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ADMINISTRATIVE CORPUS JURIS BETWEEN IMPLEMENTATION, REFORMS AND CONTINUOUS DEVELOPMENTS

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Administrative Corpus Juris between Implementation, Reforms and Continuous Developments

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Activity

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Drept Public, Pandectele române, Curierul Judiciar, Notebooks of international law, Tribuna Economică, Economie și Administrație locală etc.

Prizes

"Anibal Teodorescu" Prize awarded by the Union of Jurists of Romania in 2014 for the work „Cartea de contracte administrative – modele, comentarii, explicații" („The Book of administrative contracts - models, comments, explanations"), C.H. Beck Publishing House, Bucharest, 2013.

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Preface

Editors
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*Associate Profesor **Cătălin-Silviu Săraru**, Bucharest University of Economic Studies, Romania*

This volume contains the scientific papers presented at the 5th International Conference "Contemporary Challenges in Administrative Law from an Interdisciplinary Perspective" that was held on 27 May 2022 online on Zoom. The conference is organized by the Society of Juridical and Administrative Sciences. More information about the conference can be found on the official website: www.alpaconference.ro.

The scientific studies included in this volume are grouped into two chapters:

- *Real and virtual meeting points for contemporary approaches to the study and practice of administrative law.* The papers in this chapter refer to: the effects of judgments on the suspension of normative administrative acts and their concrete consequences; administrative burdens in the process of legal regulation; election and dismissal of the deputy mayor according to the Romanian Administrative Code; institutions of administrative law that protect the rights of tourists, consumers of hotel services in Romania/ European Union; dilemmas of judicial control of economic administration - on the example of Polish law; moral damages in comparative administrative law.
- *A rehearsal of some topics of interdisciplinary approaches in administrative sciences*. This chapter includes papers on: suspension of public servants - constitutionality issues of article 513 paragraph (1) letter l) of the Romanian Administrative Code; the Law on metropolitan areas, the intention of the legislator to regulate one of the forms of association of local communities; the constitutional review of the standing orders and resolutions of the Parliament; Ukrainian Competition Council; the documents issued within the surrender procedure based on the European arrest warrant according to Law no. 302/2004 on international judicial cooperation in criminal matters – typical administrative acts; power and inclusion of students in their own postgraduate learning journeys.

This volume is aimed at practitioners, researchers, students and PhD can-

didates in juridical and administrative sciences, who are interested in recent developments and prospects for development in the field of administrative law and public administration at international and national level.

We thank all contributors and partners, and are confident that this volume will meet the needs for growing documentation and information of readers in the context of globalization and the rise of dynamic elements in contemporary administrative law and public administration.

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REAL AND VIRTUAL MEETING POINTS FOR CONTEMPORARY APPROACHES TO THE STUDY AND PRACTICE OF ADMINISTRATIVE LAW

The effects of judgments on the suspension of normative administrative acts and their concrete consequences

Lecturer **Anamaria GROZA**[1]

Abstract

The judgments ordering the suspension of administrative acts, whether individual or normative, have effect only between the parties to the dispute in which they were given. If in the case of individual administrative acts, this effect is fully justified, in the case of normative administrative acts, the situation becomes problematic. The study aims to analyze the legal basis of the two proposed solutions regarding the effects of judgments ordering the suspension of normative administrative acts: inter partes effects vs. erga omnes effects. The research conducted is descriptive and explanatory, supported by relevant case law and doctrine. If a normative administrative act has been suspended by the court (all the more so when the judgment has become final), that act might be suspected of illegality. In this case, one of the three presumptions on which its enforceability is based, the presumption of legality respectively, has been temporarily removed. The principle of the legality of administrative acts justifies the removal of the enforcement of this act also in relation to the persons who did not have the quality of party, but who can bear the consequences of a seemingly illegal act. At the same time, the specifics of the normative administrative act, as well as the principles of the predictability of the law and legal certainty, argue in favour of this solution.

Keywords: *normative administrative act, suspension of enforcement of the administrative act, erga omnes effects, inter partes effects, res judicata authority.*

JEL Classification*:* K23, K41

1. Introduction

The suspension of the enforcement of an administrative act is an *exceptional measure*, by which the court removes the enforceability character[2] of the administrative act, and it can be ordered only under the conditions expressly provided by law, the exceptions being of strict interpretation and application (*exceptio est strictissimae interpretionis*). Taking this measure involves proving the existence of those circumstances which are likely to create a *serious doubt* as to the legality of the administrative act, but especially the need to temporarily remove

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[2] The enforceability of administrative acts results from the three *simple presumptions* that are associated with them: the principle of legality (the administrative act is in accordance with the law); authenticity (the administrative act is presumed to emanate from the competent public authority) and truthfulness (the act reflects a correct factual situation).

the enforceability character of the act in order to prevent imminent damage, damage that is analyzed in concrete terms[3].

The regulatory framework on the suspension of the enforcement of administrative acts by judicial means, is represented by the provisions of art. 14 and 15 of Law no. 554/2004 on administrative litigation (hereinafter referred to as LAL). The regulation in these articles is a transposition into national law of a Recommendation adopted by the Committee of Ministers of the Council of Europe on 13 September 1989 on *provisional court protection* in administrative matters.

Judgments ordering the suspension of administrative acts, whether individual or normative, have effect only between the parties to the dispute in which they were given. If in the case of individual administrative acts, this effect is fully justified, in the case of normative administrative acts, the situation becomes problematic.

The issue of the effects of judgments suspending normative administrative acts was brought to the attention of the High Court of Cassation and Justice (hereinafter the HCCJ), through an appeal in the interest of the law, filed by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice. By decision no. 18/2 October 2017, the HCCJ, the panel competent to decide on the appeal in the interest of the law, rejected as inadmissible the notification having as object "the interpretation and application of the provisions of art. 14 and 15 of Law no. 554/2004 on administrative litigation, as subsequently amended and completed, and of art. 453 of the Civil Procedure Code, concerning the hypothesis of admitting the request for the suspension of the enforcement of an administrative act of a normative nature and the effects of this solution on the parties to the dispute, as well as on third parties". We will analyze this decision, given that it presents the two jurisprudential and doctrinal orientations in the matter, namely the thesis of *erga omnes* effects, as opposed to the thesis of *inter partes* effects (*section 1*).

In the second section of the article, we will illustrate the shortcomings of the thesis of *inter partes* effects in the case of judgments on the suspension of normative administrative acts, through a synthesis of the case law of the courts of appeal regarding the Order of the Minister of Education no. 3993/2021 on the establishment of specific salary rights for the teaching staff in education, provided in the Framework Law no. 153/2017 on the remuneration of staff paid from public funds[4] (*section 2*).

The final part of the study includes our opinion regarding the correct approach, as well as the remedies that the courts can use until the intervention of

[3] On the conditions for the judicial suspension of administrative acts see Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, Ed. C.H. Beck, Bucharest, 2016, p. 520-528; Cătălin-Silviu Săraru, *Contenciosul administrativ român*, Ed. C.H. Beck, Bucharest, 2019, p. 281-301.

[4] The order was published in the Official Gazette Part I, no. 605/17. 06. 2021.

the legislature amending the Law on administrative litigation.

2. Suspension of administrative acts and proposed solutions in the case of judgments suspending normative administrative acts

Article 14 of Law no. 554/2004 (LAL) confers the possibility for the injured persons, in well- justified cases and for the prevention of imminent damage, after the notification, under art. 7, of the public authority that issued the act or of the hierarchically superior authority, to request the competent court to order the suspension of the enforcement of the unilateral administrative act until the pronouncement of the first instance court. Article 15 imposes an additional condition, ie filing the application for suspension with the application for the annulment of the act, in the same action or by a separate action. The distinction between the provisions of art. 14 and art. 15 LAL is given by the existence or not before the courts of the action for the annulment of the administrative act, a condition verified in relation to the date of filing the application for suspension.

The provisions of art. 2(1) letter t) of Law no. 554/2004, define the well-justified case as the circumstance related to the state of fact and law, which is likely to create serious doubt with regard to the legality of the administrative act. Under this condition, the legality of the act whose suspension is requested is not analyzed, this being the attribute of the court of administrative litigation which will analyze the action for annulment. In determining the existence of a *well-justified case*, the judge may carry out only a summary analysis of the act, apparently without pre-deciding on the merits, by relating to the factual and legal grounds raised by the claimant on the basis of minimal evidence, excluding a substantive analysis of the legality of the administrative act.

It is important to note that if, in order to verify the criticisms raised by the claimant, the judge had to administer complex evidence (such as expert evidence) or to pre-decide on the merits of the case, the condition of a manifest aspect of illegality of the contested act in favour of the claimant would not be met, but, on the contrary, there would be an aspect of legality of the administrative act.

In its case law, the supreme court has considered that such well-justified cases may be the issuance of an act by an incompetent body, the failure to state reasons for the administrative act, the failure to indicate the legal basis for issuing the administrative act, the declaration as unconstitutional of the Government ordinance underlying the issuance of the administrative act, the annulment or partial revocation of the administrative act by the issuing public authority or by the hierarchically superior authority.

The *imminent damage* is defined by art. 2(1) letter ş) of Law no. 554/2004 as the *future and foreseeable material damage or, as the case may be, the serious foreseeable disturbance of the functioning of a public authority or of a public service*. As stated in the national case law, the possibility of damage is a matter of fact, left to the discretion of the judge. Administrative acts are enforceable ex

officio and, if the judge finds that the enforcement could cause harm to the person to whom the act is addressed, he is entitled to suspend it.

In order to justify the suspension, the damage must meet the following conditions[5]:

- *Not to have occurred yet, because the law mentions future damage*. Suspension of enforcement may also be sought in the event of damage caused by successive acts, continued in time, the suspension having the role of interrupting the performance of those acts and thus preventing the occurrence of future damage.

- *To be of a patrimonial nature*. The law refers to material damage, thus indicating its patrimonial nature. The suspension could not result in moral damages.

- *The occurrence of damage must be certain, unquestionable.* Therefore, it cannot be a question of possible damage, but only of certain damage, the occurrence of which in the future must be demonstrated by the person who requested the suspension of the enforcement of the act.

Judgments ordering the suspension of administrative acts, whether individual or normative, have effect only between the parties to the dispute in which they were given. In the case of individual administrative acts, this effect is fully justified, but in the case of normative administrative acts, the situation becomes problematic. The HCCJ rejected as inadmissible an appeal in the interest of the law, which had as object the situation of normative acts suspended by courts, a decision which we will discuss below, because it illustrates the two possible solutions in this matter.

As a preliminary point, it should be noted that the legislature did not regulate the effects of the judgments ordering the suspension of normative administrative acts. Art. 23 LAL disposes only with regard to the judgments on the annulment of normative acts: "final and irrevocable judgments by which a normative administrative act has been annulled in whole or in part are generally binding and are effective only for the future. They must be published after motivation, at the request of the courts, in the Official Gazette of Romania, Part I, or, as the case may be, in the official gazettes of the counties or of the municipality of Bucharest, being exempted from publication fees".

By the appeal in the interest of the law[6], it has been shown that in judicial practice there is no consistent point of view on the issue of law subject to ruling, and there are two orientations. In one, it has been considered that the decision admitting the request for the suspension of the enforcement of the normative administrative act has *inter partes* effects, so that third parties who were not parties to the dispute in which the judgment in question was given cannot benefit from the effects of the suspension. In another direction, it has been held that, since, by

[5] See Cătălin Silviu Săraru, *op. cit.*, 2019, p. 284-286; Eugenia Marin, *Legea contenciosului administrativ nr. 554/2004, Comentariu pe articole*, Ed. Hamangiu, Bucharest, 2020, p. 361.
[6] HCCJ, Decision no. 18/2 October 2017.

their nature, normative administrative acts address an indefinite number of legal subjects and once annulled by a final judgment, cease to produce *erga omnes* legal effects, it results that the admission of the request for the suspension of the enforcement of those normative acts also produces effects for third parties not participating in the proceedings.

Erga omnes effects. The Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice considered that the appeal in the interest of the law should be decided on in the sense of recognizing the *erga omnes* effects. He argued that the suspension of the enforcement of the administrative act was a means of ensuring compliance with the principle of legality, and it was fair that, as long as the public authority or the court, as a result of challenging the administrative act, was in the process of verifying its legality, it should not have any effect on those concerned. "By referring to the normative character of the administrative act, which produces legal effects for all persons, *erga omnes,* correlatively, for reasons of legal logic, the judgment on the suspension of such an act, legally enforceable under art. 14(4) of Law no. 554/2004, also produces *erga omnes* effects, depriving of interest a possible application having a similar object"[7]. Another argument put forward by the initiator of the appeal concerned the *discrimination* that would occur by suspending the enforcement of the act in relation to the addressees who challenged it in court, respectively by enforcing it in relation to the addressees who did not challenge it. The Prosecutor General also emphasized that the different orientations on the issue were based on "the confusion between the principle of the relativity of the effects of judgments, which implies, indeed, that the obligation of such effects and the authority of res judicata should be imposed only on the parties, and the principle of the enforceability of the same effects, which are manifested in the relationship with third parties, prohibiting them from ignoring and violating them, as long as they do not prove another legal reality"[8].

The same *erga omnes* effects were supported by the Faculty of Law of the "Babeș-Bolyai" University in Cluj-Napoca. In essence, its representative stressed that the suspension of a normative administrative act, as well as the issuance, revocation, repeal and annulment, by symmetry, produces *erga omnes* effects. Secondly, he suggested the possibility of using art. 60(2) of the Civil Procedure Code[9], since, by the nature of the legal relationship, the effects of the normative administrative act extend to an indefinite number of persons, and the effects of the suspension decision should benefit everyone.

[7] HCCJ, Decision no. 18/2 October 2017, par. 12.
[8] HCCJ, Decision no. 18/2 October 2017, par. 18.
[9] Pursuant to art. 60(2) of the Civil Proc. Code, "(...) if, by the nature of the legal relationship or under a provision of the law, the effects of the judgment extend to all claimants or defendants, the procedural acts performed only by some of them or the time limits given only to some of them for the performance of procedural acts also benefit others. When the procedural acts of some are contrary to those performed by others, the most favourable acts shall be taken into account".

Inter partes effects. The *inter partes* effects of the judgments on the suspension of normative administrative acts were supported by the Faculty of Law of the University of Bucharest. The representatives of the Faculty of Law of the University of Bucharest supported their standpoint, starting from the *subjective administrative litigation*, which implies not only the illegality of the act, but also possible damage to be caused by it. The request for the suspension of an administrative act, either individual or normative, has as a premise an *injured person* and the notion of *imminent damage*.

Secondly, it was noted that in order to produce the *erga omnes* effects, it would be necessary to introduce a procedure for the publication of judgments on suspension. At the same time, the exceptional and provisional nature of the suspension measure was emphasized.

The HCCJ stated that the appeal in the interest of the law was admissible only if it was proved that the legal issue which made the object of the trial had been resolved differently by final judgments, which had to be attached to the notification, a requirement which was not met in this case.

In the doctrine it has been found that the suspension of the enforcement of administrative acts implies the cumulative fulfilment of the conditions regarding the well-justified case and the imminent damage, conditions that can only be analyzed with regard to the person of the claimant. "(...) Even if there are doubts as to the legality of that administrative act, in each case the cumulative fulfilment of the conditions, namely the ***"well-justified case"*** and the ***"imminent damage"*** must be proved, and these conditions can be considered fulfilled only by presenting arguments to prove compliance with these conditions in the case of each injured person and in the absence of such evidence, the request for suspension could be rejected for their non-cumulative fulfilment"[10].

It has also been noted that the principle of symmetry cannot be applied in the present case because the procedure for publishing the judgment is absent; and art. 23 LAL is an exceptional norm from the provisions of art. 453 of the Civil Procedure Code, being of strict interpretation and application. "By virtue of the principle of relativity, the judgment does not give rise to any rights or obligations imposed on third parties; they only have to acknowledge and respect the legal situation created, until proven otherwise, in accordance with the principle of enforceability"[11].

In the doctrine as well, it has been proposed to analyze the principle of *res judicata* authority or the principle of *res judicata* power of the previous solutions by which the suspension was ordered[12].

[10] Eugenia Marin, *op. cit.*, 2020, p. 381.
[11] Gabriela Bogasiu, *Legea contenciosului administrativ comentată și adnotată,* 4th edition, revised and added, Ed. Universul Juridic, Bucharest, 2018, p. 426.
[12] Eugenia Marin, *op. cit.*, p. 383.

3. Case study: Order of the Ministry of Education no. 3993 of 16 June 2021 regarding the establishment of specific salary rights for the teaching staff in education, provided in the Framework Law no. 153/2017 on the remuneration of staff paid from public funds

By various requests addressed to the territorially competent courts of appeal, the education unions, on behalf of the union members, requested the suspension of the enforcement of art. 1(2) of the Order of the Ministry of Education no. 3 993 of 16 June 2021 regarding the establishment of specific salary rights for the teaching staff in education, provided in the Framework Law no. 153/2017 on the remuneration of staff paid from public funds[13]. In accordance with these provisions, "the provisions of art. 14(3) of the Framework Law no. 153/2017 on the remuneration of staff paid from public funds, as subsequently amended and completed, also apply to teachers who have obtained the teacher certificate I by equivalence, prior to 1 July 2017".

The well-justified case invoked by the claimants consisted in the violation of the principle of the non-retroactivity of the law enshrined in art. 15(2) of the Constitution and art. 14(3) of the Framework Law 153/2017. It has been estimated that the application of the normative administrative act will generate imminent damage to teachers who have equated their scientific title of doctor with the teacher certificate I prior to 1 July 2017, the date of entry into force of Law 153/2017, the salary incomes of whom will be reduced starting with the salary rights related to June 2021. The teachers in question will not be able to exercise their right of option provided by art. 14(3) final thesis of Law 153/2017[14].

Art. 14(3) of Law 153/2017 provided for the mandatory option between the allowance for the scientific title of doctor and the equivalence with the teacher certificate I, only in the case of teachers who obtain the teacher certificate I by equivalence, after the date of entry into force of the law. *Per a contrario*, the teaching staff who obtained the equivalence of the scientific title of doctor with the teacher certificate I, prior to 30 June 2017, benefited both from the salary

[13] Published in the Official Gazette no. 605 of 17 June 2021.

[14] Pursuant to art. 14 of Law 153/2017, called *salary rights for holding the scientific title of doctor*, "the staff holding a PhD title shall receive a monthly allowance for the PhD title in the amount of 50% of the level of the minimum gross basic salary in the country guaranteed in payment, if they carry out their activity in the field for which they hold the title. The salary amount of this allowance is not taken into account when determining the limit of increases, compensations, bonuses, prizes and allowances provided in art. 25. (2) In the situation of a cumulation of functions, the allowance provided in par. (1) shall be granted, upon request, only by the employer where the beneficiary has the declared basic position. (3) The teaching staff who request and obtain the teacher certificate I by equivalence, in accordance with the provisions of the Order of the Minister of Education, Research, Youth and Sports no. 5561/2011 for the approval of the Methodology regarding the lifelong training of the staff from the pre-university education, as subsequently amended and completed, do not receive the indemnity for the scientific title of doctor. Teachers shall opt for the allowance for the scientific title of doctor or for the equivalence with the teacher certificate I".

corresponding to the certificate I and from the payment of the rights for the doctoral bonus. The grammatical and literal interpretation of art. 14(3) of the law was invoked.

On the other hand, the defendant, the Ministry of National Education, pointed out that the procedure of equivalence of the scientific title of doctor with the teacher certificate I, determined several benefits for teachers, namely the allowance for the scientific title of doctor, the transition to the certificate I without any contest and related remuneration, access to management, guidance and control positions, etc. By art. 14(3) of Law 153/2017, the legislature prohibited the cumulation of two salary rights based on the same PhD title. But, if the teachers initially obtained the teacher certificate I, and later the doctoral degree, they are entitled to receive both monetary rights. The specific presumptions of administrative acts and the fact that they are respected, as well as the non-fulfilment of the conditions provided by art. 14 LAL were invoked.

The *Constanța Court of Appeal* considered that obtaining the scientific title of doctor and the teacher certificate I through legal acts entered in the civil circuit, taking into account the provisions of art. 38 of the Labour Code and the principle of the non-retroactivity of the civil law, constitutionally enshrined, constituted legal arguments regarding the illegality of the challenged provision[15].

One month later, the *Bucharest Court of Appeal* rejected such a request, stating that "the claimant does not reveal any factual or legal circumstances that would create a serious doubt as to the legality of the contested order. The claimant agreed to reiterate, in proving the well-justified case, grounds of illegality on the merits, also seen in the procedure prior to the action for annulment, aspects which clearly address the merits of the case. (...) As regards the requirement of a justified case, the Court finds that it is not fulfilled in the present case, as there are no factual or legal circumstances which are capable of giving the court a serious doubt with regard to the legality of the challenged administrative acts. (...) The violation of the constitutional principle of the non-retroactivity of the law cannot be held either, since the contested order does not contain provisions likely to affect the salary rights of the claimants which were obtained in the past but only those to be born, namely those due starting with June 2021, the month when the order, the suspension of which is requested, was issued"[16].

The same solution of rejection was pronounced by the *Ploiești Court of Appeal*. The essence of the motivation was as follows: "teachers opt for the allowance for the scientific title of doctor or for equivalence with the teacher certificate I and the obligation to opt between the allowance for the scientific title of doctor and the equivalence with the teacher certificate I exclusively pertains to those teachers who, from the date of entry into force of the law, obtain the teacher certificate I by equivalence.

[15] Constanța Court of Appeal, sentence no. 154/19. 08. 2021.
[16] Bucharest Court of Appeal, sentence no. 1250/17. 09. 2021.

Teachers who have been awarded the teacher certificate I by equating the scientific title of doctor no longer have a real right of option, already enjoying the rights that belong to teachers with the first certificate, based on the individual administrative act by which they acquired the teacher certificate I and which entered the civil circuit; they continue to enjoy both rights, and cannot opt - the requirement imposed by the legislature. This obligation to choose is held only by those employees who did not yet have the title of doctor equivalent to the teacher certificate I, on 1 July 2017. (...) The criticisms formulated concern aspects related to the merits of the case, in connection with temporality, application, the procedure for obtaining the professional degree, respectively the doctoral degree, elements that are likely to determine the administration of specific evidence"[17].

The *Timișoara Court of Appeal* rejected such a request. The following were noted: "the principle of non-retroactivity is the legal rule in accordance with which the law applies only to situations arising after its entry into force, *per a contrario*, not being applicable to previous situations. In order to be able to apply the principle of the non-retroactivity of the law, a premise situation is necessary, namely two or more successive regulations regarding the solution to a single legal problem. Once this situation exists, it is natural that the new law does not act retroactively, in order to maintain the balance of the legal situations born before the entry into force of the new law. In this case, Order no. 3993/2021 applies starting with the salary rights related to June 2021, therefore it does not apply to situations born before its entry into force. Nor can the violation of the constitutional principle of the non-retroactivity of the law be held, since the contested order does not contain provisions likely to affect the salary rights of the claimants which were obtained in the past, but only those to be born, namely those due from June 2021, the month in which the order whose suspension is required was issued. (...) The interpretation given by the claimant is exclusively a grammatical one (based eminently on the present tense of the verbs in art. 14(3) above), but in the Court's view it cannot be accepted because, on the one hand, it is taken out of context, which is contrary to the spirit of the law (...) which was in the sense of repealing, from the date of entry into force of the new salary law, the cumulation of the doctoral allowance with any other financial benefit derived from the same source (PhD title) and, on the other hand, to the intention of the legislature to eliminate any form of discrimination in terms of salaries (see art. 6 letter b of Law 153/2017)"[18].

The *Craiova Court of Appeal* admitted the requests for the suspension of the enforcement of art. 1(2) of the Order of the Ministry of Education no. 3 993 of 16 June 2021. The court held that the principle of the non-retroactivity of the law was not observed: "The Court considers, contrary to the defendant's claims, that art. 1(2) of the Order of the Ministry of Education no. 3 993 of 16 June 2021

[17] Ploiești Court of Appeal, sentence no. 179/21. 10. 2021.
[18] Timișoara Court of Appeal, sentence no. 621/2. 12. 2021.

violates the constitutional and legal provisions on the non-retroactivity of the law. The right of option of teachers is not, as the defendant argues, between the salary rights due for obtaining the certificate I and those due for the scientific title of doctor, teachers having the possibility of opting between obtaining the certificate I by equivalence on the grounds that they hold the title of doctor, in which case they will no longer receive the salary rights due for the doctor's degree, or following the procedure provided by art. 242 of the Law on national education in order to obtain the certificate I. (...) It is clear that, by applying art. 1(2) of the Order of the Ministry of Education no. 3 993 of 16 June 2021, as regards the claimants, the provisions of art. 14(3) of Law no. 153/2017 apply to a legal situation born before the entry into force of the law. In the light of the foregoing, the Court finds that, in the present case, the contested administrative act appears to be unlawful in that it provides for a legal provision to be applied retroactively, so that the condition of a well-justified case *is met*"[19].

The situation presented above demonstrates, in our opinion, the harmful nature of the inter partes effects of judgments on the suspension of normative administrative acts. In all cases, the claimants were in the same factual and legal situation, ie they were teachers who had obtained the teacher certificate I by equivalence with the title of doctor, prior to 31 June 2017. Until the date of entry into force of the Order of the Ministry of Education no. 3 993 of 16 June 2021, they had received both the allowance for the scientific title of doctor and the salary related to the teacher certificate I. The well-justified case was represented in all applications, by the violation of the principle of the non-retroactivity of the law, and the courts delivered opposite judgments on this principle and the suspension requests within a few months.

4. Conclusions

If a normative administrative act has been suspended by the court (all the more so when the judgment has become final), the act is *seemingly illegal*. In this case, one of the three presumptions on which its enforceability is based, namely the presumption of legality, has been temporarily removed. The principle of the legality of administrative acts justifies the removal of the enforcement of this act also in relation to persons who did not have the quality of party, but who can bear the consequences of a seemingly illegal act. The fact that the suspension is an exceptional measure is not denied, the administrative act being suspended only until the end of the trial on the merits.

Secondly, the absence of the procedure for publishing the judgments and even the absence of an explicit mention in the text of the LAL, as in the case of art. 23 LAL, do not represent, in our opinion, solid elements to accept the *inter*

[19] Craiova Court of Appeal, sentence no. 411/2021 of 21.12.2021.

partes effects. It is obvious that what imposed the *erga omnes* effects of the judgments regarding the annulment of the normative administrative acts are not so much the provisions of art. 23 LAL, but *the nature and the effects that the normative administrative acts produce*. Art. 23 LAL is the transposition into positive law of the specifics of normative acts, specifics also present in the case of the action for the suspension of their enforcement. "As such, the effects of the normative act occur in a general way, compared to a series of persons who are not determined in concrete terms. Equally, in the event that there is a possibility that the act may be unlawful and this appearance of illegality is held by a court in deciding on a request for suspension, in order to protect the rights and legitimate interests of the legal subjects to whom that act is addressed also for the sake of identity of reason, its effects should be suspended for all its addressees"[20].

Thirdly, *the well-justified case is not assessed strictly subjectively, but rather has an objective and general character, as it follows from the assessment of the state of fact and law (always objective)*. Therefore, at least as regards the requirement of a well-justified case, the *authority* or *res judicata* of a previous judgment on the suspension of the enforcement of the respective normative act can be held.

Indeed, the argument that, even in the case of the suspension of normative administrative acts, the conditions of the well-justified case and the imminent damage must be proved cumulatively, remains unbeatable, the latter condition being appreciated in close connection with the applicant.

Under these circumstances, we believe that *the specifics of the normative administrative act should prevail.* As shown by Professor Ovidiu Podaru, in the presentation of the point of view of the Faculty of Law in Cluj, the suspension of a normative administrative act, as well as the issuance, revocation, repeal and annulment, produces, through symmetry, *erga omnes* effects. This seems to be the decisive argument, also supported by the observance of the principle of the *legality* of administrative acts, *predictability* of the law and legal *certainty*.

It is a desideratum that the legislature should intervene and introduce in the Law on Administrative Litigation, provisions similar to those contained in art. 23 LAL, in case of the suspension of normative administrative acts. In the absence of this intervention, we believe that the courts invested with the requests for the suspension of the enforcement of normative administrative acts, must, first of all, verify whether similar requests have been previously filed and how they have been decided on. Where judgments have been given to admit the application for suspension, the courts should raise, ex officio, the authority or, where appropriate, the power of res judicata.

[20] Alexandru Mitră, *Considerații cu privire la întinderea efectelor suspendării executării actelor administrative cu caracter normativ*, „Revista Română de Drept Public", no. 3-4/2020, p. 113.

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Administrative burdens in the process of legal regulation

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Abstract

The orientation of the mechanism of legal regulation towards the protection and improvement of legally relevant public relations is accompanied by the opposite process. Its numerous manifestations are collectively verbally referred to as administrative burdens. They are not unequivocally negative. Achieving and maintaining a reasonable balance in this unity of opposites is a challenge not only for the executive power but also for the legislature and the judiciary. This balance is important because it depends on the state of the right to good governance and good administration, including the confidence of citizens in the normative system of law and the democratic foundations of society. Its refinement is a difficult task, given the potential of administrative burdens to be reproduced, as well as because the concept of good administration lacks in-depth study of the relation between good administration - good citizens. Their systemic conditionality predetermines the application of a systematic method of scientific research to find acceptable and effective solutions for both the legislature and the executive, as well as for citizens. Revealing the importance and role of dialogue in achieving these goals justifies the use of discursive analysis.

Keywords: *administrative burdens, legal regulation, reproduction, lawmaking, good citizens.*

JEL Classification: K23

1. Introduction

The analysis on the topic is not aimed at another disclosure of the essence of administrative burdens and legal regulation. Emphasis is placed on the interconnection between them and the directions for overcoming the adverse effects. Legal regulation is a process with a specific purpose and connection with lawmaking activity. There are numerous arguments for prioritizing the legal impact on social interaction. However, the consequences are not unambiguously positive. From the good intentions of the legislator arise results evaluated negatively not only by the subject of law-making activity but also by the participants in the legally regulated public relations. This, in turn, provokes another type of lawmaking activity aimed at overcoming the negatives of the primary legal regulation carried out by the legislator and the secondary, detailed legal regulation carried out by the executive authorities. What is disturbing, in this case, is not so much the direction and simultaneous existence of the two processes as the fact that they are carried out by the same subject. The reduction or elimination of the

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negative consequences is possible with the adoption of the next legal normative acts for amendment, supplement or repeal. In this way, a continuous process of increasing the volume of current legislation and the amendments, supplements and repealed provisions in the legal normative acts is launched - a circumstance that inevitably leads to confusion among citizens.

