

# PROTECTION OF CREDITORS' RIGHTS IN THE CONTEXT OF AN EVOLVING INVESTMENT ENVIRONMENT UNDER EU LAW

Yordanka Noneva-Zlatkova<sup>1</sup>

DOI: <https://doi.org/10.31410/EMAN.2020.179>

---

**Abstract:** *In the post-global economic and financial crisis, Europe is suffering from significantly low levels of investment. This applies both to national level in the individual Member States and to those with a supranational scope. For this reason, the EC tried to stimulate the development of any investment initiative through the Juncker Plan, which is based on three pillars: the European Fund for Strategic Investments, the European Investment Advisory Center and the European Investment Projects Portal, and third, improving the business environment by removing regulatory barriers to investment at national and European level. Policies in this direction will continue and build on over the period 2021-2027 through the InvestEU program, which aims to continue to support increased investment, innovation and job creation in Europe. The process of implementation of each such initiative directly affects the individual legal and natural persons as investors who enter different bond relations, which have both national and international dimension. The development of new investment products and instruments would be unthinkable without the Bank's involvement as a major creditor in the implementation of investment projects. This fact shows that it is necessary to examine the legal guarantees for the protection of creditors in these relationships in case of possible threat the debtor to damage the creditor in case of unfavourable development of the respective investment initiative. This paper will justify the significance and the peculiarities of Paul's claim as a means of protecting creditors in the context of a developing EU investment environment and its legal framework. This method of preventing the decline of the asset and / or the increase of the liability of the debtor's property is characterized by extreme persistence over time as a legal institution that originated in the Roman era and has survived to the present without losing its significance.*

**Keywords:** *Creditors' rights, Actio Pauliana, Investment, InvestEU, Juncker Plan, Collateral, Fraudulent misconduct, Insolvency, Trade law, Civil law.*

---

## 1. INTRODUCTION: PROBLEM STATEMENT

**A**nnouncement and the subsequent launching of the Juncker Plan implementation by the European Commission puts the development of bond and trade relations between natural and legal persons at Member States and EU level in front of new challenges. On the one hand, the Plan acts as a guarantee to the entities, which are active in civic and trade life, for access to finance for the development of innovative business ideas in the European interest. This, in turn, is an additional incentive for them to participate increasingly active underutilization of funds for large investments over 25 million euros directly to the European Investment Bank Group or at - small projects through credit lines established in cooperation with national and regional banks that know the local markets. On the other hand, it is very important to note that the European Investment Bank does not grant loans in excess of 50% of the required funds for the implementation of a project, which in turn confronts the entities with the challenge of obtaining the funds they need to realize the investment from their own savings or through an additional bank credit. This, in turn, puts national credit institutions in a special position. On the one hand, borrowing less than 25 million euros, national credit institutions are secured partially with funding from the European Fund for Strategic Investment, which creates a need for additional

---

<sup>1</sup> Faculty of Law and History, South-West University 'Neofit Rilski', Blagoevgrad, Bulgaria

collateral, which the credit institutions want from individuals and legal entities to approve the project of idea financing. The incentive effect of the plan on the one hand creates prerequisites for active participation, but from another point of view, it has a deterrent effect, because the credit institution must be additionally secured. So, at micro level, whatever it's the civil status of the investor, the credit institution is a creditor whose interest is trying to as secure as possible.

In addition to this level, in terms of evolving investment environment, it should be considered purely the narrow bond and trade relations on the occasion of the realization of the investment project and its start, which gives rise to multiple bonds and/or commercial relationships either unilateral or bilateral between businesses, which makes it a topical question: By what means the creditor's interest can be protected. No matter which are the parties to the relationship, the arising mechanisms are the same and apply to them since ancient time on. These are so-called personal collateral (surety, solidarity) and real collateral (pledge and mortgage, among them there are other types of unusual collateral (Actio Pauliana and Actio Obliqua). In this article, we will pay attention to the latter type of uncharacteristically collateral, among which Actio Pauliana is of importance. This article focuses on the raised problem through the prism of Bulgarian legislation and some jurisdictions in other Member States, reflecting the practice of Court of Justice of the European Union (CJEU).

## **2. FACTORS WITH POSITIVE AND NEGATIVE EFFECTS ON THE INVESTMENT ENVIRONMENT**

Before we get to the heart of the problem, we will look at some factors at EU level, with an impact on Member States, which have both a positive and a negative impact on the investment environment, and which give rise to an increasingly comprehensive application of these security mechanisms, as follows:

### **2.1. The World Financial Crisis 2007-2008**

The EU has faced many difficulties in its historical development. We must not forget that it was the creation of the '*sui generis*' EC, which subsequently gave birth to the EU as a phoenix from the ashes in the period immediately after World War II. The path of this creation called the EU, which is neither an international organization or federation is dotted with tumultuous since its inception which are as political as economic ones. From the union of several Western European countries, the EU has grown to Union of 28 countries till 2016, which share values and ideas, are individual countries as sovereignty and separately functioning economies. It was not an easy period adapting the individual economies of the Member States, so that to make the EU an independent political and economic factor on the international stage. In addition to their individual crises at national level, each Member State has been parallel to those at supranational level. One such crisis is the 2007–2008 World Financial Crisis, which economists see as even heavier than the Great Depression in the first half of the 20th century. As a result of the financial crisis, stock markets collapsed, key sectors for the development of the economy, as the banking is threatened by a serious collapse, the population significantly impoverished. Of course, from the view of the present one of the main reasons mentioned as the first causative agent of this crisis is the large relative share of over-indebted borrowers who cannot repay their mortgage loans. This, in turn, led to a collapse in banking systems globally, to numerous bankruptcies of credit institutions. This global crisis is also fundamental to the development of the debt crisis in Europe and known as the Euro crisis and especially to the Member States participating in the eurozone. As a combination of a public debt crisis, a banking crisis and a growth and competitiveness crisis, it confronts old Member States like Italy and Greece on the verge of bankruptcy.

