annoté sous la direction de), Code civil*, p. 1746.

[43] J.-L. BAUDOUIN, Y. RENAUD, *Code civil du Québec annoté*, 24e édition, tome 2, p. 3791.

[44] J. GUILLOT (annoté et commenté par), *Code civil luxembourgeois*, p. 1035.

[45] J. GUILLOT (annoté et commenté par), *Code civil luxembourgeois*, p. 1035.

> beneficiul de diviziune, însă corectă ar fi fost sintagma „cea urmărită”, căci în discuţie este una dintre persoanele ce s-au pus în poziţia de fideiusori.

În Franţa, în contextul beneficiului de diviziune, vechiul art. 2302 C.civ.fr. ţinea seama de acelaşi debitor şi aceeaşi datorie[46]. Azi, art. 2306 alin. (1) C.civ.fr. are de-a face doar cu aceeaşi datorie, fără să mai pomenească necesitatea de a exista acelaşi debitor. Anterior actualului art. 2306 alin. (1) C.civ.fr., doctrina rostea aceste vocabule: fideiusori având garantat codebitori solidari diferiţi nu pot să se prevaleze de beneficiul de diviziune, căci chiar dacă ei garantează, în acest caz, aceeaşi datorie, ei nu garantează acelaşi debitor[47]. Luând în considerare art. 2306 alin. (1) C.civ.fr., s-ar putea bănui că fideiusorii ai doi codebitori solidari distincţi pot de acum înainte să se prevaleze de beneficiul de diviziune, în măsura în care aceeaşi datorie este cea cauţionată[48].

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[46] Y. BLANDIN, *Réforme du droit des sûretés*, LGDJ, Paris, 2022, p. 36 *(„Anc. art. 2302 [:] Lorsque plusieurs personnes se sont rendues cautions d'**un même débiteur** pour **une même dette**, elles sont obligées chacune à toute la dette”* [s.n.].

[47] Ph. SIMLER, op.cit., p. 574, nr. 556 *(„... des cautions ayant garanti des codébiteurs solidaires différents ne peuvent se prévaloir du bénéfice de division, car si elles garantissent, dans ce cas, la même dette, elles ne garantissent pas le même débiteur”).*

[48] A. GOUËZEL, op.cit., p. 142, nr. 247 *(„... les cautions de deux codébiteurs solidaires distincts peuvent désormais se prévaloir du bénéfice de discussion* (sic!; *de division;* n.n.*), dans la mesure où c'est bien la même dette qui est cautionnée”).*

Beneficiul de diviziune poate fi definit ca dreptul acordat unui fideiusor de a solicita ca creditorul să-şi dividă cererea între fideiusorii solvabili și să-și reducă acțiunea la partea de care fideiusorul urmărit este ținut în cadrul datoriei[49]. Simple considerații de echitate justifică beneficiul de diviziune[50].

Beneficiul de diviziune nu poate fi opus decât dacă fideiusorul este urmărit de creditor[51]. Dacă nicio acțiune n-a fost exercitată contra sa, fideiusorul nu poate invoca beneficiul așa încât să-l oblige pe creditor să primească doar partea acelui garant și, astfel, fideiusorul să fie liberat de obligaţiile sale[52]. Desigur, fideiusorul care vrea să pună în operă beneficiul de diviziune trebuie să-l ceară[53]. Instanţa nu invocă din oficiu beneficiul de diviziune[54].

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49 M. BOUDREAULT, M. LACHANCE, op.cit., p. 500, nr. 888 *(„Le bénéfice de division peut être défini comme le droit accordé à une caution d'exiger que le créancier divise sa réclamation entre les cautions solvables et réduise son action à la seule part et portion dont la caution poursuivie est tenue dans la dette").*

50 A.-S. BARTHEZ, D. HOUTCIEFF, op.cit., p. 583, nr. 800 *(„De simples considérations d'équité justifient ... qu'un cofidéjusseur poursuivi seul soit admis à exiger que le créancier divise son recours et le réduise à la part et portion de chacun : tel est l'objet du bénéfice de division ...").*

51 É. LAMBERT, op.cit., p. 194 *(„... le bénéfice de division ne peut être opposé que lorsque la caution est poursuivie par le créancier").*

52 É. LAMBERT, op.cit., p. 194 *(„... si aucune action n'a été exercée contre elle, la caution ne peut l'invoquer afin d'obliger le créancier à recevoir sa part et, ainsi, être libérée de ses obligations ...").*

53 M. BOUDREAULT, M. Lachance, op.cit., p. 501, nr. 890 *(„La caution qui veut mettre en oeuvre le bénéfice de division doit en faire la demande").*

54 É. LAMBERT, op.cit., p. 195 *(„... le tribunal ne soulève pas d'office le bénéfice de division").*

Fiecare dintre fideiusori poate, în mod liber, să renunţe la beneficiul de diviziune, căci acesta nu este instaurat decât în interesul său[55]. Renunţarea la acest beneficiu trebuie să fie făcută de o manieră expresă şi redactată în termeni clari şi preciși[56] (art. 2297 C.civ. român).

Merită precizat că beneficiul de diviziune ar putea fi invocat de un fideiusor legal, convenţional sau judiciar[57].

Diviziunea nu are efect decât în privinţa fideiusorului simplu care o cere[58]. Creditorul va fi forţat să-şi reducă pretenţiile la partea fiecărui garant [art. 2298 alin. (1) C.civ. român]. Determinarea acestei părţi se stabileşte prin divizarea datoriei la numărul fideiusorilor solvabili în momentul în care beneficiul de diviziune este pronunţat[59]. Divizarea se face pe părţi virile[60] (*i.e.*, egale). Iată un exemplu: fideiusorii A, B şi C garantează o datorie de 900 de lei. Creditorul îl urmăreşte pe garantul A pentru toţi cei 900 de lei. A invocă şi îi este acordat beneficiul de diviziune. Determinarea părţii lui A se face prin împărţirea datoriei de 900 de lei la numărul fideiusorilor solvabili (presupunem că toţi cei trei garanţi sunt solvabili); astfel, partea lui A este de 300 de lei. Finalmente, divizarea având loc pe părţi virile sau egale, porţiunea

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55 A.-S. BARTHEZ, D. HOUTCIEFF, op.cit., p. 586, nr. 806 *(„Chacune des cautions peut librement renoncer au bénéfice de division, puisque celui-ci n'est instauré que dans son seul intérêt").*

56 V. Karim, op.cit., p. 52-53, nr. 178 *(„... la renonciation au bénéfice de division doit être faite de manière expresse et rédigée en termes clairs et précis").*

57 É. LAMBERT, op.cit., p. 194 *(„... le bénéfice de division pourrait être invoqué par une caution légale, conventionnelle ou judiciaire").*

58 M. BOURASSIN, op.cit., p. 241, nr. 312 *(„... la division n'a d'effet qu'à l'égard de la caution simple qui la demande ...").*

59 É. LAMBERT, op.cit., p. 196 *(„... la détermination de cette part s'établit en divisant la dette par le nombre de cautions solvables au moment où le bénéfice de division est prononcé").*

60 M. BOURASSIN, op.cit., p. 241, nr. 312 *(„... **la division se fait par parts viriles**, c'est-à-dire qu'il suffit de diviser le montant de la dette ou le montant garanti par le nombre de cautions solvables";* s.n.).

fiecărui fideiusor este de câte 300 de lei. Insolvabilitatea unui fideiusor în clipa în care diviziunea este invocată este suportată de cei care sunt solvabili[61]: astfel, dacă fideiusorul C este insolvabil în momentul invocării beneficiului de diviziune, această insolvabilitate va fi suportată de fideiusorii solvabili A şi B, partea fiecăruia fiind de 450 de lei (*i.e.*, cuantumul de 900 de lei împărţit la cei doi fideiusori rămaşi solvabili[62]).

III. III. Fideiusiunea solidară

5. În practică, creditorii profesionişti (în particular, bancherii) cer o fideiusiune solidară, de manieră să împiedice fideiusorul să se prevaleze de beneficiile de discuţiune şi de diviziune[63].

[61] Y. PICOD, J.-J. ANSAULT, op.cit., p. 185, nr. 83 *(„L'insolvabilité d'une caution au jour où la division est invoquée est supportée par celles qui sont solvables").*

[62] Într-adevăr, datoria trebuie să fie divizată doar între fideiusorii solvabili în momentul în care beneficiul este acordat. M. BOUDREAULT, M. LACHANCE, op.cit., p. 501, nr. 891 *(„... la dette doit être divisée entre les seules cautions solvables au moment où le bénéfice est octroyé").*

[63] Y. PICOD, J.-J. ANSAULT, op.cit., p. 181, nr. 82 *bis („Dans la pratique, les créanciers professionels (en particulier les banquiers) exigent un cautionnement solidaire, de façon à empêcher la caution de se prévaloir des bénéfices de discussion et de division").*

6. Art. 2290 C.civ.fr. scoate în lumină: *„Le cautionnement est simple ou solidaire [alin. (1)]. La solidarité peut être stipulée entre la caution et le débiteur principal, entre les cautions, ou entre eux tous [alin. (2)]”*[64] (Fideiusiunea este simplă sau solidară [alin. (1)]. Solidaritatea poate fi stipulată între fideiusor şi debitorul principal, între fideiusori sau între ei toţi [alin. (2)]; t.n.).

Art. 2352, teza I C.civ.q. vine cu următoarele precizări: *„Lorsque la caution s'oblige, avec le débiteur principal, en prenant la qualification de caution solidaire ou de codébiteur solidaire, elle ne peut plus invoquer les bénéfices de discussion et de division …”*[65] (dacă fideiusorul se obligă, cu debitorul principal, luând calificarea de fideiusor solidar ori de codebitor solidar, nu mai poate invoca beneficiile de discuţiune şi de diviziune; t.n.).

Art. 2021 C. civ. luxemburghez face aluzie la fideiusorul ce se poate obliga în solidar cu debitorul[66].

Art. 2300 C. civ. român semnalează că „atunci când se obligă împreună cu debitorul principal cu titlu de fideiusor solidar sau de codebitor solidar, fideiusorul nu mai poate invoca beneficiile de discuţiune şi de diviziune”.

7. Solidaritatea poate fi stipulată fie între fideiusor şi debitor (*i*), fie între fideiusori (*ii*), fie, în acelaşi timp, între fideiusori, pe de-o parte şi, pe de altă parte, între fiecare fideiusor şi debitorul principal[67] (*iii*). Solidaritatea, aşadar, apare ca verticală[68] (*i.e.*, între fideiusor şi debitorul principal) sau orizontală[69]

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[64] L. LEVENEUR *(annoté sous la direction de), Code civil*, p. 1743.

[65] J.-L. BAUDOUIN, Y. RENAUD, *Code civil du Québec annoté*, 24e édition, tome 2, p. 3793.

[66] J. GUILLOT (annoté et commenté par), *Code civil luxembourgeois*, p. 1034 *(„Art. 2021 [:] … à moins qu'elle (i.e., la caution ;* n.n*.) ne se soit obligée solidairement avec le débiteur …”).*

[67] P. TAFFOREAU, C. HELAINE, op.cit., p. 88, nr. 108 *(„La solidarité peut être stipulée soit entre la caution et le débiteur …, soit entre les cautions …, soit … à la fois entre les cautions, d'une part, et, d'autre part, entre chaque caution et le débiteur principal …”).*

[68] J. FRANÇOIS, op.cit., p. 39, nr. 53 *(„La solidarité verticale est celle qui gouverne les rapports de chaque caution avec le débiteur principal …”).*

[69] J. FRANÇOIS, op.cit., p. 39, nr. 53 *(„… la solidarité horizontale est celle qui gouverne les relations des cautions les unes avec les autres”).*

(*i.e.*, între cofideiusori) ori atât verticală cât și orizontală (*i.e.*, între cofideiusori cât și cu debitorul principal)[70].

Bineînțeles, pare cu totul acceptabil să ne întrebăm cum ia naștere o fideiusiune solidară? Dintru început, ne amintim că solidaritatea trebuie să rezulte dintr-o voință clară și precisă și trebuie să fie exclusă în caz de îndoială[71]; solidaritatea nu se prezumă (art. 1445 C.civ. român). În mod obișnuit, astfel, o clauză de solidaritate se impune stipulată în fideiusiune[72]. Totuși, câteodată, solidaritatea se prezumă. Art. 1525 alin. (2) C.civ.q. pretinde că „*elle (i.e., la solidarité;* n.n.) *est … présumée entre les débiteurs d'une obligation contractée pour le service ou l'exploitation d'une entreprise*"[73] (solidaritatea este prezumată între debitorii unei obligații contractate pentru serviciul sau exploatarea unei întreprinderi; t.n.). Aproape identic, art. 1446 C.civ. român evidențiază că „*solidaritatea se prezumă între debitorii unei obligații contractate în exercițiul activității unei întreprinderi* …". Așa fiind, în Québec și în România, solidaritatea poate fi, de asemenea,

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70 A. GOUËZEL, op.cit., p. 39-40, nr. 64 *(„… celle-ci (i.e., la solidarité;* n.n.) *peut exister entre la ou les cautions et le débiteur principal (solidarité verticale), entre les cofidéjusseurs eux-mêmes (solidarité horizontale) ou entre les cofidéjusseurs eux-mêmes ainsi qu'avec le débiteur principal (solidarité verticale et horizontale)").*

71 L. BOUGEROL, G. MEGRET, *Le guide du cautionnement et autres sûretés personnelles*, 1re édition, Dalloz, Paris, 2022, p. 90, nr. 13.53 *(„… la solidarité doit résulter d'une volonté claire et précise, et doit être exclue en cas de doute").*

72 M. BOURASSIN, op.cit., p. 240, nr. 308 *(„… une clause de solidarité est stipulée dans le cautionnement …").* De asemenea, É. LAMBERT, op.cit., p. 218 *(„ … la solidarité résulte d'une stipulation dans le contrat de cautionnement …").*

73 J.-L. BAUDOUIN, Y. RENAUD, *Code civil du Québec annoté*, 24e édition, tome 2, p. 2438.

prezumată între fideiusorii care garantează executarea obligaţiei contractate în cursul activităţilor unei întreprinderi[74].

8. În Québec, art. 2352 C.civ.q. ţine seama de posibilitatea ca fideiusorul să se oblige, alături de debitor, luând calificarea, *inter alia*, de codebitor solidar[75]. Asemănător, art. 2300 C.civ. român îmbrăţişează ipoteza fideiusorului care se poate obliga, împreună cu datornicul principal, cu titlu de codebitor solidar. Iată, atunci, ce ne este posibil să ne interogăm: fideiusorul solidar este un fel de codebitor solidar?

Referindu-se la fideiusiunea solidară (între garant şi debitorul principal), un autor opinează că fideiusorul se transformă într-un datornic principal obligat în solidar cu debitorul principal iniţial, astfel încât creditorul se vede dotat cu doi debitori principali ţinuţi solidar[76]. Punctul de vedere nu ne pare convingător. Într-adevăr, fideiusorul care se angajează solidar cu debitorul principal rămâne, evident, un fideiusor: el nu devine un codebitor solidar al obligaţiei principale[77].

După cum bine s-a spus, chiar solidar, fideiusorul rămâne un debitor accesoriu, un garant; el nu poate fi asimilat unui codebitor solidar, care este ţinut cu titlu principal[78].

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[74] V. KARIM, op.cit., p. 56, nr. 189 *(„La solidarité peut aussi être présumée entre les cautions qui garantissent l'exécution de l'obligation contractée dans le cours des activités d'une entreprise").*

[75] J.-L. BAUDOUIN, Y. RENAUD, *Code civil du Québec annoté, 24e édition, tome 2, p*. 3793.

[76] P. VASILESCU, *Drept civil. Obligaţii*, ediţia a 3-a, Hamangiu, Bucureşti, 2024, p. 167-168.

[77] É. LAMBERT, op.cit., p. 221 *(„... la caution qui s'engage solidairement avec le débiteur principal demeure évidemment une caution : elle ne devient pas un codébiteur solidaire de l'obligation principale").*

[78] A. GOUËZEL, op.cit., p. 41, nr. 67 *(„... même solidaire, la caution reste un débiteur accessoire, un garant ; elle ne peut donc pas être assimilé à un codébiteur solidaire, qui est tenu à titre principal").*

Bineînțeles, câteva diferențe pot fi detectate între fideiusorul solidar și codebitorul solidar. Fideiusorul solidar, fiind un garant personal, nu trebuie să suporte nicio contribuție definitivă la datorie[79]; unul dintre caracterele esențiale ale garanției personale este tocmai absența de contribuție la datorie din partea garantului[80]. Astfel, fideiusorul solidar, dacă îl plătește pe creditor, va recupera tot de la debitorul principal, așa încât să nu contribuie definitiv la datorie. Codebitorul solidar, însă, contribuie parțial la datoria totală[81] [art. 1456 alin. (1) C. civ. român]. În sfârșit, beneficiul de cesiune de acțiuni (*i.e.*, beneficiul de subrogație)[82] i-a fost refuzat codebitorului solidar, însă recunoscut fideiusorului solidar[83].

9. Efectul principal al calificării de fideiusiune solidară este suprimarea beneficiilor de discuțiune și de diviziune[84]. Desigur, nuanțările trebuie să intervină; astfel, este întru totul util să diferențiem diversele figuri ale solidarității în domeniul fideiusiunii.

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[79] M. CABRILLAC, Ch. MOULY, S. CABRILLAC, Ph. PETEL, *Droit des sûretés*, 11e édition, LexisNexis, Paris, 2022, p. 29, nr. 27 *(„ ... le garant qui ne doit supporter aucune contribution définitive").*

[80] M. CABRILLAC, Ch. MOULY, S. CABRILLAC, Ph. PETEL, op.cit., p. 26, nr. 23 *(„La sûreté personnelle se reconnaît à la réunion de deux* ***caractères essentiels*** *: ... création d'un droit de créance supplémentaire; ...* ***absence de contribution à la dette par le garant****";* s.n.).

[81] M. CABRILLAC, Ch. MOULY, S. CABRILLAC, Ph. PETEL, op.cit., p. 29, nr. 27 *(„****La contribution partielle*** *à la dette totale qu'assure* ***le codébiteur solidaire*** *..." ;* s.n.).

[82] Ph. SIMLER, op.cit., p. 833, nr. 831 *(„... une cause de décharge de la caution empruntée au droit romain,* ***appelée « bénéfice de cession d'actions » ou « bénéfice de subrogation »****" ; s.n.).*

[83] Ph. SIMLER, op.cit., p. 97, nr. 89 *(„ ... le bénéfice de cession d'actions [...] a été refusé au codébiteur solidaire [...], mais reconnu à la caution solidaire ...").*

[84] H. WESTENDORF, *Les sûretés et garanties du crédit en droit luxembourgeois*, tome 3, *Les sûretés personnelles*, 2e édition, Éditions Larcier-Intersentia, Bruxelles, 2023, p. 196, nr. 343 *(„L'effet principal de la qualification de cautionnement solidaire est la suppression des bénéfices de discussion et de division").*

Întâi, ne va preocupa cazul solidarităţii ce este, în acelaşi timp, orizontală şi verticală, existând între fideiusori şi între fiecare fideiusor şi debitorul principal; în această ipoteză, solidaritatea exclude atât beneficiul de diviziune, cât şi beneficiul de discuţiune[85].