2. The inevitability of administrative burdens

Given the context of the title, the content of the article is focused on administrative burdens and their indisputable conditionality of legal regulation and its purpose. In particular, on the one hand, legal regulation is intended to bring stability to the system of relevant public relations and connections, but on the other hand, it has the potential to provoke the opposite effect with possible consequences of different nature. Administrative burdens are a good example. They fall into the category of easily predictable consequences and, despite their obvious negative nature for the participants in the legally institutionalized public relations, they appear to be inevitable. At the same time, this quality is shared by the subject of law-making activity. This finding does not call into question the need for legal regulation for society but provokes the need to study the outlined problematic situation from different angles and search for acceptable and effective solutions for both the legislature and the executive, as well as for citizens.

It is difficult to say with certainty which of the above entities was the first to identify the "administrative burdens problem". Whether the entity that creates the laws and thus essentially sets the parameters of legal regulation or the state authority in charge of law enforcement or the addressees of the legal norms. This is a matter of clear debate because the unilateral recognition of the role of citizens in this discovery will seriously devalue the role of the state in lawmaking and legal regulation. On the other hand, the legitimate question will arise - why does the state allow it, since it initially has an idea of upgrading the existing administrative burdens with the adoption of new legal normative acts.

The inevitable subject of discussion should be whether law-making activities and legal regulation are possible without the formation of administrative burdens. As incredible as this question may sound, it implies a positive answer. This is possible only if the subjective assessments of the participants in the legal relationship in the performance of legal obligations - legal or administrative, are positive and do not cause irritation, moreover, are not associated with difficulties of various kinds, including significant financial costs.

The relativity of legal normative acts to a predetermined range of legal entities presupposes another answer, not only because the assessments based on the experience of fulfilling legally validating obligations are different[2], but also

[2] For the subjective attitude towards administrative burdens, see Donald Moynihan, Pamela Herd, Hope Harvey. *Administrative Burden: Learning, Psychological, and Compliance Costs in*

because processes with unequivocally negative assessment by all are a real fact. The ever-increasing number of legal normative acts is just one obvious example of this. An increasing trend is observed not only concerning the laws but also concerning the administrative acts adopted by the competent authorities. This process is a natural and difficult to overcome consequence. Among the many reasons for its existence are: the emergence of new legal formative factors, including the rearrangement of existing values, EU acts and, last but not least, the election promises of the political parties represented in the legislature.

Administrative burdens have the resources to be reproduced not only in the process of exercising legislative and administrative power but also in the administration of justice. This gives the court the status of a participant in this process, which, despite its impartiality, rules based on current law. Citizens in their capacity as victims of administrative burdens, also make a significant contribution to their existence and "production". This seemingly absurd finding has its theoretical and practical arguments. They should be discussed in a language understandable to all, in the context of targeted communicative impact to reach consensus[3]. This is the task of the state and the doctrine, the successful solution of which depends on the nature of the citizens' attitude towards the state and the administration.

The high degree of sensitivity of citizens to any intervention regarding their rights is natural. Moreover, there are trends in a civil society striving to establish new rights and expand the parameters of opportunities related to a legal and legitimate interests. Legislative recognition of new rights and the expansion of opportunities "locked" in existing ones is inevitably accompanied by the establishment of generative legal facts, often in the form of complex factual compositions for their acquisition (access to them), a procedure for their exercise, legal protection and defence.

These are necessary processes from the point of view of legal regulation and achieving the goals of its purpose, but they are also the basis for the formation of administrative burdens, the existence of which can not be ignored, but only reduced to a fair and reasonable minimum. The opportunities for achieving this are divided between the legislature, the executive and the judiciary, on the one hand, and civil society, on the other.

2.1. Ambiguous estimates of administrative burdens

Administrative burdens remain an impression of disregard for citizens' rights, but at the same time, they have the opposite orientation given the purpose

Citizen-State Interactions, in „Journal of Public Administration Research and Theory", Volume 25, Issue 1, January 2015, p. 46.

[3] See Simon Susen, *Jürgen Habermas. Between Democratic Deliberation and Deliberative Democracy,* in Wodak, R. and Forchtner, B. (Eds.), *The Routledge Handbook of Language and Politics*. Abingdon, UK: Routledge. 2017, p. 43.

of legal regulation. Administrative burdens are also ambiguous in the process of legal impact. As much as they hinder citizens, and lead to waste of time and irritation from administrative services, administrative burdens are also related to guaranteeing rights. Processes of respect for certain rights hinder the exercise of others and form negative assessments, especially of an embarrassing and unacceptable sense of the dominance of the administration, sometimes combined with suspicion[4], which is further exacerbated by the neglect of citizens' dissatisfaction. This is a paradox. Administrative burdens are formed under the pretext of protecting the rights and interests of citizens and this leads to disapproval. This situation should not be viewed unilaterally negatively, because it has the potential to prompt not only the administrative authorities but also the legislator, the right solutions to problems caused by administrative burdens on legal regulation and stimulate the processes that define the administration as a learning organization. This will predetermine the permanent nature of the reduction of administrative burdens and the formation of a generally accepted perception of reasonableness, impartiality and fairness in administrative services.

2.2. Good administration and good citizens

The real assessment of the good intentions of the state bodies, objectified in obligations, can be given only in the process of their implementation. Then the connection between a reasonable time and the reasonableness of the established procedures becomes apparent. These qualities are in a direct, derivative connection with the rule of law or the corresponding administrative act. Finding the legal provisions and administrative acts - sources of administrative burdens is easy in the process of legitimate communication between citizens and the administration. This attitude is important for legal regulation because citizens and the administration are active participants in the process of social interaction. His analysis from the perspective of good governance, good administration and citizens leads to several conclusions. First of all, it is noteworthy that citizens usually are not a word combination. As expected, the symbiosis between the three concepts implies "good citizens" instead of "citizens". Disclosing the meaning and significance of "good" would largely be the basis for constructing a mechanism to exclude or minimize the administrative burdens in the regulatory process. "Good" is a characteristic of a person that is determined by the nature of his behaviour and the consequences of it. If his permanent objectification is characterized by responsiveness, and usefulness to others, then this person is unambiguously defined as good. On the other hand, good is a moral category, as opposed to evil, again related to people's behaviour to the content of the social normative system "morality".

[4] See Donald Moynihan, Pamela Herd. *Red Tape and Democracy: How Rules Affect Citizenship Rights*, „The American Review of Public Administration", 2010, DOI: 10.1177/0275074010366732, p.658.

What has been said unequivocally shows that for good governance and good administration to be possible, the other necessary element for the existence of the above-mentioned triad in a stable state of equilibrium is that citizens be also in the phrase - good citizens. And the creation of conditions for their active participation in the pre-parliamentary phase of the law-making process and some acts of the administration, based on the principles of deliberative democracy, is a prerequisite for forming another vision of administrative burdens and perhaps changing the name.

The available ethical norms are directed towards the administration. The manifestation of ethical and moral norms and principles in social interactions is explicitly assigned to one party. The one-sided formulation of moral obligations creates preconditions for inefficiently performed in this process administrative services of the citizens, mediating the access and realization of rights.

2.3. Administrative workload and legal policy

A significant contribution to the existence of administrative burdens is the lack of stability and predictability in the formation of legal policy, as well as the usual use of law for "practical implementation of political programs"[5]. Its susceptibility to factors of different natures, national and international, contributes to increasing the level of administrative burdens. This finding needs important clarification. Of course, the legal policy cannot be inconsistent with socio-political processes, but its adaptability should be based on the need to adopt a legal normative act with specific content in the context of relevant legal formative factors - not only in the short term but also in long-term, not only to satisfy one's interests at the moment but also with a view to the interests of society in the future, by specifying the necessity[6] and excluding the possibility of adopting useless laws that weaken the current ones[7]. Montesquieu's position is also relevant to the secondary normative acts and other acts issued by the administrative bodies, given the interdependence with the laws. In this sense, the consequences of adopting a law only on bureaucratic or lobbying interests and the acts of the administration issued on its basis are obvious.

2.4. The contribution of red tape

The inevitability of the manifestation of the bureaucracy in the law-making activity is another source of trouble for the legal regulation and the citizens as participants in this process. Often, under the pretext of detailing and improving

[5] See Jürgen Habermas, *How is legitimacy possible through legality*. In: *Morality, Law and Democracy*, Ed. House of Sciences for Man and Society, 2000, p. 282.
[6] See Georg Wilhelm Friedrich Hegel. *The Science of Logic*, Part One, Objective Logic, Sofia, 2001, p. 696, "What is necessary cannot be otherwise."
[7] See Charles dio Monteschio. Selected works, M., 1995, p. 651-654.

the existing legal framework, many legal administrative acts are adopted, which through the requirements contained in them are designed to validate the application of the law, hinder the legal process and irritate citizens. In this order, the belief in the futility of detailing is formed. On the other hand, through the above-mentioned initiative, the administration justifies its existence and acts in its interest. This creates a problematic situation of conflict of interest, on the one hand, the administration requires citizens to perform certain obligations in their interest, and on the other - citizens oppose also in their interest.

2.5. Law-making decisions

Based on the already outlined relations, another perspective is relevant. The philosophy of legal regulation presupposes the adoption of new legal normative acts, increasing the volume of legislation, and hence the administrative burdens. The assessment of these processes cannot be unambiguous, because the legal regulation presupposes the establishment and improvement of existing legal norms. And to what extent they will be a source of administrative burdens depends entirely on the quality of lawmaking activity, including the nature of existing procedures, according to which citizens not only present their position but also on the possibilities for its legal institutionalization[8]. Its intensity and mechanism of implementation affect not only the volume of existing legislation but also the benefits of legal regulation. In this sense, the creation of administrative burdens as a result of the adoption of new legal acts has another aspect - it leads to restrictions on the freedom of citizens[9].

It is clear from the above that administrative burdens are a negative and inevitable consequence of legal regulation, although legal regulation is intended to provide legal protection for citizens. This circumstance predetermines the emergence of a national and supranational direction to reduce administrative burdens to a consensus minimum for society[10].

Decisions are possible only with the stipulation of reducing administrative burdens to a certain acceptable, fair minimum because there will always be subjective opinions that the border can be moved in the direction of relief. This is because, on the one hand, individual citizens have different potentials to "manage burdens" and, on the other - because they may be aimed primarily at a specific target group and thus result in unequal treatment[11]. There are several possible

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[8] See Dobrinka Chankova, Valentin Vasilev, *Leadership and deliberative democracy in the changing world: compatible or reconcilable paradigms*, „Perspectives of Law and Public Administration", Volume 9, Issue 2, December 2020, p. 212.

[9] See Tencho Kolev. *Theory of Lawmaking,* University Publishing House "St. Kliment Ohridski", 2006, p. 59.

[10] See *European Commission's regulatory fitness and performance programme (REFIT)* .

[11] See Donald Moynihan, Pamela Herd, Hope Harvey, *Administrative Burden: Learning, Psychological, and Compliance Costs in Citizen-State Interactions*, „Journal of Public Administration Research and Theory", Volume 25, Issue 1, January 2015, p. 44.

solutions to the parameters of the case of legal regulation - administrative burdens. Each of them is directly dependent on the currently existing relationship between the factual and the legal. In the presence of several primary legal normative acts with the object of legal regulation of the same public relations, codification is possible. It is a suitable basis for specifying all sources of administrative burdens and reducing them to a fair minimum to achieve legal institutionalization goals.

Codification is one of the acceptable solutions to counter administrative burdens, but probably due to its complexity and the need for significant intellectual resources, it is often downplayed when possible. The process of adopting new laws is being prioritized. This intensifies the process of positioning administrative burdens in legal regulation. A clear example of this is the cases when in the presence of legal normative acts - sources of administrative burdens, any subsequent amendment of one of them to reduce administrative burdens to a certain minimum, but given the systematic nature of the normative system "law", is following other acts, ie with the administrative burdens existing in them. This is one of the paradoxes of legal regulation, which sometimes remains invisible to the legislature and administrative authorities.

The main focus in reducing administrative burdens is the analysis of their compliance with legally institutionalized objectives. The recommendations are traditionally aimed at achieving the minimum that will ensure the achievement of the goals. It turns out that achieving it is not enough. Even formally minimized, they are not deprived of the ability to reproduce themselves by acts of the administration. The introduction of mandatory legal expertise before each introduction of administrative requirements validating access and exercise of rights is an effective counteraction. The experts should unequivocally decide on the limits of discretion. Another emphasis in the expertise should be on the need for legal norms providing for exceptions or containing evaluative concepts. An important condition for the success of this initiative is the degree of citizen participation in this process and the opportunities for the institutionalization of their proposals. The development of this idea has the potential to exclude or minimize the corruption component from the negative potential of administrative burdens.

3. Conclusion

The discussion on administrative burdens is of varying intensity over time. Its permanent nature is determined by many reasons. The main one is visible in Ecclesiastes' insight that there is nothing new under the sun. For all "producers" and "users" there are obvious problems and obvious reasonable solutions, the form of institutionalization of which is a matter of using the potential of Habermas-related communicative rationality.

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Election and dismissal of the deputy mayor according to the Administrative Code

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Abstract

The position of deputy mayor has been under regulation since the beginning of the post-December legislation, the deputy mayor being qualified as an assistant of the mayor. Depending on the rank of the locality, there may be one or two deputy mayors. As an important feature, the deputy mayor enters both the executive and the deliberative power, acting as a link between the two authorities at local level, the mayor and the local council. The paper deals with the procedure of appointing the deputy mayor, as well as the loss of this quality, by dismissal, as they are regulated in the Administrative Code.

Keywords*: deputy mayor, administrative code, election, dismissal*.

JEL Classification*:* K23

1. Introduction

For the Romanian legislation, it has become a tradition for the position of deputy mayor[2] to be regulated alongside that of mayor, the Administrative Code encouraging this trend. The status of the deputy mayor has evolved through the current regulations in the sense that the legislator includes it along with the mayor in the category of local public dignitaries. If in the old regulation the mayor and the deputy mayor were qualified only as local elected officials, a category that also includes local councilors, county councilors, the president and vice-president of the county council, Government Emergency Ordinance no. 57/2019 on the Administrative Code includes these functions both in the category of local elected officials, as well as in that of dignitaries. Thus, according to Article 5 letter f) of the Code, the local elected are the mayor, the deputy mayor, the local councilors, the president of the county council, the vice-presidents of the county council and the county councilors, persons who fulfill a function of public authority, and according to Article 148 paragraph 1, the position of mayor and the position of deputy mayor are functions of public dignity.

The status of dignitary allows the deputy mayor to acquire new rights,

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[2] For the analysis of the regulation of the position of deputy mayor prior to the adoption of the Administrative Code, see Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public,* C.H. Beck Publishing House, Bucharest, 2016, p. 708, 709.

such as the right to organize a cabinet in which one or two positions are established depending on the rank of the locality[3], occupied by persons who have the role of supporting the deputy mayor in carrying out activities resulting directly from the exercise of duties[4] and, at the same time, leads to a change in the nature of relations with other public functions or dignities. Consider, for example, the relations with the mayor. Article 152 establishes that the deputy mayor is subordinated to the mayor, exercises powers delegated by the mayor and, in some situations provided by law, legally replaces the mayor. But considering the fact that the mayor and the deputy mayor have the same status of public dignitaries, as well as the way of appointing the deputy mayor, the subordination mentioned in paragraph 1 of Article 152 is purely theoretical, not legal. From the point of view of conceiving the system of local public administration authorities, introducing the notion of subordination of the deputy mayor to the mayor has no practical implications, at most it has the role of emphasizing that the position of deputy mayor is inferior to that of the mayor. As shown in the literature[5], the solution chosen by the legislator from the old regulation and maintained by the Code is debatable, the deputy mayor being elected and dismissed by the local council, the mayor having only the prerogative to propose to the local council the election or dismissal of the deputy mayor. Last but not least, the recognition by law of the dignitary status of the deputy mayor also led to a change in the conditions for its replacement.

2. The election of the deputy mayor

In each basic administrative-territorial unit (commune, city/municipality) a position of deputy mayor is established, and in the municipalities of county residence two functions of deputy mayor are established. The position of deputy mayor is not a function whose existence depends on the will of a local authority as, for example, in the case of the public administrator. It is the result of the will of the legislator, a situation also valid for the position of mayor. The deputy mayor may be appointed after the establishment of the local council or, if the position is vacated during the term of office of the local council, as a result of a case of termination of its term, the deputy mayor is elected during the term of office of the local deliberative.

While the mayor is elected by universal, equal, direct, secret and free vote, the deputy mayor is elected by indirect vote. If the direct vote is regarded

[3] Article 546 letters k) and l) of the Administrative Code.
[4] Article 541 paragraph 2 of the Administrative Code.
[5] Verginia Vedinaș, *Codul Administrativ adnotat*, 3rd ed., revised and updated, Universul Juridic Publishing House, Bucharest, 2021, p. 190.

by the Constitutional Court[6] as being the essence of modern democratic representation because it allows citizens to exercise directly and personally the option for a particular candidate proposed in the election, regarding the significance of the indirect vote, the Constitutional Court in its jurisprudence[7] has shown that "in the case of indirect voting, a smaller number of voters participate in the effective election of representatives depending on the method of election provided by law". In order to be a deputy mayor, a person must be elected for the position of local councilor and can then run for deputy mayor. Therefore, only those who have acquired the status of local councilor can apply for the position of deputy mayor.

The conditions regarding the election of the deputy mayor are included, mainly, in the provisions of Article 152 paragraphs 2, 3 and 6 of the Administrative Code. Regarding the marginal title of Article 152 "The role, appointment and dismissal of the deputy mayor" we notice that throughout its text, instead of the term "election" the term "appointment" is used, contrary to the provisions of the article, which leads us to replace the notion of "appointment" with that of "election".

The nomination for the position of deputy mayor can be made by the mayor or by the local councilors, recognizing, implicitly, the right to self-proposals as well. It follows from the wording of paragraph 2 of Article 152 of the Administrative Code that either the mayor or the local councilors may propose to the local council the candidate for the position of deputy mayor. The proposal cannot be signed at the same time by the mayor and local councilors. Given that the appointment of a person is in question, the decision of the local council to elect the deputy mayor must be adopted by secret vote. According to Article 152 paragraph 3 of the Administrative Code, the secret vote for the election of the deputy mayor is exercised on the basis of ballot papers. We appreciate that the legislator needs to improve this regulation, in the sense of adding another way of secret vote, such as electronic secret vote. In this way, a correlation is made between the legal provisions regarding the election of the deputy mayor and those regarding the online conduct of local council meetings or the participation by electronic means of local councilors in local council meetings, a right recognized to councilors by Article 137 of the Administrative Code. This completion must also be made in the case of Article 139 dedicated to the adoption of decisions of the local council. The online conduct of the local council meetings was regulated by GEO no. 61/2020[8], being claimed by the extraordinary state known by Romania, and also by the entire world, but the application of the provisions regarding online meetings is not only related to the extraordinary situation, and can also be

[6] Decision of the Constitutional Court of Romania no. 752/2010, published in the Official Gazette of Romania, Part I, issue 495 of 19 July 2010.
[7] Decision of the Constitutional Court of Romania no. 752/2010, published in the Official Gazette of Romania, Part I, issue 495 of 19 July 2010.
[8] Published in the Official Gazette of Romania, Part I, issue 381 of 12 May 2020.

applied at any time, an aspect highlighted and criticized in the literature[9]. The majority established by law for the election of the deputy mayor is the absolute majority, understood as the first natural number strictly greater than half of the total members in office of the collegiate body[10]. The election of the deputy mayor can be made both in ordinary session and in extraordinary session, because the legislator did not provide a rule in this regard. We have in view, of course, the extraordinary meeting convened pursuant to Article 134 paragraph 3 letter b), not the extraordinary meeting convened immediately according to Article 134 paragraph 4. Article 152 paragraph 6) recognizes the right of the proposed local councilor to be elected Deputy Mayor to participate in the deliberation and adoption of the decision on the election of the Deputy Mayor.

In addition to the conditions set out in Article 152, the analysis of the provisions governing the local council reveals two other conditions, namely the existence of the opinion of the specialized commission of the local council, a document that must accompany the draft decision to elect the deputy mayor, according to Article 136 paragraph 8 letter c), and the condition of validation and taking of the oath by all local councilors. Like any draft decision, the draft decision for the election of the deputy mayor must be accompanied by the documents provided in Article 136 paragraph 8 (approval report, report of the relevant department, opinion of the specialized commission/commissions within the local council) to enter the debate of the local council. In order to meet the conditions provided in Article 135 paragraph 2 and Article 136 paragraph 8, the specialized commissions of the local council must be set up, internal bodies, which adopt the consultative opinions for each draft decision. These commissions are constituted by decision of the local council. After adoption, in order to take legal effect, a decision must be signed, countersigned, assigned a number and communicated to the prefect, the mayor, and then communicated to the person concerned, in the case of an individual decision, or be made public in the case of a normative decision. Therefore, if the local council includes on the agenda of the council meeting both the constitution of the specialized commissions and the election of the deputy mayor, if the election of the deputy mayor is made before the constitution of the specialized commissions, the opinion of the specialized commission of the local council is missing, therefore ignoring the provisions of Article 135 paragraph 2 and Article 136 paragraph 8. If the election of the deputy mayor is made after the adoption of the decision on the establishment of the specialized commissions, but in the same meeting, the commissions cannot meet to draw up the opinion, because the decision produces legal effects only after the mentioned stages. The only draft decision that can be debated without the approval of the specialized commission provided in Article 136 paragraph 8 is the draft decision for the organization of specialized commissions. As long as the opinion must come from

[9] Verginia Vedinaș, *op. cit.*, 2021, p. 190.
[10] Article 5 letter cc) of the Administrative Code.

a specialized committee, that respective committee must first be set up. If the legislator had not wanted to apply one of the conditions provided in Article 136 of the draft decision on the election of the deputy mayor, in the variant of its election after the constitution of the local council, a derogation would have been instituted. In the absence of such a derogation, the rule has general application and thus obliges the local council to organize its activity at the beginning of its term so as to organize the specialized commissions in the first meeting after the meeting on the constitution ceremony and in another meeting to elect the deputy mayor/deputy mayors.

These discussions are valid in the case of electing the deputy mayor after the establishment of the local council and we wanted to present them because, in administrative practice, there were situations in which the decision on electing the deputy mayor was adopted in the same meeting as the specialized commissions. When the election of the deputy mayor takes place during the exercise of the mandate of the local council, the specialized commissions are already constituted and the provisions of Article 135 paragraph 2 corroborated with those of Article 136 paragraph 8 do not raise issues of interpretation and application.

According to the provisions of paragraph 7 of the sole article of GEO no. 190/28 October 2020[11] on some measures to ensure the conditions for the establishment and taking of the oath by the local public administration authorities, the deputy mayors can be elected after validation of the mandates of all local councilors and the taking of the oath by all local councilors. This condition has been established for the situation in which the local council is constituted during the state of emergency or alert. The question that arises is whether this rule established in an extraordinary situation still applies after the cessation of the state of emergency or alert. If in the case of taking the oath by electronic means, a procedure regulated in paragraphs 1-6 of the sole article of GEO no. 190/2020, the legislator clearly states that it can also be submitted by electronic means during the state of emergency and alert[12], the election of the deputy mayor provided the validation of the mandate and the taking of the oath by all local councilors no longer appears related to an extraordinary situation, but it is included, from the point of view of the wording, in paragraph 7 of the sole article that regulates, as shown, the taking of the oath by electronic means in a state of emergency or alert. We appreciate that for the election of the deputy mayor, the condition of validation and taking of the oath by all local councilors must be fulfilled, both during the extraordinary situation and outside it, because in this case, the legislator does not specify.

[11] The Official Gazette of Romania, Part I, issue 1007 of 30 October 2020.
[12] Sole article paragraph 1 of the GEO no. 190/2020.

3. Dismissal of the deputy mayor

If the deputy mayor of the commune, city or municipality is appointed by election, the dismissal from office leads to the termination of the quality of deputy mayor and to the maintenance of the status of local councilor. The old regulation established two ways to replace the deputy mayor, the change of office provided by Law no. 215/2001 of the local public administration, respectively the dismissal from office, as a disciplinary sanction, regulated by Law no. 393/2004 on the status of local elected officials. The Administrative Code mentions in the content of two articles about the replacement of the deputy mayor, this time the legislator using the same notion for replacement, namely the dismissal from the position of deputy mayor, which we find regulated in general by Article 152, with the marginal name "The role, appointment and dismissal of the deputy mayor" and, as a disciplinary sanction, in Article 239, dedicated to the sanctions applicable to deputy mayors.

The procedure for the dismissal of the deputy mayor is provided in Article 152 paragraph 5. The dismissal from the position of deputy mayor is made by the entity that elected it, namely by the local council, by secret vote. The proposal for dismissal can be made by either the mayor or a third of the local councilors in office. There can be no proposal for the dismissal of the deputy mayor signed by both the mayor and the local councilors. In addition to the condition of the initiator (the mayor or one third of the councilors), the legislator provided three other conditions, one regarding the motivation of the change, the second referring to the majority required for dismissal, and the third regarding the time until which the dismissal procedure can be initiated.

Thus, the proposal for dismissal from the position of deputy mayor must be duly substantiated and introduced by the entry into the last 6 months of the term of office of the local council.

Good reasoning implies a proper factual and legal substantiation of the replacement procedure.

The decision to dismiss a deputy mayor is not a mere administrative act, as it leads to the loss of a status, of a public dignity. As shown, according to Article 148 paragraph 2 of the Administrative Code, the position of mayor and the position of deputy mayor are functions of public dignity. If in the old law of local public administration (Law no. 215/2001), the mayor and the deputy mayor were included in the category of local elected officials, by the Administrative Code, the two positions are qualified as functions of public dignity. As a consequence of this change in legal status, the legislator tightened the conditions for the dismissal of the deputy mayor, in the sense that it went from requiring the mayor's motivated proposal to dismiss the deputy mayor (in the old regulation) to that of thoroughly motivated (in the current regulation - Article 152 paragraph 5).

The legislative, doctrinal and jurisprudential evolution in the matter of

motivating the administrative act obliges all the initiators of an administrative act to pay more attention to the motivation, especially when in question there are administrative acts by which a certain status is lost and, implicitly, certain rights as well. For example, the person who is released from the position of deputy mayor loses the status of local dignitary, loses the right to be part of the executive, loses the allowance of deputy mayor and ends up unable to complete projects dedicated to the local community.

According to the norms of legislative technique to which Article 136 of the Administrative Code refers, any draft administrative act must be motivated. The fact that in the case of the draft decision to dismiss the deputy mayor the legislator wants to emphasize that it must be motivated (in the old regulation) and properly motivated (in the current regulation) shows the importance given to the motivation of the deputy mayor dismissal. In such a case, the motivation cannot be purely formal, it cannot be aimed only at political arrangements, but must be properly substantiated in fact and in law.

The change in the legislator's perspective is meant, in our opinion, to diminish the temptation of political actors to periodically change the deputy mayor, ensuring it some stability in office and, at the same time, to determine the initiator of the dismissal process to draw up a rigorous motivation. Regarding the motivation of the deputy mayor's proposal for dismissal, the literature[13] showed, in turn, that this cannot be just a purely political motivation.

From the analysis of the two procedures of election, respectively of dismissal from the position regulated by Article 152 paragraph 5, it can be seen that the initiative to dismiss the deputy mayor involves a more rigid procedure than the one by which it is elected. The common elements of the two procedures are represented by the secret vote and the right of the person to be elected as deputy mayor, respectively of the deputy mayor proposed for dismissal, to participate in the election /dismissal vote.

Regarding the dismissal of the deputy mayor pursuant to Article 239 paragraph1 letter d), this is the most drastic sanction that can be applied to the deputy mayor and can intervene when it has committed serious and/or repeated acts in the exercise of the mandate of deputy mayor. In this case, the mentioned legal provisions must be corroborated with those contained in Article 152 of the Code. The deeds imputed to the deputy mayor must be committed with guilt, an aspect highlighted by the specialized literature[14].

Regarding the majority required for the dismissal of the deputy mayor, the legislator established the qualified majority. According to Article 152 paragraph 5, the deputy mayor shall be dismissed by a two-thirds majority of the number of councilors in office. This regulation has created confusion in administrative practice, because, for the calculation of 2/3, the reporting was done, in some

[13] Verginia Vedinaș, *op. cit.*, 2021, p. 191.
[14] Ibid, p. 254.

cases, to the number of councilors in office, and in other cases to the total number of councilors in a local council provided by law.

Compared to the old regulation, in which a definition of qualified majority was not inserted, the Administrative Code defines the qualified majority, in Article 5 letter dd). Thus, "qualified majority" means the first number that is higher than the numerical value resulting from the application of the fraction/percentage established by law to the total members of the collegiate body established under the law.

As this is a legal definition, the meaning of this definition must be taken into account in any situation where the use of a qualified majority is required for the adoption of an administrative act. In general, in the case of a complex normative act, such as GEO no. 57/2019 on the Administrative Code, the legislator usually explains, defines a series of terms and notions that occur during the regulation, in order to simplify the activity of interpreting the respective act, and to ensure that the act is applied in practice in accordance with the purpose pursued by the legislator.

In the administrative practice, there was defended a thesis according to which the meaning of the qualified majority considered by the legislator in Article 5 letter dd) is valid only in the case of adopting decisions regarding the acquisition or alienation of the property right in the case of real estate, bringing as an argument the provisions of Article 139 paragraph 2 of the Administrative Code. Otherwise, the percentage/fraction is reported to the number of councilors in office.