## 2.2. Brexit and the migration crisis

In determining the factors influencing the EU's investment environment, we should also consider the first opt-out of membership in the EU's history. After a held referendum in Great Britain on 23 June 2016, the United Kingdom faced the dilemma of staying a member of the EU or leaving it, and so with more than half of the votes of its population, the English people decided to leave the Union. Formally on 29 March 2017<sup>2</sup> the United Kingdom notified the European Council of its intention to leave the EU and thus triggered Article 50 of the Treaty on European Union. Thus, the EU is entered into a new crisis, but this time a political one that inevitably negatively affects the evolving investment environment in Europe, it has created significant movements in the financial markets and affected the Union's rating on the international stage. Next, we should also mention the ongoing migration crisis in Europe, which was created precisely in this period, which has an impact on the investment environment.

## 2.3. Juncker Plan

It is during this period that the European Commission also announces its investment plan. The idea of Juncker Plan is ingenious and very promising for the EU and its Member States, it gives a lot of positive results, but how would it look through the prism of the political crisis on the occasion of the UK's departure from the EU in 2021 and the nascent health crisis facing Europe and the world on the occasion of a pandemic<sup>3</sup> spreading the Corona virus (COVID19). These challenges whether or not, they face Europe, and in particular any Member State, at the threshold of a severe economic crisis as a result of the health crisis, which will reflect on ultra-micro level as a new debt crisis in the banking sector and separate indebtedness between individual companies in landmark sectors for each state economy. There are expected to be numerous and massive cuts of employees, halt of proceedings, failure of many businesses, which will become insolvent and will stop their payments not only to the state but also to their creditors. In addition, it will reduce consumption and the income and standard of living of the citizens of the European Union will be reduced significantly. People will not be able to cover not only their loans but also their daily needs. This development of the public relations in turn reposes the unfavourable development of many contractual and commercial relationships, namely the failure to comply with obligations under bond and commercial contracts of any kind. This fact enormously will place creditor as a party to a relevant contractual or commercial relationship in a disadvantaged position. Precisely and for this reason I realized the idea to write this article, which is rooted in my perception to highlight the strength and characteristics of collateral as a means of protecting the rights of creditors and, in particular, the legal institute of Actio Pauliana as a mechanism of protection of creditors either in civil or commercial law and to present its peculiarities in Bulgarian law and its manifestations in the case law of the European Court of Justice.

Despite these economic gaps in front of the EU, as a result of the euro crisis, thanks to policies related to the monitoring of government deficits and Member States 'debt levels', Europe has been able to stabilise. This is the challenge for the strategic solution of these problems not only at the macro level, but also on micro. It is precisely and for this reason that the European leaders are still distrustful as a result of the crisis, but convinced that the life of the European economy must be "breathe", to create an environment conducive to investment, the European Commission is broadcasting its strategic investment plan „Juncker". However, in the mind of every layman arises the question: How will this happen? *Firstly*, European politicians see the realisation of this plan in

<sup>2</sup> <https://eur-lex.europa.eu/content/news/Brexit-UK-withdrawal-from-the-eu.html?locale=en>

<sup>3</sup> <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

three pillars the first, to provide the opportunity to develop strategic investments that are innovative and rapidly liquid, which is expressed in the creation of a European Fund for Strategic Investments, *the second* to provide technical assistance to investors and *the third*, which is primarily the prerogative of each Member State to minimize regulatory requirements in national legislation in order to promote the development of investment and make the EU an investment oasis.

Here should also be mentioned the legal basis of the plan of the name and this is article 309 TFEU<sup>4</sup>, which proclaims the main function of the European Investment Bank to contribute, through capital markets or its own resources, to the stable development of the internal market. In this article, we may also find a provision that tells us that the European Investment Bank facilitates through loans and guarantees the financing of projects in all. In its article 16 of protocol 5 on the Statute of the European Investment Bank, which is an integral part of TFEU<sup>5</sup>, the European legislator clearly gives an understanding that the European Investment Bank provides its members, in the face of Member States or private or public enterprises, with funding in the form of loans and guarantees for investments within the territories of the Member States. Paragraph 2 of article 16 also mentions the requirement for the presence of other sources of financing under the conditions of crediting, from which we can deduce that the Bank does not give 100% investment funding.

The achievement of a significantly stable growing investment environment in the EU during the stabilisation period can be found in the implementation of article 206 of the TFEU<sup>6</sup> on the establishment of the customs union, where in order to achieve the harmonious development of world trade, the gradual abolition of restrictions on international exchange and foreign direct investment is achieved. In pursuance of this provision of EU primary law through several investment regulations<sup>7</sup> connected with the smooth transition from the current system of bilateral investment agreements between EU countries and third countries to a system whereby these agreements are negotiated by the European Commission.

