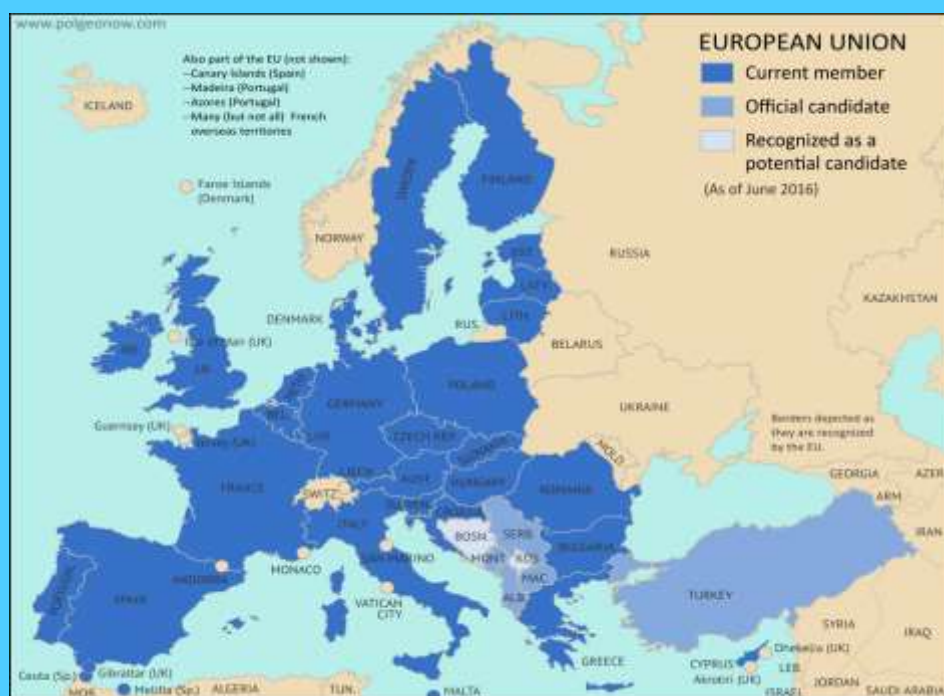


Cătălin-Silviu Săraru

European Administrative Space - recent challenges and evolution prospects



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Chapter I

The notions of European Space, European Public Space and European Administrative Space

Section 1. Affiliation to the European Administrative Space

Underlying any new beginning is a system of values. The question is to discover the values that allow us to talk today about a country belonging to the European space.

Professor Andrei Marga believes that to speak of belonging to the European Space must distinguish: **Europe's geographic**: placing between the Atlantic and the Urals, which are devoted to the continent's geographical boundaries; **historical membership in Europe**: participation in movements that have given the continent's cultural and institutional forms, from creating polis, through contact with the Judeo-Christian tradition, modern revolutions in knowledge, economics and law, to defend the foundations of a free society; **institutional membership in Europe**: the embodiment of an open society organizations and specific legislation; **cultural affiliation**: cultivating an attitude in knowledge and practical life characterized by trust factual analysis and cultivating critical thinking. The same author believes that if distinctions are made honestly, then you have to admit that, in light of European unification process started after the war's geographic and membership historic decide not a European, which is now in question (see for example the case of Turkey which perspective can become an EU member). Geography and history are indispensable conditions, but European unification, a process primarily by institutional and cultural affiliation is examined considering European institutions and culture. Situated in geography and European history does not automatically generate a cultural Europeanness, as a cultural Europeanism can be found in countries that do not belong strictly geographically and historically, from Europe¹.

European culture contains a culture of efficient administration supported a culture of law characterized by personalism, legalism and formalism. Walter Hallstein considers that EEC is a phenomenon in three aspects of law: it is a creation of law, it is a source of law and it is the order of law².

¹ Andrei Marga, *Filosofia unificării europene*, Publisher Foundation for European Studies, Cluj Napoca, 2001, p. 26.

² Walter Hallstein, *Gemeinschaftsrecht und nationales Recht in der europäischen Wirtschaftsgemeinschaft*, 1966, p. 542, cited by Andrei Marga, *op. cit.* (*Filosofia unificării europene*), 2001, p. 174.