Apoi, solidaritatea cu debitorul (*i.e.*, verticală) îl privează pe fideiusor de beneficiul de discuţiune[86].

În fine, solidaritatea între fideiusori (*i.e.*, orizontală) îi lipseşte de beneficiul de diviziune[87]. Bineînţeles, vom sublinia că fideiusorii solidari cu debitorul, dar nu şi între ei, pot opune beneficiul de diviziune[88].

În Québec, poate fi detectat un caz ... curios. În *Société d'aide au développement des collectivités (SADC) de Nicolet-Bécancour c. Désilets*, instanţa a pretins următoarele: semnarea unui contract de fideiusiune distinct de către fiecare fideiusor nu implică o solidaritate între respectivii fideiusori, ci doar cu debitorul principal; fideiusorii nu pot, aşadar, invoca beneficiul de

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85 M. BOURASSIN, op.cit., p. 243, nr. 317 („***Solidarité à la fois horizontale et verticale, entre les cautions et entre chaque caution et le débiteur principal.*** *Dans cette hypothèse, la solidarité exclut certainement tant le bénéfice de division, que le bénéfice de discussion*"; s.a).

86 A. GOUËZEL, op.cit., p. 40, nr. 66 *(„... la solidarité avec le débiteur prive la caution du bénéfice de discussion ...").*

87 A. GOUËZEL, op.cit., p. 40, nr. 66 *(„... la solidarité entre les cautions les prive du bénéfice de division ...").*

88 Ph. SIMLER, *La réforme du droit des sûretés. Commentaire article par article*, LexisNexis, Paris, 2022, p. 47, nr. *41 („... les cautions solidaires avec le débiteur, mais non entre elles peuvent opposer le bénéfice de division").* Totodată, Ph. SIMLER, Ph. DELEBECQUE, op.cit., p. 240, nr. 211 *(„... les cautions non solidaires entre elles, fussent-elles solidaires avec le débiteur, peuvent invoquer le bénéfice de division").*

diviziune între ei[89]. În viziunea curții, pare-se, fideiusorii nu erau solidari între ei, ci numai cu debitorul, și, cu toate acestea, nu li se recunoștea beneficiul de diviziune. Lucrurile, probabil, stau altfel. Precum scriu unii, un angajament solidar al fideiusorilor cu debitorul, în absența solidarității stipulate între fideiusori, n-ar trebui să antreneze decât pierderea beneficiului de discuțiune și nu dispariția beneficiului de diviziune[90].

Concluzii

10. Distincția dintre fideiusiunea simplă și cea solidară revelează un anumit divorț între practică și lege[91]. În regulă generală, fideiusiunea este simplă[92]. Fideiusiunea solidară este, în drept, excepțională[93]. În fapt, fideiusiunea este, foarte des, solidară[94]. În practică, fideiusiunea simplă, adică non-solidară, este rarisimă[95].

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[89] *Société d'aide au développement des collectivités (SADC) de* NICOLET-BECANCOUR *c.* DESILETS, (C.Q., 2005-04-07), *in* J.-L. BAUDOUIN, Y. RENAUD, *Code civil du Québec annoté*, 24e édition, tome 2, p. 3795 („*La signature d'un contrat de cautionnement distinct par chaque caution n'emporte pas solidarité entre elles, mais seulement avec le débiteur principal. Les cautions ne peuvent donc invoquer le bénéfice de division entre elles*").

[90] M. BOUDREAULT, M. LACHANCE, op.cit., p. 500, nr. 889, nota de subsol nr. 2381 („*... un engagement solidaire des cautions avec le débiteur, en l'absence de solidarité stipulée entre les cautions, ne devrait entraîner que la perte du bénéfice de discussion et non la disparition du bénéfice de division ...*").

[91] J. FRANÇOIS, op.cit., p. 34, nr. 47 *(„La distinction du cautionnement simple et solidaire révèle un certain divorce entre la pratique et la loi").*

[92] V. KARIM, op.cit., p. 49, nr. 166 *(„En règle générale, le cautionnement est simple ...").*

[93] L. AYNES, P. CROCQ, A. AYNES, op.cit., p. 77 *(„Le cautionnement solidaire est, en droit, exceptionnel ...").*

[94] L. AYNES, P. CROCQ, A. AYNES, op.cit., p. 77 *(„En fait, le cautionnement est très souvent solidaire ...").*

[95] J. FRANÇOIS, op.cit., p. 34, nr. 47 *(„En pratique, le cautionnement simple, c'est-à-dire non solidaire, est rarissime").*

Fideiusiunea simplă conferă două avantaje, în comparaţie cu fideiusiunea solidară: beneficiul de discuţiune (*supra.*, nr. 3) şi beneficiul de diviziune[96] (*supra.*, nr. 4).

Creditorii profesionişti (în particular, bancherii) cer o fideiusiune solidară, de manieră să împiedice fideiusorul să se prevaleze de beneficiile de discuţiune şi de diviziune[97]. Aşadar, efectul principal al calificării de fideiusiune solidară este suprimarea beneficiilor de discuţiune şi de diviziune[98]. Desigur, fideiusorul solidar nu se confundă cu un codebitor solidar. Chiar solidar, fideiusorul rămâne un debitor accesoriu, ceea ce interzice să fie asimilat unui codebitor solidar[99].

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[96] A. CUNY de la VERRYERE, V. De MEESTER, op.cit., p. 42, nr. 58 *(„Celui-ci* (i.e., le cautionnement simple; n.n.) *confère deux avantages en comparaison du cautionnement solidaire: le bénéfice de discussion … et le bénéfice de division …").*

[97] Y. PICOD, J.-J. ANSAULT, op.cit., p. 181, nr. 82 *bis („ … les créanciers professionnels (en particulier les banquiers) exigent un cautionnement solidaire, de façon à empêcher la caution de se prévaloir des bénéfices de discussion et de division").*

[98] H. WESTENDORF, op.cit., p. 196, nr. 343 *(„L'effet principal de la qualification de cautionnement solidaire est la suppression des bénéfices de discussion et de division").*

[99] J. FRANÇOIS, op.cit., p. 36, nr. 49 *(„Même solidaire, la caution reste un débiteur accessoire, ce qui interdit de l'assimiler à un codébiteur solidaire").*

ARTICOLE

CHALLENGES FOR ROMANIAN PROSECUTORS IN EXERCISING THEIR DUTIES OF DEFENSE DURING PRE-TRIAL STAGE

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Abstract: Current paper aims to emphasise that, over the time, it has been proven that the accuracy of an analysis of criminal procedural law is accomplished only whether it is certified by the conviction that norms and decisions of national and European courts enshrine and guarantee human rights. Thus, the legislation in criminal procedural matters can be rationalized compulsorily starting from European premises – "the unit of European conventionality" – and going further to constitutional, organic and ordinary normative requirements.

In the same time, from a methodological point of view, for reaching the human rights goals in criminal procedures, it is crucial to be adopted an approach which includes the requirement for the provisions of the Criminal Procedure Code to be interpreted in the light of the general principles of the criminal trial – many of these principles being principles of human rights, in fact. Equally, indispensable appears the feature of the principle of subsidiarity of European protection of human rights which underlines the role of the main guarantees of the European Convention on Human Rights for national judicial authorities.

Whether a hierarchy of the rights relevant for criminal procedures is established, the right to defense should be one of the most important rights to discuss.

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This traditional approach underlines the horizontal effects of the right to defense, like the need to have regulated the defense of the suspect or the accused by Code of Criminal Procedure. Alike, the vertical effects of the right to defense complete the challenges for national judicial authorities. In this context, it has to be accentuated the role of the prosecutor within the criminal investigation and prosecution phase, respectively the prosecutor must defend the legal order and fundamental rights.

Beyond legal techniques, an exquisite study of the right of the defense must contain interdisciplinary references which value the current requirements for emancipation in criminal procedural matters focused on the legal education of civil society and the change of mentality of judicial authorities.

Keywords: right to defense, prosecutor, criminal investigation, legal order

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I. European premises

The European standard for the protection of human rights is consecrated at the level of the two essential European intergovernmental organizations in a double, but unitary version of reference to normative and jurisprudential benchmarks. Thus, "the unit of conventionality" of the Council of Europe, represented by the European Convention on Human Rights, its 16 Additional Protocols and the jurisprudence of the European Court of Human Rights, highlights its importance both at the regional and national level, through the constant reporting to it done by national and European magistrates. The second European standard, inspired in its substance by the Council of Europe, is the one belonging to the European Union and it is formed by the Charter of Fundamental Rights and the case law of the Court of Justice of the European Union.

The desire to set a common standard for both European intergovernmental organizations will become a reality with the accession of the European Union to the European Convention on Human Rights regulated by the Treaty of Lisbon: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law"[1].

Beyond these normative benchmarks of a general nature in the field of human rights - the European Convention of Human Rights and the Charter of Fundamental Rights of European Union, as well as other normative acts adopted to the level of the European Union, must be taken into account, in

[1] Article 6 paragraph 3 of the Treaty of Lisbon, which was signed on 13 December 2007 and entered into force on 1 December 2009; online: https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12007L/TXT.

criminal procedural matters, in order to contribute to the identification of a set of procedural guarantees common to all member States, which have to constitute the minimum standard for the protection of the rights of persons who are suspected or accused in criminal proceedings.

European secondary legislation has focused on the specific guarantees of the suspect and the accused, regulating them in separate directives, depending on the awareness of the urgency of intervention at the European level in the context of frequent violations of the structural elements of the right to a fair trial. The first procedural guarantee that has been regulated is the one aimed at the right to interpretation and translation[2] in the context of the increase in cross-border crime and not only. But the right that represents the foundation of the guarantee offered to those who do not speak or understand the language in which the judicial procedure is carried out is the right to information about the rights of suspects or defendants in different procedural stages[3] covered by a second directive essential to criminal judicial procedures. Inextricably linked with the right to information, within the European Union directives, are consecrated other essential rights such as "the right to have access to a lawyer in criminal proceedings and European arrest warrant proceedings, the right for a third party to be informed following deprivation of liberty, the right to communicate with third parties and consular authorities during deprivation of liberty, the right to legal assistance

[2] Directive 2010/64/EU of the European Parliament and of the EU Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, online: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L :2010:280:0001:0007:ro:PDF

[3] Directive 2012/13/EU of the European Parliament and of the EU Council of 22 May 2012 on the right to information in criminal proceedings, online: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L: 2012:142:0001:0010:RO:PDF

if the defendants do not have sufficient financial resources"[4]. The context of criminal trials carried out *in absentia* – a general procedural exception – and, especially, criminal trials with an arrested defendant has justified a European normative intervention that strengthened elements guaranteeing the presumption of innocence and the sensitive right to be present at the trial in criminal proceedings[5]. Last but not least, the procedural guarantees for children who are suspected or accused in criminal proceedings[6] has constituted a concern for European legislator in order to offer additional guarantees.

Rules adopted by European Parliament and Council of the European Union has assigned the obligation for victims of crime to be treated with respect and to enjoy adequate protection, to get the proper support and to access to justice, targeting specific groups of victims such as children, victims human trafficking and victims of terrorism[7].

[4] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings, as well as the right for a third party to be informed following deprivation of liberty and the right to communicate with third parties and consular authorities during deprivation of liberty, online: https://eur-lex.europa.eu/legal-content/RO/TXT/?qid=1450449360102&uri=CELEX:32013L0048

[5] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings, online: https://eur-lex.europa.eu /legal-content/RO/TXT/?uri=CELEX%3A32016L0343

[6] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural guarantees for children who are suspected or accused persons in criminal proceedings, online: https://eur-lex.europa.eu/legal-content/RO /TXT/PDF/?uri=OJ:L:2016:132:FULL&from=EN.

[7] Directive 2012/29/EU of the European Parliament and of the EU Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and

II. National premises

The status of member State in the main European intergovernmental organizations forced the Romanian legislator to adopt and to transpose into the national normative acts fundamental principles of human rights as an obligation deriving from the ratification of the constitutive or specialized European normative documents in this field. Thus, "the Romanian state undertakes to fulfil exactly and in good faith its obligations from the treaties to which it is a party"[8]. In order to ensure a coherence and, at the same time, a unitary perspective of the entire Romanian normative framework, a complex strategy was created in order to amend both constitutional provisions and organic and ordinary laws, although once ratified the European and international treaties are becoming part of the Romanian law[9]. Constitutional provisions refer to conflicts between Romanian fundamental law and treaties, being recommended a practical solution: "if a treaty to which Romania is to become a party contains provisions contrary to the Constitution, its ratification can only take place after the revision of the Constitution"[10].

The openness towards the internalization of the fundamental values of human rights is marked by the granting of a superior position to the human rights treaties in relation to the domestic laws: ”If there are inconsistencies

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replacing Council Framework Decision 2001/220/JHA, online: https:// eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32012L0029&from=EN.

[8] Article 11 paragraph 1 of Romanian Constitution, Amended and supplemented by the Law on the revision of the Romanian Constitution no. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of October 29, 2003, republished by the Legislative Council, published in the Official Gazette of Romania no. 767 of October 31 2003.

[9] Article 11 paragraph 2 of the Romanian Constitution.

[10] Article 11 paragraph 3 of the Romanian Constitution.

between the pacts and treaties regarding fundamental human rights, to which Romania is a party, and the internal laws, the international regulations take precedence, unless the Constitution or internal laws contain more favourable provisions"[11] – as the rule in the matter, the exception being accepted only in the situation of the establishment at the national level of a higher standard of human rights protection against the international regulations that constitute the common standard.

The constitutional norm that regulates human rights fulfils the role of "mediator" of the relations between ordinary and organic internal laws and international norms in the field of human rights, facilitating the full assumption of international obligations by the Romanian authorities. Thus, it is provided that "the constitutional provisions regarding the rights and freedoms of citizens will be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the pacts and other treaties to which Romania is a party"[12]. As well, in Romanian organic law it is specified that "the norms of criminal procedure aim to ensure the effective exercise of the powers of the judicial authorities with the guarantee of the rights of the parties and the other participants in the criminal process so that the provisions of the Constitution, the constitutive treaties of the European Union and of the other regulations of the European Union in criminal procedural matters, pacts and treaties regarding fundamental human rights to which Romania is a party"[13]. This double regulation of the application by Romanian magistrates of the legal principles surrounding the field of human rights

[11] Article 20 paragraph 2 of the Romanian Constitution.

[12] Article 20 paragraph 1 of the Romanian Constitution.

[13] Article 20 paragraph 1 of Romanian Code of Criminal Procedure; Law no. 135/2010 regarding the New Code of Criminal Procedure, published in the Official Gazette no. 486 of July 15, 2010, in force since February 1, 2014.

provided by international treaties attests the indispensable nature of these obligations, Romanian magistrates fulfilling the role of main guarantors of normative acts in the field of human rights, European and international magistrates having a secondary role based on the principle of subsidiarity of European and international mechanisms in the field of human rights.

The provisions of the current Romanian Criminal Procedure Code, whether they establish the role and purpose of the rules of criminal procedure, or whether they provide the fundamental principles of the criminal process, highlight the four normative and jurisprudential benchmarks to which Romanian magistrates must refer constantly in a cumulative and not alternative manner, in own activity in order to satisfy the criterion of its efficiency: the Romanian Criminal Procedure Code, the Constitution, the treaties and other regulations of the European Union in criminal procedural matters, the pacts and treaties regarding fundamental human rights to which Romania is a party.

The provisions of the current Romanian Criminal Procedure Code must be interpreted in the light of the general principles of the criminal procedure regardless whether these are principles specific to the criminal procedural law, such as the legality of the criminal process, finding out the truth, the obligation to initiate and exercise the criminal action or they are principles specific to human rights field, with reference to particularly to social values essential for a democratic society such as the absolute right *ne bis in idem*, the relative rights to respect for human dignity and private life, the right to freedom and security, and the latter, the right to a fair trial with general guarantee elements - the fair, public character and reasonable term of the criminal process - and with specific guarantee elements - presumption of innocence, right to defense and the right to an interpreter.

III. Fundamental European principles

A fundamental European principle in human rights establishes as a premises that European Convention on Human Rights does not intend to guarantee theoretical or illusory rights, but only concrete and effective rights[14].

Another fundamental European principle specifies that national authorities are most entitled to act to prevent and remedy any alleged violations of the European Convention on Human Rights. As is has been already mentioned, the national judicial authorities are the main guarantors of the European Convention of Human Rights[15].

IV. Correlation between prosecutor and suspect or defendant

The procedural phase that is particularly relevant to highlight the correlation between the judicial authorities whose main duties are the defense of the legal order and fundamental rights is the criminal pre-trial phase, the prosecutor being the judicial authority that has been subject to changes in its duties by the decisions of the European Court of Human Rights.

The perspectives considered by the European judges in their judgments emphasize the dimensions of the relationship between the criminal judicial authorities and the main private actor of the criminal process: the defendant. The legal dimension of the reports is the one that appears to be the most incident and the most analysed within the national and

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[14] ECHR, *Artico v. Italy*, judgment of May 13, 1980, ECLI:CE:ECHR:1980:0513JUD000669474.

[15] ECHR, *Varnava and others v. Turkey*, judgment of September 18, 2009, ECLI:CE:ECHR:2009:0918JUD001606490.

European judicial procedures. The human dimension, which is imposed in particular by the standards specific to the field of human rights, and the political dimension, which cannot be omitted, are outlined by the dynamics of intrinsic and extrinsic approaches applied to the activity of the criminal investigation authorities.

A. The human dimension

The fundamental landmarks of the human dimension of the relationship between the prosecutor and the suspect or defendant are constituted by social values protected by all normative acts in the field of human rights at the national, regional or international level: human dignity, physical integrity, mental integrity.

1. The human dimension – Dignity

The fundamental right to human dignity represents the quintessence of any catalogue of human rights, its special status being conferred by its express consecration in the Universal Declaration of Human Rights, but also in the most recent European normative act in the field of human rights. Likewise, it must be accepted that the dignity of the person constitutes not an ordinary fundamental right, but represents "the very basis of fundamental rights provided in any human rights catalogue"[16]. The dignity of the person is part of the substance of the rights registered in the catalogues of rights. None

[16] Explanations of the Charter for fundamental rights of European Union, (2007/C 303/02), Official Journal of EU, C 303/17, 14 December 2007, online: https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32007X1214(01).

of the rights enshrined in national, European or international normative acts can be invoked without affecting the dignity of another person[17].

Precisely because of its essential place in the set of social values protected by rights, human dignity has become a fundamental landmark in the establishment and conduct of judicial activity, especially in its initial procedural phase. Moreover, the Romanian normative acts that govern the judicial system enshrine the general fundamental principles according to which prosecutors exercise their functions in accordance with the law, respecting and protecting human dignity and defending the rights of the person.

The same principle of human dignity is also provided as a specific principle for the criminal process, thus establishing an essential standard for the activity of both criminal investigation authorities and judges: "Any person who is under criminal investigation or trial must be treated with respect for human dignity"[18].

2. The human dimension - Degrading treatments

The social value of human dignity is also placed at the core of the right to mental integrity, imposing certain constants of the attitude shown by the prosecutor. Behaviours and attitudes contrary to human rights standards take various forms and target different procedural stages: trivial humiliation of a person in front of other people, who may be forced to act against his will and

[17] ECJ, Case C-377/98, *Netherlands v. European Parliament and Council*, Rec. 2001, p. I-7079, paragraphs 70-77, online: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61998CJ0377.

