ERROR AND DAMAGE IN PUBLIC PROCUREMENT IN ROMANIA

If you make a mistake and do not correct it,
this is called a mistake.
Confucius*

Adrian Ducu MATEI[1]

Abstract: *The paper highlights the fact that more or less significant errors may occur in the procurement process, in many cases. Depending on their importance, they are considered to be mere financial deviations or, in more serious situations, they take forms that can even cause damage to budgets. Generally, they can be corrected or repaired, and this way the public procurement process can be balanced. In other situations it can be a lesson so that past errors are no longer repeated.*
We will focus on public procurement, which is increasingly important mainly for users of information from public sector reports drafted by different institutions, in order to present the data entered in them as accurately as possible. We have noticed that in time, errors and damages have been presented as equally serious without making any distinction between them, which has led to confusion and has affected confidence in institutions. The quality of information is an important element for both management and users of various reports, syntheses, papers, analyses and even studies. Seeing the impact of the various institutions' reports on both the media and the public, it is useful to analyse in more detail a number of issues concerning the two types of financial accounting errors and financial accounting deviations generating damages. The first concern the erroneous presentation of patrimonial items, whereas the latter refer to the damage to the patrimony that needs to be repaired, including its price (unrealized benefits, damages, unrealized benefits, interest).
Keywords: *Public procurement, error, financial deviation, damage, interest.*

* **Confucius** (b. 551 B.C., Lu – d. 479 B.C., Lu, was a Chinese philosopher, in the Lu state of China, who had a major influence on Asian thinking)

[1] Phd in economics, NIER "C.C.Kiritescu"- Romanian Academy,email: ducumatei@yahoo.com

Introduction

Public procurement is an important element of national economies in the European Union. Every year, public authorities spend about one fifth of the European Union's gross domestic product (GDP) on purchases of works, supplies and services.

European Union legislation on public procurement plays a crucial role in the development of the single market and in ensuring the efficient use of public funds. The EU Public Procurement Directives apply to procurement activities carried out by Member States, including Cohesion Policy expenditure. However, EU institutions have their own rules on public procurement. These rules are broadly in line with the directives, but there are significant differences, but also elements specific to national legislation.

Public procurement is also a way to create economic goods (goods, products and services) needed in the economy, both in the private and the public sector.

The public sector purchases economic goods, observing the relevant European legislation transposed into the national legislation that is of primary, secondary and tertiary level.

As part of the procurement process, errors and deviations from legal rules may occur both in financial, budgetary and public procurement.

When auditing public procurement processes, financial, budgetary and compliance auditors may find deviations from legality, regularity, economy and.

As it is presented almost daily by the media and also in many specialized reports of some scientific research institutions or control institutions, public procurement is one of the most vulnerable sectors of corruption, illustrated by the numerous cases of fraud in public funds.

These deviations from legality, which affect the state's consolidated general budget, take place at various stages of the public procurement process, in various areas of activity and in all the development regions of Romania.

Since the level of corruption risk in the procurement process is quite high, measures to combat corruption and fraud in this sector should be a priority for Romania.

The national procurement system was the result of a slow maturing process following several years of national law enforcement. This system was faced with the lack of capacity and ability of contracting authorities to carry out public procurement procedures, combined with legislation which was difficult

to use and interpreted in a unitary manner, with frequent legislative changes, lack of transparency and efficiency of investments, numerous complaints and especially lack of projects sustainability.

The process of analysing and identifying appropriate measures was initiated at European level through a structured dialogue with representatives of the European Commission via DG Regio and DG Grow in the context of the transposition of new directives on public procurement and the signing of the 2014 - 2020 Partnership Agreement on the use of structural and investment European funds.

The new European directives in the field that have been transposed into national law are:

- Directive 2014/23 / EU of the European Parliament and of the Council as of February 26, 2014 on the award of concession contracts;
- Directive 2014/24 / EU of the European Parliament and of the Council as of February 26, 2014 on public procurement and repeal of Directive 2004/18 / EC;
- Directive 2014/25 / EU of the European Parliament and of the Council of February 26, 2014 on the procurement made by entities operating in the water, energy, transport and postal sectors and repeal of Directive 2004/17 / EC.