In the European culture the individual is subject, reference and scope of legal regulations. European civilization is essentially material embodiments of European culture.

H. R. Patapievici believes that articulate the idea of Europe was set up as a continental territory from time side and not the side from geography-as happened in a completely natural mode in the case of Africa or the Americas. "Europe is the mood that was set up by mobilization techniques of design time. You recognize the true European spirit after the capacity of the human enterprise to fit of the time after the talent to create over time and submit the time by virtue of maintaining what has been built by talent to make things take in time. Europe begins where technique is used to mobilize the time, to master the space³... "

Claude Delmas talks about a "European conscience" which becomes operational once it enters the interest of European realities about everyday concerns of the masses thus exceeding the philosophical plan and political options⁴.

Section 2. The European Administrative Space component of the European Public Space

After François Guizot, European civilization is characterized by several features that distinguish it from all other - justice, legality, public space and freedom⁵. Through public space Guizot understand the existence of general interests, ideas public, briefly of society.

European public space is under construction in terms of discovery and resorts internal legitimacy to govern. The concept of "European Public Space", yet elusive theoretical in terminology of the European integration will encompass and describe in a systemic manner, mechanisms, processes and complex phenomena that govern the development of public sectors and European administrations, highlighting the connections and the determinations of an administrative nature , economic, social or political.

Today it is noted that at European Union level, wants to create a public space allowing legitimizing transnational European institutions and the founding of a European collective identity. But certainly the conceptual definition of public space must be revealed in the light of the political unification of Europe, the political will, having a decisive role.

The conditions for the existence a European Public Space can be summarized as:

³ Horia-Roman Patapievici, *Omul recent*, 3rd edition, Humanitas Publishing House, Bucharest, 2004, pp. 62-64.

⁴ Claude Delmas, *Histoire de la civilisation européenne*, Presses universitaires de France, 1969, Paris, p. 6.

⁵ François Guizot, *Istoria civilizației în Europa. De la căderea Imperiului Roman până la Revoluția Franceză*, Humanitas, Bucharest, 2000, p. 38.

- existence of a Union based on law
- existence of Community institutions functioning of a democratic manner
- existence of an organized debate in public life based on the existence of means allowing all EU citizens to express themselves publicly⁶. The ways concerning the public debate and obtaining of the European public solidarity are yet to be invented⁷.
- existence of the frame allowing the concepts contoured after the discussions from public life to be enacted by public law.

The framework of the European public debate and citizen initiatives is designed currently in the article 11 of the Treaty on European Union. The principle of participatory democracy requires that EU institutions give citizens and representative associations the opportunity to make their views known and to exchange views publicly in all areas of Union action. Union institutions are obliged to maintain an open, transparent and regular dialogue with representative associations and civil society. In order to ensure consistency and transparency of the actions of the Union, the Commission should carry out broad consultations with stakeholders. At the initiative of at least one million EU citizens from a significant number of Member States, the Commission may be invited to make an appropriate proposal on matters where citizens consider that it is necessary a legal act of the Union, in order to implement the treaties.

The European public law has the role to include the concepts contoured in the public debate. The Public law covering the constitutional law and the administrative law, remains the reference for European Public Space, some authors revealing true convergence between European administrations based on elements of public law: the European political systems have remained faithful to parliamentarism, the existence of parliamentary majority based on the discipline of vote, the practice exercised at national referendum, the decentralization, the existence of an administration of "career" and, especially, the European model of constitutional review⁸.

⁶ Définition de notions de la sphère de la Société civile 2002, par Jean Claude Boual, Paris / Horst Grützke, Berlin, Forum permanent de la Société civile européenne, www.europa-jetzt.org, last consultation on 01/10/2016.

⁷ Dominique Wolton highlight recently: the French, for example, become aware of press, radio and television, of the latest news and debates concerning their country and the debate between supporters and opponents of European integration is not a European debate but a mosaic of debates in the bosom of each European countries. In addition, major European solidarity remains to be invented: the time when Northern Italy make fuss in supporting the efforts of Southern Italy to overcome backwardness, or the exclusions undermine unity of nations, a political Europe destined only economic impetus to sanction most favored European regions can expose the worst cramping corporate and nationalist – see Jean-Michel Besnier, *Concepteale umanității. O istorie a ideilor*, Lider Publishing House, Bucharest, 1996.