[18] Article 11 paragraph 1 of Romanian Criminal Procedure Code.

conscience[19], vexatious measures[20], discrimination[21], verbal and non-verbal language that inspires feelings of fear, anguish and inferiority[22].

3. The human dimension - Inhuman treatments

The suspect's or defendant's right to integrity is also protected in its physical form, alongside the mental one. In order to meet the constituent elements of the absolute rights provided by the normative acts in the form of prohibitions, the criminal investigation authorities must cause mental and physical suffering of particular intensity[23].

Although these variants of behaviour involving the use of physical force against a suspect or defendant are incompatible with the standards of a democratic society, situations which have been brought to the attention of European judges demonstrate a contrary practice. The example set by the in-depth interrogations can only attest that the use of violence is administrative practice. In this context, the impact of the official tolerance preferred by the

[19] ECHR, *Tyrer v. United Kingdom*, judgment of April 25, 1978, online: ECLI:CE:ECHR:1978:0425JUD000585672.

[20] ECHR, *Pendiuc v. Romania*, judgment of February 14, 2017, online: ECLI:CE:ECHR:2017:0214JUD001760515.

[21] ECHR, *Stoica v. Romania*, judgment of March 4, 2008, ECLI:CE:ECHR:2008:0304JUD004272202.

[22] ECHR, *Kudla v. Poland*, judgment of October 26, 2000, ECLI:CE:ECHR:2000:1026JUD003021096; Pantea v. Romania, judgment of June 3, 2003, ECLI:CE:ECHR:2003:0603JUD003334396.

[23] ECHR, *Poede v. Romania*, judgment of September 15, 2015. ECLI:CE:ECHR:2015:0915JUD004054911; Cazan v. Romania, judgment of April 5, 2016, ECLI:CE:ECHR:2016:0405JUD003005012.

competent authorities, such as omitting to take immediate measures to stop the violation of rights, must also be identified[24].

A peculiarity in the case law of the European Court of Human Rights is represented by the position of the European judges regarding the interpretation of the principle of positive obligations, both substantive obligations and procedural obligations, which belong to the criminal investigations and prosecution authorities. Representing an important jurisprudential change, currently, the burden of proof of the aggressive acts belongs to the judicial authorities when a person is in their custody. This principle applies even if the person is in a context other than actual deprivation of liberty, such as an identity check or a simple interrogation[25].

B. The legal dimension

The legal dimension of the relationship between the criminal investigation authorities and the suspect or defendant has at its core general fundamental guarantees recognized by the common European standards regarding the judicial system - independence, impartiality - but also guarantees specific to the material criminal sphere of the object of a judicial procedure: *in dubio pro reo*. Equally important is the principle of good faith of criminal investigation authorities in carrying out their own activities.

1. Independence

Although expressly enshrined in the normative acts in the field of human rights with direct reference to the courts, the guarantee of

[24] ECHR, *Ireland v. The United Kingdom*, judgment of January 18, 1978, ECLI:CE:ECHR:1978:0118JUD000531071.

[25] ECHR, *Bouyid v. Belgium*, judgment of September 25, 2015, ECLI:CE:ECHR:2013:1121JUD002338009.

independence was analysed by the European judges and related to the activity of the prosecutors, especially due to the controversial form of regulation in the Romanian normative acts.

The natural similarity of the wording of the constitutional and organic texts strengthens the guidelines of the organization and activity of the prosecutor's offices - independence, impartiality and hierarchical control – but also sharpens the controversies caused by the principle of the Public Ministry's operation "under the authority of the Minister of Justice"[26]. It is precisely this adjacent principle that led European judges, despite the nuances within the organic law regarding the relations between prosecutors and courts and other state authorities, to rule, regardless of the violated right – the right to a fair trial[27] or the right to freedom and security[28] that in Romania, prosecutors do not meet the condition of independence in relation to the executive power due to the double relationship of subordination they have as representatives of the Public Ministry: first, the subordination to the General Prosecutor, then so called subordination to the Minister of Justice.

The clarifications established by the Strasbourg judges regarding the notion of magistrate and the possibility of including prosecutors within

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[26] Article 132 paragraph 1 of Romanian Constitution.

[27] ECHR, *Vasilescu v. Romania,* judgment of May 28, 1998, ECLI:CE:ECHR:1998:0522JUD002705395: Analyzing article 6 paragraph 1 of the Convention, it was specified that in Romania, prosecutors, acting as representatives of the Public Ministry, are subordinated, first, to the general prosecutor, then to the minister of justice, they do not fulfill the condition of independence in relation to the executive power.

[28] ECHR, *Pantea v. Romania,* judgment of June 3, 2003, ECLI:CE:ECHR:2003:0603JUD003334396: "The Court does not identify any reason that would lead to a different conclusion in the case, this time, on the grounds of Art. 5.3 of the Convention, since independence from the executive is included among the guarantees implied by the notion of 'magistrate', in the sense of Art. 5.3 of the Convention."

magistrates focus on the ability to exercise judicial functions as they present guarantees against arbitrariness and unjustified deprivation of liberty and highlight the need for independence in towards the executive and the parties[29].

The context of the analysis of some objective circumstances, existing at the time of taking the measure of preventive arrest, may be relevant: if the magistrate can intervene in the criminal procedure subsequent to the time of taking the measure, as a follow-up body, his independence and impartiality may be questioned[30].

2. Impartiality

Impartiality as a general fundamental guarantee is defined in the judgments of the European Court of Human Rights as "the absence of prejudice or preconceived opinions"[31]. Related to the specific activity and to the criteria for distinguishing different types of impartiality, the following should be mentioned: subjective impartiality, which refers to the personal beliefs or interests of a particular prosecutor in a particular case; and objective impartiality, which highlights that the prosecutor offers sufficient guarantees to exclude any reasonable doubt from this point of view[32].

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[29] ECHR, *Schiesser v. Switzerland,* judgment of December 4, 1979, ECLI:CE:ECHR:1979:1204JUD000771076.

[30] ECHR, *Huber v. Switzerland*, October 23, 1990; Brincat vs. Italy, November 26, 1992, ECLI:CE:ECHR:1990:1023JUD001279487.
https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22JUDGMENTS%22]}.

[31] ECHR, *N.D. and N.T. v. Spain*, judgment of February 13, 2020, ECLI:CE:ECHR:2020:0213JUD000867515.

[32] ECHR, *De Cubber v. Belgium,* judgment of October, 26, 1984, ECLI:CE:ECHR:1984:1026JUD000918680.

The prosecutor's impartiality must be understood in the key of its relativity, as it is presumed until the contrary is proven. Moreover, the relativity of impartiality is not established only in relation to the prosecutor, but also to any professional magistrate, to a member of a jury or to persons specialized in various fields of activity, who participate, together with the professional magistrates, in solving some categories of litigation.

A particular case is constituted by military prosecutors who are active officers at the time of the commission of the acts. Their membership in a military structure provides the space for the manifestation of the principle of hierarchical subordination, which has both positive coordinates, such as the military ranks, which give them the privileges of hierarchical subordination, and negative coordinates, such as the sanctions applied in case of violation of the rules of military discipline. Specifically, based on the existence of an institutional link, the absence of independence of the military prosecutor can be interpreted as a lack of impartiality in the conduct of the prosecution regarding the accused policemen, if the policemen are active officers[33].

3. Principle *in dubio pro reo*

The principle specific to the criminal sphere *in dubio pro reo* has constituted the concern of legislators both at the national and European level, precisely because it is highlighted the importance of its observance in the context of analysing a factual situation in the light of human rights and criminal law, regardless of the procedural phase of criminal trial.

Thus, at the European level, obligations have been established for the member states by which they, in the national legislation, must ensure that any

[33] ECHR, *Bursuc v. Romania,* judgment of January 12, 2005, ECLI:CE:ECHR:2004:1012JUD004206698 and *Barbu Anghelescu v. Romania*, judgement of October 5, 2004, ECLI:CE:ECHR:2004:1005JUD004643099.

doubt regarding the guilt is in favor of the suspect or the accused, including in cases where the court evaluates the possibility of his acquittal.

The Romanian legislator complied with European requirements prior to their establishment at the level of the European Union, preferring to regulate the *in dubio pro reo* principle within the legal institution of evidence. By establishing broad limits of manifestation – "after the administration of all the evidence" – an essential objective element is specified according to which the evaluation of the evidence – conviction – is carried out by the judicial authorities. Thus, the doubt is always interpreted in favour of the suspect or the accused.

4. Good faith

The subjectivity of the concept of good faith may lead to different approaches. The diametrically opposite concept can have a more effective impact in the context of analysing the activity of criminal investigation authorities. Thus, bad faith was defined in European judgements as "the attitude of a person who performs an act or a fact that contravenes the law, being at the same time fully aware of the illicit character of his conduct"[34].

The Romanian criminal procedural legislation expressly provides the principle of the bad faith in relation to the activity of criminal investigation authorities, emphasizing that “the rejection or non-recording in bad faith of the evidence proposed in favour of the suspect or defendant is sanctioned according to the provisions of [the] code”[35].

[34]ECHR, *Păduraru v. Romania,* judgment of April 1, 2005, ECLI:CE:ECHR:2005:1201JUD006325200.

[35] Article 5 paragraph 2 and article 306 paragraph 2 of the Romanian Criminal Procedure Code.

Not less important, the same organic law stipulates that "the right to defense must be exercised in good faith, according to the purpose for which it was recognized by law"[36].

This dynamic of the concepts of good faith and bad faith, related to both to the authorities and defendants has the role to underline the relevance of the ethics of conducts in the criminal trials.

5. Effects of the right to defense

a) The horizontal effect of the right to defense: the defender of the suspect, the accused

The protection of the rights provided by the current Romanian Code of Criminal Procedure must be essential for the legal performance of the prosecutor's activity. As well, it also creates directions of activity for the defendant's defender, both approaches having as their source the rights of the defendant[37]. The first right is the right not to give any statement during the criminal trial. This right has an important added provision related to the inexistence of consequences for his refusal to give statements, especially when his statements they can be used as evidence against him. Then is provided the right to consult the file, under the law. As well, is set the right to have a lawyer by his choice and" if he does not appoint one, in cases of mandatory assistance, the right to have a lawyer appointed ex officio". Listing is completed by "the right to propose the administration of evidence under the conditions provided by law, to raise exceptions and to make conclusions". A general right with double effects is "the right to make any other requests related to the settlement of the criminal and civil side of the case". A sensitive right for all

[36] Article 10 paragraph 6 of the Romanian Criminal Procedure Code.

[37] Article 83 of the Romanian Criminal Procedure Code.

national authorities is ”the right to benefit from an interpreter free of charge when he does not understand, does not express himself well or cannot communicate in Romanian”. Not less important is a specific right for Romanian legislation: the right to appeal to a mediator, in cases permitted by law”. The character unlimited of this listing is obvious in the presence of the provision ”other cases provided by law” [38].

b) The vertical effect of the right to defense: the prosecutor, leader of the criminal process during the criminal investigation

The defendant's rights represent a challenge for judicial police and magistrates. In order to respect the positive obligations assumed by Romania ratifying European Convention on Human Rights, it is necessary that domestic laws to provide detailed procedural activities.

The management and supervision of the activity of the criminal investigation authorities by the prosecutor highlights not only his role as leader of the criminal process, but also his involvement in collecting and management of evidences, both in favour and against the suspect or defendant[39].

Consequently, all documents specific to the first phase of the criminal process, including the notification to the criminal investigation authorities, the admissibility of the evidence gathered during the execution of the preliminary documents[40], the criminal investigation *in rem*, are essential in analysing the observance of the right to defense.

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[38] Idem.

[39] Articles 299 and 300 of the Romanian Criminal Procedure Code.

[40] ECHR, *Creangă v. Romania* (MC), judgment of February 23, 2012, ECLI:CE:ECHR:2012:0223JUD002922603; *Niculescu v. Romania*, judgment of June 25, 2013, ECLI:CE:ECHR:2013:0625JUD002533303, and *Blaj v. Romania*, judgment of April 8, 2014, ECLI:CE:ECHR:2014:0408JUD003625904.

More precisely, the criminal investigation and prosecution authorities have "the obligation to ensure, based on evidence, the truth about the facts and circumstances of the case"[41]. Equally, the criminal investigation authorities have "the obligation to carry out the criminal investigation respecting the procedural guarantees and the rights of the parties and the procedural subjects, so that the facts that constitute crimes are ascertained in time and completely"[42].

In the administration of evidence, special attention must be paid to the burden of proof. Thus, in accordance with European requirements, "member States ensure that the burden of proof in establishing the guilt of suspected and accused persons belongs to the criminal investigation authorities. This doesn't create any obligation for judges to seek both incriminating and exculpatory evidences, nor implies the right of the defense to present evidence in accordance with applicable domestic law"[43].

The criminal prosecution *in personam* is another procedural stage that requires the guarantee of certain parameters imposed by the observance of the right to defense. Consequently, the criminal investigation authorities have the obligation to ensure, on the basis of evidence, the truth about the person of the suspect or the defendant. Likewise, the criminal prosecution authorities have the obligation to collect and administer evidences both in favour and against the suspect or defendant[44].

Very special are the guarantees regarding the suspect's right to be informed, before being heard, about the action for which he is being

[41] Article 5 paragraph 1 of the Romanian Criminal Code.

[42] Article 8 of the Romanian Criminal Code.

[43]Article 6 paragraph 1 Directive (EU) 2016/343 of the European Parliament and of the Council.

[44] Article 5 paragraph 1 of the Romanian Criminal Code.

investigated and its legal framework[45], to which are added the procedural rights provided by current Romanian Code of Criminal Procedure. Before being heard, the accused must be made aware that he has "the right not to make any statement, drawing his attention to the fact that if he refuses to give statements, he will not suffer any adverse consequences, and if he gives statements they can be used as evidence against him"[46].

Another procedural stage in which the right to defense must be taken into account is the initiation of the criminal action. The prosecutor is obliged to initiate and exercise the criminal action *ex officio* when "there are evidences from which a crime has been committed and there is no legal reason to impede it"[47], respectively "the fact does not exist; the act is not provided for by criminal law or has not been committed with the culpability required by law; there is no evidence that a person has committed the offense; there is a justifiable or non-culpable ground; there is no prior complaint, authorization or referral to the competent body or other condition required by law for initiating criminal proceedings; amnesty or prescription has occurred, the death of the suspect or the accused natural person has occurred or the suspect or the accused legal person has been ordered to be struck off the register; the preliminary complaint has been withdrawn, in the case of offenses for which the withdrawal of the preliminary complaint removes criminal liability, a reconciliation has taken place or a mediation agreement has been concluded under the conditions of the law; there is a ground for non-punishment provided by law; there is res judicata; there has been a transfer of proceedings to another State in accordance with the law[48].

[45] Article 83 letter a^1) of the Romanian Criminal Code.

[46] Article 83 letter a) of the Romanian Criminal Code.

[47] Article 309 paragraph 1 of the Romanian Criminal Code.

[48] Article 16 paragraph 1 of the Romanian Criminal Code.

"The initiation of criminal proceedings must be communicated to the defendant by the prosecuting authority, which shall summon him to be heard"[49]. Whether the accused asks a copy of the order ordering the measure, authorities must provide it to him[50]. As well, it is imperative for criminal investigation body – judicial police or prosecutor[51] – to hear the defendant in his new procedural quality. Nevertheless, there are several cases when such a hearing doesn't take place: "the defendant is unjustifiably absent, absconds or is missing"[52].

Similarly, the conditions for ordering preventive arrest must also be taken into account in the context of a complete analysis of the right to defense: " the defendant has fled or has gone into hiding for the purpose of evading prosecution or trial, or has made preparations of any kind for such acts; the defendant attempts to influence another participant in the commission of the crime, a witness or an expert, or to destroy, alter, conceal or remove material evidence or to induce another person to engage in such conduct; the defendant puts pressure on the injured person or attempts to enter into a fraudulent agreement with the injured person; there is a reasonable suspicion that, after the criminal proceedings have been instituted against him/her, the defendant has intentionally committed a new offense or is preparing to commit a new offense"[53].

The extension of the criminal prosecution[54] or the change of legal framework[55] are other procedural acts that raise questions about the way in

[49] Article 309 paragraph 2 of the Romanian Criminal Procedure Code.

[50] Article 309 paragraph 3 of the Romanian Criminal Procedure Code.

[51] Article 309 paragraph 4 of the Romanian Criminal Procedure Code.

[52] Article 309 paragraph 5 of the Romanian Criminal Procedure Code.

[53] Article 223 paragraph 1 of the Romanian Criminal Procedure Code.

[54] Article 311 paragraphs 1 to 5 of the Romanian Criminal Procedure Code.

[55] Article 311 of the Romanian Criminal Procedure Code.

which the right to defense can be ensured. Some particularities appear in forward procedural movement of this complex legal concepts. Taken into account the importance for the trial of these two procedural activities, Romanian legislator stipulated indirectly which is the authority who is in charge with them. As general rule, it is preferred to offer these assignments to the investigation and prosecuting authority, differentiations being made in function of the number of suspects or defendants from the case. Firstly, there is the situation "when the criminal prosecution is conducted against a single person", when the extension might be ordered by the criminal investigation body and are imposed the condition regarding "confirmation of the prosecutor supervising the criminal prosecution, within 3 days from the date of the order, at the latest and the obligation to submit the case file to the prosecutor[56]. Secondly, whether the criminal prosecution has been extended to more than one person, the prosecuting authority is obliged to inform them that they become suspects in the criminal case[57]. As well is provided expressly in which situations can be applied these assignments: "where, after the commencement of the criminal prosecution, discovers new facts, data on the participation of other persons or circumstances that may lead to a change in the legal classification of the act"[58]. Not less important, essential is the obligation for the judicial authority that ordered the extension of the criminal investigation or the change of legal qualification "to inform the suspect about the new facts regarding which the extension was ordered"[59].

[56] Article 311 paragraph 2 of the Romanian Criminal Procedure Code.

[57] Article 311 paragraph 4 of the Romanian Criminal Procedure Code.

[58] Article 311 paragraph 4 and article 307 of the Romanian Criminal Procedure Code.

[59] Article 311 paragraph 3 of the Romanian Criminal Procedure Code; Decision no. 90/2017 of Romanian Constitutional Court, published in Official Gazzete no. 291, 25 April 2017, online: https://www.ccr.ro/wp-content/uploads/2020/07/Decizie_90_2017.pdf.

In case of suspension of the criminal prosecution, other guarantees of the right to defense must be established. Thus, "while the prosecution is suspended, the criminal investigation authorities continue to carry out all the acts, the fulfilment of which is not prevented by the situation of the suspect or the defendant, respecting the right of defense of the parties or procedural subjects"[60]. When the criminal prosecution resumes, "the acts carried out during the suspension can be redone, if possible, at the request of the suspect or the accused"[61].

A controversial procedural act in the light of the current Code of Criminal Procedure is the presentation of the criminal investigation file to the defendant. Since this is not expressly regulated as in the previous regulations[62], such a primary procedural activity is left to the discretion of the prosecutor. Fundamental questions arise, such as when and how the defendant learns that the criminal investigation is being completed, both elements being essential for the effective guarantee of the right to defense in the criminal investigation stage.