Next, the positive development and creation of a favourable investment climate in Europe also provides EU policy for the conclusion of the so-called EU trade agreements, the main purpose of which is the promotion of trade (argument art. 207 TFEU)<sup>8</sup>. In this context, in May 2018, the Council of Ministers adopted conclusions on the negotiation and conclusion of trade agreements, which set out the basic principles that will be based on the Council's approach to trade negotiations in the future. One of the main issues is the intention of the European Commission to recommend splitting into separate agreements the provisions relating to investment and other trade provisions and the role of the Council in negotiations.

<sup>4</sup> CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, ELI: [http://data.europa.eu/eli/treaty/tfeu\\_2012/oj](http://data.europa.eu/eli/treaty/tfeu_2012/oj)

<sup>5</sup> Supra note 4

<sup>6</sup> Supra note 4

<sup>7</sup> Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, ELI: <http://data.europa.eu/eli/reg/2012/1219/oj>;

Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is a party, ELI: <http://data.europa.eu/eli/reg/2014/912/oj>;

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, ELI: <http://data.europa.eu/eli/reg/2011/182/oj>;

<sup>8</sup> Supra note 4

To sum up, in line with the EU's work on the development of international relations in the field of trade and investment, it should be stressed that the realisation of the strategic idea of the Commission „Juncker” to provide funds in the form of loans for the realization of innovative ideas is very well entered. However, the implementation of the plan is unthinkable without the involvement of the bank sector, as the main accelerator of fast liquid funds, which can give life to innovative entrepreneurial ideas at European level. That is why, as a lesson from the bitter experience of the world economic crisis, this European Fund for Strategic Investments is being created, as part of the EU budget, which aims to play the role of a guarantee for the European Investment Bank Group in a possible ‘first loss’. Thus, in the form of loans, investors realise their ideas and push the European economy up. This mechanism of action seems to take greater success than the grant financing of large, small and medium-sized enterprises through the financing of business under the various European programmes. It is precisely and for this reason that after the enviable success of this initiative in his State of the Union speech<sup>9</sup>, the President of the European Commission then Jean Claude Juncker announces his proposal for an extension of the European Fund for Strategic Investments duration to 2020, providing that the investments will reach at least 500 billion euros.

#### **2.4. Mechanisms at national level taken to reinforce the investment environment**

In pursuance of the third pillar of the Juncker plan to improve the investment environment, each Member State should make steps to take measures to strengthen investment at national level. Republic of Bulgaria is one of the first countries in the EU, which prepares its own action plan, in which 118 measures<sup>10</sup> are identified, which address the main problems in the investment environment at the level of Bulgaria. These measures are related to the amendment of nearly 20 legislative acts at national level, which are aimed at administrative facilitation of investors, such as terms in the construction of the leading technical infrastructure and the construction of investment sites that are being worked on. Some of the main legislative acts in the Bulgarian legislation, which are relevant to the investments and have undergone amendments during this period are: the Law on promotion of investments and the rules for its implementation, setting out the conditions and procedures for encouraging investments in the Republic of Bulgaria and the activities of the public authorities in this field, The Corporate Income Tax Act, which has separate provisions related to tax concessions them, the Spatial Planning Act, which contains provisions for the settlement of investment design and realization of spatial plans by investors, certified under the law for promotion of investments, Law on energy, governing special rules related to investments in the energy sector, the Concessions Act, as well as their rules of application.

As a result of the experience gained and the results achieved <sup>11</sup>( in 2010, nearly 88% of the total EIB funds amounting to EUR 72 billion are invested in projects in the EU). It is foreseen that this undertaking will continue in the next multiannual financial framework 2020-2027 in the form of the InvestEU programme, which foresees that additional investments of at least EUR 650 billion are to be mobilised in the next long-term EU budget. But how will the looming new economic crisis affect the implementation of the forthcoming plan? This is a question, whose answer, I think, is that it will have an extremely negative impact as this is not a pure economic crisis, but that caused by several other health and the social crises. Not only of the EU, but of the whole world will require a longer period to recover from the damage that will cause the looming new world crisis.

<sup>9</sup> [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_16\\_3002](https://ec.europa.eu/commission/presscorner/detail/en/IP_16_3002)

<sup>10</sup> Official website of Bulgarian Ministry of Finance <https://www.minfin.bg/bg/1199>

<sup>11</sup> Official brochure of the Group of the European Investment Bank [https://www.eib.org/attachments/country/the\\_eib\\_group\\_in\\_bulgaria\\_bg.pdf](https://www.eib.org/attachments/country/the_eib_group_in_bulgaria_bg.pdf)



In this line of thought in a developing Investment environment more and more social relations in the field of credit (Credit Institution- natural persons relationships or Legal persons/investors) will develop. This fact, on the other hand, makes the examination of the additional mechanisms for securing the resources that a credit institution has to realise the relevant business idea beyond the material scope of the European Fund of Structural Investment (EFSI) guarantees and how they would reflect on the credit institution in a position of unsatisfied creditor in the event that a business idea fails.