⁸ Florin Bucur Vasilescu, *Constituționalitate și constituționalism*, National Publishing House, 1999, Bucharest, p. 14.

The chances of unifying transnational public law are maximized in case of nearby communities of states that demonstrates in general the same economic structure, social, cultural and political. These conditions are increasingly present within the European Union, it is legitimate therefore the hope that the move towards a "ius commune" over Europe can develop as well also in the public law domain⁹.

The European Communities were created to join efforts towards a first European economic space. As history shows, the European Communities were involved first in an economic market common, evolving then in the creation of the European Union institution which is not driven only by economic interests, but also by the desire to build social ties and political ties between European nations (as he had desired and signatories original Treaty of Rome). Today the European Union is not only a market for goods and services. Thus, the Treaty on the Functioning of the European Union (TFEU) in Title V talks about "Space of Freedom, Security and Justice", and some doctrinal works speak of a "European social space"¹⁰. Lately doctrine speaks now about a "European Administrative Space". This is an exclusive creation of the doctrine, the notion is no such in legislation.

Reality shows that it is very difficult to talk in Europe about one way or model of public administration. Concerning the development of the European concept of public administration, Rutgers and Schreurs notes that public administration is still at the primary stage of conceptualizations and national approaches. In addition, there is almost no study about European public administration. What kind of government is addressed to the European area remains to be discovered¹¹. The notion of the European Administrative Space is more a creation of doctrine based on certain principles revealed by primary and secondary EU legislation.

The public administrations of EU Member States although they have a very old structure, they have continuously adapted to modern conditions, including joining the European Union. The constant contact between civil servants from EU Member States and the Commission, the requirement to develop and implement the *acquis communautaire* at equivalent standards of reliability across the Union, the need for a system of administrative justice unique to Europe and sharing of principles and values of public administration led to some convergence

⁹ See in this regard Ioan Alexandru, *Drept administrativ comparat*, Lumina Lex Publishing House, Bucharest, 2000, p. 14.

¹⁰ See Andrei Popescu, Nicolae Voiculescu, *Dreptul social European*, „Fundatia România de Măine” Publishing House, Bucharest, 2003, p. 209-213.

¹¹ Rutgers, Mark and Petra Schreurs, *Briefly Noted from Europe: Discovering the European Idea of Public Administration*, „Administrative Theory and Praxis” vol 22, No. 3, 2000, p. 621.

between the national administrations. This was described as the "European Administrative Space"¹².

The European Administrative Space can be understood broadly as a space of European public administration and may be the subject of administrative science, a multidisciplinary science, in its concerns entered the classical concept of *Staatswissenschaften* elements: public law, political science and public economics¹³. European structure can be analyzed from the perspective of these areas that are studied in different proportions also in the national university curricula¹⁴. In a narrow sense we can speak of administrative law governing this European space¹⁵.

The notion of European administrative space can be thought modeled on European economic and social space, being connected with the legal system-wide cooperation. Traditionally, a common administrative space is possible when a set of legal principles, rules and regulations are respected uniformly in a territory covered by a national constitution. Thus we can speak of each sovereign state administrative law. The issue a law on public administration which fits all sovereign states that joined the EU was debated intensely since the establishment of the European Community, but without reaching a consensus¹⁶.

EU Member States' legal systems are in a constant process of approximation in many different fields, under the guidance of Community legislation through the legislative work of the Community institutions and to the European Court of Justice. The EC legal concepts are introduced into national systems by directly applicable regulations or directives that determine adapt their legislation to EU specifics. These regulations can have a direct impact on Member States' administrative systems and can lead to significant changes in the applicable legal principles in public administration.

European Court of Justice can generate general principles governing a European administrative law. Jürgen Schwarze shows that in many cases the interpretation of legislative acts of the European Community, by the European

¹² SIGMA Papers, no. 23, *Preparing Public Administration for the European Administrative Space*, OECD, Paris, 1998.

¹³ Wolfgang Drechsler, *On the Viability of the Concept of Staatswissenschaften*, „European Journal of Law and Economics” 12, 2001, pp. 105-111.