From the analysis of the provisions of Article 139 paragraph 1 and 2 can be seen as reminiscent of the types of majorities that can be used by the local council for decision-making. In the activity of the local council, the rule is the simple majority, and for the fields expressly regulated in the legal text, the absolute majority or the qualified majority is used. The fact that the legislator mentioned in the content of Article 139 only a single case in which the qualified majority is employed with the meaning given in Article 5 letter dd) does not mean that only in this case the meaning established in Article 5 letter dd) or that it would be the only situation in which a qualified majority is needed.

The legislator wanted to make this clarification in the content of Article 139, dedicated to the adoption of the decisions of the local council, in order to delimit the sphere of the decisions regarding the patrimony, considering the fact that in this matter a different vision of the legislator was imposed towards the old regulation. If in the old regulation no distinction was made between the decisions regarding the patrimony, establishing the condition of their adoption with a majority of 2/3, in the current regulation the legislator distinguishes between the patrimony decisions, which aim at acquiring or alienating the property right for real estate, and the rest of the patrimony decisions (for example, the decisions regarding the patrimony administration are adopted with absolute majority, according to Article 139 paragraph 3 letter g) of the Code).

Therefore, whenever we encounter in a definite normative act a notion

with which the respective act operates, the legal definition is the one to which we refer in each case that appeared in practice.

According to the legal definition, the fraction of 2/3 applies to the total number provided by law of the collegiate body, not to the number of councilors in office at a given time. Thus, if a local council has 13 local councilors established by law, and there are only 12 in the mandate because one of the mandates has not been validated by the court, the fraction of 2/3 applies to the total number of councilors established by law for the respective local council. Moreover, this conclusion is reinforced by the provisions of Order no. 25 of 14 January 2021[15] for the approval of the indicative model of the status of the administrative-territorial unit, as well as of the indicative model of the regulation of organization and functioning of the local council which, in annex no. 11, details the calculation of the absolute majority and the qualified majority by reference to the total number of members of the collegiate body. According to the mentioned provisions, the qualified majority is calculated by reference to 13 mandates of local councilors, and the number resulting from the application of the fraction of 2/3 is 9.

4. Conclusions

It is a well-known fact that the position of deputy mayor is one of the most coveted positions in local public administration, after that of mayor, the political actors constantly aiming to consolidate their inheritance as local elected officials. The deputy mayor is part of both the local executive and the deliberative (after his election he retains the quality of local councilor) and, through his status consolidated by the provisions of the Administrative Code, has acquired an increased importance in the decision-making mechanism at local level. Along with the modification of the deputy mayor's status, there were also changes in the scope of the conditions that must be met for the election or replacement of the deputy mayor, conditions analyzed in the paper. Not infrequently, the rules that establish such conditions are analyzed and interpreted differently in the administrative practice, which is why we have sought to offer options for interpreting these norms.

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[15] Published in the Official Gazette of Romania, Part I, issue 76 of 25 January 2021.

Institutions of administrative law that protect the rights of tourists, consumers of hotel services in Romania/European Union

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Abstract

In the field of tourism, especially in the HoReCa sector, the protection of customers-beneficiaries of consumers of hotel services and products is vital, because if these products and services are non-compliant, unsafe, they can affect and cause damage to the health and safety of consumers. In the legislative context, both at EU and domestic level, through a number of legal instruments, a number of measures are being taken to protect consumers' rights, including through alternative dispute resolution methods. The role of whistleblowers is also of particular importance because infringements of legal rules can be affected by: fair competition for all EU professionals, business, contractual relations, consumer rights, the interests of traders and shareholders in business investment. All this can ultimately lead to the destabilization of the internal market and, implicitly, of the international market, of the business environment.

Keywords: *hotel services, tourist-European consumer, alternative dispute resolution methods, HoReCa, integrity warning, public interest.*

JEL Classification: K23

1. Introduction. Preliminary details

The term "HoReCa", used mainly in Europe (Scandinavia, Benelux and France), describes 3 words: Hotels, Restaurants and Cafes/Catering. It is considered that spaces such as cafes and canteens can be included in the restaurant segment[3].

This term, used in the hospitality industry, in the tourism sector, mainly describes activities related to hotel services.

Within the tourism sector[4], the growth of the Horeca industry has been

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[3] https://www.gastroprofis.ro/ce-inseamna-horeca, accessed on 17.03.2022 at 13.28.

[4] Since 1 December 2009 the entry into force of the Treaty on the Functioning of the European Union (TFEU) 2012/C 326/01 published in Official Journal C 326, 26/10/2012, according to art. 6 (letter D) and art. 195 Title XXII of the TFEU, at the level of the European Union regulates the tourism policy, this field thus benefiting from its own legal basis. In this regulatory context, HoReCa implicitly enjoys official recognition, provided that it also benefits from non-reimbursable

achieved mainly through hotel service providers.

The hotel service provider (hotel), as a professional, company (legal entity)[5], carries out hotel activities (accommodation, public catering and other specific services)[6], in a tourist reception structure having accommodation function[7].

The activities are carried out on the basis of the hotel services contract[8] concluded between the hotel and the beneficiaries-tourists-consumers, natural/ legal persons.

2. The rights of the client/tourist consuming hotel services, regarding accommodation and/or public catering as well as other specific services, in relation to the hotel

The rights that the tourist has, in his capacity as a consumer, citizen of a

funding programs (including post Covid 19). Article 6 (d) of the Treaty on the Functioning of the European Union "The Union shall be competent to carry out actions to support, coordinate or supplement the action of the Member States. By their European purpose, these actions have the following areas: (a) the protection and improvement of human health; (b) industry, (c) culture, (d) tourism, (e) education, training, youth and sport, (f) civil protection; (g) administrative cooperation.art. 195 Title XXII on Tourism, of the Treaty on the Functioning of the European Union: 1. The Union shall complement the action of the Member States in the tourism sector, in particular by promoting the competitiveness of Union undertakings in that sector."

[5] The company is constituted and operates based on the provisions of Law no. 31/1990 on companies, republished in the Official Gazette of Romania no. 1066 of 17.11.2004, with subsequent amendments and completions (Companies Law).

[6] In accordance with the provisions of Order no. 337/20.04.2007 regarding the updating of the Classification of activities in the national economy, issued by the President of the National Institute of Statistics, published in the Official Gazette of Romania no. 293 of May 3, 2007 ("CAEN CODE"), the provision of predominant activities within the hotel industry, is found in the following caen codes: Hotels and other similar accommodation facilities - 5510; Restaurant - 5610; Event catering activities - 5621; Other food activities nec 5629; Bars and other beverage service activities – 5630.

[7] In accordance with the provisions of art. tourism - Ministry of Economy, published in the Official Gazette of Romania no. 353 bis of 14.06.2013, with subsequent amendments and completions "tourist reception structure with accommodation function means: hotels, apartment hotels, hostels, motels, tourist villas, tourist chalets, bungalows, holiday villages, campsites, rest tourist accommodation, camping houses, apartments and rooms for rent in family dwellings, river and sea vessels including floating pontoons, tourist pensions and agritourism pensions and other units with tourist accommodation functions, and tourist reception structure with public catering function means: units catering facilities within the reception structures with accommodation functions (including those that serve them), public catering units located in tourist resorts, as well as those managed by tourism companies, restaurants, bars, fast food units, confectioneries, pastry shops and which are certified according to the law".

[8] See Crenguța Leaua, *Business Law, General Notions of Private Law,* Universul Juridic Publishing House, Bucharest, 2012, p. 38 and following.

member state of the European Union (EU)[9], in connection with to the hotel services provided by the hotel, are the following:

In the context of EU legislation, European administrative law, it supports the consumer tourist in connection with the hotel services purchased.

He has the right to address the competent institutions, in defense of his rights, both judicially (through the courts) and extrajudicially.

Therefore, the consumer of hotel services has the following legal instruments:

1. to address the institutions at European level, which protect the interests of consumers, namely the European Consumer Center Romania (ECC)[10].

For this purpose, it shall benefit from the provisions of Regulation (EU) No. 2017/2394[11] on cooperation between national authorities responsible for ensuring compliance with consumer protection legislation and repealing Regulation (EC) No. 2006/2004[12].

The ECC Romania institution, part of the Network of European Consumer Centers, as a public service, has competences only in the amicable settlement of cross-border consumer disputes.

These disputes arise as a result of the purchase by the consumer tourist resident in Romania, of defective hotel products and/or/services, from a hotel-trader provider.

In this situation, the hotel is headquartered in an EU Member State other than Romania.

ECC Romania also resolves disputes resulting from the consumer's[13] purchase of defective hotel products/services from a merchant hotel that has its registered office in Romania.

ECC Romania settles amicably, only cross-border disputes between the natural consumer[14] and the hotel trader.

However, the institution does not resolve disputes between two consumers - individuals or economic operators.

As a preliminary procedure to address ECC Romania, the consumer tourist - as a plaintiff - will contact the hotel trader.

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[9] See, Ioana-Nely Militaru, *European Union Law. Chronology. Springs. Principles. Institutions. Internal Market of the European Union. Fundamental Freedoms*, 3rd edition, revised and added, Universul Juridic, Bucharest, 2017, p. 33 and following.

[10] https://anpc.ro/articol/565/ecc-romania accessed on 24.02.2022 at 16.34.

[11] From 12 of December, 2017.

[12] https://anpc.ro/articol/1024/regulamentul--ue--2017-2394-din-12-decembrie-2017-privind-cooperarea-dintre-autorit--ile-na-ionale--ns-rcinate-s--asigure-respectarea-legisla-iei--n-materie-de-protec-ie-a-consumatorului--i-de-abrogare-a-regulamentului--ce--nr--2006-2004 accesed on 24.2.2022 at 16.37.

[13] Resident in an EU Member State other than Romania.

[14] In accordance with Romanian and EU legislation, the consumer is the natural person who purchases products and services for his/her own/his family's use.

If the tourist proves to ECC Romania, the fact that he notified the merchant hotel in advance, but without receiving an answer or the answer does not satisfy the tourist's requests, ECC Romania will accept the tourist's petition.

The tourist consumer will attach to the petition, the documents proving his/her claims, for example: written order/reservation, contract, proof of payment (bank account statement), invoice, etc.

It will also attach the petition sent to the hotel merchant as well as the proof of its transmission/correspondence in relation to the hotel.

The trader's center so located, located within the network of European Consumer Centers, will analyze the consumer's petition and propose a solution[15].

2. to resolve disputes with the hotel, using the means/methods of alternative settlement of disputes (disputes) SOL. These involve reaching an agreement with the economic operator[16], without solving by means of a court settlement.

The methods involve the specialized assistance of an impartial dispute resolution body. They are also easier and more efficient compared to court proceedings.

The methods of SOL are as follows: conciliation, mediation, arbitration, ombudsman institution as well as complaints commissions.

3. to formulate notifications/complaints, in the conditions when accessing *online*, hotel accommodation services (room reservation) and is dissatisfied with the services provided by the hotel.

In this case, access to hotel services is done through a booking platform or directly on the hotel website (as an accommodation unit).

Therefore, the consumer client turns to the European Consumer Centers network[17] for advice[18], especially in pandemic situations (eg. coronavirus-covid

[15] "Failure to resolve the case due to a lack of response from the trader or his refusal to accept the amicable settlement, if it exists in the state of the Merchant Center, the transfer of the case, if necessary, to another institution authorized to take action, where it exists. If the case is rejected, the consumer will be informed of the possible means at his disposal for the settlement of the dispute, including alternative dispute resolution (ADR), the European Small Claims Procedure and the European order for payment order."

[16] https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/resolve-yourconsumercomplaint/alternative-dispute-resolution-consumers_en, accessed on 24.02.2022. In the same sense, in accordance with the provisions of art. 3 paragraph 1 letter j of GO 38/2015, "the European online dispute resolution platform, hereinafter referred to as the SOL platform - a digital tool created by the European Commission to facilitate independent, impartial, transparent, effective, fast and equitable resolution, out of court, disputes concerning contractual obligations arising out of contracts for the sale or supply of online services between a consumer resident in the Union and a trader established in the Union, in accordance with the provisions of Regulation (EU) No. 182/2011. Regulation (EC) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on the online settlement of consumer disputes and amending Regulation (EC) No. 2.006/ 2004 and Directive 2009/22/EC (Consumer SOL Regulation)".

[17] https://eccromania.ro/wp-content/uploads/2021/03/Rezervare-online-pentru-cazare.pdf accessed on 24.02.2022 at 17.00 as well as https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint_ro accessed on 24.02.2022 at 17.05.

[18] For example, for the cancellation of accommodation, reserved events, etc.

pandemic19)[19].

4. the rights of the consumer tourist, according to the following legal regulations:

a. Regulation 2017/2394[20] on cooperation between national authorities responsible for ensuring compliance with consumer protection legislation and Directive 2000/31/EC[21] on certain legal aspects of information society services, in particular electronic commerce in the internal market (Directive on e-commerce).

Their role is to protect the consumer of hotel services (within HoReCa), against breaches of EU consumer protection legislation.

This is done through cooperation between the following competent institutions: the national authorities within the EU, the countries of the European Economic Area (EEA) and the European Free Trade Association (EFTA), some of them, and these in relation to the European Commission.

Regulations help increase the confidence of professionals and consumers in e-commerce in the EU.

b. Directive 2015/2302 of the European Parliament and of the Council on package travel packages and associated travel services[22].

As tourism is an important factor in the economy of the European Union[23] and the package of tourist services (holidays, tours/travel) constitutes a significant percentage in this field, the Directive establishes the rights of the consumer regarding these packages.

Consumer rights[24] in tourist packages concern the following aspects:

- the manner of information as well as the liability of professional hotel traders, in connection with the execution of the included services,

- protection of the consumer tourist, in case of insolvency of the hotel service provider or of the organizer of these packages (for example, the travel agency).

The Directive is based on access to internet services, the environment through which tourist services are offered for sale. It offers security guarantees, from a legal point of view, both for the tourist-beneficiary of tourist services and for the hotelier-professional trader.

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[19] See Ioana-Nely Militaru, *Tourism in the European Union in the context of the Covid-19 Pandemic crisis* in Dalvinder Singh, Cristina Elena Popa Tache, Cătălin-Silviu Săraru (editors), *Looking for New Paths in Comparative and International Law*, ADJURIS – International Academic Publisher, Bucharest, Paris, Calgary, 2021, p. 219-225.

[20] From 12.12.2017, which repeals and replaces Regulation (EC) no. 2006/2004 of 17.01.2020, issued by the European Parliament and the EU Council.

[21] From 08.06.2000, issued by the European Parliament and the EU Council.

[22] From 25.11.2015, amending Regulation (EC) no. 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC.

[23] See Ioana Nely Militaru, *Protection of fundamental rights in the European Union*, „Perspectives of Law and Public Administration", 2019, vol. 8, issue 2, pp. 352-357.

[24] See Elise Nicoleta Valcu, *Sustainable development and sustainable tourism in the European Union*, „The Annals of the Stefan cel Mare University of Suceava. Fascicle of the Faculty of Economics and Public Administration", vol. 9, 2009, Issue Special, pp. 12-22.

c. Directive 2000/31/EC[25] of the European Parliament and of the Council on certain legal aspects of information society services, in particular those of electronic commerce, in the internal market (referred to as the "e-commerce directive"),

d. Directive 2019/2161[26] of the European Parliament and of the Council on ensuring compliance with and modernization of EU consumer protection rules, Directive 2005/29/EC[27] of the European Parliament and of the Council on unfair business-to-consumer commercial practices in the internal market (referred to as the "Unfair Commercial Practices Directive").

5. Public administration authorities and the business environment. State and legal protection of the consumer. Alert in the public interest (of integrity), for legal persons under private law - hotel service providers at the level of the European Union

In the business environment, in the context of hotel services, in the field of tourism, illegal activities and abusive practices can be reported. These are in the form of unfair commercial actions, threats or harm to the public interest, caused by recklessness, negligence.

In the case of hotel business, employees of the hotel or those who have direct contact with the hotel, based on their professional activities, become aware as a matter of priority, in connection with possible illegal activities[28].

Therefore, the above-mentioned persons are entitled to inform in a timely manner the management bodies, the decision-makers of the hotel provider, in order to make decisions favorable to his organization as well as to his consumer customers.

Persons who report or communicate, to the organization to which they belong (including another competent external authority), information obtained in a professional context, regarding the conduct of an illegal activity, are called whistleblowers of integrity.

Through this method, the whistleblowers of integrity, as a supervisory institution, of the economic consumer market, thus help to prevent possible damage to the public interest.

To this end, the European Commission has adopted a Directive[29] on the

[25] From 08 of June, 2000.

[26] Since 27.11.2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council.

[27] From 11.05.2005, and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC, of the European Parliament and of the Council and of Regulation (EC) no. 2006/2004 of the European Parliament and of the Council.

[28] Pursuant to Article 1 of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019.

[29] In accordance with the provisions of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons reporting infringements of Union

protection of whistleblowers of integrity who report breaches of European Union (EU) law, in order to protect the public interest at European level.

The Directive ensures the establishment of easy institutional reporting channels. They have the following obligations: to maintain the confidentiality of the information transmitted by whistleblowers, to prohibit retaliation against such persons, to establish protective measures in this regard.

EU Member States are required to transpose the said Directive into national law[30] on the establishment of internal channels within the framework of legal entities governed by private law.[31]

The Directive is currently being transposed into national legislative (Chamber of Deputies)[32].

The professional trader-provider of hotel services (legal person under private law) must prevent incorrect actions, which can cause serious harm to both the public interest and his organization, including the relationship between the organization and the tourist customer consuming hotel services and products. It must therefore adopt a series of internal measures and procedures.

In this regard, it shall designate, within its organization[33], a person appointed as a worker (according to EU law)[34] with the status of a public interest

law, it was adopted on 23 October 2019, published in L 305/17 of 26.11.2019 and entered into force on 16 December 2019. See in the same vein https://eur-lex.europa.eu/legal-content/RO/ALL/ ?uri=CELEX:32019L1937 accessed on 01.03.2022 at 16.50 .

[30] Until 17 of December, 2023.

[31] Institutions with between 50 and 249 employees.

[32] Romania, as a member state of the European Union since 01.01.2007, according to https:// european-union.europa.eu/principles-countries-history/country-profiles/romania_en, accessed on 01.93.2022. Also, according to http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp =19690, accessed on 17.03.2022 at 13.30. The legislative proposal is also based on the provisions of Law no. 571/2004 on the protection of personnel from public authorities, public institutions and other units that report violations of the law, published in the Official Gazette of Romania no. 1214 of 17.12.2004.

[33] In this regard, the organization, which has at least 50 employees, has the obligation to identify, establish, internal reporting channels, to be made available to whistleblowers, for the areas mentioned in the Directive. Also, the conditions for determining whether a private entity is under the obligation to identify/establish internal reporting channels can be found in the User Manual prepared by the European Commission - the definition of small and medium enterprises (SMEs) - number of employees, according to https://ec.europa.eu/docsroom/documents/ 42921/attachments /1/translations/ro/renditions/native, accessed on 01.03.2022.

[34] According to the provisions of point 38 of the Directive, the persons who have the status of "workers", within the meaning of art. 45 para. (1) of the Treaty on the Functioning of the European Union (TFEU), as interpreted by the European Court, are those who, for a certain period of time, provide services to and under the direction of another person, in return for whom they receive remuneration. Therefore, protection should also be granted to workers in atypical employment relationships, including part-time workers and workers with a fixed-term individual employment contract, as well as to persons who have concluded an employment contract or employment relationship. work with a temporary agent, which are types of precarious relationships in which standard forms of protection against unfair treatment are often difficult to apply. The concept of "worker" also includes civil servants, civil servants and any other person working in the public sector.

whistleblower[35], responsible for reporting information on illegal activities that are detrimental to the public interest.

Thus, the whistleblower must have good reason to believe that the information provided at the time of reporting is true in order to prevent malicious or abusive reporting.

The public interest whistleblower integrity will report information in the following areas: public health and consumer protection, safety of food products and services provided/provided to the consumer (food safety), prevention and combating money laundering and terrorist financing, protection of privacy and personal data personnel, security of network and information systems, according to the object of activity of the organization.

By his acts and facts, the whistleblower contributes to the following:

- guaranteeing the well-being of a society and its citizens as well as the organization of the hotel service provider,

- ensuring the ethics[36], good faith and fairness of the provider in its contractual relationship with the customer- consumer of hotel products and services.

It also plays an important role in preventing, exposing and reporting all illegal activities, which are in breach of European Union law, which harm the public interest and welfare.

In this respect, we consider that it also has the function to prevent the occurrence of disputes/conflicts/litigations caused by such illegal activities, including in the HoReCa sector.

6. Conclusions

By implementing of all these legal instruments (regulations, directives, etc.), at the level of the European Union and implicitly at the national level, we consider that the reporting methods of the targeted areas, including the HoReCa sector, will be considerably improved and streamlined.

This will increase the possibilities for detecting, preventing and deterring infringements. Disputes between the Contracting Parties shall also be settled amicably by means of alternative methods of settlement.

In the same context, in order to exercise its powers, the integrity warning will have a strong impact on the consumer and economic environment, thus protecting, from a legal perspective, both the interests and business of the hotel service provider and those of the beneficiary-consumer of services.

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[35] This category also includes "natural persons who assist the whistleblower in the reporting process in a professional context and whose assistance should be confidential - provided by the project as facilitators, third parties who have links with the reporting persons and who should retaliation in a professional context (such as colleagues or relatives of the reporting staff), as well as the legal entities that the reporting staff owns, a professional context".

[36] See Gheorghe Piperea, *Contracts and commercial obligations*, C.H.Beck Publishing House, Bucharest, 2019, pp. 110-114.

In this respect, reporting by whistleblowers is key to reducing, preventing and eliminating any risks arising from breaches of EU rules. These refer to consumer protection, which has direct implications for public health.

Therefore, we consider that the transposition by Romania (as an EU member state), in the internal legislation, of the Directive on the establishment of internal channels, within the organizations - legal persons of private law, represents a legislative priority.

The national legislation, through its internal rules, on the protection of whistleblowers, has the following advantages:

- brings benefits to the business investment environment and at the same time intensifies the trust in the public institutions of the state;

- develops transparency, accountability and facilitates the fight against acts and acts of corruption;

- provides citizens (as Europeans) with the legal certainty of the necessary protection, while at the same time providing assurance to potential whistleblowers, thus encouraging them to report.

The protection of integrity whistleblowers is necessary to improve the application of EU law, with regard to ensuring compliance with the law and with regard to the conduct of public procurement procedures.

They are carried out both by the national contracting authorities and by the contracting entities, which are also applicable to the field of tourism (provision of accommodation and catering services or provision of goods related to them)[37].

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[37] See Cristina Elena Popa Tache, *How can be affected international investment by the reaction of states during crises?*, in Sónia de Carvalho, Anton Petričević (editors), *Building an Adapted Business Law (Contributions to the 11th International Conference Perspectives of Business Law in the Third Millennium, November 19, 2021, Bucharest)*, Adjuris – International Academic Publisher, Bucharest, Paris, Calgary, 2022, p. 12.

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The dilemmas of the judicial review of economic administration on the example of Polish law

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Abstract

The article deals with the problem of the judicial review of economic authorities in Polish law. The analysis of constitutional provisions warrants the conclusion that such control may be exercised by both common courts and administrative courts, despite the fact that each is governed by different systemic and procedural regulations. In fact, the judicial review of economic administration in Poland has been exercised by both types of courts, although the legitimacy of this dual solution is questioned in the literature.

Keywords: *Polish law, judicial review, economic administration, administrative courts, common courts.*

JEL Classification: K21, K23

1. Introduction

Modern standards of governance aptly recognize the need for regulating the mechanism of judicial review of administrative actions. Economic administration is a special branch of public administration dealing with the implementation of relevant economic tasks and of economic policy at large. In the Polish legal doctrine, attention is drawn to the fact that legitimacy and a sense of duty do not suffice to ensure the efficiency of economic administration and must be accompanied by purposefulness and resourcefulness[2]. The question is, how is the model of the judicial review of economic administration regulated in Polish law?

2. Materials and methods

To answer the question formulated above, several independent factors must be analyzed. Firstly, the structure of the judiciary system in Poland must be determined, followed by an examination of whether the systemic regulations provide for one type of courts or whether special administrative courts have been established to review administrative actions (including economic). Secondly, in the event of identifying the pluralism of the judiciary, it would be necessary to explore what distinguishes (through the prism of court proceedings regulations)

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[2] K. Kiczka, *Administracja gospodarcza – pojęcie* [w:] System prawa administracyjnego. T. 8a: Publiczne prawo gospodarcze, ed. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2013, 528-541.

common courts from administrative courts. Finally, it would seem justified to consider whether and why a particular type of courts is better suited to review economic administration.

The specificity of these problem questions requires a review of normative acts as well as familiarization with the relevant stance of the doctrine. Hence, a great part of the research materials are derived from Polish law and the literature.

2.1. The judiciary system in Poland and jurisdiction in the scope of economic administration review

Let us note that the judiciary system in Poland envisages the co-existence of common and administrative courts. Although the administration of justice in Poland is also exercised by military courts, their role in the structure of the justice system is irrelevant to deliberations concerning judicial review of economic authorities. However, a question arises whether the provisions of the Constitution of the Republic of Poland specify the relationship between the extent of jurisdiction of common courts and administrative courts in the scope of their review of economic authorities. Art. 175 of the Constitution of the Republic of Poland[3] merely indicates that the administration of justice is to be implemented by common courts, administrative courts and military courts. However, in art. 177 of the Constitution we read: „the common courts shall implement the administration of justice concerning all matters save for those statutorily reserved to other courts."

It follows from the cited provision that in all matters not directly attributed to the jurisdiction of courts other than common courts, the jurisdiction is to rest with the common courts. This prompts the argumentation that common courts have presumed competence under Polish constitutional law[4]. This presumption of competence, despite appearances to the contrary, does not rule out the competence of common courts in matters of the judicial review of administrative bodies, including economic. In order for any category of matters to fall beyond the scope of jurisdiction of common courts, a clear legal basis is necessary which excludes the presumption indicated above. Importantly, the constitutional law merely confirmed that administrative courts - in what concerns the review of public administration - are competent only to the extent specified by statute. The above stems from art. 184 of the Constitution, which states: „the Supreme Administrative Court and other administrative courts shall exercise, to the extent specified by statute, control over the performance of public administration. Such control shall also extend to judgments on the conformity to statute of resolutions of organs of local government and normative acts of territorial organs of government administration."

[3] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U. Nr 78, poz. 483 z poźn. zm.).

[4] Postanowienie Naczelnego Sądu Administracyjnego z dnia 23 lutego 2018 r., I OSK 2796/17, Legalis.

This means that, under the Polish constitutional law, judicial review of public decisions, including those taken by economic administration, is also subject to the presumed jurisdiction of common courts. The administrative judiciary exercises control over public administration only to the extent specified by statute. Thus, it is rightly pointed out in judicial practice that the competence of administrative courts includes only those matters in which special provisions envisage judicial review of public administration by these courts[5].

Having said that, the provisions of the Constitution are not the only ones worth citing. Considering the above-mentioned division of competence between common courts and administrative courts, a significant statutory change can be observed. According to art. 3 § 1 of the Act of 30 August 2002 - Law on Proceedings Before Administrative Courts[6], it is the administrative courts that exercise control over the performance of public administration, and thus also that of economic authorities. If, however, the administrative court were to consider itself inapt to recognize a case necessitating the review of actions taken by economic administration, Polish law provides for a mechanism to protect an individual's right to a trial. According to art. 199[1] of the Act of 17 November 1964 - Code of Civil Procedure[7], "[t]he court may not reject the application on the ground that it is the competent authority of the public administration or the administrative court to hear the case, if the public administration or the administrative court has been found to be inappropriate in that case".

2.2. Judicial review of economic authorities and judicialization

Regardless of whether a specific action of economic authorities is subject to review exercised by common courts or administrative courts, it should be emphasized that administrative proceedings pending before such authorities are marked by judicialization in the scope of appeal. The above results from the view that subjecting the actions of administrative bodies to judicial review reflects judicialization of administrative proceedings, which, in addition to the previously indicated meaning, consists in establishing judicial control over the legitimacy of administrative decisions aimed at ensuring impartial verification of administrative bodies and implementation of guarantees for the protection of the rights of individuals on the grounds of proceedings based on the adversarial system (disputes between an individual and an authority)[8]. Subjecting the decisions of economic authorities to judicial review is "a manifestation of the exercise by the

[5] E.g. Postanowienie Naczelnego Sądu Administracyjnego z dnia 27 maja 2011 r., I OSK 1314/10, Legalis.
[6] Ustawa z dnia 30 sierpnia 2002 r. – Prawo o postępowaniu przed sądami administracyjnymi (Dz.U. z 2022 r. poz. 329 z późn. zm.).
[7] Dz.U. z 2021 r. poz. 1805 z późn. zm.
[8] R. Suwaj, *Sądowa kontrola działań administracji publicznej jako przejaw judycjalizacji postępowania administracyjnego*, „Studia Prawnoustrojowe" 2009, no. 9, p. 199 et seq.

legislator of the constitutional right to a trial, to the extent to which the decisions of administrative bodies […] may interfere with the interests of the individuals who are addressees of these decisions. Moreover, judicial review of the authorities [...] is a form of subjecting the latter to social responsibility and accountability [...], and therefore it is one of the forms of legitimizing the actions of these bodies, which is an absolutely crucial component of a democratic state under the rule of law"[9]. At this point let us note that the need stipulated in Polish law to subject decisions of administrative authorities, including economic, to court review derives not only from art. 45 sec. 1 of the Constitution, which guarantees the right to a trial[10], but also from the provisions of EU law and public international law.

2.3. The differences and similarities between common and administrative courts in Poland

First and foremost, let us recall that common courts and administrative courts in Poland, already differentiated on the basis of constitutional provisions, are also subject to separate constitutional laws. While the structure and basic principles governing common courts fall under the Act of 27 July 2001 - Law on the System of Common Courts[11], a separate normative act was devoted to determining the organization of administrative courts, namely the Act of 25 July 2002 - Law on the System of Administrative Courts[12]. However, it should be noted that the latter act is not comprehensive, and although it includes certain provisions establishing a system of administrative courts and the role of administrative-court judges and other court employees, it cannot be considered exhaustive. The Common Courts Act is more detailed, and to avoid duplicating the relevant provisions in the Administrative Courts Act, art. 29 § 1 in the latter references the former as follows: "Any matters not regulated by the Act related to voivodeship administrative courts as well as judges, court assessors, senior court referendaries, court referendaries, senior judge assistants, and judge assistants shall be governed by appropriate provisions concerning the system of courts of general jurisdiction".