This resettlement at European level required a rethinking of the national procurement system by adopting new national legislation as a natural solution to reform the system.

These working tools have been transposed into national legislation by 4 primary level normative acts and 3 secondary level normative acts as follows:

• Law no. 98/2016 on public procurement, published in the Official Bulletin issue 390 / May 23, 2016

- Implementing rules: Government Decision no. 395/2016, published in the Official Bulletin issue 423 / June 6, 2016

• Law no. 99/2016 on Sector Procurement, published in the Official Bulletin issue 390 / May 23, 2016

- Implementing rules: Government Decision no. 394/2016, published in the Official Bulletin issue 423 / June 6, 2016

• Law no. 100/2016 on concessions of works and concessions of services, published in the Official Bulletin of Romania issue 392/2016;

– Implementing rules: Government Decision no. 867/2016, published in the Official Bulletin issue 985 / July 7, 2016

• Law no. 101/2016 on the remedies and appeals regarding the award of public procurement contracts, sectorial contracts and concession contracts for works and concession of services, as well as for the organization and functioning of N.C.S.C. – NATIONAL COUNCIL FOR SOLVING COMPLAINTS, published in in the Official Bulletin issue 393/2016.

We can add the following to national legislation on public finance, accounting and preventive financial control:

• Law no. 500/2002 on Public Finances, published in the Official Bulletin issue 597 / August 13, 2012, as subsequently amended and supplemented;

– Order of the Minister of Public Finance no. 1,792 / 2002, approving the Methodological Norms regarding hiring, liquidation, authorization and payment of public institutions expenses, as well as the organization, recording and reporting of budget and legal commitments, published in the Official Bulletin issue 37 / January 23, 2003, as subsequently amended and supplemented;

• Law no. 273/2006 on local public finances, published in the Official Bulletin issue 618 / July 18, 2006, with the subsequent amendments and completions;

• Accounting Law no. 82/1991, published in the Official Bulletin issue 392/2016, as amended and supplemented;

– Order of the Minister of Public Finance no. 1,917 / 2005, approving the Methodological Norms regarding the organization and management of the accounting of public institutions, the Plan of Accounts for Public Institutions and its Implementation and the Instructions published in the Official Bulletin issue 1186 / December 29, 2005, as subsequently amended and supplemented;

• Government Ordinance no. 119/1999 on internal / managerial control and preventive financial control, published in the Official Bulletin of Romania issue 430 / August 31, 1999, as amended and supplemented.

1. Principles of public procurement

The principles upon which the awarding of contracts and the organization of solutions contests are based on, according to the national legislation, respectively in Law no. 98/2016 on public procurement and Law no.99/2016 regarding sectoral procurement, are the following:

a) discrimination;
b) equal treatment;
c) mutual recognition;
d) transparency;
e) proportionality;
f) making admission of liability.

The purpose of the two laws is to achieve the purchase of goods, services and works in conditions of economic and social efficiency.

Observing these principles creates a competitive environment favourable to balanced economic development and reveals the concept of"value for money" and sets the foundations for harmonious development. Economic operators are encouraged to participate in public procurement processes, promote good quality goods, products, works and services in conditions of economic efficiency. When these goals are promoted, the premises of lowering the level of corruption and diminishing the fraud of public funds and budgets are created.

As mentioned before, errors and deviations occur in public procurement processes; some of them are less serious and do not have a financial impact on the funds, yet they are signs of unfairness in these processes, whereas others are more serious and affect public budgets in a negative way, generating damages; they must be eliminated.

For this, we need to recall a number of concepts that help us detail these differences such as patrimony, public funds, legality, regularity, economy, efficiency and effectiveness, concepts used in the analysis of sound financial management.

Thus, heritage means all the rights and obligations of economic value belonging to the state, the administrative-territorial units or their public entities, acquired or assumed under any title, as well as the goods which these rights relate to. The state patrimony includes both its public and private patrimony, of the administrative-territorial units as well as of the public entities.