¹⁴ Sciences that studies related to public administration at national level are shown in the analysis made by Bernadette Connaughton (Department of Government and Society, University of Limerick, Ireland) and Tiina Randma (Department of Public Administration, University of Tartu, Estonia). They analyze the commonalities and differences in curricula of public administration in European countries, members of the EU or not in the paper *Teaching and Principles of Public Administration: is it possible to achieve a common European perspective?*, www.unpan.org/europe-analyticalreport-untc.asp

¹⁵ SIGMA Paper no. 27, *European Principles for Public Administration*, OECD, 1999, Paris: SIGMA-OECD; <http://oecd.org/puma/sigmaweb> (last consultation on 01/10/2016) treats the perspective of administrative law governing the European Administrative Space.

¹⁶ See SIGMA Paper no. 27, *op. cit.*, as well as Jürgen Schwarze, *European Administrative Law, Office for official publications of the European communities*, Sweet and Maxwell, 1992, p. 12.

Court leads to changes in the way principles of administrative law are applied in an EU Member State¹⁷.

We are thus witnessing to the Europeanization of administrative law.

¹⁷ Jürgen Schwarze, *Administrative Law under European Influence: On the Convergence of the Administrative Laws of the EU Member States*, Baden-Baden, Sweet si Maxwell, Londra, 1996.

Chapter II

European administrative convergences

The convergence involves the reducing of the disparities between administrative systems¹⁸, following identification of a portfolio of common features in the various European governments.

The convergence is not proposed as a matter of power and imposing a particular model. In this respect, American authors Woolcock and Pritchett conclude that in framework of development policies should be very careful when we use the assumption of certain rules or lessons with broad application that can be applied to public sector reform, project management or provision of services¹⁹. They underline the often dysfunctional mentality regarding "best practice" that a functional practice in a part of the world is immediately made public and recommended as a model to be followed in other parts of the world.

An European model of public administration is currently in the stage of ideal. There is no an administration type to which we can refer to as standard²⁰.

According prof. Christoph Reichard of the University of Potsdam forces leading to convergence between national administrations in the Union are: the unified economic space which is crucial for the emergence of common administrative structures; a common legal structure developed by the Court of Justice; the constant interaction between the bureaucrats and politicians; a clear doctrine in most European countries in favor of a public action of better quality, as well as for administrative reform²¹. However, a "European public administration" does not exist: although manifests a unique power in favor of integration, there are many differences of law, administrative and budgetary and fiscal policies; social and governance policies vary considerably and expectations of citizens are not standardized.

There are a limited number of systematic studies about "European administrative convergence". The concept is found mostly in public law studies and reports OECD / SIGMA related to the context of Union enlargement. It is noted,

¹⁸ Johan P. Olsen, *Towards a European Administrative Space?*, Online ARENA Working Papers, WP 02/26; Centre for European Studies; University of Oslo; www.arena.uio.no/, last consultation on 01/10/2016.

¹⁹ Michael Woolcock, Lant Pritchett, *Solutions when the solutions is the Problem: Arraying the Disarray in Development*, Washington D. C., Center for Global Development Paper 10, 2002, authors cited by Francis Fukuyama, *Construcția statelor. Ordinea mondială în secolul XXI*, Antet XX Press Publishing House, 2004, p. 90.

²⁰ See in this regard Ioan Alexandru, *Administrația publică. Teorii. Realități. Perspective*, 2nd edition, Lumina Lex Publishing House, Bucharest, 2001, p. 605.

²¹ Christoph Reichard, presentation at the annual conference of the European Group for Public Administration, Potsdam, 2002, www.uni-potsdam.de/egpa2002/registration/Form%20A1.pdf

however, that there is no consensus in the literature about the existence of convergence vis-a-vis a common European model.

Nizzo, along with other authors, believes that there is an ESA, in which the space allocated for convergence to exceed that of divergence²². Jürgen Schwarze believes that national administrative structures seem to manifest itself in particular resistance to European influence²³. The study undertaken by the latter author on public space of 12 EU member states reveal substantial structural differences between the systems of administrative law and he provides that the national administrative order not to lose features and dominant role in the near future.