Due to this dual nature of the judiciary system in Poland, administrative courts have - as a rule - a more thorough substantive background to recognize whether in the proceedings before an economic authority the general principles of administrative proceedings, or the specific rules of hearings involving entrepreneurs (regulated in the Act of 6 March 2018 - Entrepreneurs' Law[13]), have

[9] M. Szydło, *Judycjalizacja unijnej i polskiej polityki konkurencji: W kierunku rewizji obecnego paradygmatu*, [w:] *Prawo konkurencji. 25 lat*, ed. T. Skoczny, Warszawa 2015, p. 80.
[10] That means "the right to a fair and public hearing without undue delay by a competent, independent, impartial and independent court" regulated in Article 45 par. 1 of the Constitution of the Republic of Poland - Z. Czeszejko-Sochacki, *Prawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej (ogólna charakterystyka)*, PiP 1997, no. 11-12.
[11] Dz.U. z 2020 r. poz. 2072 z późn. zm.
[12] Dz.U. z 2021 r. poz. 137 z późn. zm.
[13] Dz.U. z 2021 r. poz. 162 z późn. zm.

been observed. It follows from the above that is it the administrative courts that are objectively specialized[14] to control the performance of economic-administration bodies, whereas common courts exercise this control as a matter of exception.

Possible proceedings concerning the review of administrative actions fall under civil proceedings, which is why common courts - as a rule - are examined under civil proceedings regulated by the provisions of the Act - Code of Civil Procedure. Meanwhile, the proceedings before administrative courts are regulated in the Act - Law on Proceedings Before Administrative Courts.

Common courts rule fully on the merits, examining the factual basis and making a legal assessment in line with the adversarial system. Meanwhile, in proceedings before administrative courts, review of administrative actions consists in the assessment of the legitimacy of an economic activity[15]. However, administrative courts use the legitimacy criterion to assess not only the correct application of substantive law but also the lawful conduct of the proceedings by the administrative authority (art. 145 § 1 of the Act - Law on Proceedings Before Administrative Courts). The control exercised by administrative courts also covers the adherence to the principle of objective truth by the administrative authority. Moreover, the decision of the authority appealed against to the administrative court is subject to examination within the limits of a given case, where the administrative court is not bound by the allegations or motions of the complaint and the legal basis provided (art. 134 § 1 of the Act - Law on Proceedings Before Administrative Courts). Having said that, administrative courts do not - as a rule - conduct evidentiary hearings (with the notable exception of documentary evidence - art. 106 § 3 of the Act - Law on Proceedings Before Administrative Courts). This necessity to supplement the evidentiary proceedings prompts the annulment of the judgment appealed against, consequently committing the administrative authority to appropriate evidentiary proceedings.

Proceedings before an administrative court do not normally allow for amending the contested ruling. However, administrative court proceedings are no stranger to the regulation stipulating that the administrative court may grant the complaint against an administrative decision or order by revoking the contested judgment (art. 145a § 1 of the Act - Law on Proceedings Before Administrative Courts). Moreover, in their ruling, administrative courts render a specific legal assessment that is binding on the authority in a given case (art. 153 of the Act - Law on Proceedings Before Administrative Courts).

The difference between common and administrative courts also concerns the composition of judges. In administrative courts, adjudication is entrusted to a panel of three judges (art. 16 § 1 of the Act - Law on Proceedings Before Administrative Courts). Meanwhile, in the proceedings before the common court (in the

[14] A. Piszcz, *Competition Law in Comparative Perspective*, Białystok 2011, p. 51.
[15] Wyrok Naczelnego Sądu Administracyjnego z dnia 9 grudnia 2016 r., II GSK 1384/15, LEX.

first instance), only one judge recognizes cases (art. 47 § 1 of the Act - Code of Civil Procedure), with the three-judge composition being reserved for appeals against the judgment (art. 367 § 3 of the same Act).

3. Discussion

Despite having examined the regulations concerning the entrustment of judicial review of economic authorities under Polish law, let us bear in mind that, considered from a broader perspective and based on the analysis of other systems of domestic law, the conclusion can be drawn that in practice there are several models of economic-activity control. Essentially, a model of administrative control exercised by administrative courts or by specialized units acting under common courts can be distinguished[16]. However, even in legal systems that provide for the former, the rules of proceeding and the scope of rulings vary markedly[17]. This begs the question whether the control of economic administration really requires the separation of a specialized administrative judicial body or whether this control might as well be exercised by common courts.

Does Polish law provide guidance on how to answer the question just posed? Apart from the theoretical indication that economic authorities may be subject to review in Poland alternatively by administrative courts or common courts, it should be emphasized that the vast majority of judicial review of such bodies has so far been entrusted to the former[18]. However, a notable example of an economic authority subject to review from common courts is the President of the Office of Competition and Consumer Protection (UOKiK)[19]; namely, the party may appeal against decisions taken by this body to a common court - the Court of Competition and Consumer Protection (SOKiK) as the court of first instance. Moreover, the judgment of this court may be appealed against, with extraordinary means of appeal provided for in civil proceedings[20].

Proceedings before the Court of Competition and Consumer Protection follow the adversarial system, which reveals a different approach to case recognition by common courts on one hand and administrative courts on the other.

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[16] J.-M. Woehrling, *Judicial Control of Administrative Authorities in Europe: Toward a Common Model*, "Hrvatska Javna Uprava" 2006, br 6, pp. 35-56.

[17] A. Skoczylas, *Modele uprawnień orzeczniczych sądów administracyjnych w Europie*, „Państwo i Prawo" 2012, nr 10, p. 21 i n.

[18] L. Kieres, *Ochrona interesu przedsiębiorcy w ramach sądownictwa cywilnego i administracyjnego,* [in:] *System prawa administracyjnego. T. 8a: Publiczne prawo gospodarcze*, ed. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2013, p. 823 i n.

[19] O tym organie zob. R.R. Wasilewski, *Term of office as an indicator of independence of the antitrust authority in the implementation of the ECN+ Directive: experiences of Polish law and of the Polish antitrust authority*, [in:] S. de Carvalho, A. Petričević (ed.), *Building an Adapted Business Law*, ADJURIS - International Academic Publisher, Bucharest, Paris, Calgary, 2022, p. 303 i n.

[20] R.R. Wasilewski, *Postępowanie dowodowe przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów*, Warszawa 2020, p. 321 i n.

Thus, a party to the proceedings - in the current model of appeal - is burdened with a number of procedural obligations related to the specificity of civil proceedings. In particular, the appealing party is obliged to formulate certain allegations (art. 479^{28} § 3 of the Act - Code of Civil Procedure), whereas in administrative court proceedings - as a rule - the complaint against an authority's decision is subject to review within the scope of a given case and the administrative court is not bound by the allegations and implications of the complaint or the legal basis invoked.

Having said all that, such specific procedures for the control of economic administration by common courts are sometimes criticized in legal discourse and there are postulates in the doctrine arguing that any review of economic administration should be entrusted only to administrative courts[21].

4. Conclusions

Currently in Polish law, on the basis of constitutional regulations, the judicial review of administrative actions, including those economic, may be exercised by both common courts and administrative courts. Although from the perspective of the constitutional provisions the presumption of jurisdiction for the administration of justice applies to common courts, the statutory provisions indicate that the review of administrative actions is normally the domain of administrative courts, with the judicial review of economic authorities by common courts constituting an exception. Not only are common courts and administrative courts governed by different provisions, they also hear cases following different procedural rules. While the proceedings before common courts are governed by the civil, adversarial procedure, administrative courts exercise control on the basis of provisions concerning administrative court proceedings, assessing administrative actions through the prism of the sheer legitimacy of such decisions. The different systemic and procedural regulations result in the lack of unanimity as to whether the review of economic authorities should be exercised by common courts or separate administrative courts. However, the example of Polish law demonstrates that this type of control within the scope of one legal system may be exercised by both types of courts in parallel.

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[21] Ibidem, p. 337 et seq.

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Moral damages in comparative administrative law

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Abstract

At present, the national legislation does not provide criteria for assessing the moral damages for prejudice suffered by the victim of an activity of the administration. In this sense, the judge will be the one who will analyze on a case-by-case basis whether he will grant moral damages and in what amount. We are currently witnessing an interference of civil law with administrative law regarding the forms of administrative-patrimonial liability. From this perspective, the present paper aims to analyze the case-law of French law in order to outline such a tendency of the judge, whether from the Administrative Court or the Council of State, on whether or not to grant moral damages arising from the idea of risk in the activity of public administration. Through law-specific research methods, we will investigate two current cases that can provide an insight into the contribution of case-law to shaping the legal regime of administrative liability. This highlights the way in which the administrative judge grants moral damages if the state is held liable sans faute. From this point of view, the topic is interesting for legal specialists who will find in this paper information about the practical applicability of the concept of administrative liability.

Keywords: *administrative law, the Council of State, liability, moral damages, public service.*

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JEL Classification: K23

1. Introduction

This study analyzes the administrative-patrimonial liability, continuing the observation of the relatively recent case-law in French administrative law. If in a previous paper mediated case was presented which established the liability of the state for environmental damage and we refer to the "Business of the Century" (*L'Affaire du Siecle*) before the Administrative Court of Paris which settled the case on February 3, 2021, this time we develop the analysis of the liability of the state[2], by proposing other recent cases. In fact, as the doctrine points out, "administrative law has a peculiarity: originally, it is the work of the judge[3]".

The presentation of cases which have in common the grant of compensation for moral damages suffered by the plaintiffs, such as the long-term exposure

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[2] See also Georges Vedel and Pierre Delvolve, *Droit administratif*, Presses Universitaires de France, 1958, Chapter IV: „*La responsabilite de l'Administration et de ses agents"*, p.446 et seq.

[3] Clemence Barray and Pierre-Xavier Boyer, *Droit du contentieux administratif*, Gualino, Lextenso, 2020, p.17.

to asbestos of a civil servant or the death of a person present at a demonstration repressed by the gendarmes by using exceptional methods, gives us a picture of current issues decided by the judge.

Moreover, the French doctrine also analyzes administrative liability, for example: the liability of the state for unconstitutional laws[4] or the foundations of liability sans faute in administrative law[5]. We should not be surprised that we are currently witnessing an evolution of concepts that are in a continuous transformation and adaptation to new realities, blending harmoniously with digitalization[6]. In the same train of ideas, the concept of liability cannot remain static as long as new forms of liability appear, detached from the dynamics of social life. In this regard, we note a concern of our doctrine that points very well to a reality: "the proliferation of forms of legal liability means detachment from the traditional concept of legal liability, especially from the general law of private liability which legally punishes illegal behavior[7]".

Therefore, the scope of this study, through its two sections, is to capture the tendency of the administrative judge regarding the granting of moral damages in case of administrative-patrimonial liability of the state, by analyzing some cases from the comparative law[8].

2. Content of the paper

2.1. Legality - interest - prejudice. The point of view of administrative doctrine

We cannot ignore the role that traditions and values play in state systems. In this sense, our doctrine observed a very interesting idea: "each state, each branch of law is specific to certain institutions and traditional principles that define its identity and have played a key role in their evolution as branches of law and social relations that regulates them[9]".

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[4] Teo Ducharme, *La responsabilite de L'Etat du fait des lois declarees contraires a la Constitution*, LGDJ, 2019, 564 p.

[5] Benoit Canguilhem, *Recherche sur le fondements de la responsabilite sans faute en droit administratif*, Dalloz, 2014, 490 p.

[6] See also Augustin Fuerea, *Dimensiunea juridică europeană a globalizării în era digitală,* in the collective volume In Honorem Viorel Roș. *Studii de Drept Privat și Public*, coordinators Ciprian Paul Romițan and Paul-George Buta, Hamangiu Publishing House, Bucharest, 2021, p.57.

[7] Mihai Bădescu, *Legal liability through the prism of the new conceptual mutation*, „Juridical Tribune – Tribuna Juridica", Volume 7, Issue 2, December 2017, p.118.

[8] See Cristina Elena Popa Tache, *Administrative Review and Reform Movements from the Perspective of International Investment Law*, in Julien Cazala, Velimir Zivkovic (eds.), *Administrative Law and Public Administration in the Global Social System*, ADJURIS – International Academic Publisher, Bucharest, Paris, 2021, p. 215.

[9] Verginia Vedinaș, *Quo vadis administrative law*, „Juridical Tribune – Tribuna Juridica", Volume 8, Issue 2, December 2018, p. 391.

In addition to traditions and principles, we cannot ignore the legality[10] that we value as a social imperative, and states have ever-present concerns about criminalizing violations of the law in any area of social life. In the opinion of the authors Georges Vedel and Pierre Delvolve legality is "the quality of being in accordance with the law[11]". "The principle of legality applied to the administration expresses the rule according to which the administration must act in accordance with the law[12]". As our doctrine points out, "at European Union level, the European Administrative Law Research Network (ReNEUAL) has developed (….) the Code of Administrative Procedure for the European Union[13]". From this point of view, it would be helpful for our legislator to take care to regulate in many more areas than he has done so far. For example, in our country the Administrative Code has been adopted but the Code of Administrative Procedure is pending.

We cannot ignore the important moment in the history of administrative law in France, regarding the recognition of the state's liability for damages. According to Rene Chapus, "the autonomous formula of the Blanco decision clearly dominated the public liability regime[14]". On the other hand, Emmanuel Aubin states that: "after the 1973 Driancourt decision, illegality is a crime and can be held liable by the administration[15]".

In national law, this form of liability that allows the granting of compensation falls within the administrative-patrimonial liability, regulated by the Administrative Code and is combined with the civil liability under the aspect of the mechanism for granting damages. According to the doctrine, "such liability may be material or moral, we would say "or/and moral"- and is exclusive to the public authority or institution, and although the Code does not provide, it is the public

[10] See also Ulrich Stelkens, *La question initiale: combien existe-t-il de principes de legalite en droit de l' Union europeenne?,* RFDA no.2/2022, p.199; Bennoit Pressix, *Le principe de legalite en droit administratif francais*, RFDA no.2/2022, p. 206; Anne Jacquemet- Gauche, *Le principe de legalite en droit administratif allemand*, RFDA no. 2/2022, p.217. Maria Kordeva, *Perspectives allemandes sur le principe de legalite: la theorie de la decision substantielle dans la case-law de la Cour constitutionnelle federale*, RFDA no. 2/2022, p. 223; Cristina Fraenkel-Haeberle, *Le principe de legalite en droit administratif italien*, RFDA no. 2/2022, p. 229; Emanuel Slautsky, *Le principe de legalite en droit administratif belge*, RFDA no. 2/2022, p. 235; Yseak Marique, *Le principe de legalite en droit administratif anglais: un concept «flou» face aux transformations de l'action administrative*, RFDA no. 2/2022, p. 241.

[11] Georges Vedel and Pierre Delvolve, *op.cit.*, p.373.

[12] *Ibidem*, p.374.

[13] Cătălin Silviu Săraru, *Considerations on the sources of Romanian administrative law. The need to codify the rules of Romanian administrative law*, „Juridical Tribune – Tribuna Juridica", Volume 7, Issue 2, December 2017, p. 234.

[14] Rene Chapus, *Droit administratif general*, Tome 1, 4 èdition, Montchrestien, 1988, p. 760.

[15] Emmanuel Aubin, *Droit administratif. 190 mots cles definis et expliques*, Gualino editeur, Lextenso editions, 2017, p.87.

authority or institution providing public service[16]". It is also observed: "The prejudice consists in the damage for an administration, a public agent or a third party through the action of the public power[17]".

On the other hand: "The right to compensation for damage can be recognized only if the conditions for incurring liability are met. There must be damage which is a direct consequence of the act considered harmful[18]." At the same time: "Administrative liability may be incurred without fault when there is a presumption of guilt which requires the administrative authority to prove that the actions or inactions were not at fault[19]".

Moreover, both French law and case-law recognize the right to material and moral damages. Regarding moral damages, Rene Chapus stated that "these are in terms of feelings[20]" and "moral pain consists in harming the feelings of affection for a person whose harmful act (for example) caused death[21]."

2.2. Recent developments in French case-law on administrative liability

By selecting the cases we present, we will try to emphasize the administrative judge's view on whether or not to grant moral damages and in what amount. Regarding the action in administrative litigation, Constantin Rarincescu stated that: "an interest derived from the violation of a right, which action brings some general advantage or profit, and not to be limited only to a statement of principles, which could not be of any use to him[22]". The plaintiffs in the selected cases therefore justified the interest in promoting those actions.

Case No. 1 - The Administrative Court of Toulouse on 25 November 2021 ruled in a case aimed at establishing state liability in the event of the death of a 21-year-old man, due to a grenade thrown by a gendarme at a demonstration against a dam, a demonstration in which the young man participated. In this case, moral damages were granted to the young man's relatives, in a total amount of 46,400 euros:

- 14,000 euros for each of the two parents;
- 9,600 euros for his sister;

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[16] Verginia Vedinaș, *Codul administrativ adnotat. Noutăți. Examinare comparativă. Note explicative*, second edition, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2020, p. 429.
[17] Emmanuel Aubin, *op. cit.*, p. 73.
[18] Rene Chapus, *op.cit.*, p. 764.
[19] Emmanuel Aubin, *op. cit.*, p.88.
[20] Rene Chapus, *op. cit.*, p. 766.
[21] *Ibidem.*
[22] Constantin Rarincescu, *Contenciosul administrativ român*, second edition, Universul Juridic Publishing House, Bucharest, 2019, p. 242.

- 4,000 euros for each of the two grandparents[23].

The issue examined by the Administrative Tribunal referred to: the sans fault liability of the state through the use by the gendarmerie forces of a weapon that carries exceptional risks. For the reasons of the decision, we note:

- "where police personnel have used weapons or machines which present exceptional risks to persons and property, public liability shall be incurred in the absence of fault, even if the damage caused by such circumstances exceeds, by their gravity, the tasks must normally be borne by individuals in return for the benefits of this public service"[24]. "However, the same is not true for damage suffered by persons or property foreign to the police operations that caused them[25]".

Regarding the *sans faute* liability of the state based on art. L 211-10 of the Internal Security Code[26], the administrative judge establishes the following:

- "These provisions cover not only the damage caused directly by the perpetrators of these offenses or contraventions but also those which may lead to measures taken by the public authority to restore order[27]".
- "The court found that the young man's death was the direct and safe consequence of the explosion in contact with an OF F1-type offensive grenade fired by an officer of Platoon Charlie, Reole Squadron in the context of the violent clashes that took place at Sivens on the night of 25-26 October 2014[28]".
- "The prejudice claimed by the plaintiffs is the result of a measure taken by the public authorities to restore order in the violent clashes, bringing together at least 100 demonstrators who are part of the extension of the event organized for the grand assembly scheduled for the weekend of 25 and 26 October 2014 by a group of associations to protest against the Sivens Dam project[29]".

Regarding the remedy of the prejudice, the court ruled: "Given the unexpected nature of the young man's death at the age of 21 and the particularly tragic circumstances of this drama, a fair assessment will be made of the moral damage suffered by the plaintiffs by granting compensation[30]". In fact, this case is the expression of what was stated in the French doctrine about the sans faute liability of the state: "liability is committed in the absence of guilt. It is a full-fledged

[23] Tribunal Administratif de Toulouse din 25 noiembrie 2021, no. 1805497, available online at https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2021/12/ta_toulouse_25-11-2021_1805497.pdf, accessed on 02.05.2022 (*emphasis added - the translation belongs to me*).
[24] See also Gilles Pellissier, *Injonction et dommages de travaux publics*, RFDA no.1/2020, p.121.
[25] Page 5 par.2.
[26] Art. L 211-10 of the Internal Security Code: "The State is civilly liable for damage and prejudices resulting from crimes and offenses committed by force or violence in armed or unarmed crowds or assemblies, either against persons or against their property (…)", available online at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038382940/, accessed on 01.05. 2022 (*emphasis added - the translation belongs to me*).
[27] Page 5 par.4.
[28] Page 6 par.6.
[29] Pages 6-7, par.6.
[30] Page 10, par.17-19.

liability by virtue of the damage caused[31]".

Under German law, "if the regulators and the police act illegally, they are required to compensate the victim. Liability with guilt (*Amtshaftung)* is generally excluded from police law[32]". „Although this regime is favorable to the victim, in that it allows a full remedy of the prejudice suffered, its implementation is required[33]".

Case no.2.- The Council of State[34] has ruled several times on the damage for occupational exposure to asbestos, which is also known as anxiety damage[35]. The problem is extremely important, current, because in 1997 the use of asbestos was banned in France[36], as it appears from an official report[37], being considered dangerous to health and currently there are European concerns in this area. The liability of the state in this case was analyzed considering its quality of employer.

Thus, in 2017 the Council of State[38] ruled in the case in which the plaintiff asked the Toulon Administrative Court to order the State to pay him compensation for moral prejudice and life damage suffered as a result of exposure to asbestos dust in the shipbuilding department in Toulon[39]. The plaintiff was exposed to asbestos for over 31 years as a maintenance mechanic, in charge of dismantling, repairing and reconditioning weaponry equipment on board asbestos-containing ships[40] and obtaining court compensation.

In another case, pending before the State Council and completed recently, on 28 March 2022, it refers to the claim for damages filed by a person who worked for several years in the national navy and was exposed to asbestos.

We note briefly, the reasons of the court decision:

- "it is certain that asbestos was commonly used as insulation in ships in the French Navy, built until the late 1980, to insulate both pipes and certain walls and equipment on board, that these asbestos materials tended to disintegrate due to the physical constraints imposed on these materials, heat, aging insulation, or

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[31] Rene Chapus, *op.cit.*, p. 827.

[32] Anne Jacquemet-Gauche, *Droit administratif alemand*, Presses Universitaires de France, Humensis, 2022, p. 426.

[33] *Ibidem.*

[34] See also Edouard Dubout, *Le Conseil d'Etat, juge constitutionnel europeen*, RFDA no. 2/2020, p. 297.

[35] See also Mateo Bartolucci, *Le prejudice d'anxiete en droit public*, RFDA no.1/2018, p. 153.

[36] Decree no. 96-1133 of 24 December 1996 on the prohibition of asbestos, implemented by the Labor Code and the Consumer Code, available online at https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000734637, accessed on 02.05.2022. (*s.n. the translation belongs to me*).

[37] *La drame de l'amiante en France: comprendre, mieux reparer, en tirer des leçons pour l'avenir (rapport)*, available online at: https://www.senat.fr/rap/r05-037-1/r05-037-175.html#fn71, accessed on 02.05.2022.

[38] See also Vincent Villette, *La responsabilite de l'Etat du fait des controles de securite. Le cas de l'amiante*, RFDA no. 2/2021, p. 381.

[39] Conseil Etat, 3 March 2017, no. 401395, available online at https://www.legifrance.gouv.fr/ceta/id/CETATEXT000034134193, accessed on 02.05.2022. (*emphasis added - the translation belongs to me).*

[40] *Idem.*

maintenance work at sea or in the basin, and therefore sailors serving on French naval vessels who often lived and worked indoors were likely to be exposed to inhalation of asbestos dust[41]".

According to the Council of State, 'the plaintiff was intensely exposed, without special protection, during his missions on board French naval vessels, under the conditions mentioned above, to inhaling asbestos dust for a period of approximately 8 years and 4 months, thus, he was exposed to a high risk of developing a serious pathology, which could cause compensable anxiety damage, even if his duties as a civil servant were not in themselves such as to expose him to such a risk[42]". In conclusion, in the court's opinion, the plaintiff justified the granting of moral damage, which was decided by the court decision.

In fact, the European Parliament's Resolution of 20 October 2021 containing recommendations to the Commission on the protection of workers against asbestos (2019/2182 (INL))[43] was adopted at European level. We note among other provisions of the European document - the adoption of a European Strategy for the Elimination of Asbestos - ESRAA, which should include the following: those related to anxiety; all medical costs should be covered by employers if they have not taken all the appropriate measures and have not made every effort, within their means, to prevent asbestos exposure; calls on the Commission to assess the possible need for legislation establishing a general liability regime for diffuse pollution, in order to compensate victims for all damage caused by diffuse pollution, including asbestos (…)".

3. Conclusions

Through the analysis carried out, we appreciate the scope of the present study, that of capturing the tendency of the case-law regarding the granting of moral damages in the case of the administrative-patrimonial liability of the state, by means of some cases under French law. Thus, it was observed that the administrative judge granted compensation to the plaintiff for the damage suffered by the victim, being a responsibility of the state in the idea of risk in the activity of public administration[44].

With regard to moral damages, through the selected cases, regarding the damage suffered by long-term exposure to asbestos, in connection with work or

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[41] Conseil Etat, March 28, 2022, no. 453378, available online at https://www.conseil-etat.fr/fr/ arianeweb/CE/decision/2022-03-28/453378, accessed on 02.05.2022 (*emphasis added - the translation belongs to me).*

[42] *Idem.*

[43] European Parliament resolution of 20 October 2021 with recommendations to the Commission on the protection of workers from asbestos (2019/2182 (INL)), available online at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0427_EN.html, accessed on 02.05.2022 (*emphasis added - the translation belongs to me).*

[44] See also Roxana Mariana Popescu, *Jurisprudența CJUE cu privire la noțiunea de „administrație publică" utilizată în art. 45 alin*. (4) TFEU, in CKS ebook 2017, pp. 528-532.

the damage suffered by the death of a family member as a result of an action to repress a demonstration, the tendency to satisfy claims in the French administrative dispute with such an object.

In conclusion, the selected cases that have debated the issue of moral damages incumbent on the responsible state *sans faute* are relatively recent, but the subject is far from exhausted and this will be done through future research.

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A REHEARSAL OF SOME TOPICS OF INTERDISCIPLINARY APPROACHES IN ADMINISTRATIVE SCIENCES

Suspension of public servants - constitutionality issues of article 513 paragraph (1) letter l) of the Romanian Administrative Code

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Abstract

The entry into force of the Romanian Administrative Code has maintained, unfortunately, a controversial legal provision, regarding the suspension of the public servant's employment relationship, in case legal proceedings are taken against the public servant, if commited certain acts.From our perspective, article 513 paragraph (1) letter l) of the Romanian Administrative Code raises serious concerns regarding the presumption of innocence and the right to work of the public servants found in such situation. The present study tries to bring a multidisciplinary legal interpretation of the authors regarding the analysed legal provision and certain arguments for considering this provision able to be declared, soon, unconstitutional.

Keywords: *presumption of innocence, right to work, public servant, Administrative Code, criminal law, suspension of the public employment relationship*

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JEL Classification*:* K14, K23, K41

1. Introductive remarks

The liability of a public servant for offences committed in the course of his or her duties or in connection with the duties of his or her public office shall be incurred in accordance with the criminal law[4].

We regret that the entry into force of the Government Emergency Ordinance no. 57/2019[5] (hereinafter "*the Administrative Code*") has maintained a controversial legal provision concerning the suspension of the public servant's employment relationship in the event of the initiation of criminal proceedings.

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[4] Marta-Claudia Cliza, Constantin-Claudiu Ulariu, *Drept administrativ*, revised edition according to the amendments of the Administrative Code, Pro Universitaria Publishing House, Bucharest, 2020, p. 260.

[5] Please see the Government Emergency Ordinance no. 57/2019 Code Administrative, published in the Romanian Official Journal Part I, no. 555 of 05.07.2019, with subsequent amendments and suppletions.

Thus, according to the provisions of Article 513 para. (1) letter l) of the Administrative Code, the employment relationship of a public servant in Romania is suspended *de jure* when a public servant is indicted for committing an offence referred to in Article 465 letter h) of the same normative act.

In our view, as far as public servants in such a legal situation are concerned, this legal provision violates two essential human rights in a democratic society - *the presumption of innocence* and *the right to work*.

For these reasons, we consider that the matter should be referred to the Constitutional Court of Romania[6] in order to issue a decision on the unconstitutionality of this legal provision.

Thus, we start our present scientific approach by arguing why we consider that the above-mentioned provisions violate Article 16 para. (1), Article 23 para. (11), Article 41 para. (1) and Article 47 para. (1) of the Romanian Constitution, as well as Article 6 para. (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "*the European Convention on Human Rights*").

2. Applicable legal provisions

According to Article 513 para. (1) letter l) of the Administrative Code:

"*The employment relationship shall be suspended de jure when the public servant is in one of the following situations: (...) l) in case it was ordered the referral for trial for perpetrating a crime referred to in Article 465 letter (h); (...)*".

According to Article 465 letter h) of the Administrative Code, a person may hold public office if, among other things, "*he or she has not been convicted of a crime against humanity, against the state or against authority, corruption or service crimes, crimes that impede the course of justice, forgery crimes or a crime committed with intent that would make him or her incompatible with the exercise of public office, except in the case of rehabilitation, post-conviction amnesty or decriminalisation of the crime;*".

In our view, Article 513 para. (1) letter l) of the Administrative Code is enacted in violation of the following constitutional and conventional provisions:

(i) Article 16 para. (1) of the Romanian Constitution: *"Citizens are equal before the law and public authorities, without privileges and without discrimination.*"

(ii) Article 23 para. (11) of the Romanian Constitution: "*Until the final judgment of conviction has become final, the person is considered innocent.*"

(iii) Article 41 para. (1) of the Romanian Constitution: "*The right to work cannot be restricted. The choice of profession, trade or occupation and the*

[6] For aspects regarding the constitutional justice and the role of the Romanian Constitutional Court, please see Silviu-Gabriel Barbu, Andrei Muraru, Valentina Barbateanu, *Elemente de contencios constituțional*, C.H. Beck Publishing House, Bucharest, 2021.

place of work is free."

(iv) Article 47 para. (1) of the Romanian Constitution: "*The state is obliged to take economic development and social protection measures to ensure a decent standard of living for its citizens.*"

(v) Article 6 para. (2) of the European Convention on Human Rights: „*Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*".