Public patrimony includes all the rights and obligations of the state, of the administrative-territorial units or of their public entities, acquired or assumed by any title. The rights and obligations of the state and of the administrative-territorial units refer exclusively to public goods.

Public funds are another important concept, representing the sums allocated from the state budget, the local budgets, the state social insurance budget, the special fund budgets, the State Treasury budget, the budgets of the autonomous public institutions, the budgets of the public institutions financed

entirely or partially from the state budget, as the case may be, the budgets of public institutions entirely financed from own revenues, the budget of funds from external credits contracted or guaranteed by the state and whose repayment, interest and other costs are provided by public funds, the budget of the non-reimbursable external funds, guaranteed by the local public administration authorities, internal loans contracted by the local public administration authorities, as well as from the budgets of public institutions entirely or partially financed by the local budgets.

Fraud is an important concept that occurs in the public asset management and use of public funds process, which adversely affects these components; it represents any intentional action or omission in relation to:

(a) the use or presentation of false or incorrect or incomplete statements or documents which have as effect the allocation / acquisition, respectively the misuse of public funds;

(b) failure to disclose information in breach of a specific obligation having the same effect as previously mentioned;

As described in legislation and in the literature, *legality* is the feature of an operation *to comply with all legal provisions applicable to it and in force at the date of its implementation*.

Regularity means the feature of an operation *to observe all the aspects of the procedural and methodological principles and rules that apply to the category of operations which it belongs to*.

Regarding the *economy*, we can say that it is *a feature attributed to the situation in which minimization of the estimated cost of the resources allocated to achieve the expected results of an activity, while maintaining the proper quality of these results.*

Efficiency means *maximizing the results of an activity* in relation to the resources used;

In terms of *effectiveness*, this is *the degree of achievement of the scheduled objectives* for each activity and *the relationship between the projected effect and the actual outcome of the activity.*

2. Non damaging financial accounting deviations

When analysing sound financial management it is necessary to carry out an investigation, a research on the management of the public and private patrimony of the state and of the administrative-territorial units and / or if the implementation of the income and expenditure budget of the investigated entity is in accordance with the purpose, objectives and attributions provided in the

normative acts by which the entity was established and whether it complies with the principles of legality, regularity, economy, efficiency and effectiveness, and in particular the use of public funds allocated to finance expenditures on public procurement of goods, works and services, including verification of the legality of procedures used to award public procurement contracts.

The investigation of sound financial management may result in financial non-prejudicial accounting deviations which still result in non-observance of principles that affect fair competition or misrepresent a number of patrimonial elements in the annual financial statements that affect their credibility, mislead the users of this information, management included, or creates an erroneous picture of the patrimony and financial position.

All these create an economical environment of mistrust and investors either leave such savings, or loans to cover fund gaps are attracted to higher prices to cover the increased risks in an economy that tolerates such inappropriate behaviours.

A situation that can be customized is that which concerns irregularities or deviations which are not prejudicial to public procurement.

Thus, we can focus on non-damaging financial accounting deviations in the public procurement process, in stages, which can be encountered if we investigate how to comply with the rules and related legislation.

Thus, we can identify a number of deviations which may arise considering the legislation governing public finances, local public finances, accounting for public institutions, preventive financial control and public procurement.

In this regard, we can show below a series of deviations that may occur during the planning, the organization of the execution procedure and the monitoring of the implementation of the public procurement contract stages.