The documents SIGMA notes, however, that the forces driving toward convergence lately gained speed and power. Increasingly more diversity of viewpoints is placed under European administrative standards. Johan P. Olsen notes that, although there is no *acquis communautaire* to regulate the "European public administration" (treaties do not prescribe a European administrative model), there was a **unofficial (non-formalized) acquis**²⁴. Thus Member States, despite having different legal traditions and different systems of governance, have developed a common body of doctrine and share the same principles of administrative law and standards of good practice and the need to deploy unified and effective EU law. An example of this is the European Ombudsman institution which through collaborative network with national ombudsmen has created a trend in European administration on administrative openness and transparency, the development of good administration and respect for human rights.

We see today that although the term and concept of law of government differ from one national system to another, it is possible an agreement on a common definition of administrative law, as a set of principles and rules that relate to organization and management of public administration, and relations between governments and citizens²⁵.

Section 1. Factors that can play a role in European administrative convergence

The factors that may play a role in European administrative convergence underlined more often in the doctrine are: EU treaties and secondary legislation

²² C. Nizzo, *National public administrations and European integration*. Paris: OECD/Sigma, 2001, <http://www1.OECD.org/puma/sigmaweb>, last consultation on 01/10/2016.

²³ Jürgen Schwarze, *The Europeanization of national administrative law* în Jürgen Schwarze (ed.): *op. cit. (Administrative Law under European Influence...)*, 1996, pp. 789-840.

²⁴ Johan P. Olsen, *op. cit. (Towards a European Administrative Space?)*.

²⁵ J. Ziller, *Administrations comparees: les systemes politico-administratifs de l'Europe des Douze*, Montchrestien, Paris, 1993.

implementing them are part of the national laws of the Member States; the constant cooperation between the officials of the Member States and between them and those of the European Union; the role of the European Court of Justice in the formation of common administrative principles in the European Union; the "contamination" of national laws by the principles of European Union law; the European dimension to the study of public administration.

§1. The Treaties of the European Union and the secondary legislation implementing them are part of the national laws of the Member States

EU treaties and secondary legislation implementing them are part of the national laws of the Member States. Public administrations and national courts are required to apply these Treaties and related secondary legislation to the same extent as they apply their own laws. Thus, although each Member State has the freedom to decide on the ways in which the Treaties and the secondary legislation of the EU can be obtained, common understanding and principles have been developed within the Union. The situation is less visible in the administrative-organizational arrangements and structures, as there is a great diversity between Member States' forms and degrees of decentralization. However, the legislative work of the European Institutions is a major source of common European administrative autonomy for Member States, their courts of law and citizens.

Jürgen Schwarze points out that Community law (now EU law) is primarily formed of rules of administrative law, particularly economic and public administration. This is because it concerns, on the one hand, the organization and functioning of the community institutions, the acts issued by them and their conformity with the basic treaties of the community and the derived regulations²⁶, and on the other hand, the mediation role of the national public administrations in the implementation of the community policies²⁷. From this perspective, in the view of the same author, the term "community of law" used by the European Court of Justice to designate European communities could have the meaning of "community of administrative law".

The European Union's administrative legislation has a strong sectoral character and is grouped into a number of areas: free competition in the internal market, telecommunications, environment, agriculture, industrial policy, science

²⁶ Jürgen. Schwarze, *Droit administratif européen*, Office des Publications officielles des communautés européennes, Bruylant, vol. I, 1994, p. 8.

²⁷ so European administrative law addresses largely aspects relating to the role of mediator of national public administrations, ensuring the free competition of firms in the European Union territory, thus stimulating them to meet the standards specific to the Member States and providing support to enterprises, authorized and monitored support by the European Union, see OECD, 1999. *European Principles for Public Administration*. SIGMA Paper No. 27. Paris: SIGMA-OECD.

and research, customs control, etc. This important administrative law is the "acquis communautaire" whose level of compatibility with the relevant rules in the candidate countries is imposed by the European Commission in the accession negotiation process.

