



**CRAIOVA
COURT OF APPEAL**



**SUCEAVA
COURT OF APPEAL**



**COUNTY COURT
OF RIJEKA**



**THE GERMAN FOUNDATION
FOR INTERNATIONAL
LEGAL COOPERATION**

Daniel-Mihail Șandru

Irina Alexe

Petronel Dobrică

PROTECTION MEASURES IN CIVIL MATTERS – A STUDY OF THE LEGAL AND SOCIOLOGICAL PERSPECTIVES



EDITURA UNIVERSITARĂ



Project funded by the "Justice" Programme of the European Union JUST/2015/JTRA/AG/EJTR/8645

This publication has been produced with the financial support of the Justice Programme of the European Union. The contents of this publication are the sole responsibility of Craiova Court of Appeal and can in no way be taken to reflect the views of the European Commission

**PROTECTION MEASURES IN CIVIL MATTERS –
A STUDY OF THE LEGAL
AND SOCIOLOGICAL PERSPECTIVES**

ABOUT THE AUTHORS



Daniel-Mihail SANDRU is a Professor at “Dimitrie Cantemir” Christian University and at the Bucharest University. He is the founder and coordinator of the Centre for European Law Studies of the Acad. Andrei Radulescu” Legal Research Institute of the Romanian Academy. Ad hoc judge for the European Court of Human Rights and arbitrator for the International Court of Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry. President of the Society for Legal Sciences and of the Romanian Association for Law and European Affairs.

Editor-in-chief of the Romanian Journal of European Law (Wolters Kluwer). He can be contacted by using the following details mihai.sandru@csde.ro; web page: www.mihaisandru.ro



Irina ALEXE is an Associate Researcher for the “Acad. Andrei Radulescu” Legal Research Institute of the Romanian Academy. She graduated the Law School within the “Alexandru Ioan Cuza” Police Academy and she has a PhD in Law awarded by the Bucharest University Law School. She worked for 20 years within the Ministry of Internal Affairs and she is now a reserve officer. She is an expert in drafting and submission of bills of law within governmental and parliamentary-based proceedings in the field of home affairs, the central and local administration activities, respectively the

coordination of Prefect’s Offices. Her areas of interest are administrative law, constitutional law and European law. She can be contacted by using the following details irina_alexe@yahoo.com; web page www.irinaalexe.ro



Petronel DOBRICĂ is an Associate Professor at the Bucharest University, Faculty of Sociology and Social Work, Department of Sociology. His field of specialization is the sociology of deviance, sociology of total institutions and sociology of punishment. He is the coordinator of the Master degree in Social Deviance and Crime. He led national research programmes in the areas of inter-ethnic relations, probation and prisons. He is an expert for national and international institutions in project on probation and prisons

(European Commission, UNICEF, the Romanian Ombudsman, Ministry of Justice). He can be contacted by using the following details petroneldobrica@yahoo.com

Authors’ contribution:

Topics 1 and 2 were drafted by Mrs. Irina Alexe, PhD; topics 3, 4, 5 were drafted by Professor Daniel-Mihail Șandru, PhD, topics 6-10 were drafted by Associate Professor Petronel Dobrică, PhD. Research Coordinator: Professor Daniel-Mihail Șandru, PhD.

DANIEL-MIHAIL ȘANDRU
IRINA ALEXE
PETRONEL DOBRICĂ

PROTECTION MEASURES IN CIVIL MATTERS – A STUDY OF THE LEGAL AND SOCIOLOGICAL PERSPECTIVES



EDITURA UNIVERSITARĂ
București, 2017

Redactor: Gheorghe Iovan
Tehnoredactor: Ameluța Vișan
Coperta: Monica Balaban

Traducerea în limba engleză a fost realizată de către SC AXIS MUNDI CONSULTING SRL

Editură recunoscută de Consiliul Național al Cercetării Științifice (C.N.C.S.) și inclusă de Consiliul Național de Atestare a Titlurilor, Diplomelor și Certificatelor Universitare (C.N.A.T.D.C.U.) în categoria editurilor de prestigiu recunoscut.

Descrierea CIP a Bibliotecii Naționale a României

ȘANDRU, DANIEL-MIHAIL

Protection measures in civil matters : a study of the legal and sociological perspectives / Daniel-Mihail Șandru, Irina Alexe, Petronel

Dobrică. - București : Editura Universitară, 2017

Conține bibliografie

ISBN 978-606-28-0604-0

I. Alexe, Irina

II. Dobrică, Petronel

34

DOI: (Digital Object Identifier): 10.5682/9786062806040

© Toate drepturile asupra acestei lucrări sunt rezervate, nicio parte din această lucrare nu poate fi copiată fără acordul Editurii Universitare

Copyright © 2017

Editura Universitară

Editor: Vasile Muscalu

B-dul. N. Bălcescu nr. 27-33, Sector 1, București

Tel.: 021 – 315.32.47 / 319.67.27

www.editurauniversitara.ro e-mail:

redactia@editurauniversitara.ro

Distribuție: tel.: 021-315.32.47 / 319.67.27 / 0744 EDITOR / 07217 CARTE

comenzi@editurauniversitara.ro

O.P. 15, C.P. 35, București

www.editurauniversitara.ro

CONTENTS

Topic no. 1 - Role and objectives of Regulation (EU) no. 606/2013.	7
Topic no. 2 - European legal framework comprised of:	
Regulation (EU) no. 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, adopted at Strasbourg on 12 June 2013;	
Directive 2004/38/CE of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC;	
Charter of Fundamental Rights of the European Union.	30
Topic no. 3 - Recognition and enforcement of protection orders in the European Union. Judicial practice in the matter in the European Union.	48
Topic no. 4 - Applicability of Regulation (EU) no. 606/2013 in the context of Regulations Brussels Ia and Brussels IIa.....	57
Topic no. 5 - Cooperation between the national judge and the CJEU in the consistent interpretation and application of Regulation (EU) no. 606/2013.	64
Topic no. 6 - Summary references in sociology. Sociology of law: outlooks, methods, research instruments Contemporaneous societies: legal regulations and various social groups.	86
Topic no. 7 - The law as tool for social change: - The use of law: cultural conditioning and application of law; - Official and working definitions: laws and day to day life.	103
Topic no. 8 - A sociological approach to the protection of the civil rights of	

citizens in the European area.	119
Topic no. 9 - Sociological research methods applied to judicial reality.	121
Topic no. 10 - Analysis of Community case law and legislation from a sociological perspective.	123
Selected Bibliography	126

Note. The Guide refers to the laws and case law available by the 8th of May 2017, date when the websites mentioned were last accessed.

TOPIC NO. 1 ROLE AND OBJECTIVES OF REGULATION (EU) NO. 606/2013

General Considerations

Title V of the Treaty on the Functioning of the European Union (TFEU)¹ regulates the area of freedom, security and justice. What is it and how is it defined? For the purpose of our discussion, the answers lie in the text of Article 67² itself, whereby the area of freedom, security and justice is constituted with respect for fundamental rights and the different legal systems and traditions of the Member States, such as to ensure a high level of security in the Member States, as well as the free movement of persons. This objective that may be achieved not only through

¹ The Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union and of the Treaty on the Functioning of the European Union, Protocols, Annexes, Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 and the Tables of equivalences are published in OJ C 326 of 26.10.2012, p. 0001 – 0390 and are available at <http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A12012E%2FTXT>.

² Article 67 (ex-Article 61 TEC and ex-Article 29 TEU): “1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. 2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals 3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgements in criminal matters and, if necessary, through the approximation of criminal laws. 4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.”

measures for coordination and cooperation between police and judicial authorities and other competent authorities, but also through the mutual recognition of judgments in criminal matters or by facilitating access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters. This description of the European area of freedom, security and justice is reveals a strong cross-border nature, hence the need for effective cooperation.

In order to create the mechanisms required in the European Union (EU) for consolidating the free movement and facilitating the access of persons to justice,

but even more so for protecting the persons, the TFEU structures the topics related to the European area of freedom, security and justice under four policy fields, thus: border checks, asylum and immigration³, judicial cooperation in civil matters⁴, judicial cooperation in criminal matters⁵ and police cooperation⁶. It is a known that, before the amendments brought to the EU Treaties by the Lisbon Treaty, the two latter policy fields were part of the former Pillar III of the EU⁷, and the EU institutions had no jurisdiction to regulate these areas, nor could they adopt regulations or directives, these policy areas being regulated by intergovernmental cooperation⁸. With regard to the two former policy fields, the Treaty assigns new responsibilities to the EU institutions, of which the ones of specific interest for our study are the principle of mutual recognition of judicial and extrajudicial decisions in civil matters with cross-border implications and effective access to justice. After the elimination of the Pillars, EU may intervene in the regulation of all the four policy fields mentioned above, according to the scope of jurisdiction defined by the Treaty, including by the adoption of regulations and directives.

Based on the provisions of the TFEU, in order to achieve the goals and ensure compliance with the above-mentioned principles, but even more so in order to maintain and continue in any of the Member States⁹ the effective protection of natural persons travelling or settling in another Member State than that which granted

³ TFEU - Article 77 (ex-Article 62 TCE), Article 78 (ex-Article 63 Points 1 and 2 and ex-Article 64 Paragraph (2) TCE), Article 79 (ex-Article 63 Points 3 and 4 TCE) and Article 80.

⁴ TFEU - Article 81 (ex-Article 65 TCE).

⁵ TFEU - Article 82 (ex-Article 31 TEU), Article 83 (ex-Article 31 TEU), Article 84, Article 85 (ex-Article 31 TEU) and Article 86.

⁶ TFEU - Article 87 (ex-Article 30 TEU), Article 88 (ex-Article 30 TEU) and Article 89 (ex-Article 32 TEU).

⁷ Police and Judicial Cooperation in Criminal Matters (PJCC). A conclusive analysis of these aspects is that of Robert Schutze in his *European Constitutional Law (Dreptul Constituțional al Uniunii Europene)* (translation Mihai Banu, Mihaela Banu), Editura Universitară, Bucharest, 2012, pp.43-44. According to Robert Schutze, "...while the Union is still not formally based on a single Treaty, the Lisbon Treaty has successfully abolished the pillars of the (Maastricht) Union. The former "Second Pillar" on the CFSP has been integrated into the (new) TEU. And in its substance, the CFSP has been strengthened with regard to the Union's defence policy. (The strengthened role of a European defence policy induced the Western European Union to dissolve.) With regard to the third pillar, the Lisbon Treaty transferred PJCC to the former First Pillar. The (Amsterdam) Third Pillar is thus "reunited" with the rest of the original (Maastricht) pillar on Justice and Home Affairs, and both are now under the supranational roof of Title V of Part Three of TFEU".

⁸ "The nature of the Third Pillar was as intergovernmental as that of the Second Pillar. Its decisionmaking processes as well as the normative quality of its law lacked a supranational character." - Robert Schutze *op.cit.*, p.32.

⁹ According to Protocol no. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, and Protocol no. 22 on the position of Denmark, annexed to the TEU and the TFEU, the three States are benefit from derogations and the so-called "opt-in" and "opt-out" clauses granting each of them the right to participate or not to participate in the adoption of measures or in the enforcement of an already adopted measure in this policy field, and allows them at any time not to implement a measure related to the area of freedom, security and justice.

them a protection measure, the competent EU institutions have proposed, debated and adopted legal acts regulating these areas. To illustrate this, we point

out a Directive¹⁰ in criminal matters adopted in 2011 on the grounds of Article 82 TFEU, another Directive¹⁰ adopted in 2012 on support and protection of victims of crime and a Regulation¹¹ in civil matters grounded on Article 81 TFEU, Regulation that, as we shall detail in the following Section, also completes the 2012 Directive. Thus, as shown in the documents published by the House of Commons¹², the Project was postponed on its first reading in the Council, given that Article 81 (1) d) cannot constitute grounds for protection order in civil matters.¹³

The Role played by the Regulation

Why was such a Regulation necessary? The necessity, appropriateness and role of the Regulation result from its preamble. Recalling the EU's objectives to maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured and access to justice is facilitated, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters, as well as of ensuring free circulation of protection measures, the preamble states the need and appropriateness of adopting measures relating to judicial cooperation in civil matters having cross-border implications¹⁴ via the Regulation. Compared to the past, the latter years have been seen as a time

¹⁰ Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, published in OJ L 338, 21.12.2011, p.2; according to Paragraphs (40) – (42)

¹⁰ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, published in OJ L 315, 14.11.2010, p.57.

¹¹ Regulation (EU) no. 606/2013 of the European Parliament and of the Council of 12 June 2013, on mutual recognition of protection measures in civil matters, published in OJ L 181, 29.06.2013; according to Paragraphs (40) and (41) of the Regulation, the United Kingdom and Ireland have notified their intention to participate in the adoption and implementation of the Regulation, whilst Denmark does not take part in its adoption, and is not bound by it or subject to its application.

¹² House of Commons, European Scrutiny Committee - Forty-First Report 41st Report of Session 2010-12, Section "26 MOJ (33131) (31634) European Protection Order", p. 142 and subsequent. The document is available at <https://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/428-xxxvi/42802.htm> and as pdf in Google Books.

¹³ See also Stawomir Buczman, Rafał Kierzyńska – Protection of victims of crime in the view of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime in the European Union and the Directive 2011/99/EU on the European protection order, p. 10-11. The document is available at http://www.ja-sr.sk/files/Kierzyńska_Buczman_Protection%20of%20victims.pdf. The study is part of a project on "Judiciary and protection of victims" developed by the Krajowa Szkoła Sądownictwa i Prokuratury, Országos Bírósági Hivatal and Justiční Akademie in partnership with the Visegrad Judicial Academies. Project information is available at http://www.ja-sr.sk/files/E-BOOK_Judiciary_and_protection_of_victims_EN.pdf.

¹⁴ See also C. Macovei, Dreptul European al contractelor - Modernizarea normelor de drept conflictual (European Contract Law – Modernisation of rules in conflict of law), second, appended edition, Publisher: Ed. Universităţii Al. I. Cuza, Iaşi, 2009, p. 21 and subsequent.

of the Directive Preamble, the United Kingdom has notified its wish to take part in the adoption and application of the Directive, whilst Ireland and Denmark does not take part in the adoption of the Directive, and is not bound by it or subject to its application.

of limited progress, yet Regulation no. 606/2013 is but a (small) extension of the mutual recognition principle.¹⁵

Thus, the Regulation states that *“In a common area of justice without internal borders, provisions to ensure rapid and simple recognition and, where applicable, enforcement in another Member State of protection measures ordered in a Member State are essential to ensure that the protection afforded to a natural person in one Member State is maintained and continued in any other Member State to which that person travels or moves. It is necessary to ensure that the legitimate exercise by citizens of the Union of their right to move and reside freely within the territory of Member States, in accordance with Article 3(2) of the Treaty on European Union (TEU) and Article 21 TFEU, does not result in a loss of that protection”*¹⁶, and *“Mutual trust in the administration of justice in the Union and the aim of ensuring quicker and less costly circulation of protection measures within the Union justify the principle according to which protection measures ordered in one Member State are recognised in all other Member States without any special procedure being required. As a result, a protection measure ordered in one Member State (‘Member State of origin’) should be treated as if it had been ordered in the Member State where its recognition is sought (‘Member State addressed’).”*¹⁷

In this context, in order to achieve the above-mentioned objective – to ensure free, faster and less costly circulation of protection measures, but also the recognition and enforcement of such measures in the Member States, the Regulation we now analyse was adopted. The Regulation is binding and directly applicable in the Member States, except Denmark¹⁸.

The text of Article 288 TFEU (ex-article 249 TCE) regulates the legal acts adopted by the European Parliament and the Council¹⁹. Analysing the text, we learn that, unlike the directive, which *“shall be binding, as to the result to be achieved, upon each Member State to which it is addressed”*, but leaves to *“the national authorities the choice of form and methods”* for transposing the provisions of the directive into the national law of the Member State in question (therefore, for the

¹⁵ Jörg Monar, *Justice and Home Affairs*, Annual Review, JCMS 2014 Volume 52, p. 152.

¹⁶ Paragraph (3) of preamble.

¹⁷ Paragraph (4) of preamble.

¹⁸ See 8 above.

¹⁹ For the different forms that the secondary EU law may take and its legal instruments, see Robert Schutze, *op. cit.*, p. 307: *“The provision thus acknowledges three binding legal instruments – regulations, directives, and decisions – and two non-binding instruments. Why was there a need for three distinct binding instruments? The answer seems to lie in their specific – direct and indirect – effects in the national legal orders recital xxx in the preamble. While regulations and decisions were considered Union acts that directly established legal norms (Section 2), directives appeared to be designed as indirect forms of legislation (Section 3).”*

directive, a national transposition act is necessary)²⁰, the regulation has “*general application*” and is “*binding in its entirety and directly applicable in all Member States*”.

Thus, we appreciate that the role of the Regulation is to ensure (based on the mutual recognition principle) a consistent, binding and directly applicable legal framework, whereby a protection measure in civil matters ordered by a competent authority from a Member State is recognised and enforced in any of the other Member States, except Denmark, without any special procedures being necessary, even where EU citizens exercise their rights to move and reside freely in EU Member States, without the exercise of such rights resulting in the loss of the protection afforded in the Member State of origin.

It is a known fact that a significant number of EU citizens exercise their right to move and reside freely, travel or settle in another Member State than their Member State of origin. Therefore, it is essential that a protection measure issued in the Member State of origin is recognised by the Member State addressed as if it had been ordered by itself. Moreover, it is essential for the beneficiary of a protection measure who travels to or settles in another Member State than the one that granted the protection to continue to be protected. These goals can only be achieved through the Regulation we analyse herein.

Objectives of the Regulation

Analysing the preamble, we identify the specific objectives envisaged by the adoption of the Regulation. They are subsumed to the role of the Regulation, contribute to the realization of this role and include: applicability in civil matters only; equality and non-discrimination; protection of victims in the context of free movement of persons; respect for the legal traditions and national systems of the Member States; mutual recognition of protection measures; recognising only the obligation imposed by the protection measure; the possibility to adjust the protection measure; facilitating free, uniform, faster and less costly circulation of protection measures within the EU; ensuring respect for the rights of defence and a fair trial for the person causing the risk; due regard to the interest of the protected person in not having his or her whereabouts or other contact details disclosed; possibility to refuse the recognition or enforcement a protection measure or limit such a measure; effective access to justice for the protected person; and facilitating the implementation of the Regulation.

Hereinafter, in the following paragraphs, we will detail all these objectives, yet for the time being our analysis will be limited to the preamble, and not include

²⁰ For a discussion on the meaning of Member States’ decision making autonomy in instating measures (*lato sensu*) to transpose the Directive, see Irina Alexe, Constantin Mihai Banu, *Transpunerea directivei prin ordonanță de urgență. Exemple recente din dreptul român and aspecte comparate (Transposition of directives by expeditious ordinance. Recent examples from the Romanian law and compared aspects)*, pp.132 – 136, in the volume Directives – legal acts of the

the text of the Regulation. The contents of the Regulation will be analysed in the next Topic.

European Union – and the Romanian law, coordinators: Daniel-Mihail Șandru, Constantin Mihai Banu, Dragoș Călin, Publisher: Editura Universitară, Bucharest, 2016. About directives as legal acts of EU and their transposition into national law by the Member States, see in the same volume, Constantin Mihai Banu, *Introducere. Directiva – act de dreptul Uniunii Europene (Introduction. The Directive – legal act of the European Union)*, pp.15 – 32.

• ***Applicability in civil matters only***

According to paragraphs (9) and (10) of the Preamble, the Regulation only applies to protection measures in civil matters, any protection measures ordered in criminal matters being excluded. “(9)...*Protection measures adopted in criminal matters are covered by Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order*²¹. (10) *The notion of civil matters should be interpreted autonomously, in accordance with the principles of Union law. The civil, administrative or criminal nature of the authority ordering a protection measure should not be determinative for the purpose of assessing the civil character of a protection measure.*”

With regard to the EU law principles, Professor Norbert Reich stated that: “*General Principles*” of EU law have long been recognised as part of unwritten law. They have been developed constant flow of case law of the now called Court of Justice of the EU (CJEU or simply CEJ) which takes its mandate from Article 19 (1) TEU, whereby “*It shall ensure that in the interpretation and application of the Treaties the law is observed*”. The law – *das Recht – le droit* – this formula was to be found already in then original EEC Treaty, and was taken by what later became the EC Treaty after Amsterdam (Article 220 EC) and has not changed its wording in the latest Lisbon version. However, its “*upgrading*” from what is now called the Treaty on the Functioning of the European Union (“TFEU”), formerly the EC Treaty, to the Treaty on the European Union (“TEU”) containing then basic principles and institutions of the Union itself, shows its high standing and importance in the political and legal order.”²²

According to the same author, “*EU civil law, to the regret of many observers who do not seem to understand the competence limits of the EU under the principle of conferral (Article 5 (1) and (2) TEU), consists of a number of not always systematic and in many cases incoherent provisions of mandatory and exceptionally default nature. The development of “general principles” must therefore take this somewhat haphazard nature of EU civil law as functionoriented regulatory law into account. It does not however mean that there are no general characteristics which*

²¹ OJ L 338, 21.12.2011, p. 2.

²² Norbert Reich, *General Principles of EU Civil Law (Principii generale ale dreptului civil al Uniunii Europene)*, (translation Constantin Mihai Banu), Publisher: Editura Universitară, Bucharest, 2013, p.3.

*could not be used to interpret these provisions and to fill gaps in the sense mentioned above. Caution however is necessary: the principles must not be used to extend the scope of application of the “generalised provisions”. The Charter makes it clear that the rights to be respected and principles to be observed therein may not be used to establish new powers or to modify the EU’s existing ones [Article 51 (2)]. This of course does not exempt both EU and implementing Member States law from conforming to these principles and being subject to judicial control, as mentioned above.”*²³

Furthermore, looking at paragraph (11) of the preamble, we should point out a matter that will be further analysed in another Topic, namely the relation between Regulation 606/2013/EU and the Brussels Ia²⁴ and Brussels IIa²⁵ Regulations. The above-mentioned text indicates that the Regulation should not be detrimental to Brussels II a Regulation, explicitly stating that *“judgements issued on the grounds of Regulation Brussels IIa should continue to be recognised and enforced on the grounds of that Regulation.”*

- ***Equality and non-discrimination***

One of the objectives is for the Regulation to *“apply to protection measures ordered with a view to protecting a person where there exist serious grounds for considering that that person’s life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk, for example so as to prevent any form of gender-based violence or violence in close relationships such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion. It is important to underline that this Regulation applies to all victims, regardless of whether they are victims of gender-based violence.”*²⁷

Thus, we see that the objective of ensuring equality and non-discrimination is achieved by applying the protection measures to all persons who are considered victims based on serious grounds to believe that that person’s life, integrity (physical, psychological or sexual), personal liberty or security are at risk. Moreover, we note that the protection measures are to be taken in order to prevent any form of violence (gender based or in close relationships) or various forms of indirect coercion, and the Regulation applies to all victims, be them victims of gender-based violence or not. Further on, highlighting the same equality and nondiscrimination objective in context, we will note the information and support granted to victims. Thus, as we will detail in the following paragraph, a person who is granted protection on the grounds of the Regulation may be also defined as a victim of criminality.

²³ Norbert Reich, *op.cit.*, p.21.

²⁴ Regulation (EU) no. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, OJ L 351, 20.12.2012, p. 1.

²⁵ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, OJ L 338, 23.12.2003, p.1. ²⁷ Paragraph (6) of the Regulation.

- *Protection of victims in the context of free movement of persons*

Complementary to paragraph (3) of the preamble, in the context of the ever growing mobility of EU citizens who exercise their rights to free movement and settlement on the territory of the Member States (guaranteed, as pointed out above, by the EU founding treaties and the EU), it was necessary to ensure that the protection measures granted to a natural person by a Member State are not forfeited, but on the contrary, are recognised, maintained and continued in any Member States where such a person decides to travel or settle.

We underlined above that the Regulation only applies in civil matters, and not in criminal matters, yet paragraphs (7) and (8) of the Regulation preamble state that “*Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime*”²⁶ ensures that victims of crime receive appropriate information and support”²⁷, the Regulation thus appending Directive 2012/29/EU, and “*The fact that a person is the object of a protection measure ordered in civil matters does not necessarily preclude that person from being defined as a ‘victim’ under that Directive*”²⁸.

According to the Directive, the victim was defined in Article 2 as “(i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; (ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death.”

As its title indicates, Directive 2012/29/EU²⁹ instated minimum standards on the rights, support and protection of victims of crime in the EU, with the main goal of ensuring that victims of crime receive adequate information, support and protection and are afforded the possibility to participate in criminal proceedings in a EU Member State, such rights being applied in a non-discriminatory manner. Furthermore, Article 1 (1) of the Directive states that the “*Member States shall ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or*

²⁶ OJ L 315, 14.11.2012, p.57.

²⁷ Paragraph (7) of the Regulation.

²⁸ Paragraph (8) of the Regulation

²⁹ The Directive came into force on the 15th of November 2012, and the EU Member States were required to transpose it into their respective national laws by the 16th of November 2015. According to the national transposition measures communicated by the Member States (available at <http://eurlex.europa.eu/legal-content/EN/NIM/?uri=celex:32012L0029>), Romania communicated 29 measures transposing the provisions of the Directive into the national law. In our opinion, this number is reasonable, given that, on the one hand, some of the regulations communicated were already in force when and remained in force after the Directive became effective, since they did not breach, but rather contribute to the achievement of the Directive's objectives, and, on the other hand, the very large number of national transposition measures communicated by other Member States, such as the United Kingdom (86), Lithuania (60) or Hungary (55).

restorative justice services or a competent authority, operating within the context of criminal proceedings. The rights set out in this Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status.”

• ***Respect for the legal traditions and national systems of the Member States***

By analysing paragraphs 12 and 13 of the preamble, we understand the Regulation’s applicability in relation with the national systems of the Member States and the types of authorities to which the Regulation is addressed, as well as the national procedural autonomy, including any specific limitations applicable³⁰. From the start of our discussion we pointed out that the European area of freedom, security and justice is based and constituted including with respect for fundamental rights and the different legal systems and traditions of the Member States.³¹

Paragraph (12) provides that the Regulation “*takes account of the different legal traditions of the Member States and does not interfere with the national systems for ordering protection measures. This Regulation does not oblige the Member States to modify their national systems so as to enable protection measures to be ordered in civil matters, or to introduce protection measures in civil matters for the application of this Regulation.*”

Thus, we note the delineation between the Regulation – which covers the mutual recognition of protection measures in civil matters – and the right of the national systems of the Member States to order protection measures in compliance with their own legal traditions. We observe that the Member States are under no requirement to amend their national systems for issuing protection measures in civil matters or for applying the Regulation, but it is sufficient to comply with the Regulation in terms of recognising protection measures in civil matters issued by the authorities of other EU Member States.

Thus, paragraph (13) of the Regulation preamble reads: “*In order to take account of the various types of authorities which order protection measures in civil matters in the Member States, and unlike in other areas of judicial cooperation, this Regulation should apply to decisions of both judicial authorities and administrative authorities provided that the latter offer guarantees with regard, in particular, to their impartiality and to the right of the parties to judicial review. In no event should police authorities be considered as issuing authorities within the meaning of this Regulation*”.

In our opinion, the most important statement is that police authorities cannot be considered issuing authorities that may order protection measures in civil matters in the Member States.

³⁰ For a detailed analysis of the national procedural autonomy of Member States in relation to EU law, but also of the limits of such authority, see Robert Shutze, *op. cit.*, p. 376 – 405, and for a detailed analysis of the effectiveness principle, see Norbert Reich, *op. cit.*, p. 145 - 213.

³¹ See also Codrin Macovei, *Unificarea dreptului contractelor - O perspectivă europeană* (Unifying Contract Law – A European Perspective), Publisher: Ed. Junimea, Iași, 2005, p. 7 et seq.

Another clarification concerns the types of authorities that order protection measures in civil matters. Unlike in other areas of judicial cooperation, in the matter of mutual recognition of protection measures, the authorities may be both judicial and administrative.

Whilst in the case of the judicial authorities no further determination is necessary as to the guarantees they should provide (since the guarantees are presumed to derive precisely from the judicial character of the authority), in the case of administrative authorities, the text sets the requirement of them providing guarantees, in particular in terms of their impartiality and the right of the parties to judicial review.

The national procedural autonomy and its limitations may be inferred from the context, defined by the four principles described in the European law doctrine: national law must be interpreted in conformity with European Union law “*to the extent possible, national (courts and administrative bodies) are required to interpret the national law in the light of European law*”), principle of equivalence (according to which “*national procedural rules could not make the enforcement of European rights less favourable than the enforcement of similar national rights*”), an interdiction of procedural discrimination that “*requests national courts to extend existing national remedies to similar European actions*”), principle of effectiveness (means that “*national procedural rules – even if not discriminatory – ought not to make the enforcement of European rights ‘impossible in practice’*” and “*demand that these national remedies must not make the enforcement of European law ‘excessively difficult’*”) and the principle of responsibility³². In a subsequent section, we shall review in detail the principle of effectiveness, including the applicability of the Regulation in relation with the Charter of Fundamental Rights of the European Union.

In the only preliminary decision issued to date on the interpretation of Directive 2012/29 (and rejected for manifest lack of jurisdiction), the Court of Justice underlined the role of legal tradition of Member State in criminal matters³³, in paragraphs 36 -40, thus:

“36. The legal basis for this Directive is Article 82 (2) TFEU, which provides that, to the extent necessary to facilitate the mutual recognition of judgements and judicial decisions, as well as police and judicial cooperation in criminal matters having cross-border dimensions, the European Parliament and the Council, acting by means of directives, in accordance with the ordinary legislative procedure, may lay down minimum rules. These minimum rules take into account the differences between the traditions and legal systems of the Member States and relate in particular to the rights of victims of crime.

³² Robert Schutze, *op. cit.*, p. 379 and 404. Analysing these aspects, the author underlines that “Traditionally, all three limitations on the principle of national procedural autonomy did not require national authorities to create new remedies. This absolute limitation was challenged by a fourth principle – the liability principle.” – p.404.

³³ Case C-484/16, Semeraro, Order of 16 December 2016, ECLI:EU:C:2016:952, paras 36-40.

37. *Unlike Article 83 (1) and (2) TFEU, which constitute legal grounds for the adoption of Directives laying down minimum rules on the definition of criminal offences and penalties, it is clear that Article 82 (2) TFEU does not confer jurisdiction on the European Union law makers either to define elements of criminal offences or to oblige Member States to classify certain acts as 'criminal offences'.*

38. *Article 83 TFEU provides, in paragraph 1, that the European Parliament and the Council, acting by means of directives in accordance with the ordinary legislative procedure, may lay down minimum rules on the definition of criminal offences and Sanctions in areas of particularly serious crime with a crossborder dimension resulting from the nature or impact of those offences or from a particular need to combat them on a common basis. Terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime are concerned, but in the light of developments in crime, the Council may adopt, unanimously and after approval by the European Parliament, a decision identifying other areas of crime which meet the criteria Referred to in this paragraph.*

39. *On the other hand, Article 83 (2) TFEU provides that where the approximation of the laws and regulations of the Member States in criminal matters is essential to ensure the effective implementation of a Union policy in a field which has been the subject of harmonization measures, minimum rules on the definition of criminal offences and penalties in the field concerned may be laid down through directives. Such directives shall be adopted in an ordinary or special law-making procedure identical to that used for the adoption of the harmonization measures in question, without prejudice to Article 76 TFEU.*

40. *It follows that Article 83 (1) and (2) TFEU do not confer on the Union the power to adopt rules on the definition of criminal offences, such as the offence of abuse that is at issue in the main case.”*

• Mutual recognition of protection measures

With regard to the objective of mutual recognition of protection measures, we should point out that the elements that contribute to its achievement (namely the principle of mutual recognition, the diversity of the protection measures provided by the laws of the Member States, duration of protection measures correlated with the duration of the effects of the recognition of the protection measures, effects and limits of recognition) are described in paragraphs (14), (15), (16) and (17) of the Regulation preamble.

Thus, according to paragraph (14), *“Based on the principle of mutual recognition, protection measures ordered in civil matters in the Member State of origin should be recognised in the Member State addressed as protection measures in civil matters in accordance with this Regulation”*, and according to the same principle, *“the recognition corresponds to the duration of the protection measure.*

However, taking into account the diversity of protection measures under the laws of the Member States, in particular in terms of their duration, and the fact that this Regulation will typically apply in urgent situations, the effects of recognition under this Regulation should, by way of exception, be limited to a period of 12 months from the issuing of the certificate provided for by this Regulation, irrespective of whether the protection measure itself (be it provisional, time-limited or indefinite in nature) has a longer duration” – paragraph (15).

Reviewing the two paragraphs mentioned above, we note that the recognition of protection measures issued in civil matters by the Member State of origin are recognised as such in the Member State addressed, based on the Regulation and the principle of mutual recognition, for the duration of the measure, by the effects of the recognition of the protection measure cannot extend beyond 12 months from the issuance of the certificate required by the Regulation, even when the measure was ordered for a longer or unlimited period of time.

In introducing this time limitation in the recognition of the effects of a protection measure on the territory of the addressed State, the diversity of the protection measures provided for in the laws of the Member States was considered, but also the emergency character of such protection measures, given that, as we showed previously and will detail later on, such measures – even when ordered in civil matters – envisage the protection of an individual against a potential aggressor who could pose a risk to such an individual’s physical or psychological integrity.

What happens though when the duration of the protection measure exceeds 12 months or is not limited in time and the protected person exercises his/her right to free circulation and settlement on the territory of another EU Member State? Does such a time limitation of the effects of the recognition of the protection measure leads or not to the protected person losing the protection he/she has been granted by the authorities from the Member State of origin?

The answers to these questions are found in paragraph (16), which states that *“In cases where the duration of a protection measure is greater than 12 months, the limitation of the effects of recognition under this Regulation should be without prejudice to the right of the protected person to invoke that protection measure under any other available legal act of the Union providing for recognition or to apply for a national protection measure in the Member State addressed.”* We see here that the limitation of the effects of recognition in its essence does not cancel the right of the protected person, but the protection measure can no longer be recognised on the grounds of Regulation 606/2013 after the elapse of the 12 months, yet the protected person is entitled to invoke the protection measure in question under any other available legal act of the EU that provides for recognition or has the possibility to request the State addressed to issue a national protection measure. It is obvious that, in order for protection to be granted, such a new request (addressed to the national authorities of the State if the risk persists and the protection continues to be necessary) must be compliant with the national law of the EU Member State in question.

Furthermore, paragraph (17) of the preamble explicitly states the exceptional character of the limitation of the effects of recognition, thus: *“The limitation of the effects of recognition is exceptional due to the special nature of the subject matter of this Regulation and should not serve as a precedent for other instruments in civil and commercial matters”*.

• ***Recognising only the obligation imposed by the protection measure***

Another Regulation objective – closely related to and aimed at detailing and circumscribing the objective of mutual recognition of protection measures – is that related to the recognition of the obligation imposed by the protection measure only. For that matter, paragraph (18) of the preamble states from the very beginning this objective that is further detailed in paragraphs (18) and (19).

According to paragraph (18), *“This Regulation should deal only with the recognition of the obligation imposed by the protection measure. It should not regulate the procedures for implementation or enforcement of the protection measure, nor should it cover any potential sanctions that might be imposed if the obligation ordered by the protection measure is infringed in the Member State addressed. Those matters are left to the law of that Member State. However, in accordance with the general principles of Union law and particularly the principle of mutual recognition, Member States are to ensure that protection measures recognised under this Regulation can take effect in the Member State addressed.”*

In other words, as we showed before when we reviewed the role of the Regulation, it does neither impose procedures for the enforcement or execution of a protection measure nor sanctions for potential breaches of the obligation ordered by the protection measure – these being aspects regulated by the national laws of the Member States –, but has merely the role of ensuring that a mandatory EUwide legal instrument exists, directly applicable in all Member States (except Denmark), for the recognition by the Member State addressed of the obligation imposed by the protection measure. In the context of instating the obligation for Member States to guarantee that the protection measures recognised on the grounds of the Regulation produce effects on the territory of the State addressed, the general principles of EU law are reasserted, the principle of mutual recognition – that we analysed above – being specifically mentioned.

In addition, paragraph (19) provides that *“Protection measures covered by this Regulation should afford protection to the protected person at his or her place of residence or place of work, or at another place which that person visits on a regular basis, such as the residence of close relatives or the school or educational establishment attended by his or her child. Irrespective of whether the place in question or the extent of the area covered by the protection measure is described in the protection measure by one or more specific addresses or by reference to a circumscribed area which the person causing the risk may not approach or enter, respectively (or a combination of the two), the recognition of the obligation imposed*

by the protection measure relates to the purpose which the place serves for the protected person rather than to the specific address.”