3. Unconstitutionality of Article 513 para. (1) letter l) of the Administrative Code by reference to Article 16 para. (1) of the Romanian Constitution

Firstly, the provisions of Article 513 para. (1) letter l) of the Administrative Code provides that the public servant's employment relationship shall be automatically suspended if he/she is prosecuted for committing an offence referred to in Article 465 letter h) of the Administrative Code[7].

However, with reference to the current legal framework, please note that there is an **unjustified difference in treatment** between the regime applied to public servants and the regime applied to employees.

In particular, according to the provisions of Article 52 para. (1) letter b) second thesis of the Labour Code[8], the individual employment agreement may be suspended **at the initiative of the employer** if for the employee it has been ordered the referral for trial for perpetrating crimes incompatible with the position held, until the final judgment has become final. **Thus, in the event of the employee's referral for trial, the suspension of the employment relationship is optional and is left to the employer's discretion.**

In other words, we notice that the employee is in a more favourable position than the public servant, in the case of the latter the suspension of the employment relationship intervenes *de jure*, without any right of appreciation on the part of the head of the public institution and without any possibility for the public servant to provide justifications or explanations which might show that the suspension measure is not justified or necessary.

The legislator has not provided any justification for the adoption of such regulation, which establishes a **difference in treatment** between the public servant and the employee, which is why we consider that Article 513 para. (1) letter l) of the Administrative Code violates Article 16 para. (1) of the Romanian Constitution.

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[7] For an interesting study regarding the administrative-disciplinary liability of public servants, please see Elena Emilia Ștefan, *Brief Considerations Regarding the Public Servants Administrative-Disciplinary Liability*, in the Proceedings of CKS eBook, 2021, Pro Universitaria Publishing House, Bucharest, 2021, p. 659 and following.

[8] Please see Law no. 53/2003 on Labour Code, republished in the Romanian Official Journal, Part I, no. 345 of 18.05.2011.

4. Unconstitutionality of Article 513 para. (1) letter l) of the Administrative Code by reference to Article 23 para. (11) of the Romanian Constitution and Article 6 para. (2) of the European Convention on Human Rights

Secondly, in accordance with the provisions of Article 513 para. (1) letter l) of the Administrative Code, the *de jure* suspension of the civil servant's employment relationship intervenes if he or she is reffered for trial for perpetrating a crime referred to in Article 465 letter h) of the Administrative Code.

The referral for trial is made through the issuance of the indictment by the prosecutor, as provided for in Article 327 letter a) of the Criminal Procedure Code[9]: "*when he or she finds that the legal provisions guaranteeing the ascertainment of the truth have been complied with, that the criminal prosecution is complete and that the necessary and legally administered evidence exists, the prosecutor: (a) issues an indictment ordering the referral for trial, if it appears from the criminal prosecution material that the act exists, that it was committed by the defendant and that he or she is criminally liable*".

However, **the indictment** is a document drawn up by the prosecutor which is subject to legality review at the pre-trial chamber stage and **may be annulled, amended or redrafted**, as follows:

i. Article 3 para. (6) of the Criminal Procedure Code: "*The legality of the indictment and the evidence on which it is based, as well as the legality of decisions not to indict, shall be decided by the pre-trial chamber judge, in accordance with the law.*";

ii. Article 342 of the Criminal Procedure Code: "*The purpose of the pre-trial chamber procedure is to verify, after the referral for trial, the jurisdiction and legality of the referral to the court, as well as the legality of the taking of evidence and the performance of acts by the prosecution authorities.*";

iii. Article 346 para. (3) of the Criminal Procedure Code: "*The pre-trial chamber judge shall return the case to the prosecution if: a) the indictment is irregularly drawn up, and the irregularity has not been remedied by the prosecutor within the period provided for in Article 345 para. (3), if the irregularity makes it impossible to determine the subject-matter or limits of the trial; b) has excluded all evidence taken in the course of the prosecution; c) the prosecutor requests the return of the case under Article 345 para. (3) or fails to reply within the time-limit laid down in the same provision.*".

In the light of these legal provisions, it follows that the **purpose of the pre-trial chamber procedure is precisely to verify the act of referral of the case to the court**, and only once the legality of this act has been established, may the trial be ordered to commence.

In that context, we would like to point out that the stage of referral for

[9] Please see Law no. 135/2010 on Criminal Procedure Code, published in the Romanian Official Journal, Part I, no. 486 din 15.07.2010.

trial is not the same as the stage of commencement of the trial, the latter being a subsequent stage which occurs subject to the strict and limited conditions laid down by law. Even so, it is only the conviction that leads to the loss of integrity/probity, a fundamental element of the exercise of public authority without which the person occupying the public office in question no longer has the legitimacy to continue his or her activity[10].

Therefore, in order to respect the presumption of innocence provided for in Article 23 para. (11) of the Romanian Constitution and in Article 6 para. (2) of the European Convention on Human Rights, we consider that the suspension of the public servant's employment relationship under Article 513 para (1) letter l) of the Administrative Code should intervene only when the pre-trial chamber judge orders the trial to begin, i.e. only if (i) the indictment drawn up by the prosecutor and the evidence administered during the criminal prosecution phase are validated from the point of view of legality and (ii) there is no other impediment to the beginning of the trial on the merits.

According to the case law of the European Court of Human Rights, the presumption of innocence[11] established by Article 6 para. (2) of the European Convention on Human Rights is relevant not only in criminal proceedings, but also in other cases where national courts have not had to determine the question of guilt, its essential purpose being to prevent any national authority from reflecting the view that the person concerned is guilty before he or she is found guilty according to law (see the judgment in *Allenet de Ribemont v France*[12]).

The European Court of Human Rights has also held that it is sufficient, even in the absence of an official finding, to have an argument suggesting that the public authority considers the accused guilty (see judgment in *Minelli v. Switzerland*[13]).

In the present case, although there is no final decision of conviction and not even a decision of the pre-trial chamber judge to validate the indictment and start the trial on the merits, under Article 513 para. (1) letter (l) of the Administrative Code, **the public servant is already been penalised** by the temporary interruption of his or her employment relationship and by the deprivation of the financial rights and benefits to which he or she would normally be entitled, not to mention the moral effects, namely the public opprobrium.

Consequently, from the fact that Article 513 para. (1) letter (l) of the Administrative Code allows a public servant to be punished by *the jure* suspension

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[10] Please see in this regard, Cochintu Ioniţa, *Abrogarea normelor legale referitoare la suspendarea raportului de serviciu al funcţionarului public ca urmare a trimiterii în judecată. Neconstituţionalitate,* in „Revista Română de Jurisprudenţă" no. 1 of 2018.

[11] Please see in this regard, Laura-Cristiana Spătaru-Negură, *Protecţia internaţională a drepturilor omului. Note de curs*, Hamangiu Publishing House, Bucharest, 2018, p. 146 and following.

[12] See the judgment in the case *Allenet de Ribemont v. Franţei*, of 10 February 1995, paras. 35-36, available online in English at https://hudoc.echr.coe.int/eng?i=001-57914 (last access 07.05.2022).

[13] See the judgment in the case *Minelli v. Elveţiei*, of 25 March 1983, para 37, available online in English at https://hudoc.echr.coe.int/eng?i=001-57540 (last access 07.05.2022).

of his or her employment relationship **as soon as the indictment is issued**, it is clear that these provisions violate the presumption of innocence established by Article 23 para. (11) of the Romanian Constitution and by Article 6 para. (2) of the European Convention on Human Rights.

5. Unconstitutionality of Article 513 para. (1) letter l) of the Administrative Code by reference to Article 41 para. (1) and to Article 47 para. (1) of the Romanian Constitution

Thirdly, as mentioned above, by the effect of the provisions of Article 513 para. (1) letter (l) of the Administrative Code, the public servant is sanctioned with the temporary interruption of the employment relationship, depriving him or her of the monetary rights and benefits to which he or she would normally have been entitled during the entire period of suspension.

The mere issuing of the indictment, without verification of the legality of that act, the legality of the evidence adduced and the manner in which the alleged act was committed, including the circumstances of the alleged act, cannot constitute a legal ground for the application of the sanction of *de jure* suspension of the public servant's employment relationship.

In addition, the suspension of the employment relationship on the basis of an act which is liable to be annulled, amended or recast generates serious uncertainty for the career and the material situation of the public servant.

Under the old law, i.e. Law no. 188/1999 on the Statute of Public Servants[14], the provisions of Article 86 paras. (2) and (3) provided as follows: "*(2) If the public servant is indicted for committing an offence of the nature referred to in Article 54 letter (h), the person who has the legal power of appointment to the public office shall order the suspension of the public servant from the public office he or she holds. (3) In case of dismissal or waiver of criminal prosecution or acquittal or waiver of punishment or postponement of punishment, as well as in case of termination of criminal proceedings, the suspension from public office shall be terminated and the public servant concerned shall resume his or her activity in the previously held public office and shall be paid the salary rights related to the period of suspension*[15]".

In other words, although the provisions of Article 513 para. (1) letter (l) of the Administrative Code were found in the same form in Article 86 para. (2) of Law no. 188/1999, the law provided in Article 86 para. (3) of Law no. 188/1999 also provided for a measure of a pecuniary nature in the event of dismissal, discontinuation of criminal proceedings, acquittal or waiver of punishment or postponement of punishment, as well as in the event of termination of

[14] Republished in the Romanian Official Journal no. 365 of 29.05.2007, with subsequent amendments and additions.

[15] These legal texts have been abrogated at 05.07.2019 by Article 597 alin. (2) let. B of part IX of the Administrative Code.

criminal proceedings, the public servant was paid the salary rights related to the period of suspension.

However, in the present case, the Administrative Code no longer provides for such a remedial measure and **there is no legal grounds on which the public servant can be compensated for the financial benefits he or she has been deprived of if it is established that his or her suspension from the office was unjustified,** and he or she has not been found guilty of the criminal acts of which he or she is accused.

In the absence of such a legal remedy and bearing in mind also that the suspension of the service relationship occurs in the absence of a final conviction and even in the absence of a decision validating the writ of summons, it is clear that the provisions of Article 513 para. (1) letter (l) of the Administrative Code also infringes the right to work and the right to a decent standard of living provided for in Article 41 para. (1) and in Article 47 para. (1) of the Romanian Constitution.

6. Final remarks

As outlined in the abstract of the present study, this study attempts to provide the authors' interpretation of this controversial legal provision that we have analysed.

In conclusion, for all the reasons outlined in this study, we believe that such an exception of unconstitutionality could most likely be admitted by the Constitutional Court of Romania.

If such a decision were to be admitted by the Constitutional Court, according to the provisions of Article 147 para. (4) of the Constitution and Article 31 para. (3) of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, the provisions of Article 513 para. (1) letter l) of the Administrative Code would be suspended by law for 45 days from the date of publication of the decision in the Romanian Official Journal. Subsequently, if the Romanian legislator (i.e. the Romanian Parliament, the Romanian Government) remains passive, the provision will cease to have legal effects, since within 45 days of publication, the unconstitutional provisions have not been brought into line with the provisions of the Constitution. The unconstitutionality decision would set a strong judicial precedent[16].

We also believe that it could be of interest for a possible scientific approach to analyse the regulatory framework applicable in the 27 Member States

[16] Nicolae Popa (coordinator), Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spataru-Negura, *Teoria generala a dreptului. Caiet de seminar*, 3rd edition, revised and enlarged, C.H. Beck Publishing House, Bucharest, 2017, p. 144 and folowing.

of the European Union[17] in order to observe how the legislators of other democratic countries have legislated on this sensitive issue that may arise in the exercise of public office. A correctly implemented solution in another EU Member State could also be a source of inspiration for the Romanian legislator to remove this controversy through legal transplantation. It remains to be seen what will happen first.

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[17] For information on the specificities of the European Union, please see Augustin Fuerea, *Dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2016; Mihaela Augustina Dumitrascu, Roxana Mariana Popescu, *Dreptul Uniunii Europene, Sinteze si aplicatii*, second edition revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015; Alina-Mihaela Conea, *Politicile Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2019; Laura-Cristiana Spataru-Negura, *Dreptul Uniunii Europene – o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest, 2016.

The Law on metropolitan areas. The intention of the legislator to regulate one of the forms of association of local communities

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Abstract

The forms of association of local communities are the intercommunity development association and the metropolitan area. These two forms of association of local communities can be formed into private entities of public interest. In contrast to inter-community development associations, metropolitan areas may have a limited territorial jurisdiction of up to 30 km compared to the county municipality where they can be established. In addition, according to the normative acts in force, metropolitan areas can only be established around municipalities of county or municipalities declared. Although the legislator wished for a difference between intercommunity development associations and metropolitan areas, even though there was no express text of the law that could be applied for differentiation, local public authorities understood to establish metropolitan areas in the same way as inter-community development associations. Realizing that the metropolitan area can be used to determine financial and social growth within the communities that compose it, the legislator, through the relevant ministry, published on its virtual page, on March 8, for public consultation, on the Metropolitan areas Law, wishing to know the position of the citizens in relation to the changes they wish to make in relation to this form of association of local communities. In the present study, we analyze the provisions of the draft normative act on metropolitan areas quantitatively, showing what essential changes shall be made within this form of association of local communities if the law shall be promulgated, what are the financial and social benefits for the local communities that make up a metropolitan area and what changes could be made to the draft normative act. For the administrative territorial organization of the Romanian state, the legislation on metropolitan areas represented a step toward a modern administrative territorial organization of European type, respecting the principle of subsidiarity more than it is currently respected.

Keywords*: administrative territorial organization, metropolitan areas,* principle of subsidiarity, *administrative law.*

JEL Classification: K23

1. Constitutional regulations regarding administrative territorial organization

The administrative territorial organization of the Romanian state is provided by the regulations of Article 3 of the Constitution of Romania, republished

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in 2003. According to the regulations of Article[2] 3 paragraph (3) of the Constitution, administratively, the territory is organized into towns, cities and counties. According to specialists in constitutional law, when the constituent legislator established the form of administrative territorial organization, it took into account *"the current state of development of society"*.[3]

At the time of the 1991 Constitution, the form of administrative territorial organization in Romania by *towns, cities and counties* mirrored the development of the state after 50 years of authoritarian political system, but we do not understand why the constituent legislator "sealed" the administrative territorial organization of the Romanian state, as it was not possible to establish other forms of administrative division[4]by organic law, this 'sealing' being a factor slowing down the modernization of local public administration, especially as since 2007 the Romanian state has become a full member of the European Union, the form of administrative territorial organization in *towns, cities and counties* being supplemented by forms of statist organization, in fact artificial legal constructions (statistical development regions) designed to meet the requirements of financing from non-refundable European funds.

It is well known that through the procedure of revision of the Constitution[5], new forms of administrative territorial organization can be introduced, but this procedure is complex, requiring a political decision that brings together two thirds of the members of Parliament or half of the number of citizens, in case the initiative to change the forms of administrative territorial organization belongs to the latter.

By imperatively establishing the form of internal organization, the constituent legislator imposed that local autonomy shall be implemented only within these forms of administrative territorial organization, local public authorities having territorial competence only within the administrative territorial units.

However, social dynamics has shown that the local public administration cannot function efficiently in the configuration provided by the constitutional regulations, the accession of the Romanian state will require in our country the establishment of regional administration[6] and other intermediate forms such as districts.

Due to the complex procedure of amending the constitutional regulations that could have introduced new forms of administrative territorial organization, the organic legislator considered it more efficient to introduce a legal framework

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[2] Article 3 paragraph (3) of the Constitution of Romania explicitly stipulates: *"The territory is administratively organized into towns, cities and counties. Under the law, some cities are declared municipalities".*

[3] M. Constantinescu, A. Iorgovan, I. Muraru, E.S. Tănăsescu, *Legi comentate, Constituția României revizuita, comentarii si explicații,* Ed. All Back, Bucharest, 2004, p. 6.

[4] D. C. Dănisor, *Constituția României Comentata,* Ed. Universul Juridic, Bucharest, 2009, p.140.

[5] Title VII of the Constitution expressly provides for the procedure for revising the Constitution, Articles 150, 151 and 152 of the Constitution detailing the manner in which it may be revised.

[6] D. C. Dănisor, *op. cit.*, 2009, p. 140.

allowing administrative territorial units to associate.

Within the context of Romania's accession, the European Union, the legislation on local public administration had to take significant steps to meet the new requirements, the Romanian legislator adopting in 2001 Law No. 215 on local public administration, a law that was republished after accession, the local public administration would operate under certain rules that modernized the system.

Following the adoption of Law no. 215/2001 on local public administration, there is also a distinct law on the possibility for administrative territorial units to form associations, with inter-community development associations providing integrated public services such as public transport, the supply of heat-transfer fluid, the collection and management of household waste, etc. to local authorities in several administrative territorial units. Metropolitan areas have also been introduced in the inter-community development associations, established with the express consent of the local councils of the administrative territorial units in force. [7]

After defining metropolitan areas as inter-community development associations[8], the legislator defined the metropolitan area separately in the Law no. 351/2001 on the approval of the National Spatial Plan - Section IV - Network of municipalities, expressly indicating in Art. 7 paragraph (1) the way of establishment of these forms of association and in point 11 of Annex No. I of the law the way of establishment.

It is obvious that through these normative acts, Law no. 215/2001 and Law no. 351/2001 the legislator respected the imperative norms of the Constitution regarding the internal organization of the territory, the association of administrative territorial units, even as legal persons of private law of public utility, without affecting the forms of organization of administrative territorial units.

The "sealing" of the forms of organization of local authorities by the regulations of the Constitution should be disposed in the future, the internal organization of the territory should remain only at the level of principle, through a future revision of the Constitution, with the Parliament taking over this prerogative.

2. Regulation of metropolitan areas by the time of the draft normative act in 2022

As mentioned, by Law no. 351/2001[9] the legislator defined metropolitan

[7] M. C. Apostolache, *Legea nr.215/2001 a administrației publice locale – comentata si adnotată,* Ed. Universitară, Bucharest, 2015, p. 43.

[8] On inter-community development associations for the creation of metro-political areas see C.-S. Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, Ed. C.H. Beck, Bucharest, 2016, p. 740, 741.

[9] Law no. 351/2001 on the approval of the National Spatial Plan - Section IV - Network of municipalities, was originally published in the Official Gazette no. 408 of 24 July 2001.

areas, establising according to Art. 7 paragraph (1) of the law that metropolitan areas shall be established by voluntary association around the state capital and the county seats, the association shall be made between the county seat and the concerned territorial administrative units, the purpose of the association being the balanced development of the territory.

As regards the legal personality of these forms of association, unlike inter-community development associations, legal persons of private law of public utility according to Art. 11 of Law no. 215/2001, adopted by Art. 89 of G.E.O 57/2019 on the Administrative Code, this type of voluntary association has no legal personality according to Art. 7 paragraph (2) of Law no. 351/2001 as amended. The obvious question arises, if metropolitan areas do not have legal personality, in what form can they participate in administrative law relations with third parties? Moreover, without legal personality, what role do metropolitan areas play in the territorial development process? These questions shall be answered in the third part of the study, but it is clear that without legal personality, metropolitan areas are legal constructs that cannot create, modify or dissolve legal relations of administrative law, and at the moment these legal constructs seem to be of no use. Moreover, practice has shown that although 22 metropolitan areas were established by association between 2004 and 2016, their activity was minimal.

Proceeding with the present research in relation to the regulations of Law no. 351/2001, under point 11 of Annex No. 1 of the law, we find the delimitation of the *metropolitan area*, in fact the way a metropolitan area and its territorial competence is established. As defined in the above-mentioned normative act, a metropolitan area can be established according to Law no. 215/2001 republished, including the administrative territory of the polarizing city centre and of the administrative territorial units within its commuting area, within a distance up to 30 km, which respects the condition of spatial contiguity and within which cooperation relations have developed on multiple levels.

Analysing point 11 of Annex I of Law no. 351/2001 as amended, we note the essential features of a metropolitan area but also the inconsistencies compared to the legal text in Art. 7 paragraph (2) of the same normative act.

First of all, a metropolitan area is made up of a polarizing municipality, a social and economic center. Compared to inter-community development associations, the establishment of a metropolitan area around a municipality is the first element of difference. If inter-community development associations can be established according to the law on associations and foundations, in the case of the *metropolitan area* it is mandatory to have a polarizing municipality. It is obvious that the legislator wanted to distinguish between inter-community development associations and metropolitan areas by introducing this compulsory element, but the political decision-makers who set up metropolitan areas did not fully understand this distinction, organizing metropolitan areas as inter-community development associations, which, in my opinion, led to the lack of activity

of these metropolitan areas. Moreover, point 11 of Annex I of Law no. 351/2001 stipulates that metropolitan areas shall be established in accordance with the regulations of Law no. 215/2001, and under Law no. 215/2001 the only form of association of administrative territorial units is the "inter-community development association - a legal person of private law and public utility".

Secondly, a metropolitan area can consist of the association of the polarizing municipality and the administrative territorial units between which there is a spatial contiguity, without the legislator expressly defining what spatial contiguity means. The literal definition of contiguity shows that two objects can be contiguous when they are spatially or temporally adjacent. The legislator certainly considered the proximity of the administrative territorial units but the legal formulation is unfortunate. In fact, as seen in the third part of this section, the draft normative act on the establishment and functioning of metropolitan areas regulates this aspect, the legislator expressly defining the link between the polarizing municipality and the administrative territorial units that will form a metropolitan area.

Thirdly, metropolitan areas shall be established between administrative territorial units where there is a commuting relationship and between which cooperation relations have developed on multiple levels. Even this characteristic of a *metropolitan area* is not clearly and concisely defined by the legislator, leaving room for interpretation, without having previously defined elements such as *commuting and cooperative relationships on multiple levels*. If in terms of commuting it can be considered that in fact it is about that group of citizens who move from home to the polarizing municipality of the area, in order to carry out work activities, in terms of cooperative relations on *multiple levels* it is difficult to define this condition of establishing the metropolitan area.

Lastly, the legislator establishes the territorial limit of metropolitan areas, which is a maximum of 30 km from the polarizing municipality of the metropolitan area. As will be shown in the third part of the qualitative research, this aspect of imposing a maximum territorial limit on association is unconstitutional, in violation of Art. 40 paragraph (1), final sentence of the Constitution. Limiting the association of administrative territorial units in the form of metropolitan areas is contrary to the interests of the citizens forming the local authorities of a metropolitan area, even if it could be considered that this type of association does not concern the individual interests of citizens, our distinct opinion is that local public authorities are in fact the entities legally empowered by the local authorities to represent their interests both within the administrative territorial units and in relation to other administrative territorial units. Therefore, we believe that it would have been legally appropriate to adopt a solution whereby citizens would be asked by referendum about the metropolitan areas, and the result of the vote expressed by the citizens would be implemented in the forms of organization of metropolitan areas.

Concerning the interpretation of point 11 of Annex I under Law no.

351/2001 directly related to the regulations of Art. 7 paragraph (2) of the same normative act, we do not see how a metropolitan area can be established in accordance with the regulations of Law no. 215/2001, and regulations of Art. 11, since the second paragraph of the Art. 7 of Law no. 351/2001 expressly stipulates that *metropolitan areas* are associated *without legal personality*. Highlighting this aspect, the legislator, through the draft normative act to be analysed in the third part of the research, has eliminated this legal inconvenience, establishing only that *metropolitan areas* shall be established according to the intercommunity development associations foreseen in the Administrative Code.

In conclusion of this part of the research it is claimed that although the legislator has established that metropolitan areas are a type of inter-community development associations, with a polarizing municipality, a territorial limit up to 30 km from the polarizing municipality as well as certain criteria of establishment, political decision makers have established metropolitan areas similar to inter-community development associations, an aspect which, together with the lack of legal personality, led to the inefficiency of these forms of association of administrative territorial units, although the legislator's intention was one of urban and peri-urban development of the territory of the Romanian state, without violating the constitutional regulations regarding the internal administrative organization.

3. Updates introduced by the draft normative act on metropolitan areas

Realizing the need to establish metropolitan areas, the Romanian Government proposed for public consultation on March 8th, 2022, a draft normative act regulating metropolitan areas in a distinct way, this draft normative act aims to modernize and bring to European standards the organization and functioning of metropolitan areas.

Following, through a qualitative analysis, the important changes to be applied in relation to the organization and functioning of *metropolitan areas* are highlighted.

From Art. 1 of the draft normative act on metropolitan areas, the legislator states that the normative act shall establish the institutional framework, objectives, competences and specific instruments of the metropolitan development policy. It would have been appropriate to point out that the normative act establishes the form of organization and functioning of metropolitan areas, because the elaboration and implementation of a public policy represents a set of normative acts and related activities and not the elaboration of a single normative act. Perhaps in its final form, the act will take a different approach, specifying that it regulates the establishment and functioning of metropolitan areas and not an entire public policy.

To strengthen the assertions, analyzing the regulations of Art. 2 paragraph (1) of the content of the draft normative act, it can be seen that the legislator defines metropolitan development policy as *"the set of elaborated policies, in collaboration with the socio-economic partners concerned, for the coherent and sustainable development of integrated urban and rural territorial areas...".*[10]

As a first new element, compared to the legal regulation in force concerning metropolitan areas, in Art. 3 of the draft normative act, the general objectives of the metropolitan development policy can be found.

These objectives aim to:

a) reduce economic, social and regional disparities by strengthening urban-rural connections;

b) increase economic competitiveness and the ability of regions to thrive in a global economy;

c) increase the coherence of the administrative act and ensure good local administration;

d) ensure and improve access for all citizens to services of general interest.

These objectives included in the draft normative act are related to regional development policies and not to the way of association of administrative units in the form of metropolitan areas, the only relevant objective being to ensure and improve access of all citizens to services of general interest. Once again, we reiterate the opinion that the development policies of metropolitan areas are a combination of activities and normative acts and not a norm-setting activity for the establishment and functioning of *metropolitan areas.*

Researching further the draft normative act, the second new element is the delimitation of the territory of metropolitan areas. Within Art. 5 of the draft normative act, includes the establishment procedure for metropolitan areas. Metropolitan areas can only be established in accordance with the draft normative act, which will have the following configurations:

- for Bucharest, at least the administrative territory of Ilfov county;
- for county seats – first two peri-urban areas
- for municipalities other than county seats - the first peri-urban area.

Also as a new element, in Art. 5 of the draft normative act appears the definition of the peri-urban area, *the first peri-urban area* representing the cumulated territory of the administrative territorial units in the immediate vicinity of the municipality with which they have at least one common border point.

The second peri-urban area is represented by the cumulated territory of the administrative territorial units in the immediate vicinity of the first peri-urban area.

In comparison with point 11 of Annex No. I of Law 351/2001, which

[10] The draft normative act can be found on the website of the Ministry of Regional Development and Public Administration at: https://www.mdlpa.ro/pages/proiectlegezonemetropolitane.

provided the possibility of establishing metropolitan areas within a maximum distance of 30 km from the polarizing municipality, the draft normative act on metropolitan areas introduces a new element, the peri-urban area.

It is important to mention that this form of organization of metropolitan areas, by peri-urban areas, also appears as a violation of the constitutional regulations regarding the right of association of citizens, reiterating the opinion according to which the representatives of administrative units have the constitutional right to decide on the association of local communities, under any form of association, regardless of the limitations of the normative acts in terms of administrative law.

The problem arises for an administrative territorial unit that does not border a municipality and wishes to be part of the metropolitan area of that municipality. How can the members of the metropolitan area justify their refusal to include the administrative territorial unit willing to be part of the metropolitan area in relation to the regulations of the Romanian Constitution, which stipulates the right of every citizen to associate? Considering that the draft normative act on the establishment and functioning of metropolitan areas should contain guidelines and not mandatory rules that may violate constitutional norms.

Note that the draft normative act introduces a new element into the legislation on the organization of associations of administrative territorial units, namely the peri-urban area, an element that can be used when proposing the establishment of new forms of administrative territorial organization such as districts, as an element of delimitation for territorial competence.

Based on the regulations of the Administrative Code, the draft normative act expressly stipulates that these forms of organization of associations between administrative territorial units do not represent new forms of administrative territorial organization, as the administrative territorial units of the metropolitan areas shall continue to exercise the duties established by the Administrative Code.

The central element of the draft normative act is represented by Art. 10, which expressly mentions the objectives for which metropolitan areas may be established and the fact that a metropolitan area may also be established to achieve several objectives simultaneously.

From the content of the draft normative act it can be noticed that the objectives for establishing a metropolitan area are:

a) to ensure integrated and sustainable territorial planning;

b) to develope infrastructures and development objectives of common interest to ensure mobility within the metropolitan area;

c) to improve, modernise and develop the technical and public infrastructure;

d) to develop education and health infrastructure;

e) to modernise, develop, interconnect and increase the efficiency of public services;

f) to provide jointly public services of local interest;

g) to develop integrated and sustainable development of the territory of all the administrative territorial units that form the metropolitan area;

h) integrated economic development and increased economic competitiveness;

i) to develop human resources and human capital, to increase employment rates and to prevent exclusion and social imbalances for all social groups;

j) to manage the housing sector and address the specific issues of vulnerable groups and sidelined communities, including informal settlements, in an integrated manner;

k) to reduce socio-economic imbalances in territorial development, in administrative territorial units of the metropolitan areas' peri-urban area 1 and peri-urban area 2;

l) other objectives that fall within the general objectives of metropolitan development policy.

The procedure to be followed by a metropolitan area in order to achieve at least one of the objectives shall be inserted in the content of the statute of the new *metropolitan area*, this association of administrative territorial units having to draw up the statute, including the procedure for achieving the objective, taking into account the regulations of Art. 16 of the draft normative act, in my opinion, article defining the competences of metropolitan areas.

There is not enough room for a detailed qualitative analysis of the objectives that a metropolitan area *can achieve*, but for example, the objective described by the draft normative act in point h) of Article 10 paragraph (1) can be found as a separate duty of the local council within Art. 129 paragraph (4) point f) of the Administrative Code. It is obvious that by establishing *metropolitan areas*, the legislator aimed through the draft normative act to facilitate the fulfilment of the duties of local public authorities for a territorial extension that brings together several administrative territorial units, but these objectives would have been more efficient if stated in the form of general principles for the establishment of *metropolitan areas than to be listed in concrete terms.*

As already mentioned, the achievement of the objective or objectives towards which a *metropolitan area* shall be established is closely linked to the duties carried out by such an association of administrative territorial units.