§2. Constant cooperation between Member State officials and between them and those of the European Union

Another source of administrative rapprochement is the constant contact between the officials of the Member States and between them and those of the European Union. Intergovernmental relations contribute to building a common vision on how to implement EU policies at national level and to exchange beneficial positive initiatives to achieve the results of these policies. Inter-administrative cooperation is a concept stipulated and promoted by the Maastricht Treaty (Article 209 A). Co-operation and exchange of information create formal pressures to reach common standards and ensure that the results of the Treaties and the secondary legislation of the European Commission are achieved. Intergovernmental relations contribute to the promotion of a set of common administrative management principles, which will then lead to the implementation of a common model for the behavior of civil servants in the Union. This effect is mainly due to the fact that the officials involved are able to develop a stable professional career in their public services.

On the other hand, the Union can support the efforts made by Member States to improve their administrative capacity in the implementation of Union law. This can mainly consist in facilitating the exchange of information, by officials, and in supporting training programs.

The European Council has recommended Member States and the Commission to develop administrative cooperation for the implementation of Community legislation at internal level²⁸.

§3. Role of the European Court of Justice in the formation of common administrative principles in the European Union

The European Court of Justice has the most important role in shaping common administrative principles in the European Union. While secondary legislation has a rather sectoral influence, the rulings of the European Court of Justice lead to the reflection and development of general administrative principles, even if they are established on a case-by-case basis. In fact, the case-law of the European Court of Justice is the main source of non-sectoral administrative law

²⁸ see Resolution of 16 June 1994 - O.J.C.C. 179, 01/07/1994, p. 1-3.

in the European Union. The Court defines its own administrative principles or applies principles created and defined by the National Administrative Courts of the Member States. The storage of the latter defines general administrative principles applicable to all Member States and their inhabitants within the European Union legislative framework.

The starting point for Community administrative case law is the **Algera judgment** of 12 July 1957 in which the European Court of Justice ruled that the lack of basic treaties in order to resolve a litigation of an administrative nature does not prevent its being settled, in view of the legislation, doctrine and jurisprudence of the Member States. Starting from a double restriction - the absence of a Community norm and the prohibition of denial of justice²⁹ - the Court, in its rich jurisprudence, has laid down principles which all Member States must respect. The following can be mentioned: the principle of administration by law, the principle of proportionality, legal certainty, the protection of legitimate claims, non-discrimination, the right to a hearing in the decision-making procedures of the administration, interim reports, equal access to administrative courts, public administration. However, it is often noted that the European Court did not provide a Community or national legal basis for principles such as trust, legal certainty or proportionality. On the contrary, it has assumed their authenticity or established their special characteristics as principles of Community law in the shortest formulas.

§4. "Contamination" of national laws by the principles of European Union law

Jurgen Schwarze highlights a phenomenon of interpenetration of European Union law into national systems. This is that it would be very difficult to use, within a given state, different standards and practices of application for national legislation and European Community law³⁰. Gradually, national institutions applied the same standards and used the same practices for both. This leads to the idea of a common public administration law developed in the EU Member States. This kind of "contamination" of national legislation by EU law principles also contributes to the establishment of a European Administrative Space.

It should be stressed that we can not in principle dissociate the European administrative law into an administrative law applicable only to the EU institutions and an externally-administered administrative law applicable to the administrative institutions of the member countries. The European public debate creates

²⁹ Referring to the Court's duty to avoid denial of justice clearly demonstrates the influence of French legal thinking. The well-known prohibition of the refusal of justice in Article 4 of the Civil Code states: „*Le juge qui refusera de jouer, sous prétexte du silence, de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice*”.

³⁰ Jürgen Schwarze, *op. cit.* (*Administrative Law under European Influence...*), 1996.

currents and opinions across the Union. Thus, the Code of Good Administrative Behavior adopted by the European Parliament on 6 September 2001 at the proposal of the European Ombudsman contains rules and principles that the Union institutions must respect in their relations with European citizens. But thanks to the collaboration of the European Mediator with national mediators or similar bodies in the member countries these principles apply throughout the Union. If by European administrative law we only understand the law governing the organization and functioning of the institutions of the European Union, we limit ourselves to the classical vision of the international organization (see Council of Europe) which can not impose its decisions on the Member States only through the Treaty instrument and the need for its ratification to have effect in national law³¹. However, European Union regulations are directly applicable in the domestic law of the Member States.