Table 1 - Non damaging financial accounting deviations

No.	Investigation	Legislation	Investigated documents	Possible deviations	Possible impact	Examples
1.	**Planning public procurement**					
a.	*Identifying needs and drafting Purchase Requisition Reports, including supporting documents, as well as contracting strategy for that procedure*					
	One will audit whether the Purchase Requisition Reports drafted in the last quarter of the current year for	Law 500/ 2002 art. 4 para. (4), art. 14, art. 21 para. (8), art. 22 para. (1) Law 98/2016 art.2 para.	Purchase Requisition Reports	Purchase Requisition Reports include products, services and works not related to the activity of the entity and / or the	The process of substantiating the revenue and expenditure budget and the decision to spend the money were done	In the case of an institution carrying out activities in the field of veterinary and food safety, there

No.	Investigation	Legislation	Investigated documents	Possible deviations	Possible impact	Examples
	the next year include products, services and works related to the activity of the entity and / or the acquisition of which is allowed in the verified year	(1) GD 395/2016 art.3, art.9 para.1 Law 99/2016 art.2 para. (1) GD 394/2016 art. 3, art.9 para. (1) GO 119/ 1999 art. 5 para. (1)		acquisition of which is not allowed in the verified year, while they have been purchased and paid for	without observing the principle of sound financial management. Fine according to Law 98/2016 art. 224 para. (1) letter b) depending on the seriousness of the deed between RON 5000 and 30000 - sanction based on a record of findings and (subsequent) penalties pertaining/in regards to contraventions.	was a request to purchase sporting equipment, with relation to its activity.
	One will audit if in the case of public procurement contracts regarding *insurance* the contracting authority calculated the estimated value of the procurement based on *insurance premiums to be paid and any other forms of remuneration* relating to those services	Law 500/ 2002 art. 21 para. (8), art. 22 para. (1) and (2) letter c) Law 98/2016 art. 22, art. 2 para. (1), art. 11 para. (2) Law 99/2016 art. 2 para. (1), art. 16 para. (2), art. 27 GO 119/ 1999 art. 5 para. (1)	Annual public procurement strategy Annual procurement program Contract strategy Data sheet	Over-estimation of the estimated value in the case of public service contracts for insurance services above the level of insurance premiums to be paid and any other forms of remuneration relating to those services. Underestimation of the estimated acquisition value in the case of public service contracts for insurance services below the insurance premiums to be granted and any other forms of remuneration relating to those services for the purpose of applying an incorrect award procedure.	The process of substantiating the revenue and expenditure budget and the decision to spend the money were done without observing the principle of sound financial management (the principle of legality). Fine according to Law 98/2016 art. 224 para. (1) letter b) and d) or Law 99/2016 art. 245 para. (2) letter. b), depending on the seriousness of the deed between RON 5000 and 30000 - sanction based on a record of findings and (subsequent) penalties pertaining/in regards to con-traventions.	In the case of an institution, in order to substantiate the costs of the insurance services, the estimated total value of the insurance services was calculated taking into account a number of double / half / year premiums / half of the budget year required to provide these services.

No.	Investigation	Legislation	Investigated documents	Possible deviations	Possible impact	Examples
2.	**Organizing public procurement – simplified procedure**					
	One will verify whether the contracting authority has responded clearly, fully and legally to any request for clarification of the awarding documentation or additional information	Law 500/ 2002 art. 21 para. (8), art. 22 para. (1) Law 98/2016 art. 160 para. (2), art. 161, art. 2 para. (2) letter d) GD 394/2016 art 108 para. (2) Law 99/2016 art. 2 para. (2) letter d), art. 172 para. (2) GD 395/2016 art 103 para. (2) GO 119/1999 art. 5 para. (1)	Communication/ Note/ Information/ Procurement file	The contracting authority did not fully and / or legally respond to any request for clarification of the awarding documentation or additional information, thereby favouring a single tenderer to participate in the procedure and / or eliminating as unacceptable all bids lower than the winning bid (price + operating costs).	Failure to comply with the principles of sound financial management. Failure to comply with the principle of transparency. Fine according to Law 98/2016 art. 224 para. (1) letter B) depending on the seriousness of the deed between RON 5000 and 30000 - sanction based on a record of findings and (subsequent) penalties pertaining/in regards to contraventions.	Upon submitting a request for clarification received from a tenderer whose financial offer is lower than the financial offer of the tenderer the contract was concluded with, the contracting authority did not reply nor was the response clear, complete or transmitted within the legal timeframe.
3.	**Implementation and monitoring of implementation of the public procurement contract**					
	One will audit whether the contracts concluded between the contractor and the subcon-tractor / subcontractors nominated in the tender or subsequently declared are in line with the offer and are attached to the public procurement contract	Law 500/ 2002 art. 22 para (2) letter c) GO 119/1999, art. 5 para (1) Law 98/2016, art. 2 para. (2) letter d), art. 218 para. (5) Law 99/2016, art. 2 para. (2) letter d), art. 232 para. (5)	Contracts concluded between the contractor and the subcontractor / subcontractors	Contracts concluded between the contractor and the subcontractor / subcontractors nominated in the tender or subsequently declared are not in line with the offer and are not attached to the public procurement contract, violating the principle of sound financial management and transparency.	Failure to comply with the principles of sound financial management. Failure to comply with the principle of transparency. Fine according to Law 98/2016 art. 224 para. (1) letter d) depending on the seriousness of the deed between RON 5000 and 30000 - sanction based on a record of findings and (subsequent) penalties pertaining/in regards to contraventions.	The contract between the contractor and the subcontractor mentioned in the offer is not in line with the offer, as it contains other goods and prices which were not included in the offer.