Unlimited, in Art. 16 paragraph (1) of the draft normative act, are listed duties that a metropolitan area can carry out, duties that summarize, as mentioned above, a series of duties that local public authorities have. Following duties that metropolitan areas can perform shall be described, the third paragraph of Art. 16 of the draft normative act expressly states that metropolitan areas may perform other duties, within the limits of their establishment status.

Duties of metropolitan areas according to Art. 16 paragraph (1) of the draft normative act are:

a) to elaborate, adopt, supervise and periodically evaluate the integrated

strategy for sustainable development of the metropolitan area, the sustainable urban mobility plan of the metropolitan area and the inter-community spatial planning of the metropolitan area;

b) to elaborate common fiscal policies designed to attract foreign or domestic capital investment[11];

c) to ensure the correlation of the various interventions in the action plans related to the integrated metropolitan development strategy and the sustainable urban mobility plan of the metropolitan area;

d) to elaborate and adopt strategy and planning documents, public policies, action plans and development programmes for the whole or part of the metropolitan territory;

e) for administrative territorial units that have not approved a mandate for the fulfilment of the duty under point (d), the metropolitan area shall issue an advisory opinion on strategy and planning documents and public policies implemented at the level of the metropolitan territory;

f) to elaborate technical-economic documentation for projects of metropolitan interest;

g) to provide specialised support and technical assistance to the local public authorities of the member administrative territorial units, including joint purchase for the supply of goods and the provision of services in the metropolitan area;

h) to manage the public services established according to the statute;

i) to promote, submit and implement projects financed by national, European or international funds of interest for the development of the metropolitan area.

If it were to analyze the duties of the metropolitan area alongside the duties of the public authorities, it would be clear that the duties of *metropolitan areas* are in fact part of the duties of the public authorities of the member administrative territorial units, transferred to this form of association by delegation. Was the introduction in the draft normative act of certain duties of the public authorities, to be exercised by the association (metropolitan area) by delegation, necessary? The practice of *metropolitan areas* will answer this question. What can be stated is that through this draft normative act on the organization and functioning of *metropolitan areas,* the legislator has "over-regulated" this form of association of administrative territorial units, maybe the desire to avoid ambiguous situations in the future within the procedures for the establishment and functioning of *metropolitan areas*, but if the legislator had established more principles for

[11] See C. E. Popa (Tache), *Compliance with the legal treatment standards of international investments during the global economic crises. Between yes and no*, in D. Singh, C. E. Popa Tache, C.-S. Săraru (editors), *Looking for New Paths in Comparative and International Law (Contributions to the Conference on Comparative and International Law June 25, 2021, Bucharest - International Conference)*, Adjuris – International Academic Publisher, Bucharest, Paris, 2021, p. 162, 163.

the association of administrative territorial units as *metropolitan areas* and had not "over-regulated" these associations, it would have been more efficient both for the administrative territorial units and for the citizens belonging to them.

A final update introduced by the draft normative act regarding the establishment and functioning of metropolitan areas is the way they are financed.

The sources of funding for *metropolitan areas* are several, as inserted in Art. 18 of the draft normative act.

First of all, in the same way as inter-community associations develop, the main source of income is represented by the contributions that each administrative territorial unit, member of the *metropolitan area*, is going to pay. This is not an update because the regulation in force also provides that metropolitan areas can be developed and operate in the same way as inter-community development associations.

A first update, in terms of financing metropolitan areas, is the possibility for these forms of association to establish special local taxes to finance the activities of metropolitan areas. After the implementation of the law on metropolitan areas we will see how the members of the *metropolitan areas* will agree to the establishment and implementation of such "metropolitan" taxes and what will be the impact on the citizens of the administrative territorial units members of the *metropolitan areas*.

Another update for the financing of metropolitan areas is the possibility for metropolitan areas to charge, under the law, for metropolitan services to be provided. This can be useful for local authorities, as certain public services, performed at metropolitan territorial level, can lead to lower prices and greater efficiency. For example, the provision of central heating services for homes and the supply of heat-transfer fluid to a metropolitan area, by own or private companies, automatically leads to a lower price per unit delivered. Also, as an example, the provision of public transport services in the metropolitan area is also considered, with the price of a metropolitan trip decreasing significantly compared to the current fares charged for a trip between two neighbouring towns within the metropolitan area.

Also, from Art. 18 of the draft normative act stipulates that both the Government and the county can financially support the functioning of metropolitan areas, under certain conditions and on the basis of the normative acts in force.

A final source of funding is the attraction of non-reimbursable funds, with *metropolitan areas* becoming eligible entities to access such funding. The draft normative act expressly stipulates that a metropolitan area becomes eligible for national and European funding programmes when any administrative territorial unit member of the association is eligible to receive funding.

Although not included in Article 18 on the financing of metropolitan areas, the most important issue related to the financing of metropolitan areas is how income tax shall be distributed within metropolitan areas.

Under the regulations of Art. 22 of the draft normative act on the organization and functioning of metropolitan areas is indicated the way of collection of income tax, 30% of income tax will go to the administrative territorial unit where the employee is domiciled and 70% will go to the administrative territorial unit where the employer performs his activity and is a payer of income tax. Moreover, from the income tax, deducted as mentioned above, 5% of it will be transferred to the metropolitan area through the Regional Directorate of Public Finance.

All the new update elements presented in this study outline certain aspects that shall be highlighted, since *metropolitan areas* may represent in the future forms of administrative territorial organization, if the political will decides.

The draft normative act on the organization and functioning of *metropolitan areas* introduces updates in terms of their organization and functioning, the practice in this field shall determine whether the law is good and meets the requirements of local communities.

The first update is that *metropolitan areas* are no longer entities without legal personality, they will be established in accordance with the regulations of Art. 89 of the Administrative Code. This settles a legal situation that did not allow metropolitan areas to become subjects of administrative law.

The second update is represented by the forms that the *metropolitan areas* will take, as they will be set up in addition to the county seats or municipalities and will include the administrative territorial units bordering the municipalities, the legislator establishing the form of proximity as level I and II *peri-urban areas*.

The third update is that *metropolitan areas* are assigned specific duties necessary to achieve the objectives for which they were created. If the current regulation of *metropolitan areas* refers to the general framework of association of administrative territorial units, the draft normative act establishes the form of functioning of *metropolitan areas* separately, "furnishing" metropolitan areas with specific duties.

Another update is the way in which the resolutions of the General Assembly of a metropolitan area are adopted. In order to avoid any interpretation, the legislator established that the resolutions of the General Assembly of the metropolitan area shall be adopted by a vote of at least 72% of the members of the General Assembly, which must represent at least 65% of the population of the metropolitan area. These percentages were probably determined taking into account the regulations of Art. 5 point (d) of the Administrative Code, regulations that define qualified majority.

A final update of the draft normative act for metropolitan areas is the sources of funding. The draft normative act establishes separately the financing modalities of metropolitan areas, the legislator wishing to establish a security of income collection similar to the way of collecting income at the level of administrative territorial units.

4. Conclusions

In conclusion, the draft normative act on the organization and functioning of *metropolitan areas* represents an important step for local public administration, as the administrative territorial units will in the future be able to exercise their duties outside their territorial competence through these metropolitan areas.

Nevertheless, based on practice, it remains to be seen what improvements can be made to the normative act regulating metropolitan areas, believing that these metropolitan areas will develop local public administration economically and socially.

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The constitutional review of the Standing Orders and Resolutions of the Parliament

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Abstract

The Constitution of Romania regulates the constitutional review of the Standing Orders of each Chamber of the Parliament, and the Law on the organization and functioning of the Constitutional Court regulates the constitutional review of the Resolutions of the Parliament. Over time, an established case-law of the Constitutional Court of Romania has been straightened out, likely to reveal both the extent of the constitutional powers and the rules to be complied with by the Parliament in adopting the resolutions, as well as the extent of the powers of the Constitutional Court in carrying out the above-mentioned powers. This study is aimed at highlighting the importance of the constitutional review of the Standing Orders and resolutions of the Parliament in order to ensure the rule of law.

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Keywords*: Parliamentary resolutions, Standing Orders of the Parliament, constitutional review, rule of law, Constitutional Court.*

JEL Classification: K23, K41

1. Introduction

10 years ago, in a context of increased political tectonics, some of the actions of the political majority aimed, among others, at restricting the powers of the Constitutional Court of Romania (CCR), in the sense of eliminating the possibility of constitutional review of the parliamentary resolutions[2]. In the Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law No. 47/1992 regarding the organization and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law No. 3/2000 regarding the organization of a referendum in Romania, adopted at the 93rd Plenary Session (Venice, 14-15 December 2012)[3], the Venice Commission had a critical position both on the form of the act by which this restriction was achieved, as well as on the merits of that measure. Given the

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[2] This power was introduced by Law No. 177/2010 under Article 146 l) of the Constitution: „*The Constitutional Court has the following powers: […] to also fulfil other prerogatives stipulated by the organic law of the Court*".

[3] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)026-rom

subject of this study, we will refer to the substantive arguments contained in the Opinion, which support the need for and importance of scrutiny on the parliamentary acts.

Thus, according to the Venice Commission, "at first sight, the argument sounds convincing that internal, often individual acts of Parliament should not be controlled by a court because these decisions are usually of a political nature, which is not accessible to judicial control. However, with its Rules of Procedure and other general rules, Parliament however adopts normative acts, which are a yardstick for Parliament as a whole and its members individually. **Judicial control of the application of normative acts is an essential element of the rule of law. The absence of judicial control means that the majority in Parliament becomes the judge of its own acts.** If only the majority can decide on the observance of parliamentary rules, the minority has nowhere to turn for help if these rules are flouted. **Even if the acts concerned are individual ones, this affects not only the rights of the parliamentary minority but, as a consequence, also the right to vote of the citizens who have elected the parliamentary minority. Judicial control of individual acts of Parliament is** therefore **not only a rule of law issue but, as the right to vote is affected, even a question of human rights**. What is important is that the procedure, not necessarily the substance of the decision (e.g. which person is appointed to a given post), should be controllable in judicial proceedings."[4]

By Decision No. 727 of 9 July 2012[5] pronounced in that context, the Constitutional Court ruled on the respective legislative measure, finding that «the legislative solution that excludes from constitutional review the resolutions of the Parliament affecting constitutional values and principles is unconstitutional. In the recitals of its decision, the Court held, *inter alia*, that "the exclusion from the constitutional review of all resolutions of the plenum of the Chamber of Deputies, the resolutions of the plenum of the Senate and the resolutions of the two Joint Chambers of Parliament is not based on the rule of law, but possibly on recitals of opportunity, which in essence implies subjectivism, interpretation and arbitrariness. However, constitutional justice is based on the rule of law, not on opportunity. Therefore, this power shall not have the meaning of an "*excessive*" burden for the Constitutional Court, as mentioned in the explanatory memorandum to the law subject to review, an argument without legal significance, but it shall integrate, inextricably, once it has been legitimately granted, into a legal mechanism likely to contribute to the achievement of the principle of separation and balance of powers in a rule of law, democratic and social. To appreciate and decide on the activity of the Constitutional Court, especially in terms of quantitative standards, means its incorrect acceptance and even more, the ignorance of the substance of its fundamental role." Likewise, the

[4] Ibidem, paragraphs 21-23.
[5] Published in the Official Gazette of Romania Part I, no. 477 of 12 July 2012.

Court emphasized **"the importance of the constitutional review on the parliamentary resolutions for the proper functioning of the rule of law and for the compliance with the separation and balance of State powers."**

We believe that a study on the evolution of the constitutional review on the parliamentary resolutions ten years after that moment of crossroads could help determine the role of this review as emphasized by both the cited Venice Commission Opinion and the invoked case law of the CCR. To illustrate this evolution, after a brief presentation of the constitutional and legal framework in the matter, we will highlight the jurisprudential landmarks that we consider to be relevant.

2. Constitutional and legal framework of the constitutional review of Standing Orders and Resolutions of the Parliament

2.1 Subject matter of the review

Article 76 of the Constitution distinguishes between the Standing Orders of the Parliament (considered true extensions of the constitutional provisions, as long as they are adopted by a majority required by the organic law), and the other Resolutions (which are adopted by a majority vote of the present Deputies and Senators, such as the ordinary laws). In turn, the latter resolutions may be of a normative or individual nature.

The Standing Orders of the Parliament have been the subject matter of the constitutional review since the establishment of the Court, entering into its original powers, established by the 1991 Constitution [currently Article 146 c) of the Constitution]. The subject matter of the review is the provisions of the Standing Orders of the Parliament, namely the own Standing Orders of the Chambers, as well as the joint Standing Orders. Furthermore, the review carried out by the Court includes the resolutions amending or supplementing the Standing Orders of the Parliament.

As for the constitutional review of the resolutions of the plenum of the Chamber of Deputies, the resolutions of the plenum of the Senate and the resolutions of the plenum of the Joint Chambers of the Parliament, this power of the CCR was established by Article I point 1 of Law No. 177/2010 amending and supplementing Law No. 47/1992 on the organization and functioning of the Constitutional Court, the Code of Civil Procedure and the Code of Criminal Procedure of Romania[6], pursuant to Article 146 l) of the Constitution and is subject to the same rules as the one provided by Article 146 c) of the Constitution. The regulation in 2010 of this new power of the CCR has been criticized, appreciating that "the role of a constitutional court is placed too low on the scale of values", as well as the fact that allowing the Court's review over individual

[6] Official Gazette of Romania, Part I, no. 672 of 4 October 2010.

parliamentary resolutions "means to allow that it can decide, instead of Parliament, on certain appointments to public office and dignities, so that it could replace the Parliament", concluding that "this amendment (supplement) must be considered a serious political and parliamentary error"[7]. In this light, it is all the more relevant to examine the extent to which the constitutional review of the resolutions of the Parliament has become, in time, a tool to guarantee the supremacy of the Constitution and the rule of law or an error of assessment regarding the powers of the constitutional court.

The Constitutional Court has established, based on the interpretation of the Constitution, the following requirements for the admissibility of the referral and, consequently, for its jurisdiction in this matter: the resolutions in question be adopted after conferring the new power[8]; the resolutions in question affect constitutional values, rules and principles or, where appropriate, the organization and functioning of the constitutional authorities and institutions[9]; the reference rule must be of constitutional rank[10]; with regard to the resolutions aiming at the organization and functioning of the constitutional authorities and institutions, the reference norms, within the constitutional review carried out, may be both a constitutional and an unconstitutional provision, taking into account the provisions of Article 1 (5) of the Constitution. Likewise, we note the distinction in the sense of delimiting the constitutional aspects of the resolutions of the Parliament with an individual nature (for example, the appointment to offices), in relation to those of opportunity, subjective, which, by their nature, cannot be subject to the examination carried out by the CCR. Thus, according to the CCR, "the enshrinement of the dichotomous nature of the legal requirements that the appointed person must meet, namely objective and subjective requirements, has as a consequence only the admissibility of a review carried out by the constitutional court exclusively regarding the objective requirements". The Court cannot analyze and censor the Chambers' option regarding a person considered to meet the requirement of "*high professional competence*", under the conditions established by the Constitution, but it can only verify and decide on the fulfilment

[7] I. Muraru, A. Muraru, *A century of constitutional control in Romania*, „Revista română de drept privat" (Romanian Review of Private Law) no. 2/2012, p. 171-186; T. Toader, M. Safta, *Constitutia Romaniei. Decizii ale Curtii Constitutionale, hotarari C.E.D.O., hotarari C.J.U.E., legislatie conexa*, 4th ed., Ed. Hamangiu, Bucharest, 2021, p. 45.

[8] Decision No. 53 of 25 January 2011 (Official Gazette of Romania, Part I, no. 90 of 3 February 2011); Decision No. 54 of 25 January 2011 (Official Gazette of Romania, Part I, no. 90 of 3 February 2011); Decision No. 307 of 28 March 2012 (Official Gazette of Romania, Part I, no. 293 of 4 May 2012); Decision No. 783 of 26 September 2012 (Official Gazette of Romania, Part I, no. 684 of 3 October 2012).

[9] *Ibidem.*

[10] Decision No. 307 of 28 March 2012 (Official Gazette of Romania, Part I, no. 293 of 4 May 2012); Decision No. 783 of 26 September 2012 (Official Gazette of Romania, Part I, no. 684 of 3 October 2012).

of the objective requirements provided by law.[11]

2.2. Procedural issues

The subjects who can initiate the constitutional review in both situations (the two distinct powers of the CCR) are one of the presidents of the two Chambers of the Parliament, a parliamentary group, a number of at least 50 deputies or at least 25 senators. According to the case-law of the CCR, taking into consideration the principle of the regulatory autonomy of the Chambers of Parliament, the President and the members of one of the Chambers or a parliamentary group in one Chamber may not request the constitutional review of the Standing Order of the other Chamber.

If the referral is submitted by parliamentarians, it shall be sent to the Constitutional Court by the Secretary-General of the Chamber to which they belong, on the day of its submission, and the Constitutional Court shall communicate it within 24 hours from the registration to the Presidents of the two Chambers, specifying the date when the debates are to take place. Until the date of the debate, the Presidents of the two Chambers may communicate the viewpoints of the Standing Bureau.

The debate shall take place in the Plenum of the Constitutional Court, based on the act on the case submitted to the Court and the viewpoints received. The decision shall be pronounced by the majority of the Judges' votes and it shall be notified to the Chamber whose Standing Orders/resolutions have been debated.

According to Article 147 of the Constitution, the decision of the CCR is final and generally binding. If any provisions of the Standing Order are found unconstitutional, the notified Chamber is bound to reconsider, within 45 days, these provisions, in order to bring them into line with the provisions of the Constitution. During this period, the provisions of the Standing Order found to be unconstitutional are suspended. Upon expiry of the 45-day period, the provisions found to be unconstitutional shall cease their legal effect.

3. Jurisprudential landmarks. Effectiveness of the constitutional review of the Standing Orders and Resolutions of the Parliament

According to the information on the CCR website[12], in the cases having

[11]See Decision No. 251 of 30 April 2014, paragraphs 19 and 20, Decision No. 389 of 2 July 2014, paragraph 23, Decision No. 459 of 16 September 2014, paragraphs 48 and 49, Decision No. 433 of 21 June 2018, published in the Official Gazette of Romania, Part I, no. 617 of 18 July 2018, paragraph 31, Decision No. 65 of 23 January 2019, paragraphs 32 and 33

[12] https://www.ccr.ro/wp-content/uploads/2022/03/SinRoNew_feb.pdf, statistics of 28 February 2022.

as subject-matter the Standing Orders of the Parliament or the resolutions amending the Standing Orders, there were pronounced 22 admission decisions, representing 43.14% of the total of 51 pronounced decisions (1992-2022). In the 12 years since the introduction of the power regarding the review of the other resolutions of the Parliament (2010-2022), a number of 20 admission decisions have been pronounced, representing 30.77% of the total of 65 pronounced decisions.

We believe that there is a significant number of referrals to the Court. In this light, the assessment of the number of referrals should be made in relation to the powers of the CCR other than the settlement of the exceptions of unconstitutionality, as the latter are the substance of the activity of the CCR and stand out naturally, including as volume, in this activity. Therefore, the quantitative assessment reveals a high percentage of admission decisions, which in itself is an indicator of the effectiveness of the constitutional justice, in the sense that the referrals with which it was invested raised the issues of constitutionality, which required the intervention of the Court for correction.

As for the authors of the referrals, we note the share of the parliamentary groups as authors, which supports the idea that the powers on the review of the resolutions of the Parliament serve as a tool at the disposal of the parliamentary minority in order to express themselves effectively when the Constitution is violated by the majority.

As concerns their subject-matter, we note the diversity of the issue addressed, and its importance, mainly discussing appointments and dismissals in public offices, but also issues related to the compliance with the constitutional principles governing the work of the Parliament. In some of the cases, finding the unconstitutionality of the resolutions on the appointment/ nomination/validation to offices, CCR held that both the appointment proposal and the appointment to offices must be based on the prior verification of compliance with the legal and constitutional requirements for holding that dignity, as well as the prohibitions and incompatibilities that may result either from the personal status or from other legal provisions. In other cases, the Court referred to the constitutional provisions governing the parliamentary procedure for the adoption of acts, the constitutional imperative of observing the political configuration or political pluralism.

Thus, for example, **the Court found the unconstitutionality of the resolutions regarding the appointment to various offices**, such as:

Resolution of the Plenum of the Senate no. 31 of 15 December 2010 regarding **the election of the two representatives of the civil society in the Superior Council of Magistracy**[13], in relation to the constitutional provisions of Article 1 (5), according to which "*in Romania, the observance of the Constitution, of its supremacy and that of the laws shall be mandatory*" and of Article 16(2), according to which "*No one is above the law.*"

[13] Decision No. 54 of 25 January 2011 (Official Gazette of Romania, Part I, no. 90 of 03 February 2011).

Resolution of the Plenum of the Senate no. 43 of 22 December 2010 on **the validation of magistrates and as members of the Superior Council of Magistracy**[14], by reference to the same constitutional texts mentioned above.

Resolution of the Parliament of Romania no. 28/2012 regarding **the appointment of the members of the Board of Directors of the Romanian Television Company**[15]**.** As regards the nomination of candidates by the joint parliamentary groups of the two Chambers of Parliament, **by** reference to Article 1 (5) of the Constitution, which provides that the observance of the law shall be mandatory and of the rule of law, enshrined in Article 1 (3) of the Constitution, the Court specified the legal effects of the decision in its recitals, stating that, according to Article147 (4) of the Constitution, the Resolution of the Parliament of Romania no. 28/2012 shall cease its legal effects regarding the 8 candidates nominated by the parliamentary groups on the date of publication of this decision in the Official Gazette of Romania, Part I. Also, as an effect of the binding nature of the decisions of the Constitutional Court, the Parliament is to establish the procedure for appointing the members of the Board of the Romanian Television with reference to the 8 seats allocated to the parliamentary groups in full compliance with the mandatory provisions of Article 19 (2) a) of Law No. 41/1994.

Resolution of the Parliament of Romania no. 24/2014 on **the appointment of the members of the Board of Directors of the Romanian Broadcasting Company**[16], adopted in violation of the provisions of Article 19 (1) a) of Law No 41/1994, which has as a consequence the disregard of the constitutional provisions of Article 1 (3) and (5). The Court specified the effects of the decision in its recitals, stating that the Resolution of the Parliament of Romania no. 24/2014 shall cease its legal effects regarding the 8 candidates nominated by the parliamentary groups on the date of publication of the decision in the Official Gazette of Romania.

Resolution of the Parliament of Romania no. 26/2014 on **the appointment of the first vice-president, executive member, and of a non-executive member of the Council of the Financial Supervisory Authority**, in relation to the provisions of Article 1 (3) and (5) of the Constitution regarding the rule of law and the obligation to comply with the law[17].

Resolution of the Parliament no. 28 of 16 June 2014 on **the appointment of certain accountants and a vice-president of the Court of Accounts**, regarding some of the appointments to the office of accountants, in relation to the constitutional provisions contained in Article 140 (4) on the prohibition of the

[14] Decision No. 53 of 25 January 2011 (Official Gazette of Romania, Part I, no. 90 of 03 February 2011).
[15] Decision No. 783 of 26 September 2012 (Official Gazette of Romania, Part I, no. 684 of 03 October 2012).
[16] Decision No. 417 of 3 July 2014 (Official Gazette of Romania, Part I, no. 535 of 18 July 2014).
[17] Decision No. 389 of 2 July 2014 (Official Gazette of Romania, Part I, no. 534 of 17 July 2014).

renewal of the term of office and in Article 1 (5) of the Constitution, according to which "*In Romania, the observance of the Constitution, of its supremacy and that of the laws shall be mandatory*".[18]

Resolution of the Parliament of Romania no. 17/2011 on **the appointment of certain accountants and a vice-chairman of the Audit Authority** regarding an appointment as an accountant and, implicitly, the appointment of the same person as vice-president of the Audit Authority, by reference to the constitutional provisions contained in Article 140 (4) regarding the prohibition of the renewal of the term of office and in Article 1 (5) of the Constitution, according to which "*in Romania, the observance of the Constitution, of its supremacy and that of the laws shall be mandatory"*[19].

Resolution of the Parliament of Romania no. 32/2021 on **the appointment of the interim general director of the Romanian Broadcasting Company**, in relation to the constitutional provisions contained in Article 1 (5) which enshrines the principle of legality and supremacy of the Basic Law, as well as to the provisions of Article 19 and Article 20 of Law no. 41/1994[20].

Resolution of the Senate of Romania no. 36 of 10 September 2019 **by which the President of the Chamber was elected**, from the position of candidate proposed by another parliamentary group than the one of which he was a member, by reference to Article 1 (5) which enshrines the principle of legality and of the supremacy of the Fundamental Law, to Article 8 (2) and Article 64 (1), (3) and (5) which enshrines the principle of political pluralism and the principles of parliamentary activity[21].

Likewise, **the Court found the unconstitutionality of a resolution on the dismissal from office**, in the case of the Advocate of the People.[22] The Court noted the very vague nature of the ground for revocation, which is not rigorously specified, so as to cover only serious misconduct committed by the Advocate of the People, the fact that the law does not provide for the Advocate of the People the right to defence, in a transparent procedure, so as to ensure him/her a public hearing, and that there is no procedure for challenging the revocation resolution before the Constitutional Court to the revoked person itself. All these elements constitute, separately and together, flaws of unconstitutionality of the resolution of the Parliament subject to the review carried out by the constitutional court, free access to justice, which the Constitution guarantees to the revoked person.

In another case, the Court found the unconstitutionality of the **Resolution**

[18] Decision No. 442 of 10 July 2014 (Official Gazette of Romania, Part I, no. 565 of 30 July 2014).
[19] Decision No. 514 of 8 October 2014 (Official Gazette of Romania, Part I, no. 779 of 27 October 2014)
[20] Decision No. 428 of 17 June 2021 (Official Gazette of Romania, Part I, no. 616 of 23 June 2021); see also Decision No. 429 of 17 June 2021 (Official Gazette of Romania, Part I, no. 616 of 23 June 2021).
[21] Decision No. 25 of 22 January 2020 (Official Gazette of Romania, Part I, no. 122 of 17 February 2020).
[22] Decision No. 455 of 29 June 2021 (Official Gazette of Romania, Part I, no. 666 of 6 July 2021).

of the Senate no. 32 of 25 March 2015 by which the Senate finds that the conditions required by Article 24 (4) of Law No 96/2006 on the Statute of Deputies and of Senators and by Article 173 of the Standing Order of the Senate, in order to approve the detention and pre-trial detention of a Senator[23] since it was adopted on the basis of the legal and regulatory provisions that were contrary to the provisions of Article 76 (2) of the Constitution. In this context, the Court sanctioned the violation of the parliamentary procedures, for example the quorum rules for the adoption of the acts, as in the case of the Resolution of the Parliament of Romania no. 72/2017 amending the annex to the Resolution of the Parliament of Romania no. 15/2017 on the approval of the nominal composition and the leadership of the Executive Committee of the Romanian Group to the Interparliamentary Union[24] or the Resolution of the Parliament of Romania no. 70/2017 amending the annex to the Resolution of the Parliament of Romania no. 10/2017 on the approval of the nominal composition and the leadership of the Permanent Delegation of the Parliament of Romania to the Parliamentary Assembly of the Black Sea Economic Cooperation[25].

Likewise, the establishment of an inquiry commission did not pass the constitutionality test. The Court found the unconstitutionality of the Resolution of the Parliament of Romania no.11/2018 on the establishment of the Parliamentary Commission of Inquiry of the Senate and the Chamber of Deputies to verify the activity of the director of the Protection and Guard Service**,** Mr. Pahonțu Lucian-Silvan, and the way in which he may have involved the institution in activities that go beyond the legal framework, noting the contradiction with the role and powers of the parliamentary inquiry committee, as they have been circumscribed by the case-law of the Constitutional Court[26].

In other case, giving effect to the decision pronounced in another form of review (of the laws before promulgation), the Court found **the unconstitutionality of the Resolution of the Parliament of Romania no. 5/2020 for approving the state of alert and the measures established by the Government Decision No. 394/2020 on the declaration of the state of alert and the measures applied during it to prevent and combat the effects of the COVID-19 pandemic**. The ascertainment of the unconstitutionality of the legal provisions that constituted the basis for the adoption of the normative act of the Parliament [Article 4 (3) and (4) of Law no. 55/2020] lacks the effects of the subsequent normative act [Resolution of the Parliament of Romania no. 5/2002], which ceased to take legal effects, by virtue of the provisions of Article 147 (1) and (4) of the Constitution, as

[23] Decision No. 341 of 6 May 2015 (Official Gazette of Romania, Part I, no. 344 of 19 May 2015).
[24] Decision No. 730 of 22 November 2017 (Official Gazette of Romania, Part I, no. 1043 of 29 December 2017).
[25] Decision No. 732 of 22 November 2017 (Official Gazette of Romania, Part I, no. 1035 of 28 December 2017).
[26] Decision No. 206 of 3 April 2018 (Official Gazette of Romania, Part I, no. 351 of 23 April 2018).

from the date of publication in the Official Gazette of Romania, Part I, of Decision no. 457 of 25 June 2020 of the Constitutional Court, in violation of the provisions contained in Article 1 (4) and Article 108 of the Constitution. Thus, by virtue of the principle *resoluto iure dantis, resolvitur ius accipientis*, since the resolution of the Parliament is an act subsequent to the law, given in its execution, the ascertainment of the unconstitutionality of the main act directly affects the secondary act, lacking legal effects.[27]

In this light, we notice **the high percentage of decisions allowing the referrals of unconstitutionality**, supporting an active role of the CCR and a strong influence exercised by the constitutional review on the parliamentary activity, in order to ensure the compliance with the Fundamental Law. However, this shall constitute in itself a guarantee of the term of office given by the voters to the elected members of parliament.