### **3. OTHER MEANS OF PROTECTING CREDITORS OUTSIDE EFSI GUARANTEES**

As a result of this fluidity at the macro level (EU level, individual Member State level), we should address the problem to the ordinary micro detail- at the level of individual relationships between the simple legal figures of a creditor and a debtor, so that we can be understandable to present them. To all of us who participate actively in a civic and commercial life, the fulfilment of an obligation is the normal development of the legal relationship in which we participate in the contract or trade. However, this does not preclude the possibility for the debtor party not to fulfil. It is for this reason that the right, in order to ensure legal certainty of civic life, governs ways in which creditors' rights are protected independently of the surrounding macroeconomic or political environment. These methods are called collateral. Next comes the question besides a defensive what the function of the collaterals is still. In this direction, we should share the opinion of much of the theory that collateral also has a stimulating credit function<sup>12</sup>. This function of collateral is expressed in the willingness of creditors to allocate money to the debtor. An unsecured creditor will not have such a willingness to allocate exemplary loans, because the performance of his claim is not sufficiently guaranteed. This in turn is the ideology of the credit institutions that participate at national level in the implementation of the investment plan. As above-mentioned, it is said that the funds cumulated in the European Fund for Strategic Investments serve as an EU guarantee, which aims to mobilise private investment. Again, the Group of the European Investment Bank (concerning projects above 25 million euro) and the national credit institutions, respectively, did not allocate 100% of funding, but at 50%. This places investors in a position to accumulate the remainder of the percentage of own funds and capital or through additional credit lines and/or instruments. So that the means to protect the creditor in the form of different collateral are applied.

In this line of thought, the Bulgarian legislation has adopted a large part of its legal institutes related to collateral from Roman law, which have made a large part of the European countries from the romance legal circle, too. Although, the Bulgarian legal system is part of the Continental one, Bulgaria cannot boast of a civil Code, which fully regulates the matter of civil law in the country. The legislation is dispersed across several legislative acts depending on the relationship which it governs. Fundamental in Bulgaria in terms of civil and commercial life are the Law on Obligations and Contracts<sup>13</sup> (*Lex generalis*) and the Commercial Act<sup>14</sup> (*Lex specialis*). And so, in our Law on Obligations and Contracts there is chapter 7 of the common part, which governs collateral such as the securitisation of debtor property, the exercise of debtor's rights by the creditor (*Actio Obliqua*), the avoidance action (*Actio Pauliana*), the privileges, the

<sup>12</sup> Kalaidjiev A., *Obligation Law*, Op. cit., p.618, 7<sup>th</sup> Edition, Sofia, Sibi, 2016, ISBN 978-954-730-991-3

<sup>13</sup> Law on Obligations and Contracts (published in Bulgarian State Gazette, 275, issued on 22<sup>nd</sup> of November 1950, entered into force on 1<sup>st</sup> of January 1951, last modified 50, issued on 30<sup>th</sup> of May 2008)

<sup>14</sup> Commercial Act (published in Bulgarian State Gazette, 48, issued on 18<sup>th</sup> of June 1991, entered into force on 1<sup>st</sup> of July 1991, last modified 83, issued on 22<sup>nd</sup> of October 2019)

guarantor, the pledge and the mortgage. Moreover, it should be mentioned that in Bulgarian law there are other institutes known to the world since Roman law which have a protective function, namely the retention right (lien), penalty, deposit and solidarity obligations. On the other hand, the Bulgarian commercial law in part 3, Commercial transactions, although the alternative to apply the rules of the Law on Obligations and Contracts under article 288 of the Commercial Act in special provisions sets out the peculiarities of these institutes, which are characteristic of the relations between traders. Such are the commercial pledge and the commercial retention right (commercial lien). In this regard, it should be noted that the Bulgarian law also knows the special pledge that is governed by a separate legislative act, namely the Pledge law<sup>15</sup>, where the legislature deviates from the perception of the real nature of the legal institute of the pledge. At the same place, it should be mentioned that in comparison with other legislations like Czech Republic<sup>16</sup>, Germany<sup>17</sup>, Estonia<sup>18</sup>, where the matter of bankruptcy is regulated in separate legal acts, in Bulgaria it is contained in part 4, entitled Bankruptcy of the Commercial Act. There are the special provisions governing different hypotheses that protect creditors in the open insolvency proceedings. From Art. 645 to art. 649 of Commercial Act is contained the legal framework of the special preferential claims<sup>19</sup> and the subsidiary application of the Actio Pauliana under art. 135 of the Law of Obligations and Contracts.

Before proceeding to the institute of Actio Pauliana, which is the subject of a more in-depth study in this article, we will make a short distinction of the types of collateral. The doctrine<sup>20</sup> generalized the division of the types of collateral according to the differences of the funds that guarantee the implementation. Based on this criterion, theoretically we divide them into personal and real (in rem). As with the former, we have several persons who guarantee the creditor that his debtor will fulfil his obligation, in the second type this position is occupied by an item (a property law). In practice, creditors prefer tangible collateral that is not tied to the person of an additional individual who secures the creditor's claim because it is not always safe for the person to have the solvency of the individual, for example, for the guarantor. No doubt as a real (in rem) collateral we can be pointed the pledge and the mortgage, from the category of the personal-the guarantor and passive solidarity.