3. Damaging financial accounting deviations

In these cases too we can identify a number of deviations which may arise in the light of the legislation governing public finances, local public finances, accounting of public institutions, preventive financial control and public procurement.

In this respect we can indicate in the stage regarding the execution and monitoring of the implementation of the public procurement contract possible deviations from which we exemplify:

Table 2 - Damaging financial accounting deviations

No.	Investigation	Legislation	Investigated documents	Possible deviations	Possible impact	Examples
1.	**Implementation and monitoring of implementation of the public procurement contract**					
	One will audit whether the update of the overall estimate is made in the situations stipulated by the law and the procurement contract, and if it has been approved by the main budget administrator	Law 500/2002 art. 14, art. 43 para. (2) GD 394 art. 30 GD 395 art. 28	General estimate Annual Investment Program, Technical and Economic Documentation Documentation for the approval of the intervention works, Substantiation notes on the necessity and opportunity of spending for the investment categories	The update of the overall estimate has been made in circumstances other than those provided for by law and / or contract and / or without the approval of the main authorizing officers and / or does not have a preventive fiscal control visa.	Damage to patrimony = value of paid updates exceeding the level resulting from the application of the rules provided by law or not provided for in the procurement contract.	The update was made without being provided in the tender documentation and the contract

In such situations as above, one can appreciate that this nature of the deviation is a serious one damaging the budget of the public institution, the consolidated general budget.

Some mentions on damage are necessary.

Aspects of civil liability for offense and the general conditions under which this liability can be undertaken are found in Art. 1349 para. (1) to (2) and Art. 1357-1371 of the Civil Code adopted by Law no. 287/2009 on the Civil Code[1], as subsequently amended and supplemented.

[1] Law no. 287/2009 on the Civil Code, (published in the Official Bulletin issue 511 as of July 24, 2009), modified and ammended by Law no. 71/2011 for the implementation of

At the same time, we note that in the analysis of civil liability for damages caused by own deed, it is also necessary to consider the provisions of art. 1381-1395 of the aforementioned normative act, which regulates the rules applicable to reparation of the damage caused under the conditions of tort liability in all cases.

As stated in the law, one who causes a damage to another so as to suffer an offense by an offense committed with culpability is obliged to fix it[1].

In addressing the issue of civil liability, it is also necessary to consider the provisions of art. 219-224 of the Civil Code regarding the liability of private legal entities and private legal entities for **the lawful and tort acts of the management bodies in the assigned positions**.

Considering the content of the legal provisions, it is necessary to cumulate the following conditions for the existence of a tort civil liability: **the damage, the tort act, the causal relation between the illicit act and the damage, the guilt of the author of the tort act and prejudicial act**. Importantly, these conditions were also necessary under the provisions of Art. 998-999 of the 1864 Civil Code.