Perhaps the most energetic or visible intervention of the CCR in this regard was the ascertainment of the unconstitutionality of the dismissal of the Advocate of the People and the clarification that the CCR made in the decision regarding its effects, namely the resumption of the office of the Advocate of the People by the person revoked by the Parliament in violation of the Constitution. Thus, the CCR noted in that case that "based on the legal provisions that do not ensure the guarantees of independence of the Advocate of the People in relation to other public authorities, provisions to which the Parliament has assigned a different interpretation than that resulting from their normative content, Resolution of the Parliament of Romania no. 36/2021 on the dismissal of Ms. RW from the office of the Advocate of the People violates the constitutional provisions contained in Article 1(3) and (5) which enshrine the principle of the rule of law and the principle of the legality and supremacy of the Fundamental Law, as well as the provisions of Article 9 (2) of Law No. 35/1997". The Court found that, "since the act of revocation, which is the cause of termination of the term of office of the Advocate of the People, is unconstitutional, it shall cease to take legal effects. Therefore, pursuant to Article 147 (4) of the Constitution, which enshrines the general binding nature and future effects of the decisions of the Constitutional Court, (…) as from the date of publication of this decision in the Official Gazette of Romania, Ms. RW shall resume her office as the Advocate of the People, exercising her constitutional term of office for which she was appointed by the Resolution of the Parliament of Romania no. 18/2019, published in the Official Gazette of Romania, Part I, no. 524 of 26 June 2019 (paragraph 84)."[28]

4. Conclusions

We can conclude that, after the initial turmoil, the new power of the CCR

[27] Decision No. 672 of 20 October 2021 (Official Gazette of Romania, Part I, no. 1030 of 28 October 2021).
[28] Decision No. 455 of 29 June 2021 (Official Gazette of Romania, Part I, no. 666 of 6 July 2021).

conferred in 2010, as well as the constitutional review of the resolutions of the Parliament as a whole, were imposed in the national constitutional landscape, revealing its role and importance in substantiating the rule of law and democracy.

Likewise, the reading of the decisions shows a straightening out of the case-law of the Constitutional Court, in the sense of delimiting its powers from those of the Parliament/other authorities, by outlining admission requirements of the notifications formulated as regards the constitutionality of the resolutions of the Parliament.

The significant number of separate and concurring opinions expressed in the settlement of these cases reveals that the issues raised, often at the political/legal, constitutional/opportunity, subjective/objective frontier, continue to impose serious restrictions on the extent of the jurisdiction of the constitutional court in this matter and a refining of the review, including with regard to the reasoning of the decisions of the Constitutional Court in this situation.

As for the conferral of the new power of the CCR by its organic law on organization and functioning, we consider that it should be approached with caution, taking into account the recitals of the decision mentioned at the beginning of this study, which shows that the reference rule giving the legislator the prerogative to supplement the organic law of the CCR in order to increase its powers does not also entitle to their elimination.

Thus, the Court held that «the meaning of the reference rule contained in Article 146 l) of the Constitution, as it results from its wording - "*fulfils other prerogatives stipulated by the organic law of the Court*", is to allow the legislator the increase, the extension of the powers of the constitutional court. Therefore, to interpret the mentioned fundamental norm, in the sense that the legislator would have the possibility to limit, eliminate or reduce these powers, to the detriment of other fundamental provisions, is tantamount to its emptying of content, namely to its diversion from the purpose of improving the constitutional democracy, aimed by the framer himself on the occasion of the revision, which is absolutely unacceptable. As a consequence, no amendment of the powers of the Constitutional Court pursuant to Article 146 l) of the Fundamental Law can be made if it has the effect of suppressing, under any conditions and in violation of certain fundamental norms, one of these powers. In this light, even if the power regarding the constitutional review of the resolutions of the Parliament was granted to the Constitutional Court by its organic law, it acquired constitutional validity based on the provisions of Article 146 l) of the Constitution».

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Competition Council in Ukraine

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Abstract

Even in the present context, we must now the legal preconditions for the harmonization of Ukrainian legislation in the field of competition law with the law of the European Union. Due to its evolution, the competition law has been, and remains, a priority in the harmonization process of Ukrainian legislation. This aspect now is very important due to Ukraine determination to became member of European Union and because is one of the Romania s neighbors.

Keywords: *Ukraine, European Union, competition, Antimonopoly Committee.*

JEL Classification: K23, K33

1. Introduction

We can speak about competition law in Ukraine, like in other former communist countries, after 1990.

In addition to the Competition Law, the regulatory framework includes the Law on the Antimonopoly Committee of Ukraine - Law on the AMC, AMC Methodology for Establishment of the Monopoly (Dominant) Position of the Undertakings on the Market 2002 (Monopoly Methodology), AMC Resolution on the Procedure for Filing Applications with the AMC for Obtaining its Approval of the Concerted Practices of the Undertakings 2002 (Concerted Practices Regulation), AMC Resolution on the Standard Requirements to Concerted Practices of the Undertakings for their General Exemption from the Requirement to Obtain Prior AMC Clearance 2002 (General Exemption Regulation), AMC Resolution on the Standard Requirements to Associations 2006, AMC Resolution on the Standard Requirements to Concerted Practices of the Undertakings concerning Specialisation of Production 2008 (Specialisation Regulation), AMC Resolution on the Standard Requirements to Concerted Practices of the Undertakings concerning Joint R&D and/or Development and Engineering Works 2012 (R&D Regulation). Regulation on the Procedure Application of Leniency 2012 (Leniency Regulation) Guidelines on Calculation of Fines for Violation of Ukrainian Competition Law 2016 (Guidelines on Fines), AMC Resolution on the Standard Requirements to Vertical Concerted Practices of the Undertakings 2017 (Vertical Block Exemption Regulation) and AMC Resolution on the Standard Require-

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ments to Concerted Practices of the Undertakings concerning Technology Transfer Agreements 2018.[2]

2. General aspects

The main institution with competences in the field of competition law was established by the adoption of the Law on the Antitrust Committee (the ukrainian name for Competition Council).[3]

The AMCU president was appointed in 1992 and ten state commissioners were appointed in 1993. Staff members were recruited and AMCU became operational in 1994. Since then, the AMCU Act has undergone many changes. As a result, the organizational structure of AMCU has also changed. Since 2009, there have been continuous changes in the staff of the Ukrainian competition authority.

AMCU and its bodies are the competent authorities.[4]

Those detailed rules on competences are contained in Article 20 of the Law on the Antitrust Committee of Ukraine. The organizational structure of the Ukrainian Antitrust Commission AMCU was established in November 1993 with the adoption of the AMCU Act and began operations in 1994. The AMCU Act has been amended several times in recent years.

Currently, in accordance with Article 6 of the AMCU Law and the Law on Central Bodies of the Executive Branch, the Commission is composed of a President and eight State Commissioners. A first deputy and a vice-president are appointed from among the state commissioners.[5]

Since the last amendment to the AMCU Law, the President of Ukraine has been appointed to appoint an additional Vice President. The President of the AMCU is appointed for a term of seven years and may be removed by the President of Ukraine with the approval of the Verkhovna Rada (Article 9 of the AMCU Law). The First Deputy and the Vice-President, as well as all other State Commissioners, are appointed by the President of Ukraine on the proposal of the President of AMCU and the Prime Minister of Ukraine and dismissed by the President of Ukraine. In 2011, the Verkhovna Rada adopted the Law on Central Bodies of the Executive Branch and Law no. 4287-IV.

According to these laws, together with the Law of the Cabinet of Ministers of Ukraine, AMCU has officially become a central executive body with special status. This special status is defined in the Constitution of Ukraine and in the

[2] I. Svechkar, O. Voznyuk, Al. Pustovit, T. Vovk, *Trade Restrictions and Domination in Ukraine: Overview Thomson Reuters*, 2021, accessed at: https://content.next.westlaw.com/7-569-9990?__lrTS=20220522051219606&transitionType=Default&contextData=(sc.Default)&firstPage=true, consulted on 1.02.2022, p. 1.

[3] UNCTAD, Voluntary peer review of Competition Law and Policy: Ukraine United Nations, 2013, p 12.

[4] Ibid, p 38.

[5] Ibid, p 38.

AMCU Law.[6]

According to the AMCU Law, this status is determined by the powers and responsibilities of the AMCU, including its role in shaping competition policy and the special procedure for the appointment and removal of the AMCU President, deputies, state commissioners. , the heads of the regional offices of AMCU, as well as special procedural grounds for the activities of AMCU, the granting of social guarantees, the protection of personal and property rights of AMCU employees at the same level as the law enforcement bodies, as well as in terms of pay.[7]

The independence of a competition authority from political influence is a fundamental principle in all market economies. Such independence is a prerequisite for managing conflicts of interest and avoiding corruption. It is not uncommon for a market economy to have conflicts of interest between different ministries or politicians in connection with competition cases. Such conflicts of interest are almost "natural." For example, in the case of a merger, the merger could be in the public interest because it would provide jobs. Therefore, it would also be in the interest of local politicians. However, this specific merger could at the same time lead to a decrease in competition in the relevant markets. A competition authority must be in a position to decide on such cases without any influence.[8]

The guarantee of the neutrality of the decision-making process of the competition authority in order to fulfill its function of protecting competition against the interest of governments or ministries and to achieve its economic visions is in the public interest.

3. Administrative aspects

AMCU has 27 territorial offices, which are organs of the organizational structure of AMCU.

Their heads are appointed and dismissed by the AMCU president. The main tasks, competencies, authority and organizational principles of the territorial offices are regulated by the Provisions on the Territorial Offices of AMCU. Within AMCU there are four operational departments, the Market Research Department, the Investigation Department, the Legal Department and the Mergers and Concerted Actions Department. Administrative support for AMCU and its President. is provided by the Organization and Procurement Department and, respectively, the Management and Support Department to the President. All regional departments and offices are headed by an AMCU State Commissioner.[9]

The department responsible for investigations is the Investigation Depart-

[6] Ibid, p. 38.
[7] Ibid, p. 38.
[8] Ibid, p. 38.
[9] Ibid, p. 39.

ment, established only in May 2011, in the context of a comprehensive reorganization of AMCU. There has been a process of transformation in recent years from a sectoral to a more functional approach to the Commission's organizational structure. Today, AMCU has 46 different functions, including the investigative function. The Investigation Department currently is divided into four divisions, the Division for the Investigation of Monopoly Abuse and Restrictive Practices, the Division for the Investigation of Horizontal Concerted Actions, the Division for the Investigation of Unfair Competition and the Division for Auction Fraud.[10]

It is responsible for investigating cartels, cases of auction fraud, unfair competition and cases of abuse of a dominant position, as well as infringements by public authorities.

The Market Research Department is divided into four directions, all dealing with specific economic branches. Each directorate is again headed by a state commissioner.

The four departments within the Department of Market Research are divided into divisions.[11]

Each division is competent for a specific area of the economy or specific markets (for example, the Food Markets Division, the Financial Markets Division). During the above-mentioned transformation and reorganization process of AMCU, the functions of the Market Research Department were extended. Based on the analysis performed, the Department now has the power to initiate cases and conduct investigations. The department investigates particular cases that require in-depth economic analysis or those involving government institutions. Thus, combines market research and investigation functions.[12]

In September 2012, the Department reported 13 cases to the Investigation Department. In these procedures the Department of Market Research has a rather supportive function. The Infrastructure, Housing and Utilities Department is responsible for the transport, communications, housing and utilities sectors. It conducts ex officio market research on the basis of available information and not necessarily on the basis of complaints received. In 2012, the highest number of cases of abuse of a dominant position handled by AMCU targeted the housing and utilities sector (32.2 percent of the total number of abuses). The Energy Markets Division comprises the Oil and Petroleum Products Division and the Gas and Electricity Markets Division. Both divisions are competent to detect and prevent breaches of competition law in the energy markets. The main method used to detect violations in this area is to monitor prices through regional offices.

The Legal Department provides legal advice to all AMCU departments, departments and divisions.[13]

He is responsible for drafting responses to complaints. It also has the

[10] Ibid, p. 41.
[11] Ibid, p. 41.
[12] Ibid, p. 41.
[13] Ibid, p. 41.

function of drafting amendments to the main laws, regulations and procedures. In defending AMCU's decisions in court, the Legal Department works closely with the Investigation Department. A lawyer and a case manager defend AMCU's decisions in court.

In 2004, a specific directorate was set up under AMCU to deal with mergers and concerted actions, namely the Directorate for the Control of Mergers and Concerted Actions. Prior to the establishment of this specific Directorate, the Department for Market Research was responsible for merger control.[14]

The AMCU law regulates the powers and rights of the AMCU, as well as the application of competition law. It prescribes in detail the attributions of AMCU in different categories, monitoring the observance of the legislation on the protection of economic competition, exercising control over coordinated actions and concentrations, development and implementation of competition policy, promotion of competition and method of providing logical support for the application of competition law.

According to Article 3 of the AMCU Law, AMCU will participate in the development and implementation of competition policy, thus giving AMCU the right to be involved in all political decisions that have an effect on competition.[15]

An amending law of 2000 (Article 7 of Law No. 1907-III of 13 July 2000) provides that "no other authority of the State may exercise the powers of the Antitrust Committee of Ukraine". In this context, AMCU participates in the development of other laws and regulations that address issues relevant to the development of competition and competition policy, as well as the demonopolization of the economy through the transmission of recommendations.

In addition, AMCU is engaged in drafting and submitting proposals or recommendations to the President of Ukraine and the Cabinet of Ministers, coordinating draft regulations of the President, the Cabinet of Ministers, central and local administrative bodies, local and administrative authorities and control. authorities, which may have an impact on competition (Article 7 of the AMCU Act).[16]

Article 20 of the AMCU Law obliges, in particular, state and local authorities to participate in the development and implementation of specific policies and to cooperate with AMCU in the field of competition development and regional economic development and demonopolization programs. Article 20.1 describes in more detail the relationship between the AMCU and the Verkhovna Rada and the Cabinet of Ministers. The article also deals with cooperation with legislative bodies on economic development and program implementation. AMCU's investigative powers are listed in Article 7 of the AMCU Act and can be summarized as follows (power to collect and request information, power to in-

[14] Ibid, p. 41.
[15] Ibid, p. 42.
[16] Ibid, p. 42.

spect offices and vehicles, the power to seize or arrest evidence, in particular documents or other data media, the power to request the intervention of enforcement bodies in cases of interference of the economic entity concerned, the power to hire other law enforcement agencies to facilitate investigations and the power to implement the leniency program). At present, AMCU does not have the power to conduct a raid at dawn in accordance with similar powers conferred on competition authorities in the European Union and other jurisdictions.

An "inspection" under the LPEC always depends on the support and cooperation of the economic entity involved and therefore cannot be considered a powerful investigative tool.[17]

Raids or searches at dawn are well-known investigative measures in Ukrainian law. Articles 234, 235 and 236 of the Code of Criminal Procedure of Ukraine contain precise regulations on this powerful investigative tool.

Regarding AMCU resources, a major recommendation of the OECD Peer Review is still valid: the state should provide adequate resources to ensure that AMCU can maintain high standards of performance in fulfilling its mission. This recommendation refers to three aspects as prerequisites for performing the tasks required in a professional manner (the amount of financial resources available to AMCU, number of available staff, quality of staff. In particular, it is highly recommended that AMCU jobs be attractive to well-educated and trained staff, for example, by paying adequate salaries). Well-educated and trained AMCU staff should remain in authority and not be employed by industry or law firms.

Another noteworthy issue is that various other government agencies in Ukraine currently perform functions that overlap or are closely related to the work of AMCU.[18]

The Ministry of Economic Development and Trade allocates resources to state price inspection functions that overlap with AMCU's price monitoring responsibilities. In addition, Ukraine has a separate consumer protection body whose mandate is in line with AMCU's mandate to address unfair competition, false advertising and misleading marketing practices. The unification of these resources and mandates within AMCU offers the prospect of a more coherent and efficient policy development by concentrating the relevant activity in a single institution.

The Internal Audit Unit reports directly to the President.

An analysis of AMCU's experience in enforcing competition law reveals three important phenomena.[19]

First, the high number of cases covered by AMCU is due to the relatively lower application thresholds and related criteria that measure a significant number of issues of minor competitive significance or that need to be addressed by other public authorities. The large number of issues involving concerted action

[17] Ibid, p. 43.
[18] Ibid, p. 43.
[19] Ibid, p. 48.

seems to be due to the relatively low standards of evidence for collusion proof. Merger notification thresholds are also very low. AMCU is aware of the reasons for the high number of cases per year.

In all areas, AMCU seeks to reduce its total workload by eliminating cases where the competitive effect is negligible. With a more selective approach, AMCU could focus most of its resources on issues that involve serious competition issues.

Second, AMCU invests substantial time and effort in price control. The central government is urging the AMCU to react immediately to raise prices in "socially sensitive" markets. In response to these demands, AMCU's dominant abuse initiatives focus heavily on excessive pricing. However, AMCU should focus on promoting competition in the markets rather than regulating prices.

Third, as discussed earlier, AMCU does not have the power to conduct raids at dawn. Investigations depend to a large extent on the voluntary cooperation of commercial entities - an adverse condition for effective enforcement, especially for cartel offenses.[20]

Effective enforcement of competition law requires highly specialized judges, and fair and transparent judicial proceedings. Judges need to understand the broader implications of competition for aspects beyond law enforcement, such as privatization or deregulation of markets where the principles of competition have not yet been introduced.

The LPEC (Competition Law) establishes the exclusive jurisdiction of the commercial courts to resolve appeals against decisions of AMCU bodies. According to the Commercial Procedure Court of Ukraine, appeals against decisions of AMCU bodies must be lodged by economic entities with commercial courts located in the same territory as the AMCU body concerned.[21]

According to the Code of Procedure of the Administrative Court of Ukraine, any decision, act or omission of a public authority, including the AMCU, can be challenged in the administrative courts, unless the Constitution or the law requires otherwise. If the parties to a case challenge a decision in an administrative court, the regional jurisdiction of the court shall be at the discretion of the appellant. It can be the administrative court in the area where the appellant is located or the administrative court in the area where the defendant is located (AMCU body).

Jurisdiction of competition courts is still unclear and divided between administrative and commercial courts.[22]

Where the parties to the proceedings challenge a decision in an administrative court, the jurisdiction of the court shall depend on the place where the undertakings are registered. In the “wood case” mentioned above, this led to a situation in which 14 different courts not only had jurisdiction but also settled the

[20] Ibid, p. 48.
[21] Ibid, p. 48.
[22] Ibid, p. 49.

same case. For both administrative and commercial courts, there are good arguments as to which would be most appropriate, but in any case, a decision must be taken as to which higher court would have exclusive jurisdiction in resolving appeals against AMCU's decisions in competition cases. in a timely manner to enable the judiciary to achieve a better reorganization in order to make correct and appropriate decisions in a specialized field.

4. Last evolutions

The lack of clarity is a weakness of Ukraine's competition policy system.[23]

Competition law is a difficult and complex area of law and requires well-trained experts not only in the competition authority but also in the courts. The fact that no decision has been taken on which higher court would have exclusive jurisdiction in resolving appeals against AMCU decisions in competition cases does not encourage Ukrainian judges to specialize in this area of law. The effective distribution of cases between Ukrainian courts prevents judges of any single court from gaining sufficient knowledge and experience to effectively review AMCU decisions. Due to the limited expertise and experience of the courts, they are not able to put sufficient pressure on AMCU decisions. All this strongly argues for the establishment of a specialized court for competition cases in either administrative or commercial jurisdiction.

The President of Ukraine undoubtedly has a substantial influence on the antitrust/competition state policy, as he controls the activity of the AMCU and appoints the heads and members of the AMCU and the national regulators.[24]

This presidential power structure provides an opportunity to directly involve the AMCU in the drafting of presidential decrees and other legislative acts.

One of the explanations for the large number of violations committed by government bodies is the liberal approach used by the AMC.[25]

Many actions by ministries, agencies and other state bodies that indicated violations were concluded without examining the cases, but through negotiations and consultations. The Committee also often addressed "official appeals to state bodies containing proposals for voluntary cessation of infringements". As a result of these recommendations, 75% of infringements were stopped in 2000 and 90% in 2001.

Administrative proceedings against infringing officers were not even widely initiated. Article 20 of the AMC Law on Ukraine requires the agreement of the AMC with the draft of those decisions taken by the central and local executive bodies and the local self-governing bodies which may lead to a distortion

[23] Ibid, p. 49.
[24] Ibid, p. 51.
[25] Y. Stotyka, *Development of Competition Policy in Ukraine*, „Acta Oeconomica", Vol. 54, no. 2, 2004, p. 191.

of competition. This requirement is intended to ensure that government bodies monitor compliance with competition law. The number of documents examined by the AMC was large (1195 in 1996, 1386 in 2001).[26]

However, this mechanism has proved ineffective, and the requirement is often ignored by government bodies. In 1996, 90% of detected cases of state discrimination were associated with non-compliance. In addition, proposals made by AMC after reviewing projects were often not considered. In 2001, only 56% of the recommendations were considered. Provisions on the control of the activities of state bodies that may restrict strict competition can be found in the competition laws of Hungary, Slovakia, the Czech Republic and most CIS countries. However, this type of violation is a more serious problem in the CIS countries, which may be related to a low level of legal awareness and discipline in their state bodies, as well as other reasons relevant to Ukraine mentioned above. In Russia, for example, 44% of all violations of antitrust rules in 1997 and 40% in 1998 involved anti-competitive actions by government structures.[27]

According to the Law on the Privatization of State Property, compliance with antitrust law is one of the basic principles of privatization.[28]

The legislation has provided AMC with powerful tools to influence the process. Representatives of the AMC participated in the privatization commissions and made proposals for the privatization plans. The main tasks included assisting in the creation of a competitive environment, preventing the transformation of state monopolies into private monopolies and preventing the monopolization of markets.

In general, the Committee insisted on the destruction of monopolistic structures before their privatization, in cases where such a break-up was possible and desirable. These cases mainly included a separation of horizontally integrated structures with subsidiaries that could thus become competitors. At the same time, in other cases, AMC supported the privatization of monopoly enterprises without dissolving them (for example, 170 monopoly formations were privatized in 1996 and 44 in 1997).[29]

In general, AMC used a double standard when deciding on the creation of state and private monopolies.[30]

The AMC may issue binding orders to ministries and other government agencies and may appeal to the court if the orders are not complied with. However, regarding the laws, the decisions of the Government and the decrees of the President, AMC can only present its opinion, and this opinion can be taken into account or ignored. If the creation of a monopoly structure takes place in accordance with a state program, the AMC may be tempted to find effective grounds for

[26] Ibid, p. 191.
[27] Ibid, p. 191.
[28] Ibid, p. 192.
[29] Ibid, p. 193.
[30] Ibid, p. 193.

authorization, even if they do not exist.

In fact, there have been many cases in which the consent of the Committee for the creation of state monopolies has not even been sought.[31]

In the field of enhancing the procedural factors of competition regulation enforcement, it is vital to put in force the principle of transparency and applicable decision-making procedure by the AMCU and Ukrainian courts in lawsuits regarding concerted actions and concentrations. For that reason, current national legislation have to be supplemented so as to impose upon the AMCU an responsibility to post its decisions in cases of an infringement of national competition policies. The current Article 48 of the Law on the Protection of Economic Competition (LPEC) does not oblige the AMCU to formally post its competition regulation decisions. Neither does such responsibility exist in the Ukrainian Law on the AMCU.[32]

The main gap between Ukraine and the EU lies in the lack of fairness and transparency in the competition law enforcement process. As a result, the text of the Association Agreement contains a whole range of competition rules, unlike other spheres of economic cooperation that are covered in detailed harmonization schemes which supplement the Agreement in a number of annexes.[33]

The main difficulties lie in the process of effective enforcement of substantive competition rules in a transparent, timely and non-discriminatory manner, respecting the principles of procedural fairness and rights of defence. The main gaps are seen here in the failure to officially publish AMCU decisions and in the lack of a precise official act on calculating fines.

As a result of these faults, enforcement practice lacks legal certainty.[34]

In Ukraine the biggest fine on a single undertaking for abuse of dominance was estblished in January 2016 on PJSC Gazprom for UAH 85.97 billion (approximately EUR 3.26 billion), the only undertaking entitled to buy services of natural gas transit pipelines through Ukraine. The undertaking's failure to take measures to ensure the services of natural gas transit pipelines through Ukraine on reasonable conditions (which would have been impossible under the conditions of existence of significant competition in the market) led to the infringement of the interests of "Naftogaz Ukraine".[35]

5. Conclusions

In practice, certain groups and individuals manipulate the legal frame-

[31] Ibid, p. 193.
[32] K Smyrnova, *Enforcement of Competition Rules in the Association Agreement between the EU & Ukraine,* „Yearbook of Antitrust and Regulatory Studies", Vol 7 (10), 2014, p. 270.
[33] Ibid, p. 270.
[34] Ibid, p. 274.
[35] I. Svechkar, O. Voznyuk, Al. Pustovit, T. Vovk, *op. cit.,* p. 20.

work in order to create unfair barriers to market admission, which entrenches oligopolistic market structures and anticompetitive behavior. Low levels of competition are further perceived to be driven by negative aspects in the national competition policy framework and the often ineffective application of competition policies.

Some reform efforts are already in progress.

The Anti-Monopoly Committee (AMC) is working on the fullcomplete harmonization of Ukrainian competition legislation with EU standards as well as the planning of the National Competition Program 2014-2024 having as goal to enhance the competitive business environment and to boost the AMC's investigative power.

In the AMC opinion enhanced competition would require judges with adequate qualifications and training to adjudicate competition cases, transparency in the provision of state aid, and the AMC's independence in its investigative functions.

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The documents issued within the surrender procedure based on the European arrest warrant according to the Law no. 302/2004 on – typical administrative acts

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Abstract

The administrative law`s formation as a distinctive branch of law has been generated by the necessity to organize the complex activity of the public administration, the social relations within this sphere being, therefore, regulated also in relation to other branches of public and private law. Except for the well-known inner connection between the contravention and criminal matters from the perspective of the guarantees provided to the individuals, the administrative law is highly connected to other branches of public law, such as criminal executional law, as we will present further. The current paper aims to present the peculiarities of the surrender procedure based on a European arrest warrant from the perspective of the issuing of administrative acts that can be subject to the control of lawfulness before the contentious administrative Court.

Keywords: *European arrest warrant, administrative acts, abuse of power, judicial competent authority, Ministry of Justice, JHA Framework Decision.*

JEL Classification*:* K14, K23, K42

1. General overview

The European arrest warrant is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial cooperation, according to the foreword of the Framework Decision of the Council of the European Union dated 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

The Member States have, consistently and rigorously, intended for the Framework Decision to respect all fundamental rights and principles acknowledged by the Treaty on the European Union and mirrored in the Charter of Fundamental Rights of the European Union.

The regulation of the European arrest warrant replaced the European Convention on Extradition, as the mechanism of the European arrest warrant regards a forced transfer of a person from one Member State to another, hence, replacing the extradition procedure and expanding in all fields.

The European arrest warrant is a judicial decision issued by a Member

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State aiming the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order[2].

The surrender procedure based on a European arrest warrant is set out in Law no. 302/2004`s provisions, being characterized by a multiple element of extraneity.

The procedural complexity is given, simultaneously, by the regulation of the case in which the information provided by the issuing Member State are insufficient for the surrendering of the required person to be ordered.

Within the current scientifical analysis, we chose to examine a practical case, in which the Court has been invested with the judging of a contentious administrative application for the annulment of the documents, issued with abuse of power within a surrender procedure based on a warrant issued by the Romanian authorities, pending before the judicial authorities of another Member State.

Through this demarche, it has been called into question the juridical nature of these acts from the perspective of the effects produced, triggering, to this regard, criticism toward both the inadmissibility of the application and the jurisdiction of the contentious administrative Court.

Considering that these documents have the nature of genuine typical administrative acts, the paper will illustrate the primary considerations for which the documents issued within the surrender procedure based on a European arrest warrant can be censored by the contentious administrative based on the application for the annulment.

2. Factual circumstances of the case pending before the Court

For a better understanding of this scientific demarche, we will proceed to the presentation of the factual circumstances that generated the competence of the contentious administrative Court with the application for annulment of the documents issued within the surrender procedure based on a European arrest warrant.

On the date of the submission of the application for the annulment, before the judicial authorities of the executing Member State, a European arrest warrant issued by the Romanian judicial authorities was pending, as a consequence of the final conviction of the person requested.

The surrender procedure was pending before the Court of another European Union Member State, as the executing authority, in the appeal phase.

In Romania, the competent judicial authority within the surrender procedure based on the European arrest warrant issued in the name of the Applicant is the executing authority, while the central competent authority (to facilitate the communication between the executing authority and issuing authority) is the

[2] See, article 1 paragraph 1 of the Framework Decision 2002/584/JHA from 13 June 2002 of the Council of the European Union.

Ministry of Justice – Department for International Law and Judicial Cooperation.

The executing authorities have requested on several occasion additional information from the Romanian authorities.

The answers provided by the Romanian authorities to some of the executing authorities' requests have not been issued by the authorities with jurisdiction in this field, but by the Romanian prosecutor who issued the indictment in the file in which the requested person has been convicted.

Therefore, these documents sent as a response by the Romanian authorities have been subsequently appropriated by the executing authority, fact that generated a new juridical situation, namely the vitiation of the surrender procedure based on a European arrest warrant.

In the light of these circumstances, the requested person submitted a prior application and invested the contentious administrative Court with the solving of the application for the annulment of these administrative acts issued, as a direct consequence of the abuse of power of the Respondents, with the breach of both the provisions regarding the jurisdiction and the rights of the Applicant.

The Respondents, have invoked, through the statement of defense, the exception of inadmissibility of the application, arguing that the documents challenged do not have the juridical nature of administrative acts, and labeling them as mere correspondence.

3. Relevant legal provisions

According to **article 2 paragraph 1) subparagraph c) of Law no. 554/2004**, administrative act means: *„the unilateral act having individual or normative character, issued by a public authority, in exercise of its official powers, with the aim of either organize the execution of the law or the concrete execution of the law, that gives rise, modifies or extinguish legal relations".*

Article 2 paragraph 1) subparagraph n) of Law no. 554/2004, defines the *"abuse of power"* as *"the exercising of the right to assessment of the public authority by breaching the limits of the jurisdiction provided by the law or by breaching the rights and freedoms of the citizens".*

As a consequence of the fact that the abuse of power is equivalent to the discretionary power of the administration exercised in an abusive manner, without any legal justification whatsoever of its behavior, the legal provisions regarding the competent issuing authority are of high relevance.