<sup>15</sup> Pledge Law (published in Bulgarian State Gazette, 100, issued on 22<sup>nd</sup> of November 1996, , last modified 102, issued on 31<sup>st</sup> of December 2019)

<sup>16</sup> Insolvency proceedings in the Czech Republic are primarily regulated by Act No 182/2006 on insolvency and insolvency procedures (Zákon č. 182/2006 Sb., o úpadku a způsobech jeho řešení) (the Insolvency Act), supported by Act No 99/1963, the Code of Civil Procedure (Zákon č. 99/1963 Sb., občanský soudní řád).

<sup>Another</sup> important instrument is Act No 312/2006 on insolvency administrators (Zákon č. 312/2006 Sb., o insolvenčních správcích), which (in conjunction with the Insolvency Act) establishes a legal framework for the profession of insolvency practitioner. The current versions of these provisions can be found on the Public Administration Portal (Portál veřejné správy): <https://portal.gov.cz/app/zakony/>.

<sup>17</sup> The law governing insolvency and insolvency proceedings is regulated in Germany by the Insolvency Code (Insolvenzordnung –'InsO'), which entered into force on 1 January 1999. The particularity of the Insolvency Code is that it contains not only procedural, but also substantive provisions. For example, the provisions determining the effects of opening insolvency proceedings are substantive provisions (Sections 80 to 147 of the InsO)

<sup>18</sup> Bankruptcy proceedings are governed by the Bankruptcy Act, the rules covering reorganisation are set out in the Reorganisation Act and the debt restructuring rules are set out in the Debt Restructuring and Debt Protection Act. The Acts are available in Estonian and in English from Estonia's official online publication, Riigi Teataja (State Gazette) (<https://www.riigiteataja.ee/>).

<sup>19</sup> Stefan St., Preferential claims to replenish the bankruptcy estate, Op. cit., p.33, Sofia, Sibi, 2011, ISBN 978-954-730-691-2

<sup>20</sup> Kozuharov A., Obligation Law, Op. cit., p.579-580, Sofia, Jurispress, 2002, ISBN 954-632-049-8

All these remedies of creditors are directly applicable, regardless of the environment. While the guarantee under the European Fund for Strategic Investments applies only during the period of implementation of the Juncker plan, the other collateral can serve as collateral for the creditor without regard to a certain programming period.

This article is aimed at one of the remedies for the protection of the rights of the creditor, namely the Actio Paulina or the so-called in theory and practice, 'revocable claim', it will be given attention in the present work.

### 3.1. Origin and historical development of Actio Pauliana

Actio Pauliana found its origin in the Roman Empire during the time of the law. Around 150-125 BC. a pretor named Paul<sup>21</sup> proclaims the idea of overcoming formalism and the emergence of a law of a personal nature that allows the creditor to annul the debtor's actions with which he deliberately damages him. Although the enigmatic person of the Rector Paul is the basis of great controversy among the romanists now, most of the doctrine maintains its origins in the legal right. It should be noted and that there is also an opinion that the same claim was first introduced by the glossators.<sup>22</sup> At the time of the Roman era Actio Pauliana was manifested in various forms during the various historical periods. It evolved from an ,executive method which gave the creditor the right to sell in slavery the debtor ,, in law, ,allowing the creditor to annul acts committed intentionally by the debtor with the intent to harm him , by directing his claim , against the third party acquiring the disputed property ,.<sup>23</sup> Next centuries the Actio Pauliana is also found in the digestate. It includes the most developed version of Actio Pauliana. It is from this moment that the concept of Actio Pauliana began to develop on the basis of alienation (alienation), the ensuing damage (Eventus Fraudis), Intent (Fraus) and knowledge of disability (participation Fraudis), as the Advocate General DÁMASO RUIZ-JARABO COLOMER very accurately points out in the analysis of his opinion in case C-339/07. Another opinion of the same advocate General is that the classical period is Two methods exist to protect the creditor against damage from the debtor: restitutio in integrum ob fraudem and Interdictum fraudatorium. The first method marks a very great similarity with the claims for the filling of the bankruptcy estate in insolvency proceedings. This claim is led by the so-called Curator Bonorum Manager of the property of the insolvent debtor, who nowadays equated with the figure insolvency practitioner. The first means of protection gave the right of the general manager of property to ask the relevant magistrate to order the return of the transferred with intent to damage assets back to the debtor's humidor. The second claim already constitutes protection for a creditor who could have requested the relevant magistrate to issue an order (Interdictum) by virtue of which the transferred assets in the debtor's patrimonium are returned with the intent to satisfy the injured creditor.

Already in the time of the Justinian code these two methods merge into one action, namely Pauliana. Thus, the three defining signs of that action are defined, namely: the existence of actual damage at the time of the claim, the debtor's actions with the intent of damaging the creditor and the bad faith of the third party, which is knew for harmful debtor action.

<sup>21</sup> Kalaidjiev A., *Obligation Law*, Op. cit., p.628, 7th Edition, Sofia, Sibi, 2016, ISBN 978-954-730-991-3

<sup>22</sup> Supra note 21

<sup>23</sup> OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER, delivered on 16 October 2008, Seagon, C-339/07, ECLI:EU:C:2008:575, p.25-30 under Judgement of the European Court of Justice ( First Chamber), issued on 12 February 2009, Seagon, C-339/07, ECLI:EU:C:2009:83



On the basis of the exhibitions, historical analysis should be inferred, that it should be noted the foresight and genius of the Roman jurist and, as this legal institute has resisted the development of public relations for more than 2000 years, albeit with slight amendments and specificities it has been recycled and adopted in the modern legislations of the majority of Member States of the EU, from which are France, Germany, Poland.