File consultation is essential under the current Romanian Criminal Procedure Code in the light of the same right to defense. The right to consult the file, under the terms of the law, implies both that the defender assists in the performance of any act of criminal prosecution, and consults the documents of the file in different procedural phases: in the procedure of the preliminary chamber and during the trial. The lawyer of the parties and the main procedural subjects has the right to request consultation of the file throughout the criminal process. This right cannot be exercised or restricted

[60] Article 313 paragraph 3 thesis 1 of the Romanian Criminal Procedure Code.

[61] Article 313 paragraph 3 thesis 2 of the Romanian Criminal Procedure Code.

[62] Article 254 of the Old Romanian Criminal Procedure Code; The updated Criminal Procedure Code 2011-2012, republished in the Official Gazette no. 78 of April 30, 1997.

in an abusive manner. During the criminal prosecution, the prosecutor sets the date and duration of the consultation within a reasonable period[63].

The prosecutor can restrict the consultation of the file during the criminal investigation. This restriction has to satisfy different types of requirements such as the necessity for the restriction to affect the proper conduct of the criminal investigation, and the compensation obligation for the prosecutor to argue his measure. A particular demand refers to the term of the restriction which can reach a maximum of 10 days[64]. Another fundamental exigency takes note of the lawyer's obligation "to preserve the confidentiality or secrecy of the data and documents which he became aware of during the consultation of the file, during the criminal prosecution"[65]. Not less important, also related to lawyer's activity, "in order to prepare the defense, the defendant's lawyer has the right to learn about the entire material of the criminal investigation file in the proceedings conducted before the judge of rights and freedoms regarding the privative or restrictive measures of rights, in which the lawyer participates"[66].

Regarding the completion of the criminal investigation, it is essential to be notified about the closure solutions – a copy of the ordinance or report of the criminal investigation body, the relinquishment of the criminal investigation – copy of the ordinance and the summons by the judge of the

[63] Article 94 of the Romanian Criminal Procedure Code; Order of the Minister of Interior Affairs No 64/2015 on establishing organizational measures to ensure the exercise of the right to consult the criminal file (Official Gazette No 500 of 7 July 2015); Article 7 of Directive (EU) No 13 of 22 May 2012 on the right to information in criminal proceedings (OJ L 142 of 01.06.2012).

[64] Articolul 94 paragraph 4 of the Romanian Criminal Procedure Code.

[65] Articolul 94 paragraph 5 of the Romanian Criminal Procedure Code.

[66] Article 94 paragraph 7 of the Romanian Criminal Procedure Code.

preliminary chamber, the continuation of the criminal investigation at the request of the suspect or the defendant[67].

In case of closure of the procedure as a result of finding that the amnesty, the prescription, the withdrawal of the prior complaint or the existence of a cause of non-punishment, as well as in the case of the prosecutor giving up the criminal investigation, the suspect or the defendant can request, within 20 days from receiving the copy of the case resolution order, continuing the criminal investigation[68].

Regarding the prosecution, in order to satisfy the right to defense, it is required that "the indictment be accompanied by the case file and by a necessary number of certified copies of the indictment, to be communicated to the defendants, they are sent to the competent court to judge the case in fund"[69]. "The indictment must state the names and surnames of the persons to be summoned in court, indicating their capacity in the process, and the place where they are to be summoned"[70].

Regarding the re-opening of the criminal investigation, it must be specified that it is subject to the confirmation of the judge of the preliminary chamber, both following the denial of the prosecutor's solution by the superior hierarchical prosecutor in the procedure[71], as well as in the case of the refutation ordered *ex officio*.

As a component element of the right to defense, the right to file a complaint against criminal prosecution measures and documents can be exercised, if legitimate interests have been affected by them. The right to

[67] Articles 319 and 320 of the Romanian Criminal Procedure Code.

[68] Article 319 of the Romanian Criminal Procedure Code.

[69] Article 329 of the Romanian Criminal Procedure Code.

[70] Article 328 of the Romanian Criminal Procedure Code.

[71] Article 336 of the Romanian Criminal Procedure Code.

defense also includes the requirement to communicate immediately – 48 hours, at most 20 days – the resolution of the complaint[72]. An appeal can be lodged before the judge of the preliminary chamber against the solutions of non-prosecution and non-sentence[73].

6. Interdependence of rights

The right to defense cannot be analysed individually, but only in close conjunction with other rights provided by normative acts in the field of human rights, or other specific procedural guarantees, such as the presumption of innocence or general guarantees, such as the right to an effective appeal or other rights with fundamental relevance in the criminal sphere: the right to freedom and security.

7. Conflicts of rights

The right to defense can also be analysed from the perspective of the simultaneous exercise of some component elements of the right to a fair trial, elements that can put the criminal investigation body in the situation of choosing which right it will give priority to. The easiest "confrontation" of the right to defense is with the right to a reasonable term of the fair trial.

C. The political dimension

Questions regarding political interference in the national and international judicial system arise in the context of certain cases depending on the defendant and division of Public Ministry which investigates the case.

[72] Article 338 of the Romanian Criminal Procedure Code.

[73] Article 340 of the Romanian Criminal Procedure Code.

Conclusions

For an effective guarantee of the right to defense has to be taken into account general analysis parameters which require that Public Ministry must defend the rule of law and fundamental rights, being alongside as judges, the main guarantors of the European Convention on Human Rights.

But the most important approach in ensuring the satisfaction of European standards in the field of human rights, including respect for human rights, is educating society and changing the mentality of judicial authorities.

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ARTICOLE

RECOMANDĂRILE BIROULUI ONU PENTRU CONTROLUL DROGURILOR ȘI PREVENIREA CRIMINALITĂȚII (UNODC) PRIVIND MĂSURILE PRIVATIVE DE LIBERTATE ȘI RISCUL LA RECIDIVĂ

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Rezumat: Încă din anul 2007, Biroul ONU pentru Controlul Drogurilor şi Prevenirea Criminalităţii face recomandări pentru evitarea măsurilor şi a pedepselor privative de libertate. Un grup interguvernamental de experţi au elaborat, începând cu anul 2023, documentul E/CN.15/2023/13 care prezintă strategiile statelor membre în combaterea recidivei penale. Unul dintre principiile de bază este evitarea arestării şi a detenţiei. Experţii opinează că timpul petrecut într-o unitate de detenţie poate spori riscul infracţional şi nu potenţează reintegrarea. Aceste concluzii sunt contra-intuitive şi ne aşteptăm să nu fie primite cu uşurinţă de opinia publică care se simte mai în siguranţă atunci când infractorii sunt izolaţi.

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Cuvinte cheie: Organizației Națiunilor Unite, ONU, UNODC, recidivism, măsuri privative de libertate.

UN OFFICE ON DRUGS AND CRIME (UNODC) RECOMMENDATIONS REGARDING CUSTODIAL MEASURES AND THE RISK OF RECIDIVISM

Abstract: Since 2007, the United Nations Office on Drugs and Crime has been making recommendations to avoid punitive measures and custodial sentences. Starting in 2023, an intergovernmental group of experts developed the document E/CN.15/2023/13 which presents outlines the strategies of member states for combating criminal recidivism. One of the key principles is to avoid arrest and detention. Experts argue that time spent in a detention facility can increase criminal risk and does not aid reintegration. These conclusions may seem are counter intuitive and we expect they will not be readily received by the public who feel safer when criminals are isolated.

Keywords: United Nations, UN, UNODC, recidivism, custodial measures

Cuprins

Introducere

Recidiva penală este un comportament social de risc ce preocupă fiecare stat, prin strategii naţionale de combatere a infracţionalităţii şi prin politici penale diverse. Potrivit art. 41 din Codul penal, „există recidivă când, după rămânerea definitivă a unei hotărâri de condamnare la pedeapsa închisorii mai mare de un an sau a detenţiunii pe viaţă şi până la reabilitare sau împlinirea termenului de reabilitare, condamnatul săvârşeşte din nou o infracţiune cu intenţie sau cu intenţie depăşită, pentru care legea prevede pedeapsa închisorii de un an sau mai mare" sau pedeapsa detenţiunii pe viaţă[1]. Combaterea recidivei nu se poate realiza doar prin politici penale privind pedepsele, comportamentul infracţional fiind complex şi depinzând de mult mai mulţi factori decât pedepsele stabilite de legiuitori.

În domeniul cercetărilor criminologice asupra recidivei penale, rezultatele au fost multă vreme ambivalente şi neclare. Mulţi cercetători au explorat relaţia dintre timpul petrecut în închisoare şi recidivă. Există studii care au arătat că pedeapsa cu închisoarea reduce riscul de recidivă, efecte care totuşi se reduc pe măsură ce pedeapsa este mai lungă[2] şi altele care au arătat

[1] Art. 41 Cod Penal - Recidiva

(1) Există recidivă când, după rămânerea definitivă a unei hotărâri de condamnare la pedeapsa închisorii mai mare de un an şi până la reabilitare sau împlinirea termenului de reabilitare, condamnatul săvârşeşte din nou o infracţiune cu intenţie sau cu intenţie depăşită, pentru care legea prevede pedeapsa închisorii de un an sau mai mare. (2) Există recidivă şi în cazul în care una dintre pedepsele prevăzute în alin. (1) este detenţiunea pe viaţă. (3) Pentru stabilirea stării de recidivă se ţine seama şi de hotărârea de condamnare pronunţată în străinătate, pentru o faptă prevăzută şi de legea penală română, dacă hotărârea de condamnare a fost recunoscută potrivit legii".

[2] A. COOK, S.H. HAYNES, *Imprisonment pains, reentry strains, and perceived likelihood of reoffending*, Criminal Justice Studies, Nr. 34(1), 2021, p.16-32.

că pedeapsa cu închisoarea fie nu are efect asupra recidivei, fie creşte riscul de recidivă[3,4]. O meta-analiză recentă[5] a concluzionat că efectul încarcerării nu este unul de diminuare a riscului de recidivă. Cercetătorii care au realizat meta-analiza au arătat că începând cu anii 1970, în Statele Unite s-a început un experiment de „închisoare în masă". Susţinătorii acestei politici penale de "încarcerare în masă" considerau că pedepsele aspre, cum ar fi închisoarea, reduc criminalitatea prin descurajarea deţinuţilor de la recidivă. Scepticii au susţinut că închisoarea poate avea un efect criminogen. Scepticii aveau dreptate. Evaluările narative şi meta-analizele anterioare au concluzionat că efectul general al închisorii este nul. Pe baza meta-analizei actuale[6], mult mai amplă, vizând 116 studii, s-a constatat că sancţiunile privative de libertate nu au niciun efect asupra recidivei sau o măresc uşor în comparaţie cu efectele sancţiunilor neprivative de libertate, cum ar fi probaţiunea. Această constatare este robustă, indiferent de variaţiile de rigoare metodologică, tipurile de sancţiuni examinate şi caracteristicile sociodemografice ale eşantioanelor. Meta-analizele au o valoare ştiinţifică mare, având în vedere că înglobează în analiza datelor foarte multe studii de cercetare care au analizat aceleaşi variabile. Astfel, în lucrarea citată mai sus, toate cele 116 studii de cercetare asupra relaţiei dintre închisoare şi recidivă, studii realizate de autori independeţi au fost analizate prin metode statistice avansate. Toate evaluările sofisticate ale meta-nalizei au ajuns în mod independent la aceeaşi concluzie:

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[3] W. D. BALES, A.R. PIQUERO, *Assessing the impact of imprisonment on recidivism*, Journal of Experimental Criminology, Nr. 8, 2012, p. 71-101.

[4] F. T. CULLEN, C. L. Jonson C. L., D.S. NAGIN, *Prisons Do Not Reduce Recidivism The High Cost of Ignoring Science,* The Prison Journal, Nr. 91(3_suppl), 2011, p. 48S-65S.

[5] D.M. PETRICH, T.C. PRATT, C.L. JONSON, F.T. CULLEN, *Custodial sanctions and reoffending: A meta-analytic review*, Crime and justice, Nr. 50(1), 2021, p.353-424.

[6] D.M. PETRICH, T.C. PRATT, C.L. JONSON, F.T. CULLEN, op. cit. , 2021, p.353-424.

privarea de libertate are un efect nul asupra recidivei în comparaţie cu sancţiunile neprivative de libertate. Încarcerarea nu poate fi justificată pe motiv că oferă siguranţă publică prin scăderea recidivei. Autorii meta-analizei conchid că este puţin probabil ca pedeapsa cu închisoarea să reducă recidiva, cu excepţia cazului în care unităţile de detenţie devin „instituţii care schimbă oamenii", prin programele de reabilitare *bazate pe dovezi*. Concluziile studiilor de cercetare privind arestarea preventivă constată şi ele un efect dăunător al arestării asupra recidivei după eliberare[7].

În acelaşi sens, un document recent al Consiliului Europei subliniază necesitatea accelerării cercetării în domeniul intervenţiilor pentru reducerea recidivei, în scopul conceperii de programe *bazate pe dovezi (evidence-based)*[8]. În acelaşi direcţie sunt şi recomandările Biroului Naţiunilor Unite pentru Droguri şi Criminalitate (UNODC).[9] - formulate de grupul deschis interguvernamental de experţi în vederea elaborării unor strategii-model de reducere a recidivei convocat prin rezoluţia 77/232 intitulată „*Reducerea recidivei prin reabilitare şi reintegrare*" a Adunării Generale a ONU.

[7] C.E. LOEFFLER, D.S. NAGIN, D.S., *The impact of incarceration on recidivism*, Annual review of criminology, Nr. 5(1), 2022, p.133-152.

[8] Charlie BROOKER, Jorge MONTEIRO, *Prisons and probation: a Council of Europe White Paper regarding persons with mental health disorders*, Council for Penological Cooperation, Council of Europe, 2022, p. 19.

[9] ONU, CES, COMMISSION ON CRIME PREVENTION AND CRIMINAL JUSTICE, *Open-ended intergovernmental expert group meeting on model strategies on reducing reoffending, Working paper by the Secretariat,* E/CN.15/2023/13, online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V23/016/06/PDF/V2301606.pdf.

Mai multe demersuri ale UNODC[10] au dus spre convocarea unui grup interguvernamental de experți, care să contribuie la împărtășirea bunelor practici și la agrearea unor modele de strategice, care să fundamenteze eforturile statelor membre în elaborarea politicilor naționale de prevenire a criminalității/recidivei.

Cu ocazia celei de-a 31-a sesiuni a CCPCJ (Rețeaua Programului ONU de prevenire a criminalității și justiție penală) din mai 2022, a fost adoptată rezoluția „*Reducerea recidivei prin reabilitare și reintegrare*"[11], care încuraja Statele Membre să împărtășească cu UNODC, prin contribuții scrise, informații cu privire la practicile promițătoare pentru o posibilă includere în proiectele de strategii-model de reducere a recidivei, pentru a fi examinate de către un grup de experți inter-guvernamentali. Ulterior, Secretariatul UNODC a elaborat un document de lucru, care include atât observațiile formulate de către experții reuniți în luna aprilie 2022, cât și mențiuni din contribuțiile scrise, transmise de statele membre, acesta constituind suportul discuțiilor pentru întâlnirea grupului interguvernamental de experți, ce a avut loc în perioada 4-6 septembrie 2023.

[10] Organizației Națiunilor Unite - Biroul Națiunilor Unite pentru Droguri și Criminalitate (UNODC) a făcut demersuri prin Documentul de lucru E/CN.15/2023/13, care vizează elaborarea unor strategii-model pentru reducerea recidivei. Acest proiect a început ca urmare a adoptării, la data de 16 decembrie 2021, a Rezoluției 76/182 a Adunării Generale ONU, prin care se reafirma angajamentul exprimat în Declarația de la Kyoto (Kyoto Declaration on Advancing Crime Prevention, Criminal Justice and the Rule of Law: Towards the Achievement of the 2030 Agenda for Sustainable Development).

[11] E/CN.15/2022/L.4/Rev.1 intitulată „Reducerea recidivei prin reabilitare și reintegrare"

II. Recomandările UNODC privind măsurile neprivative de libertate în contextul combaterii recidivei

Recomandările UNODC privind găsirea unor alternative pentru privarea de libertate sunt încă din anul 2007[12], când s-a concluzionat că:

> „*Privarea de libertate încalcă în mod inevitabil cel puţin unele drepturi ale omului şi este foarte scumpă. Adevărul este că marea parte dintre obiectivele sale pot fi realizate cu mai multă eficienţă, cu alte mijloace. Alternativele la privarea de libertate încalcă în mai mică măsură drepturile omului şi sunt mai ieftine. Evaluate pe baza standardelor drepturilor omului şi a cheltuielilor implicate, argumentele împotriva detenţiunii sunt foarte puternice*. (t.n.)"

În noul document, din 2023[13], toate recomandările agreate sunt în direcţia evitării privării de libertate şi identificării altor alternative (chiar şi pentru recidivişti). Al doilea dintre cele şase principii adoptate este evitarea privării de libertate.

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[12] UNODC, *Handbook of basic principles and promising practices on alternatives to imprisonment, criminal justice handbook series,* pub.nr. E.07.XI.2, Austria, 2007, p. 80 online: https://icclr.org/wp-content/uploads/2019/05/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf.

[13] UNODC, *Open-ended intergovernmental expert group meeting on model strategies on reducing reoffending*. [Working paper by the Secretaria], E/CN.15/2023/13, online: https://documents.un.org/doc/undoc/gen/v23/016/06/pdf/v2301606.pdf.

Principiu de bază II

„Detenția[14] ar trebui evitată în situațiile în care nu este strict necesară, deoarece poate agrava condițiile care au contribuit la comportamentul penal al unei persoane și poate înrăutăți dificultăți preexistente la nivelul integrării sociale a infractorilor.(t.n.)"

II.A.Precizările experților desemnați de statele membre ONU

În tot procesul decizional din domeniul justiţiei penale ar trebui să se dea prioritate celor mai puţin restrictive măsuri adecvate, detenţia urmând să fie folosită ca măsură de ultimă instanţă. Trebuie să se obţină un echilibru între drepturile infractorilor, drepturile victimelor şi protejarea societăţii, în timp ce se asigură că răspunsul este proporţional cu gravitatea, natura şi circumstanţele infracţiunii.[15] Riscurile de recidivă ar putea creşte mai degrabă decât să fie reduse, date fiind condiţiile de detenţie, precum mediul restrictiv şi traumatizant, separarea de familie şi comunitate, pierderea şanselor la educaţie şi la remuneraţie şi a contactului apropiat cu persoane, respectiv reţelele infracţionale din mediul de detenţie.

Utilizarea eficientă a alternativelor la detenţie, atunci când situaţiile permit acest lucru, este benefică pentru reducerea recidivei, inclusiv datorită faptului că permite atât suspecţilor, cât şi infractorilor să-şi menţină relaţiile şi legăturile cu comunităţile lor. Intervenţiile de reabilitare şi de reintegrare socială se pot realiza mai eficient în sânul comunităţii decât în închisoare, în

[14] În înțelesul acestui document, „detenția" *(„imprisonment")* se referă atât la arestare provizorie (preventivă) cât și la pedeapsa cu închisoarea.