According to the **Framework Decision 2002/585/JHA** of the Council of the European Union, dated 13 June 2002: *"**Article 1.** 1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.*

(...)

Article 6. *1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.*

2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.

3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.

Article 7. 1. Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities.

2. A Member State may, if it is necessary as a result of the organization of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto.

Member State wishing to make use of the possibilities referred to in this Article shall communicate to the General Secretariat of the Council information relating to the designated central authority or central authorities. These indications shall be binding upon all the authorities of the issuing Member State.

(...)

Article 15. *1. The executing judicial authority shall decide, within the time-limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.*

2. If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17.

3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority."

Nevertheless, according to **Law no. 302/2004 on international judicial cooperation in criminal matters**:

"Article 89. 3. The European Arrest Warrant is issued: d) within the enforcement phase, by the judge established by the President of the execution Court, ex officio or at the request of the prosecutor or the body that has the execution of the conviction warrant or the decision through which the measure involving the deprivation of liberty has been ordered.

(...)

Article 90. *6. When the foreign authority having the jurisdiction to receive or to execute the European arrest warrant establishes that the European arrest warrant does not fulfill the formal conditions or it is imprecise, the issuing authority takes measures to make the necessary amendments or additions.*

(...)

8. In the situation of a direct transmission, the issuing authority informs the special department within the Ministry of Justice on the last business day of each month regarding the European arrest warrants transmitted for enforcement in the reporting period and the stage of their execution.

(...)

Article 91. *1. On or subsequent the date of the transmission of the European arrest warrant for execution, the issuing authority informs, ex officio or at the request of the foreign authority, the necessary additional information for the enforcement of the warrant. The transmission and the translation of the additional information is carried out compliance with article 90".*

That is to say, the role of the Ministry of Justice – Department for International Law and Judicial Cooperation is exclusively one of assisting the competent authorities within this procedure, as the law acknowledges to it exclusively the quality of a facilitator, that is to transmit and receive the correspondence between the authorities.

Moreover, taking into consideration that the Ministry of Justice does not have the competence to subrogate itself into the rights and obligations of the issuing authority of the warrant, and implicitly, to elaborate legal opinions in the latter`s place, we consider that the documents issued to this regard are unlawful from the perspective of the manifest abuse of power that characterizes them.

4. The juridical nature of the administrative act

Analyzing the applicability of Law no. 554/2004 to the case in discussion, the acts challenged represent genuine typical administrative acts, in the sense provided for by article 2 paragraph 1) subparagraph c) of Law no. 554/2004, issued by the central public authorities, having the quality of Respondents in the case in discussion.

Based on the corroboration of the constitutional provisions with the relevant ones from Law no. 554/2004, it can be observed that an application in the contentious administrative can be directed against either the failure of solving the action in the legal term provided or the unjustified refusal to solve an application regarding a legitimate right or interest, or against the contracts perfected by the public authorities having their object expressly established by Law no. 554/2004 or other administrative contracts, provided by special laws and that are subject to the contentious administrative Courts` jurisdiction, this not being the situation in the present case pending before the Court.

Having regard of the exception of inadmissibility of the application, raised by the Respondents, the Applicant showed, through the Response to the statement of defense, the essential characteristics of the administrative act, that can be found also compared to the documents object of the application for annulment.

Specifically, the analysis aimed for in the present paper, proceeds from the clear definition of the administrative act. Within the most comprehensive post-revolutionary Treaty of Administrative Law, the administrative act is regarded as the primary juridical form of the public administration bodies` activity, which consists in a unilateral and explicit display of wills that gives rise, modifies or extinguish legal rights and obligations, carried out in the exercise of the public power, under the primary control of lawfulness of the courts[3].

The same author[4] underlines that the administrative act represents one of the forms with juridical signification by which the public administration authorities can carry out their jurisdiction, hence, their duties.

The premises from which the issue must be analyzed is that an administrative act is one with a *secundum legem* force; that is to say, its scope is to establish a connection between the abstract provisions of the law (which the act enforces) and the concrete situation in which an individual finds himself.

Consequently, just as the doctrine has noted, anytime the administrative act consists in a display of a unilateral and formal will of the public administration, carried out with the scope of producing legal effects, it shall be considered that we are in the presence of an administrative act.[5]

We consider that the issuing of an administrative act by the Public Ministry, at the request of the Ministry of Justice, represents a typical case of issuing an administrative act upon prior request.

Based on the peculiarities of the procedure within which the administrative act rises, it must be delimited and distinguished by mere letters/briefings/communications which were acknowledged the juridical nature of simple material or technical operations and that are not encompassed within the concept of administrative act.

The juridical nature of a document it is not determined by its denomination, but by having regard to its content, to the framework within which it was issued as well as to its scope.

Moreover, it should not be overlooked that, nowadays, the contentious administrative must be regarded not only as a counter-measure, through justice, to the public administration, but also as an efficient tool of guaranteeing the rights of the citizen, the juridical protection of the citizen.

Simultaneously, we point out that, at the European level[6], the administra-

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[3] Antonie Iorgovan, *Tratat de drept administrativ*. Vol. II, 4th ed., Ed. All Beck, Bucharest, 2005; p. 25.

[4] Ibidem, p. 29.

[5] Ovidiu Podaru, *Drept administrativ. Vol. I. Actul administrativ (I) Repere pentru o teorie altfel*, Ed. Hamangiu, Bucharest, 2010, p. 258; Cătălin-Silviu Săraru, *Contenciosul administrativ român*, Ed. C.H. Beck, Bucharest, 2019, p. 46.

[6] According to the Recommendation no. R(89)8, adopted at 13 September 1989 by the Committee of Ministers within the Council of Europe, available at https://rm.coe.int/0900001680a43b5e , last accessed at 7 May 2022.

tive act is regarded as any other individual measure or decision issued in the exercise of the public authority and that it produces direct effects over the rights, freedoms and interests of the people.

Consequently, as established within the doctrine and the case-law[7], to the extent that the document analyzed produces legal effects, being therefore *"able to inflict a harm to the rights of the person who was able to exercise certain prerogatives until that moment",* is an administrative act of authority, that can be censored through the contentious administrative, even if it has a denomination specific to the material-technical operations (letter)[8].

According to article 2 paragraph 1) subparagraph n) of Law no. 554/2004, the *"abuse of power"* is defined as *"the exercising of the right to assessment of the public authority by breaching the limits of the jurisdiction provided by the law or by breaching the rights and freedoms of the citizens".*

This article transposes at the legislative level, the principle of avoiding the abuse of power within the administrative behavior, principle which *"imposes for the administrative behavior to avoid the abuse of power, in the sense that the community officer must exercise his prerogatives only within the scope they were acknowledged to him, and especially avoid, using them without a solid legal ground or for the realization of scopes that are not justified by a public interest."*[9]

In the case aforementioned, pending before the Court, the situation is an atypical one, compared to the extraneity elements that characterizes the entire procedure. The administrative acts, through their unlawfulness, directly produce effects over the situation of the Applicant (*i.e.,* the person in whose name the arrest warrant is issued) being able, through themselves, to vitiate the entire procedure within which they have been requested and issued.

Despite that it can be argued that these acts underpin the decision of the extradition authority and that they can only be challenged alongside this decision, we appreciate that such assertion is clearly void, taking into consideration that the execution authority does not have the capacity to verify whether the act issued by the Romanian authority fulfills the legal conditions derived from the Romanian legislation, as there is no possibility to invoke before it an eventual exception of unlawfulness which could be sustained compared to the internal legal provisions in Romania.

We consider that such an assertion would excessively restrain the right to verify the lawfulness of the administrative acts issued by the Respondents and

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[7] Cluj Court of Appeal, Administrative and Fiscal Litigation Section, civil decision no. 1493 of October 9, 2006, in *Buletinul Jurisprudentei 2006*, Legal Sphere Publishing House, Cluj-Napoca, 2007, p. 463-465.

[8] Ovidiu Podaru, *Drept administrativ, Vol. I. Actul administrativ-repere pentru o teorie altfel*, Ed. Hamangiu, Bucharest, 2010, p. 7.

[9] E. Albu, *Carta Europeană a drepturilor fundamentale – dreptul la o bună administrație*, in Gabriela Bogasiu, *Legea contenciosului administrativ. Comentată și adnotată*, Ed. Universul Juridic, Bucharest, 2018, p. 74.

sent to the execution authority, which would generate consequences that are manifestly contrary to article 6 paragraph 1 of the European Convention of Human Rights.

Therefore, as long as the acts contested have not had a mere documentary or statistical role, but have manifested as autonomous acts, by offering own analysis, juridical reasoning, explanation with the scope of producing legal effects in the procedure of surrendering a person based on a European Arrest Warrant, we consider that these acts have the juridical nature of an administrative act and are clearly unlawful.

As a result of the materialization of the Respondents` abuse of power, we consider that the administrative acts challenged are unlawful, because they were issued by a public authority with no jurisdiction, the basis of these administrative acts being the partiality and the subjectivism of the person who made the entire file based on which the requested person was convicted in Romania.

The power acknowledged to a public authority cannot be regarded, in a state of law, as an absolute and limitless power, because the exercising of the right to assessment by breaching the rights and fundamental freedoms provided for by the applicable legislation represents a real abuse of power, in the sense of article 2 paragraph 1) subparagraph n) of Law no. 554/2004.

The right to assessment is not equivalent to the possibility to act in an abusive manner, arbitrary, without no legal justification whatsoever and outside any control, its exercising being subject to the principle of proportionality, which imposes the upholding of a reasonable balance between the public interest that the authority has the obligation to fulfill and the rights or legitimate interests that can be prejudiced by the authorities` behavior.

Consequently, the unlawfulness of the documents issued derive from the prosecutor`s lack of legal quality in relation to the information transfer within the surrender procedure based on a European arrest warrant, procedure conducted before the authorities of another European Union Member State.

Basically, the documents issued as a response to the executing authority`s requests for information have been issued by a community official who does not have the quality of issuing judicial authority of the European arrest warrant. Nevertheless, the prosecutor constantly had an active presence, at the level of establishing a monopole in regard to the information transfer between the two states, transmitting erroneous information as well.

Reverting to the administrative act`s definition, summarizing the arguments grounding the judicial demarche, in the light of both the legal provisions and the doctrinal perspective, the documents issued within the procedure of surrendering a person based on a European arrest warrant are administrative act as:

(i) they represent a display of will: of the Public Ministry, through the prosecutor, the Ministry of Justice - Department for International Law and Judicial Cooperation, respectively, which have unlawfully interfered within the surrender process by the executing authorities;

(ii) they have unilateral character: their issuing requires a single author (Public Ministry/Ministry of Justice - Department for International Law and Judicial Cooperation);

(iii) they have individual character: they are meant to produce effects exclusively towards the Applicant (*i.e.,* the person in whose name the European arrest warrant has been issued), as they generate consequences within the surrender process by the executing authorities;

(iv) they are issued by a public authority: Public Ministry and the Ministry of Justice - Department for International Law and Judicial Cooperation;

(v) issued in the exercise of the public power: they are issued and produce effects in the surrender process based on a European arrest warrant, procedure set out in Law no. 302/2004 on international judicial cooperation in criminal matters.

5. Conclusions

As shown within the abstract of the paper, the current analysis aims to highlight how, depending on the peculiarities of the relations established, the subject of the administrative law finds its applicability in criminal procedures as well, even in the contentious stage, which, actually ensures the effectiveness of the rights guaranteed by the law.

The administrative act`s particular characteristics must be analyzed concretely, especially compared to their ability to prejudice the rights of the individual to whom they are addressed, directly or indirectly, and against whom they produce legal effects.

Therefore, within this "common" judicial demarche, which falls under the jurisdiction of the contentious administrative Court, there are being called into question aspects of criminal executional law, *i.e.,* the surrender process based on a European arrest warrant, the jurisdiction of the authorities etc.

Consequently, we can only notice the complexity of the administrative law, whose applicability extends including over a cross-border procedure regarding the execution of a conviction, precisely in order to censor the inconveniences caused to the individual, which can be excessively burdening, disproportionate compared to the aimed scopes, just as the European Court of Human Rights` jurisprudence states.[10]

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Power and inclusion of students in their own postgraduate learning journeys

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Abstract

Supervisors have a duty to develop students into independent researchers. Types of supervision include one-on-one supervision, co-supervision, and group supervision. Postgraduate students pass through different stages to acquire their appropriate degrees. They include proposal stage, data collection, progression to masters or PhD, and completion. Supervisors have to internalise the needs of postgraduate students and facilitate research in their areas of specialisation. They assist students to realise their potentials. They can influence and motivate students to complete their postgraduate studies. Supervisors need to understand and accommodate the diversity of students. They have to include all students in all the scholarship activities and ensure they respond to the needs of each specific student. Students should be responsible for their postgraduate studies. At the same time, supervisors have to provide feedback on the works of the students within a reasonable time. A Memorandum of Understanding is crucial to manage and maintain the good relationship between a student and a supervisor. The throughput rate can be increased if there is a good working relationship between the supervisors and students.

Keywords: *postgraduate students, supervisors, supervision, independent researchers, inclusion, diversity, memorandum of understanding.*

JEL Classification: K23, I21, I23

1. Introduction

Supervisors have a responsibility to facilitate or develop postgraduate students to become researchers at masters and doctoral levels.[2] In this way, supervision is a form of teaching[3] where a student is developed through different stages to achieve his or her degree. The current types of supervision include one-on-one supervision, co-supervision and group supervision.[4] During the course of postgraduate studies, the students go through various stages: proposal stage, data

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[2] Khene, C.P. (2014). Supporting a humanizing pedagogy in the supervision relationship and process: a reflection in a developing country. *International Journal of doctoral Studies*, 9, 73; Hemer, S.R. (2012). Informality, power and relationship in postgraduate supervision: supervising PhD candidates over coffee. *Higher Education Research & Development*, 31:6, 829.

[3] Khene, C.P., *op. cit.*, 2014, p. 73.

[4] Parker-Jenkins, M. (2018). Mind the gap: developing the roles, expectations and boundaries in the doctoral supervisor-supervisee relationship. *Studies in Higher Education*, 43:1, 58.

collection, progression to PhD, and completion.[5] Postgraduate students come from different backgrounds and supervisors have to understand their needs and facilitate the research in a specific discipline.[6] The supervisor is a facilitator and ensures that students realise their potentials. Supervisors occupy a position of authority that can influence and motivate the progression of students in their postgraduate studies. In the South African context, postgraduate students come from different backgrounds and need to be accommodated in various programmes.[7] In this regard, the supervisors have to understand their students in order to meet their needs and encourage scholarship at postgraduate level. However, the students also have a role to play in their postgraduate studies. They need to realise that it is their work and take responsibility for the success of their postgraduate studies. This article discusses the power relations between supervisors and students, different stages in postgraduate supervision, and supervision experience in the Faculty of Law at the North-West University.

2. Power relation between supervisors and students

The relationship between a supervisor and a student is a crucial element to the completion of the degree that the student has been enrolled for.[8] However, it is an unequal relationship as the supervisor is in a more powerful position than the student. The supervisor plays a role of an advisor or mentor to the postgraduate students.[9] They possess in-depth knowledge in the culture of their disciplines and have to continuously update themselves with the new developments in their areas of specialization. During the course of the studies, the supervisor aims to transform the student into an independent researcher or professional developer.[10] In this process, the supervisors exercise some controls over the students as they guide and motivate them in their research studies. However, the relationship may be problematic for both parties: for instance, some students may struggle to access their supervisors in order to discuss their topics; and some supervisors may spend a significant amount of time with certain students to ensure that they reach the required standard of knowledge for the specific degree.[11] This is a challenge for supervisors as it has a significant impact on the time they allocate for other

[5] Benmore, A. (2016). Boundary management in doctoral supervision: how supervisors negotiate roles and role transitions throughout the supervisory journey. *Studies in the Higher Education*, 41:7, 1256.
[6] Khene, C.P., *op. cit.*, 2014, p. 74.
[7] Ibid.
[8] Hemer, S.R. (2012). Informality, power and relationship in postgraduate supervision: supervising PhD candidates over coffee. *Higher Education Research & Development*, 31:6, 828.
[9] Ibid; Manathunga, C. (2007). Supervision as mentoring: the role of power and boundary crossing. *Studies in Continuing Education*, 29:2, 207.
[10] Hemer, S.R., *op. cit.*, 2012, p. 829; Grant, B. (2003). Mapping the Pleasures and Risks of supervision, discourse: studies in the cultural politics of education. *Discourse: Studies in the Cultural Politics of Education*, 24:2, 175.
[11] Parker-Jenkins, M. *op. cit.*, 2018, p. 60 - 61.

students. Supervisors should guide against spending more time for specific students to the detriment of other students.

Both supervisors and students have expectations in their relationship that must be fulfilled.[12] For instance, the student must have a motivation to do and complete his or her postgraduate degree.[13] However, some students may require a substantial support from the supervisors[14] in order to acquire knowledge and complete their degrees. The supervisors must keep accurate record of everything they do with the students.[15] They also need to safeguard adequate written progress report for the students. Furthermore, the supervisors can give advice on publication to students, especially as co-authors in journal articles.[16] Briefly, the supervisors expect their students to "be honest when reporting on progress and follow the advice that they give, especially when it has been given at the request of the student".[17] At the same time, students expect their supervisors to "be constructively critical, be available when needed, have sufficient interest in their research to put more information in the students' path".[18] Both supervisors and students learn during the process of supervision.

The relationship between the students and supervisors needs to be managed.[19] Doctoral students have to be socialised into the academic culture. They should work independently and take responsibility for their actions.[20] This means that students must produce their own unaided work and use comments from the supervisors to develop in their knowledge. Good supervisors allow students to improve and find originality of their research.[21] At the same time, supervisors are responsible for the success of their students.[22] They share knowledge and provide advice to students to incite a critical thinking. The supervisor becomes "a guide, intellectual critic, and general counsellor"[23] on academic and personal matters for the students. At the same time, the supervisors are also assessors or gatekeepers[24] to ensure that students who graduate have achieved the required standards of a specific degree on appropriate level.

In the South African context, research supervision focuses more on the

[12] Ibid, p. 64.
[13] Ibid, p. 61.
[14] Ibid, p. 61 – 62.
[15] Ibid, p. 62.
[16] Ibid, p. 63.
[17] Ibid, p. 64.
[18] Ibid, p. 64.
[19] Bastalich, W. (2017). Content and context in knowledge production: a critical review of doctoral supervision literature. *Studies in Higher Education*, 42:7, 1145 – 1146; Lee, A. (2008). How are doctoral students supervised? Concepts of doctoral research supervision. *Studies in Higher Education*, vol. 33, issue 3, p. 267.
[20] Bastalich, W., *op. cit.*, 2017, p. 1147.
[21] Ibid, p. 1147.
[22] Ibid, p. 1147.
[23] Ibid, p. 1147.
[24] Ibid, p. 1148.

development of the students rather than achieving the outcome.[25] Supervisors need to carefully think on the manner in which they provide their criticisms to students.[26] They should be conveyed in a way that they do not discourage or demoralise students. This means that supervisors should be careful when they give feedback to their students. They should provide constructive criticisms and always think on how the students are going to receive and interpret their comments.[27] This will encourage students to correct their mistakes and move on with their studies.

3. Different stages in postgraduate studies

Postgraduate supervision has different stages: proposal stage, data collection, progression to PhD, and completion.[28] Khene has identified 3 phases in postgraduate supervision.[29] They include induction (research proposal), developmental (literature review, data collection, analysis), and launch (data collection, analysis, final write-up). Each of these stages significantly contributes to the completion of the postgraduate degree. The supervisor and student play different roles in each stage. This research discusses each stage in more detail below.

3.1. Proposal stage

Proposal stage is concerned with exploring, discovering, and focusing on the topic that a student intends to research on. The student familiarises himself or herself with the discipline and has an opportunity to secure a clear direction for a viable study.[30] The supervisor guides, encourages, and expects students to develop independently in their research study. Students develop or acquire research skills and critical thinking while the supervisors are careful as they realise that their work will be scrutinised by their peers.[31] This is where the supervisors must be knowledgeable in their areas of specialisation and be able to detect or discern whether the students have researchable topics. At this stage, there is a need for mutual trust and respect between the students and supervisors for the relationship and progress to move smoothfully.[32] Supervisors trust their students according to what they do and produce in their research. At the same time, the students respect

[25] Maistry, S. (2015). Towards a humanizing pedagogy: an autoethnographic reflection of my emerging postgraduate research supervision practice. *Journal of Education*, 62, 86.
[26] Ibid, p. 93.
[27] Ibid, p. 96.
[28] Benmore, A. *op. cit.*, 2016, p. 1256.
[29] Khene, C.P., *op. cit.*, 2014, p. 78.
[30] Benmore, A. (2016). *op. cit.*, 2016, p. 1256.
[31] Ibid 1257; Lee, A., *op. cit.*, 2008, p. 273; Lee, A. & Murray, R. (2015). Supervising Writing: helping postgraduate students develop as researchers. *Innovations in Education and Teaching International*, 52:5, 560.
[32] Benmore, A., *op. cit.*, 2016, p. 1258; Hemer, S.R., *op. cit.*, 2012, p. 828.

supervisors as they realise that there are different things that they can learn from them.

3.2. Data collection stage

Data collection stage requires the students to find out specific issues related to their research study. The supervisors give students opportunity to engage in knowledge creation[33] for the problem that they are investigating for their studies. However, the supervisors need to have a balance of control over their students and allow them to demonstrate their originality and autonomy in the research study.[34] They have to monitor the students in order to ensure progress in the postgraduate supervision. The supervisors have a duty to make their expectations clear[35] to the students to facilitate students in complying with the standards at the postgraduate levels. At this stage, it is important for students to start participating in their research community[36] in order to explore their knowledge and skills.

3.3. Progress to PhD. (or Masters) stage

Progress to PhD (or Masters) stage involves analysis and sense-making[37] of the topic under discussion. The students approach their supervisors to validate their work. However, the supervisors have a duty to develop students into being independent in their studies.[38] Constructive criticism of the work of the students is necessary to develop and achieve the standard of independent researchers. The supervisors must allow a room for their students to grow so that they can achieve a degree of independence in their works.[39] However, supervisors who do not sufficiently consider the needs of their students are likely to undermine or hinder the completion of the studies for their students.[40]

3.4. Completion stage

Completion stage involves "critically thinking about originality and contribution"[41] of the work of the student to the existing knowledge. The students are ready to present their works on equal footing as their supervisors or peers in the

[33] Benmore, A., *op. cit.*, 2016, p. 1258.
[34] Ibid, p. 1259; Delamont, S., Parry, O., & Atkinson, P. (1998). Creating a delicate balance: the doctoral supervisor's dilemmas. *Teaching in Higher Education*, 3:2, 157.
[35] Benmore, A., *op. cit.*, 2016, p. 1259.
[36] Ibid, p. 1259.
[37] Ibid, p. 1260.
[38] Ibid, p. 1260.
[39] Ibid, p. 1261; Akerlind, G. & McAlpine, L. (2017). Supervising doctoral students: variation in purpose and pedagogy. *Studies in Higher Education*, 42:9, 1690.
[40] Benmore, A., *op. cit.*, 2016, p. 1261.
[41] Ibid, p. 1261.

specific discipline of study. However, the supervisors still need to assist students to develop originality in their work[42] to satisfy the requirements of the PhD degree. The supervisors start treating students as equal or critical friends, meanwhile they remain personal mentors to the supervisees.[43] During the course of supervision, the power relation changes and the students become members of academic community or professionals in their careers[44]. However, the supervisors can maintain their powerful positions where they remain as "boundary maintainer, gatekeeper, judging eye".[45] This occurs where the supervisors maintain or keep the standards of specific degrees and are able to evaluate the works of the students. When the standards are maintained across all the disciplines, then the education remains valued by the entire community. The students become confident and ready to submit their works for examination for the postgraduate degrees.

During supervision process, supervisors often introduce students to research support from other areas such as academic development, scholarly industry, and peer networks.[46] The students are encouraged to become peers and take up research identities to establish their area of innovation in the specific disciplines.[47] Practically, the supervisors can take their students to academic conferences and introduce them to the academic community. The students can establish networks in the academic community from the persons who attend the conferences. These networks can facilitate students in their academic works until they become established members in their disciplines of study. For the students who do not join academia, the networks can assist them to develop in their professional careers. The next session deals with the supervision experience at the North-West University.

3.5. Personal experience of supervision in in the Faculty of Law at the North-West University

The Faculty of Law at the North-West University applies one-on-one supervision and co-supervision for the postgraduate students. There is no group supervision in the Faculty of Law. Students who are enrolled for the postgraduate studies must have acquired at least 60 percent marks in their previous degrees. For the LLM degrees, students must complete their research proposals within 6 months; and LLD (PhD) students are required to have their proposals approved

[42] Ibid, p. 1262; Watts, J.H. (2012). Preparing doctoral candidates for the viva: issues for students and supervisors. *Journal of Further and Higher Education*, 36:3, 372.
[43] Benmore, A., *op. cit.*, 2016, p. 1262.
[44] Ibid, p. 1262; Lee, A. & Green, B. (2009). Supervision as metaphor. *Studies in Higher Education*, vol. 34, no. 6, 615.
[45] Benmore, A., *op. cit.*, 2016, p. 1262.
[46] Bastalich, W., *op. cit.*, 2017, p. 1150.
[47] Ibid, p. 1151; Boud, D. & Lee, A. (2005). Peer learning as pedagogic discourse for research education. *Studies in Higher Education*, vol. 30, no. 5, 504.

within 9 months from the time they are registered as postgraduate students. During this period, the students develop research proposals with the assistance of study leaders. There is a research methodology seminar that is organised by the Faculty of Law for one or two days for all postgraduate students. It is then assumed that all registered students are able to go and write their research proposals. There is a generic writing centre for the whole university students hosted by the Centre for Teaching and Learning (CTL). However, the writing centre does not adequately cuter for the law students as they have their own writing style. It is recommended that the writing centre should have people with law background to assist or guide postgraduate law students in their writing style.

Once the student completes the research proposal with the assistance of a study leader, it is sent to the Director for Postgraduate Studies who send it to two critical readers. Both critical readers have to approve the research proposal for it to be formally accepted. Problems arise when one critical reader approves the research proposal and the other one rejects it. In this case, the student has to comply with the comments from the critical reader and resubmit the research proposal for approval. There is no possibility to involve a third critical reader when one critical reader consistently rejects the research proposal. This can have a negative impact on the progress of the student in his or her study. It is recommended that a third critical reader should be involved when one of the critical reader consistently rejects the research proposal. This can solve the problem and allow the student to progress in his or her research study. Once the research proposals for LLM dissertations and LLD/PhD thesis have been approved by the critical readers, each student has to defend his or her topic. This does not apply for LLM mini-dissertations. The defence occurs during the course of the study in a panel of experts from the Faculty of Law and other universities in South Africa and abroad. The student has to convince the panel that his or her research topic is worthwhile and receives questions or comments from the experts. At the end, the experts in the area of research have to approve the topic with some comments. If the topic is rejected, the student will be advised to redo the topic again and another date will be organised or scheduled for the defence. This is commendable as the students and supervisors get constructive comments and criticisms on the topic under discussion. Once the research is complete, it is sent to the Higher Degrees Office for examination.

I did and completed my LLD when I was a staff member of the Faculty of Law at the North-West University in 2020. It is a challenge to study and work at the same times as there are different commitments that one needs to fulfil. In my situation, I managed to get a study leave for 6 months in 2019 to complete my LLD. However, during my study leave, I still had responsibility to supervise my undergraduate students for LLB mini-dissertations. This had an impact on my time to do my LLD thesis. It is recommended that when a staff member is on study leave, he or she must be relieved from other academic activities so that he or she can have time to concentrate on his or her studies. This will increase the

number of staff members who have LLD or PhD at the North-West University.

During my LLD supervision, I realised that some students had to wait for a long time to receive comments from their supervisors for the works they submitted. This was not the case with me as I received feedback from my supervisor generally within two weeks. I also observed that some students drop out from their postgraduate studies due to the lack of funds. Financial assistance is limited at the postgraduate studies and few students manage to acquire bursaries. This is a challenge for many students in their postgraduate supervision and it is recommended that postgraduate funding in terms of bursaries or loans should be available to assist students in their studies and achieve a good throughput rate.

I intend to improve my postgraduate supervision by involving students and responding to their needs. For instance, I must provide feedback to students for the works they submit within two weeks. I will have a Memorandum of Understanding for each student and establish a reasonable timetable to submit their works in order to complete the degree on record time. I will accommodate students from different backgrounds, encourage students from previously disadvantaged communities and meet their needs whenever it is possible. I will also accept changes to the initial timetable for students to submit their works when it is necessary to do so. I believe these measures will improve my postgraduate supervision and achieve a good throughput rate.

4. Concluding remarks

The supervisors and postgraduate students play important roles to ensure the success or completion of the postgraduate studies and acquisition of degrees. In this regard, the relationship between the supervisors and students needs to be adequately managed. Supervisors have to know and assist their students to ensure that they achieve the academic qualifications they are enrolled for in a specific discipline. At the same time, postgraduate students also have to play their roles in order to acquire their degrees. They must achieve the standards required for the specific degrees that they are enrolled for.

Postgraduate supervision is a journey that the students must walk with their supervisors. It has different stages for both parties in order to achieve the completion of the postgraduate degrees. The supervisors play different roles and have to facilitate students to become independent researchers in the specific field. The supervisors can introduce the students to the academic community where they can establish networks and develop their research skills or grow in their professional careers. When supervision is done or conducted appropriately, the postgraduate student becomes peer to his or her supervisor and establishes his or her own area of expertise.

To improve the postgraduate supervision at the Faculty of Law at the North-West University, each student should have a Memorandum of Understand-

ing with his or her supervisor where a reasonable timetable is established for students to submit their works. The Memorandum of Understanding assists or guides both students and supervisors in their research activities. Supervisors should give feedback to students for their works submitted with two weeks or within a reasonable time. Measures should be introduced to assist postgraduate students financially so that they can only concentrate on their works. This will increase the throughput rates for postgraduate students.

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