### 3.2. Actio Pauliana in Bulgarian law

Actio Pauliana is governed by art. 135 by the Bulgarian Law on Obligations and Contracts (LOC) and is expressed in the creditor's ability to declare invalid in respect of him the acts which the debtor has taken in order to harm the creditor interest. Although it is meant by the term 'claim', it is settled as a self-substantive right of the creditor. In legal literature, there is a dispute about the nature of that right, whether it has a character or a contractual nature. According to the opinion of prof. Lyuben Dikov<sup>24</sup> the creditor's entitlement is of a material nature on the ground that it can be exercised both against the debtor and against all third parties. According to other authors<sup>25</sup>, this right of the creditor has the character of a claim because it is directed to a specific person and it is the debtor. However, there is no shortage of allegations and that the claim as a right has a mixed character. There is a fourth opinion<sup>26</sup>, which denies all other opinions, motivated by the understanding that the law under article 135 of the Law of Obligations and Contracts has a secondary character, that is subject to the existence and the emergence of another relationship. The motive for the maintenance of the present opinion is rooted in the fact that the law is not directed erga omnes and that its exercise does not require assistance to the debtor party. That last understanding should be shared by me and based on the preliminary ruling nature of the harmful action. Furthermore, this right is from the category of material non-proprietary rights which are transformative, because the creditor unilaterally without requiring conduct by the debtor can exercise his right.<sup>27</sup>

In order to be able to identify the nature and distinguish it from the remaining collateral, it is necessary to indicate under what circumstances that right arises, so we must determine its factual composition.

*The first prerequisite* to be fulfilled is that there must be a claim to make the creditor's quality of the injured party conditional. In the Bulgarian case-law, some categories of creditors who have been legitimated to pursue this claim, namely the bill of the assignee, the purchaser of the preliminary contract<sup>28</sup>, have established the two interpretative decisions<sup>29</sup>. That creditor claim should be actual, this means that it is not void and it is lawful in the legal peace. Likewise, this right to claim must not be barred and terminated on any ground. It should be noted that it is not necessary to prove the right to claim to be proved by an enforceable decision, but it is enough that the claim is receivable<sup>30</sup>.

*The second element* of the actual composition is the harmful action of the debtor. It should be noted here that this action is a kind of a voluntary act, regardless of the nature of the action or transaction. As in the legal doctrine, it is head set the opinion that if the action is a transaction,

<sup>24</sup> Dikov I., Civil Law Course. Obligation Law, Common part, Volume III, Op. cit., p.43, Sofia, 1934

<sup>25</sup> Aubry C., C. Rau. Op.cit., p.138; Planiol, M. Op.cit., p.191

<sup>26</sup> Kalaidjiev A., Obligation Law, Op. cit., p.629, 7th Edition, Sofia, Sibi, 2016, ISBN 978-954-730-991-3

<sup>27</sup> See supra note 26

<sup>28</sup> Judgement 31-2006-II-Civil Chamber of the Bulgarian Supreme Court

<sup>29</sup> Judgement 197-2014-IV-Civil Chamber of the Bulgarian Supreme Court

<sup>30</sup> Judgement 328-2010-III-Civil Chamber of the Bulgarian Supreme Court and Judgement 423-2000-V-Civil Chamber of the Bulgarian Supreme Court

it can be unilateral or other, repayable or gratuitous, stating that the transaction should be a consideration, that is to say, to have an exchange of goods. It is important that the existence of damage to the creditor is it is an objective fact which is not determined either by the creditor's assessment or by the debtor's discretion, but is a causal relationship.<sup>31</sup> There is always a disability when the creditor's ability to meet the debtor's assets is reduced. If the debtor tries to reduce his property, there is also a disability. In the Bulgarian case-law is determined that, if, by its actions, the debtor has attempted to hinder the satisfaction of the creditor also has a disability. In this direction the case-law says that there is a hindrance to the creditor's satisfaction when the debtor sells immovable property by concealing the sale price<sup>32</sup>.

**The third prerequisite** is subjective, and its elements differ depending on whether the harmful action was either for consideration or free of charge. Art. 135, par. 1, sentence 1 of the Law of Obligations and Contracts tells us that when the transaction is a grant, it is necessary for the debtor to be aware of the disability, meaning that it is sufficient to have an intention for damage rather than fraud. The latter is not an element of the actual composition of the law under art. 135 of the LOC, as under French law (fraudulent transaction). However, where the harmful action is a consideration, it is necessary, in addition to the debtor's intention to damage the creditor and the knowledge there of, by the third party (per argumentum of article 135, par. 1, p. 2 of LOC). Of Course, the burden of proving the knowledge of disability rests with the creditor. The knowledge of disability in article 135, par. 2 of the LOC may indicate the existence of a rebuttable through the event, which makes it clear that until proven to the contrary, the third party's knowledge is presumed if it is a spouse, descending or ascending, brother or sister of the debtor. Under that provision, the knowledge of the debtor is also presumed.