[15] ONU, *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules): resolution / adopted by the General Assembly, A/RES/45/110, online: https://digitallibrary.un.org/record/105347?v=pdf*, [pe viitor Regulile de la Tokyo], regula 1.4.

timp ce infractorii continuă să fie traşi la răspundere pentru faptele lor;[16] prin urmare, statele ar trebui să asigure disponibilitatea unor alternative eficiente neprivative de libertate în toate etapele procesului de justiţie penală.

> Proiect de strategie model nr. 3
>
> „Statele ar trebui să dezvolte și să dea prioritate aplicării unor alternative la detenția provizorie în modul de abordare a infracțiunilor și a recidivei și ar trebui să ofere asistență persoanelor eliberate din acest tip de arest.(t.n.)"

Aplicarea detenţiei provizorii, mai ales pentru perioade îndelungate, ar putea genera sau potenţa riscul de săvârşire de infracţiuni sau de recidivă; la ea ar trebui să se apeleze ca *ultima ratio* în procedurile penale.[17] Deciziile de a ţine în detenţie provizorie suspecţii ar trebui să fie limitate strict la situaţii în care se consideră necesară combaterea riscului ca infractorii să se sustragă, să comită alte infracţiuni sau să submineze cursul procesului de justiţie.[18]

Există o nevoie de elaborare și promovare a unor alternative variate la detenţia provizorie, precum impunerea unor obligaţii, garanţii, ordine de supraveghere în cazul eliberării pe cauţiune și monitorizare. Cu toate acestea, se impune ca garanţiile financiare să fie folosite cu prudenţă, având în vedere că ar putea contribui, de fapt, la creşterea probabilităţii de săvârşire de infracţiuni sau de recidivă sau ar putea crea dificultăţi suplimentare pentru persoanele marginalizate. Se impun eforturi de conştientizare în rândul

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[16] UNODC, *The Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders,* , Viena, 2018, online: https://www.unodc.org/documents/justice-and-prison-reform/18-02303_ebook.pdf.

[17] Regulile de la Tokyo, regula 6.1.

[18] UNODC, DIrk VAN ZYL SMIT, *Incorporating the Nelson Mandela Rules into National Prison Legislation: A Model Prison Act and Related Commentary*, Viena, 2022, online: https://www.unodc.org/documents/justice-and-prison-reform/21-08355_Incorporating_the_Nelson_Mandela_Rules_into_National_Prison_Legislation.pdf.

decidenţilor cu privire la astfel de alternative şi la efectele adverse ale arestării preventive. În plus, atât actorii guvernamentali, cât şi cei neguvernamentali ar trebui să ia în calcul furnizarea de asistenţă necesară persoanelor aflate în aşteptarea judecăţii. Cei care sunt liberaţi ar trebui să beneficieze de asistenţă în procesul de reintegrare, mai ales dacă au fost în detenţie provizorie perioade îndelungate.

II.B. Regulile minime standard privind măsurile neprivative de libertate (45/110 Regulile Tokyo)

Redăm mai jos şi un extras din Regulile Tokyo ale Naţiunilor Unite, care sunt formulate în urma mai multor considerente, printre care:

> „Conştientizarea faptului că restrângerea libertăţii este justificabilă doar din punctul de vedere al siguranţei publice, prevenirii criminalităţii, justiţiei pedepsei şi descurajării şi că scopul ultim al sistemului de justiţie penală este reintegrarea infractorului în societate."
>
> 6.Regulile privind evitarea arestării preventive sunt următoarele:
>
> 6.1. Arestarea preventivă va fi utilizată ca mijloc de ultimă instanţă în procesul penal, respectând investigarea infracţiunii presupuse şi asigurând protejarea societăţii şi a victimei.
>
> 6.2. Alternativele arestării preventive vor fi utilizate în cadrul unei etape cât mai incipiente. Arestarea preventivă nu va dura mai mult decât este necesar pentru atingerea obiectivelor enunţate la regula 6.1 şi va fi administrată în mod uman şi respectând demnitatea inerentă a drepturilor omului.
>
> 6.3. Infractorul are dreptul de a face apel la o autoritate judiciară sau o altă autoritate independentă competentă în cazurile în care se aplică arestarea preventivă. (t.n.)"

Concluzii

Pentru aplicarea unor astfel de politici penale (evitarea arestării/detenţiei), comunitatea trebuie să fie pregătită la nivel social şi să fie informată corect. Doar înţelegând mecanismele care stau în spatele comportamentului infracţional şi doar cunoscând efectele privării de libertate asupra recidivismului, opinia publică va putea susţine prin reacţiile ei aplicarea principiului evitării privării de libertate. Într-un document recent coordonat de Ministerului Justiţiei[19] au fost analizate cauzele recidivei în România. Cercetătorii care au analizat datele au concluzionat că cei mai importanţi predictori ai recidivei penale în România sunt: proveniența din familii disfuncționale, săvârşirea de fapte penale în perioada copilăriei, abandonarea şcolii şi consumul de substanţe interzise sau alcool. Au fost de asemenea prezentate recomandările internaţionale ale UNODC, propunându-se măsuri alternative la detenţie, respectiv la măsura preventivă a arestului. Transpunerea recomandărilor în acte normative şi implementarea bunelor practici internaţionale sunt procese de durată ce necesită adaptări legislative. Oricum, faptul că există cercetări atât naţionale cât şi internaţionale cu privire la populaţia penitenciară şi legătura dintre încarcerare şi recidivă este un progres important pentru dezideratul de a aborda politici sociale bazate pe dovezi.

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[19] A. BÎRSAN, G. GROZA, I. P. CURT, R. JURCHIŞ, S. SUCIU *et.al., Studiu integrat privind cauzele recidivei, realizat în cadrul proiectul „a safe and educated community undertaking responsible engagement - secure" (o comunitate sigură, educată şi implicată în mod responsabil),* finanţat prin programul „justiţie", Mecanismul Financiar Norvegian 2014-2021, contract de finanţare nr. 7/1583/28.04.2021*, ed. Istros a muzeului Brăilei „Carol I", Brăila, 2024,* online: Https://Anp.Gov.Ro/Norwaygrants/Wp-Content/Uploads/Sites/51/2024/01/20240103-Studiu-Integrat-Recidiva.Pdf., p. 15.

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ARTICOLE

THE (ALLEGED) FAILURE OF PRIVATE EXPERT EVIDENCE IN HUNGARIAN CIVIL LITIGATION

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Abstract: The study examines why the Hungarian legislator decided to recognize the private expert commissioned by the testifying party as an expert on an equal footing with the court-appointed expert in the new Civil Procedure Code [Act CXXX of 2016 on the Civil Procedure Code (Ptk.)], entered into force on the 1st of January 2018, and why the legislative efforts to make this method of expert evidence more widely available failed. It examines why the legislative intention was not fully implemented in practice. This legal instrument is not completely unknown: it was also used in previous procedural codes, although there are differing opinions about its nature, application and evaluation. The Ptk. sought to definitively resolve this uncertainty - not entirely successfully. The aim of this research is to examine the institutional system and regulatory nature of private experts.

During the codification of expert evidence, the legislator placed great emphasis on the regulation of private expert evidence. Already during the codification, numerous questions arose regarding the legal institution, but after the 2016 Civil Code, the expected ideas were not reflected in legal practice. The study examines the institution of private experts based on the practical experiences of domestic law.

Keywords: private expert, evidence, civil procedure

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Introduction

> "The expert has been involved in the administration of justice since time immemorial. The frequency with which cases are brought to a decision, the knowledge of the person or persons called upon to decide on them being insufficient, makes this a natural consequence".[1]

The study examines why the Hungarian legislator decided to recognise the private expert commissioned by the party giving evidence as an expert on an equal footing with the court-appointed expert - in contrast to the previous legislation - in the new Civil Procedure Code (Act CXXX of 2016 on Civil Procedure (CCP)), which entered into force on 1 January 2018 - and why the legislator's efforts to make this way of expert evidence more widespread seem

[1] Árpád ERDEI: *Fact and Law in Expert Opinion*, Economic and Legal Publishing House, Budapest 1987, p. 9.

to have failed. Examine why the legislator's intention has not been fully realised in practice. This legal instrument is not entirely unfamiliar to us: it was used in previous codes of procedure, although different views have been expressed on its nature and application, as well as on its evaluation. This uncertainty was intended to be resolved definitively by the Civil Code - not entirely successfully. This research aims to examine the system of requirements and the regulatory nature of the private expert institution.

In the codification process concerning expert evidence, the legislator has placed great emphasis on the regulation of private expert evidence. Already during the codification process, a number of questions were raised regarding the legal institution, and after the entry into force of the 2016 Civil Code, the expected ideas were not reflected in the case law. The study examines the institution of private expert based on the case law experience of the domestic legislation.

I. The rationale behind the regulation

In Hungary, the previous Code of Civil Procedure, Act III of 1952 on the Civil Procedure (1952 Civil Code), was in force for almost 70 years. Although it no longer contained socialist procedural law, the law went beyond the scope of its original ideology. After the change of regime, the law underwent almost a hundred amendments, which resulted in a breakdown of its regulatory unity and inconsistencies in the text of the norm. As a result, the legislator decided that a new Code of Civil Procedure, a new regulation of the Code of Civil Procedure, was needed instead of amendments. One of the most important innovations in the regulation of evidence was the conceptual renewal of expert evidence, including the regulation of the institution of private experts. The 2016 Code of Civil Procedure had to regulate the

evidentiary value of the use of experts and private experts in court and of the expert's opinion. However, the dispute was based on the difference in approach to the role of the expert in the application of the law, which clearly affected the institution of the private expert. After all, if there is no established position on the institution of the expert when it comes to its assessment as evidence, how can the private expert institution come to the fore and become an integral evidentiary tool in the application of the law?

The 2016 Code of Procedure aims to filter out objective, unbiased expert opinions. Consequently, the opinion of a private expert cannot be one-sided, because the 2016 Code of Civil Procedure requires the private expert to prepare his opinion not only on the basis of the information provided by his client, but also in an evaluative manner of the opponent's statements. He must inform his client's opponent about the subject of the assignment, allow the opponent to make statements and comments on the subject of the assignment before the investigation, be present during the investigation and answer fully and to the best of his knowledge any questions put by the opponent, or the private expert instructed by the opponent during the hearing. If the private expert does not comply with these obligations, his opinion will not be considered as evidence in the proceedings, but only as an argument by the client, and will be considered as a matter of concern in the terminology of the proposal.

In contrast, in 2016, the legal characteristics of the institution of private expert procedure before the Code of Procedure of the year 2016 - that in the performance of its duties it does not have the appointment of a court and thus the system of rights and obligations granted to the expert by law, but instead carries out its activities at the request of a litigant, most often on the basis of a contract of engagement - necessarily raise the question: how does the private expert's opinion, usually obtained unilaterally by one of the

parties, relate to the fundamental principles of civil procedure, in particular the principles of impartiality, the right to a fair trial and equality of arms? The basis of the debate lies in the differences of interpretation.

I am convinced that this has not been translated into practice, and that the institution's prominence in the theoretical arena has stagnated. On the basis of my hypothesis, I believe that the codification effort has not been realised on the practical stage, and that there is a certain concern about the opinions of private experts. In this respect, hopes for private expert evidence have faded. This is what the study seeks to demonstrate, as a lesson for the law of procedure in other countries.

II. Evidence in civil proceedings in general

The taking of evidence is the most important stage of civil proceedings, but it is not a necessary one. Its purpose is to establish the factual elements in issue in the dispute brought before the court by the parties to the dispute, i.e. to enable the court to verify the veracity of the facts on which the substantive and procedural conditions for the performance of substantive legal claims are based and to give a decision on the merits of the case, so that a decision can be reached on the basis of a correct interpretation of the legal provisions and a factually sound decision.[2]

If the legal facts are not disputed between the parties, there is no evidentiary procedure in the case, but the court, after defining the scope of the

[2] Attila DÖME, Mariann DZSULA, Tamás GÁLL, Judit GÁSPÁRNÉ BARABÁNY, János KOVÁCS, István LÉGRÁDI, Zsuzsanna PAPP, Mátyás PARLAGI, András POMEILS, Petra VOGYICSKA, Károly ZAICSEK *Evidence* In: István VARGA, Tamás ÉLESS: *Expert Proposal for the Codification of the New Civil Procedure Code*, HVG-ORAC Newspaper and Book Publisher Ltd. and Hungarian Gazette Newspaper and Book Publisher Ltd., Budapest, 2016., p. 386.

dispute and considering the facts and evidence presented by the parties, takes a position on the legal issue and makes a decision on the merits. The right of evidence covers the process of judicial fact-finding, including the rights and obligations of the parties to the proceedings in relation to the taking of evidence, the functions of the court in this area, the duty of the court to intervene, the method and means of taking evidence and, where other persons are involved in the proceedings, such as experts, the conditions of their participation, their rights and obligations. The rules of evidence in civil proceedings, which are based on continental legal traditions and are governed by domestic law, are essentially laid down in the Code of Civil Procedure.[3]

Evidence in civil litigation cannot be examined independently of the fundamental principle of procedural law, the principle of dispositive justice. Modern legal systems, including the Hungarian Civil Procedure Code, make it clear that the parties are the masters of the case. This principle is not, however, unlimited, as it could be exercised within the framework of the bona fide exercise of the right. The legal literature attaches so much importance to the dispositive principle because it best illustrates the relationship of the court and the parties to the subject matter of the litigation.[4] According to the legal literature, the dispositive principle has two meanings. On the one hand, the party has the right to exercise one aspect of his constitutional right of self-determination, i.e. to initiate the proceedings,[5] and, on the other hand, it asserts the autonomy of the individual by determining the subject matter and

[3] Attila DÖME - *Evidence* In: András JAKAB - Miklós KÖNCZÖL - Attila MENYHÁRD - Gábor SULYOK (eds.): Internet Encyclopaedia of Law (Civil Procedure Law section, column editor: Viktória HARSÁGI) http://ijoten.hu/szocikk/bizonyitas , 2019., 1. oldal (download date: April 12, 2024.)

[4] Miklós KENGYEL: *Hungarian Civil Procedure Law*. Osiris Publisher, Budapest, 2013. http://www.tankonyvtar.hu/en/tartalom/tamop425/2011_0001_520_magyar_polgari_eljarasjog/ch02s03.html Part 1-7, p. 72.

[5] See: decision 8/1990 (IV.23.) AB, decision 9/1992 (I.30.) AB

the personal framework of the proceedings, and the course of the proceedings, once they have been initiated, since the procedural margin of manoeuvre of the court is also defined by the party, in accordance with the provisions of the law.[6] The parties' freedom of disposal also extended to the provision of the case file, which imposes on the parties a considerable obligation and duty in the area of evidence, given that they were and are obliged under the rules of the Code of Procedure currently in force to provide the court with the evidence at their disposal. The court is bound by the motions and requests submitted by the parties and cannot go beyond them and can only take evidence on the express request of the parties, with the exception of cases where the law permits evidence of its own motion.

The Hungarian Code of Civil Procedure refers to the right of disposal of evidence as a separate principle, one of the most important principles, which is expressed in the form of the *trial principle*. In relation to the trial principle, the law allows evidence to be taken ex officio as an exception to the general rule.[7] The trial principle does not only affect the rules of evidence, but also the division of tasks between the court and the parties to the proceedings and the position and activity of the court in the proceedings, given that it is one of the ways of gathering the material for the proceedings. The trial principle requires the parties to place the facts and evidence at the disposal of the court, from which the court will make a judgment. In this case, only what has been made available to the court can form the basis of the judgment. The interest of proof divides the burden of proof between the parties to the

[6] János NÉMETH - Daisy KISS (eds.): *Explanation of the Civil Procedure Code*. Complex Publisher, Budapest, 2007. p. 94-95.

[7] Such authorisation can be found in several places in the law. Paragraph 172 (3), CCP. § 317 (2), CCP. 323. § (2) bekezdés, CCP. § 429, CCP. § 323 (2), CCP. § 429, CCP. § 434 (3), CCP. Paragraph 492 (2).

litigation. The interest of the parties in providing evidence answers the question of which party the court should primarily expect to provide the facts on which its decision is based. The evidentiary interest is linked to the interest to allege, not to the factual allegations actually made. In other words, a party interested in making a statement of fact may have an interest in proving even if another litigant has made a material statement of fact in the case instead. The evidentiary interest can generally be determined on the basis of the substantive law which gives rise to the substantive right sought to be enforced. In addition to the trial principle, the gathering of evidence may be carried out in accordance with the *investigative principle,* which in civil proceedings is only subsidiary.[8] This means that even if the court finds it necessary to order the taking of evidence of its own motion, it will do so only if the party concerned has not made a proper application after having been informed of the substance of the case. The court may order evidence of its own motion if this is permitted by the Civil Code or other law.[9]

[8] István VARGA, Tamás ÉLESS: *Expert Proposal for the Codification of the New Civil Procedure Code*, HVG-ORAC Newspaper and Book Publisher Ltd. and Hungarian Gazette Newspaper and Book Publisher Ltd, Budapest, 2016. pp. 33-39.

[9]The Hague Convention, which was promulgated by a separate law and thus became part of the Hungarian legal order, does not authorise *ex officio* evidence [Curia Pfv.II.20.263/2020/5.]

> As Géza MAGYARY put it, "the balance between the judge and the party has been achieved in the trial, and the reason for this lies mainly in two things. First, that it has been possible to keep the parties' dispositions within reasonable limits. It should be up to the party whether he wants legal protection or not. But it should not be up to the party to decide how the proceedings should be conducted and how long they should last. If the party seeks legal protection, the judge should not be prevented from seeking justice."[10]

It follows from *the principle of freedom of establishment of the facts* that it is possible to use not only the methods of proof mentioned above, but also any other atypical method of proof. The basic requirements for methods of proof not specifically provided for by law are adequacy, expediency and compliance with public policy. In the absence of these requirements, the result of the procedural act cannot be considered as evidence.[11]

The fundamental principle of Hungarian civil procedural law that remains unchanged is freedom of evidence. Unless otherwise provided by law, the court is not bound by formal rules of evidence, a particular method of proof or the use of a particular means of proof in a lawsuit. The purpose of proof is not to establish the existence or otherwise of certain facts with scientific certainty, but to create in the members of the court a kind of strong conviction on which the court can base its judgment with a clear conscience. This is the purpose of the principle of free evidence, which is intended, inter alia, to ensure that the court is not obliged to base its decision, despite its best belief, on facts which are not known to exist, because the evidence is vitiated by a formal defect.

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[10] Géza MAGYARY: *Hungarian Civil Procedure Law,* Franklin- Company Hungarian Literary Institute and Book Printing House, Budapest, second completely revised edition, 1924. p. 36.

[11] Ferenc PETRIK: *Civil Procedure Law I-II.- new Civil Code - Commentary for Practice*, Third Edition, ORAC Publishing House, Budapest 2023. https://jogkodex.hu/doc/1089485?ts=2023-07-01#ss13986.

It follows directly from the characteristics of evidence described above that, if the case raises a technical issue on which the judge does not have the relevant knowledge, any evidence that is suitable for the purpose could be used to establish the facts - even the opinion of a private expert commissioned by the party giving evidence. In addition, the opinion of a private expert, preferably prepared in advance of the trial, will help to bring the proceedings to a conclusion within a reasonable time and will put the legal practitioner in a position to dispose of the dispute as quickly as possible. However, it is not that simple.