This latter paragraph, details the objective of only recognising the obligation imposed through the protection measure that relates rather to the purpose which the place serves for the protected person, rather than to the specific address. Thus, it is specifically stipulated that, for the recognition of the obligation imposed through the protection measure on the person posing a risk, it is not mandatory for the place or the extent of the area covered by the measure to be described in the protection measure by specific addresses or by reference to a particular area, but the protection measure should ensure the protection of the protected person in/at the his/her place of residence or place of work or another place which the person visits on a regular basis.

• ***The possibility to adjust the protection measure***

The possibility that the authorities of the addressed state have to adjust the protection measure is in close connection to the aspects mentioned above – the objectives of mutual recognition of the protection measures and the recognition only of the obligation imposed by the protection measure. The possibility to adjust the protection measure is described in paragraphs (20) and (21) of then preamble, thus:

“(20) In the light of the foregoing and provided that the nature and the essential elements of the protection measure are maintained, the competent authority of the Member State addressed should be allowed to adjust the factual elements of the protection measure where such adjustment is necessary in order for the recognition of the protection measure to be effective in practical terms in the Member State addressed. Factual elements include the address, the general location or the minimum distance the person causing the risk must keep from the protected person, the address or the general location. However, the type and the civil nature of the protection measure may not be affected by such adjustment.

(21) In order to facilitate any adjustment of a protection measure, the certificate should indicate whether the address specified in the protection measure constitutes the place of residence, the place of work or a place that the protected person visits on a regular basis. Furthermore, if relevant, the circumscribed area (approximate radius from the specific address) to which the obligation imposed by the protection measure on the person causing the risk applies should also be indicated in the certificate.”

When reviewing the texts, we infer a number of features that define the protection measure, thus:

- The adjustment cannot affect the type or the civil nature of the protection measure;
- Adjusting the protection measure is an option, not an obligation that the addressed state may exercise in the procedure of recognising the protection measure ordered by the state of origin;

- The need for adjustment is subsumed to the objective of ensuring that the protection measure is effective in the Member State addressed;
- The nature and elements of the protection measure must be maintained; ○ The adjustment only covers factual elements of the protection measure (address, the general location or the minimum distance the person causing the risk must keep from the protected person, the address or the general location);
- The Member State addressed should include the elements pertaining to the adjustment of the protection measure in the certificate³⁴.

For the purpose of facilitating the adjustment of the protection measure, the provisions on the certificate state that it should include two items concerning the place. The first is that it should indicate whether the address specified in the protection measure is the place of residence, place of work or a place that the protected person visits on a regular basis. The second – only mentioned in the certificate if and when necessary – is that the circumscribed area (approximate radius from the specific address) to which the obligation imposed by the protection measure on the person causing the risk applies should also be indicated in the certificate.

We consider that paragraphs (28) and (29) of the preamble are also relevant for and subsumed to this objective, specifically stating:

“(28) The issuing of the certificate should not be subject to appeal.

(29) The certificate should be rectified where, due to an obvious error or inaccuracy, such as a typing error or an error of transcription or copying, the certificate does not correctly reflect the protection measure, or should be withdrawn if it was clearly wrongly granted, for example where it was used for a measure that falls outside the scope of this Regulation or where it was issued in breach of the requirements for its issuing.”

In our opinion, the lack of a means for appealing against the issuing of the certificate is entirely justified by the character of the issuing authority (judicial or administrative, as applicable, with the above-mentioned guarantees), but also because – as we mentioned above – the certificate does not generate new rights for the protected person nor does it create new obligations for the persons posing the risk. A further justification lays in the urgent need of recognising such a protection measure correlated with the objective of free, faster and less costly circulation of protection measures within the EU, objective that we will review later on.

Also, we note that the certificate may be rectified or withdrawn.

- ⌚ Rectification is possible in two situations that cover formal rather than substantive errors, namely when:
 - the certificate contains obvious errors or inaccuracies (typing, transcription or copying errors);
 - the certificate does not correctly reflect the protection measure.

³⁴ The description and contents of the certificate will be analysed both in the following paragraphs and in the second Topic where the contents of Regulation 606/2013/EU will also be discussed.

- ⌚ Withdrawal is possible in two situations that question the substance and legality of the measure, namely when:
 - it was clearly wrongly granted (it was used for a measure that falls outside the scope of the Regulation);
 - it was issued in breach of the requirements for its issuing.

What happens in case the protection measure is suspended or withdrawn or the certificate is withdrawn in the Member State of origin? The answer is to be found in paragraph (33) of the preamble that reads: *“In the event of suspension or withdrawal of the protection measure or withdrawal of the certificate in the Member State of origin, the competent authority of the Member State addressed should, upon submission of the relevant certificate, suspend or withdraw the effects of recognition and, where applicable, the enforcement of the protection measure.”* Thus, we observe that, after the suspension or withdrawal in the Member State of origin, the competent authority of the Member State addressed should be notified on the measure taken, such as to suspend or withdraw the effects of recognition or the enforcement of the protection measure.

• *Facilitating free, uniform, faster and less costly circulation of protection measures within the EU*

The objective of facilitating free, uniform, faster and less costly circulation of protection measures also concerns the certificate and is described in paragraphs (22), (23) and (24) of the preamble, according to which:

“(22) In order to facilitate the free movement of protection measures within the Union, this Regulation should introduce a uniform model of certificate and provide for the establishment of a multilingual standard form for that purpose. The issuing authority should issue the certificate upon request by the protected person.

(23) Free text fields in the multilingual standard form for the certificate should be as limited as possible, so that translation or transliteration may be provided in most cases without imposing any costs on the protected person by making use of the standard form in the relevant language. Any costs for necessary translation that goes beyond the text of the multilingual standard form are to be allocated as provided under the law of the Member State of origin.

(24) Where a certificate contains free text, the competent authority of the Member State addressed should determine whether any translation or transliteration is required. This should not preclude the protected person or the issuing authority of the Member State of origin from providing a translation or transliteration on their own initiative.”

Analysing the texts and correlating them with paragraph (28) of the preamble (which, as we showed above, states that the issuing of the certificate should not be subject to appeal), we deem that the objective of the Regulation to facilitate free, uniform, faster and less costly circulation of protection measures is defined by the following features: ○ uniform model of certificate; ○ multilingual standard form;

- certificate issued by the issuing authority upon request by the protected person;
- free text fields in the multilingual standard form, facilitating translation or transliteration;
- no costs imposed on the protected person for using the multilingual standard form;
- multilingual standard form to be used in the relevant language; ○ the costs for translation (other than the text of the multilingual standard form) are to be allocated according to the law of the Member State of origin;
- the competent authority of the Member State addressed should determine whether any translation or transliteration of a certificate that contains free text is required;
- the protected person or the issuing authority of the Member State of origin may provide a translation or transliteration on their own initiative to the competent authority of the Member State addressed;
- the issuing of the certificate should not be subject to any means of appeal.

In order to support the protected person, paragraph (30) of the Regulation preamble instates the obligation of the issuing authority from the Member State of origin to “*assist the protected person*”, to obtain “*information on the authorities of the Member State addressed before which the protection measure is to be invoked or enforcement is to be sought*”.

We should point out that, with a view to achieving the objective of free, uniform, faster and less costly circulation of protection measures based on the Regulation (as we will discuss later on), the European Commission has adopted a regulation for the implementation³⁵ of the provisions of Regulation (EU) no.606/2013 with respect to the certificate and the multilingual standard form.

Furthermore, we appreciate that paragraph (36) of the preamble is also relevant for our analysis and for the adoption of the Regulation for the implementation of Regulation (EU) no.606/2013. The said paragraph (36) reads: “*In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission with regard to the establishment and subsequent amendment of the forms provided for in this Regulation. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers*”³⁶.

³⁵ Commission Implementing Regulation (EU) No 939/2014 of 2 September 2014 establishing the certificates referred to in Articles 5 and 14 of Regulation (EU) No 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, OJ L 263, 03.09.2014, p. 10.

³⁶ OJ L 55, 28.2.2011, p. 13.

Regulation (EU) no.182/2011 – mainly grounded on the provisions of Article 291 (3) of TFEU³⁷ - establishes the general the rules and general principles governing the mechanisms which apply where a legally binding Union act identifies the need for uniform conditions of implementation and requires that the adoption of implementing acts by the Commission be subject to the control of Member States³⁸.

We should also note that paragraph (37) of the preamble to Regulation (EU) no. 606/2013 indicates the procedure that should be used “*or the adoption of implementing acts establishing and subsequently amending the forms provided for in this Regulation*”, namely the examination procedure³⁹.

- **Ensuring respect for the rights of defence and a fair trial for the person causing the risk**

It is not our intention to analyse in this section the relationship between the Charter of Fundamental Rights of the European Union⁴⁰ (CFREU) and the Regulation, since it will be discussed in the following section. However, we highlight that Articles 47 and 48 of the CFREU guarantee the right to a fair trial and the right to defence and, as the Founding Treaties themselves stipulate⁴¹, after the coming into force of the Treaty of Lisbon, CFREU has the same legal force as the Treaties. Furthermore, we point out that, from analysing paragraph (25) in correlation with

³⁷ Article 291 TFEU: “(1) Member States shall adopt all measures of national law necessary to implement legally binding Union acts. (2) Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council. (3) For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.”

³⁸ For details on the implementation of this Regulation, see the Report from the Commission to the European Parliament and to the Council on the implementation of Regulation (EU) no. 182/2011 – COM(2016)92 final, available here <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0092&from=EN>.

³⁹ The examination procedure applied by the European Commission for adopting implementation acts is mainly used for measures with a general scope or with potentially significant impact and requires the setting up of a committee comprised of representatives of all Member States, committee that provides a formal, voted opinion on the measures proposed by the Commission. For an in depth analysis of comitology and the constitutional guarantees for implementation regulations, see Robert Schutze, *op. cit.*, p. 239 – 242.

⁴⁰ EU Charter of Fundamental Rights adopted on 12 December 2007, at Strasbourg, OJ C 326, 26.10.2012, p. 391.

⁴¹ Article 6 Paragraph (1) TEU (ex-Article 6 TEU): “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.”

paragraphs (26) and (38) of the Regulation Preamble, we note that one of the objectives of the Regulation is to guarantee the right to defence and a fair trial for the person causing the risk, in the context of mutual recognition of a protection measure in civil matters.

Thus, “(25) *To ensure respect for the rights of defence of the person causing the risk, where the protection measure was ordered in default of appearance or under a procedure that does not provide for prior notice to that person (‘ex-parte proceeding’), the issue of the certificate should only be possible if that person has had the opportunity to arrange for his or her defence against the protection measure. However, with a view to avoiding circumvention and taking into account the typical urgency of cases necessitating protection measures, it should not be required that the period for raising such defence has expired before a certificate may be issued. The certificate should be issued as soon as the protection measure is enforceable in the Member State of origin.*

(26) *Having regard to the objectives of simplicity and speed, this Regulation provides for simple and quick methods to be used for bringing procedural steps to the notice of the person causing the risk. Those specific methods of notification should apply only for the purposes of this Regulation due to the special nature of its subject matter, should not serve as a precedent for other instruments in civil and commercial matters and should not affect any obligations of a Member State concerning the service abroad of judicial and extrajudicial documents in civil matters arising from a bilateral or multilateral convention concluded between that Member State and a third country.*

...

(38) *This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure the rights of the defence and fair trial, as established in Articles 47 and 48 thereof. This Regulation should be applied according to those rights and principles.”*

We note that, from the very beginning, the preamble differentiates between the principles and rights stipulated in the CFREU and, though the objective of the Regulation is to guarantee the right to defence and a fair trial, the statement that the Regulation should be applied according to the rights and principles⁴² is crucial.

In terms of ensuring the rights of defence of the person causing the risk, the following aspects are defining:

- It is necessary when the protection measure *was ordered in default of appearance* or as part of “*ex parte*” proceedings;
- the issue of the certificate should only be possible if that person has had the opportunity to arrange for his or her defence against the protection measure;

⁴² For a comprehensive discussion on the principles and rights included in CFREU see Robert Schutze, *op.cit.*, p. 420 - 424.

- it should not be required that the period for raising such defence has expired before a certificate may be issued, (with a view to avoiding circumvention and taking into account the typical urgency of cases necessitating protection measures);
- The certificate should be issued as soon as the protection measure is enforceable in the Member State of origin;
- The use of simple and quick methods to be used for bringing procedural steps to the notice of the person causing the risk, methods that:
 - ⌚ should apply only for the purposes of this Regulation due to the special nature of its subject matter
 - ⌚ should not serve as a precedent for other instruments in civil and commercial matters
 - ⌚ should not affect any obligations of a Member State concerning the service abroad of judicial and extrajudicial documents in civil matters arising from a bilateral or multilateral convention concluded between that Member State and a third country.

• **Due regard to the interest of the protected person in not having his or her whereabouts or other contact details disclosed**

In correlation with the above-mentioned objective – aimed at ensuring the right to defence of the person posing the risk and informing him/her on the protection measures or adjusted – paragraph (27) of the preamble also states another objective of the Regulation, namely to pay due regard should be paid to the interest of the protected person in not having his or her whereabouts or other contact details disclosed. The objective is worded thus: *“When the certificate is brought to the notice of the person causing the risk and also when any adjustment is made to any factual elements of a protection measure in the Member State addressed, due regard should be paid to the interest of the protected person in not having his or her whereabouts or other contact details disclosed. Such details should not be disclosed to the person causing the risk unless such disclosure is necessary for compliance with, or the enforcement of, the protection measure.”* Analysing the text we note that:

- due regard should be paid to the interest of the protected person in not having his or her whereabouts or other contact details disclosed should be paid:
 - ⌚ When the certificate is brought to the notice of the person causing the risk;
 - ⌚ When any adjustment is made to any factual elements of a protection measure in the Member State addressed.
- The general rule is that the whereabouts or other contact details of the protected person may not be disclosed to the person causing the risk;
- However, as an exception, the whereabouts or other contact details of the protected person may be disclosed to the person causing the risk only when

and if such disclosure is necessary for compliance with or the enforcement of the protection measure.

- **Possibility to refuse the recognition or enforcement a protection measure or limit such a measure**

This objective of the Regulation ensues from paragraphs (31) and (32) of the preamble, thus:

“(31) The harmonious functioning of justice requires that irreconcilable decisions should not be delivered in two Member States. To that end, this Regulation should provide for a ground for refusal of recognition or enforcement of the protection measure in cases of irreconcilability with a judgment given or recognised in the Member State addressed.

(32) Public interest considerations may, in exceptional circumstances, justify a refusal by the court of the Member State addressed to recognise or enforce a protection measure where its application would be manifestly incompatible with the public policy of that Member State. However, the court should not be able to apply the public-policy exception in order to refuse recognition or enforcement of a protection measure when to do so would be contrary to the rights set out in the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof.”

Accordingly, we note that the refusal to recognise or enforce a protection measure was afforded in two types of situations:

- In ordinary circumstances – the Regulation should provide for a ground for refusal of recognition or enforcement of the protection measure in cases of irreconcilability with a judgment given or recognised in the Member State addressed
 - ↳ in order to concur to the harmonious functioning of justice;
 - ↳ to avoid the situation where irreconcilable judgements are given in two different Member States;
- in exceptional circumstances - refusal by the court of the Member State addressed to recognise or enforce a protection measure may be justified
 - ↳ by public interest considerations;
 - ↳ if its application would be manifestly incompatible with the public policy of that Member State.

We observe that the text on exceptional circumstances also introduces a limitation of the courts’ right to refuse recognition or enforcement of a protection measure: the public-policy exception should not be applicable if the rights provided in the Charter of Fundamental Rights of the Union (in particular Article 21 – Nondiscrimination⁴³) would be breached.

⁴³ Article 21 CFREU: “(1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be

Furthermore, analysing the conditionality on *public interest considerations*, the reference to *public-policy exception* and the interdiction to apply it set forth in this latter paragraph we note only, without going into any details⁴⁴, the relation between the Regulation, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members⁴⁷ and CFREU.

• ***Effective access to justice for the protected person***

Effective access to justice for the aggrieved person is not only an objective of the Regulation, but a right of all EU citizens, enshrined in the primary EU law⁴⁵. We shall not analyse here the contents of this right, but just remind of it in order to recognise – as paragraph (34) of the preamble states – the connection between the Regulation and the EU legal act on access to justice in cross-border litigations:

“(34) A protected person should have effective access to justice in other Member States. To ensure such effective access in procedures covered by this Regulation, legal aid is to be provided in accordance with Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes”⁴⁶.

The Directive was adopted with the goal of improving access to justice in cross-border cases and lays down minimum common rules relating to legal aid in such disputes. The objective of this EU legal act is to guarantee a suitable level of legal aid to persons who do not have sufficient financial resources and are involved in cross-border litigations.

In our opinion, this objective, in correlation with that of simplicity and speed, and the requirements for the Member State of origin to provide the protected person (on request) with information on the authorities of the Member State addressed before which the protection measure is to be invoked or enforcement is to be sought, also lead to the achievement of the role of the Regulation.

• ***Facilitating the implementation of the Regulation***

prohibited. (2) Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.”

⁴⁴ The analysis of the three instruments of the EU law (Regulation EU no. 606/2013, Directive 2004/38/EC and CFREU) and the correlation between them is the subject of the next Topic. ⁴⁷ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p.77.

⁴⁵ On the effectiveness principle and the constitutionalisation of EU civil law, see Norbert Reich, *op.cit.*, p. 198 - 200.

⁴⁶ OJ L 26, 31.1.2003, p.41.

According to paragraph (35) of the preamble, *“In order to facilitate the application of this Regulation, Member States should be required to provide certain information regarding their national rules and procedures concerning protection measures in civil matters within the framework of the European Judicial Network in civil and commercial matters established by Council Decision 2001/470/EC⁴⁷. Access to the information provided by the Member States should be made available through the European e-Justice Portal.”*

One of the objectives for the creation of the European Judicial Network was to improve judicial cooperation in civil and commercial matters between the EU Member States EU (except Denmark, which does not participate in this Network), with the aim of simplifying and facilitating judicial cooperation in cross-border cases, but also for the purpose of ensuring adequate, specialised information via the EU e-justice portal.

We shall stop here with the analysis of the specific objective of the Regulation by concluding that all the objectives are directed to fulfilling the role that the Regulation has in the overall EU legal system and contributes to the achievement of the general goal of creating a simple and expeditious mechanism for the recognition and enforcement in a Member State addressed of a protection measures issued in civil matters in a Member State of origin, in compliance with both the subsidiarity and the proportionality principles.

As a matter of fact, this is also the objective stated in paragraph (39) of the preamble: *“Since the objective of this Regulation, namely to establish rules for a simple and rapid mechanism for the recognition of protection measures ordered in a Member State in civil matters, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.”*

⁴⁷ JO L 174, 27.6.2001, p.25.

TOPIC NO. 2

EUROPEAN LEGAL FRAMEWORK COMPRISED OF:

- ⌚ **Regulation (EU) no. 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, adopted at Strasbourg on 12 June 2013;**
- ⌚ **Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC;**
- ⌚ **Charter of Fundamental Rights of the European Union**

- *General Considerations*

In a brief review, in the first topic we looked the European context that led to the adoption, as well as at its role and objectives of Regulation (EU) no. 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters.

In this second topic we will analyse the contents of the Regulation and the correlations between it, Directive 2004/38/CE of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (hereinafter referred to as Directive no.2004/38/CE) and the Charter of Fundamental Rights of the European Union (hereinafter referred to as CFREU), these being the legal acts that provide the European legal framework based on which the circulation of protection measures in civil matters issued by a EU Member State is organised, recognised and facilitated on the territory of the EU Member States (except Denmark) and allows the persons protected by such measures to enjoy the protection afforded by a EU Member State continuously (uninterrupted), easily and at no supplementary costs, if such protected persons decide to exercise their right to free movement and/or settlement on the territory of another EU Member State.

Therefore, hereinafter we shall analyse aspects concerning Regulation (EU) no.606/2013, following its structure and specifically indicate the connections with Directive no. 2004/38/CE and CFREU as and when necessary.

- **Subject Matter of Regulation**

As provided in Article 1, the Regulation “*establishes rules for a simple and rapid mechanism for the recognition of protection measures ordered in a Member State in civil matters.*”

In the first Topic we commented on the simplicity and speed of the mechanism instated by the Regulation for recognising protection measures in civil matters, by reviewing the specific objectives that we will continue to analyse in this Topic.

According to Points 1 – 3 of Article 3 of the Regulation:

“*For the purposes of this Regulation, the following definitions shall apply:*

1. *‘protection measure’ means any decision, whatever it may be called, ordered by the issuing authority of the Member State of origin in accordance with its national law and imposing one or more of the following obligations on the person causing the risk with a view to protecting another person, when the latter person’s physical or psychological integrity may be at risk:*

(a) *a prohibition or regulation on entering the place where the protected person resides, works, or regularly visits or stays;*

(b) *a prohibition or regulation of contact, in any form, with the protected person, including by telephone, electronic or ordinary mail, fax or any other means;*

(c) *a prohibition or regulation on approaching the protected person closer than a prescribed distance.”*

2. *‘protected person’ means a natural person who is the object of the protection afforded by a protection measure;*

3. *‘person causing the risk’ means a natural person on whom one or more of the obligations referred to in point (1) have been imposed”.*

- **Scope of Regulation**

According to Article 2 of the Regulation, which defines the scope, we distinguish the following characteristics:

🔗 **It applies to protection measures in civil matters ordered by an issuing authority** that, according to Article 3 (4) of the Regulation, “*means any judicial authority, or any other authority designated by a Member State as having competence in the matters falling within the scope of this Regulation, provided that such other authority offers guarantees to the parties with regard to impartiality, and that its decisions in relation to the protection measure may, under the law of the Member State in which it operates, be made subject to review by a judicial authority and have similar force and effects to those of a decision of a judicial authority on the same matter”;*

- ☞ **Applies in cross-border cases** - *a case shall be deemed to be a crossborder case where the recognition of a protection measure ordered in one Member State is sought in another Member State*; according to Article 3 (5) and (6) of the Regulation: “ ‘Member State of origin’ means the Member State in which the protection measure is ordered; 6. ‘Member State addressed’ means the Member State in which the recognition and, where applicable, the enforcement of the protection measure is sought”;
- ☞ **Does not apply to protection measures that fall under the scope of Regulation (CE) no. 2201/2003.**

Analysing some of the features of the scope⁴⁸ of the Regulation, we showed in the first Topic that, according to paragraphs (9) and (10) of the preamble, it only applies to protection measures in civil matters, for the purpose of Article 81 of the TFEU, that the concept of “civil matters” should be interpreted autonomously, in compliance with the EU law principles, and the civil, administrative or criminal nature of the authority issuing a protection measure should not be determined in assessing the civil character of a protection measure⁴⁹. Furthermore, in order to underline the civil nature, the Regulation itself stipulates (in paragraph (9) of the preamble) that the protection measures adopted in criminal matters fall within the scope of a different legal act of the EU, namely Directive 2011/99/EU of the

⁴⁸ On the brief description of the substantive scope of the Regulation, see Guillaume Payan, *Le Règlement européen n° 606/2013 du 12 juin 2013, relatif à la reconnaissance mutuelle des mesures de protection en matière civile: entrée en application d'un Règlement passé quasiment inaperçu*, Lexbase Hebdo édition privée n° 603 du 5 mars 2015, N° Lexbase : N6208BUH, p. 1 -2. According to the author, “Ce Règlement constitue le “volet civil” d'un nouvel arsenal législatif européen de protection des “victimes” qui comporte également un “volet pénal”. A ce titre, il complète notamment la Directive 2011/99/EU du Parlement européen et du Conseil du 13 décembre 2011, relative à la décision de protection européenne ainsi que la Directive 2012/29/EU du Parlement européen et du Conseil du 25 octobre 2012, établissant des normes minimales concernant les droits, le soutien et la protection des victimes de la criminalité et remplaçant la décision-cadre 2001 /220/JAI du Conseil. La “matière civile” couverte par le Règlement (EU) n° 606/2013 s'entend néanmoins par exclusion du champ d'application matériel du Règlement (CE) n° 2201/2003, dit “Bruxelles II bis” et, singulièrement, du domaine de la responsabilité parentale. A titre d'exemple, les mesures d'interdiction de recevoir ou de rencontrer un enfant sur lequel la “personne à l'origine du risque” exerce la responsabilité parentale sont régies par le Règlement (CE) n° 2201/2003 et non par le Règlement (EU) n° 606 /2013.”

⁴⁹ For a relatively recent study on the Court of Justice of the European Union and the impact of its civil justice case law in national judicial and administrative authorities, see Dr. iur Inga Kačevska, Dr.iur Baiba Rudevska, Dr.iur Arnis Buka, Mg.iur Mārtiņš Dambergs and LL.M Aleksandrs Fillers, *Project “The Court of Justice of the European Union and its case law in the area of civil justice” JUST/2013/JCIV/AG/4691 (No. TM 2014/13/EK) - The Court of Justice of the European Union and the impact of its case law in the area of civil justice on national judicial and administrative authorities (Latvia, Hungary, Germany, Sweden and the United Kingdom)* Riga, 1 January 2015, available at http://www.kacevska.lv/upload/Petijums_anglu.pdf.

European Parliament and of the Council of 13 December 2011 on the European protection order⁵⁰.

A comparative study⁵¹ shows that, beyond similarities (e.g. identical stipulations in Article 5 of the Directive and Article 3 (1) of the Regulation or the lack of relevance of the authority that issues the measure – civil, criminal or administrative), some significant differences exist:

- Recognition of the measure - Article 9 of the Directive and Article 4 of the Regulation;
- Delineation may be made based on the level of risk posed by the behaviour that led to the instatement of the protection order; paragraph 6 of the Regulation preamble instating the European protection order in civil matters contains numerous references to actions that are incriminated in most jurisdictions whilst paragraph 8 is outright confuse⁵²
- Though the differentiation civil/criminal is not sufficiently defined, the Regulation indicates that the concept of “civil” is autonomous in EU law; however, the civil/criminal sphere is not left to the appreciation of the States, though, in practice, the national courts may apply national laws.

Another study⁵³ provides a critical analysis of the European law makers’ option to renounce to regulate the jurisdiction.

Nevertheless, we reiterate the principles reviewed above (stated in paragraphs (7) and (8) of the Regulation preamble), according to which they append Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and “*the fact that a person is the object of a protection measure ordered in civil matters does not necessarily preclude that person from being defined as a ‘victim’ under that Directive.*”⁵⁴

We note the distinction introduced in the text in the definition of issuing authorities (also stated in paragraph (13) of the preamble⁵⁸) between the judicial authorities and any other authorities designated by a Member State as having jurisdiction in the matters covered by the scope of the Regulation (administrative

⁵⁰ On the implementation of Directive 2011/99/EU in 26 EU Member States, see Neus Oliveras, Raquel Vano (coord.), *The European protection order – Its application to the victims of gender violence*, Layout: Grupo Anaya, Madrid, 2015, prepared as part of the Daphne Programme of the European Commission and available at http://158.109.137.58/epogender2/images/news/Libro/EUROPEAN_PROTECTION_ORDER.pdf.

⁵¹ Michael Bogdan, *Some reflections on the scope of application of the EU Regulation no 606/2013 on mutual recognition of protection measures in civil matters*, Yearbook of Private International Law, vol. 16/2014-2015, p. 406 and subsequent.

⁵² At length, **M. Bogdan**, op. cit., p. 406-407. For a comparison with the Directive in criminal matters, see p. 183.

⁵³ **Anatol Dutta**, *Cross-border protection measures in the European Union*, Journal of Private International Law, vol. 12, no. 1/2016, p. 169.

⁵⁴ For details, see Topic 1, *supra*, p. 6 – 7. ⁵⁸

Idem, p. 8.

authority), including through the requirements set forth for administrative authorities:

- ☞ *offers guarantees to the parties with regard to impartiality;*
- ☞ *its decisions in relation to the protection measure may, under the law of the Member State in which it operates, be made subject to review by a judicial authority;*
- ☞ *its decisions on the protection measure, under the law of the Member State in which it operates, have similar force and effects to those of a decision of a judicial authority on the same matter;*
- ☞ *under no circumstances should police authorities be considered as issuing authorities.*

With regard to applicability in cross-border cases, a relevant connection exists between the Regulation subject matter and scope and the exercising by EU citizens and their family members of the right to free movement and settlement on the territory of EU Member States EU based on the EU Founding Treaties and Directive no. 2004/38/CE. This connection (also provided for in paragraph (3) of the Regulation preamble) guarantees that the EU citizens who exercise of their rights in the common European area of freedom, security and justice, as provided by Directive no. 2004/38/CE, cannot be in the situation of forfeiting the protection afforded to them through a protection measure in civil matters issued in the State of origin. Also, we underline the fact that the Directive establishes: the conditions under which EU citizens and their family members may exercise their light to free movement and settlement on the territory of the EU, the right to permanent settlement on the territory of EU Member States, as well as the limitations of these rights for reasons of public order, safety or health.

With regard to the concept of public order for the purposes of the Directive, we shall note during our analysis of the Topic that it has been also extended to Regulation (EU) no.606/2013 and that the same concept provides the connection of the two legal acts of the EU (Regulation and Directive) with the CFREU, when the possibility to invoke the public order exception and the limitations in the recognition and enforcement of a protection measure⁵⁵ are regulated.

Concerning the cross-border cases, the doctrine⁵⁶ shows that they are not defined in a consistent manner. As we observe, the Regulation explains the

⁵⁵ *Infra*, p.14, note 25.

⁵⁶ About the concept of “cross-border cases” see Guillaume Payan, *op.cit*, footnote 11: “A ce jour, il n'existe pas de définition unique de la notion d'affaires ou de litiges transfrontières. Plusieurs Règlements et Directives adoptés dans le domaine de la coopération judiciaire civile contiennent leur propre définition. Cela est par exemple le cas du Règlement (CE) n° 1896/2006 du Parlement européen et du Conseil du 12 décembre 2006 instituant une procédure européenne d'injonction de payer (JOUE n° L 399, 30 décembre 2006, p. 1 ; spéc. Article 3) ou encore du Règlement (EU) n° 655/2014 du Parlement européen et du Conseil du 15 mai 2014 portant création d'une procédure d'ordonnance européenne de saisie conservatoire des comptes bancaires, destinée à faciliter le recouvrement transfrontière de créances en matière civile et commerciale (JOUE n° L 189, 27 juin 2014, p. 59 ; spéc. Article 3).”, p. 6.

crossborder character in relation to the request for recognition in the Member State addressed of a protection measure in civil matters issued in a Member State of origin.

With reference to the inapplicability of Regulation (EU) no.606/2013 to protection measures issued on the grounds of another regulation – Regulation (CE) no.2201/2003⁵⁷, also known as Brussels IIa Regulation – paragraph (11) of the preamble shows that “*Decisions taken under the Brussels IIa Regulation should continue to be recognised and enforced under that Regulation.*”

• Recognition and Enforcement of Protection Measures

A recent study⁵⁸ (that assessed both the implementation of the provisions on the recognition and enforcement of protection measures and the level of protection afforded by national laws on protection orders in civil and criminal matters) concludes that such provisions are necessary for the protection of persons subject to risk, as well as for upholding the rights and freedoms conferred to EU citizens by the relevant laws.

Article 4 (1) of the Regulation establishes the manner in which a protection measure issued in a Member State is recognised and enforced in the other Member States, thus:

☞ *shall be recognised without any special procedure being required;*

☞ *shall be enforceable without a declaration of enforceability being required.*

According to paragraphs (2) – (5) of Article 4:

“(2) *A protected person who wishes to invoke in the Member State addressed a protection measure ordered in the Member State of origin shall provide the competent authority of the Member State addressed with:*

a) a copy of the protection measure which satisfies the conditions necessary to establish its authenticity;

b) the certificate issued in the Member State of origin pursuant to Article 5; and

c) where necessary, a transliteration and/or a translation of the certificate in accordance with Article 16.

(3) The certificate shall take effect only within the limits of the enforceability of the protection measure.

⁵⁷ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, OJ L 338, 23.12.2003, p.1.

⁵⁸ Suzan van der Aa, Johanna Niemi, Lorena Sosa, Ana Ferreira, Anna Baldry, *Mapping the legislation and assessing the impact of protection orders in the European Member States*, Wolf Legal Publishers, 2015; the study, financed from the Daphne Programme of the EU, is available in its entirety at <http://poems-project.com/wp-content/uploads/2015/04/Intervict-Poems-digi-1.pdf>.

(4) Irrespective of whether the protection measure has a longer duration, the effects of recognition pursuant to paragraph 1 shall be limited to a period of 12 months, starting from the date of the issuing of the certificate.

(5) The procedure for the enforcement of protection measures shall be governed by the law of the Member State addressed.”

The provisions of this Article should be interpreted in compliance with the elements that contribute to the effective recognition and enforcement of such measures, as laid down in paragraphs (14) - (16) and (18) - (19) of the preamble, detailed above⁵⁹. They include:

- Recognition of the protection measure based on the mutual recognition principle
- Recognition only of the obligation imposed by the protection measure, and not regulating the implementation or enforcement procedure that is regulated by the national law of the Member State
- Correlation of the recognition duration and effects with the duration of the protection measure, but without exceeding 12 months from the issuance of the certificate.

We believe it is important to reiterate the fact that, if the risk persists or the protection is necessary for a longer period, beyond the duration provided for by the Regulation, the person subject to risk has the possibility to request a protection measure, but on the grounds of the national laws of the EU Member State or of another EU instrument. In such cases, Regulation (EU) no.606/2013 is no longer applicable.

In the following paragraphs we are going to show that all the procedures for the mutual recognition of protection measures in civil matters instated by the Regulation are, in fact, circumscribed to the certificate.

• The Certificate

According to Article 5,

“(1) The issuing authority of the Member State of origin shall, upon request by the protected person, issue the certificate using the multilingual standard form established in accordance with Article 19 and containing the information provided for in Article 7.

(2) No appeal shall lie against the issuing of the certificate.

(3) Upon request by the protected person, the issuing authority of the Member State of origin shall provide the protected person with a transliteration and/or a translation of the certificate by making use of the multilingual standard form established in accordance with Article 19.”

Article 5 (concerning the certificate) should be correlated and interpreted in the light of the specific objective of the Regulation to facilitate free, faster and less

⁵⁹ For details, see Topic 1, *supra*, p. 11 - 13.

costly circulation of protection measures, described in paragraphs (22), (23) and (24) of the preamble.⁶⁰

With regard to the use of a multilingual standard form, precisely with the aim of facilitating the recognition of protection measures and on the grounds of Article 19, an EU implementing regulation was adopted about the nature and legal grounds of which we have discussed above⁶¹. Thus, the Implementing Regulation⁶² establishes the multilingual standard forms for the certificates mentioned in Articles 5 and 14 of Regulation (EU) no. 606/2013.

• Requirements for the Issuing of the Certificate

Article 6 of the Regulation, named *Requirements for the issuing of the certificate*, provides thus:

“(1) The certificate may only be issued if the protection measure has been brought to the notice of the person causing the risk in accordance with the law of the Member State of origin.

(2) Where the protection measure was ordered in default of appearance, the certificate may only be issued if the person causing the risk had been served with the document which instituted the proceeding or an equivalent document or, where relevant, had been otherwise informed of the initiation of the proceeding in accordance with the law of the Member State of origin in sufficient time and in such a way as to enable that person to arrange for his or her defence.

(3) Where the protection measure was ordered under a procedure that does not provide for prior notice to be given to the person causing the risk (‘ex-parte proceeding’), the certificate may only be issued if that person had the right to challenge the protection measure under the law of the Member State of origin”.

When analysing the text in correlation with paragraphs (25), (26) and (38) of the preamble⁶³ (which we have already discussed above), we observe the close connection between these provisions of the Regulation and CFREU that, in articles 47 and 48, guarantees the right to a fair trial and to defence. One of the specific objectives of the Regulation – ensuring the right to defence and a fair trial of the person posing the risk in the context of the recognition of a protection measure in civil matters – could not be achieved in the absence of the requirements set forth in Article 6, which would mean that the overall purpose of the Regulation could not be realized.

⁶⁰ *Idem*, p. 15 – 17. For a comment, see also **A. Dutta**, *op. cit.*, p. 178-179.

⁶¹ *Idem*, p. 16 – 17.

⁶² Commission Implementing Regulation (EU) no. 939/2014 of 2 September 2014 establishing the certificates referred to in Articles 5 and 14 of Regulation (EU) No 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, OJ L 263, 03.09.2014, p. 10.

⁶³ For details see Topic 1, *supra*, p. 18 - 19.

Accordingly, we observe that the sanction for breaching this fundamental right of the person causing the risk (on the one hand, to be informed in advance about the instatement of the protection measure, such as to be able to arrange for his/her defence or, on the other hand, if the measure was issued as part of an *ex parte procedure*, to be afforded the right to challenge the protection measure) is the ban on issuing the certificate. However, as the Regulation itself indicates, we point out the fact that the procedure for notifying the person causing the risk (namely, the notification of the documents which instituted the proceeding and, as applicable, those on challenging the measure) is in compliance with the law of the Member State of origin and is not covered by the Regulation or EU laws.