In order to repair the damage caused to the victim, it must meet the following conditions: **be certain, not to have been repaired yet, be direct, be personal and to result from the violation or the attainment of a legitimate interest**.

A. The certainty of the damage

The damage is certain when its existence can be certainly ascertained and when it can be assessed. The phrase "safety damage" encompasses both actual and present damage as well as future damage. The present, actual damage is that damage that has already occurred at the time one claims to be repaired. A future injury is one that, although it has not occurred yet, it is certain that it will occur in the future and is therefore susceptible of evaluation (an example of

---

Law no. 287/2009 on the Civil Code, (published in the Official Billetin issue 409 as of June 10, 2011), as subsequently amended and supplemented.

[1] Art. 1357 of the Civil Code: "*(1) A person who causes another to suffer an unlawful act committed with guilt is obliged to fix it. (2) The author of the damage shall be liable for the lightest fault*", and according to the provisions of art. 1349, "*Everyone has the duty to observe the rules of conduct which the local law or customs impose and not to damage, through hi/her actions or lack of actions, the rights or legitimate interests of others. (2) The person who, being legally competent, violates this duty, shall be liable for all the damages caused, being obliged to fully repair them"*

such damage may be the result of a person's death, when the compensation is due to the persons which they provided for, with the possibility of updating them in relation to the evolution of the state of health or according to the state of need in which those entitled to compensation are).

Under the UNIDROIT Principles 2004[1], future damage is certain when it comes to both its existence and its extent[2].

We point out that the possible damage is not included in the future damage, because its production is not safe and it cannot be evaluated. A novelty of the current Civil Code is the regulation in art. 1385 para. 4, of "*damage caused by the loss of the opportunity to gain an advantage or to avoid damage*".

This issue has been and continues to be the subject of some doctrinal[3] and jurisprudential[4] disputes in France, where the authors of the new Civil Code also took their inspiration from.

Regarding the possibility of repairing damages caused by losing a chance, by means of tort liability, the chance must meet the following cumulative conditions is necessary: *the chance to be real and serious*[5]*; the*

[1] The International Institute for the Unification of Private Law (UNIDROIT) has developed the international principles of commercial contracts, which are models of rules on the sale of goods and the provision of services. These instruments have created standards that have served as model norms for lawmakers around the world (For example, the Organization for the Harmonization of Commercial Law in Africa is working on drafting a single contract law, inspired to a large extent by the principles developed by UNIDROIT on international trade contracts. The UNIDROIT and PECL Principles have also been the source of inspiration for the Law on Contracts adopted in China in 1999.) and for parties of the commercial contracts which, even if they do not designate them as a law governing certain aspects of their contracts.

[2] The UNIDROIT 2004 principles on international commercial contracts, 2004, available at: http://www.unidroit.org, art. 7.4.3, comment 2.

[3] G. Viney, P. Jourdain, Traité du droit civil, supervised by J. Ghestin, Éd. Librairie Générale de Droit et de Jurisprudence, 1998, p. 87-103.

[4] Cass. crim., 23 février 1977, Bull. crim. nr. 73, p. 169, „The loss of a chance may in itself be a direct and certain element in all cases where the real possibility disappears as a favorable event, by definition, to lead to that chance" (quoted by L. Pop, I.F. Popa, S.I. Vidu, in op cit. p. 417).

[5] G. Viney, P. Jourdain, op. cit. p. 98-100; L. Pop, I.F. Popa, S.I. Vidu, op. cit. p. 417; L. R. Boilă, chapter IV. Civil liability in the New Civil Code, Comment on articles, art.1-2664, Cordonators: Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, Editura C.H.Beck, Bucharest 2012, p.1462;

loss of chance to be determined directly by the unlawful act or by another circumstance for which the tort liability is committed.

In conclusion, in order to obtain compensation in such a situation, the victim will have to prove that he or she has missed an advantage or a certain favour, which was almost certain, had the author's unlawful act not occurred.