III. The role of the expert

The purpose of expert evidence is always to establish some facts, and the facts necessary for the court to form its opinion are established by the expert on the basis of the data of the court-ordered taking of evidence and his or her professional experience from the expert's examination. The examination and use of evidence and the establishment of facts are all a judicial task, not a specific feature of the means of proof. An expert's opinion is a factual statement based on scientific, technical or other scientific laws which objectively provides some information as to whether the facts or allegations put forward by the parties are true or false and thus serves to clarify the facts put forward by the parties in the proceedings. In the light of the above, it can be said that expert evidence is fundamentally different from other forms of evidence, as it is related to the judicial activity. It is precisely because of its scientific basis that an expert's opinion contains a kind of judgement, a judgment. At the same time, it is a scientific assessment of the facts and a scientific, professional statement of connections and

conclusions.[12] Several perceptions have developed around the role of the expert. According to two completely opposing views, the expert can be considered both *as an assistant to the court* and as *an evidentiary tool*. These two positions also determine the positioning of the private expert institution in the evidence. The legislator's position that the expert is an assistant to the court leads to specific consequences. In this case, private expert evidence as a legal institution cannot be given a place in civil procedural law. Indeed, by designating the expert as an assistant to the court, as a body attached to the court, the legal status of the expert is accepted as being dependent on the judge, thereby excluding the possibility of a legal relationship of commission between the parties to the proceedings and the private expert to carry out the private expert's work. If this is the starting point, then the line of reasoning according to which only the opinion of the expert appointed by the court is capable of answering the technical question is correct.

If the legislator considers the role of the expert as an evidentiary tool that can be used in the context of free evidence, this approach already allows the use of private expert opinion as a basis for a judgment, but at the same time the question immediately arises: how does private expert opinion relate to the right to a fair trial, the principle of equality of arms between the parties, or the principle of equal opportunity in a trial, the principle of impartiality and independence? The use of a private expert's opinion is clearly guaranteed by the system of judicial experts, including the use of the register of judicial experts as a fundamental criterion to ensure that a private expert can only be a registered judicial expert. With regard to the relationship of appointment, although the private expert called upon by one of the parties carries out the investigation and gives an expert opinion to answer the technical question, it is mandatory, on the one hand, to inform the opposing party and ensure that

[12] Géza IMREGH: *Expert evidence in civil proceedings.* Hungarian Law, 2002/11. p. 648.

he is present at the investigation and has the opportunity to make a statement and, on the other hand, the opposing party has the possibility, on the basis of counter-evidence, to appoint a private expert. In my view, what may cause fundamental problems is the parties' property and financial situation. In many cases, it is observed that, in the course of litigation, a party is not in a financial position to engage the services of an expert, and must pay the costs of such services in advance. Although it is well established that litigation is costly and that it is up to the party to decide whether or not to initiate it, bearing in mind the time and cost involved, in many cases it is not the plaintiff who is affected, but the defendant who is affected, because of his financial circumstances.

Overall, the issues surrounding the role of the expert have also had a major impact on the legal status of the institution of the private expert, since the expert, as a person or organisation dependent on the judge, is used as an assistant to the judge, which precludes the possibility of using a private expert, while the evaluation of evidence raises the necessary guarantees for a fair trial.

IV. Allowing the private expert to give evidence in civil proceedings - the challenge

The 1952 Code of Civil Procedure regulated the only way of expert evidence: evidence by an appointed expert. A seconded expert gives an expert opinion on the basis of an act of public authority of the court, at the request of the court. The predominance of the public authority character of the expert's appointment jeopardised the full development of the principle of the disposition of evidence. In judicial practice, it has become almost a rule that expert evidence is always controlled by the court: although the parties make a request for the expert to be appointed, the court asks the expert questions, the

court detects the shortcomings in the expert's opinion and it is the court's task to detect and remedy the shortcomings in the expert's opinion. On more than one occasion, it has been felt by the parties seeking justice that, although not formally, much of the expert evidence is provided ex officio, since the expert is not assisting the parties but the court, and it is therefore the court's responsibility and duty to obtain the full range of professional findings on which the judgment is based.

Increasingly, a party seeking to strengthen its litigation interests beyond the findings of a court-appointed expert has resorted to the possibility of bringing to the attention of the court the professional findings of a professional (not necessarily an expert) whom it has called upon. The practice of the time was for a private expert's opinion to be part of the case-file, on the basis of a unilateral mandate from a party, limited to answering only that party's questions, taking account only of that party's observations, not on the basis of the court's authorisation but presented at an unexpected and unforeseeable moment by the party, and increasingly becoming part of the case-file in civil proceedings. The submission of private expert opinions typically occurred in two periods of the litigation: on the one hand, the plaintiff often attached to the statement of claim a private expert's opinion supporting his professional claims, as if to 'scare' the other party; on the other hand, he usually attached it as a rebuttal to the opinion of the appointed expert he did not like. The opposing party could almost invoke unilateralism as a justification for all this: since it had no involvement in the preparation of the opinion, had no influence on its preparation, and since the opinion was drawn up expressly in the interests of the client and on his instructions, any consideration of it would be in serious breach of the requirement of a fair trial and could not therefore be accepted as a basis for judgment.

However, a rule covering only the evidence of experts called upon to give evidence appeared to be contrary to the fundamental principle of the free admissibility of evidence, according to which a civil litigant is not bound by formal rules of evidence, a particular method of proof or the use of particular means of proof, and is free to use the parties' statements and any other evidence that may be relevant to the facts of the case.[13]

This tension has arisen precisely in the assessment of the findings of the expert commissioned by a party to provide an expert opinion. It is undoubted that the private expert's report, drawn up on the basis of a unilateral request, did not in any way comply with the guarantee provisions of the Code of Civil Procedure and, as regards the expert himself, with the legislation governing the status of the expert, but it did contain information of a professional nature and was part of the case-file, a tension which the court, acting under the principle of the free system of evidence, had to resolve somehow. This constant pressure to improve the interpretation of the law led first to the identification of problems and then to a complete reform of private expert evidence. The literature has been consistent in pointing out that the use of private experts in litigation has long been a pressing practical need, and has also been required to ensure consistency with the substantive law applicable to forensic experts.[14]

[13] 1952 CCP. § 3 (5)

[14] Péter SZALAI: *Chapter XXI: Experts*. In Zsuzsa WOPERA (ed.): Commentary to Act CXXX of 2016 on Civil Procedure. W. P. WAKAS, Hungarian Official Gazette and Book Publisher, 2017. p. 528.

V. Reform of private expert evidence

When the new Code of Civil Procedure was drafted, the legislator wanted to achieve a complete reform of expert evidence. In view of this, it is essential that the study summarises the milestones in the reform of expert evidence and then describes the institution from legal theory to practical application.

The Civil Code, which entered into force on 1 January 2018, introduced new provisions to ensure the conditions for a concentrated litigation, by focusing on the parties' responsible litigation, which made the parties' substantive claims even more efficient before the courts. These efforts were mainly achieved through the introduction of the principle of the provision of evidence, in which the legislator sought to completely overhaul and reform the rules governing the taking of expert evidence.[15]

Civil procedural law can satisfy both individual and abstract legal protection if it recognises the parties' right to dispose of their property and allows them to exercise their rights from the commencement of proceedings to the taking of evidence.[16] The Code therefore expressly sought to ensure the effective enforcement of private law claims through the consistent application of the principle of *lis pendens*. Although the obligation to provide material was imposed on the parties by the principle of the right to be heard, which was of equal importance to the principle of the right to be heard and could be exercised by the parties in the context of the free provision of evidence, this principle was not consistently applied in the previous legislation in relation to expert evidence. The new Code of Civil Procedure sought to overcome this

[15] László PRIBULA: The practical problems of determining the expert fee in the renewed civil procedure model. Legal Gazette 2022/2, p. 49.

[16] László PRIBULA: i.m. p. 49.

problem by allowing the opinion of private experts into evidence for the first time in the history of Hungarian law.

The basic principle of the legislation is that a party can choose between using an appointed expert or a seconded expert, and it is not necessary for the expert to be appointed by the court, as the opinion of an expert appointed in other proceedings can also be used as evidence in the proceedings. Whichever route is chosen by the party giving evidence, an expert under the Act on Forensic Experts or an ad hoc expert as defined therein may be used as an expert.

Expert evidence is based on the extensive material support of the court. Although it follows from the trial principle that it is the party giving evidence who must move for the expert's appointment and then move to correct any errors in the expert's opinion that may give rise to concern - the judge's role is far from passive. If there is a dispute between the parties as to which party should bear the burden of proving a fact, the court should also inform the parties of the consequences of failing to provide evidence or to move for the production of evidence, and of the possible failure of the evidence to be produced.[17] In addition, the court must draw the party's attention to the need to call an expert, to the fact that an expert may be called by law only on a secondment basis, to the need to obtain an expert opinion on the basis of information not provided in the proceedings, and to the fact that the expert opinion is not suitable for the purpose of reaching a decision, i.e. that the private expert's opinion or the opinion of the seconded expert is of concern.[18]This much greater involvement than in the previous solution increases the responsibility of the judge.

[17] CCP. § 237 (2)

[18] CCP. § 317 (1)

The submission of a private expert opinion may be requested by the party giving evidence, unless otherwise provided by law.[19] The party interested in providing evidence may decide whether it wishes to provide evidence on a particular issue by a private expert or by a seconded expert. In this respect, the expert mode of proof can be considered to be uniform in procedural law, since there is no difference between the expert routes in terms of their function and evidential value. This is also facilitated by the Ministerial Decree, which applies uniformly to the activities of both seconded and commissioned experts.[20]

If you choose the private expert route, you must file a motion for an expert opinion, without which you cannot attach a legally valid expert opinion to the file, at least the court will not consider the private expert opinion submitted in spite of this as evidence in the same line as the expert opinion. The motion will be governed by the general rules of evidence and other relevant rules of procedure, and the court will apply them in deciding whether or not to grant the motion and, if so, when.[21] In the case of an expert on secondment, the party must already indicate in his motion the questions he wishes to put, which the court may grant. In the case of the use of a private expert, unlike in the case of a secondment, the specific questions to be answered by the expert do not have to be indicated in the application. Indeed, in the case of a private expert's opinion, the expert must act not according to the instructions given by the court in its order, but in accordance with the party's instructions, on the basis of the information provided by the party.

[19] CCP. § 302 (1)

[20] Mátyás PARLAGI: *Experts,* In: István VARGA (ed.) Commentary on the Code of Civil Procedure and related legislation II., HVG-ORAC Kiadó, Budapest, 2018., p.1246.

[21] Géza BARTAL: *Private Expert Opinion in the New Civil Code*, Hungarian Law, Budapest, 2018/6. p. 322.

However, if private expert evidence has not been obtained before the opening of the proceedings, this may be done after the private expert opinion has been drawn up, which is to be assessed in the context of the supplement to the private expert opinion.

The rules of the Code of Civil Procedure give the private expert the rights to perform his or her task in accordance with the mandate and in full, but also impose obligations on him or her to ensure that the private expert's opinion is not one-sided solely on the basis of the information provided by the party commissioning the expert and does not jeopardise the possibility of providing an independent - impartial - objective expert opinion. The client may not instruct the expert providing the private expert opinion in relation to the professional content of the private expert opinion, which, in my view, is a form of guarantee of the private expert opinion, which is intended to provide an independent, impartial expert opinion. The private expert has the right, under the general rules, to inspect and copy documents and to be present at the hearing or otherwise at the taking of evidence and to ask questions there after presenting his opinion. The private expert shall act in full compliance with the professional rules governing his activities, independently of the interests of his client, impartially and impartially, and shall formulate his opinion on the basis of an objective and objective assessment of the facts established and refuse to accept any assignment which is contrary to the law. This means, therefore, that the opinion of a private expert can never be one-sided: the party giving evidence is obviously first informed as to which recognised expert he wishes to use to answer the technical question of his evidentiary interest, and therefore seeks out a suitable expert and asks him to give an expert opinion on the basis of his mandate in the case - but at that stage the private expert has not yet started to give the opinion. It then agrees with the chosen expert on the remuneration, the timeframes that can be

agreed and the conditions for presenting the expert's findings - but at this stage the private expert has still not started to prepare the expert report. The trial then starts, where, after the court has been informed, the party giving evidence moves for a private expert - but the private expert still does not start to prepare the expert report. The court then grants the motion and orders the witness to submit the expert opinion within a reasonable time - and only then does the private expert begin to prepare the opinion. However, the expert's opinion is then given with the involvement of the other party, in the light of his comments and questions, and with the utmost equality of arms. Once the expert's opinion has been drawn up, the private expert will hand it over to the party who commissioned him to submit it to the court. The private expert's opinion can only be the basis for a conviction if it has complied with all these strict rules.

The private expert's opinion shall be served by the court on the opposing party, who may put questions to the private expert concerning the private expert's opinion, whether or not he/she has employed a private expert.[22] The opposing party may also comment on the private expert's opinion. They may state why they consider that the expert's opinion is of concern and should not be taken into account as evidence. The opposing party may, in accordance with Pp. With regard to Article 304 (1), the opposing party may submit questions for which the law imposes time and content limits, and the court shall call the opposing party to this effect by setting a time limit. Since the private expert is not an intervener, the opposing party may not ask questions to verify the impartiality and credibility of the private expert's opinion, and his right to question is limited to the content of the private expert's opinion.

[22] CCP. § 304 (1).

Questions or comments by the opposing party in relation to the expert opinion or information in the proceedings that has emerged after the submission of the expert opinion or a conflict between the opinions on a technical issue may also justify a party's request to supplement the expert opinion submitted by it in order to make the private expert opinion suitable for evidence or counter-evidence. The law also provides for the possibility, in the context of supplementation, for the party to address other concerns raised about the expert opinion. A supplement to a private expert's report submitted by a party may only be made if the party moves to supplement the private expert's report submitted by the party.[23]

A specific feature of the legislation is that, although only one expert may be called to give evidence on a specific issue in a case, private expert evidence is an exception to this rule: the opposing party may also submit a private expert's opinion if he disputes the private expert's opinion and seeks to overturn it. A private expert's opinion requested by the opponent of the party giving evidence is drawn up in the same way as a private expert commissioned by the party giving evidence: on the basis of impartiality, objectivity and equality of arms.[24]

If the private expert's opinion thus drawn up is free of objections, because it is professionally correct, has complied with the rules governing its preparation, and has provided the necessary answers to the party's comments and questions, it will be the basis for the judgment. If, on the other hand, the private expert's opinion does not meet these conditions, i.e. if it is not satisfactory, including where there is an irresolvable contradiction between the opinions of the party giving evidence and those of the private expert

[23] CCP. § 304 (2) paragraph b).

[24] CCP. § 302 (3).

commissioned by the opposing party, the private expert's opinion will fail and cannot be the basis for a judgment.[25]

In this case, it is not possible to continue the private expert evidence, the party giving evidence cannot ask for another private expert after the expert's opinion has been challenged - but can switch to the seconded expert evidence route.[26]

The legislation described above is the result of a lengthy professional and social debate, and the legislator expected it to lead to an increase in the number of experts used by the parties and, indirectly, to an increase in the prestige of the profession. However, practical experience shows that this has not been the case.

VI. The main problems of application of the law in relation to private expert evidence

Relatively soon after the entry into force of the Civil Code, the difficulties in the application of the law were revealed, which cast doubt on the smooth implementation of the legislative aspirations.

After the reform of the private expert evidence, it was noticeable that it remained typical: the plaintiff attached to the statement of claim, as if to "scare" the defendant, a private expert's opinion which was unilaterally drawn up on the basis of his questions, in which the other parties were not involved. This is precisely what the new legal solution was intended to avoid. It was therefore for the courts interpreting the legal provisions to take the view that the private expert's opinion could be drawn up before the submission of the application for a private expert's opinion and that the private expert's opinion

[25] CCP. 316 § (2).

[26] CCP. 307 (1) paragraph (1) point b).

could be annexed to the application. However, this does not constitute a private expert's opinion, but merely the grounds for the application for the employment of a private expert. If the private expert's report is drawn up before the application is lodged, failure to comply with the private expert's obligations in the proceedings under this Act may give rise to a risk of concern. It can be seen that the preparation of a private expert's report in this way is contrary to the purpose of the Act.[27]

Despite the fact that, due to the correct interpretation of the court, the right of the party challenging the opinion of the seconded expert to challenge it by requesting a private expert had to be reduced, the old habits persisted: it still happened that, after the seconded expert's opinion had been presented, the party challenging it attached a private expert's opinion, also unilaterally prepared, answering questions asked to refute the seconded expert's findings, and prepared without the involvement of the other party. This too had to be dealt with in judicial practice. A guiding final decision stated. The court ruled.[28]

However, the fact that this could have arisen at all after the entry into force of the CP indicates the difficulty of changing the mindset of litigants. In my view, a major problem of application of the law in the light of the available court decisions against the private expert institution is that the procedural role of the expert is still not given sufficient weight in the evidence and is sometimes considered as a personal presentation of the party, with the fundamental problem that the procedural role of the private expert, given that

[27] Resolution No. 7 of the Consultative Body on Legal Interpretation Issues of the new Civil Code, adopted at the meeting of the Consultative Body on Legal Interpretation Issues of the new Civil Code on 8 December 2017, Resolution No. 45 of the National Consultation of Heads of Civil Affairs Colleges of 20-21 November 2017.

[28] Court of Pécs Pf.III.20.012/2023/7. (published: BDT2023. 4672).

only a forensic expert can perform such an activity, is given by his specific expertise. Many decisions show that the opinion of a private expert is not given sufficient weight to ensure the right to a fair trial, the principle of equality of arms between the parties, the principles of impartiality and independence. I see one reason for this in the prevailing view of the private expert - although there are guarantees that he will give an impartial, independent, professional opinion - that he will accept a fee from one of the parties, that he will act on their behalf, which makes him incapable of giving an impartial, independent expert opinion. This approach is based on the erroneous assumption that it is obvious that a private expert's opinion cannot contain findings that support the facts and allegations of the opposing party, in direct contradiction to the position of the party who commissioned it.

By adopting the principle of one expert and essentially seeking to ensure that the principle of concentration of litigation prevails, i.e. that the dispute between the parties is resolved as quickly as possible, the Code of Procedure rejects the possibility that litigants should be free to appoint private experts in all respects. In relation to the specific subject matter, the current text of the law imposes a limitation by stating that a new private expert may only be engaged if the private expert has been excluded from the proceedings by the court or cannot give a private expert opinion, since he is not entitled to act as a forensic expert or to answer the specific question under the law.[29]

If we take the view that the private expert is influenced by the framework of the mandate and the remuneration received during the mandate, then we can say that the interests of the court in the speedy conduct of the proceedings and the reaching of a decision on the merits are best served and adequately secured by the procedure of the appointed expert, However, in practice, it can be observed that the proceedings of seconded experts are

[29] CCP. 305. §.

slower, if only because the range of forensic experts authorised to answer a given question is narrower, so that using only them in all litigation leads to a significant delay in the proceedings. In many cases, whether civil or criminal, the court allows an extra time limit for answering the questions, does not apply the penalties for delay and, because of the greater judicial intervention provided by the secondment, orders the experts to provide further and further evidence, even out of an unnecessary sense of caution. In my view, the institution of private experts would remedy this, as it would allow a wider range of forensic experts to be used in relation to the specific issue, and the higher fee for the engagement, as opposed to the fee for the seconded expert, would encourage the private expert to proceed more quickly and efficiently.