• Contents of the Certificate

According to Article 6 of the Regulation,

“The certificate shall contain the following information:

- a) the name and address/contact details of the issuing authority;*
- b) the reference number of the file;*
- c) the date of issue of the certificate;*
- d) details concerning the protected person: name, date and place of birth, where available, and an address to be used for notification purposes, preceded by a conspicuous warning that that address may be disclosed to the person causing the risk;*
- e) details concerning the person causing the risk: name, date and place of birth, where available, and address to be used for notification purposes;*
- f) all information necessary for enforcement of the protection measure, including, where applicable, the type of the measure and the obligation imposed by it on the person causing the risk and specifying the function of the place and/or the circumscribed area which that person is prohibited from approaching or entering, respectively;*
- g) the duration of the protection measure;*
- h) the duration of the effects of recognition pursuant to Article 4 (4);*
- i) a declaration that the requirements laid down in Article 6 have been met;*
- j) information on the rights granted under Articles 9 and 13;*
- k) or ease of reference, the full title of this Regulation.”*

We shall not detail on the categories of information required in the certificate, since they are of a strictly technical nature and do not requires such detailing. Nevertheless, we note the attention paid to these categories of data that, if incomplete or erroneous, may lead to the need for rectification or withdrawal and/or refusal to recognise or enforce the protection measure, and which we are going to discuss

further on. As paragraph (27)⁶⁴ of the Regulation preamble states, we appreciate that is important for the certificate to include a clear warning that the notification address of the protected person might be disclosed to the person posing the risk. Same as the Regulation, we differentiate between the notification address (that may be disclosed) and the place where the protected person is located and his/her contact details de contact that, as we shall analyse in the following section, may not be disclosed to the person causing the risk (may only be disclosed in certain limitative and specific conditions defined in Article 8 and paragraph (27) of the preamble⁶⁹)

For the purpose of upholding the principles, but even more so the rights guaranteed by the CFREU, a critical requirement is that of a declaration that the right of the person causing the risk to be notified such as to arrange for defence and, as applicable, his/her right to challenge the protection measure issued in an *ex parte* procedure were ensured.

• Notification of the Certificate to the Person Causing the Risk

The process for notifying the certificate to the person causing the risk is described in Article 8 of the Regulation and covers the following aspects:

- ⌚ Identification of the authority that brings to the notice of the person causing the risk the certificate and the effects of it being issued – the issuing authority of the Member State of origin;
- ⌚ Means for notification – in direct relation with the address of residence of the person causing the risk, thus:
 - in accordance with the law of the Member State of origin – when the person causing the risk resides in the Member State of origin
 - by registered letter with acknowledgment of receipt or equivalent – when the person causing the risk resides in a Member State other than the Member State of origin or in a third country;
 - according to the law of the Member State of origin – when the address of the person causing the risk is not known.
- ⌚ Method of action when the person causing the risk refuses to accept receipt of the notification – are governed by the law of the Member State of origin;
- ⌚ Interdiction to disclose to the person causing the risk the whereabouts or other contact details of the protected person, as well as situations when the interdiction is lifted, and the information may be disclosed:
 - the rule that the whereabouts and the contact details may not be disclosed;

⁶⁴ *Idem*, p. 19 – 20. ⁶⁹ *Ibidem*.

- the exception applies and the interdiction is lifted only when the disclosure is necessary for compliance with or the enforcement of the protection measure.

• **Rectification or Withdrawal of the Certificate**

The conditions whereby the certificate may be rectified or withdrawn are described in paragraph (29) of the preamble⁶⁵ and in Article 9 of the Regulation. Article (9) states:

“(1) Without prejudice to Article 5 (2) and upon request by the protected person or the person causing the risk to the issuing authority of the Member State of origin or on that authority’s own initiative, the certificate shall be:

- a) rectified where, due to a clerical error, there is a discrepancy between the protection measure and the certificate; or*
- b) withdrawn where it was clearly wrongly granted, having regard to the requirements laid down in Article 6 and the scope of this Regulation.*

(2) The procedure, including any appeal, with regard to the rectification or withdrawal of the certificate shall be governed by the law of the Member State of origin.”

From the onset we note that both the rectification (that does not cover the substance, but only correcting formal errors that lead to any discrepancies between the protection measure and the certificate) and the withdrawal of the certificate (for reasons of legality that also impact on the substance, not only on the form, it being clear that the certificate was used for a measure that does not fall within the scope of the Regulation or was issued in breach of the issuing requirements) are not means of appeal for the purpose of Article 5 (2) of the Regulation, but rather actions taken to eliminate formal errors or non-legal measures.

Such actions are undertaken *ex-officio* by the issuing authority from the Member State of origin or on request of the protected person or the person causing the risk.

Also, we should point out the fact that the rectification or withdrawal is subject to appeal if the law of the Member State of origin provides for such an appeal. Furthermore, the entire procedure for the rectification or withdrawal of the certificate is governed by the law of the Member State of origin.

• **Assistance to the Protected Person**

Article 10 of the Regulation states: *“Upon request by the protected person, the issuing authority of the Member State of origin shall assist that person in obtaining information, as made available in accordance with Articles 17 and 18, concerning*

⁶⁵ Paragraph (29) of the Regulation Preamble was discussed in Topic I, *supra*, p. 14 -15.

the authorities of the Member State addressed before which the protection measure is to be invoked or enforcement is to be sought". This text should be correlated with the provisions of paragraph (30) of the preamble⁶⁶ and with Article 17 (about the information made available to the public), as well as with Article 18 (covering the communication of information by the Member States), which will analyse hereinafter.

- **Information Made Available to the Public**

According to Article 17 of the Regulation, *"The Member States shall provide, within the framework of the European Judicial Network in civil and commercial matters established by Decision 2001/470/EC and with a view to making the information available to the public, a description of the national rules and procedures concerning protection measures in civil matters, including information on the type of authorities which are competent in the matters falling within the scope of this Regulation. The Member States shall keep that information updated."*

We note here that the EU Member States are bound by both the obligation to make the information available to the public and to update such information. Article 17 of the Regulation should be read in conjunction with paragraph (35) of the preamble –about facilitating the application of the Regulation⁶⁷. At the end of the first Topic, we pointed out that one of the objectives for which the European Judicial Network was set up covers the simplification and facilitation of judicial cooperation in cross-border cases, but also suitable, specialised communication via the EU e-justice portal⁶⁸.

- **Communication of Information by the Member States**

According to Article 18 of the Regulation,

"(1) By 11 July 2014, Member States shall communicate to the Commission the following information:

- a) the type of authorities which are competent in the matters falling within the scope of this Regulation, specifying, where applicable:*
 - (i) the authorities which are competent to order protection measures and issue certificates in accordance with Article 5;*
 - (ii) the authorities before which a protection measure ordered in another Member State is to be invoked and/or which are competent to enforce such a measure;*
 - (iii) the authorities which are competent to effect the adjustment of protection measures in accordance with Article 11 (1);*

⁶⁶ Paragraph (30) of the Regulation Preamble was discussed in Topic I, *supra*, p. 16.

⁶⁷ *Idem*, p. 22.

⁶⁸ To visit the portal, access <https://e-justice.europa.eu/home.do?plang=ro&action=home>.

- (iv) *the courts to which the application for refusal of recognition and, where applicable, enforcement is to be submitted in accordance with Article 13;*
 - b) *the language or languages accepted for translations as referred to in Article 16 (1).*
- (2) *The Commission shall make the information referred to in paragraph 1 available to the public through any appropriate means, in particular through the website of the European Judicial Network in civil and commercial matters.”*

As we observe, the information that should be communicated to the Commission by the EU Member States EU are aimed at facilitating cooperation from the purpose of implementing the Regulation and the information required is as required by the Regulation. It is evident that each Member State has designated the competent authorities and the categories of information that are to be communicated to the Commission. When we access the website *e-justice.europa.eu/home.do* follow the links *European judicial atlas in civil matters* and *Mutual recognition of protection measures in civil matters*, besides the general information on the Regulation and certificates based on multilingual standard forms required by the Implementing Regulation, we find detailed information for each Member State participating in the *European Judicial Network in civil and commercial matters*, information that is available in the pages dedicated to each individual Member State⁶⁹.

• Adjustment of the Protection Measure

We have analysed in depth the main coordinates that form the basis for adjusting the protection measure, as stated in paragraphs (20) and (21) of the preamble, and we have identified the main features of adjusting the protection measure⁷⁰. We should point out that Article 11 of the Regulation details the coordinates described in the preamble.

Thus, the adjustment of the protection measure:

- ⌚ is a possibility, and not an obligation of the competent authority from the Member State addressed;
- ⌚ is aimed at enforcing the protection measure in the Member State addressed, such as to ensure that the protection measure is effectively recognised in the Member State addressed;

⁶⁹ For example, for France, the information are available at https://e-justice.europa.eu/content_mutual_recognition_of_protection_measures_in_civil_matters-352-fr-ro.do?clang=fr, and for Romania at https://e-justice.europa.eu/content_mutual_recognition_of_protection_measures_in_civil_matters-352-ro-ro.do?member=1.

⁷⁰ *Idem*, p. 13 - 14.

- ⌚ only covers the factual elements of the protection measure – cannot affect the type and civil nature of the protection measure; the nature of the elements of the protection measure must be maintained;
- ⌚ the authorities from the Member State addressed shall enter in the certificate any adjustments of the protection measure;
- ⌚ the procedure for the adjustment of the protection measure is governed by the law of the Member State addressed;
- ⌚ the adjustment of the protection measure is notified to the person causing the risk and the rules laid down in paragraph (4) of Article 11 cover the means of effecting the notification, which, same as in the case of the notifying the certificate, are dependant on the place of residence of the person causing the risk, thus:
 - in accordance with the law of the Member State addressed – when the person causing the risk resides in the Member State addressed;
 - by registered letter with acknowledgment of receipt or equivalent – when the person causing the risk resides in a Member State other than the Member State addressed or in a third country;
 - according to the law of the Member State addressed – when address of the person causing the risk is not known.
- ⌚ the situations in which the person causing the risk refuses to accept receipt of the notification are governed by the law of the Member State addressed.
- ⌚ it is possible to appeal the adjustment of the protection measure
 - the appeal may be lodged by the protected person or by the person causing the risk
 - the appeal procedure is governed by the law of the Member State addressed
 - the lodging of an appeal has suspensive effect.

- **No Review as to Substance**

Article 12 of the Regulation (providing that “*Under no circumstances may a protection measure ordered in the Member State of origin be reviewed as to its substance in the Member State addressed*”) is directly related to the subject matter and the purpose of the Regulation. It is known that the purpose of the Regulation is the recognition and enforcement in a Member State addressed of a protection measure in civil matters issued in the Member State of origin, and not the establishment of new rights and obligations as to the substance of the protection measure.

Neither the certificate nor the adjustment of the protection measure creates new rights for the protected person or new obligations for the person causing the risk. Therefore, the ban on reviews as to substance makes perfect sense and, where, for objective reasons, the recognition and/or enforcement of the protection measure

are not possible, another institution provided for by the Regulation applies, namely the refusal of recognition or enforcement of the protection measure.

- **Refusal of Recognition or Enforcement**

The possibility for an addressed State to refuse the recognition or enforcement on its territory of a protection measure issued in a Member State of origin, as well as the purpose of instating such an institution, are detailed in paragraphs (31) and (32) of the preamble⁷¹ and in Article 13 of the Regulation, thus:

“(1) The recognition and, where applicable, the enforcement of the protection measure shall be refused, upon application by the person causing the risk, to the extent such recognition is:

- a) manifestly contrary to public policy in the Member State addressed; or*
- b) irreconcilable with a judgment given or recognised in the Member State addressed.*

(2) The application for refusal of recognition or enforcement shall be submitted to the court of the Member State addressed as communicated by that Member State to the Commission in accordance with point (a)(iv).

(3) The recognition of the protection measure may not be refused on the ground that the law of the Member State addressed does not allow for such a measure.”

We note that the text in question introduces a number of requirements for the refusal of recognition or enforcement:

- ⌚ the procedure is initiated on request of the person causing the risk;
- ⌚ the application for a refusal of recognition or enforcement is to be filed with the relevant court of jurisdiction from the Member State addressed, as communicated to the Commission according to Article 18 of the Regulation;
- ⌚ the recognition of the protection measure may not be refused on the ground that the law of the Member State addressed does not allow for such a measure;
- ⌚ the recognition and, where applicable, the enforcement of the protection measure may be refused in two situations:
 - ⌚ to the extent to which such recognition is manifestly contrary to public policy in the Member State addressed,
 - ⌚ to the extent to which such a measure is irreconcilable with a judgment given or recognised in the Member State addressed.

Regarding the refusal for reasons of public policy, we appreciate that the provisions of paragraph (32) of the Regulation preamble are also relevant – referring

⁷¹ Idem, p.20 – 21.

to, among others, to the public-policy exception and the limitations of its application in the context of the CFREU. Moreover, as it is known, the concept of “public policy” is defined in Directive 2004/38⁷². Can the same concept be extended to the implementation of Regulation (EU) no.606/2014? The answer lies both in the CJEU case law and in paragraph (32) of the preamble, according to which, even though the right of national courts to refuse recognition or enforcement of a protection measure is recognised when such enforcement would be manifestly contrary to public policy of the Member State in question, the courts should not be permitted to invoke the public policy exception for refusing the recognition or enforcement of a protection measure if, by so doing, they would breach the rights enshrined in the Charter of Fundamental Rights of the European Union, in particular Article 21 – non-discrimination⁷³.

We pointed out above that the Regulation preamble reiterates the objective according to which the harmonious functioning of justice requires avoiding the situations in which two Member States issue irreconcilable judgments. For such cases, the Regulation requires a reason for refusing the recognition or, as the case may be, enforcement of the protection measure.

• Suspension or Withdrawal of Recognition or Enforcement

The matters related to the suspension or withdrawal of recognition or enforcement of the protection measure are covered in the preamble, paragraph (33)⁷⁹, as well as in Article 14 of the Regulation:

“(1) In the event of suspension or withdrawal of the protection measure in the Member State of origin, suspension or limitation of its enforceability, or withdrawal of the certificate in accordance with point (b) of Article 9(1), the issuing authority of the Member State of origin shall, upon request by the protected person or the person causing the risk, issue a certificate indicating that suspension, limitation or withdrawal using the multilingual standard form established in accordance with Article 19.

(2) Upon submission by the protected person or the person causing the risk of the certificate issued in accordance with paragraph 1, the competent authority of the Member State addressed shall suspend or withdraw the effects of the recognition and, where applicable, the enforcement of the protection measure.”

⁷² For details, see both the Directive preamble and Article 27 – General Principles.

⁷³ Previous CJUE case law concerning the freedom of settlement and mutual recognition – *Case C340/89, Vlassopoulou/Ministerium für Justiz, Bundes-u. Europaangelegenheiten Baden-Württemberg*, Judgement of 7 mai 1991, ECR 1991 p.I-2357, par.15: “...even if applied without any discrimination on the basis of nationality, national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in the exercise of their right of establishment guaranteed to them by Article 52 of the EEC Treaty. That could be the case if the national rules in

When analysing the text, we identify the following procedure characteristics:

- ⌚ the issuing authority of the Member State of origin issues a certificate – if the protection measure is suspended or withdrawn in the Member State of origin, then its enforceability is suspended or limited, or if the certificate is withdrawn on the grounds of Article 9 (1) (b);
- ⌚ the certificate indicating the suspension, limitation or withdrawal is issued in request of the protected person or of the person causing the risk;
- ⌚ the certificate indicating the suspension, limitation or withdrawal is based on the multilingual standard form determined in Article 19;
- ⌚ the person causing the risk submits the certificate indicating the suspension, limitation or withdrawal to the competent authority from the Member State addressed;

question took no account of the knowledge and qualifications already acquired by the person concerned in another Member State.” Based on this Judgement, criteria were established for verifying the responsibility of the States in the mutual recognition of diplomas. The situation is similar in the the Directive and Regulation on the protection order. For more details, see Anna Sievälä, *Mutual recognition of protection measures in the European Union: Equal protection to all EU citizens?*, Master Thesis, 2016, available here http://epublications.uef.fi/pub/urn_nbn-fi_uef20140819/urn_nbn-fi_uef-20140819.pdf, p. 38.

⁷⁹ Paragraph (32) of the Regulation Preamble was discussed in Topic I, *supra*, p. 15.

- ⌚ Upon submission of the certificate, the competent authority of the Member State addressed suspends or withdraws the effects of the recognition and, where applicable, the enforcement of the protection measure.

• Establishment and Subsequent Amendment of the Forms

According to Article 19 of the Regulation, “*The Commission shall adopt implementing acts establishing and subsequently amending the forms referred to in Articles 5 and 14. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 20*” – the committee procedure.⁷⁴

We showed above that, on the grounds of this text, the Implementing Regulation was adopted that establishes multilingual standard forms for the certificates provided for in Articles 5 and 14⁷⁵, thus meeting the specific objective of facilitating free, uniform, faster and less costly circulation of protection measures in the EU.

• Legalisation and Other Similar Formalities

⁷⁴ We have detailed this procedure in Topic I of the Study. See *supra*, p.17, footnote 39.

⁷⁵ See *supra*, p.7, note 13.

As also provided for in the preamble, in the pursuit of the simplification and speed objective, Article 15 of the Regulation states that *“No legalisation or other similar formality shall be required for documents issued in a Member State in the context of this Regulation”*.

- **Transliteration or Translation**

According to paragraph (24) of the preamble⁷⁶, where a certificate contains free text, the competent authority of the Member State addressed should determine whether any translation or transliteration is required, but the protected person or the issuing authority of the Member State of origin may provide a translation or transliteration on their own initiative, thus meeting the same simplification and speed objective mentioned before.

According to Article 16 of the Regulation, *“(1) Any transliteration or translation required under this Regulation shall be into the official language or one of the official languages of the Member State addressed or into any other official language of the institutions of the Union which that Member State has indicated it can accept.*

(2) Subject to Article 5(3), any translation under this Regulation shall be done by a person qualified to do translations in one of the Member States.”

- **Final Provisions on Review, Entry into Force and Implementation**

The review, entry into force and implementation are regulated in Articles 21 and 22. According to them, *“By 11 January 2020, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If necessary, the report shall be accompanied by proposals for amendments”*.

The Regulation, which came into force on the twentieth day after its publication in the OJ, applies from the 11th January 2015 *“to protection measures ordered on or after 11 January 2015, irrespective of when proceedings have been instituted”*.

From the onset of our analysis, we underlined that the Regulation is binding in all its elements and directly applicable in the Member States in accordance with the Treaties (except Denmark).

⁷⁶ See Topic I of the Study, p. 16.

TOPIC NO. 3

RECOGNITION AND ENFORCEMENT OF PROTECTION ORDERS IN THE EUROPEAN UNION. JUDICIAL PRACTICE IN THE MATTER IN THE EUROPEAN UNION

§1. General features of recognition and enforcement of protection orders

In the European Union, protection orders have been recognised and enforced mainly in the implementation of the Directive in criminal matters. To date, only one reference for a preliminary ruling on a protection order in criminal matters has been formulated and it has been rejected for manifest lack of jurisdiction of the Court.⁷⁷ Regarding the European protection order in civil matters, no references for a preliminary ruling have been made and we could not identify situations where the national courts applied Regulation (EU) no. 606/2013. It should be mentioned that, though the procedure is a European one, the applicable substantial law is the national one, so that the European protection order is issued according to the national civil procedure.

§2. Application of the Regulation “ratione temporis”

Regulation no. 606/2013 has become effective in the 11th of January 2015. According to Article 22, the Regulation “shall apply to protection measures ordered on or after 11 January 2015, irrespective of when proceedings have been instituted.”⁷⁸

§3. Case law of the Court of Justice of the European Union

To date, no preliminary questions have been addressed by the courts of the Member States according to the procedure enacted by Article 267 TFEU, nor questions on its validity. Whilst the latter are unlikely, the references for preliminary ruling will prove useful for the consistent implementation of the Regulation, as the case has been in other matters of judicial cooperation.⁷⁹ The case law will be taken

⁷⁷ Case C-484/16, *Semeraro*, Order of 16 December 2016, ECLI:EU:C:2016:952.

⁷⁸ See also: **A. Dutta**, op. cit., p. 173.

⁷⁹ For practical examples see: *Cooperarea judiciară în materie civilă and comercială în Uniunea Europeană. Regulamente adnotate (Judicial cooperation in civil and commercial matters. Annotated*

into account for any potential amendments, as provided for by Article 21 of the Regulation. The report on the application of the Regulation will have to be completed by 2020, a reasonable deadline for the Court of Justice to rule. Furthermore, paragraph (36) stresses the importance of uniform implementation of the Regulation and confers extended powers to the Commission, in accordance with Regulation no. 182/2011.⁸⁶

§3. Autonomy of the notion of civil matters

The principle of autonomous interpretation of the notion of “civil matters” is mentioned in Regulation no. 606/2013, as we pointed out in Chapter 2, when we discussed the difference between the Regulation and the Directive, which both instate the same measure.⁸⁷

The Court of Justice has ruled in a number of cases on the autonomy of particular concepts, more specifically, on “civil and commercial matters”.⁸⁸ With a view to ensuring, to the extent possible, the equality and consistency of the rights and obligations derived from the Convention of Brussels for the Contracting States and any interested parties [currently Regulation no. 1215/2012], the terms of the disposition in question should not be interpreted as a simple reference to the national law of one or another of the States.⁸⁹ Thus, consistent case law of the Court indicates that the notion of “civil and commercial matters” should be deemed to be an autonomous concept that should be interpreted in reference to the objectives and system of the Convention of Brussels, on the one hand, and, on the other hand, to the general principles that result from the national legal systems.⁹⁰

In another Case,⁹¹ the Court emphasised that (...) “it must be stated that the scope of Regulation No 44/2001 is, like that of the Brussels Convention, limited to

Regulations), **Dragoş Călin, Roxana-Maria Călin, Alina Ciolofan, Irina Cioponea, Paula Andradă Coţovanu, Nina-Paraschiva Gogescu, Anamaria Groza, Andrei Iacuba, Sanda Elena Lungu, Lucia Zaharia, Dorina Zeca**, Publisher C. H. Beck, 2014.

⁸⁶ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, OJ L 55, 28.2.2011, p. 13.

⁸⁷ M. Bogdan, op. cit., p. 409 considers that references for preliminary rulings on the scope of the Directive/Regulation could shed light on things, though it may be difficult to define objective demarcation criteria.

⁸⁸ C-292/05, Lechouritou and others, Judgement of 15 February 2007, ECR 2007 p. I-1519, ECLI:EU:C:2007:102.

⁸⁹ See **Anamaria Toma-Bianov**, *Aplicarea privată a regulilor concurenței în Uniunea Europeană. Acțiunile în despăgubire promovate în fața instanțelor naționale și tribunalelor arbitrale (Private application of competition rules in the European Union. Claims filed with national courts and arbitral tribunals)*, Publisher: Editura Universitară, 2016, p.144

⁹⁰ See, in particular, Case 29/76, LTU, Judgement of 14 October 1976, Rec., p. 1541, paras 3 and 5; Case 814/79, Rüffer, Judgement of 16 December 1980, Rec., p. 3807, paragraph 7; C-271/00, Baten, Judgement of 14 November 2002, Rec., p. I-10489, paragraph 28; C-266/01, Préservatrice foncière

TIARD, Judgement of 15 May 2003, Rec., p. I-4867, paragraph 20; C-343/04, ČEZ, Judgement of 18

May 2006, Rec., p. I-4557, paragraph 2.2

⁹¹ C-49/12, Sunico and Others, Judgement of 12 September 2013, ECLI:EU:C:2013:545, par. 33-34.

‘civil and commercial matters’. It follows from settled case-law of the Court that that scope is defined essentially by the elements which characterise the nature of the legal relationships between the parties to the dispute or the subject-matter thereof (see, in particular, Case C-406/09 Realchemie Nederland [2011] ECR I-9773, paragraph 39, and Sapir and Others, paragraph 32).”

One last Judgement we will quote illustrates the teleological interpretation of the Court: “Since the term ‘civil matters’ is to be interpreted with regard to the objectives of Regulation No 2201/2003, if decisions on the taking into care and placement of a child, which in some Member States are governed by public law, were for that reason alone to be excluded from the scope of that regulation, the very purpose of mutual recognition and enforcement of decisions in matters of parental responsibility would clearly be compromised. In that context, it should be noted that it is apparent from Articles 1(1) and 2(1) of Regulation No 2201/2003 that neither the judicial organisation of the Member States nor the conferral of powers on administrative authorities can affect the scope of that regulation or the interpretation of ‘civil matters’.

Consequently, the term ‘civil matters’ must be interpreted autonomously.

Only the uniform application of Regulation No 2201/2003 in the Member States, which requires that the scope of that regulation be defined by Community law and not by national law, is capable of ensuring that the objectives pursued by that regulation, one of which is equal treatment for all children concerned, are attained.”⁸⁰

§4. Relevant case law from the Member States - Romania

No case law is available in Romania in which the Regulation was applied, as indicated by the main databases (rolii.ro, idrept, legalis). Moreover, no case law exists illustrating the application of the Law for the implementation of the Regulation (Law no. 206/2016).⁹³ The national regulation that instates the protection order is Law no. 217/2003 on preventing and fighting domestic violence, for which case law exists, including in the matter of non-enforcement of court decisions issued on the grounds of this Law. Furthermore, Law no. 151/2016 on the European protection order and amending and supplementing certain legislative acts was adopted for transposing Directive 2011/99/EU⁸¹, and for which relevant case law exists.

⁸⁰ Case C, C-435/06, Judgement of 27 November 2007, ECR 2007 p. I-10141, ECLI:EU:C:2007:714.

⁹³ Law no. 206 of 7 November 2016 supplementing Government Expeditious Ordinance no. 119/2006 on certain measures required for the implementation of certain Community Regulations at the time of Romania’s accession to the European Union and amending and supplementing the Law of Notaries Public and notarialisation activities no. 36/1995, published in the Official Gazette no. 898 of 9 November 2016.

⁸¹ Official Gazette no. 545/20 July 2016.

We have already referred to the *ratione temporis* aspect, both in order to introduce this novelty of the Regulation (which has not yet generated issues to be referred to the CJEU, but also because the Romanian Courts have issued a very interesting judgement in this matter.

In the case of the petition filed by the plaintiff on 12.06.2014, not supported by sound legal reasoning, the Court applied the analogy in an original manner.⁸² The Judgement passed by the Court on 20.06.2014 admits the application for the issuance of a protection order, in the context whereby the facts were not “*exactly within the scope of Law no. 217/2003, which is dedicated precisely to the protection and advancement of the interests of the victims of domestic violence, and no national laws exist that allow the issuance of a protection order against violence perpetrated outside the family settings*”. The Court applies the Law of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms in a teleological manner.

“Nevertheless, it should be noted that such a protection instrument has been adopted at the level of the European Union. It is Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order.

The preamble of this legal instrument states that, in a common area of freedom, security and justice, the judicial cooperation in criminal matters should be grounded in the principle of mutual recognition of judgements and judicial decisions. According to the Stockholm Programme for an open and secure Europe serving and protecting citizens, mutual recognition should be extended to all types of Court judgements and decisions that, depending on the legal system, may be criminal or administrative.

Through this legal instrument, the European Union requires the Member States to identify the most effective means of improving the laws and the practical measures taken to support the victims.

In this context, it was deemed necessary to ensure that the protection afforded to a natural person in a Member State is further maintained in any other Member State where the person in question may have relocated, given that this is the only manner in which exercising the right to free movement and settlement is truly guaranteed.

The Directive applies to a wider range of protection measures, since such measures are aimed specifically to protect a person against a criminal act of another person which may, in any way, endanger that person’s life or physical, psychological and sexual integrity, as well as that person’s dignity or personal liberty, and are intended to prevent new criminal acts or to reduce the consequences of previous criminal acts.

The measures covered in the Directive are described in the preamble: serve specifically to protect a person and do not serve other aims; do not require the

⁸² Motru Town Court, Judgement no. 1094/2014 given in public session on 20 June 2014. The case is available at <http://rolii.ro/hotarari/58a02dade49009c41a001a00>

existence of a crime determined by a final conviction; it is irrelevant whether the authority that issued the measure is a criminal or civil court or an administrative one; are measures adopted in favour of victims or possible victims of crimes; are taken with appropriate speed or even in urgency, in order to ensure the protection of the person in question; should take into account the needs of the victims, including vulnerable persons, such as underage or disabled; should be issued in observance of the person's right to be heard on and challenge the measure (Article 6 CEDO).

According to Article 1 of Directive 2011/99/EU, its objective is to set out rules "allowing a judicial or equivalent authority in a Member State, in which a protection measure has been adopted with a view to protecting a person against a criminal act by another person which may endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity, to issue a European protection order enabling a competent authority in another Member State to continue the protection of the person in the territory of that other Member State, following criminal conduct, or alleged criminal conduct, in accordance with the national law of the issuing State".

Article 2 of the same legal instrument defines the European protection order as "decision, taken by a judicial or equivalent authority of a Member State in relation to a protection measure, on the basis of which a judicial or equivalent authority of another Member State takes any appropriate measure or measures under its own national law with a view to continuing the protection of the protected person".

For the purposes of Directive 2011/99/EU, "protection measure" means "a decision in criminal matters adopted in the issuing State in accordance with its national law and procedures by which one or more of the prohibitions or restrictions referred to in Article 5 are imposed on a person causing danger in order to protect a protected person against a criminal act which may endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity".

The prohibitions referred to in Article 5 of the European document are: a) a prohibition from entering certain localities, places or defined areas where the protected person resides or visits; b) a prohibition or regulation of contact, in any form, with the protected person, including by phone, electronic or ordinary mail, fax or any other means; or (c) a prohibition or regulation on approaching the protected person closer than a prescribed distance.

According to Article 6 of Directive no. 2011/99/EU, such a European protection order may be issued when the protected person decides to reside or already resides in another Member State or when the protected person decides to stay or already stays in another Member State. When issuing such an order, the length of the period or periods that the protected person intends to stay in the executing State and the seriousness of the need for protection are also taken into account. The order is only be issued on request and after verifying that the protection measure meets the requirements set out in the above-quoted Article 5, and the request may be addressed either to the competent authority of the issuing State or to the competent authority of the executing State. In the spirit of the observance of the

fundamental human rights, it is stated that, before issuing a European protection order, the person causing danger shall be given the right to be heard and the right to challenge the protection measure, if that person has not been granted these rights in the procedure leading to the adoption of the protection measure.

By introducing the institution of the protection order in the national law, the premises have been set for ensuring the protection of the interests of the Romanian citizens in the common area of freedom, security and justice, given that the person protected by such an order will not be exposed to aggression if and when residing or staying in another EU Member State.

We note that, compared to the European protection order, the national order has a narrower scope, limited only to victims of domestic violence, whilst the European order is aimed at protecting the victims of any kind of violence. For this reason, the law makers should take action, since the Directive is a legal act that establishes an objective that should be achieved by all the Member States of the European Union.

Even though the provisions of the above-mentioned Directive have not been fully transposed in the national law, we should not overlook its binding character, in all its elements, for each State to which it is addressed. Therefore, it is judicious to take this into account when ruling on this case, given the legal issue submitted for judgement, which requires expeditious settlement and cannot be deferred until such time when national rules will be adopted in compliance with the European laws.

When ruling on this case, the Court shall equally take into account the provisions of the European Convention of Human Rights and the case law of the European Court of Human Rights (institutions that cover the overall protection of human rights in the whole of Europe) as being part of our national laws, given that, according to the Constitution of Romania, the treaties duly ratified by the Parliament are part of the national laws.

With regard to the facts described in the petition, the Court finds that Article 8 (that protects the right to life of the person) of the European Convention of Human Rights are applicable for the protection of the petitioner.

*In varied contexts, the European Court of Human Rights has previously stated that the notion of “private life” includes a person’s physical and mental integrity and that the States, through their authorities, including the Judiciary, have the positive obligation to prevent other individuals from violating the physical and moral integrity of a person, when the authorities know or should have known that such violations exist (see *Costello-Roberts vs. The United Kingdom*, no. 38.719/97, point 118, 10 October 2002, and *M.C. vs. Bulgaria*, no. 39.272/98, points 73 and 149, CEDO 2003-XII).*

In the opinion of the Court, it should be determined whether the authorities had or should have had knowledge at the time that a real and present risk existed to the life or physical integrity of an individual and if the authorities, within the scope of their respective jurisdiction, failed to take measures that, on a reasonable analysis, would have been expected to avoid the occurrence of the risk.

In the case on trial, as we have showed above, sufficient indications exist that lead to the reasonable belief that threats and verbal aggression were perpetrated, resulting in impacts on the plaintiff's mental integrity and private life, of such nature as to cause fear in any person and convince such person that future negative consequences will occur.

Therefore, even though the national law does not include any specific provisions regulating the situation submitted for trial (being confronted with a gap in the law), we believe that, in order to comply with the requirements imposed by the European Court of Human Rights on each Member State, the case law shall have to adopt an extended interpretation of Law no. 217/2003 (which is also appropriate in the case on trial), adequate to the purpose for which it was established. At the same time, the Court appreciates that legal initiative is necessary to regulate similar situations with the one on trial and, implicitly, to avoid potential convictions by the European Court of Human Rights for breach of the fundamental human rights.

To the same effect, it is easy to see that, whatever the facts, the declared purpose of a law, including of Law no. 217/2003, can only be the administration of justice, whilst, conversely, the ultimate aim of positive law cannot be, from the objective perspective, any other than effecting the idea of justice in social life to the widest extent possible.

The plaintiff addressed the Court convinced that she would be afforded the protection of her rights, her last resort for being relieved of the abuse she is being subjected to. Therefore, even when the law is flawed, the Court has the mission to ensure that justice is served. After all, the judge, as representative of the judiciary – an institution inherent to any legal order and society – is called upon to take up the profound responsibility of judging, being the arbiter of the honour, possessions and life of the citizens and, based on the civil procedure rules, by administering justice, to ensure that everyone benefits from the rights they have.”

This Judgement that we have quoted extensively expresses the judge's trust in the fundamental principles of natural law and in the international laws, based on which he/she extends the scope of Law no. 217/2013. At that time, Regulation no. 606/2013 had been adopted and published in the Official Journal and could have provided an argument of positive law that would have complemented the authority of the Judgement.

As we have already shown, neither the Regulation, nor the implementation law, have been applied by Romanian courts. A guide for the application of Regulation no. 606/2013 could be provided, at least in part, by Law no. 151/2016 that transposes the Directive on the protection order in criminal matters. One judgement⁸³ draws attention, first because the Romanian Court extends the effects of an order issued by a Court from Spain,⁸⁴ and second because it changes a paradigm.

⁸³ Galați Town Court, Criminal Division, Criminal Sentence no. 738/2016 available on idrept.ro

⁸⁴ “Consequently, since the foreign judicial authorities have requested the recognition of the protection order for a period of 12 months, from 23.06.2016 until 17.06.2017, the Court shall order that the

Previously, judgements had been issued refusing the instatement of the protection order on the grounds that the person causing the risk was abroad.⁸⁵ For that matter, the Judgement of Galați Town Court also applies the legal analogy: “On the ground so Article 15 (1) of Law no. 151/2016 on the European protection order, the duration of the prohibitions listed above may not exceed the maximum provided for in the Romanian law for similar measures in nature and content, namely 6 months from the time the order is issued (according to Article 24 of Law no. 217/2003, recast, on the protection order).”

Finally, in another judgement⁸⁶⁸⁷ that was not pronounced final, given that the plaintiff dropped the petition, the court of first instance rejected the application for a protection order for the same reason, namely that the person posing the risk was abroad. In this case, though, the victim was also abroad:

„Both parties have their usual residence in Italy and do not live together and do not have their usual residence on the Romanian territory. Thus, the purpose of this petition is to obtain a European protection order at the usual residence of the petitioner, yet such an order cannot be issued in the absence of a national order. Proof of domicile in Romania is not a requirement for determining the jurisdiction of this Court on the grounds of the national laws, as long as the parties have no connection with this country, except their legal domicile. Furthermore, the petitioner declared that she would go to work in Italy, so that the Court of first instance acknowledged that the justification of petitioning the Bucharest Sector 2 Court for the issuance of a national protection order was not demonstrated. All the elements of the legal action are related to the country of usual residence, such that the Romanian Court has no jurisdiction to issue a protection order on the grounds of Law no. 217/2003.