From a practical point of view, it is of interest rather what happens after the court decides on the claim in favour of the creditor. The point is that the debtor's action is declared void only in respect of the creditor. The exercise of claim under art. 135 LOC does not entitle the creditor to dispose of the rights of the action under attack, (a) he may make enforcement of the rights subject to the declared invalid action<sup>33</sup>. A very important element is the effect of this action from the moment when it is occurring is attested by the entry of the application for a declaration of invalidity (art. 135, para. 1, last sentence LOC).

In conclusion, the main function of Actio Pauliana is to protect the creditor against valid legal acts with which his debtor frustrates or hampers the satisfaction of his claim.<sup>34</sup>

### 3.3. Actio Pauliana in the CJEU's case-law:

In the case-law of the CJEU, the Actio Pauliana has been examined in different situations in several cases, in addition to the European dimension of that action, the characterisation and peculiarity of the Actio Pauliana in the relevant national legislation is also given in court rulings.

<sup>31</sup> Kalaidjiev A., Obligation Law, Op. cit., p.634, 7th Edition, Sofia, Sibi, 2016, ISBN 978-954-730-991-3

<sup>32</sup> Judgement 407-2014-II-Civil Chamber of the Bulgarian Supreme Court

<sup>33</sup> Kalaidjiev A., Obligation Law, Op. cit., p.640, 7th Edition, Sofia, Sibi, 2016, ISBN 978-954-730-991-3

<sup>34</sup> Ruschev, Iv., Team of Authors Securities in material and procedural private law, Op. cit., p.330, Sofia, Publisher Trud i Pravo, 2018, ISBN 978-954-608-255-8

### 3.4. First case: C-394/18<sup>35</sup>

In that judgment, the Court of Justice render a decision under the preliminary ruling procedure. The dispute in the case is between I.G.I. Srl and Maria Grazia Cicenía, Mario Di Pierro, Salvatore de Vito, Antonio Raffaele appeals. Court of Naples, Italy made a reference for a preliminary ruling, which consists in the fact that, by Notarial Act of 16 September 2009 Costruzioni Ing. G. Iandolo Srl transferred a part of his property to I.G.I., established for that purpose by the same notarial deed. By that action, the applicants consider that there is a detrimental effect on them which the company Costruzioni Ing. G. Iandolo remains the owner of low-value landed property and, as a result of the division, has lost much of its property. This fact has given rise to the plea of Ms Cicenía, Mr Di Pierro, Mr De Vito and Mr Raffaele to submit a complaint to the court of First instance, Avellino Italia with the legal bases of art. 2901 of the Italian Civil Code. On this basis, they have claimed declaration of invalidity of the act of separation. The court of first instance upheld the creditors Actio Pauliana, but the defendant appealed on the ground that the action is unfounded, since the objection under article 2503 of the Civil Code is the only legal remedy available to creditors of the companies involved in a division and that, where no objection is filed, the effects of the division become definitive in respect of the creditors". They also point out that the legal basis on which they are based, namely the Art. 2504 by the Italian Civil Code in its essence transposes articles 12 and 19 of the Sixth Directive. On the other hand, the Italian Court of Appeal justifies the need for a reference for a preliminary ruling that, under article 19 of the Sixth Directive, which lays down rules on the nullity of a division. This article provides that invalidity cannot be declared after the division is entered in the trade register. In that regard, there were two strands in Italian legal literature on whether Actio Pauliana was admissible. One is in favour of admissibility on the ground that the debtor's assets serve as a comprehensive guarantee to the creditor. In the opposite direction is the second opinion in the Italian case-law, the creditors of the company being divided must not be allowed to take account of the objective of the Sixth Directive, which is to make the effects of the division definitive and irreversible to creditors within a short period of time in order to protect the interests of the multiple parties affected by the division, other than the creditors of the company being divided.

In its decision the CJEU's judicial composition, after analysing the legal framework at national and European level, stipulates the Court emphasised that article 12 of the Sixth directive provided for a minimum system of protection of the interests of the creditors of the company being divided as regards the claims which arose before the time when the splitting plan was published and whose maturity had not occurred at that time. Member States may therefore provide for additional means of redress.<sup>36</sup> , , As the formation here distinguishes between nullity under article 12 of the Directive, which, as a law institute, deletes the effects of the transaction as if they had not existed, whereas the Actio Pauliana permits the debtor's actions to be declared to be unenforceable as to the division and, in particular, the transfer of the properties referred to in the Act of Division. In this sense is the thesis of assoc. prof. T. Iosifova on the enforceability and the external effects of the contracts in its monographic work<sup>37</sup>.

This work of the CJEU can be defined as a sign of the determination of the essence of Actio Pauliana as an additional non-characteristic method of defending the rights of the creditor,

<sup>35</sup> Judgement of the European Court of Justice (Second Chamber) of 30 January 2020, I.G.I. Srl v Maria Grazia Cicenía and Others, C-394/18, ECLI:EU:C:2020:56

<sup>36</sup> Judgement of the European Court of Justice (Second Chamber) of 30 January 2020, I.G.I. Srl v Maria Grazia Cicenía and Others, C-394/18, ECLI:EU:C:2020:56

<sup>37</sup> Iosifova, T., Effects of the contract upon persons, Op. cit., p.121-p.146, Sofia, Sibi, 2019, ISBN 978-619-226-106-1

which has a separate application against the actions for the realisation of the protective mechanism of the other collateral.