In addition, the question arises whether the fairness of the proceedings can really be ensured only by the appointed expert or whether it could be ensured by private experts used by the parties, which, although not in favour of the one expert principle, would be more efficient.

Another important enforcement problem is that private expert opinions suffer from substantive deficiencies which are not adequately addressed by the court in the proceedings. In this respect, judicial practice appears to be too strict. In my view, if the findings of fact, the research methodology, the references to the literature and the summarised conclusion drawn in the private expert's opinion are thorough, clear and logical, then grounds such as the fact that the opposing party was not invited to make a statement by the private expert should not be grounds for rejection. First, in my view, that omission and deficiency can be remedied in litigation and, second, in many cases, the opposing party will seek to prevent the private expert from being called so that it is later possible to exclude the private expert's opinion from the evidence on the basis of a challenge to the private expert's opinion. In a number of cases, private expert opinions, if they are not

in accordance with the CP. 303 (2) are not fulfilled, they are not admitted into evidence and their findings are disregarded by the court. This is a further challenge to private expert evidence.[30]

It is also a problem for the application of the law and leads to the marginalisation of the use of private experts that the fee for a private expert, if there is a concern, cannot be charged as part of the cost of the litigation and that in a significant number of proceedings the private expert's opinion is found to be of concern. While the fee for the expert's report is part of the litigation costs, the fee for the private expert can easily become an unnecessary extra cost for the party instructing him. In practice, it can be observed that a private expert's opinion may be of concern not only because it is incomplete, or because it contains findings that are contrary to itself or to the facts of the case, or because it is vague, but also if there are, for example, two private expert opinions that take different positions and reach different conclusions. If, however, the party later requests the appointment of an expert to prove its position and the expert confirms the findings of one or other of the private experts, it may be that the private expert's opinion, which has been found to be questionable, is well founded, but the fee paid cannot be charged as legal costs. If the wording of the standard would allow the fee for the private expert's opinion, which has been found to be well-founded by a new expert, to be included in the costs of the proceedings, the hiring of a private expert would also be more attractive for the parties. In this context, the question of over-proof arises, where it is essential to take a position on whether litigation

[30] Decisions on which the findings are based: the Curia Kfv.X.37.416/2019/4., the Curia Kfv.35.482/2020/5., the Curia Pfv.20.154/2022/8., the Curia Gfv.V.30.208/2023/4. (published: BH 2024.3.65.), Capital Court 7.Pf.20.679/2021/8/II., Court of Debrecen Pf.II.20.067/2023/7.

efficiency is served by 'discovering' the truth or by a speedy resolution of the case.

The difficulties in the application of the law were essentially confirmed by the first comprehensive amendment of the Civil Procedure Code, Act CXIX of 2020 (Civil Procedure Code Novella), which entered into force on 1 January 2022, and which - although only in certain types of litigation, but definitely - curbed the use of private expert evidence. The Pp. According to the general explanatory memorandum to the amendment[31] one of the main objectives of the amendments aimed at personal status litigation was to introduce provisions aimed at enhancing the protection of the interests of minor children. In view of this, Article 51 of the amendment to the Civil Code excluded the possibility of private expert evidence in all personal status actions.[32] The reason given for this was that if expert evidence is conducted in accordance with the former provisions of the new Civil Code and the provisions of the new Civil Code are not complied with, the court may not be able to take evidence. 434 § (5) and 444 § (1) of the new CP., the law provides for the possibility of private expert evidence in all proceedings concerning personal status other than guardianship proceedings, the parties will - also by virtue of the principle of free evidence - make use of the possibility of private expert evidence, in which case the case of a doubtful, contradictory expert opinion may arise, which the court must endeavour to resolve. In such a case, in the course of a claim relating to matrimonial or parental custody, the private expert, private experts or ultimately the appointed expert may have to examine/remove the minor child several times, depending on how the contradiction or concern of the expert opinion is resolved, which is contrary

[31] See Explanatory memorandum 2020/148, final explanatory memorandum to Act CXIX of 2020,

[32] CCP. short story § 51.

to the provisions of the Civil Code. 4:2 (1), which provides for increased protection of the child's interests and rights in family relationships.

The fundamentally reformed private expert evidence was not affected by the amendment to the Civil Code, except for the provisions on personal status, but it did send a message that private expert evidence is not considered to be on a par with the path of evidence of an appointed expert.

VII. The answer to the hypothesis

The study aimed at examining how the spirit of the new Hungarian civil procedure code, the emphasis on the institution of private experts, has affected the practice, and whether the theoretical aspirations of the codification process have been successfully translated into practical application. On the basis of my hypothesis, I have argued that the codification effort has not been realised on the practical stage, and that a certain anxiety about the opinions of private experts can be observed. In this respect, hopes for private expert evidence have faded**.**

In the case studies it can be seen that, although private expert evidence was an innovation of the CP. and there were high hopes for it, its practical application and the evaluation of private expert opinions were still under the spell of the difference in approach before the new CP., and the doubts were not dispelled. The jurisprudence was somewhat lagging behind the legal provisions and approached this legal institution with trepidation.

In my view, firstly, because if the private expert's opinion was excluded, unnecessary litigation costs were incurred, which remained the burden of proof. On the other hand, because it was subjected to greater scrutiny - whether the right to impartiality, independence, fairness, impartiality, whether the opposing party was able to assert its rights during

the private expert's proceedings, whether the private expert took due account of them - as the appointed expert. Although the parties could and do agree on the person of the appointed expert, judicial control is still present, since ultimately - in the absence of a compromise - it is the court that appoints the expert.

The reasons for refusing to use a private expert institution should be examined. There may be legal sociological reasons for this, but the most likely reason is that the courts do not see the application of civil law principles as guaranteed when assessing the private expert's private opinion. Despite the fact that the private expert's opinion is drawn up on the basis of and in accordance with the criteria and requirements applicable to forensic experts, the presence of a relationship of trust jeopardises the principles of impartiality, independence and the right to a fair trial, which are fundamental to the whole litigation process.

Based on the analysis of the court decisions, the assumption seems to be somewhat confirmed, i.e. that the acceptance of private expert opinions has produced worse results than expected and in many cases was either excluded from the evidence or was not suitable to be used as a basis for a decision on the merits, because it was based on the judicial reasoning or suffered from some deficiency that could not be remedied in the procedure. Although it could be presumed that the court in charge probably did not dare to take the risk of issuing a judgment that could be challenged because the right to a fair trial, the requirements of impartiality and independence were not fully respected in the proceedings - this could clearly not be justified, however, because no decision in the context of the appeal proceedings could be found which had established a procedural violation in this respect, and therefore no such conclusion could be drawn.

Overall, it is clear that the use of a private expert has not been as widespread as the legislator expected within the framework of the Code of Procedure. Even if there is no basis for this in the legal guarantees, the violation of impartiality is regularly raised by litigants. It is difficult to prove, and can only be deduced from the results, that the courts are also more cautious about this expert evidence route, and several problems of application of the law arise. Society has not been able to change its thinking on this issue, and the seemingly radical changes in the law have only partially been followed by everyday practice.

VIII. *De lege ferenda* proposal

Because of the shortcomings of the institution of private expert witnesses, I do not see the solution to the practical problems in legislative amendments, I believe that the legislator has provided an adequate background for this form of evidence through the legal provisions, but at the same time, in my opinion, it is necessary to take measures which, if not directly, then indirectly, will act as a guarantee.

In my opinion, the judicial practice has not yet fully caught up with the private expert institution, which is also one of the drawbacks of the new Civil Code, since it has not been regulated yet, which could perhaps be facilitated by reducing the tasks that have to be included in the scope of the judge's supervision and by omitting the necessary training, since the court is given a number of additional tasks with the private expert institution (its procedural assessment, its financial supervision, and later its substantive assessment).

In my view, it is not permissible to allow the practice of making private expert opinions inadmissible on the grounds of concerns about the lack of involvement of the opposing party. The expert works from material brought

in, and of course, if he or she enters into a relationship of trust with one of the parties, he or she can rely mainly on documents and data obtained from him or her. In view of this, he cannot be expected to be complete and accurate in cases where the opposing party does not participate in the proceedings - does not want to participate and thus impedes the taking of evidence, but at the same time, on the basis of judicial practice, there are a significant number of private expert opinions which are excluded from evidence not because they are not logically convincing to the court or contain contradictions which could not be resolved, but because they suffer from formal or substantive deficiencies (e.g: the opposing party was not informed of the examination, or, if it was, it was not informed that it could comment, make a statement, be present during the examination, or the expert's report does not contain the methods to be used, indicating which of them the expert applied and why he chose them), which could be absolutely eliminated. In my opinion, this could be resolved by imposing on the expert - who, being a private expert, can only be a forensic expert and must be aware of the relevant provisions of the Civil Code if he accepts an assignment - the obligation to give an expert opinion in which he at least pays sufficient attention to the formal and mandatory content requirements, by appropriate means, in particular by the professional supervisory body.

The study showed that there were also a number of practical difficulties and questions regarding the newly introduced private expert evidence. It has tried to formulate proposals to solve these problems, which hopefully contain suggestions useful for legislation and law enforcement.

ARTICOLE

OVERVIEW OF THE DIGITAL HEALTHCARE IN HUNGARY

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Abstract: eHealthcare has become part of the healthcare system as a result of a long process and the development of communication of information. Hungary's eHealth system is the National eHealth Infrastructure *(Elektronikus Egészségügyi Szolgáltatási Tér, EESzT),* which greatly facilitates the work of health professionals and the daily lives of users. In this paper I would like to describe the structure and functioning of the Hungarian scheme. It is a nicely designed interface, with a careful technical and legal background, which is completely user-friendly, as its handling is very clear. It can be used online for writing prescriptions, booking appointments, writing referrals and many other useful tasks, which I will describe in detail in the paper. However, there is still room for improvement and progress. I believe that healthcare is a field that requires continuous development. It is necessary to keep pace with the development of technologies in order to provide high-quality services to patients.

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Keywords: *governance, eGovernance, eHealthcare, healthcare management, digitalization, National eHealth Infrastructure, COVID19*

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Introduction

The aim of my study is to describe the electronic healthcare administration system in Hungary; therefore I chose the descriptive-analytical method for the study. The development of EESzT[1] has resulted in a new, integrated system.

I believe that this is a unique system, so I find it important to discover the opportunities it offers. For example, ePrescriptions help to solve the problem of the digital gap. Also, the system allows users to look into their documents, and with the help of the Treatment Catalogue doctors and patients can check all the treatments provided.

The discussion of the strict regulatory background of EESzT is an absolutely necessary part of studying the subject. The system fulfils the requirements of the Hungarian regulations. The self-determination function allows users to enjoy their data protection rights.

During my researches I used Hungarian studies. This may be due to the fact that Hungarian health care is not very much dealt with at the international level. This is one of the reasons why I think that my study would be a valuable contribution.

[1] EESzT (Elektronikus Egészségügyi Szolgáltatási Tér): short for Hungary's electronic health system.

I. Digital Governance

Our world is constantly changing. This includes the dynamic development of the IT sector, which is driven by new demands in all areas of life. Digitalization opens new horizons.

This process affects various systems in society, including governance. This means that new routines have been introduced. Infocommunication-related habits and the use of devices have changed, which affects governance.[2] It is important that the new solutions should be easy to understand both for those working in the sector and for citizens. A good example is the EESzT system, which is complex, yet easy to use.

The word "electronic" can be interpreted in many ways, but in the field of law and governance in particular it means the future.[3] Technological development is present in all areas, producing new solutions every day, in line with demands. IT is used in all fields where new demands require changes. Governance is no exception. The question may arise whether digitalization is needed and applicable in all areas. The number of fields where paper-based administration is replaced by digital solutions is increasing. They result in lower costs and error rates and make procedures faster and more efficient. Electronic governance means more than replacing human work with devices and introducing automatization. It also includes the introduction of new methods to provide the existing services, and the introduction of new services.

2 Balázs Benjámin BUDAI, Balázs Szabolcs GERENCSÉR. Bernadett VESZPRÉMI, *A digitális kor hazai közigazgatási specifikumai*, Dialóg Campus Kiadó, Budapest (2018), 15.

3 Sándor NAGY, *Circulus vitiosus: az elektonikus közigazgatás megvalósulása helyi szinten*, Új Magyar Közigazgatás, 2021.december/14.évfolyam/4.szám, 65.

Its regulation is complex because there are many types of tools used in the sector, and technological development is, so to say, hard to follow.[4]

eGovernance is based on an online system that is accessible anywhere and allows citizens to take care of their administration-related issues even if they are on holiday or on a business trip. The concept of eGovernance is the result of an international process, including conferences, status reports and EU recommendations.[5] According to the Organisation for Economic Cooperation and Development, e–governance covers the use of information and communication technologies in all fields of governance in order to provide services more efficiently.[6]

II. eHealthcare

Digitalization affects all areas of public services. The course of development is in line with the demands of the specific fields. In this regard, healthcare is one of the main areas, and Hungary has made a huge achievement with EESzT. Even though the digitalization of healthcare had been discussed and needed for quite some time, the breakthrough came with COVID19. It was a milestone in the national healthcare system. EHeatlhcare

4 Zsolt CZÉKMANN, Gergely CSEH, Bernadett VESZPRÉMI, *Az e–közigazgatás, e–kormányzat szakigazgatása*. In: LAPSÁNSZKY András: *Közigazgatási jog, Szakigazgatásaink elmélete és működése,* Budapest, Wolters Kluwer Hungary Kft (2020) 329–331.

5 Zsuzsanna ÁRVA, István BALÁZS, Attila BARTA, Bernadett VESZPRÉMI, *Közigazgatás–elmélet* Debreceni Egyetem, Állam– és Jogtudományi Kar, Debrecen (2020) 263.

6 *E–government: Analysis Framework and Methodology*. OECD Public Management Service, Public Management Committee, 2001.

will not cover all sectors in the area, but this innovation will support those who do not have the required infrastructure and services.[7]

The European Union has developed action plans to improve healthcare. The first eHhealthcare action plan was launched in 2004[8]. It was created because it had become clear that in a few members states the electronic systems that help provide healthcare services were absent.[9] In 2005, the "eEurópa 2005[10]: Information for Everyone" action plan was created, which, among other matters, aimed to facilitate the improvement of online healthcare services and the establishment of healthcare information networks. In 2008, the European Commission issued another recommendation[11], in order to make better use of the eHealthcare systems, and because healthcare systems were not consistent in the member states, and not all citizens had access to high-quality healthcare services.[12] In line with the action plan produced in 2005, the European Commission created a strategic action plan entitled "2010[13]: European Information Society for the Development of Jobs", which aimed to improve the quality of life. On 27

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7 Norbert INCZE – Tamás PESUTH, *E-Health – Digitalizálódik az egészségügy?*, Köz-gazdaság, 2020/4. 247-250.

8 More information: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0356:FIN:EN:PDF.

9 Dóra LOVAS, *Vigyázó szemetek az egészségügyre vessétek! Elektronikus Egészségügyi Szolgáltatási Tér az európai egységes digitális piac összefüggésrendszerében*, Közjavak, 2019/V.évfolyam/3.szám 9. 9-10.

10 More information: Commission, 'e-Health - making healthcare better for European citizens: an action plan for a European e-Health Area' COM 356 final.

11 More information: Commission Recommendation of 2 July 2008 on cross-border interoperability of electronic health record systems [2008] OJ L 190/37.

12 D LOVAS, *ibid.p.*10.

13 More information: Comission, 'i2010 – A European Information Society for growth and employment' COM 229 final.

September 2013, The EU published the opinion of the Committee of the Regions about the EC action plan[14] related to the development of eHealthcare systems in the 2012-2020 period. The plan put eHealthcare in social context and explained specific benefits for citizens. In terms of social context, it promoted transparency, the improvement of the quality of life, and equality. As for individual citizens, it referred to bespoke treatment and services, shorter hospital care, and more cost-efficient treatments due to technological developments.[15]

III. National eHealth Infrastructure

EESzT is an important part of eGovernance. In order to eliminate errors in governance, the connection of databases has become a major issue. Health data is recorded in various documents which are not necessarily stored by the authorities. EESzT is an integrated database where citizens' records are stored. The National eHealth Infrastructure, co-financed by an EU grant and the Hungarian government, revolutionizes healthcare, and eGovernance in general. The system combines traditional healthcare with cutting-edge IT solutions and services. In order to provide high-quality and efficient patient care, it is imperative to make patient data available to practitioners, regardless of what financial programme patients use for covering their treatments.

This national database stores all medical information on every citizen. Clinics, laboratories, hospitals and practitioners transfer data to the system.

14 More information: Opinion of the Committee of the Regions C 280/33 on 'eHealth Action Plan 2012-20 — Innovative Healthcare for the 21st Century'.

15 Ágnes VÁRADI, *E-health fejlesztések az egészségügyi szolgáltatások hazai és európai uniós rendszerében,* Összefoglaló Közlemény, Magyar tudományos Akadémia, Társadalomtudományi Kutatóközpont, Jogtudományi Intézet, Budapest, 4-5. https://akjournals.com/view/journals/650/155/21/article-p822.xml.

All appointments are recorded in the social security system. Data can be sorted, which makes the system easy to use, and patients can even print their medical records. Data upload is mandatory, the consent of patients is not required[16]. Healthcare service providers are responsible for creating medical records.[17]The related requirements are specified in Art 2 and 3 of Regulation *39/2016. (XII. 21.)* of the Ministry of Human Resources.[18]

> "The Ministry initiated a social discussion on the modification of regulations related to healthcare and health insurance. The proposal included the regulation of the establishment of EESzT.[19] The project TIOP 2.3.2 is one of the pillars of the Hungarian e-healthcare programme. Its objective was to create a platform that allows and helps communication and collaboration (which resulted in the establishment of EESzT), and connects sectoral IT systems and healthcare professionals."

The project, which related to "certified public records", aimed to improve the IT infrastructure in the sector and to reform data transfer among institutions. EESzT is a platform for communication and collaboration, which is secure and meets data protection regulations.[20]

The EESzT has been available for healthcare providers since 1 September 2017. Many general practitioners, institutions providing healthcare services to inpatients and outpatients and pharmacies have joined

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16 Hajnalka CSEKE, *Elstartolt az e–egészségügy–Adatok a felhőben*, Figyelő, 2017/8. 28.

17 Máté JULESZ, *„A telemedicina és a COVID–19–világjárvány"*. Információs Társadalom XX, 3.szám (2020), 32.

18 EMMI Decree 39/2016. (XII. 21.) on the detailed provisions on the National eHealth Infrastructure.

19 Á VÁRADI: *ibid.p.*8.