Regarding the issue of a European order, the Court finds that, though the petition was not grounded on the provisions of Directive 2011/99/EU, according to the consistent case law of CJEU (Case Marshall vs. Southampton), a Directive may not be invoked against a natural person and, in the case, it cannot be invoked against the defendant, it being necessary for the State to transpose the Directive in a national law. Though the deadline for transposition has expired, the Directive has not yet been transposed by the Romanian State.”

duration of the prohibitions imposed on the said X to be determined from the date of the Judgement recognising the European protection order, that is from 15.12.2016 until 15.06.2017, including.”

⁸⁵ In the context, among others, the Court acknowledges that “the witnesses declared that the respondent had left abroad about a month before, so that he cannot cause a state of danger for the petitioner”. In fact, nothing in the evidence indicates that the requirements of the law have been met. See Târgu Jiu Town Court, Session in Chambers of 11.04. 2014, available on idrept.ro and rolii.ro

⁸⁶ Bucharest City Court, Civil Judgement no. 1803 R/ 2015, not published, available at <http://rolii.ro/hotarari/587e02c9e4900948110018c5>, which analyses the legality of the Civil Judgement no. 7495/30.06.2015 passed by the Sector 2 Court. Since the right to appeal was waived during the trial, we shall only take into account the arguments of the Court of first instance. ¹⁰⁰ The Law, translated in English, is available here: http://gdnr.mvr.bg/NR/rdonlyres/A2CE049F97B3-495D-9005-D4325E0E2BD/0/LAW_ON_PROTECTION_FROM_THE_DOMESTIC_VIOLENCE.rtf

⁸⁷ <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12238&l=1>

In other countries, in Bulgaria, for instance, the law makers have integrated the implementation rules in the law on domestic violence,¹⁰⁰ whilst in Malta the regulation is self standing,¹⁰¹ yet we have not identified relevant case law in neither case. Moreover, in the research we carried out in other Member States we could not identify case law where Regulation no. 606/2013 was applied.⁸⁸

The regulation of the protection order is also important in states outside the EU. The perception is that the criminal courts see domestic violence as a “private” issue, and the police is not involved for that same reason. Sometimes people forget that the aim of the protection order is to protect the victim for the future, and not to punish the person causing the risk.⁸⁹ There is one interesting case from Romania: the petitioner’s application for a protection order was rejected because she was withdrawing her criminal complaints. Thus, the medical reports apart, the Courts (both first instance and appeal) considered that abandoning the criminal lawsuit left the application for a protection order unsupported. This impossibility of detaching the protection order in family matters from the other aspects of the case stems from more than just the law, demonstrating rather a position in a comfort zone and a way of thinking.⁹⁰

The fact that the protection in criminal and civil matters has not been regulated in a single legal act, in particular as a result of the negotiations on the application of Articles 81 and 82 TFEU,⁹¹ impacts on the judicial practice, either because of situations where certain States (e.g. Ireland) did not opt for implementing the

⁸⁸ The status of the implementation of the Regulation is available on-line (https://ejustice.europa.eu/content_mutual_recognition_of_protection_measures_in_civil_matters-352-en.do), and covers some of the elements discussed in the previous Topics, in particular on the issue of competent courts.

⁸⁹ **Wing-Cheong Chan**, *A Review of Civil Protection Orders in Six Jurisdictions*, Statute Law Review, vol. 38 1/2017, p. 6.

⁹⁰ “As justly acknowledged the Court of first instance, the institution of the protection order – regulated by Law no. 25/2012 – is in its nature *exhaustive of rights*, only being applicable when the measure requested is supported by evidence.” Furthermore, the Court states that this behaviour raises suspicions as to the state of risk. Yet it is self understood that the petitioner and the defendant were in a family relationship (husband / wife) that cannot be interpreted exclusively from the perspective of criminal law. **Florin Radu**, Hunedoara County Court, Civil Division, Judgement no. 778/R/2012, published in the Magazine “Hunedoara Juridică” no. 1/2013, p. 138-141. The comment is available on juridice.ro. In another case, the Court accepts as indirect evidence the fact that the person causing the risk to the family (wife and child) was at the same time subject to a criminal investigation for actions against other family members (parents, siblings): The fact that the appealing-defendant poses a threat for the physical and psychological integrity of his wife and son may also result indirectly from the circumstances whereby the defendant behaves in the same physical and psychological aggressive manner with the other members of his family, namely with his parents and brother, the appellant being party in a number of criminal cases where he is under investigation for several counts of domestic violence, threats, criminal damage and trespassing. **Florin Radu**, *Culegere de practică judiciară în materie civilă pe anul 2014* (Collection of case law in civil matters for the year 2014). Hunedoara Town Court, Publisher: Editura Universul Juridic, 2015, p. 62-66.

⁹¹ M. Bogdan, op. cit, p. 409.

Directive, with consequences on the implementation of the Regulation⁹², or because the notion of *victim* is not common for the Directive and the Regulation.

⁹² For exemplification, see: **Andrea Ryan**, *A Lot is Happening in European Criminal Justice – But Not in Ireland...*, 6 May 2016, available here: <https://criminaljusticeinireland.wordpress.com/2016/05/06/a-lot-is-happening-in-european-criminal-justice-but-not-in-ireland/>

TOPIC NO. 4

APPLICABILITY OF REGULATION (EU) NO. 606/2013 IN THE CONTEXT OF REGULATIONS BRUSSELS IA AND BRUSSELS IIA

§1. Applicability of Regulation (EU) no. 606/2013 in the context of the European regulations on judicial cooperation in civil matters

Though some of the literature the listing of European Union legal acts instating measures on the European protection order seems to indicate an overall progress⁹³, other works draw attention to the complexity of the approach, method, purpose and instruments.⁹⁴

Regulation no. 606/2013 lies at the intersection of different directions – element for implementing the free movement of persons, specific means for recognising a judgement passed in another State, a component of family protection as a fundamental right on the European Union, and protecting the weaker party in a trial.

The applicability of Regulation (EU) no. 606/2013 in relation to Regulations Brussels Ia⁹⁵ (or I bis, more specifically, Regulation (EU) no. 1215/2012) and Brussels Iia⁹⁶ (or II bis, more specifically, Regulation (CE) no. 2201/2003) is outlined from the Regulation preamble. According to paragraph 11 of the preamble, Regulation no. 606/2013 “*should not interfere with the functioning of Council*

⁹³ **Begona Vidal Fernandez**, *Victims as Individuals with Rights in the European Union: Their Protection and their Legal Standing* in vol. **Joanna Beata Banach-Gutierrez and Christopher Harding** (eds), *EU Criminal Law and Policy. Values, Principles and Methods*, Routledge, 2016, p. 173. See also: **Jens M. Scherpe** (ed), *European Family Law Volume I. The Impact of Institutions and Organisations on European Family Law*, Edward Elgar, 2016, p. 273

⁹⁴ Extensively, **A. Dutta**, op. cit., p. 180-183; **Maria Bergström**, *Mutual Recognition in Civil and Criminal Justice: Towards Order and Method?*, in **Burkhard Hess, Maria Bergström, Eva Storskrubb**, *EU Civil Justice Current Issues and Future Outlook*, Bloomsbury, 2016. See also: **Agnieszka Frąckowiak-Adamska**, *Time for a European 'full faith and credit clause'*, *Common Market Law Review*, 2015, vol. 52, p. 192 and subsequent. The author makes a “state of art” review, noticing the possible complexity that led to situations like that mentioned by Xandra Kramer (**Xandra E. Kramer**, *Cross-Border Enforcement in the EU: Mutual Trust Versus Fair Trial? Towards Principles of European Civil Procedure*, *International Journal of Procedural Law*, Vol. 2, p. 202-230, 2011 available at SSRN: <https://ssrn.com/abstract=1995682>).

⁹⁵ Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, published in OJ L 351, 20.12.2012, p. 1–32.

⁹⁶ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental

Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility ('Brussels IIa Regulation'). Decisions taken under the Brussels IIa Regulation should continue to be recognised and enforced under that Regulation".

Further down, we will analyse a number of practical aspects of the relation between Regulation (EU) no. 606/2013 and other European regulations in the area of judicial cooperation in civil matters.

It should be mentioned that the professional associations (e.g. the Bars) considered that the protection order being regulated only in criminal matters generated a vacuum and, moreover, instability of measures that have the same purpose, as shown in the Judgement we quoted extensively in the previous Chapter (Motru Town Court).¹¹¹ Also, it has been shown that the instatement of the European protection order (in criminal matters) has been an ambitious measure, since in many of the European Union Member States the protection measures are of civil, and not criminal nature.¹¹²

§ 2. Regulation Brussels IIa and Regulation no. 606/2013

The connections between¹¹³ **Regulation Brussels IIa** and Regulation no. 606/2013 are highlighted in the legal literature. More specifically, the measures stipulated in Regulation no. 2201/2003¹¹⁴ are not impacted upon by the measures taken based on Regulation no. 606:

- (a) rights of custody and rights of access;
- (b) guardianship, curatorship and similar institutions;

responsibility, repealing Regulation (EC) No 1347/2000, published in OJ, special edition in the Romanian Language, Chapter 19 vol. 006 p. 183 – 211 [OJ L 338, 23.12.2003, p. 1–29].

¹¹¹ CCBE Response to the European Commission Proposal for a Regulation on mutual recognition of protection measures in civil matters, the document is available at http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/CRIMINAL_LAW/CRM_Position_papers/EN_CRM_20120330_CCBE-Response-to-the-European-Commission-Proposal-for-aRegulation-on-mutual-recognition-of-protection-measures-in-civil-matters.pdf

¹¹² Anne Weyembergh, Zlata Durdevic, *Judicial control in cooperation in criminal matters. The evolution from judicial cooperation to mutual recognition* în vol. Katalin Ligeti (ed), *Toward a Prosecutor for the European Union, Volume I, A Comparative Analysis*, Hart/Beck Publishing, 2012, p. 958.

¹¹³ Begona Vidal Fernandez, *op. cit.*, p. 173, as well as the literature quoted in footnote 28.

¹¹⁴ On the scope of Regulation no. 2201/2003, see Călina Jugastru, *Competența internațională a instanțelor române (International Jurisdiction of Romanian Courts)*, in Ioan Leș (coordinator), Călina Jugastru, Verginel Lozneanu, Adrian Circa, Eugen Hurubă, Sebastian Spinei, *Tratat de drept procesual civil (Treaty of Civil Process Law) Volume II. Căile de atac. Procedurile speciale. Executarea silită. Procesul civil internațional. Conform Codului de procedură civilă republicat (Remedies. Special procedures. Enforcement. The international Civil Trial. According to*

the Code of Civil Procedure, recast) Publisher: Editura Universul Juridic, Bucharest, 2015, p. 834-835.

- (c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
- (d) the placement of the child in a foster family or in institutional care;
- (e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

Furthermore, the protection measures that concern unmarried couples, same gender partners or neighbours are an example of measures that are not covered by Regulation Brussels II-bis.⁹⁷

An interesting exclusion that could be subject to interpretation by the Court of Justice is that stipulated in Article 2 (3)⁹⁸ and paragraph 11 of the preamble of Regulation no. 606/2003. M. Bogdan appreciates that banning contacts or visits between spouses could be envisaged (required in divorce, separation or cancellation of marriage proceedings), but the practice might come up with different answers, this remaining an open question.⁹⁹ In the mirror, paragraph 8 of the preamble to Regulation Brussels IIa concerning the effects of the abovementioned proceedings, considers that this Regulation “should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures”, where “any other ancillary measures” might also mean a protection order.

A study prepared for the European Commission¹⁰⁰ showed that some Member States have difficulties in identifying the differences between the aim of Regulation Brussels IIa and that of Regulation no. 606/2013, in particular when it comes to Article 20 of Regulation no. 2201/2003.¹⁰¹ Article 20 of the Regulation 2201 has

⁹⁷ **Marta Requejo**, *Regulation on the Mutual Recognition of Protection Measures in Civil Matters*, available here <http://conflictoflaws.net/2012/regulation-on-the-mutual-recognition-of-protectionmeasures-in-civil-matters/>

⁹⁸ “This Regulation shall not apply to protection measures falling within the scope of Regulation (EC) No 2201/2003.”

⁹⁹ **M. Bogdan**, op. cit., p.

¹⁰⁰ **European Commission, Directorate-General for Justice and Consumers**, *Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment*, This assignment was conducted by a team from Deloitte, headed by **Luc Chalsège** with the support of **Éva Kamarás, Katarina Bartz, Anna Siede, Florian Linz, Charlotte Dekempeneer, Lionel Kapff, Nicolas Moalic** and the external expert prof. **Rainer Hausmann**. The Study is available here http://ec.europa.eu/justice/civil/files/bxl_iaa_final_report_evaluation.pdf, p. 11.

¹⁰¹ The title of Article 20 of Regulation no. 2201 is “Provisional, including protective, measures:

been subject to references for a preliminary ruling, therefore, has been posing significant interpretation difficulties.¹⁰²¹⁰³¹⁰⁴⁰

The Court of Justice has emphasised that Article 20 (1) of Regulation no. 2201/2003 provides that “the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter. Since this in an exception from the system of competences established by the Regulation, this provision should be interpreted strictly.

It follows from the very wording of Article 20(1) that the adoption of measures in matters of parental responsibility by courts of Member States which do not have jurisdiction as to the substance of the matter is subject to three cumulative conditions, namely: the measures concerned must be urgent; they must be taken in respect of persons or assets in the Member State where the court seised of the dispute is situated; and they must be provisional¹²¹.”

Moreover, the European Court appreciated that “admitting an emergency in such a case would breach the principle of mutual recognition of judgements issued in the Member States instated by Regulation no. 2201/2003, a principle that, in turn, is based on the principle of mutual trust between the Member States, as shown in recital (21) of the Regulation.” (Paragraph 45).

In addition, the same Study¹²² showed that, in reality, the family law is not at all harmonised, this leading to unjustified complexities and *ad hoc* solutions in practice and in the interpretation of certain concepts, such as that of “usual residence”.

§ 3. Regulation Brussels Ia and Regulation no. 606/2013

Though a relation seems to exist between Regulation no. 606/2013 and Regulation no. 1215/2012, it should be taken into account that Article 1 refers only to “rules for a simple and rapid mechanism for the recognition of protection measures”, whilst Article 67 of Regulation no. 1215 states that “This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgements in specific matters which are contained

¹⁰² . In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.

¹⁰³ . The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.”

¹⁰⁴ C-403/09 PPU, Detiček, Judgement of 23 December 2009, ECR 2009 p. I-12193) ECLI:EU:C:2009:810: “Article 20 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters

in instruments of the Union or in national legislation harmonised pursuant to such instruments”. Thus, it is easy to see that, in fact, Regulation no. 606 does not

and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, must be interpreted as not allowing, in circumstances such as those of the main proceedings, a court of a Member State to take a provisional measure in matters of parental responsibility granting custody of a child who is in the territory of that Member State to one parent, where a court of another Member State, which has jurisdiction under that regulation as to the substance of the dispute relating to custody of the child, has already delivered a judgment provisionally giving custody of the child to the other parent, and that judgment has been declared enforceable in the territory of the former Member State.”

¹²¹ See for this Case A, C-523/07, Judgement of 2 April 2009, ECR 2009 p. I-2805, ECLI:EU:C:2009:225, paragraph 47

¹²² **European Commission, Directorate-General for Justice and Consumers**, *Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment*, quoted *supra*. establish any form of jurisdiction, but continues to refer to Regulation Brussels Ia.¹⁰⁵

Regulation Brussels Ia comes up with an essential change, namely, it abolishes the exequatur¹⁰⁶. The role as a “bridge” of the exequatur is underscored, which means the formality of recognising a foreign decision, but also verifying it. Nonetheless, according to Article 45 of Regulation no. 1215/2012, any interested party may apply for a refusal of recognition¹⁰⁷. Therefore, this is not a reform *per se*, but rather an attempt to eliminate formalities in those cases in which the parties act in good faith in enforcing the judgement. Regulation no. 606/2013 envisages the simplification of the recognition procedure and states, in a rather poetic manner, that “a protection measure ordered in one Member State (‘Member State of origin’) should be treated as if it had been ordered in the Member State where its recognition is sought (‘Member State addressed’).” Regulation no. 606/2013 regulates the recognition and enforcement of the protection order. It is interesting to note that the European law makers went even further than indicated in the preamble, referred to the legal tradition of the Member States and imposed the requirement of recognition,

¹⁰⁵ M. Bogdan, *op. cit.*, p. 409-410. See also Case 120/79, *De Cavel*, Judgement of 6 March 1980, ECR 1980 p. 731; **Anatol Dutta**, *op. cit.*, p. 171 shows that the initial draft of the Commission also covered jurisdiction.

¹⁰⁶ Extensively, on the exequatur systems, see: **Agnieszka Frackowiak-Adamska**, *op. cit.*, p. 194, in particular p. 198-199 on Regulation Bruxelles Ia and Regulation no. 606/2-013; **Marta Requejo Isidro**, *The Enforcement of Monetary Final Judgements Under the Brussels Ibis Regulation (A Critical Assessment)* in the volume **Vesna Lazić, Steven Stuij, (Eds.)**, *Brussels Ibis Regulation. Changes and Challenges of the Renewed Procedural Scheme*, Springer, 2017, p. 72 and subsequent.; **Marta Requejo Isidro**, On the Abolition of Exequatur in the volume of **Burkhard Hess, Maria Bergström, Eva Storskrubb**, *EU Civil Justice Current Issues and Future Outlook*, Bloomsbury, 2016.

¹⁰⁷ This time, the topic is the recognition via the court of law (main or incidental recognition). On the grounds for refusing recognition, mentioned in Article 45 of the Regulation, see, **Călina Jugastru**, *Eficacitatea hotărârilor străine – aspecte de drept European (Effectiveness of foreign judgements – European law aspects)*, in *Anuarul Institutului de Istorie „George Barițiu”* (Yearbook the “George Barițiu” Institute of History) of the Romanian Academy, Series “Humanistica”, tome XIV, Publisher: Editura Academiei Române, Bucharest, 2016, p. 265-269, available at http://www.humanistica.ro/index_ro.htm.

reasoning that such traditions cannot be grounds for refusing the enforcement of the protection order if “the law of the Member State addressed does not allow for such a measure based on the same facts.” [Article 13 (3)].¹⁰⁸ The abolition of the exequatur was also analysed by the European Court of Human Rights in the Case of Povse vs. Austria¹⁰⁹. The Judgement placed under a

¹⁰⁸ This is how the free movement of citizens is supported by international instruments of private law. For another example, see: **Pierre Callé**, *Promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents within and outside the European Union (Proposal for a Regulation, COM(2013) 208)*, in the collective volume *Cross-border activities in the EU - Making life easier for citizens*, European Parliament, DIRECTORATE GENERAL FOR INTERNAL POLICIES POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS, p.54 and subsequent, available at [http://www.europarl.europa.eu/cmsdata/98654/IPOL_STU\(2015\)510003_EN.pdf](http://www.europarl.europa.eu/cmsdata/98654/IPOL_STU(2015)510003_EN.pdf)

¹⁰⁹ Judgement of 8 June 2013, admissibility, Petition no. 3890/11.

question mark the reform, seen rather as a political token.¹¹⁰ Regulation Brussels was considered as a legal act that protects the weaker party.¹²⁹

§4. Relation between Brussels Ia and Brussels IIa from the perspective of provisional and protective measures. Case law of CJEU.

In a previous Judgement, the Court of Justice stated: “the system of recognition and enforcement provided for by Regulation No 2201/2003 is not applicable to measures which fall within the scope of Article 20 of that regulation.” (point 83).¹¹¹

For the purpose of identical reasoning, the same situation is found in Regulation no. 606/2013.

For judging this case, the Court of Justice referred to the preparatory documents of Regulation no. 2201/2003.

“As is clear from the explanatory memorandum in the Commission’s 2002 proposal which led to the adoption of Regulation No 2201/2003 (COM(2002) 222 final), Article 20(1) of that regulation has its origins in Article 12 of Regulation No 1347/2000, which is a re-statement of Article 12 of the Brussels II convention. The explanatory memorandum in the Commission’s 1999 proposal which led to the adoption of Regulation No 1347/2000 (COM (1999) 220 final) and the Borrás report on the Brussels II convention both indicate, in identical terms in relation to those articles, that ‘[t]he rule laid down in this Article is confined to establishing territorial effects in the State in which the measures are adopted’.”

The Borrás report emphasises in that regard the difference in wording between Article 12 of the Brussels II Convention and Article 24 of the Brussels Convention in that ‘the measures to which Article 24 ... refers are restricted to matters within the scope of the Convention [and] ... on the other hand, have extraterritorial effects.’ It is clear from this comparison with the Brussels convention that those drafting the Brussels II convention intended to establish a link between the matters which provisional measures could deal with and the territorial effect of those measures.

The explanation for that link may be the risk of circumvention of rules laid down in other European Union legislation, in particular Regulation No 44/2001. As was stated both in the explanatory memorandum in the Commission’s 1999 proposal which led to the adoption of Regulation No 1347/2000 and in the Borrás report, the provisional measures covered by Article 20 of Regulation No 2201/2003 relate both to persons and assets and encompass, consequently, matters outwith the scope of that

¹¹⁰ **Monique Hazelhorst**, *The ECtHR's Decision in Povse: Guidance for the Future of the Abolition of Exequatur for Civil Judgements in the European Union*. *European Court of Human Rights* 18 June 2013, *Decision on Admissibility*, Appl. No. 3890/11 (*Povse v. Austria*), in *Nederlands Internationaal Privaatrecht* 2014 (1) p. 27-33. The article is available from SSRN: <https://ssrn.com/abstract=2553110>

¹²⁹ **Vesna Lazic**, *Procedural Justice for ‘Weaker Parties’ in Cross-Border Litigation under the EU Regulatory Scheme*, *Utrecht Law Review*, Vol. 10, No. 4, p. 100-117, November 2014. Available at SSRN: <https://ssrn.com/abstract=2529971>

¹¹¹ Case C-256/09, *Purrucker*, Judgement of 15 July 2010, ECR 2010 p. I-7353, CLI:EU:C:2010:437.

regulation. Thus, if the system of recognition and enforcement provided for in Regulation No 2201/2003 were applicable, that would create the possibility of the recognition and enforcement, in other Member States, of measures relating to matters outwith the scope of that regulation, measures the adoption of which might, for example, be contrary to rules providing for the specific or exclusive jurisdiction of other courts pursuant to Regulation No 44/2001.

There is no evidence whatsoever in Regulation No 2201/2003 of an intention to cast aside the explanations given in those preparatory documents in relation to the effects of measures falling within the scope of Article 20 of that regulation. On the contrary, the position of that provision within the regulation and the expressions ‘shall not prevent’ and ‘should not prevent’, to be found in Article 20(1) and Recital 16 of the regulation, show that measures within the scope of Article 20 do not fall into the category of judgements which are adopted in accordance with the rules of jurisdiction laid down by that regulation and which qualify, therefore, for the system of recognition and enforcement established there under.” (points 84-87)

Besides the arguments indicated (that are based on the European law makers’ thinking), the Court also took into account the arguments of the interveners:

- two significant differences distinguish Article 11(1) of the 1996 Hague Convention from Article 20 of Regulation No 2201/2003. First, Article 11 of the convention is manifestly designed to be a rule of jurisdiction and structurally is to be found in the list of provisions of that type, which is not true of Article 20 of the regulation (point 89);
- the judicial review in the Hague system is different from the provisions of Article 24 of Regulation no. 2201, which prohibits any review of the jurisdiction of the court of the Member State of origin (point 90); - the risk of forum shopping (point 91).

It should be mentioned that, whilst Regulations Brussels Ia and IIa stipulate rules on the jurisdiction of and cooperation between the courts, Regulation no. 606/2013 provides that cooperation may also take place between national courts and administrative authorities.¹¹²

TOPIC NO. 5

¹¹² See also **Evelien Brouwer, Damien Gerard**, *Mapping mutual trust: understanding and framing the role of mutual trust in EU law*, EUI MWP; 2016/13, available at <http://cadmus.eui.eu/handle/1814/41486>

Paragraph 18 of Regulation no. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims is quoted: “Mutual trust in the administration of justice in the Member States justifies the assessment by the court of one Member State that all conditions (...) are fulfilled to enable a judgment to be enforced in all other Member States without judicial review of the proper application of the minimum procedural standards in the Member State where the judgment is to be enforced.” In fact, the internal market was also based on administrative cooperation and communication structure. For examples, see mainly p. 62 and subsequent.

COOPERATION BETWEEN THE NATIONAL JUDGE AND THE CJEU IN THE CONSISTENT INTERPRETATION AND APPLICATION OF REGULATION (EU) NO. 606/2013

§1. Jurisdictional cooperation – Principles

Jurisdictional cooperation between the national judge and the Court of Justice of the European Union has been the subject of noteworthy literature, the procedure of the reference for a preliminary ruling being regulated in Article 267 TFEU.¹¹³

The important role of Regulation no. 606/2016 is emphasised in a research¹¹⁴, but also the fact that national case law does not exist. Certainly, the Regulation remains important, along side other legal acts, directives and regulations on succession, legal aid and mediation that require ever more specialised developments in the matter of civil law.

The reference for a preliminary ruling was regulated as a method whereby an institution of the European Union may ensure the consistent interpretation of the Union Law in all the Member States.¹¹⁵ “In principle, the decision whether to submit a reference for a preliminary ruling falls within the jurisdiction of the national courts. This is an example of shared jurisdiction, the success of which depends on mutual cooperation”.¹³⁵ Such cooperation is achieved starting from the fundamental principles of the European Union Law, namely loyal cooperation. Thus, it has been

¹¹³ The possibility for cooperation and sharing relevant judgements is also envisaged by the European Institute of Florence that has developed a database of Court judgements <http://judcoop.eu.europa.eu/data/?p=ata>. Also, the website of the Association of the Councils of State and Administrative jurisdictions of the European Union (ACA-Europe) may be of interest <http://www.aca-europe.eu/index.php/en/jurisprudence-en/9-uncategorised/384-guide-to-preliminary-ruling-proceedings-before-the-europeancourt-of-justice>

¹¹⁴ **Dr.iur Inga Kačevska, Dr.iur Baiba Rudevska, Dr.iur Arnis Buka, Mg.iur Mārtiņš Dambergs, LL.M Aleksandrs Fillers**, *The Court of Justice of the European Union and the impact of its case law in the area of civil justice on national judicial and administrative authorities (Latvia, Hungary, Germany, Sweden and the United Kingdom)*, Riga, 2015, p. 19, 110.

¹¹⁵ The Court of Justice has repeatedly emphasized its organic jurisdiction in interpreting the EU law. Thus, in particular after the adoption of the Treaty of Lisbon, it has been underscored that “With respect more particularly to the preliminary ruling procedure provided for in Article 267 TFEU, it may be pointed out in this connection that its method of operation, as a result of its decentralised nature which means that the national courts have general jurisdiction in respect of European Union law, has given altogether satisfactory results for more than half a century, even though the Union now consists of 27 Member States. However, it is not certain that a reference for a preliminary ruling will be made to the Court of Justice in every case in which the conformity of European Union action with fundamental rights could be challenged.” (*Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European*

noted¹³⁶ that the “the mechanism of judicial cooperation between the national courts and the CJ is based on the recognition of the national courts’ exclusive jurisdiction to decide whether to refer or not a prejudicial question, a discretionary competence that is justified by the fact that only the national courts may have knowledge of the main trial and the applicability of EU law in each individual case.”

As part of *judicial cooperation*, the national courts should ensure the *effective application* of the EU law¹³⁷: “In that context, it should be noted that it is for the national courts to interpret, as far as it is possible, the provisions of national law in such a way that they can be applied in a manner which contributes to the implementation of Community law. It also follows from settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation”.

In the context of *conform interpretation* and application of Regulation no. 606/2013, it is relevant to quote the Court Judgement that states that “It is for the national court to the full extent of its discretion under national law, to interpret and apply domestic law in accordance with the requirements of Community law and, to the extent that such an interpretation is not possible in relation to the EC Treaty provisions conferring rights on individuals which are enforceable by them and which the national courts must protect, to disapply any provision of domestic law which is contrary to those provisions”.¹³⁸

The European Union Law is interpreted within the framework of the Treaties that provide for *procedural autonomy* of the Courts. “in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law”.¹³⁹

Convention for the Protection of Human Rights and Fundamental Freedoms, available here https://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_ro_2010-05-21_08-58-25_717.pdf)

¹³⁵ L. Woods, J. Steiner, *EU law*, 10th ed., Oxford University Press, 2009, p. 225.

¹³⁶ Elena Simina Tănăsescu, *Trimiterea preliminară and cooperarea judiciară loială (The reference for a preliminary ruling and loyal judicial cooperation)*, Revista română de drept european (Romanian Review of European Law) no. 3/2012, p.33.

¹³⁷ Case C-119/05, Lucchini, Judgement of 18 July 2007, ECR 2007 p. I-6199, ECLI:EU:C:2007:434, points 60-61.

¹³⁸ Case C-208/05, ITC, Judgement of 11 January 2007, ECR 2007 p. I-181, ECLI:EU:C:2007:16 ¹³⁹ Case C-435/05, Investrand, Judgement of 8 February 2007, ECR 2007 p. I-1315, ECLI:EU:C:2007:87.

It is the task of the national courts to ensure legal certainty, taking into account the Community legal order.¹¹⁶

According to Paul Craig, the difference between interpretation and application is essential for determining the jurisdictions of national Courts and of the CJEU. „Article 267 TFEU grants the Court the power to interpret the Treaty, but does not specifically empower it to apply the Treaty to the facts of a particular case. It is deemed that precisely this distinction between interpretation and application defines the division of competences between CJEU and the national courts: the former interprets the Treaty and the latter apply such interpretation to the facts of a specific case. This is the distinction said to differentiate the relation between the national courts and CEJ from a federal system of hierarchical control, where the upper court may decide in the specific case”.¹¹⁷ The Court of Justice does not interpret the national law, nor its conformity with the Community Law.

In several cases, the Court of Justice emphasised that the preliminary ruling proceedings are a tool for cooperation between the national judge and the Court of Justice.¹¹⁸ This principle has multiple effects on the entire procedure, such as the unmotivated withdrawal of the reference by the national court or the possibility of the court to formulate its own opinion on the raised question. Moreover, the Court of Justice may request clarification on the reference submitted, on the applicable national law or the context in which the reference was formulated. At the same time, where it considers that this is the case, may inform the national court that it has already issued a judgement on the question referred and ask whether the national court maintains its question. Of course, it is the role of the national court to decide whether it maintains the reference or not. Furthermore, the procedure for formulating the reference – whether it submits a document from the case file (a decision) or a separate document – is an issue that is dependant on the decision of the national court and, possibly, on the civil procedure of the Member State.

§ 2. Making a referral for a preliminary ruling

Judicial cooperation between the courts of the Member States and the Court of Justice starts with the national court raising a question for preliminary ruling. The proceedings are non-litigious and this principle leads to the conclusion that there no

¹¹⁶ Case C-344/04, IATA and ELFAA, Judgement of 10 January 2006, ECR 2006 p. I-403, ECLI:EU:C:2006:10.

¹¹⁷ **Paul Craig**, *Dreptul Uniunii Europene, Comentarii, jurisprudență and doctrină*, ed. a 5-a (EU law: Text, Cases, and Materials, 5th ed.) Bucharest, Publisher: Ed. Hamangiu, Bucharest, 2009, p. 618. See also: **Mihai Șandru, Mihai Banu, Dragos Călin**, *Procedura trimiterii preliminare. Principii de drept al Uniunii Europene and experiențe ale sistemului român de drept (The procedure of the reference for a preliminary ruling. Legal principles of the EU and the experience of the Romanian judiciary)*, Publisher: Editura C.H. Beck, 2013, p. 15

¹¹⁸ Case C-343/90, Lourenço Dias, Judgement of 16 July 1992, ECR 1992 p. I-4673, ECLI:EU:C:1992:327, paragraph 14; Case C-144/04, Mangold, Judgement of 22 November 2005, ECR 2005 p. I-9981, ECLI:EU:C:2005:709, paragraph 33.

parties as such appear in front of the Court of Justice. The jurisdiction of national courts to address questions to the Court of Justice stems from the Treaty on the Functioning of the European Union. Certainly, this may be appended with the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings. The Recommendations have a technical character, providing guidance to the national courts on appropriateness (e.g., the appropriate stage of the trial at which to make a reference for a preliminary ruling).

It is irrelevant whether the reference for a preliminary ruling was proposed by the parties or it was made *ex-officio*. Of course, in order to observe the adversarial character of the trial, the national court raises the referral for the discussion of the parties. Even where the parties request a referral, the court is solely responsible for making the reference. The text of the referral may be discussed with the parties and they may have the right to appeal against the referral, but the court of appeal may not withdraw the referral made by the lower court. The rationale of the reference for a preliminary ruling is not for the Court of Justice to deliver consultative opinions on general or hypothetical issue, but should be necessary to the referring court.¹¹⁹

The preliminary referral is not an appeal against a judgement of the national judiciary.¹²⁰ In fact, in the Court case law, the relationship between the national judge and the Court of Justice has been deemed to be based on the European Law.¹²¹

The request for a preliminary ruling should include the following information as a minimum:¹⁴⁶

1. The referring court or tribunal

A request for a preliminary ruling must specify the referring court or tribunal and, where appropriate, the chamber or formation of the court or tribunal making the reference, and must include full contact details for that court or tribunal, in order to facilitate subsequent contact between that court or tribunal and the Court of Justice.

2. The parties to the main proceedings and their representatives

After specifying the referring court or tribunal, the request for a preliminary ruling should state the names of the parties to the main proceedings and anyone representing them before that court or tribunal.

3. The subject matter of the main dispute and the relevant facts

¹¹⁹ See C-466/04, *Acereda Herrera*, Judgement of 15 June 2006, ECR 2006 p. I-5341, ECLI:EU:C:2006:405, paragraph 48.

¹²⁰ Case C-376/05, *Brünsteiner*, 30 November 2006, ECR 2006 p. I-11383, ECLI:EU:C:2006:753, paragraph 28.

¹²¹ Case 244/80, *Foglia*, 16 December 1981, ECR 1981 p. 3045, ECLI:EU:C:1981:302, paragraph 16.

¹⁴⁶ The absence of one or several elements will lead to cumbersome proceedings or even to the rejection of the request of the national court. After adequately completing the request, the national court may make a new reference for a preliminary ruling.

The referring court or tribunal must briefly describe the subject matter of the dispute in the main proceedings and the relevant findings of fact, as determined by that court or tribunal.

4. The relevant legal provisions

The request for a preliminary ruling must contain precise references to the national provisions applicable to the facts of the dispute in the main proceedings, including any relevant case-law, and the provisions of EU law whose interpretation is sought or whose validity is challenged.

5. The grounds for the reference

The Court can rule on the request for a preliminary ruling only if EU law is applicable to the case in the main proceedings.

6. The questions referred for preliminary ruling

The referring court or tribunal should set out, clearly and distinctly, the questions it is submitting to the Court for a preliminary ruling.

7. Possible need for specific treatment

Lastly, where the referring court or tribunal considers that the request it is submitting to the Court has to be dealt with in a particular way, both as regards the need to preserve the anonymity of the persons concerned by the dispute in the main proceedings and as regards the rapidity with which the request may have to be dealt with by the Court, the reasons for such treatment must be set out in detail in the request for a preliminary ruling and in any covering letter.

This latter aspect is important in the matter of Regulation no. 606/2013. The national court should inform the parties that the request may be anonymised, given that the acts described in the reference for a preliminary ruling may be embarrassing for certain persons and may concern their private life. Such information about the parties, though important, may be anonymised.¹²²

§ 3. The jurisdiction of the Court of Justice

The Court of Justice is called upon to decide on the interpretation of EU law, within the limits of jurisdiction imposed on it by the Treaties. Requested to issue an opinion on the grounds of Article 267 TFEU, the Court of Justice has jurisdiction *ratione materiae* to rule on the interpretation of the Treaty and on the validity and interpretation of acts of the Community institutions. The jurisdiction of the Court is confined to considering provisions of EU law only.¹²³

¹²² Regulation no. 606/2013 includes references to the protection of personal data.

¹²³ Case C-453/04, *Innoventif*, 1 June 2006, ECR 2006 p. I-4929, ECLI:EU:C:2006:361, paragraph 29.

The Court has no jurisdiction to rule on the interpretation of provisions other than those of Community law.¹²⁴ The Court has no jurisdiction on European Union acts that have not yet been adopted.¹²⁵

As for the *ratione temporis* aspect, this is not an issue under Regulation no. 606/2013, given that, after its adoption, no other Member States acceded to the EU. Some factual issues may exist, raising objections as to the applicability of the Regulation in a particular situation, but this should not be the case either, since almost two years have passed since its entry into force and no reference for a preliminary ruling has been made.