According to the provisions of para. 4 of art. 1385 of the new Civil Code "*the reparation shall be proportional to the probability of obtaining the advantage, or, as the case may be, to avoiding the damage, taking into account the circumstances and the concrete situation of the victim.*"

The analysis of the above legal provision leads us to the conclusion that the repair in such a case will be less than the profit that the victim would have made by capitalizing on the chance, because this will be done taking into account the percentage in which that chance could have occurred.

b. The damage has not been repaired yet

In case the victim of the illicit deed received compensation, the tort liability was extinguished and as a consequence, the right of action was extinguished by execution.

As a rule, compensation for the damage by payment is made by the person who caused the damage by an illicit deed, in which case the payment made is direct. In such a case, we distinguish two situations:

- the offender voluntarily carries out the obligation to pay as a result of the agreement thereof with the victim;
- in the absence of a settlement, the parties may file the case to the courts of law, in civil or criminal proceedings , which will also rule on the material damage.

The victim's right to claim damages can also be extinguished if the damage has been covered by a third party, by way of an onerous act or free of charge. In the case of the third party who has paid the pecuniary damage, it will subrogate himself to the rights of the creditor victim, and will have recourse against the debtor-author of the offense. If the payment was made for free, then the obligations will be extinguished. When a third party **pays only part of the damage, the victim creditor will be able to pursue the debtor author** of the unlawful deed causing injury for **the unpaid difference**.

Also, in the case of insurance contracts where the payment was made by the insurance company, the victim's right to compensation is extinguished[1].

C. The direct nature of the damage is given by the causal relationship between the unlawful act and that unjust damage, which caused damage to the victim

This features is based on an objective element, namely the causal relationship, rather than the subjective one. It was rightly pointed out in literature[2], that the phrase 'direct damage' is not confused with the notion of directly caused damage, in that the scope of the concept of direct damage is wider, covering both damage caused by a direct causal relation, and an indirect one. The damage is indirect when there is no causal relationship between the illicit act and the damage.

The New Civil Code does not expressly define the direct nature of reparable damage, although such a clarification would have been beneficial, but it may be inferred from the provisions of Art. 1533, the last part, according to which "*... damages only cover what is the direct and necessary consequence of the non-performance of the obligation*."

D. The personal nature of the damage arises from the fact that the right to claim remedy belongs only to the person who has suffered injurious damage

Of course, the same right to claim reparation for an unjust damage will be experienced not only by the person as an individual, but also by the group of people, the group of injured people, but also the indirect victims, those who have also been harmed.

The personal nature of the damage is not such as to impede reparation for collective damage, [3], which result from the breach of collective interests belonging to whole categories of people, nor of indirect damage [1].

---

[1] Regarding the nalysis of the cases mentioned above: C. Stătescu, C. Bîrsan – op.cit., p.155-158.

[2] M. Eliescu , op.cit. p.97; L. Pop I.F. Popa, S.I. Vidu Tratat… 2012, p.418-419; V. Stoica, Relația cauzală complexă ca element al răspunderii civile delictuale în procesul penal, în „Revista Română de Drept" nr. 2/1984, p.35.

[3] X. Pradel, defines collective damage as being "those injuries that are caused to more than one person by one and the same event", op. cit. p. 277-279.

E. The damage results from the violation or damage to a legitimate right or interest

The specialized doctrine, by interpretation of the provisions of the 1864 Civil Code, concludes that civil liability would be committed in those situations where the damage is caused to the victim by violation of patrimonial or non-patrimonial subjective rights (right to property, right to support, right to privacy, right to health, right to physical integrity, right to honor, etc.)[2].

Everyday life has shown that damage also occurs as a result of the violation of a person's or people's interest which does not have a correspondent in a subjective right.

The conclusion in literature is that achieving a simple interest resulting from a factual situation gives the right to reparation of the damage caused. The culpable person will be liable for damages by damaging an interest if the following conditions are met:

A) it is legitimate, that is, it complies with the requirements of the material law;

B) it is serious, that is reasonable and in accordance with good morals;

C) it seems to be a civil subjective right [3].