20 Attila PITI, Beáta HEILING KOLTAI, GYEMSZI, *Nemzeti Egészségügyi Informatika (e–Egészségügy)–Elektronikus közhiteles nyilvántartások és ágazati portál fejlesztési projekt helyzetjelentése*, IME–Interdiszciplináris Magyar Egészségügy, 2014.szeptember/XIII.évfolyam/7.szám 58–60.

the system. Private service providers were planned to connect by the end of 2018. The National Ambulance Service joined the system in November 2018. It was a milestone in patient care. Users have been trained by the member institutions with the help of the operator.[21]; Retrospective data upload, the integration of data sources, and the standardisation of digital documents were performed in the framework of the EFOP–1.9.6–16–2017–00001 project entitled "Electronic and Healthcare Development", as part of the Széchenyi 2020 programme.[22]

A. Regulatory background of EESzT

All projects that aimed to develop EESzT and its sectoral modules were completed at the end of 2015. The system integrates the previously existing systems of hospitals, pharmacies and general practitioners, and allows the introduction of new services.[23]

Article III/A of Act XLVII. of 1997[24] about the handling and protection of healthcare data and related personal data came in effect on 1 January 2016. It defines rules related to data management in EESzT. Art 35/A. (1)-(3) specifies that the operator of EESZT, which is the National Directorate General for Hospital, based on Art 7(4) of Government Decree 516/2020. (XI. 25.), shall provide related data transfer, and may store data pending consent by individual citizens. The objective of the decree was to define the conditions

[21] Bálint Szabó, Beáta Heiling Koltai, Állami Egészségügyi Ellátó Központ (Áeek), *Startol az EESzT,* IME–Interdiszciplináris Magyar Egészségügy, 2017.február/XVI.évfolyam/2.szám 48–49.

[22] EESzT Fenntartási és Üzemeltetési Főosztály: *Korábbi egészségügyi adatainkat is elérhetik a kezelőorvosok–Kulcsfontosságú fejlesztésekkel épül tovább az EEszT,* IME–Interdiszciplináris Magyar Egészségügy, 2019.március/XVIII.évfolyam/2.szám 56.

[23] Bálint Szabó, Beáta Heiling Koltai, Állami Egészségügyi Ellátó Központ (Áeek), *ibid.p.*48.

[24] Act LXXXIII of 1997 on compulsory health insurance.

and purposes of managing medical and personal information.[25] One of the chapters in the decree deals specifically with EESzT, and provides detailed information about the management and protection of medical and personal information.[26]

The testing of the system began on 1 January 2016 and was carried out by the National Infocommunications Service Company Ltd, which still operates the system.[27] The suppliers of the systems operated by connected institutions were informed on all technical requirements that they had to fulfil in order to make their systems compatible with *EESzT."*[28]

The operation of the EEszT is regulated by Decree 39/2016. (XII. 21.) of the Ministry of Human Resources[29]. The Regulation consists of 3 chapters, which describe the eHealth system in detail and clearly.

A short description of the 3 chapters:

Chapter 1 provides detailed information about the procedure and conditions of connection, the requirements regarding the IT system of the connecting entity, about the introduction of the service, the system, the management of authorisations, and the management of downtime and malfunction.[30]

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25 Kinga NÉMETH, *Egészségügyi adatkezelés és a GDPR hatása*, Med. Et. Jur., 2018. szeptember/9. évfolyam/3. szám 17.

26 *1997. Act XLVII of 1997 on the processing anf protection of medical and other related personal data.*

27 *Decree No 7/2013. (II. 26.) of the Minister of National Development, Schedule 1, par 23 and 1.24k .*

28 Bálint SZABÓ, Beáta HEILING KOLTAI, Állami Egészségügyi Ellátó Központ (ÁEEK), ibid.p. 48-49.

29 Decree No 7/2013. (II. 26.) of the Minister of National Development, Schedule 1, par 23 and 1.24k.

30 *EMMI Decree 39/2016. (XII. 21.)* on the detailed provisions on the National eHealth Infrastructure, art 2.§ (1)-(2).

Chapter 2 describes the services that are available through the system, including the central event catalogue and the management of master data.[31] It also discusses self-determination and healthcare databases, healthcare profile, medical records management and data provision requirements.

Chapter 3 includes appendices that help interpret the decree and its application in practice.

One of the major issues regarding the EESzT is data protection. Users may have concerns about the security and availability of their medical records.

On 27 April 2016, the regulation 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) was issued.

GDPR regulates issues relating to data protection. It came into effect on 24 May 2016 and has been mandatory for all member states since 25 May 2018.[32] In terms of the operation of EESzT the Hungarian regulation is in line with the GDPR. The GDPR states that "The protection of natural persons in relation to the processing of personal data is a fundamental right. Article 8(1) of the Charter of Fundamental Rights of the European Union (the 'Charter') and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) provide that everyone has the right to the protection of personal data concerning him or her".[33] It also states that "The right to the protection of personal data is not an absolute right; it must be considered in relation to its

31 *EMMI Decree 39/2016. (XII. 21.) on the detailed provisions ont he National eHealth Infrastructure, art 2.§ (1).*

32 Balázs SZÉCSÉNYI-NAGY, *Az egészségügyi adatkezelés és a GDPR összefüggései*, Med. Et Jur., 2021./12. évfolyam/májusi különszám, p. 6.

33 Regulation (EU) 2016/679 of the European Parliament and of the Council, preambulum, par. (1) .

function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality."[34] The data protection principles basically apply to the data of persons who are identified or identifiable. This means that they do not apply to collected anonymous information and the data of deceased persons. The management of personal data can be based on regulations (*e.g.* in the case of an objective of public interest) or on the voluntary, informed consent of individuals.[35] The Preamble of the Regulation defines the scope of personal medical information.[36] Article 4 defines the concept of medical information.[37] According to the Regulation, genetic and biometric data that may be used to identify an individual, and medical records are special categories of information. Data falling into these categories may basically not processed, with certain exceptions.[38] The Regulation states that „Such processing of data concerning health for reasons of public interest should not result in personal data being processed for other purposes by third parties such as employers or insurance and banking companies."[39] The concept of data protection impact assessment is also defined. It covers the assessment of how the planned data processing operation will affect the protection of personal data.[40]

The establishment of EESzT and the introduction of GDPR had a major effect on the management of personal health information. The

34 Regulation (EU) 2016/679 of the European Parliament and of the Council, preambulum, par. (4) .

35 Balázs SZÉCSÉNYI-NAGY, *ibid.p.*6.

36 Regulation (Eu) 2016/679 Of The European Parliament and of the Council (35) .

37 Regulation (Eu) 2016/679, art 4 15.

38 Regulation (Eu) 2016/679, art 9 (1).

39 Regulation (Eu) 2016/679, preambulum, par. (54).

40 K NÉMETH, *ibid.p.*20.

databases of EESzT were created on the legal basis of public interest, and personal health information is stored accordingly.[41][42]

> According to Article 8 of the Charter of Fundamental Rights of the European Union: "Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. Compliance with these rules shall be subject to control by an independent authority."
>
> The Treaty of Lisbon also deals with the issue of data protection in Article 16: "(1) Everyone has the right to the protection of personal data concerning them. (2) The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities."

Article 6 of the Constitution of Hungary states that "Everyone has the right to the protection of their personal data concerning them".

On the whole, regarding data protection issues we have to assess how we can increase efficiency without even minimally restricting personality rights. The introduction of uniform identifiers must be based on facts and analysis, which requires careful consideration of the benefits, the risks, the potential limitation of fundamental rights, and alternative solutions. The recommended solution must be in line with the principle of proportionality![43]

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41 Balázs SZÉCSÉNYI-NAGY, *ibid.p.*8.

42 Regulation (Eu) 2016/679 Of The European Parliament and of the Council, preambulum, par. (63).

43 Tamás KOVÁCS A., *Egy univerzális azonosító bevezetésének lehetősége – Az 1996. évi XX. törvény 20 éve és a lehetséges folytatás,* Új magyar közigazgatás 2017/10.évfolyam/2.sz. 69.

B. "I have uploaded the prescription in the cloud"

The ePrescription module of EESzT greatly simplifies patient care and helps both practitioners and patients.

The National Health Insurance Fund (NEAK, formerly OEP) prepared the introduction of ePrescription in 2012. The authority planned to use EU resources. The objectives were safe redemption of prescriptions, transparency, less administration, better communication with patients, and shorter queues in the pharmacies.[44]

Following discussions among the authorities concerned and other entities, the system was launched on 1 November 2017. Not much later medical aids were involved in the system, in addition to licenced medicines and magistral formulas[45], and private healthcare providers started to join the system. One might think that it is not easy to shift from traditional paper-based administration to an online system, but after six months it was clear that the use ePrescription had become part of the everyday routine of pharmacies and general practitioners, which proved the efficient digitalization and development of healthcare.[46]

I think that the functions of the ePrescription module developed for patients are user-friendly, and are very easy to use. I also use the system, and

44 *Announcement of the National Health Insurance Fund (21 June 2012.).*

45 *Ministerial Decree No 14/2007 (III. 14.) on Inclusion in Social Insurance Coverage of Medical Aids and Coverage of Their Prescription, Supply, Reparation and Borrowing*

46 Lóránt BERTALAN–Gergely HÉJA, *Féléves a magyar eRecept–El tudunk szakadni a papírtól?,* IME–Interdiszciplináris Magyar Egészségügy, 2018. június/XVII.évfolyam/5.szám, 52–53.

I believe that this cloud-based solution is a major step forward in eHealthcare. The use of the ePrescription is controlled by the regulation of medicines.[47]

As a rule, medicines can still only be prescribed following an appointment with the patient. However, due to the COVID–19 pandemic, it can also take place in the form of telemedicine treatment. The practitioner uploads the prescription to the system, and the patient can redeem the prescription in any pharmacy in the country. On 7 July 2021 the rules relating to the prescription certifications changed. Now it must be issued on paper or in electronic form, depending on the patient's request. This also applies to patients under 14 years of age. With an ePrescription ID anybody can redeem prescriptions for themselves or for others, due to the pandemic.[48] Those who do not have access to the Client Gate system can also use the solution, which is especially useful for older people who do not necessarily have the IT background and skills to use such systems. The environmental benefits of the ePrescription system are also significant as it reduces the use of paper in healthcare.

[47] *Regulation No 44/2004 of the Minister for Health, Labour Affairs and Family on the prescription and dispensing of medicinal products for human use) of 28 April 2004*

[48] https://www.eeszt.gov.hu/hu/erecept-kivaltas.

C. eProfile[49]

> "The eProfile module ensures the possibility to record the most characteristic health summary data (Health Characteristics) of patients. The information stored here – unlike several of EESZT modules – is not data on patients' health events, but a summary of the patient's own health." [50]

The records contain all information that may be necessary in treatments in a uniform and consolidated form. The eProfile content must meet two requirements. First, it has to include all medical information that may be necessary in case treatment is needed. Second, all incidents and interventions that may affect the condition of the patient and the potential treatments in the future must be documented. There are two categories of data in the system: Emergency and general. Data managed in the eProfile module rarely change.

Specialists and general practitioners can upload data into the system with the patient's consent.

[49] Based on https://e-egeszsegugy.gov.hu/e-profil.

[50] https://e-egeszsegugy.gov.hu/e-profil.

D. eReferral[51]

> "Referrals were mostly written by hand, and they were often difficult to read. Healthcare providers have always been required to record all data. This made the transition to eReferral easier. The system ensures the reliable and secure transfer of medical information. It eliminates factors that have caused problems so far. Referrals are stored in the system and are available to healthcare institutions that provide treatment to the patient. Medical records are uploaded into the system, about which both the referring practitioner and the patient are informed in EESzT. Using the Citizen Portal function, users can check their referrals, but they can also request to receive a message through the Client Gate."[52]

There may be cases, such as emergency care at night, when practitioners have no time to upload information into the system. In order to ensure continuous medical services, paper-based referrals remain an option.

The concept of ePrescriptions was introduced in the act on mandatory healthcare services (Ebtv) in 2016 (Art 18/A)[53]. Also, a detailed description was introduced in the relevant government decree in 2016[54].

E. eMedical history[55]

> "The eMedical history (EHR repository) allows for the central storage and retrieval of medical documents generated in connection with each medical encounter. Case history only stores treatment documentation, while other documentation generated during health care processes is stored in other modules of EESZT."[56]

Documents can be placed in the eMedical history in two ways:

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[51] Based on https://e-egeszsegugy.gov.hu/e-beutalo.

[52] https://e-egeszsegugy.gov.hu/e-beutalo.

[53] *1997. Act LXXXIII of 1997 on compulsory health insurance*

[54] *Governmental Decree 217/1997. (XII. 1.) on the implementation oof Act LXXXIII. of 1997.*

[55] Based on https://e-egeszsegugy.gov.hu/e-kortortenet-ehr- .

[56] https://e-egeszsegugy.gov.hu/e-kortortenet-ehr-.

Physically stored (internal) documents are documents stored in the EESZT eMedical history (EHR) module.

(External) documents stored as reference documents, which are stored in other modules of EESZT. Referrals are stored in the eReferral module, prescriptions are stored in the ePrescription module, image diagnostics files are stored in the Digital Image Transfer and Remote Consultation Module (DKTK). On the other hand, it is a so-called external document, stored in the form of a reference, which is stored in other modules of the EESzT.

EMedical history documents are stored and can be queried in a hierarchical system. The SSN (TAJ) is a unique identification number for identifying patients. eMedical history assigns a unique internal ID to every patient in the country. Cases can be identified by their case number and documents by their document ID which is transferred from the submitting system to the eMedical history module, and the eMedical history module assigns a unique internal ID to every case in the country.

Currently, care institutions are required to transfer many documents to EESZT[57], for example related to prenatal care and child care.

[57] *EMMI Decree 39/2016. (XII. 21.)on the detailed provisions on the National eHealth Infrastructure.*

F. Event Catalogue[58]

> "The Event Catalogue module of EESZT contains all instances when an individual has received services as an inpatient or an outpatient, in an emergency room, in a laboratory, a radiology clinic, or visited a general practitioner. The institutions and doctors upload the data into the system, so patients and doctors are able to check, even years later, what treatments the patient received, and who provided the services. It may help the diagnostic process later and communication between therapists." [59]

The medical history of patients is only available to the patient and the specialists who provided services to them. With the Self-determination function, patients can decide which service provider can have access to their data.

The scope of events to be recorded in EESzT is defined by law.[60] These events include patient admission and release, laboratory diagnostics, dental care, prenatal care, infant care, balneology sessions, physiotherapy sessions, etc.

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58 Based on https://e-egeszsegugy.gov.hu/esemenykatalogus.

For further aspects of patient's right to self-determination see: Judit ZÁKÁNY: Patient's right to self-determination and its interpretation in case law, Debreceni Jogi Műhely, 2023/1-2.

59 https://e-egeszsegugy.gov.hu/esemenykatalogus

60 *1997. Act LXXXIII of 1997 on compulsory health insurance*.

G. Self-determination[61]

> "All persons have the civil right and responsibility to self-determination with regard to medical information."[62]
>
> "In order to protect personal data, the system allows every citizen to control access to their data entered into the National eHealth Infrastructure (EESZT) in the future. The scope of Digital Patient Consent with regard to medical and related personal data is allowed by provisions defined in Act XLVII. of 1997 about the handling and protection of health care data and related personal data as amended by Act CCXXIV of 2015."

Citizens can exercise their right to self-determination either online or in administrative bureaus in person.

Citizens can set up their account in the Self-determination function. They can request email notification in the case of certain EESzT events, and can track who requested access to their data. Practitioners and therapists can have access to patients' medical data and documents, while pharmacies can only check information regarding prescriptions. Users can restrict access to their data.

The Self-determination module offers a number of functions. Citizens can set and modify their self-determination status any time. They can even determine if the system should send a notification to the practitioner, therapist or pharmacist whose access to data is restricted. They can also set a phone number that should be called in case of emergency.

There are sensitive medical data that are, by default, available only to the concerned therapist. The scope of such data includes, for example, information related to mental illnesses. However, users can change this setting. By applying the status regulated by a simplified provision, they can allow, restrict or prohibit access to their sensitive data. With the status

[61] Based on https://e-egeszsegugy.gov.hu/onrendelkezes.

[62] Szabó Heiling Koltai, Állami Egészségügyi Ellátó Központ: *ibid. p.* 48.

controlled by a complex provision, users can specify complex access provisions for persons making a query, document type and disease category data, and object sources. In this status it is possible to allow or restrict access rights. A status completely prohibiting access is also available. This means that users can prohibit all users on the healthcare side to have access to their data stored in EESZT, except for 3 cases. Users cannot dispose of **ePrescriptions** for which the drugs have **not yet been collected** and the **eReferral** documents still to be used. The third one is emergency care. If, despite the restrictions set, the user wishes to give their therapist permission to view their medical documents because of a particular examination or treatment, they may do so by issuing a **24-hour individual permit** for a given calendar day and in the name of the physician concerned. It can be done in the Self-determination module, or in writing in front of the therapist. Self-determination right also applies to the user's eProfile data and medication history.

In my opinion, users should carefully consider using restriction or prohibition, because if a therapist is not allowed to access the relevant information, it may cause problems later, in the case of using healthcare services.

The National eHealth Infrastructure is a cutting-edge solution and is in line with the principles of patient care. It is a system that stores all medical information of patients, which may result in faster treatment, shorter recovery time, simplified prescribing and post-treatment. Healthcare professionals have to make decisions that may affect the length and quality of treatments, or even the survival of a patient. This system can be a huge help in this regard,

as the easy-to-access data stored in the system help doctors to choose an efficient and tailor-made treatment.[63]

Summary

Healthcare management as part of governance, and in particular sectoral management, plays a central role in everyday life. It is imperative to ensure that the system keep pace with technological development. Digitalization is in progress in all areas of life. The digitalization of healthcare has revolutionized the system. The COVID19 pandemic has speeded up this development. The new and efficient solutions will be useful in the future.

EESzT has allowed reduction of load on the healthcare system and facilitation of citizens' lives and proved very useful during the pandemic. The system is easy to use and, due to the regulatory background, secure. It allows users to exercise their rights to self-determination within reasonable limits, considering that these rights should not reduce the efficiency of the future treatments of patients.

Continuous development ensures that the system is always up to date in order to ensure the easy use of EESzT for healthcare professionals.

Of course, the Hungarian system is not perfect either, as it has its advantages and disadvantages. The biggest problem with the system is that only those who have a Client Gate system can use the EESzT system. As a consequence, a small but not insignificant part of the population cannot benefit from the system. Take, for example, the older age group who are sheltered from technical innovations and are unlikely to have a Client Gate

63 EESzT: *Fejlesztések a két éve indult EESzT–ben*, IME–Interdiszciplináris Magyar Egészségügy, 2019. november–december/XVIII. évfolyam/9. szám 64.

system and thus no EESzT. So despite the fact that eRecept is available to all, there is still a problem of digital divide. Furthermore, from an empirical point of view, the fact that patients see the results of tests sooner than they would consult a doctor is also considered a bad feature. Since patients are mostly lay people, they may panic, worry and wait until they can consult the doctor in person or by phone in case of an unclear diagnosis. This can cause unnecessary stress to the patient. First of all, I would like to mention the environmental benefits, because thanks to ePrescription, not all prescriptions need to be printed on paper, and many patient documents are in the system in electronic form instead of printed paper. And because the documents are electronic, the patient does not have to carry them around with him or her at all times, but they are easily accessible to the doctor in the digital system. A huge advantage is that it reduces the burden on the healthcare system. For example, if you want to book an appointment for a treatment, in some cases you don't need to phone the hospital but can easily do it online. For general medicines, we don't have to queue unnecessarily at the doctor's but can simply ask him to prescribe them in the cloud over the phone. For many people, this was only possible by asking for time off work, but nowadays patients can buy a prescription during a lunch break.

I believe that EESzT may be a good example for other countries with its novelties, functions and benefits; such a system may revolutionize healthcare and governance anywhere in the world.

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