With regard to the international regulations on judicial cooperation, an interesting aspect may be identified in Court Judgement where it ruled that it has no jurisdiction to interpret international treaties, even when Member States are signatories or parties to them.¹²⁶

§ 4. Elements for potential referrals for preliminary rulings in the matter of Regulation (EU) no. 606/2013

Same as the other regulations on judicial cooperation in civil matters, Regulation no. 606/2013 could be the subject matter of referrals for preliminary rulings. Certain key points are present in the Regulation, which, depending on the national law, might need to be further defined, namely the notions of “victim” and that of “residence”.

§5. The preliminary reference – possibility or obligation

As Article 267 provides:

“Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.”

The option of the court to make a reference for a preliminary ruling should be seen, on the one hand, in the context of its liability for disregarding the European Union law and, on the other hand, of the need for the referral to meet the relevance and utility requirements. Furthermore, the CILFIT criteria should be taken into

¹²⁴ Case C-141/99, AMID, 14 December 2000, ECR 2000 p. I-11619, ECLI:EU:C:2000:696, paragraph 29

¹²⁵ C-343/90, citat supra, paragraph 18.

¹²⁶ Case 130/73, *Vandeweghe and Others/ Berufsgenossenschaft für die chemische Industrie*, ECR 1973 p. 1329, ECLI:EU:C:1973:131, 27 November 1973, paragraph 2, 4. Exceptions from the rule exist, when the international treaty or agreement is integrated in the legal order of the EU. In this latter situation, the CJ demonstrated its competence to interpret even mixed agreements.

account: “it follows from the relationship between the second and third paragraphs of Article [267 TFEU] that the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case”¹²⁷.

“Although the third paragraph of Article [267] unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law ... to refer to the Court every question of interpretation raised before them, the authority of an interpretation under Article [267] already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case”. (paragraphs 13-14).

“[...] the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.” (Paragraph 16)

§6. Rephrasing preliminary questions

The Court of Justice has jurisdiction to rephrase the preliminary questions or, considering a number of questions and the relevance of the answer, to give a single ruling on several preliminary questions. The national court may follow up with a new reference for a preliminary ruling, and Court of Justice has the possibility (jurisdiction) to interpret its own rulings.

§7. The notion of “court making a reference for preliminary ruling”

The notion of court has autonomous character in the Community law and only the Court of Justice may decide in this respect¹²⁸. In the context of Regulation no.

¹²⁷ Case 283/81, *CILFIT/Ministero della Sanità*, Judgement of 6 October 1982, ECR 1982 p. 3415, ECLI:EU:C:1982:335, paragraph 10.

¹²⁸ See Anamaria Toma-Bianov, “ICSID Arbitral Tribunals and the Direct Referrals to the Court of Justice of European Union”, *MEALEY's International Arbitration Report*, 31(10), 2016

606/2013, it is possible that certain administrative authorities to be interested in making references for preliminary rulings.¹²⁹

In a recent case, the Court had the opportunity to reiterate the criteria based on which a court is defined:¹³⁰

“In that regard, it must be recalled that, in accordance with settled case-law of the Court, in order to determine whether a body making a reference is a ‘court or tribunal’ for the purposes of Article 267 TFEU, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, *inter alia*, the judgements in *Miles and Others*, C- 196/09, EU:C:2011:388, paragraph 37 and case-law cited, and *Belov*, C- 394/11, EU:C:2013:48, paragraph 38).

As regards, more specifically, the independence of the body making a reference, that condition presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them (see *Wilson*, EU:C:2006:587, paragraph 51).

Further, in order to establish whether a national body, entrusted by law with different categories of function, is to be regarded as a ‘court or tribunal’ within the meaning of Article 267 TFEU, it is necessary to determine in what specific capacity it is acting within the particular legal context in which it seeks a ruling from the Court. A national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see *Belov*, EU:C:2013:48, paragraphs 39 and 41).” (points 17-19)

§8. The dispute should be real, not fictitious, and be pending in a court

The Court of Justice has rejected a number of references for a preliminary ruling on the grounds that they were devised or hypothetical.

In a case¹³¹ where the claim that the reference was inadmissible was closely examined, we note the mechanism used by the Court to rule based on this principle: (...) *dispute the admissibility of the references for a preliminary ruling.*

First of all, they argue, the referring court does not provide any information on the factual situation of Mr Blanco Pérez and Ms Chao Gómez. Secondly, it does not clearly indicate the provisions of national law concerned and does not sufficiently set out the reasons which led it to inquire as to the compatibility of those provisions with Article 49 TFEU. Lastly, the questions referred are hypothetical since the disputes in the main proceedings concern two Spanish nationals. In the

¹²⁹ Case C-96/04, *Standesamt Stadt Niebüll*, Judgement of 27 April 2006, ECR 2006 p. I-3561, ECLI:EU:C:2006:254, paragraph 13

¹³⁰ Cases C-58/13 and C-59/13, *Torresi*, Judgement of 17 July 2014, ECLI:EU:C:2014:2088.

¹³¹ Joined Cases C-570/07 and C-571/07, *Blanco Pérez and Chao Gómez*, Judgement of 1 June 2010, ECR 2010 p. I-4629, ECLI:EU:C:2010:300, paragraph 33-41.

absence of any cross-border element, those questions are unrelated to European Union law ('EU law').

In that regard, it should be borne in mind that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling¹³².

It follows that questions concerning EU law enjoy a presumption of relevance. Thus, the Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.¹³³

Having regard to that case-law, it should be observed, first, that the national court states in the orders for reference, as the reason why it considers it necessary to refer the questions for a preliminary ruling, that the lawfulness of the legislation at issue in the main proceedings depends on the interpretation by the Court of Article 49 TFEU.

Secondly, it is not obvious that the interpretation sought is unrelated to the actual facts of the main actions or their purpose, or that the problem is hypothetical.

Admittedly, it is common ground that Mr Blanco Pérez and Ms Chao Gómez are of Spanish nationality and that all aspects of the main proceedings are confined within one Member State. However, as is apparent from the case-law, the Court's answer may be useful to the referring court even in such circumstances, in particular if its national law were to require it to grant a Spanish national the same rights as those which a national of another Member State would derive from EU law in the same situation¹³⁴.

Furthermore, while national legislation such as that at issue in the main proceedings – which applies to Spanish nationals and to nationals of other Member States alike – is, generally, capable of falling within the scope of the provisions relating to the fundamental freedoms established by the Treaty only to the extent that it applies to situations connected with trade between the Member States, it is far from inconceivable that nationals established in Member States other than the Kingdom

¹³² C-379/98, *PreussenElektra*, Judgement of 13 March 2001, ECR 2001 p. I-2099, ECLI:EU:C:2001:160, paragraph 38; C-169/07, *Hartlauer*, Judgement of 10 March 2009, ECR 2009 p. I-1721, ECLI:EU:C:2009:141, paragraph 24.

¹³³ C-94/04 and C-202/04, *Cipolla and Others*, Judgement of 5 December 2006, ECR 2005 p. I-10423, ECLI:EU:C:2005:741, paragraph 25; C-222/05-C-225/05, *van der Weerd and Others*, Judgement of 7 June 2007, ECR 2007 p. I-4233, ECLI:EU:C:2007:318, paragraph 22.

¹³⁴ C-451/03, *Servizi Ausiliari Dottori Commercialisti*, Judgement of 30 March 2006, ECR 2006 p. I-2941, ECLI:EU:C:2006:208, paragraph 29.

of Spain have been or are interested in operating pharmacies in the Autonomous Community of Asturias¹³⁵.

Thirdly, the orders for reference adequately describe the legal and factual background to the disputes in the main proceedings and the information provided by the referring court allows the scope of the questions referred to be determined. Thus, the orders for reference have given interested parties a genuine opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union, as is indeed shown by the content of the observations submitted in these proceedings.”

The requirement for the dispute to be real, not devised, is essential for the jurisdictional cooperation between the courts of the Member States and the Court of Justice. The Court is not a doctrinaire entity that builds assumptions, but rather has jurisdiction to interpret the Community law whenever it is applicable.

§ 9. The role of the parties

No parties as such appear in front of the Court of Justice or, as the Court stated, the preliminary referral procedure is confirmed by the absence of parties, in the proper sense of the word.¹³⁶

In a recent judgement,¹³⁷ the Court emphasised that referrals from parties are not admissible:

“In accordance with settled case-law of the Court, in the context of the cooperation between the Court and the national courts provided for by Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case before it, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. The right to determine the questions to be put to the Court thus devolves on the national court alone and the parties to the main proceedings may not change their tenor.”¹³⁸

In addition, to alter the substance of the questions referred for a preliminary ruling, or to answer additional questions mentioned by the parties, would be incompatible with the Court’s duty to ensure that the governments of the Member States and the parties concerned are given the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European

¹³⁵ C-384/08, Attanasio Group, Judgement of 11 March 2010, ECR 2010 p. I-2055, ECLI:EU:C:2010:133, paragraphs 23-24.

¹³⁶ Joint Cases 28 and 30/62, Da Costa and Schaake, 27 March 1963, ECR 1963, p. 31, ECLI:EU:C:1963:6.

¹³⁷ C-605/12, Welmory, Judgement of 16 October 2014, ECLI:EU:C:2014:2298.

¹³⁸ Extensively C-316/10, Danske Svineproducenter, EU:C:2011:863, paragraph 32 and the quoted case law

Union, bearing in mind the fact that, under that provision, only the decision of the referring court is notified to the interested parties ¹³⁹.”

§10. The role of the national judge

The national judge is required to implement Article 267 TFEU. ¹⁶⁵

The Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings place a number of factual elements within the responsibility of the judge, elements that the judge knows directly and based on which he/she is in the best position to appreciate the appropriateness of the referral.

The national judge has also the obligation to observe the national law. In the national proceedings, the reference for preliminary ruling is an incident or an exception. Therefore, the court shall take all the necessary measures, for instance, will suspend the trial by default (as applicable in the Romanian law) or optionally (Denmark and Slovakia, though the trial is also suspended in most cases).¹⁴⁰

Where the Court rejects the reference for a preliminary ruling, the potential liability of the State for non-observance of the European Union law should be considered. In this context, we bring to attention the possible liability of the Member State for violating EU law. The Romanian experience in a direct lawsuit against the State for the refusal of a preliminary reference may provide guide mark as to the consequences of such a legal action.¹⁴¹

“By a petition submitted to the Court, the plaintiff sued the Romanian State represented by the Ministry of Public Finances, in turn represented by the general Department of Public Finances of Bucharest City, requesting the Court to order the defendant to pay 13425 USD as equivalent to the moral damages incurred by the plaintiff through the breach by a Romanian court of its obligation to respect the Treaty on the Functioning of the European Union.”

In the written conclusions submitted by the attorney of the plaintiff, the former requested the court to refer a number of questions to the Court of Justice on the interpretation of particular provisions of Regulation no. 44/2001. However, the court

¹³⁹ C-316/10, *Danske Svineproducenter*, EU:C:2011:863, paragraph 33 and the quoted case law

¹⁶⁵ Case 166/73, *Rheinmühlen*, Judgement of 16 January 1974, Rec. p. 33, paragraph 3.

¹⁴⁰ Extensively: **Mihai Șandru, Mihai Banu, Dragoș Călin**, *Suspendarea procedurii de către instanța judecătorească din România în situația efectuării unei trimeri preliminare către Curtea de Justiție potrivit reglementării noului Cod de procedură civilă* (*Suspension of proceedings by the Romanian court when making a reference for preliminary ruling to the Court of Justice according to the New Code of Civil Procedure*), Published in *Curierul Judiciar* no. 1/2013, p. 54-55, available here http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2466262

¹⁴¹ **Mihai Șandru, Mihai Banu, Dragoș Călin**, *Există sancțiuni pentru încălcarea obligației instanței naționale de efectuare a unei referențe pentru preliminară la Curtea de Justiție?* [Are there any sanctions for breaching the duty to refer to the European Court of Justice?], *Curierul Judiciar*, no. 12/2014, p. 708-713

ruled that this request was made after the end of the debates, during the deliberation stage, stage when “no more new requests may be made”.

The Bucharest City Court rejected the appeal as ungrounded¹⁴², showing that “the failure of the national court to fulfil its obligation to request a preliminary ruling may attract the liability of the Member State for breach of Community law, if such breach generates losses for one of the parties in the proceedings.” In its reasoning, the Bucharest City Court referred to the *Köbler* Case.

§11. The refusal to make a preliminary reference

§11.1. The typology of refusals to make references for a preliminary ruling

The refusal to make a reference for a preliminary ruling is, as we have shown above, within the exclusive jurisdiction of the national courts. In the same manner in which the appeal against a referral has no effect in fact, the appeal against a refusal to make a preliminary reference cannot result in the upper court imposing on the lower one (whose failure to refer was appealed against) the obligation to make a reference for a preliminary ruling.

The reasons for a refusal to make a preliminary reference may cover:¹⁴³

- *Ratione temporis* elements;¹⁴⁴
- The possibility of a legal remedy: “the court appreciated that a ruling from the European Court of Justice is not necessary, in particular since the judgement is subject to appeal”¹⁴⁵;
- Rejecting the application to refer to the Court of Justice on the grounds of the “*acte clair*” theory;
- The resolution of the dispute is inferred from the Court of Justice case law or appears *a fortiori*;
- Allocation of jurisdiction by Article 267 TFEU and lack of relevance and utility of the preliminary reference for settling the case;
- Deadline for the transposition of a Directive and futility of preliminary referral;
- Lack of utility of a response from the Court of Justice;
- Rejection of the application for a reference for a preliminary ruling for the interpretation of an international public law act

¹⁴² Bucharest City Court, Vth Civil Division, Judgement no. 137 R of 21.01.2014, not published.

¹⁴³ Extensively: **Mihai Şandru, Mihai Banu, Dragoş Calin**, Refuzul instanţelor naţionale de a trimite întrebări preliminare. (Refusal of national courts to refer preliminary questions). Romanian case law, C. H. Beck, 2013, p.

¹⁴⁴ **Mihai Şandru, Mihai Banu, Dragoş Călin**, *Procedura trimiterii preliminare...*, op. cit., p. 68 and subsequent.

¹⁴⁵ C.A. Iaand, Secţia penală and pentru cauze cu minori (Division for criminal and juvenile cases), Case no. 725/45/2010, Judgement of 26 November 2010, **Mihai Şandru, Mihai Banu, Dragoş Călin**, *Procedura trimiterii preliminare...*, op. cit., p. 95 and subsequent.

Further down, we will provide examples for the most important situations.

§11.2. Rejecting the application to refer to the Court of Justice on the grounds of the “acte clair” theory

The Bucharest Court of Appeal¹⁴⁶ acknowledged that “however, the obligation to refer to CJEU is not automatic. The court of last resort not being required to refer a preliminary question as soon as the parties invoke such a need. The national court remains competent to appreciate the relevance and usefulness of a CJEU response in the resolution of a domestic dispute.”¹⁴⁷

“No unclarities exist in the transposition of Directive 2000/35/CE in the national law, so that it is not necessary to refer to the European Court; secondly, the court has also considered the appropriateness and deems that, in accordance with the CJEU practice, a referral is not necessary in a dispute of such value”.¹⁴⁸

§11.3. The resolution of the dispute is inferred from the Court of Justice case law or appears a fortiori

In one case¹⁴⁹, the application for a reference to the Court of Justice was rejected on the grounds of the clarity of the answer, thus: “[...] the court appreciates that the answer to all the [three] questions addressed by the defendant [...] can be clearly deduced from interpreting and corroborating Law 193/2000 and Directive 93/13 EEC. To the extent to which, when deliberating the substance of the case, the court will find that any possible conflict exists with the provisions of Directive 93/13 (or any other Community legal act), the Community law will take precedence (“Simmenthal Judgement”- Case 106/77)”.

Furthermore, the same type of resolutions have been passed in the matter of abusive clauses, the application for a reference to the Court of Justice being rejected

¹⁴⁶ Timiș County Court, Civil Division, Case no. 8478/30/2010, Ruling of 28 February 2011, in **Mihai Șandru, Mihai Banu, Dragos Călin**, *Procedura trimiterii preliminare...*, op. cit., p. 103 and subsequent.

¹⁴⁷ Bucharest Court of Appeal, VIIIth Division for administrative and fiscal litigation, Case no. 3785/2/2011, in **Mihai Șandru, Mihai Banu, Dragos Călin**, *Procedura trimiterii preliminare...*, op. cit., p. 106.

¹⁴⁸ Sector 2 Court, Bucharest, Civil Division, Case no. 783/300/2012, **Mihai Șandru, Mihai Banu, Dragos Călin**, *Procedura trimiterii preliminare...*, op. cit., p. 108-109. “The preliminary reference system, detailed in Article 267 TFEU, does not require a *de minimis* value cap for the dispute judged by the referring court.”

¹⁴⁹ Bucharest City Court, VIth Civil Division, Case no. 43963/3/2011, Ruling of 17 November 2011, in **Mihai Șandru, Mihai Banu, Dragos Călin**, *Procedura trimiterii preliminare...*, op. cit., p. 111. ¹⁷⁶ Bucharest City Court, VIth Commercial Division, Case no. 62514/3/2010, ruling of 6 July 2011, in **Mihai Șandru, Mihai Banu, Dragos Călin**, *Procedura trimiterii preliminare...*, op. cit., p. 112. ¹⁷⁷ Sector 1 Court, Bucharest, Case no. 19946/299/2007, in **Mihai Șandru, Mihai Banu, Dragos Călin**, *Procedura trimiterii preliminare...*, op. cit., p. 118.

by the ruling¹⁷⁶, the court acknowledging that “the request to submit preliminary questions to the CJEU made by the defendant is to be rejected, given that the national has jurisdiction to decide whether a contract clause meets the criteria for being considered as being abusive”.

§11.4. Allocation of jurisdiction according to Article 267 TFEU and lack of relevance and utility of the preliminary reference for settling the case

By the ruling passed on 16 April 2008, the Sector 1 Court of Bucharest rejected the application for a reference to the Court of Justice on the interpretation of the notion of “domicile” used in Regulation no. 2201/2003 and the clarification of the same notion from the perspective of the national law – namely the Decree-law no. 31/1954 and Law no. 105/1992. The court ruled that “the above-mentioned Regulation positively establishes the territorial jurisdiction in the resolution of divorces and accessory requests by the courts from the EU Member States and, implicitly, from Romania, such that explaining the notion of “domicile” by the Court of Justice of the European Communities on the grounds of Article 177 of the EEC Treaty would be meaningless.”¹⁷⁷

§11.5. Lack of utility of a response from the Court of Justice

“A referral to CJEU can only be discussed if assuming that the national court deems that the provisions of the Community law are not sufficiently clear, and a preliminary ruling whereby CJEU interprets such provisions would be useful to the court for settling the dispute in which the reference to CJEU was requested. In the case on trial, the provisions of the two Directives with which the preliminary questions of the petitioner are concerned do not require interpretation by the CJEU, a preliminary ruling being unnecessary for the resolution of the case. Though the preliminary questions include a particular sense that the petitioner assigns to the provisions of the Community law, requesting CJEU to rule whether the provisions in question should be interpreted in that sense, the petitioner’s purpose is to obtain an opinion on the lawfulness of the administrative act of the contracting authority that the petitioner challenged at National Council for Solving Complaints, more specifically, the manner in which the authority applied the criteria stated in the tender documentation when analysing the documents submitted by the petitioner in the tender proceedings.”¹⁵⁰

§11.6. Rejection of the application for a reference for a preliminary ruling for the interpretation of an international public law act

¹⁵⁰ The petitioner in the case had formulated no less than 16 preliminary questions. Bucharest Court of Appeal, VIIIth Division for administrative and fiscal litigation, Case no. 11159/2/2011, in **Mihai Șandru, Mihai Banu, Dragos Călin**, *Procedura trimiterii preliminare...*, op. cit., p. 192.

By the Judgement no. 670 of 7 June 2010¹⁵¹, the Bucharest Court of Appeal rejected the application for a reference to the Court of Justice to issue a preliminary ruling interpreting the provisions of the Hague Convention of 1980 in the matter of international abduction of children. In its rationale, the court stated that “the possibility to pass a preliminary ruling results not only from the two Treaties as such, but also from or in relation to particular *international conventions made under the auspices of the Community* with respect to which the Member States convened that need interpretation by the Court. This is the case, for example, of the Protocols on the Convention of 29 February 1968 on the mutual recognition of companies and legal persons and to the Convention of 27 September 1968 on jurisdiction and the enforcement of judgements in civil and commercial matters. However, the Convention on the civil aspects of international child abduction *is not included* in any of these categories that circumscribe the *Community legal order*. Quite the opposite, the Convention in question was adopted in a different legal framework, more specifically, in the plenary session of 24 October 1980, unanimously, by the States attending the *XIVth Session of the Hague Conference on Private International Law* (Germany, Australia, Austria, Belgium, Canada, Denmark, Spain, USA, Finland, France, Greece, Ireland, Japan, Luxembourg, Norway, The Netherlands, Portugal, Great Britain, Sweden, Switzerland, Czechoslovakia, Venezuela and Yugoslavia), most of them not being members of the former European Communities. Therefore, the Convention of The Hague of 25 October 1980 on the civil aspects of international child abduction cannot be subject to interpretation by the CJEU via a preliminary ruling. This decisive and nullifying argument was also used by the court of first instance, which showed that the only requirement for the admissibility of an application for a reference for a preliminary ruling is for the questions to concern the Community law, the Court having decided that it does not have jurisdiction to respond to questions that exceed the scope of the Community law”.

§11.7. Providing a rationale for the refusal to make a preliminary reference

The essential requirement here is the provision of a (pertinent) rationale for the refusal to make a reference.¹⁵²

¹⁵¹ Bucharest Court of Appeal, IIIrd Civil Division and for minors and family cases, Case no. 37334/3/2009, in **Mihai Șandru, Mihai Banu, Dragoș Călin**, *Procedura trimiterii preliminare...*, op. cit., p.

¹⁵² **Constantin Mihai Banu, Daniel Mihail Șandru, Dragoș Alin Călin**, *Trends and patterns in preliminary references in courts of Romania. Issues related to the charter of fundamental rights of the European Union and the European convention on human rights*, Law Review, Volume VI, Issue 2, July - December 2016, p. 97-124. The article is available here <http://internationallawreview.eu/Article/trends-and-patterns-in-preliminary-references-in-courts-of-romania-issues-related-to-the-charter-of-fundamental-rights-of-the-european-union-and-the-european-convention-on-human-rights>

§12. Conditions for the application of the expedited and urgent procedures

In paragraphs 31-33 of the Recommendations, the Court of Justice covers the expedited and urgent procedures which, in the matter of Regulation no. 606/2013 are likely to be more frequent than in the case of other directives or regulations.

Article 105 of the Rules of Procedure provides that a reference for a preliminary ruling may be determined pursuant to an expedited procedure derogating from the provisions of those Rules, where the nature of the case requires that it be dealt with within a short time. Since that procedure imposes significant constraints on all those involved in it, and, in particular, on all the Member States called upon to lodge their observations, whether written or oral, within much shorter time-limits than would ordinarily apply, its application should be sought only in particular circumstances that warrant the Court giving its ruling quickly on the questions referred. The large number of persons or legal situations potentially affected by the decision that the referring court or tribunal has to deliver after bringing a matter before the Court for a preliminary ruling does not, in itself, constitute an exceptional circumstance that would justify the use of the expedited procedure.

The same applies a fortiori to the urgent preliminary ruling procedure, provided for in Article 107 of the Rules of Procedure. That procedure, which applies only in the areas covered by Title V of Part Three of the TFEU, relating to the area of freedom, security and justice, imposes even greater constraints on those concerned, since it limits in particular the number of parties authorised to lodge written observations and, in cases of extreme urgency, allows the written part of the procedure before the Court to be omitted altogether. The application of the urgent procedure should therefore be requested only where it is absolutely necessary for the Court to give its ruling very quickly on the questions submitted by the referring court or tribunal.

Although it is not possible to provide an exhaustive list of such circumstances, particularly because of the varied and evolving nature of the rules of European Union law governing the area of freedom, security and justice, a national court or tribunal might, for example, consider submitting a request for the urgent preliminary ruling procedure to be applied in the case, referred to in the fourth paragraph of Article 267 TFEU, of a person in custody or deprived of his liberty, where the answer to the question raised is decisive as to the assessment of that person's legal situation, or in proceedings concerning parental authority or custody of children, where the identity of the court having jurisdiction under European Union law depends on the answer to the question referred for a preliminary ruling.

§ 13. Invoking the Charter of Fundamental Rights of the European Union

§13.1. The scope of the CFREU

As shown by the Court case law, the scope of the Charter of Fundamental Rights of the European Union is limited to its application under Article 51. The professional literature has shown that the importance of Article 53 CFREU¹⁵³ for the interpretations that the national courts have to make should not be underestimated.¹⁵⁴ Nevertheless, in a Judgement, the Galați Court of Appeal rejected a challenge for annulment¹⁵⁵ - which is an extraordinary judicial review – removing also the application of Article 53 CFREU.

“Nor can the challenge be accepted on the grounds of Article 6 (1) 1 of the European Convention of Human Rights and Article 47, 51-53 of the Charter of Fundamental Rights cross-referenced with Article 6 of the Treaty of the European Union that guarantees the right to a fair trial, called upon by the claimant as legal grounds for his challenge.

The challenge for annulment is not a means to review a judgement issued in an appeal, even when such decision is wrong, since the court judging such a challenge is only required to verify whether any of the limited legal grounds based on which this extraordinary judicial review may be initiated, not having jurisdiction to examine the fairness of the judgement.

In other words, the court required to resolve an extraordinary judicial review action will analyse the application from the perspective of the legal provisions that require the protection of the legal certainty.”

Sector 5 Court, Bucharest, in its ruling of 4 February 2010, rejected as inadmissible the application for a reference to the Court of Justice, “given that the interpretation given in Article 36 of Law no.18/1991 in correlation with Article 17 of the Charter of Fundamental Rights of the European Union is in breach of the Community law”. The Court acknowledged that “the national courts cannot request the CJEU to interpret the Community law by declaring one or another provision of the national law as being compatible or incompatible with the Community law, given that the mission of the Court is to interpret the Community law, and not to apply it in the national law. Furthermore, the subject matter of such judicial review through a preliminary ruling cannot be the interpretation of the national laws from the perspective of the Charter of Fundamental Rights of the European Union, this being under the jurisdiction of the national judge (Judgement of 30 November 1995, C-

¹⁵³ According to Article 53 CFREU “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions”.

¹⁵⁴ **Beatriz Pérez de las Heras**, *The Charter of Fundamental Rights as a New Element of European Identity and Beyond* în vol. **Beatriz Pérez de las Heras (Ed.)**, *Democratic Legitimacy in the European Union and Global Governance. Building a European Demos*, Palgrave, 2017, p. 122123. **Regarding** Regulation no. 606/2013, it is considered that its adoption is a means, an instrument for the protection of human rights in the EU.

¹⁵⁵ Court of Appeal Galați, 1st Civil Division, Judgement no. 460/R/2013, not reported, available here <http://rolii.ro/hotarari/5898a8d6e490097c19001d94>

55/94, *Reinhard Gebhard*).” The court did not notice that the subject matter of the case was, probably, outside the scope of the Union law (the Charter), preferring to emphasize the allocation of jurisdictions in the system of Article 267 TFEU.¹⁵⁶

According to Article 51, the CFREU is addressed with due regard for the subsidiarity principle to the institutions and bodies of the Union and to the Member States only when they are implementing Union law. It follows that they respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and within the limits of jurisdiction conferred to the Union by the Treaties.

Lately, the Romanian courts of justice have resorted to the Charter of Fundamental Rights for guidance and inspiration, including in cases that were not within the scope of EU law, this demonstrating even further an evident lack of knowledge of the Charter and numerous confusions over simple aspects.¹⁵⁷

§13.2. *References for a preliminary ruling made by Romanian courts.*
C434/11, National Police Corps¹⁵⁸

A case on the subject matter of pay cuts for civil servants (25%) on trial with the Alba County Court a reference for a preliminary ruling was made to the Court of Justice of the European Union on the questions “Should Article 17 (1), Article 20 and Article 21 (1) of the Charter of Fundamental Rights of the European Union be interpreted as opposing pay cuts such as those introduced by the Romanian Government by Law no. 118/2010 and Law no. 285/2010” raises an essential issue on the determination of the scope of the Charter of Fundamental Rights.

The Member States are bound to apply the provisions of the Charter *only* when they apply EU law; the Court has specified that it may interpret EU law in the light of the Charter, within the limits of its jurisdiction [Judgement of 5 October 2010, Case C-400/10 PPU, *McB*]. Furthermore, the Court also indicated that the limitation introduced by Article 51 (1) of the Charter was not modified by the Treaty of Lisbon coming into force on 1 December 2009, moment from which, on the grounds of Article 6 (1) EU (stating that the Charter provisions do not extend in any way the jurisdiction of the EU, as defined in the Treaties), the Charter acquired the same legal force as the Treaties [Order of 1 March 2011, Case C-457/09, *Chartry*].

¹⁵⁶ Sector 5 Court, Bucharest, IInd Civil Division, Case no. 7825/302/2009, in **Mihai Șandru, Mihai Banu, Dragos Călin**, *Procedura trimiterii preliminare...*, op. cit., p. 118.

¹⁵⁷ Pe larg: **Dragoș-Alin Călin, Constantin Mihai Banu, Daniel-Mihail Șandru**, „*National Report: Romania*” (*National Report, Romania*) in the volume **Laurence Burgorgue-Larsen (dir.)**, “*La Charte des droits fondamentaux de l’Union européenne saisie par les juges en Europe/ The Charter of Fundamental Rights as apprehended by Judges in Europe*”, Cahiers européens no. 10, IREDIES – Institut de recherche en droit international et européen de la Sorbonne, Université Paris 1 PanthéonSorbonne, Pedone, Paris, 2017, p. 599 and subsequent

¹⁵⁸ C-434/11, National Police Corps, Order of 14 December 2011, ECR 2011 p. I-196*, Summ.pub., ECLI:EU:C:2011:830.

“In a reference for a preliminary ruling on the grounds of Article 267 TFEU, the Court may interpret the law of the European Union only within the limits of the powers conferred on it.¹⁵⁹ As regards the requirements flowing from the protection of fundamental rights, in accordance with settled case-law, they are binding on Member States when they implement the Union law.¹⁶⁰ However, according to Article 51 (1) of the Charter, its provisions are addressed to the „Member States only when they are implementing Union law” and, according to Article 6 (1) TEU – which assigns binding force to the Charter – the Charter does not create any new competence for the Union and modify its existing competences.¹⁶¹ Given that the reference decision does not include any specific element on the grounds of which to deem that Law no. 118/2010 and Law no. 285/2010 are aimed at implementing the Union law, the jurisdiction of the Court to respond to this request for a preliminary ruling is not demonstrated.”

13.3. The rejection of an application for a request for preliminary ruling

In an appeal filed with the High Court of Cassation and Justice, one of the parties (the appellant against whom a claim had been raised as third party) applied for a reference to the Court of Justice. The application was rejected in a Ruling passed on 24 February 2009. The two preliminary questions read:

“1. Whether the provisions of Article 41 and Article 47 of the Charter of Fundamental Rights of the European Union have direct effect in the national law and whether, on these grounds, the residents may invoke rights that the national court is bound to protect; 2. If yes, in case the above-mentioned legal provisions also include the protection of the party’s right to settle the litigation by recognising the claims made against it, whether the issuance of a judgement on the substantial right on trial, without previously having resolved the request of the party to make use of its right to admit to the claims made against it, represents a breach of the principle of legitimate expectation and fair hearing in the right to defence”.

The High Court of Cassation and Justice rejected the application made by the appellant to make a reference for a preliminary ruling. “Having analysed the relevance of the question proposed to be addressed to the CJEU, the High Court acknowledges the contents of the legal provisions that are subject to the preliminary questions. Thus, according to Article 41 (1) of the Charter of Fundamental Rights of the European Union – Right to good administration – “Every person has the right to

¹⁵⁹ See Judgement of 5 October 2010, *McB.*, C-400/10 PPU, not reported in ECLI, paragraph 51, as well as Order of 22 June 2011, *Vino*, C-161/11, paragraphs 25 and 37.

¹⁶⁰ See Judgement of 11 October 2007, *Möllendorf and Möllendorf-Niehuus*, C-117/06, Rep., p. I-8361, paragraph 78, Order of 12 November 2010, *Asparuhov Estov and Others*, C-339/10, as yet not reported in ECLI, paragraph 13, as well as Order of 1 March 2011, *Chartry*, C-457/09, as yet not reported in ECLI, paragraph 22.

¹⁶¹ See Judgement *McB.*, paragraph 51, and Orders *Asparuhov Estov and Others*, paragraph 12, *Chartry*, paragraphs 23 and 24, as well as *Vino*, in paragraph 24.

have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union”, an according to Article 47 (1) - Right to an effective remedy and to a fair trial – “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.” Firstly,¹⁶² given that “[...] Articles 41 and 47 of the Charter of Fundamental Rights have no direct connection with the case, but include very generic provisions that have full correspondent and applicability in the Romanian law. These legal provisions are found in the Romanian laws and are constantly and consistently applied by the Romanian courts. Consequently, the national courts can interpret and apply correctly the regulations invoked – Articles 41 and 47 of the Charter of Fundamental Rights – leaving no room for reasonable doubt that might justify the pertinence of a preliminary question on these provisions.”¹⁶³

§13.4. Direct effect of CFREU – Court of Appeal Bucharest

On 19 September 2014, in the context of a decision for collective redundancies taken as part of the bankruptcy of a company, the Court of Appeal Bucharest issued Judgement no. 1232, in appeal. The appellant submitted a number of arguments claiming the nullity of the redundancy decision, among which the breach of the right to information and consultation enshrined in Article 27 of the Charter of Fundamental Rights and in Directive 98/59.

The Court of Appeal reviewed the Judgement *Claes and Others*, called upon by the appellant who claimed that “the interpretation given by the Court of Justice is mandatory, in that, including in the case of the company dissolution or liquidation, the provisions of Articles 1-3 of Directive 98/59/CE are binding and must be observed by the official receiver”. The court state that “having in view the Judgement invoked, but also that given in the Case Mono Car Styling, we find that the matter in question is the interpretation of the national law in compliance with the provisions of the Directive. In this case, the applicable national law is the special rule, namely Article 86 (6) of Law no. 85/2006, in the form in force at the time of the redundancies, which, however, is very clear in relieving the official receiver from the duty to undergo the information and consultation procedure provided for in Articles 68-72 of the Labour Code and that transpose Directive no. 98/59, except for giving the 15 working days redundancy notice.”

¹⁶² The second reason for rejecting the application was grounded on the application of the Charter (both in substance and in time) at the time of the dispute resolution (before the Charter becoming effective, 2009).

¹⁶³ HCCJ, Commercial Division, Case no. 2712/3/2006, Ruling of 24 February 2009, unpublished. See also Botoşani County Court, Ist Civil Division, Ruling of 4 November 2014, Case no. 2605/40/2014, unpublished; Bucharest Court of Appeal, VIIth Civil Division and, for cases involving labour and social insurance disputes, see Ruling of 25 January 2012, unpublished.

The court approached the appellant's argument in the sense of "direct applicability" of Article 27 of the Charter of Fundamental Rights and rejected the direct, horizontal effect of the Charter provision (self standing or corroborated with the Directive), referring to the Judgement *AMS*. Then, the court stated that "with regard to the limit of conform interpretation in the State law – with relevance in this case – it should be acknowledged the absolute and clear contents of the national law applicable in the case on trial, which, from this perspective, is similar to the French national law applicable in the case judged by the European Court". The Court of Appeal considered that the rationale provided by the Court of Justice in the *AMS* Case may be transposed to the dispute it tried. The resolution of the Court of Justice cannot on itself have a direct effect, beyond the effect of the Directive it interprets and beyond the provisions of the European Union law. **The Charter of Fundamental Rights of the European Union cannot be applied directly if the Directive has no direct effect, and the *AMS* Judgement is relevant in supporting these conclusions.**¹⁶⁴

§13.5. The Constitutional Court of Romania și CFREU

With regard to the application of the rules of the Charter of Fundamental Rights of the European Union by the Constitutional Court of Romania, initially, in Judgement no. 871 of 25 June 2010, it was established that the invoked rules of the Charter of Fundamental Rights of the European Union "in principle, are applicable in constitutionality review, to the extent to which they ensure, guarantee and develop the constitutional rules in the matter of fundamental rights, in other words, to the extent to which the level of protection they afford is at least that afforded by the constitutional rules in the matter of human rights."

And the rules, as consecrated in the Charter of Fundamental Rights, "equally apply to central authorities and regional or local courts, as well as to public bodies, when they implement the Union law. Therefore, the Member States should, to the extent possible, apply these legal provisions in conformity with these requirements. (Judgement CJCE of 24 March 1994 given in the Case C-2/92, *The Queen and Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock*, paragraph 16)"¹⁶⁵

¹⁶⁴ C-176/12, Association de médiation sociale, Judgement of 15 January 2014, ECLI:EU:C:2014:2.