### 3.5. The second case: C-3379/17<sup>38</sup>

Feniks v. Azteca is related to the determination of the international jurisdiction of the dispute as to whether it falls within the specific jurisdiction of Regulation 1215/2012<sup>39</sup> of article 7 (1) (a) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters or in that of Regulation 1346/2000<sup>40</sup> on insolvency.

The dispute was between Feniks sp. z o.o. and Azteca Products & SERVICES SL (,Azteca ,) on the occasion of a contract for the sale of immovable property which was concluded by Azteca and the debtor of Feniks and which, according to Feniks, damaged his rights. Here is a preliminary ruling legal dispute develops before the Polish court. The company Coliseum 2101 sp. z o.o. (,The Coliseum'), which is based in Poland, concluded a construction contract as a main contractor with the Polish company Feniks, in its capacity as investor, as the subject-matter of the contract was the implementation of an investment project in Gdansk (Poland). For the purposes of contract performance, Coliseum concludes several subcontracting agreements. As Coliseum does not fulfil its obligations to some of the subcontractors, Feniks is obliged to pay them because of the provisions of the Polish Code of Joint liability of the investor.

The question arises as to the international jurisdiction that the contracts were concluded in Szczecin (Poland) and the Coliseum sells to Azteca company, which is based in Alcora (Spain), its immovable property located in Szczecin (Poland). Thus Feniks brought an action on the basis of article 527 et seq. of the Civil Code before the referring court — Sąd Okręgowy W Szczecinie (District Court, Szczecin, Poland), with the defendant Azteca, requesting that the sale contract referred to in the preceding paragraph should be declared invalid because it was concluded by the debtor in order to damage it.

In that judgment, the Court of Justice was consistent in its analysis that *Actio Paulina* found its ground in the right to claim, the creditor's contractual right towards the debtor, and aimed to protect the possible right of the creditor to be satisfied with the debtor's assets.<sup>41</sup>

That case-law of the CJEU emphasises the nature and substance of *Actio Pauliana*, albeit through the prism of any national legislation of a Member State of the EU.

In the case-law of the CJEU's it may be also indicated the other cases, which in turn are related to the bringing of avoidance actions in insolvency proceedings like C-722/17–Reitbauer<sup>42</sup> and

<sup>38</sup> Judgement of the European Court of Justice (Second Chamber) of 4 October 2018, *I.G.I. Srl v Maria Grazia Cicienia and Others*, C-337/17, ECLI:EU:C:2018:805

<sup>39</sup> 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 judgments in civil and commercial matters, ELI: <http://data.europa.eu/eli/reg/2012/1215/oj>

<sup>40</sup> Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, No longer in force, Date of end of validity: 25/06/2017; Repealed by 32015R0848. Latest consolidated version: 12/10/2016, ELI: <http://data.europa.eu/eli/reg/2000/1346/oj>

<sup>41</sup> Judgments of 10 January 1990, *Reichert and Kockler*, C-115/88, EU: C: 1990:3, paragraph 12, and of 26 March 1992, *Reichert and Kockler*, C-261/90, EU: C: 1992:149, paragraph 17

<sup>42</sup> Judgment of the Court (First Chamber) of 10 July 2019, *Norbert Reitbauer and Others v Enrico Casamassima*, C-722/17, ECLI:EU:C:2019:577

C-339/07- Seagon<sup>43</sup>. Here is the place to mention that Bulgaria has also made a reference for a preliminary ruling to the CJEU on matters relating to the international jurisdiction of a dispute concerning an action for annulment brought in insolvency proceedings in case C-296/17<sup>44</sup>.

Finally, either way, whether the investment environment will develop or not preconditions for realization of this institute of law will have, but the question is what will be the intensity of the utilization of this mechanism. Precisely for this reason, in this article, we analyse in the current paper the circumstances in which it can be used, which are its prerequisites, what features it has in comparison with other institutes, in order to be able to conclude on what its possible practical application is.

#### 4. CONCLUSION

In conclusion, it should be said that whether the economic environment the EU is conducive to the development of investments of a different nature or not standard means of protecting creditors in national legislations with repercussions in the jurisprudence of the CJEU, will continue to exist and be amended only in the light of the development of public relations that are directly influenced by factors such as past and future crises of a different nature. However, in front of EU stands another problem: Will the European economy prevail the obstacles, will the EU's slashing power to become one of the world's leading actors in the global arena continue ahead or it will deepen the political crisis of trust between founding Member States on the example of United Kingdom or not? In one we must be convinced that the more secured a creditor is the greater its willingness to make funds (credit) investors (natural or legal persons) to realize different investment ventures. This, in turn, positively influences and increases the investment activity on the territory of the European Union.

---

<sup>43</sup> Judgment of the Court (First Chamber) of 12 February 2009, Christopher Seagon v Deko Marty Belgium NV., C-339/07, ECLI:EU:C:2009:83

<sup>44</sup> Judgment of the Court (Fourth Chamber) of 14 November 2018, Wiemer & Trachte GmbH v. Zhan Oved Tadzher, C-296/17, ECLI:EU:C:2018:902