The jurisprudence before the new Civil Code has constantly held that, in principle, there is an obligation to repair the damage also in those situations in which it was caused to a person in violation of a simple interest which does not correspond to a subjective right [4].

The new Civil Code legislated the doctrinal opinions, as well as the jurisprudence, stipulating in art. 1349 paragraph 1, the general obligation of any person not to damage the rights and legitimate interests of others. Art.

---

[1] G. Viney, P. Jourdain, op. cit. p. 117, 154-178; L. Pop, I.F. Popa, S.I. Vidu, op. cit. p. 420, Gheorghe Durac, Noul Cod civil.Comentarii, doctrină şi jurisprudență, Vol II, art. 953-1649, Hamangiu Publishing House, Bucharest, 2012, p. 687.

[2] M. Eliescu – op.cit., p.100-102; L. Pop, I.F. Popa, S.I. Vidu, op. cit. p. 422-423; C. Stătescu, C. Bîrsan – op.cit., p.146-147.

[3] M. Eliescu – op.cit., p.101-102; L. Pop, I.F. Popa, S.I. Vidu, op. cit. p. 423; C. Stătescu, C. Bîrsan – op.cit., p.147; A. Georgescu-Banc, în Noul Cod civil. Note .Corelații. Explcații., C.H.Beck Publishing House, Bucharest, 2011, p.505-506; Gheorghe Durac, op, cit. p.690; L. R. Boilă, op. cit. p.1420-1421.

[4] Supreme Court, criminal cases, decision no. 495/1966, in CD 1966, p. 432; Supreme Court, criminal cases, decision no 2722/1970, in RRD issue no. 3/1971, p. 130; Supreme Court, military cases, decision no. 39/1998 in RRD issue no. 8/1989, p. 75; Supreme Court, pen.col. Decision no. 39/1963 in J.N. issue no. 4/1969, p. 178.

1359 of the new Civil Code provides for the consequence of non-observance of the general obligation not to damage, in the sense that "*The author of the unlawful deed must repair the damage caused and if it is the consequence of the interest of another, if the interest is legitimate, serious and by the way in which it manifests, it creates the appearance of a subjective right*."

Conclusions and suggestions

According to the principle of full reparation of the damage caused to the public or private patrimony of the state, of an administrative-territorial unit or of a public entity thereof, it is necessary to cover both the **direct loss** (damnum emergens) and the **ceased profit** (lucrum cessans).

For this purpose on the basis of a sample investigation, it is necessary that the potential damage **be determined with certainty** at the date of the verification document, with the elements described above.

In conclusion, it is possible to try to define the **damage** which must be **certain, have not been repaired yet, be direct, personal and result from the violation or the attainment of a legitimate interest**, "*the actual damage must be caused to the public or private property of the state, of an administrative-territorial unit or of a public entity thereof, as a result of an illegal act by a person in charge of the administration of the patrimony. Damage must be fully recovered by covering actual damage (loss) and unrealized benefits.* "

Bibliography

Cass. crim., 23 février 1977, Bull. crim. no. 73, p. 169, „The loss of a chance may in itself be a direct and certain character in all cases where the real possibility disappears as a favorable event, by definition, to lead to that chance" (quoted by L. Pop, I.F. Popa, S.I. Vidu, in op cit. p. 417).

M. Eliescu , op.cit. p.97; L. Pop I.F. Popa, S.I. Vidu Tratat… 2012, p.418-419; V. Stoica, Relaţia cauzală complexă ca element al răspunderii civile delictuale în procesul penal, in „Revista Română de Drept" issue no. 2/1984, p.35.

G. Viney, P. Jourdain, Traité du droit civil, supervised by J. Ghestin, Éd. Librairie Générale de Droit et de Jurisprudence, 1998, p. 87-103.

X. Pradel, defines collective damage as being "those injuries that are caused to more than one person by one and the same event", op. cit. p. 277-279.

*** UNIDROIT 2004 principles regarding international commercial contracts, 2004, available at: http://www.unidroit.org, art. 7.4.3, comment 2.