¹⁶⁵ *Constitutional Court of Romania*, Judgement no. 871 of 25 June 2010 on the constitutionality challenge against the Law establishing certain measures in the matter of pensions, published in Official Gazette, Part I, no. 433 on 28 June 2010. See also Judgement no. 1479 of 8 November 2011 on the constitutional challenge against the provisions of Article 24 (2) of the Law of administrative litigation no. 554/2004, published in Official Gazette, Part I, no. 59 of 25 January 2012, but also Judgement no. 244 of 29 April 2014 on the constitutional challenge against the provisions of Article 9 of the Expeditious Ordinance of the Government no. 84/2012 establishing the wages of the public sector personnel in 2013, proroguing deadlines in certain legal acts and instating certain fiscalbudgetary measures, in reference to Article II Article 18 of the Expeditious Ordinance of the Government no. 80/2010 supplementing Article 11 of the Expeditious Ordinance of the Government no. 37/2008

More recently, in Judgement no. 64 of 24 February 2015, the Constitutional Court found that “Article 153 (1) e) of the Treaty on the Functioning of the European Union, Article 27 of the Charter of Fundamental Rights of the European Union and Articles 2 and 3 of Decision no. 98/59/CE of the Council of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies” have contents that is sufficiently clear, accurate and unambiguous, even more so based on the interpretation of the Court of Justice of the European Union by its Judgement of 3 March 2011 in the Case C-235/10, *David Claes and Other vs. Landsbanki Luxembourg SA*.

“Through their rules they lay down, the legal acts of the European Union protect the right to “*information and consultation of workers*”, supporting and augmenting the action of the Member States, thus directly targeting the fundamental right to social protection of workers, provided for in Article 41 (2) of the Constitution, as interpreted in this Judgement, a constitutional text that provides for a standard of protection that is equal to that resulting from the legal acts of the European Union.”¹⁶⁶

§13.6. CFREU and CEDO in the national case law

The High Court of Cassation and Justice, Ist Civil Division, in its Judgement no. 948 of 31 March 2015, held that the rights provided for by the Charter of Fundamental Rights of the European Union “correspond to certain rights granted by the European Convention on Human Rights, *their meaning and scope are the same as those defined in the Convention*, though the European law may provide for a more extended protection. [...] The right provided for in Article 17 of the Charter has the same meaning and scope as that guaranteed by the European Convention of Human Rights, and the limitations provided by the latter cannot be exceeded.” In another case, the Cluj Court of Appeal, Ist Civil Division, in its Ruling of 16 September 2014, held that the appellant requested a reference to the CJEU with the following preliminary question: “With a view to applying and interpreting Article 17 (1) second sentence in corroboration with Article 47 of the Charter of Fundamental Rights of the European Union, at what moment is a procedure of expropriation for public utility, compliant with the requirements of the two rules mentioned above, is deemed to have been completed? In relation to such moment, in applying Article 17 (1) second sentence and Article 47 of the Charter of Fundamental Rights of the European Union, is the notification of the administrative act establishing the compensation due

regulating certain financial measures in the public sector and instating other financial measures in the public sector, approved as amended and supplemented by Law no. 283/2011, published in Official Gazette, Part I, no. 467 din 25 June 2014.

¹⁶⁶ *Constitutional Court of Romania*, Judgement no. 64 of 24 February 2015 on the constitutional challenge against Article 86 (6) of Law no. 85/2006 on the insolvency proceedings, published in Official Gazette, Part I, no. 286 din 28 April 2015.

to the expropriated person part of the expropriation procedure or, on the contrary, is a subsequent stage?"

The Cluj Court of Appeal found that the articles invoked by the appellant contain general, principle provisions on the guaranteeing of the right to property and free access to justice, with no specific provisions on the expropriation procedure. Moreover, provisions of the nature and in the sense of those included in Article 17 of Charter of Fundamental Rights (concerning the property right) are also included in the national law, namely in Article 44 and Article 136 of the Constitution of Romania, revised in 2003.

§13.7. Conclusions

The volume signed by Sergio Carrera¹⁶⁷ shows that the case law of the Court of Justice provides varied examples regarding the family life as a fundamental right. The author quotes the *Wachauf Case*¹⁶⁸, where it is shown that the fundamental rights have a limited interpretation depending on their social function. The same applies in the matter of protection orders that cannot instate limitations of rights that go beyond the legal framework and, in a wider sense, are disproportionate. For all these reasons, the national judge is the only one called to decide, given that any potential reference for a preliminary ruling to the Court of Justice will only provide resolutions for matters of law. And the limits set forth in Articles 51-53 of the Charter will have to be considered in the application of the Charter principles in any disputes brought in front of the national courts.

TOPIC NO. 6

SUMMARY REFERENCES IN SOCIOLOGY. SOCIOLOGY OF LAW: OUTLOOKS, METHODS, RESEARCH INSTRUMENTS CONTEMPORANEOUS SOCIETIES: LEGAL REGULATIONS AND VARIOUS SOCIAL GROUPS

6.1. General considerations

¹⁶⁷ Sergio Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, Brill, 2009, p. 380-381.

¹⁶⁸ Case 5/88, *Wachauf / Bundesamt für Ernährung und Forstwirtschaft*, Judgement of 13 July 1989, ECR 1989 p. 2609, ECLI:EU:C:1989:321, par. 18.

Associating sociological considerations to a legal analysis applied to the topic *Civil rights of European citizens - protection measures in civil matters* would be a difficult task, first of all due to the novelty of this topic.

The difficulty of such an analysis is derived also from the complexity of such processes as those involved by the united Europe, providing the context for the objectives of the project that this work is a part of. The European construction process entails, among other elements, an essential change in the paradigm of defining what individuals call *our space*: European citizenship uses as a referential the space of the 28 member states, overlapping the space inside the national borders.

6.2. Methodological considerations

Legal concepts and categories are nothing else but abstractions of the daily human behaviour rules; the fact that judicial rules have specific features which differentiates them from the other social norms (method of adoption, structure, their enforcement is safeguarded through the coercive force of the state should voluntary non-compliance take place) does not make them less social, according to the sociological meaning of the term. They are born throughout the social interaction; they are used by individuals and groups in specific social situations; they are subjectively internalized and used within the social field in similar yet different manners, depending on the position taken by individuals within the social structure (position determined by birth in a certain social class, educational achievements, occupation, revenues etc.)

The way in which individuals relate to legal provisions, besides the general binding nature of the legal rule, is conditioned to a large extent by elements that are external to the law. Such elements could become important for a legal practitioner: even if they might seem somehow external to the judiciary process, for example, they actually represents the context which conditions the legal relationship, in a sociological sense: diversity of individual references to legal provisions, compliance to or, on the contrary, violation of the rules, as well as the various use of legal regulations can be explained through the diversity of social positions and representations of the world, which are specific to the individuals living in contemporary societies.

This work takes the shape of a guideline, targeted to professionals in law, mainly judges entrusted with adjudicating some specific cases, based on national and European legal regulations. A guideline is, based on a minimal definition, an instrument providing directions for a certain activity, to the extent to which is able to provide lines of action, advice and/or guidance. Thus designed, such a product must be characterized by simplicity and clarity: therefore, the instrumental function should be prevailing. Such requirements should be answered by inserting the sociological reference point.

The main consequence consists from choosing the perspective for the analysis: as this is neither an introductory handbook, nor an extended academic paper, I have

tried to select topics and approaches that can benefit to the recipients as elements in a broader context in which the apparently exclusive legal issues are being placed.

In order to exemplify the manner in which sociology and sociologists deal with law, I have chosen Emile Durkheim's perspective. This classical sociological outlook, besides the essential contribution brought to the birth of sociology as a science (also from the methodological perspective), and to the sociology of law, as a branch of sociology, has a major influence over the contemporary sociological thinking. Durkheim's model for analysis of social solidarity could be replicated, using a different key to understanding, on the analysis of social solidarity entailed by the European construction process: Which are the mechanisms which turn a mere gathering of individuals into a society? Which are the paramount elements of such a process? Which categories of solidarity are specific to simple societies, which display a low degree of differentiation? Which are the categories specific to the complex ones, where internal differentiation becomes ever more accentuated? Which are the features of individuals and relationships among them, depending on the type of society involved? How can questioning the legal institutions indicate the types of social solidarity and, as a result, the mechanisms based on which an entire society operates and conserves itself?

6.3. Durkheim's perspective of the law. Relationship between violations of the rule and the sanction

Analysis of law takes over a central position in the works of Emile Durkheim, one of the classics of sociology. According to his methodological principles, law is dealt with as a social fact,¹⁶⁹ in the sense that it is external to individuals and it prevails with a constraining power¹⁷⁰. This methodological principle is applied to the analysis of development in the division of social labour, one of his key analyses¹⁷¹. The legal rules are used here as external signs/expressions of social solidarity. Having analysed the leap from simple to complex societies, Durkheim notices that such a process is characterized by a development of legal rules, according to the dominant type of social solidarity. Thus, legal rules express relations among individuals and the groups that the society is made up of: in those simple societies,

¹⁶⁹ Emile Durkheim, *Regulile metodei sociologice (The Rules of sociological method)*, Publisher: Editura Antet, Bucharest, 1895/2004.

¹⁷⁰ The concept of social fact and the methodological principle based on which social facts must be dealt with as things on their own had been used in order to associate a scientific nature to the results of sociological analysis. In this respect, E. Durkheim recommended an attitude that was similar to that being used by the practitioners of sciences already deemed "mature": removal of pre-notions, considering the facts of the society as unknown within the scientific understanding of the term, the observation method, the use of the comparative method. It is also Emile Durkheim who used statistics, which became available in the second half of the 19th century (see *Le suicide. Etude sociologique*, published in 1897).

¹⁷¹ Emile Durkheim, *De la division du travail social*, Edition F. Alcan, Paris, 1893/1991.

the founding principle of the society is similarity of individuals; in the complex one (the type represented by contemporary societies), the principle is that of differences among individuals, differences which call for their complementary actions (the term “organic” illustrates exactly the internal differentiation and specialization of individuals, through an analogy with the biological world).

Participation to social life bears the hallmark of the type of society that the individual lives in: within simple societies, relying on mechanical solidarity (archaic societies), the human being, in order to stay human, must resemble the other, must achieve in himself/herself all the features of the collective type; as the division of social labour gets to develop itself, organic solidarity tends to become predominant, the collective type tends to become dissipated, while the individual turns ever more into a *person*, in the sense of an „... autonomous source of action”, to „... to the degree that there is something within him that is his and his alone, that makes him an individual, whereby he is more than the mere embodiment of the generic type of his race and group¹⁷²”.

Each type of social solidarity finds its expression in legal rules: mechanical solidarity finds an external expression into the repressive law, the organic one find it into the restitutive law.

One of the most significant illustrations of the sociological outlook of the law is represented by the Durkheimian analysis of two core institution of the penal law: the crime (violation of the rule, in a sociological understanding) and legal sanction (punishment).¹⁷³

Durkheim’s perspective on crime represents one of the theoretical designs influencing decisively the architecture of the sociological discourse on crime and criminality. The idea of a “collective consciousness” is placed at the very core of this perspective. Collective consciousness is defined by Durkheim as follows: “The totality of beliefs and sentiments common to the average members of a society forms a determinate system with a life of its own. It can be termed the collective or common consciousness.”¹⁷⁴ The force and spread of the collective consciousness varies depending of the predominant type of solidarity. In those societies built on mechanical solidarity, the collective consciousness covers most of individual consciences; those feelings shared by the members of the community have an extreme force, manifested in the attitude towards the crime and the criminal. However, in those societies whose founding principle is represented by the organic solidarity, the scope of existence covered by the collective consciousness is smaller; collective reactions against infringement of rules are weaker, while the margin for

¹⁷² Idem, p.399.

¹⁷³ Obviously, this is only one of the perspectives associated with the sociology of law. As the space allocated to this topic within this guideline is a limited one, the option was taken to focus mainly on the central idea of understanding law as a social fact and, at the same time, to explain the influence of the Durkheimian outlook on contemporary sociology.

¹⁷⁴ E. Durkheim, *Diviziunea muncii sociale*, Ed. Albatros Bucharest, 1922/2001, p.97

individual interpretation of collective mandatory requirements is broader.¹⁷⁵ In other terms, the mechanical solidarity links are attached to the repressive type of law, while the restitutive law matches the organic solidarity links. Each type of law has a certain type of sanction attached to it: repressive law is characterized by repressive sanctions while the restitutive law is characterized by restitutive sanctions: "These sanctions are of two kinds. The first consist essentially in some injury, or at least some disadvantage imposed upon the perpetrator of a crime. Their purpose is to do harm to him through his fortune, his honour, his life, his liberty, or to deprive him of some object whose possession he enjoys. These are said to be repressive sanctions, such as those laid down in the penal code. [...] As for the other kind of sanctions, they do not necessarily imply any suffering on the part of the perpetrator, but merely consist in restoring the previous state of affairs, re-establishing relationships that have been disturbed from their normal form. This is done either by forcibly redressing the action impugned, restoring it to the type from which it has deviated, or by annulling it, that is depriving it of all social value. Thus legal rules must be divided into two main species, according to whether they relate to repressive, organised sanctions, or to ones that are purely restitutive. The first group covers all penal law; the second, civil law, commercial law, procedural law, administrative and constitutional law, when any penal rules which may be attached to them have been removed."¹⁷⁶

The crime represents a rupture in the fabric of social solidarity, of those beliefs and feelings shared by the majority of the members of the society. More specifically, such feelings whose distinctive feature is a certain average intensity and a certain degree of precision. The link between the two elements, the crime and the feelings that it affects is a paramount one; it determines the feature of variability in those actions deemed as criminal and it imprints to the concept of crime a hallmark of a certain sense of relativity. "If the corresponding sentiments are abolished, an act most disastrous for society will not only be capable of being tolerated, but honoured and held up as an example."¹⁷⁷.... Thus the collective sentiments to which a crime corresponds must be distinguished from other sentiments by some striking characteristic: they must be of a certain average intensity. Not only are they written upon the consciousness of everyone, but they are deeply written. They are in no way mere halting, superficial caprices of the will, but emotions and dispositions strongly rooted within us. The extreme slowness with which the penal law evolves demonstrates this. It is not only less easily modified than custom, but is the one sector of positive law least amenable to change. For instance, if we observe what the law-givers have accomplished since the beginning of the century in the different spheres of the law, innovations in penal law have been extremely rare and limited in scope. By contrast, new rules have proliferated in other branches of the law -civil, commercial, administrative or constitutional. [...] This unchangeable character of

¹⁷⁵ Raymond Aron, *Les etapes de la pensee sociologique*, Ed. Gallimard, Paris, 1967, p.323

¹⁷⁶ E. Durkheim, *Diviziunea muncii sociale*, Ed. Albatros, Bucharest, 1922/2001, p.86

¹⁷⁷ Idem, p.99

penal law demonstrates the strength of resistance exerted by the collective sentiments to which it corresponds.”¹⁷⁸... Therefore, it is not enough for the feelings to be strong, they must be precise, as well. It is true, each of them relates to a very clear practice. This practice might be a simple or a complex one, a positive or a negative one, it may consist from an action or an inaction, however it is always determined. It is about doing or not doing something or something else, about not killing or harming, uttering a specific formula, performing a specific ritual. ¹⁷⁹

The, what is crime? Can crime be defined through the intrinsic properties of those actions deemed as such? That would be wrong, Durkheim states, for the mere reason that the number of acts that have been universally regarded as criminal is rather low (all crimes have an unchanging character, which “... is not to be found in the intrinsic properties of acts imposed or prohibited by penal rules, because these display so great a diversity”¹⁸⁰. Neither the conflict between the “major social conflicts” and certain behaviours does reveal the true nature of crime, for the simple reason that there is a high number of actions which are not harmful in themselves, however this does not prevent the society from deeming them as crimes. In Durkheim’s interpretation, the opposition between crime and society is paramount in understanding it. “An act is criminal when it offends the strong, well-defined states of the collective consciousness. [...] It is thus this opposition which, far from deriving from the crime, constitutes the crime. In other words, we should not say that an act offends the common consciousness because it is criminal, but that it is criminal because it offends that consciousness. We do not condemn it because it is a crime, but it is a crime because we condemn it.”¹⁸¹

The essential feature of the crime resides, therefore, in the fact that the actions deemed as such determine a certain reaction from society, entitled punishment. The definition of crime by extracting the common nature of actions making-up the variety of the criminal behaviour represents the illustration of his key methodological principles: “Take as subject of research only a group of phenomena that have been pre-defined through a number of external features which are common to them and include all those which respond to that same definition in the same research. For example, we can notice the existence of a certain number of acts that have such an external feature, according to which, once they have been committed, they would determine from society that specific reaction called punishment. We move these into a separate category, under the same heading; we call a crime any punishable act...”¹⁸²

The essence of crime resides, therefore, in two fundamental elements: harm brought to collective consciousness and social reaction determined by the rupture

¹⁷⁸ Idem, p. 95

¹⁷⁹ Idem, p.97

¹⁸⁰ Idem,p.89

¹⁸¹ Idem,p.99

¹⁸² Emile Durkheim, op.cit, p.87

produced through the criminal action, translated in punishment. The manner in which Durkheim defines the punishment is a logical consequence from this understanding of the crime. Any criminal act affects not only the victim (his/her life or physical integrity, right to property etc); more importantly, the crime harms the society itself, as it fights against collective feelings, even if these exist through individuals, they are substantiated by a higher reality than that of such individuals. Thus, we could state that the suffering of the victim is nothing but one of the consequences of the crime, an external, immediately perceivable one. No matter how horrible this could appear, we could still ask ourselves, together with Durkheim: "What does one human being the less matter to society? Or one cell fewer in the organism? It is said that public safety would be endangered in the future if the act remained unpunished; but if we compare the degree of danger, however real it may be, to the penalty, there is a striking disproportion."¹⁸³ The main "victim" of the criminal is the society itself; the crime threatens its most intimate fabric, the network of collective feelings which determine its existence, the deepest solidarity links. The crime threatens the very existence of society: "Yet what places beyond doubt the social character of punishment is that once it is pronounced, it cannot be revoked save by government, in the name of society. If it were a satisfaction granted to individuals, they would always be the ones to decide whether to commute it: one cannot conceive of a privilege that is imposed and which the beneficiary cannot renounce. If it is society alone that exerts repression, it is because it is harmed even when the harm done is to individuals, and it is the attack upon society that is repressed by punishment."¹⁸⁴

The consequences of crime explain the features of social reaction which takes the form of punishment. Naturally, this is shaped by the features of society; things could not be different, as the consequences of crime are conditioned by the type of society in which this takes place. Beyond differences, the punishment has a certain number of features which remain almost the same; their consistency represents the expression of the fact that, no matter the peculiar forms that they take, human societies have a common foundation.

What is punishment, therefore? In Durkheim's opinion, it is first of all a passionate reaction which aims at revenge; its exterior forms demonstrate that what is being targeted through punishment is to cause suffering.¹⁸⁵ The "an eye for an eye" law represents the typical expression of the method to reach such a purpose ("an eye for an eye" is nothing else but a "repetition of the crime": what the criminal has done is reproduced this time by the society; the power that society has allows it to substitute the roles; "the victim" becomes the criminal now; while the society is covered by a "moral clothing" which makes it intangible; even if the action is identical, it changes its nature, depending on the position of the author). As an expression of passion, the punishment tends to reach maximum levels, in terms of intensity and perspective. In its initial forms, it had two key features: revenge and

¹⁸³ Idem, p.89

¹⁸⁴ Idem, p.108

¹⁸⁵ Idem, p.103

suffering; more specifically, by causing suffering, the revenge was achieved. The Durkheimian discourse, however, allows for another dimension to become visible: suffering is not a mere mean, but a fact consistent with the purpose (suffering provides satisfaction by itself). While this is an explicit fact in societies with low internal differentiation levels, this still survives, in mitigated forms, in modern societies. The morality of our society justifies punishment with a different set of arguments: the need for defence takes the place of the desire to revenge; rage is replaced by a sense of foresight; suffering has left the inner body of punishment. In reality, according to Durkheim, such mutations make up a model which rather expresses how the punishment should be instead of describing what it really is. Actually, “....between the punishment of today and yesterday there is no great gulf [...] The internal structure of the phenomena remains unchanged, whether these are conscious or not. We may therefore expect the essential elements of punishment to be the same as before.”¹⁸⁶

That the nature of punishment is almost the same is demonstrated by the fact that one of the key principles governing the action of a court is that of proportionality of the penalty. This principle forces the judge to pass a judgment based on some information and criteria stipulated by law; among these, the most important one is the seriousness of the offence (the first element mentioned in the classifications included in penal codes and the laws regulating the enforcement of penalties always refers to the seriousness of the offences, the degree of danger etc.; the action and the author are jointly dealt and the magistrate’s attitude is substantiated by this form of solidarity). This preoccupation to attune the punishment to the seriousness of the crime is considered by Durkheim a proof of the fact that punishment is deemed as redemption; in other words, the suffering of the convict is shaped by the suffering resulted: “[...] even when it had been shown that the guilty person is definitely incurable, we would still not feel bound to mete out excessive punishment to him. This demonstrates that we have remained true to the principle of talion, although we conceive of it in a more lofty sense than once we did. We no longer measure in so material and rough terms either the gravity of the fault or the degree of punishment. But we still consider that there should be an equilibrium between the two elements, whether we derive any advantage or not in striking such a balance. Thus punishment has remained for us what it was for our predecessors. It is still an act of vengeance, since it is an expiation. What we are avenging, and what the criminal is expiating, is the outrage to morality.”¹⁸⁷

Therefore, the nature of punishment has not gone through essential changes; theoretical and moral justifications have become far more developed, while the social institutions tasked to set down and apply the punishment have become ever more complex and professional and the shapes that the punishment takes have suffered some changes; none of these, however, have touched upon its foundation: “Thus the

¹⁸⁶ Idem,p.105

¹⁸⁷ Idem,p.106

nature of punishment has remained essentially unchanged. All that can be said is that the necessity for vengeance is better directed nowadays than in the past. The spirit of foresight that has been awakened no longer leaves the field so clear for the blind play of passion; it contains it within set limits, opposing absurd acts of violence and damage inflicted wantonly. Being more enlightened, such passionate action spreads itself less at random. We no longer see it turn upon the innocent, in order to have satisfaction come what may. Nevertheless it lies at the very heart of the penal system. We can therefore state that punishment consists of a passionate reaction graduated in intensity.”¹⁸⁸

In Durkheim’s understanding, the fact that society punishes a criminal is not substantiated by the existence of some form of “assignment” received from the private side, victim of the crime; on the contrary, this represents the expression of the fact that the entire society is the victim of that crime, while the suffering of one or another of the injured private victims is nothing else but the external form or manifestation of a deeper suffering, that of the entire social body. The fact that certain crimes, as those inflicted against authority, are punished harsher does not represent an argument whatsoever according to which society would be injured only in such cases; on the contrary, we could state that sometimes, society only takes such additional measures in order to make sure that certain key areas of its existence function (in the past, these were the crimes against religion, nowadays, mainly crimes against authority); therefore, in Durkheim’s opinion, any crime affecting the society.¹⁸⁹ Moving forward from personal vengeance to the public punishment “... is nothing but a progressive succession of encroachments by society upon the individual, or rather upon the primary groupings that it comprises and the effect of these encroachments was increasingly to substitute for the law relating to individuals that relating to society.”¹⁹⁰

Which are the features which separate the penal repression from mere revenge? The first feature of this kind is its organized nature, which consists not from the fact that the punishments are determined (this is not the substantive feature of the punishment, as demonstrated by the fact that, in many social systems, certain actions have a criminal nature, however, the penalty is not stated, as that is the case of interdictions stipulated by the Bible), but from the fact that there is a social actor which determines and applies the punishment. “The only organisation met with everywhere that punishment proper existed is thus reduced to the establishment of a court of law.”¹⁹¹ ... In whatever way this was constituted, whether it comprised the people as a whole or only an elite, whether or not it followed a regular procedure both in investigating the case and in applying the punishment, by the mere fact that

¹⁸⁸ Idem, p.107

¹⁸⁹ Idem, p.108-111

¹⁹⁰ Idem, p.112

¹⁹¹ Idem, p.113

the offence, instead of being judged by an individual, was submitted for consideration to a properly constituted body and that the reaction of society was expressed through the intermediary of a well-defined organism, it ceased to be diffuse: it was organised.”¹⁹²

By the end of this demonstration, Durkheim provides the definition of the punishment: “Thus punishment constitutes essentially a reaction of passionate feeling, graduated in intensity, which society exerts through the mediation of an organised body over those of its members who have violated certain rules of conduct”¹⁹³. Durkheim’s reasoning reaches the conclusion that what is paramount in punishing is not the personal satisfaction provided to the victim (personal satisfaction is nothing else but a mere illusion) but a far more important element, namely that, through this punishment, we reaffirm the power of collective feelings and thus we rebuild the collective consciousness that has been harmed by crime: “As for the social character of the reaction, this derives from the social nature of the sentiments offended. Since these sentiments, because of their collective origin, their universality, their permanence over time, and their intrinsic intensity, are exceptionally strong, they stand radically apart from the rest of our consciousness, where other states are much weaker. They dominate us, they possess, so to speak, something superhuman about them. At the same time they bind us to objects that lie outside our existence in time. Thus they appear to us to be an echo resounding within ourselves of a force that is alien, one moreover superior to that which we are ourselves. We are therefore forced to project them outside ourselves, relating what concerns them to some external object. [...] Such a mirage is so inevitable that it will occur in one form or another so long as a repressive system exists. For, were it otherwise, we would need to nurture within us only collective sentiments of moderate intensity, and in that case punishment would no longer exist. [...] Since these sentiments are collective, it is not us that they represent in us, but society. Thus by taking vengeance for them it is indeed society and not ourselves that we are avenging. Moreover, it is something that is superior to the individual.”¹⁹⁴

The nature of punishment is therefore determined by the nature of crime; the features of the social reaction represented by the punishment are determined by the “crisis” produced within the society by the criminal action. This explains the diversity of punishment, the various degrees of its intensity; redemption, as an integral part of the punishment, is requested by society depending on the intensity of collective feelings harmed by the criminal and by the seriousness of the offence brought. As not all collective feelings are equally “alive” (meaning their intensity is not alike), it is only natural for the punishment to be different. “Since the gravity of the criminal act varies according to the same factors, the proportionality everywhere observed between crime and punishment is therefore established with a kind of mechanical

¹⁹² Idem, p.114

¹⁹³ Ibidem

¹⁹⁴ Idem, p.118

spontaneity [...] What brings about a gradation in crimes is also what brings about a gradation in punishments; consequently the two measures cannot fail to correspond, and such correspondence, since it is necessary, is at the same time constantly useful.”¹⁹⁵

How come the need to punish the crime? We would be tempted to make use of the simplest formula for an answer: as long as the crime causes suffering to the victim, it is only natural for the criminal to be punished. Society must react, equally in order to punish the criminal as well as in order to show to anyone else that such actions shall always be convicted. However, the explanation submitted by Durkheim has another, much more subtle dimension. Reaction to crime represents the very condition for the social body to take shape; punishment represents the means to reaffirm the collective feelings harmed by the criminal: “Now crime is only possible if respect for common feelings is not truly universal. It is also true that the existence of society is only possible when individual consciences reunite in reaffirming their belief in such common feelings. If therefore when this occurs the individual consciousness that the crime offends did not unite together to demonstrate to one another that they were still at one, that the particular case was an anomaly, in the long run they could not fail to be weakened. But they need to strengthen one another by giving mutual assurance that they are still in unison. Their sole means of doing so is to react in common. In short, since it is the common consciousness that is wounded, it must also be this that resists; consequently, resistance must be collective.”¹⁹⁶

The Durkheimian arguments lead to a conclusion which fundamentally contradicts our usual way of regarding the crime and the criminal. Any crime causes horror; it is only natural to work this way, as we feel threatened ourselves; this is why the satisfaction resulted from the suffering of the criminal produces a pleasure which is proportional with the induced level of fear, even if such satisfaction is denied by the modern moral sense as a purpose of the punishment. Nevertheless, the crime also triggers a mechanism whose end result is strengthening collective solidarity. Not only the values harmed by that crime are empowered, but the reaction against the crime represents the area favourable to such empowerment and strengthening of collective solidarity.

*
* *

Durkheim says that in each individual there are two consciousnesses: [...] the one comprises only states that are personal to each one of us, characteristic of us as individuals, whilst the other comprises states that are common to the whole of society. The former represents only our individual personality, which it constitutes;

¹⁹⁵ Idem, p.119

¹⁹⁶ Idem, p.120

the latter represents the collective type and consequently the society without which it would not exist. [...] Now, although distinct, these two consciousnesses are linked to each other, since in the end they constitute only one entity, for both have one and the same organic basis. Thus they are solidly joined together. This gives rise to a solidarity *sui generis* which, deriving from resemblances, binds the individual directly to society..."¹⁹⁷

This type of solidarity, where similarities among individuals are predominant, is expressed through the penal law. The fact that penal rules protect therefore the society does not represent a mere abstraction; the society's prime substance, collective feelings, are part of each individual conscience. What is specific to each individual does not leave aside, instead it entails what is specific to all. The penal law protects that very part of society which is present in each of us; contrary to that, the rules of civil law regulates manifestations of what is peculiar in the consciences of each individual. This is why the penal law denies negotiation and contract, which are the very foundation of civil law; by protecting feelings which, even if they exist through private individuals, find their substance in a reality transcending this private individual, the penal rules are meant to protect first and foremost the society.

It is this solidarity that repressive law expresses, at least in regard to what is vital to it. Indeed the acts which such law forbids and stigmatises as crimes are of two kinds: either they manifest directly a too violent dissimilarity between the one who commits them and the collective type; or they offend the organ of the common consciousness. In both cases the force shocked by the crime and that rejects it is thus the same. It is a result of the most vital social similarities, and its effect is to maintain the social cohesion that arises from these similarities. It is that force which the penal law guards against being weakened in any way. At the same time it does this by insisting upon a minimum number of similarities from each one of us, without which the individual would be a threat to the unity of the body social, and by enforcing respect for the symbol which expresses and epitomises these resemblances, whilst simultaneously guaranteeing them."¹⁹⁸

*
* *

The rules of the penal law match therefore the collective feelings; not any collective feelings, but those which are "alive and strong". The diversity of penal law systems is explainable through the various circumstances in which the collective types have been developed; it is therefore natural for a certain action to become punishable in one society and tolerated in another. The same mechanism is the one regulating the evolution of penal law systems; while a specific collective feeling is weakened, this fact is being reflected in the strength of the rule protecting it. It is obvious that, normally, the rule would not be removed instantaneously; as the

¹⁹⁷ Idem, p.123

¹⁹⁸ Idem, p.124

weakening of a certain feeling takes place gradually, the same applies to the matching rule (this is the reason why we notice the persistence of some rules which, even if they still formally exist within the penal codes, are not applied; at first, we would be inclined to attribute this situation to the tolerance of society or of authorities; however, this type of tolerance still needs an explanation; is it a reflection of a decrease in the intensity of that collective feeling protected by the rule?).

“This does not mean that a penal rule should nonetheless be retained because at some given moment it corresponded to a particular collective feeling. The rule has no justification unless the feeling is still alive and active. If it has disappeared or grown weak nothing is so vain or even counter-productive as to attempt to preserve it artificially by force. It may even happen to become necessary to fight against a practice that was common once, but is no longer so, one that militates against the establishment of new and essential practices.”¹⁹⁹

The manner in which Durkheim explains the punishment is derived from the mechanism through which the crime takes place; as the crime represents the action which produces an offence to some powerful instances of collective conscience, this shall mark the reaction of society. According to Durkheim, the main purpose of punishment is to undo the harm caused by the crime, more specifically to rebuild the social solidarity affected by the criminal action, those strong and alive feelings which bind individuals one to another. We are used to state that the punishment is meant for the criminal to make amends for his/her misdeeds and to discourage those who could follow his/her lead. In Durkheim’s opinion, these are mere secondary objectives, actually they look more like effects of the main function served by the punishment: “The same is true of punishment. Although it proceeds from an entirely mechanical reaction and from an access of passionate emotion, for the most part unthinking, it continues to play a useful role. But that role is not the one commonly perceived. It does not serve, or serves only very incidentally, to correct the guilty person or to scare off any possible imitators. From this dual viewpoint its effectiveness may rightly be questioned; in any case it is mediocre. Its real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour.”²⁰⁰

The paramount function of the punishment is, therefore, to rebuild the collective consciousness; in order to fulfil such a function, it is only natural for the punishment to cause certain suffering, in other words the criminal must suffer proportionally to his/her crime. From this point of view, the punishment appears to be acting especially against honest people, as the punishment leaves space for the re-assertion of collective feelings which make up one of the main binders behind social solidarity. The social defence function (the preventive dimension of the punishment) is nothing more, in Durkheim’s opinion, but a “specific counter-strike”: “Certainly it does fulfil the function of protecting society, but this is because of its expiatory nature. Moreover, if it must be expiatory, this is not because suffering redeems error

¹⁹⁹ Idem, p.125

²⁰⁰ Ibidem

by virtue of some mystic strength or another, but because it cannot produce its socially useful effect save on this one condition.”²⁰¹ “In saying that punishment, as it is, has a reason for its existence we do not mean that it is perfect and cannot be improved upon. On the contrary, it is only too plain that, since it is produced by purely mechanical causes, it can only be very imperfectly attuned to its role. The justification can only be a rough and ready one.”²⁰² Without essentially having changed its nature, the punishment has embraced a complex historical development, starting from “an eye for an eye” principle up to modern regulations; throughout the process, the importance of alternate punishments to deprivation of freedom has become ever more important.

6.4. The individual in the modern society²⁰³

The concept of *anomie* was used by Durkheim to the end of *The Division of Labour in Society* (1893); he later on developed it in *Le suicide* (1897), as the anomic suicide was considered one of the main categories of suicide (together with the egotistic and the altruistic suicide). The Durkheimian significance of the concept is broader; anomie signifies the drama of the modern individuals, prisoner of desires and passions pushed to the boundaries of impossible, of the desire to have as much and as quickly as possible, to feel as intense as possible: egotism, source and purpose of all individual efforts.

This concept plays an extremely important role in the analysis of the key problem for the Durkheimian reflection, the relationship between the individual and the community: “The topic of this first book (*De la division du travail social*, our ref.) is the central topic of Durkheimian thinking, that of the relation between individuals and community. How could a gathering of individuals make up a society? How can these deliver that pre-condition of social existence represented by consensus?”²⁰⁴

Using a different understanding, the concept of anomie introduces a nuance in the significance of our topic: the issue of the relationship between *the individual and the society* takes a more specific shape, that of *the life of the individual within society*. The human being is a social being to the extent to which he/she participates to the life of the groups that the society is made up of; participating to their life entails a limitation on individual freedoms. In exchange for such limitations, the individual enjoys the protective influence of the (family, religious, professional) group: the group purposes are higher compared to the individual ones and due to that the human

²⁰¹ Idem, p.126

²⁰² Ibidem

²⁰³ For all sociological theories presented under this topic, please see also a broader analysis in Petronel Dobrică, *Normalitate, conformare și devianță socială (Social normality, conformity and deviance)*. Sociologie (coord. Lazăr Vlăsceanu), Ed. Polirom, Iași, 2011 p.337-391

²⁰⁴ Raymond Aron, op. cit, p.319

being receives the landmarks and the energy required in order to perform his/her social function. The human being is moral, Durkheim says, to the extent to which he/she fulfils his/her function.

Participation to social life bears the sign of the type of society in which the individual lives. Unlike simple societies, the modern society has as a distinctive feature the blurring of the collective type. The consequence of this situation is represented by a diversification of desires and dreams of individuals: beyond physiological needs, relatively easy to cover, aspirations may appear that the individual turns into purposes and he/she spends his/her entire energy into achieving such purposes. The happy individual, Durkheim says, is the one who manages to reach an agreement between the purposes that he/she aims for and the means available to him/her. Is the individual alone capable to deliver such an agreement? Durkheim's answer is a negative one: "No living being can be happy or even exist unless his needs are sufficiently proportioned to his means [...] But how determine the quantity of wellbeing, comfort or luxury legitimately to be craved by a human being? Nothing appears in the individual's organic nor in his psychological constitution which sets a limit to such tendencies [...] They are thus unlimited so far as they depend on the individual alone. Irrespective of any external regulatory force, our capacity for feeling is in itself an insatiable and bottomless abyss [...] Being unlimited, they (desires - our ref.) constantly and infinitely surpass the means at their command; they cannot be quenched"²⁰⁵. The only authority which may limit the individual aspirations is the authority exerted by society: " Either directly and as a whole, or through the agency of one of its organs, society alone can play this moderating role; for it is the only moral power superior to the individual, the authority of which he accepts. It alone has the power necessary to stipulate law and to set the point beyond which the passions must not go"²⁰⁶.

There is, according to Durkheim, a certain hierarchy of occupations, jobs, an estimate of the quantity of wealth associated to each position, in the moral conscience of any society. This hierarchy includes minimal and maximal thresholds, among which the expectations of individuals are placed, and it also entails an acceptance of the way in which social positions are fulfilled and the means associated to such positions are deemed as fair: "According to accepted ideas, for example, a certain way of living is considered the upper limit to which a workman may aspire in his efforts to improve his existence, and there is another limit below which he is not willingly permitted to fall unless he has seriously demeaned himself... Both differ for city and country workers, for the domestic servant and the day-labourer, for the business clerk and the official, etc..."²⁰⁷. Under the pressure of society, the desires of individuals are limited to what they might legitimately hope to achieve; this

²⁰⁵ Durkheim, E. (1897/2002). *Le suicide. Etude sociologique*. (Livre deuxième: Causes sociales et types sociaux). Cegep de Chicoutimi. (Electronic edition , Jean- Marie Tremblay), p.99-100

²⁰⁶ Idem, p.101

²⁰⁷ Idem, p.101-102

limitation is relative, in the sense that its boundaries varies from one individual to another and from one historical age to another, depending on the increase or decrease of collective revenues and the development of moral ideas: the definition of luxury as well as the assessment of what represents the basic necessity of life for one social class or another might change depending on the developments of the society.

Obviously, the individual is not motionless, he/she is not some kind of inert mass that the society is exerting pressure on. On the contrary, he/she would continuously seek to improve his/her situation; what is essential, however, is that such searches are limited by the boundaries set by society. Moderation cast on passions and desires keeps the individual away from catastrophic deceptions; the happiness of the human being, understood as satisfaction in front of his/her own fate, results from a complex process made up from reasonable dreams, compared with the social positions, the available opportunities and the efforts made. The foundation of this agreements is represented by the individuals' acceptance of social classification principles, which exist in any society: birth among the members of a certain social class, in past societies, merit and inherited qualities, in modern societies, these all fulfil the same function, that at pointing out to the individual which is the social area to which he/she has the right to aspire.

The normal state is the one defined through a match between the individual's desires and the available possibilities; the source for such balance is society, which shows to each and every one, even if in a relative manner, until which level it would be reasonable enough to cast his/her own desires. The situation in which society is unable to fulfil such a role is that of anomie; this arises in the case of ample social transformations: "But when society is disturbed by some painful crisis or by beneficent but abrupt transitions, it is momentarily incapable of exercising this influence; thence come the sudden rises in the curve of suicides..."²⁰⁸

What economic crises and periods of rapid growth of collective and individual wealth share is the fact that both of them disrupt the collective order. The increase in the suicide rate during periods of economic downturn can be explained by the fact that individuals are forced to step down below the level they had gotten used to, to refrain their dreams, to settle for less: as the society is not able to re-train their moral sense in such a short time, the discontent that they resent generates "the suffering which detaches them from a reduced existence even before they have made trial of it"²⁰⁹.

In a different manner, however similar in its consequences, the sudden increase of individual and social wealth also affects the balance between possibilities, desires and social rewards achieved by individuals. In normal situations, the scale of individual aspirations is dependent on the scale of opportunities available to him/her; the quick growth of wealth, Durkheim says, disrupts this balance: "The limits are unknown between the possible and the impossible, what is just and what is unjust, legitimate claims and hopes and those

²⁰⁸ Idem, p.103

²⁰⁹ Idem, p.104

which are immoderate. Consequently, there is no restraint upon aspirations [...] it affects even the principles controlling the distribution of men among various occupations. Since the relations between various parts of society are necessarily modified, the ideas expressing these relations must change ... With increased prosperity, desires increase. The state of de-regulation or anomie is thus further heightened by passions being less disciplined, precisely when they need more disciplining"²¹⁰. The spectacle of wealth belonging to those favoured in such a time stimulates the entire society, no matter the social position and the associated opportunities; the individual has the feeling that he/she might wish everything, that everything is possible, that the rules are relative. Society, whose authority was operating prior to this moment as a *moral brake* on the pathway of unlimited expansion of individual passions, is now incapable of alleviating them. Human ambitions and passions are intertwined in an infinite spiral; each pleasure, once satisfied, shall generate another, each stage that has been dealt with means only a further departure from the initial moment, without closing the gap between the individual and the final purpose. Actually, this purpose has an illusory existence: the only certain reality is the permanent exultation of desires. As these are not limited, they will always fall behind achievements, unfortunately: this gap represents the source of discontent and frustrations which fuels an increase in the rate of suicides as the collective prosperity grows.

The state of anomie, Durkheim states, does not appear in case of crises only: there is a social area where anomie already represents a chronic state, that of trade and industry. "On both sides nations are declared to have the single or chief purpose of achieving industrial prosperity... Industry, instead of being still regarded as a means to an end transcending itself, has become the supreme end of individuals and societies alike. Thereupon the appetites thus excited have become freed of any limiting authority. By sanctifying them, so to speak, this apotheosis of well-being has placed them above all human law. Their restraint seems like a sort of sacrilege ... Ultimately, this liberation of desires has been made worse by the very development of industry and the almost infinite extension of the market... A thirst arises for novelties, unfamiliar pleasures, nameless sensations, all of which lose their savour once known"²¹¹. This ongoing search, *the passion for the infinite*, presented in the modern society and the ultimate moral quality, actually represents the expression of the state of anomie, a pathological state, source of discontent and despair. Social traditions and practices are unable to regulate the life of individuals; what must be built is a new kind of morals, which should match the changes brought about at collective and individual level²¹².

6.5. Legal regulations and various social groups

²¹⁰ Idem, p.104

²¹¹ Idem, p.106

²¹² Idem, p.124

The Durkheimian perspective is one which unveils itself, many times simultaneously, at multiple levels. The idea of pressures exerted by society on individuals (relative limitation of aspirations depending on reasonable means, which are available depending on the position of the individual in social hierarchy) is not at all irreconcilable with the idea of individual autonomy, involved in social activities through which he/she aims to achieve individual and group-based purposes. Social structures pre-exist individuals; at the same time, the social nature of the human being resides in the involvement into the life of social groups, ever more different, as the social division of labour becomes even more accentuated.

In order to understand the individual *and* the society one must understand the individual *within* the society. Besides a minimal set of rules and values shared by the members of the same society, in the lack of the society would be disintegrating itself, the modern world is a world of differences among individuals and groups. Social life entails to put together such different rules and values, ways of doing, feeling and thinking, which tend to become ever more specific to the “sub-worlds” that the social world is made up of: except for an extremely low number of behaviours, the assessment of infringements of rules becomes more and more an issue to be judged by the group.

Contemporary societies are, therefore, societies with an extremely accentuated degree of internal differentiation. Social groups produce rule-based and value-based sub-systems which are sometimes extremely different and quite often divergent. Such rules-based and value-based systems reflect manners of being, thinking, acting, in order to re-use a classical Durkheimian formula; in other terms they express a certain outlook of society, of human behaviours within society.

The social nature of the human being consists from his/her involvement into social life; as such involvement is achieved through and within social groups, it is obvious that the perspective of individuals over society is derived from that of the groups that they are a part of. The same applies to their behaviours in everyday life.

One of the consequences of this internal differentiation is the different use of social norms, including the legal ones, depending on the specific social contexts in which the individuals are placed. From the legal standpoint, cultural diversity could give birth to a right which is not wrongfully applied, but instead diversely applied. This is the topic of the next section.

TOPIC NO. 7

THE LAW AS TOOL FOR SOCIAL CHANGE: - THE USE

OF LAW: CULTURAL CONDITIONING AND APPLICATION OF LAW; - OFFICIAL AND WORKING DEFINITIONS: LAWS AND DAY TO DAY LIFE

7.1. Introductory considerations. Social norms and values.

According to Emile Durkheim, the move from simple to complex societies is caused by the increase in the volume of the society and its moral density (frequency and intensity of contacts between individuals). Under the pressure of these two factors, the division of labour deepens: individuals specialise, interdependencies become ever more important.

The internal differentiation is accompanied by the diversification of social norms and values; instead of a system of norms and values shared by all the members of the community, contemporary societies include a large number of regulatory and value subsystems that separate the individuals and the groups that make up the society. A certain number of social norms and values continues to exist that is common to all the members of the society, but they only regulate a part of the network of social interactions; such shared norms and values (legal, moral, religious etc.) allow individuals and social groups that make up what we call *society* to interact and build together the social order.

In the pre-industrial societies, the normative diversity was much lower; moreover, the dynamics of norms and values was much slower and, as a result, the assimilation of social norms was much easier. Entire generations succeeded conforming to the same prescriptions: whether the child of a peasant or of a craftsman, learning the roles that the family of origin had in the social fabric was sufficient for the entire life. The industrial revolution, with its consequences (rapid urban development, pre-eminence of industry and wage labour, increased horizontal and vertical social mobility), generated a multiplication of social groups and their specific normative systems; unlike previous societies, the individual relentlessly digests social norms and values, as he/she becomes integrated in various social groups: "Each group, though subordinated to the same institution, builds its own norms or hierarchies of norms through which it differentiates and particularises itself in the social field"²¹³.

A tremendous volume of sociological literature exists on the subject matter of social norms and values. The nature of this study imposes certain limitation on the approach of the subject matter, including in terms of the space allocated to each

²¹³ Ioan Mihailescu, *Sociologie generală: concepte fundamentale și studii de caz (General sociology: basic concepts and case studies)*, Publisher: Ed. Universității din București, București, 2000, p. 65

topic; accordingly, I chose to indicate the integrative function of the social norms and values, as well as their role in the individualisation of groups within the same society. At last, I believe it is useful to recall some simple definitions of social norms and values in general and of legal rules in particular.

The coercive force of social norms allows us to participate in complex social activities; we expect the other members of the society to comply, at least to a reasonable extent, with the same social norms. The social rules are mandatory landmarks that guide our actions; in other words, they represent real codes that allow the participation in social life: "The norms are social rules that specify the behaviours to be displayed in given situations. They are social conventions, established in more or less arbitrary manner"²¹⁴. The action of the norms generates the repetitive and uniform character of social facts.

Any social norm, be it legal, moral, religious, esthetical etc., expresses a certain value. "The values are abstract ideas about what is desirable, right and good for the majority of the members of a society to strive for. The value represents that which is worthy of desiring, that which is in itself worth to be appreciated or pursued. An object, a manner of being, of saying or of acting may be included in this category. Hence, economic, logical, esthetical and practical values may be discerned "²¹⁵. In another definition, the values (as elements of culture) "... guide the activity of individuals in a diffuse manner, providing them with a corpus of ideal references and, at the same time, with a variety of identification symbols that help them to position themselves and the others in relation to his ideal²¹⁶".

Legal rules are a specific type of social norms; their main features are that they are general and obligatory; in other words, they are the only social norms that may be extended to the entire society and their observance is guaranteed by the coercive force of the state, in case of willing disobedience. The notion of *rational obligation* is used as an element for defining this type of norms: a perspective located on the crossroads between sociology is that of Mircea Djuvara, according to whom the social norms can be classified into two large categories: conditioned and unconditioned norms²¹⁷. The criterion for classification is the rational assessment of the reality of facts, assessment that includes the notion of obligation. Moral and legal norms are included in the group of unconditioned norms, whilst the religious, technical, good manners etc. ones belong to the group of conditioned norms; the essential difference between the legal and moral norms is that the former regulate *external facts*, whilst the moral rules are addressed to *internal facts*.

²¹⁴ Ioan Mihailescu, op.cit, p.65

²¹⁵ Idem, p. 65

²¹⁶ Raymond Boudon, Francois Bourricaud, *Dictionnaire Critique de la Sociologie*, Ed. Puf, Paris, 1982, p. 68

²¹⁷ Mircea Djuvara, *Teoria generală a dreptului. Drept rațional, izvoare și drept pozitiv (General theory of law. Rational law, sources and positive law)*, Publisher: Ed. All, București, 1995

A specific feature of our societies is that the legal regulation has penetrated all walks of social life, including those areas that, traditionally, were regulated through non-legal instruments. The drive to rationalise the social life through legal regulations may lead to normative inflation: the overabundance of legal rules may generate major difficulties in their intended recipients acknowledging the prescriptions. In other words, this is what in sociology is designated by the concept of *perverse effect*²¹⁸: a species of the consolidation effect, an unexpected, unintended effect that generates consequences that are entirely opposed to those intended by the norm. Legal overregulation may be accompanied by parallelisms, overlaps or even contradictions between the rules, such that, besides the fact that it becomes impossible to know all the legal requirements, the risk appears that complying with one norm might contravene, at least in part, to another prescription; this legal uncertainty may also result in law enforcement agencies defining certain behaviours as being unlawful (and implicitly punishing them), despite the individuals' wish to obey by the law. The difficulties in knowing and relating to the legal prescriptions are felt not only by then regular individuals (exercising individual rights and carrying out many activities require more and more support from legal professionals), but also by qualified persons, invested to enforce the law (judges, prosecutors, lawyers, notaries, policemen etc.).

Social norms and values vary from a cultural and historic perspective: the system of values of the European culture (strongly influenced by the North-American civilisation system) is very different from that of the Orient; the vassalage connections, specific to the middle ages, come in strong contrast with the values of equality and liberty specific to the societies of contemporary Europe.

The cultural variability of the social norms is a fact that can be immediately noticed by any one travelling to a foreign country; the more remote the destination, the larger the distance between the traveller's norms and values and those of the locals; space distances are, simultaneously, cultural distances. On the other hand, this observation needs a finer distinction: the age we live in allows the reduction of space by technology; the same does not apply in the case of the cultural distance, the reduction of which requires adjustments and adaptations that are much more difficult to achieve. The European who travels in other cultures will easily observe that the norms he/she is used to are of almost no use in ten interactions with the locals; the differences are significant, from the salutation formulas to the manner for carrying out the simplest of commercial transactions; in order to interact with the locals, our traveller will have to quickly become familiar with the meaning of a minimum of norms.

That which seems simple in the case of tourist travelling, becomes much more complicated when, over a short period of time, large masses of humans are dislocated to totally dissimilar cultural areas. The current European problem of the refugees is an example: the integration difficulties confronting them and the behaviours that have caused the concern and, in some place, revolt of the citizens of some European

²¹⁸ Raymond Boudon, *Effets pervers et ordre social*, Ed. Quadrige/PUF, Paris, 1977

towns against accepting the migrants are nothing but the expression of the existing incongruity between the norms and values of the Europeans and those of the newcomers. The latter's economic integration is mainly a matter of resources; their cultural integration is a much more complex process that takes place in the space of symbols and that requires, alongside adjustments and accommodations, the renunciation of certain manners of doing, of feeling, of thinking; this outcome cannot be achieved rapidly, within the lifetime of only one generation.

The example analysed above is an extreme one, since it concerns the fundamental differences that exist between the European culture and that of the migrants who come from totally dissimilar cultural areas; the significance of this example lies in the fact that it illustrates in an extremely evident manner the importance of norms and values based on which individuals design their behaviours and actions. On a different scale, cultural adaptation problems also occur within the same cultural area: beyond the belonging to the European culture space, sensible cultural distinctions exist between the citizens of the (still) 28 States that make up the European Union: developing the European identity involves the harmonisation of these cultures concomitantly with the conservation of local identities; in other words, shared manners of being, feeling, and thinking, overlapping the national ones, an outcome that requires extremely sensitive cultural adjustments and accommodations.

7.2. The social utilisation of the law.

How are social norms created, including the legal ones? What are the mechanisms for enforcing them and which are the types of relating to their exigencies? How do the law enforcement agencies work? How is a breach of law punished? Is the punishment independent of the social context and the person that breached the law? These are but a few of the topics approached in a classical sociological work (*Outsiders*, 1963) authored by one of the most prominent representatives of the interactionist current, Howard Becker.

The starting point of his analysis is the observation on the diversity of sources that generate social norms, a specific feature of modern societies: "All social groups make rules and attempt, at some times and under some circumstances, to enforce them. Social rules define situations and the kind of behaviour appropriate to them, specifying some actions as "right" and forbidding others as "wrong"²¹⁹.

Starting from this observation, Becker notices that the idea that social norms are general and agreed by individuals is extremely questionable, both in terms of their definition and understanding and of the manner they are applied. The perspective proposed by the American author on the society strongly contrasts with what we could dub a *monochrome perspective* over the social reality, a perspective

²¹⁹ Howard Becker, *Outsiders. Etudes de la sociologie de la deviance*, Ed. Metailie, Paris (translated by J.-P. Briand and J.-M. Chapoulie), 1963/1985, p. 25

that could be summarised in the idea that any society produces a system of rules and values and the social order results from the adherence of the individuals to the contents of such rules and values (the breaking of the rules, in particular of the legal ones, being a kind of discrete crisis, a tear in the social fabric).

Quite the opposite, the picture that Becker proposes is one of a social world composed of sub-worlds that are populated with competing individuals and groups, equipped with systems of specific norms and values; defining the rules and their application may equally be source of disagreement between the various social stakeholders: "Social rules are the creation of specific social groups. [...] These groups need not and, in fact, often do not share the same rules. The problems they face in dealing with their environment, the history and traditions they carry with them, all lead to the evolution of different sets of rules. [...] Italian immigrants who went on making wine for themselves and their friends during Prohibition were acting properly by Italian immigrant standards but were breaking the law of their new country.[...] The lower-class delinquent who fights for his "turf" is only doing what he considers necessary and right, but teachers, social workers, and police see it differently. [...] While it may be argued that many or most rules are generally agreed to by all members of a society, empirical research on a given rule generally reveals variation in people's attitudes"²²⁰.

As we showed in a previous Section, the element that separates legal from other social rules is that the latter are enforced on all the members of the society (obviously, to the extent to which they are subject to one legal rule or another), and their enforcement is further guaranteed, unlike in the case of other social norms, by the potential intervention of law enforcement agencies. What happens with these rules? More specifically, beyond the diversity of rules – a rather natural expression of social diversity – do legal rules imply, entail a mechanism of obedience by their very existence? Becker's answer to this question (implicit, in my reading) is negative. Despite the existence of sanctions, the manner in which individuals relate to prescriptions, even to legal ones, is highly varied. This variability, as we shall see further on, mainly stems from the way in which the rules are adopted: "Formal rules, enforced by some specially constituted group, may differ from those actually thought appropriate by most people. Factions in a group may disagree on what I have called actual operating rules. Most important for the study of behavior ordinarily labeled deviant, the perspectives of the people who engage in the behavior are likely to be quite different from those of the people who condemn it. In this latter situation, a person may feel that he is being judged according to rules he has had no hand in making and does not accept, rules forced on him by outsiders"²²¹.

The development of social norms, in particular of the legal ones, is a fact of crucial significance. According to the thinking of our societies, the legal rules reflect and protect the general interests; in simple terms, the interests protected by legal rules seem to/claim to serve all citizens and each of them. A statement that was easy

²²⁰ Idem, p. 38-39

²²¹ Idem, p. 39-40:

to accept in ancient cities, but difficult to admit in the societies we live in today: from the differences in the adoption manner (in the past, by consulting the city, currently, by delegation of legislative power) to the pronounced heterogeneity of our societies, compared to the relative homogeneity of those that provided the primary matrix of democracy, a number of other elements make this assertion extremely questionable. However, I shall come back to this topic in one of the following sections.

Going back to H. Becker's analysis, he notes yet another critical feature of the contemporary societies: the unequally distributed capability to enforce social norms. This distribution marks the contexts in which individuals and groups who have this capability imagine what is right for the groups or, at a more general level, for the society; starting from this projection, the other individuals are required to adopt particular behaviours, and not others that are considered harmful and dangerous for individuals and for the social life.

Generally speaking, the effort to enforce rules and behaviour patterns associated to them characterises the life of all the groups that make up the society: men try to enforce certain rules on women, adults – on the young, whites – on ethnic minorities, middle class – on the working class etc.: "Differences in the ability to make rules and apply them to other people are essentially power differentials (either legal or extralegal). Those groups whose social position gives them weapons and power are best able to enforce their rules. Distinctions of age, sex, ethnicity, and class are all related to differences in power [...] ... we must also keep in mind that the rules created and maintained by such labeling are not universally agreed to. Instead, they are the object of conflict and disagreement, part of the political process of society".²²².

The differences between the individuals and groups that make up the society are not only manifest in the process of the development of social norms; the manner in which the deviation from the rules is sanctioned, including and, perhaps, especially from the legal ones, is socially conditioned, despite any ideologies built around the principle of unconditional sanctioning. The reaction of the society in relation to delinquent behaviour is not mechanical: it differs and may vary depending on a number of factors, such as the timing of the act (during social campaigns against particular behaviours, the chances to be apprehended and be dealt a harsher punishment are higher than in normal times), the status of the person committing the act (the law applies differently to middle class than to those from poor neighbourhoods, to whites compared to blacks etc.), the victim (social position and resources), consequences of the behaviour etc. This type of observations leads to the conclusion that the deviance/delinquency is not an intrinsic quality of the deviant act: "The same behavior may be an infraction of the rules at one time and not at another; may be an infraction when committed by one person, but not when committed by another; Some rules are broken with impunity, others are not. In short, whether a given act is deviant or not depends in part on the nature of the act (that is,

²²² Becker, *op.cit.*, p.41

whether or not it violates some rule) and in part on what other people do about it"²²³. The existence or inexistence of a reaction of the group to rule-breaking is an argument for refining the terms used in the two types of situations: *deviant behaviour* and *rule-breaking behaviour*. Based on these observations, Becker applies the criteria *obeying/infracton of the rule* and *labelling/not labelling as deviant* to build a typology of deviant behaviour²²⁴: those who break the rule and are perceived as deviants, those who do not break the rule, but are seen as deviants (labelling errors are, perhaps, more numerous in extrajudicial contexts than in courts) and those who break the rule without being perceived as deviants (either because the act is not known to the others or because, given a set of circumstances – timing, type of rule disobeyed, status of the infractor etc. – his/her behaviour causes no reaction from the others). In certain cases, Becker notes, the breaking of the rule carries no consequences: certain persons (such as those in the category of *white collars*) may break legal rules without any (or with minimal) risk of being labelled as deviants.

This idea is also central in another American sociological perspective, the one formulated by Edwin Sutherland in analysing white collar criminality. *White collar criminality* designates criminality among professionals, businessmen, politicians, high civil servants etc., in short, among *respectable and respected individuals*. *White collar* criminality is concentrated in extremely varied areas: real estate, railways, insurance, armament, banking, public utility, oil industry, company reorganisation and politics etc. It permeates to different degrees all areas and professions: "White collar criminality exists in every profession and can easily be identified in ordinary conversations with members, in the answer to the question: Which are the dishonest practices of your profession?"²²⁵ Why are "white collars" not included (or are marginally included) in official criminality statistics? According to Sutherland, the explanation lies in the implementation of criminal law, which leads to *administrative segregation* of criminals. Unlike the crimes committed by individuals from disadvantaged groups, which are investigated by the police, prosecuted and tried in criminal courts, the *white collar* crimes are mainly investigated by administrative inspectors and boards or by civil courts. In the case of *low class* individuals, the sanctions administered are of a criminal nature (the standard is imprisonment); for the members of the *upper class*, the sanctions are, usually, of a civil or administrative nature (cautioning, cessation orders, fines and, exceptionally, incarceration): "Thus, white collar criminals are administratively segregated from other criminals and, to a great extent, the consequence of this segregation is that they do not appear to be criminals in the proper sense of the word, neither for themselves, nor for the public at large or criminologists"²⁵⁴. What are the causes of such differences in the

²²³ Idem, p.37

²²⁴ Idem, p.43-45

²²⁵ Edwin Sutherland (Sutherland, E.H. 1940). *White Collar Criminality*. *American Sociological Review*, 5:1-12, reprinted in Cressey, D.R, Ward, D.A. 1969). (426-432) *Delinquency, Crime and Social Process*. New York: Harper & Row, p.350-351

²⁵⁴ Idem, p. 356

enforcement of criminal law, reflected in this *administrative segregation* of criminals? Law enforcement is conditional, says Sutherland, by the social position of the person in question: unlike individuals of low social and economic status, the "white collars" have the necessary resources to get away unnoticed with behaviours that might, otherwise, be easily qualified as crimes; when this is not possible, their social status provides them with the means to cause such behaviours to be seen as minor offences or civil infraction. On the other hand, the "white collars" position in the social structure influences not only the enforcement of the law (it is noteworthy that, more often than not, the judicial investigations on such persons are limited to one culprit only), but, perhaps more importantly, it influences the contents of the law, in that the members of the upper class (represented in the legislature and law enforcement agencies) are those who decide which are the permitted or banned behaviours, their legal status (misdemeanours, crimes, civil infractions etc.), as well as the range of applicable sanctions: the shaping of laws and legal system is marked by the interests of those who make the laws and control their enforcement²²⁶.

The differentiation produced in the society and the resulting (legal and extralegal) regulatory diversity require an analysis of the role that the individual *interests* play in the use of the law. The typology I propose is comprised of three elements: *the interest to relate* to a particular legal rule, *the interest to interpret* the legal rule in a certain manner, *the interest to support the adoption* of a particular legal norm. The first two elements refer to what Sutherland calls "administrative segregation of criminals", generated by the social status of the *upper class*: "...white collar criminals are relatively immune due to the influence of their class over courts and its power to guide the implementation and administration of justice. This influence impacts not only on the current work of the courts of justice, but, more importantly, marks their previous activities, when judicial precedents and the procedures that regulate their work today were established"²²⁷. Unlike the first two types of interests, which mainly refer to (effective or potential) individual participation, the judicial mechanism, *the interest to adopt a particular legal norm* is predominantly associated with the protection of certain positions. *The possibility to materialise this interest* is unequally distributed in the society and varies with the position that persons and groups have in the social fabric. Particular interests, initially individual or collective, are transformed by the use of legal mechanisms (law-making and justice administration), in *supra-individual interests* that are claimed to be important for *all* the members of the society.

In a famous volume (*Law, order and power*, 1971), W. Chambliss advocates the idea that the concept of state understood as a value-neutral framework is obviously the most powerful legitimated myth we can imagine. Claiming that the law emerges from then society requires accepting the debateable idea that some social group acts in the interest of the overall society: it may be true that *what's good*

²²⁶ Idem, p. 357

²²⁷ Idem, p. 355

for General Motors is good for the society, if all the members of the society benefit from the triumph of the special interests of the Concern; however, this rarely happens, notes the American criminologist.

This strong need for legitimacy is absolutely natural, be it for the simple reason that, were the state perceived as belonging to the powerful who use it mainly in their interest, maintaining it would come at huge costs and with matching risks. If we agree on this fact, it becomes obvious that the contents of the legal system reflects certain values and excludes others.

In theory, the centre of gravity for the legitimacy of the state's actions is the idea of public interest. The content of "public interest" is obviously heterogeneous, as long as it includes elements that are very different in their essence, from the right to decent livelihood to guaranteeing civil liberties. The vast majority of the elements comprised in the "public interest" category are difficult to define. Thus, if we look at the concept of "right to decent livelihood", an idea found in the constitution of any democratic state, we can note the ambiguity of its contents. As long as a threshold for decent livelihood is not defined, the principle remains a mere assertion. Moreover, the clear obligation of the society to ensure the effective enjoyment of this right is not state anywhere; nevertheless, the principle is used as a tool for legitimising a wide range of decisions of the state.

And, ultimately, which is the groundwork on which the list of "public interest"? The inconsistency of its contents reflects, after all, the set of values of those who, from time to time, have the possibility to decide on this issue. The idea that it is in the public interest to preserve legitimated institutions in order to peacefully resolve social issues will remain in contradiction with the right to decent livelihood for each citizen, as long as ghettos and poverty will exist and significant groups will continue to be excluded from decision making²²⁸.

The conclusion of this highly critical perspective is that the legal norms reflect the set of values of those who proclaim them; the legal system, by dictating what should be and happen, favour particular social groups to the detriment of others; in any society, those who control the economic and political establishment influence the development and enforcement of legal rules, via the legal system. In any society, a large number of behaviours are present, which may or may not be defined as criminal. Defining and treating an act as criminal depends on the interests of those who wield enough political and/or economic power to push their own interests. In a more or less manifest manner, legal incrimination reflects and, at times, protects the interests and values of the group(s) that have the power. In theory, the groups that have the power in the state make legal rules intended for the good of all. But "all" in society does not mean each; quite the opposite, by necessity, it means the exclusion of certain groups that the legal system intends to keep under control. Inevitably, the law serves the interests of particular social groups, to the detriment of others: "The legislature cannot in its nature be a neutral framework. Like every bureaucratic

²²⁸ Chambliss, W.J. Seidman, R.B. 1971). *Law, Order and Power*. Massachutes: Addison-Wesley Publishing Company, p.58-75

organisation, it responds to the pressure of the powerful and the privileged. It is a weapon in their struggle for domination... The state as value-neutral framework is obviously the most powerful legitimated myth we can imagine"²²⁹.

The issue of individual and group interests in the social competition is also present in Howard Becker's study: when in a disadvantageous power position, any individual is a *perceived deviant*: by pursuing a particular interest, he may "transform" in the subject of action for those who have the legal or extralegal power, in their effort to impose their own representations of the social world: "The interactionist theories on deviance, as all interactionist theories, insist on the manner in which the social actors mutually define themselves and their surroundings. These theories pay special attention to the labelling power, to the manner in which a group acquires and uses the power to determine how other groups should be appraised, understood and treated. The elites, the ruling class, employers, adults, men, whites, in short, the upper class groups, maintain their power by controlling the representations of the social world and exercise control in other, more primitive, forms. Perhaps they also use such more primitive forms of control for establishing their hegemony. But the control based on the manipulation of definitions and labels impacts with much more subtlety and at lower costs, and this preferred by upper class groups."²³⁰.

The interactionist perspective introduces a new character in the equation of the utilisation of the law and legal system: *the moral entrepreneur*: he who has the initiative to introduce the rule (since the norms are not self-generated in contemporary societies) and who, to ensure compliance, addresses individuals whom we, in the spirit of Becker's study, may dub *derivative entrepreneurs*: policemen, prosecutors, judges, members of law enforcement. In theory, their task is to *track and punish all deviants*. In reality, the limited resources (insufficient to track and punish all delinquents), personal and group interests (causing them to *look away from the scene of the crime*), power of certain *perceived deviants* or simply the disagreements of the bureaucracy on what is deviant behaviour, all these are critical elements in understanding the way in which the legal rules and system work in contemporary societies.

7.3. Cultural goals and legitimate means. Forms of adaptation to social anomie in contemporary societies

As we have shown in the previous Sections, the life of individuals in contemporary societies is regulated by a variety of social norms and values. The society proposes to its members a number of goals and the legitimate or legal means for achieving them. The ideal state is that of congruence between the society's expectation from individuals and the institutional pathways available for meeting

²²⁹ Chambliss, op.cit, p.54

²³⁰ Becker, op.cit, p. 229

those expectations. Officially, the societies we live in are based on the idea that the individuals engaged in the social competition have equal chances. In reality, the social status determines social success. The American author R.K.

Merton has produced a classical analysis of this issue, known in sociology as the *anomie theory*.

Analysing the social and cultural components of the American social fabric, Merton identifies two that seem to him fundamental: goals that are culturally defined as legitimate and the socially accepted means or manners for achieving those goals.

Depending on the society, the legitimate goals are shared by all the members of the society or are specific to different social layers: they provide the reference framework for individual aspirations, are the things “worth fighting for”. In some societies, such as the American one, these goals are shared by all individuals, irrespective of the social area they belong to; in other societies, where vertical social mobility is limited (such is the extreme case of cast-based societies), the goals differ and are specific to the various social areas and individuals that populate them.

Regardless of the type of society, achieving the goals is conditional in the use of a number of socially accepted and endorsed means; the social norms limit the options available to the individual for attaining legitimate goals, excluding some means that may seem more effective to the individual (force, fraud, power). In other words, any social group develops definitions for what is permitted, prohibited, compulsory or preferable.

The goals-means pair generates the dominant practices in the society; ideally, a constant relationship should exist between these two components: the society should not only stress the importance of achieving a particular goal, but equally the obligation to use institutionalised means (legal, legitimate, institutionalised practices); on the other hand, exclusive or exaggerated focus on the means compared to the goals proposed to the individuals may lead to “forgetting” the purpose for which they were created in the first place. When the accent falls mainly on goals, in that any means is permitted for achieving the goals, the society is poorly integrated; when the means are ritualised, compliance becomes the most important value, the society closes in, and is incapable of change. Between these polarities, the societies are found that maintain some kind of balance in the relationship goals-means: these are integrated and relatively stable societies that, at the same time, tolerate change²³¹. The balance of goals and means is achieved to the extent to which individuals, using institutionalised means, manage to attain the goals promoted by the society; if the goals cannot be achieved by the use of legitimate means, some individuals may opt for deviant behaviours: “...aberrant behaviour may be regarded sociologically as a symptom of dissociation between culturally prescribed aspirations and socially structured avenues for realising those aspirations”²³².

²³¹ R.K. (1957). „Social structure and anomie” in *Social Theory and Social Structure*. New York: Free Press (131-160), reprinted in Cressey, D.R, Ward, D.A. 1969). *Delinquency, Crime and Social Process*. New York: Harper & Row. (p. 257)

²³² Merton, op. cit. p. 254-285

No “normless” society exists that regulates individual behaviour; at the same time, societies are differentiated based on the adequacy of the legitimate means to the goals positioned in the top of the cultural hierarchy. For Merton, the choice of *the means* is the central issue in defining individual behaviour. From this standpoint, Merton’s definition of *anomie* is fundamentally different from the meaning that Durkheim assigns to the concept: Durkheim develops the construct mainly in relation to the unlimited individual wants, whilst for Merton *innovating behaviour*, the principal adaptive deviant reaction, concerns mainly the *means* chosen by the individuals. The reality of these two imports of the concept of *anomie* – defined especially by differences, and not so much by similarities – is further illustrated when we note that Merton’s study included only one reference to Durkheim, and that very brief: “With such differential emphases upon goals and institutional procedures, the latter may be so vitiated by the stress on the goals as to have the behaviour of many individuals limited only by considerations of technical expediency. In this context, the sole significant question becomes: Which of the available procedures is most efficient in netting the culturally approved value? The technically most effective procedure, whether culturally legitimate or not, becomes typically preferred to institutionally prescribed conduct. As this process of attenuation continues, the society becomes instable and there develops what Durkheim called anomie (or normlessness)”.

According to Merton, the American society seems to come close to the polar type, in which there is strong emphasis on particular success goals, without them matching insistence on the institutional means. Wealth accumulation, the money as value in itself, is the mark of social success: the Americans are “...bombarded on every side by precepts which affirm the right or, often, the duty of retaining the goal (financial success, n.n.) even in the face of repeated frustrations”²³³. The family, school and employers are the main agents of the process whereby the individuals are permanently pressed to participate in the social competition; ten capital sin is not to fail, but to give up and to lack the will to pursue the dream of success. The competition is open to all, no matter of the position in the social fabric: any individual can make it to the top of the social heap, if he is willing and prepared to make continuous efforts in this direction. The sociological meanings of this perspective are: the reduction of the critical capacity of individuals who lack real opportunities for success, the preservation of the social power structure (disadvantaged individuals identify themselves with those from the top of American society, and not with those from their layer), the pressure to conform to the values of American society²³⁴. Thus, the American society is characterised by the cleavage between the accent on wealth as a symbol of success and the legitimate means used for attaining this goal: the emphasis on goals tends not to be accompanied by a matching focus on institutional procedures.

²³³ Merton op. cit. p. 260

²³⁴ Merton, op. cit. p. 263

The concept of anomie may be defined in two ways. On the one hand, involving, to some extent, a simplification of Merton's analysis, it can be seen as a differential between the goals promoted by the society and the legitimate means for achieving them. On the other hand, when we start from the observation that the goals and means are owned by different structures (that are not interchangeable), the anomie appears to be a discordance between the cultural and the social structure. From the perspective of the cultural fabric, the same goals are proposed to all the individuals, irrespective of their social status; however, from the social perspective, the access to means is contingent on the uneven distribution of resources in the social fabric²³⁵.

The contradiction between the cultural and the social structure configures the typology of individual adaptation, according to the manner in which the individual accepts, rejects or replaces institutionalised goals and means: conformity, innovation, ritualism, retreatism and rebellion. Merton points out that these adaptive reactions are not types of personality organisation, but types of personal responses to the social anomie; the particular adaptation reaction depends to a significant extent on the position occupied by the individual in the social structure. The study is focused on economic activity (manufacturing, trade, distribution and consume of goods and services); at the same time, individuals can switch from one form of adaptation to another, depending on the type of social activity they are engaged in²³⁶.

Conformity is defined as equally accepting cultural goals and institutional means; it is widest spread conduct, ensuring social stability and continuity: we can only talk about society to the extent to which the behaviour of the majority is geared on fundamental values.

Innovation is the adaptation manner specific to persons who accept the goals put forth by the society, yet use banned institutional means. *The innovation pressure* is exerted in different ways, depending on the differences that exist between the strata that make up the social structure. At high economic level, more often than not, it is difficult to differentiate between legitimate and illegitimate (or non-legal) means: the history of the great American fortunes, made by *shrewd, smart and successful* men is marked by *innovations* with a more or less uncertain legal status; despite the uncertainty, the tolerance and respect with which those who "make it" are treated by the others is an indicator of the disproportionate emphasis that the society puts on goals, compared to the emphasis on means: what matters is success, and not so much how one gets it. At the same time, the financial success of persons who "started from the bottom" stimulates the imagination and deforts of those who are at disadvantage: anyone, no matter their initial position in society, can make it to the top of the social pyramid²³⁷.

²³⁵ Besnard, P. 1978. „Merton a la recherche de l'anomie". *Revue francaise de sociologie* 19 (1): 3-38.

²³⁶ Merton, op. Cit. p. 264

²³⁷ Idem, p.266-268

Though the frequency of deviant conduct in the upper layers of the social hierarchy – what Sutherland calls *white collar criminality* – is higher than shown in the criminal statistics, the strongest pressure towards deviance is found in the lower layers of the social fabric. This social area, characterised by what Merton calls “*structural inconsistency*”²³⁸, presents a high rate of deviant conduct because the individuals have internalised the goals insisted upon by the American society, but are deprived of legitimate means for achieving them: “Several reserches have shown that specialised areas of vice and crime constitute a “normal” response to a situation where the cultural emphasis upon pecuniary success has been absorbed, but there is little access to conventional and legitimate means necessary for success”²³⁹. The impossibility of social success for those with poor formal education, manual workers and limited economic resources puts a question mark over the *open-class ideology*: vertical social mobility is theoretical, as long as most individuals do not have any real means to accede to the upper strata of the society.

Seen from this perspective, poverty is not a source of deviance in itself. Large scale deviant conduct only appears when all the individuals, irrespective of their position in the social structure, are focused on the same goals, but a significant part of them benefit marginally or are completely excluded from the legitimate means of attaining those goals: “Otherwise said, our egalitarian ideology denies by implication the existence of non-competing individuals or groups in the pursuit of pecuniary success. Instead, the same body of success-symbols is held to apply to all. Goals are held to transcend class lines, not to be bound by them, yet the actual social organization is such that there exist class differentials in accessibility of the goals. In this setting, a cardinal American virtue, ‘ambition’, promotes a cardinal American vice, ‘deviant behaviour’”²⁴⁰.

Obviously, the individuals found in this situation don’t evaluate the situation by examining the inconsistency of the cultural and social structures; by and large, they tend to attribute the social difficulties they are confronted with to *mystical sources*. One of the most frequent explanations of this type identified by Merton is the *doctrine of luck*²⁴¹: same as chance plays a role in any major success, failure is explained by the lack of chance (this doctrine also explains the appetite that individuals from certain social layers have for gambling). Luck or lack of chance is employed differently, depending on the individual situation. The one who is successful, always calls upon it, thus masking the gap between the efforts put in and the social reward obtained; conversely, if success is, to a significant extent, *also* contingent on luck, this means that the cause of failure is not the social structure, since luck or lack of chance may occur in and social area. The one who fails invokes the lack of chance to preserve his self-esteem and capacity to try again for success; according to the *American success* model, failure is but a stage on the path to success.

²³⁸ Idem, p. 270

²³⁹ Merton, op.cit, p.269

²⁴⁰ Idem, p.270

²⁴¹ Idem, p.272-273

Whilst *innovation* demonstrates imperfect socialisation (deviance takes the form of using prohibited means), in contrast, *ritualism* entails a perfect internalisation of institutionalised means: individuals lower their aspirations to the point where they can be satisfied; renouncing the dream of pecuniary success and struggle for climbing the social ladder is definitely a departure from the American cultural model. Then individual that adopts this strategy is characterised by *fear of action*, fear generated by the intensity of the struggle for success: high ambitions may generate frustrations and involve dangers, whereas low aspirations lead to satisfaction and security²⁴².

In Merton's analysis, *retreatism* is the least frequent type of adaptation: the individual adopting this strategy renounces both to the goal of being socially successful and the institutional means. Vagrants, beggars, drunkards and drug addicts etc. are part of the society only in theory; in practice, their existence, usually solitary, happens on fringes that are so remote from the centre of social life that we cannot talk about them as genuine members of the community. Losers in the fight for social success, those who adopt this type of social adaptation settle the conflict between the two components of cultural and social structure in a dramatic manner: the individual becomes *dissocialised* and remains a member of the society only inasmuch as he is a social problem.

Unlike the previous, *rebellion* is a type of *collective adaptation* that, same as *retreatism*, alienation from social values. Unlike the latter type, then individual *does not leave the society*, but proposes a programme: the imbalance between goals and institutional practices must be solved not by partial and successive adjustments of the social system (the conservative doctrine), but rather by the overall transformation of the system. This type of adaptation addresses both the social and cultural structures: new goals *worth fighting for*, a new social structure defined by the harmony between social *effort, merit and reward*²⁴³.

Merton thesis is that the social and cultural structure generates a level of pressure towards anomie and deviant conduct, a pressure that is felt differently by each individual, depending on the social area they are in. To simplify the problem, the study was centred on the legitimate and illegitimate means used in the competition for pecuniary success, seen as the ultimate cultural goal. Concurrently, Merton mentions that alternative aims also exist: "The realms of intellectual and artistic creation, for example, provide alternative career patterns which may not entail large pecuniary rewards. To the extent that the cultural structure attaches prestige to the se alternatives and the social structure permits access to them, the system is somewhat stabilised... But the tendency towards anomie remains..."²⁴⁴.

Though concerned with the realities of the American society of the '50s, Merton's analysis is surprisingly current, just as is the relevance of the concept of

²⁴² Idem, p.274

²⁴³ Merton, op.cit, p.279-281

²⁴⁴ Merton op. cit. p. 282

anomie for the study of deviance and criminality in European societies. To a great extent, this is explained by the fact that The United States are the largest exporter of cultural models. One of the consequences of adopting these models is the tendency of international crime to take up the forms of North-American criminality²⁴⁵.

The concept of *anomie*, defined as a state of contradiction between the cultural and social structure (contradiction highlighted by the imbalance between social goals and legitimate practices), reveals major characteristics of contemporary societies: through advertising, individuals are permanently prompted to acquire goods and services that are increasingly less related to meeting biological needs. Their significance was reduced to that of *status indicators*. Paradoxically, they have no correspondent in (or are extremely loosely related to) the social stratum of the individuals: they are rather indicators for the *status of a successful person*. Sometimes, a manifest incongruence exists between these indicators (car, house, clothes, various accessories), such is the case, for instance, of luxury cars found in poor neighbourhoods form the outskirts of large cities. Two things matter: the goods owned should be an obvious indicator of social success and they should be obtained as quickly as possible. To a significant extent, these requirements entail disregard for the legality of means: any means is good, as long as it leads to achieving the goal. This attitude is strengthened – despite the lack of legitimate social pathways for a large part of the society – by the media coverage of the lifestyle and fabulous fortunes obtained by personages with more or less questionable pasts. The doctrine of *merit* (defined as an outcome of education, efforts and use of legal means) tends to be replaced, to a great extent, with the cynical doctrine of *resourceful spirit*. This substitution is so advanced that, to the extent to which success due to merit is not suspected of insincerity, is the subject of irony and contempt.

TOPIC NO. 8

A SOCIOLOGICAL APPROACH TO THE PROTECTION OF THE CIVIL RIGHTS OF CITIZENS IN THE EUROPEAN AREA

The sociological perspective on the rights of citizens in the European area is complementary to the legal one. Given the structure of the study, the purpose of this

²⁴⁵ Jean Pinatel, *La societe criminogene*, Ed.Calman- Levy, Paris, 1971.

section is to present the perspective of sociological approaches to this matter, as well as a number of sub-topics of sociological reflection.

The first part of the Guide comprises the legal analysis of legal acts that are addressed precisely to this common spatial system of reference: Regulation (UE) no. 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, adopted at Strasbourg on 12 June 2013, Directive 2004/38/CE of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC; Charter of Fundamental Rights of the European Union.

At the beginning of the analysis we showed that the European project requires, among other elements, an essential paradigm change in defining that which individuals name *our area*: European citizenship is defined based on the territory of the 28 Member States superimposed on the territories within national borders.

Sociologists approach issues like those analysed in the first five Topics of our paper in researches on the sociology of migration. From such a perspective, R. Delgado Wise states that “the relationship between migration and development must be approached from a multidimensional perspective that comprises economic, political, social, environmental, cultural, racial, ethnic, gender, geographical, and demographic factors”²⁴⁶; the topics approached relate to unequal development, forced migration caused by violence, conflicts or catastrophes, human trafficking, social exclusion and unemployment. Analysing the relationship between economic development and human rights, the author examines rights such the right to not migrate (entails the creation of the basic conditions needed to keep people in their countries of origin), the right to freedom of movement (defined as a voluntary decision, not a necessity), as well as the rights of migrants and their families to settle or transit other spaces and to return to their countries of origin, a right that must be upheld by governments and international bodies.

At the same time, the extreme specificity of the issues related to the legal regulation of the freedom of movement and the protection order requires a serious sociological research focused on these specific issues, in addition to the sociological analysis of the national and European legal regulations on migration.

In works on human rights sociology,²⁴⁷ the main topics dealt with are the social conditioning of human rights, relation between human rights and the needs of the individuals and society, relation individual – society and social action, anomic social phenomena, social institutions and organisations etc.

²⁴⁶ Raul Delgado Wise, Humberto marques Covarrubias, Ruben Puentes, *Reframing the Debate on Migration, Development and Human Rights*, in Population, Space and Place, Published online in Wiley Online Library (wileyonlinelibrary.com) DOI: 10.1002/psp.1783

²⁴⁷ Maria Voinea, Carmen Bulzan, *Sociologia drepturilor omului (Sociology of human rights)*, Publisher: Editura Universităţii din Bucureşti, 2004

The cultural dimension of the freedom of movement in the context of European integration, the preservation of national identities, the individuals' participation in the construction of a European identity, all these issues generate fundamental questions. What are the mechanisms through which the individuals in the twenty eight states are/could be integrated in the same society? How do the common rules – values reference system look and how will it evolve such as to allow the compatibilisation of individual behaviours in a coherent European social order? How can European solidarity be created? What is the optimal relationship between the autonomy of national societies and the European social order?

The answers provided to these questions separate the convinced advocates of the European Union from those who look with scepticism to its future. Beyond this separation of positions, in my opinion, one central fact exists: the main function of the European legal output transposed into national laws is to make up, at least in part, for the cultural differences between the Member States. This is probably the most complex social engineering experiment, where legal rules and institutions, in one word, the law, play the role of the key instrument.

The main theoretical assumption of the endeavour contradicts the traditional approach to law. Traditionally, the law has been seen as an specific output of the life and interactions between the members of a society; legal rules are an expression of life itself and, as such, bear the mark and, at the same time, express the resulting society; to this effect, each society has a characteristic law system, in other words, cultural differences are translated into differences in legal institutions.

The European project significantly transforms this perspective: the law is used as a tool for social change; the European regulatory output and its transfer in the laws of the Member States has the role, through the European and national institutions, if not to unify, at least to make compatible cultural practices that are, at times, extremely different. Local cultural resistance is one of the most important issues in this process. Moreover, this could be a significant topic for sociological field-research, with the aim of assessing the efficiency and effectiveness of European regulatory instruments.

TOPIC NO. 9

SOCIOLOGICAL RESEARCH METHODS APPLIED TO JUDICIAL REALITY

Since its birth, in the second half of the 19th century, sociology has developed research methods, instruments and techniques with the goal to acquire scientific knowledge on social life.

Like any other science, sociology is defined by object and method. After a period when, in the attempt to gain recognition as science, it had borrowed methodologies from already mature sciences (sociological trends like social physics, social mechanics, organicist perspective in biology), sociology cumulated its own investigation methods.

While its object – society or interactions between individuals and groups in the social field – is shared with other sciences (e.g. social psychology, history, especially the long-term history, practiced by the Annales School), the technical instruments are specific to sociology.

I will succinctly describe the stages and the main methods of the sociological research process, following the perspective of Anthony Giddens, the author of one of the most widely used sociology handbooks²⁴⁸, both by Romanian and Western European universities. Briefly, the sociological research process starts by establishing and *defining the research problem*; the next step is to *review the evidence*, consult existing data, and research on the selected topic; the third step is to *clarify the problem*, when, based on the information collected or on his/her sociological imagination, the researcher develops the research assumptions or questions; the next step of the process is to choose *the research method* (depending on the topic of study, the sociologist may choose quantitative methods, qualitative methods or a mix); *field research* to collect data is one of the crucial moments of the research process, where the theoretical and methodological background is essential, and will influence the quality of data to be analysed; finally, *data interpretation and the development of the research report* are the final step of the process: the research conclusions are made public; they may become the support of other research or may even generate new questions, and become the source of other sociological investigations.

The main methods of research are *participative observation* (qualitative method which requires direct contact with the daily life or with fragments of the daily life of the social groups investigated), *sociological survey* (using *standardised questionnaires and open question questionnaires*), *experiments* (one of the most famous is the Zimbardo experiment, on interactions between prisoners and prison guards), *life history* or *social biography* (collective memory investigation through the memory of the subject who has information on the recent or more distant past). To the list of methods presented by the above mentioned author, we add the analysis of *social documents*, the *focus group*²⁴⁹, and *the analysis of statistical data*.

Legal sociology of the sociology of law is a branch of sociology; therefore, the sociological methods and instruments used by other branches of sociology are fully applicable in the investigation of legal phenomena. Obviously, the specificity

²⁴⁸ Anthony Giddens, *Sociologie* [Sociology], ALL Publishing House, Bucharest, 1989/2000, p.577-592

²⁴⁹ See Richard A. Krueger, Mary Anne Casey, *Metoda focus grup. Ghid practic pentru cercetarea aplicată* [Focus Groups: A Practical Guide for Applied Research], Polirom Publishing House, Iași, 2005

of the object of study (law, legal phenomena, the relation between individuals and legal provisions, effectiveness of laws, corruption etc.) would influence the development of research instruments based on the problem under investigation.

For example, when researching the relationship between the probation counsellor and the person under supervision, one of the most widely researched legal sociology topics, the researcher may combine both statistical methods (judicial statistics provide data on the system inputs and outputs, recidivism rate etc.) and qualitative methods (interviews with probationers, with probation counsellors, focus groups, life stories).

The choice of research methods depends both on how the research problem is defined, and on the methodological options of the researcher: the methodological expertise and the theoretical perspective on the research subject may lead to the choice of different methods.

TOPIC NO.10 ANALYSIS OF COMMUNITY CASE LAW AND LEGISLATION FROM A SOCIOLOGICAL

PERSPECTIVE

The analysis of Community case law and legislation from a sociological perspective has seen little research so far. Such an attempt requires multidisciplinary teams of legal professionals and sociologists, who should analyse not only the immense legislative output of the European institutions, but should also carry out significant field research.

One of the most important aspects to be studied is to what extent the newcomers to rich Western European countries (preferred by migrants, who are attracted by the perspective of better living conditions than in their countries of origin) actually have access to the rights provided by the European legislation and by the domestic legislation of the host countries. The overall profile of the newcomer includes, generally, poor education, which places him/her in the area of manual labour: in our societies, knowledge of legal rights and access to the exercise of legal rights depend on the level of education and, sometimes, on the level of income. It is not by chance that the media often report cases when people coming from Eastern countries are victims of trafficking or exploitation by organised crime groups; unfortunately, modern slavery is a contemporary reality.

As mentioned in one of the previous sections, one of the main challenges of the European project consists in the movement of large groups of people from their countries of origin to the rich Western European countries. Free movement in the European Union means the integration of newcomers in different cultures, defined by very different customs, traditions and behavioural patterns. In general, those who intend to stay in these countries are mainly motivated by economic goals; the jobs accessible for them are usually manual labour, paid less than the minimum wage.

In the previous sections we already analysed the role of European legislation. I mention here the comment of a German judge, made during one of the training seminars organised under the project: “After more than 10 years, there are still barriers in the exercise of the right to free movement”. In my opinion, this is an obvious diagnosis: the mere adoption of European legislation is not sufficient to change the social reality. In other words, it takes long practice for legal instruments to become agents of social change. Culturally driven local resistance is an obstacle within this social engineering process, succinctly analysed in a previous section.

Another comment noted during the workshops organised under the project was that on the different perspectives in the analysis of case studies; such differences did not only mean different angles tackled by the Romanian, Croatian and German magistrates but, sometimes, substantive differences in relation to the solutions ruled by the European courts.

Nothing surprising about this finding: judicial practice is nothing by social practice; like any other social practice, it expresses different ways of living, thinking and feeling; the fact that here we speak about professional reasoning in the legal field does not fundamentally change the problem: different cultural experiences are reflected by particular judicial reasoning.

“The Treaty on the Functioning of the European Union (TFEU)²⁵⁰²⁵¹ includes Title V, Area of Freedom, Security and Justice. What is it and how is it accomplished? The answers of interest for our matter can be found in the text of Art.67²⁵², providing that the area of freedom, security and justice shall be constituted

²⁵⁰ **Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Protocols, Annexes, Declarations annexed to the final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 and Tables of equivalences are published in OJ C 326 of**

²⁵¹ *.10.2012, p. 0001 – 0390, and are available at <http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A12012E%2FTXT>.*

²⁵² Article 67 (ex Article 61 TEC and ex Article 29 TEU): “(1) *The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.* (2) *It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.* (3) *The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other*

with respect for fundamental rights, and the different legal systems and traditions of the Member States, to ensure a high level of security within the Member States, and free movement of persons”.

The quote above, which opens the presentation of the first theme, includes reference to the legal systems and traditions of the Member States: this mention, if not intentionally sociological, at least sociologically nuanced, expresses one of the aspects analysed under the theme on the sociological perspective on law: the law reflects the features of the society which created it, and the legal tradition is the rational expression of such features. On the other hand, the European project proposes and requires at least minimal agreement on certain fundamental matters, related to the civil rights of the European citizens, if not unitary judicial practice.

The starting point of this process is the very opposite of the traditional, domestic viewpoint: the goal of the rules enshrined by the European institutions, enforced either directly or through domestic agencies and institutions, is to unite individuals from this area around the same values. In other words, a *top-down* approach to impose certain social practices; the traditional direction was different, certain repetitive social practices ended up by becoming the rule. As indicated by the magistrates who participated in the project meetings, the judgment of the case often does not require the use of the European legislation, since its principles have already been implemented in the domestic legislation, therefore the solutions are already in place in the domestic legislations; the differences are given by the different interpretations.

The success of this type of social engineering is already obvious, despite eurosceptics. To give just one example, without getting into details, the judgements ruled by ECHR significantly changed the perception and attitude of the Romanian State on two matters, left unsolved for more than two decades: property and prison conditions; factual circumstance which seemed completely normal less than ten years ago are more and more defined as intolerable and unacceptable nowadays.

competent authorities, as well as through the mutual recognition of judgements in criminal matters and, if necessary, through the approximation of criminal laws. (4) The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters”.

SELECTED BIBLIOGRAPHY

- Suzan van der Aa, Johanna Niemi, Lorena Sosa, Ana Ferreira, Anna Baldry**, *Mapping the legislation and assessing the impact of protection orders in the European Member States*, Wolf Legal Publishers, 2015. The study, developed with support from the EU Daphne Programme, available at <http://poems-project.com/wp-content/uploads/2015/04/Intervict-Poems-digi1.pdf>
- Irina Alexe, Constantin Mihai Banu**, *Transpunerea directivei prin ordonanță de urgență. Exemple recente din dreptul român și aspecte comparate (Transposition of directives by expeditious ordinance. Recent examples from the Romanian law and compared aspects)*, pp.132 – 136, in the volume *Directiva – act de dreptul Uniunii Europene – și dreptul român (The Directive – legal act of the European Union – and the Romanian law)*, coordinators: Daniel-Mihail Șandru, Constantin Mihai Banu, Dragoș Călin, Publisher: Editura Universitară, Bucharest, 2016.
- Constantin Mihai Banu**, *Introducere. Directiva – act de dreptul Uniunii Europene (Introduction. The Directive, a legal act of the European Union)*, pp.15 – 32 în volumul *Directiva – act de dreptul Uniunii Europene – și dreptul român (The Directive – legal act of the European Union – and the Romanian law)*, coordinators: **Daniel-Mihail Șandru, Constantin Mihai Banu, Dragoș Călin**, Publisher: Editura Universitară, Bucharest, 2016
- Constantin Mihai Banu, Daniel Mihail Șandru, Dragoș Alin Călin**, *Trends and patterns in preliminary references in courts of Romania. Issues related to the charter of fundamental rights of the European Union and the European convention on human rights*, Law Review, Volume VI, Issue 2, July-December 2016, p. 97-124
- Maria Bergström**, *Mutual Recognition in Civil and Criminal Justice: Towards Order and Method?*, în vol **Burkhard Hess, Maria Bergström, Eva Storskrubb**, *EU Civil Justice Current Issues and Future Outlook*, Bloomsbury, 2016.
- Michael Bogdan**, *Some reflections on the scope of application of the EU Regulation no 606/2013 on mutual recognition of protection measures in civil matters*, Yearbook of Private International Law, vol. 16/2014-2015.
- Laurence Burgorgue-Larsen (dir.)** “*La Charte des droits fondamentaux de l’Union européenne saisie par les juges en Europe/ The Charter of Fundamental Rights as apprehended by Judges in Europe*”, Cahiers européens no.10, IREDIES – Institut de recherche en droit international et européen de la Sorbonne, Université Paris 1 Panthéon-Sorbonne, Pedone, Paris, 2017
- Evelien Brouwer, Damien Gerard**, *Mapping mutual trust: understanding and framing the role of mutual trust in EU law*, EUI MWP; 2016/13, available at <http://cadmus.eui.eu/handle/1814/41486>

- Geert van Calster**, *European Private International Law*, Hart Publishing, Oxford, 2016.
- Sergio Carrera**, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, Brill, 2009
- Dragoș Călin, Roxana-Maria Călin, Alina Ciolofan, Irina Cioponea, PaulaAndrada Coțovanu, Nina-Paraschiva Gogescu, Anamaria Groza, Andrei Iacuba, Sanda Elena Lungu, Lucia Zaharia, Dorina Zeca**, *Cooperarea judiciară în materie civilă și comercială în Uniunea Europeană. Regulamente adnotate (Judicial cooperation in civil and commercial matters. Annotated Regulations)*, Publisher: Editura C. H. Beck, 2014.
- Wing-Cheong Chan**, *A Review of Civil Protection Orders in Six Jurisdictions*, Statute Law Review, vol. 38 1/2017
- Anatol Dutta**, *Cross-border protection measures in the European Union*, Journal of Private International Law, vol. 12, no. 1/2016.
- Agnieszka Frackowiak-Adamska**, *Time for a European "full faith and credit clause"*, Common Market Law Review, Issue 1, 2015, Vol. 52
- Marie-Pierre Granger**, Orsolya Salat, *Report on mechanisms transposing and enforcing civil rights aiming at identifying barriers that EU citizens and third-country nationals face in gaining (cross-border) access to justice in selected EU Member States*, http://beucitizen.eu/wp-content/uploads/D7.2_Report_final.pdf
- Helen Hartnell**, *Judicial Cooperation in Civil Matters' (EUstitia): The Politics of Civil Justice under the EU's Area of Freedom, Security and Justice (AFSJ)*, EUSA Conference Papers, 2015: EUSA Fourteenth Biennial Conference www.eustudies.org
- Helen Hartnell**, *A Bird's-Eye View of the EU's Civil Justice Policy Field: Discursive and Institutional Dimensions*, EUSA Conference Papers, 2015: EUSA Fourteenth Biennial Conference www.eustudies.org
- Monique Hazelhorst**, *The ECtHR's Decision in Povse: Guidance for the Future of the Abolition of Exequatur for Civil Judgements in the European Union. European Court of Human Rights 18 June 2013, Decision on Admissibility, Appl. No. 3890/11 (Povse v. Austria)*, în *Nederlands Internationaal Privaatrecht* 2014 (1) p. 27-33. Article available at SSRN: <https://ssrn.com/abstract=2553110>
- Călina Jugastru**, *Competența internațională a instanțelor române (International Jurisdiction of Romanian Courts)*, in **Ioan Leș (coordinator), Călina Jugastru, Verginel Lozneanu, Adrian Circa, Eugen Hurubă, Sebastian Spinei**, *Tratat de drept procesual civil. (Treaty of Civil Process Law) Volume II. Căile de atac. Procedurile speciale. Executarea silită. Procesul civil internațional. Conform Codului de procedură civilă republicat (Remedies. Special procedures. Enforcement. The international Civil Trial.*

- According to the Code of Civil Procedure, recast*), Publisher: Editura Universul Juridic, București, 2015
- Dr.iur Inga Kačevska, Dr.iur Baiba Rudevska, Dr.iur Arnis Buka, Mg.iur Mārtiņš Dambergs, LL.M Aleksandrs Fillers**, *The Court of Justice of the European Union and the impact of its case law in the area of civil justice on national judicial and administrative authorities (Latvia, Hungary, Germany, Sweden and the United Kingdom)*, Riga, 2015
- Libor Klimek**, *Mutual recognition of judicial decisions in European Criminal Law*, Springer, 2016.
- Xandra E.Kramer**, *Cross-Border Enforcement in the EU: Mutual Trust Versus Fair Trial? Towards Principles of European Civil Procedure*, International Journal of Procedural Law, Vol. 2, p. 202-230, 2011, available at SSRN: <https://ssrn.com/abstract=1995682>
- Dorothea Van Iterson**, *Recognition and enforcement of foreign civil protection orders: a topic for the Hague Conference?* In the volume *A commitment to private international law: essays in honour of Hans van Loon*, Intersetia, 2013
- Ruth Lamont**, *Response to the Call for Evidence: Civil Judicial Cooperation*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279291/dr-lamont-evidence.pdf
- Vesna Lazic**, *Procedural Justice for 'Weaker Parties' in Cross-Border Litigation under the EU Regulatory Scheme*, Utrecht Law Review, Vol. 10, No. 4, p. 100-117, November 2014. Available at SSRN: <https://ssrn.com/abstract=2529971>
- Juliette Lelieur, Laurence Sinopoli**, *La reconnaissance mutuelle à l'épreuve de la coopération judiciaire*, cejec-wp, n° 2009/6
http://cejec.u-paris10.fr/wp-content/uploads/2009/11/wp-2009_6-j-lelieur-lsinopoli-rce-mutuelle.pdf
- Codrin Macovei**, *Unificarea dreptului contractelor - O perspectivă europeană (Unifying Contract Law – A European Perspective)*, Publisher: Ed. Junimea, Iași, 2005
- Valsamis Mitsilegas**, *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe*, Hart Publishing, 2016
- Guillaume Payan**, *Le règlement européen n°606/2013 du 12 juin 2013 relatif à la reconnaissance mutuelle des mesures de protection en matière civile : Entrée en application d'un règlement passé quasiment inaperçu*. Lexbase Hebdo édition privée, 2015, Lexbase Hebdo n°603, édition privée. <halshs01476766>, available here: <https://halshs.archives-ouvertes.fr/halshs01476766>
- Neus Oliveras, Raquel Vano (coord.)**, *The European protection order – Its application to the victims of gender violence*, Layout: Grupo Anaya, Madrid, 2015, developed with support from the Daphne Programme of the European Commission, available at http://158.109.137.58/epogender2/images/news/Libro/EUROPEAN_PROTECTION_ORDER.pdf

- Beatriz Pérez de las Heras**, *The Charter of Fundamental Rights as a New Element of European Identity and Beyond* în vol. **Beatriz Pérez de las Heras (Ed.)**, *Democratic Legitimacy in the European Union and Global Governance. Building a European Demos*, Palgrave, 2017
- Norbert Reich**, *Principii generale ale dreptului civil al European Union*, (trad. Constantin Mihai Banu), Editura Universitară, Bucharest, 2013
- Marta Requejo Isidro**, *The Enforcement of Monetary Final Judgements Under the Brussels Ibis Regulation (A Critical Assessment)* în vol. **Vesna Lazić, Steven Stuij, (Eds.)**, *Brussels Ibis Regulation. Changes and Challenges of the Renewed Procedural Scheme*, Springer, 2017
- Robert Schutze**, *Dreptul Constituțional al Uniunii Europene (General Principles of EU Civil Law)* (translation Mihai Banu, Mihaela Banu), Publisher: Editura Universitară, Bucharest, 2012
- Jens M. Scherpe (ed)**, *European Family Law Volume I. The Impact of Institutions and Organisations on European Family Law*, Edward Elgar, 2016
- Anna Sievälä**, *Mutual recognition of protection measures in the European Union: Equal protection to all EU citizens?*, Master Thesis, 2016, available here http://epublications.uef.fi/pub/urn_nbn_fi_uef-20140819/urn_nbn_fi_uef20140819.pdf
- Al.-Ș. Stănescu**, *Cooperarea judiciară în materie civilă și comercială: jurisprudența CJEU privind competența, recunoașterea și executarea hotărârilor (Judicial cooperation in civil and commercial matters: CJEU case law on the jurisdiction, recognition and enforcement of judgments)*. Publisher Ed. Hamangiu, Bucharest, 2011.
- Peter Stone, Youseph Farah (eds.)**, *Research handbook on EU Private International Law*, Edward Elgar, Cheltenham, 2015.
- Mihai Șandru, Mihai Banu, Dragos Călin**, *Procedura trimiterii preliminare. Principii de drept al Uniunii Europene și experiențe ale sistemului român de drept (The procedure of the reference for a preliminary ruling. Legal principles of the EU and the experience of the Romanian judiciary)*, Publisher: Editura C.H. Beck, 2013
- Camelia Toader**, *Cooperarea judiciară în materie civilă și comercială în cadrul Uniunii Europene (Judicial cooperation in civil and commercial matters in the European Union)* in the Annual Review of the Bucharest UNiversity, series Drept (Law), year 2005, April - June;
- Anamaria Toma-Bianov**, *Aplicarea privată a regulilor concurenței în European Union. Acțiunile în despăgubire promovate în fața instanțelor naționale și tribunalelor arbitrale (Private application of competition rules in the European Union. Claims filed with national courts and arbitral tribunals)*, Publisher: Editura Universitară, 2016
- Begona Vidal Fernandez**, *Victims as Individuals with Rights in the European Union: Their Protection and their Legal Standing* in the volume **Joanna Beata Banach-Gutierrez and Christopher Harding (eds)**, *EU Criminal*

- Law and Policy. Values, Principles and Methods*, Routledge, 2016
- Anne Weyembergh, Zlata Durdevic**, *Judicial control in cooperation in criminal matters. The evolution from judicial cooperation to mutual recognition in the volume Katalin Ligeti (ed), Toward a Prosecutor for the European Union, Volume 1, A Comparative Analysis*, Hart/Beck Publishing, 2012
- Aron, R.** (1967). *Les etapes de la pensee sociologiques*. Paris: Gallimard.
- Becker, H.S.** (1963/1985). *Outsiders. Etudes de la sociologie de la deviance*. Paris: Metailie (translation by J.-P. Briand and J.-M. Chapoulie).
- Besnard, P.** (1978). "Merton a la recherche de l'anomie". *Revue francaise de sociologie* 19 (1): 3-38.
- Raymond Boudon** (1977), *Effets pervers et ordre social*, Ed. Quadrige/PUF, Paris
- Raymond Boudon, Francois Bourricaud** (1982) *Dictionaire Critique de la Sociologie*, Ed. Puf, Paris
- Chambliss, W.J. Seidman, R.B.** (1971). *Law, Order and Power*. Massachutes: Addison-Wesley Publishing Company.
- Raul Delgado Wise**, Humberto marques Covarrubias, Ruben Puentes, *Reframing the Debate on Migration, Development and Human Rights*, în Population, Space and Place, Published online in Wiley Online Library (wileyonlinelibrary.com) DOI: 10.1002/psp.1783
- Mircea Djuvara** (1995), *Teoria generală a dreptului. Drept rațional, izvoare și drept pozitiv* [General theory of law. Rational law, sources and positive law], ALL Publishing House, Bucharest
- Durkheim, E.** (1893/1991). *De la division du travail social*. Paris: Quadrige/ PUF; *Diviziunea muncii sociale*, Albatros Publishing House, Bucharest, 1922/2001
- Durkheim, E.** (1895/2004). *Regulile metodei sociologice*. Bucharest: Antet.
- Durkheim, E.** (1897/2002). *Le suicide. Etude sociologique*. (Livre deuxieme: Causes sociales et types sociaux). Cegep de Chicoutimi. (Electronic edition, Jean- Marie Tremblay).
- Anthony Giddens** (1989/2000), *Sociologie [Sociology]*, Ed. ALL, Bucharest
- Richard A. Krueger, Mary Anne Casey** (2005), *Metoda focus grup. Ghid practic pentru cercetarea aplicată* [Focus Groups: A Practical Guide for Applied Research], Polirom Publishing House, Iași
- Merton, R.K.** (1957). "Social structure and anomie" in *Social Theory and Social Structure*. New York: Free Press (131-160), reprinted in Cressey, D.R, Ward, D.A. 1969). *Delinquency, Crime and Social Process*. New York: Harper & Row.(254-285).
- Pinatel, J.** (1971). *La societe criminogene*. Paris: Calman- Levy.
- Ioan Mihailescu** (2000), *Sociologie generală: concepte fundamentale și studii de caz* [General sociology: fundamental concepts and case studies], Bucharest University Publishing House, Bucharest
- Sutherland, E.H.** (1940). White Collar Criminality. *American Sociological Review*, 5:1-12, reprinted in Cressey, D.R, Ward, D.A. 1969). (426-432) *Delinquency, Crime and Social Process*. New York: Harper & Row.(349-361).

Sutherland E.H., Cressey D.R. (1966) *Principles of Criminology*. Philadelphia: J.B. Lippincot Co (77-83), reprinted in Cressey, D.R, Ward, D.A. 1969). *Delinquency, Crime and Social Process*. New York: Harper & Row.(426-433)

Maria Voinea, Carmen Bulzan (2004) *Sociologia drepturilor omului* [Human rights sociology], Bucharest University Publishing House

Project title: Protecting the Civil Rights of European Citizens – Multidisciplinary Approach

Identification number: JUST/2015/JTRA/AG/EJTR/8645

Coordinator: - Craiova Court of Appeal (Romania)

Partners: - Suceava Court of Appeal (Romania)

- German Foundation for International Judicial Cooperation – IRZ (Germany)

- Rijeka District Court (Croatia)

Project objectives:

The key objective of the project is to provide the participating magistrates with a multi-disciplinary training in the area of protection of civil rights for citizens through the perspective of the most recent European legislative instruments adopted in this field.

The project aims to improve knowledge on European legislation in the matters concerning the protection of civil rights for European citizens, to identify potential practical difficulties in the implementation process, to develop efficient cooperation mechanisms among the authorities of EU Member States and to prevent any infringements of the free movement of European Union citizens, aims which are also tackled from the perspective of legal sociology.

The project submits a practical approach to the various examples of judicial cooperation in civil matters with a cross-border dimension, an approach that should specifically translate the theoretical provisions of the law into reality and should build up the pre-requisites for a common European case law resulting from the implementation and enforcement of protection measures in civil matters with cross-border implications as stipulated by (EU) Regulation no. 606/2013.

Project implementation period is of 12 months, ranging from 01.06.2016 until 31.05.2017.

The overall project budget is 210,946 EUR (VAT not included), to which the European Commission is contributing with an amount of 168,757.10 EUR, representing 80% of the total eligible value of the project.

Project target group: 75 magistrates from Romania, Germany and Croatia.

Project activities:

Specifically, the programme consists from the implementation of **three intensive training sessions for magistrates**, in Romania, Germany and Croatia, with the purpose of ensuring, on one hand, **specialized legal training in the area of protection measures in civil matters, especially in the (EU) Regulation no. 606/2013**, as well in the area of the most recent European instruments in the field of judicial cooperation in civil matters, and, on the other hand, training in the subject of **legal sociology**, so that magistrates should benefit from a multi-disciplinary training in the area of protection of civil rights for European citizens.

The scope of such a specialized professional enterprise, involving an exchange of experience among judges from European Union Member States, represents the prerequisites for an improvement in the quality of justice.

The final output of the project consists from these guidelines whose subject is a "**Legislative and sociological research paper on protection measures in civil matters**".



www.editurauniversitara.ro