§5. European dimension on the study of public administration

The road to Europeanisation of national administrations is also reflected in academic programs³². There is a European dimension to the study of public

³¹ The administrative law rules governing the administration of international classical bodies in the interwar period are analyzed by Paul Negulescu in the paper „*Principes du Droit International Administratif*”, Académie de Droit International, Librairie du Recueil Sirey, Paris, 1935. In its opinion, **the international administrative law** studies the organization of national or international services created to meet international interests, their way of functioning and intervention, the regulation, control and coordination of the activities of states related to these interests. International Administrative Law examines the rules governing the management of general interests, which, by their nature and importance, go beyond the territorial boundaries of states in relations between states or between states and individuals. In international administrative law, the essential phenomenon is the international public service, as in central administrative law the central phenomenon is the national public service. The internal administrative law examines how the state intervenes through public services aimed at limiting the activities of individuals or procuring certain advantages. In international administrative law, the interventions of the international community seek to limit and regulate certain public service activities of the state in order to establish coordination. International Administrative Law was seen as the right of the International Administration, whose main representative was the League of Nations, which could be counted as the International Labor Organization, the European Commission of the Danube, etc. At present, the doctrine discusses the concept of **Global Administrative Law** that seeks to involve, without distinction, any kind of public or private, national or international actors involved in the globalization process that sets out rules that go beyond state barriers. At the same time, a **Global Administrative Space** is seen as an area of administrative convergence in which states, individuals, enterprises, NGOs and other groups or representatives of national and global social or economic interests. – see B. Kingsbury, N. Krisch, R. B. Stewart, *Symposium: The Emergence of Global Administrative Law*, *New York University School of Law*, în „Law and Contemporary Problems”, vol. 68, Summer–Autum 2005, p. 3–4; Mircea Dușu, *Reflecții în legătură cu emergența, natura și trăsăturile definitorii ale dreptului administrativ global*, „Dreptul” no. 7/2015, p. 70–86.

³² Bernadette Connaughton (Department of Government and Society, University of Limerick, Ireland) & Tiina Randma (Department of Public Administration, University of Tartu, Estonia),

administration found at the level of the university curriculum. Thus, in most curricula in the member countries, European Integration and Comparative Administrative Law courses are found. Comparison is the engine of knowledge that leads to the internationalization of analytical categories³³. In all these countries, the public administration integrates disciplines such as political science, law, economics, sociology. However, the legal approach of public administration prevails.

Section 2. The ways in which European administrative convergence can be achieved

Johan P. Olsen believes that convergence can be achieved in two ways: either by **attractiveness** or by **imposing** the superior model.

Attractiveness involves the voluntary learning and imitation of the superior model, which is perceived as functional, useful and legitimate. **Imposition** means the convergence based on the use of authority or power. Imposition has played a major role in European convergence until after World War II. It is worth mentioning the role played in the history of the Roman administrative or Napoleonic model. In these models conquerors have imposed their own administration principles on the conquered countries.

The creation of the current European Union is largely based on attractiveness. Ziller notes that EU Member States are pursuing among themselves the policies they apply to inspire public administration, in this case imitating the viable model³⁴. Practically, European administrations have been studying and copying for administrative affairs for centuries and sharing important characteristics³⁵.

At European level, Ziller makes a distinction between **imitation** (approximation) and **harmonization**. EU policy does not imply the imitation of a model (as a result obligation), because the Union does not seek to erase cultural differences and traditions, but only "unity in diversity". Practically, legal texts have always spoken in a traditional³⁶, cultural way, including values and legal institutions specific to each Member State. EU policy requires harmonization, but at the

op. cit. (Teaching and Principles of Public Administration...), www.unpan.org/europe-analyticalreport-untc.asp

³³ Mattei Dogan, Dominique Pelassy, *Cum să comparăm națiunile: sociologia politică comparativă*, Alternative, Bucharest, 1993, p. 12, 49 și urm.

³⁴ J. Ziller, *EU integration and Civil Service reform* în „Sigma Papers” No. 23, 1998: 136-154. Paris: OECD (CCNM/SIGMA/PUMA(98)39).

³⁵ Johan P. Olsen, *op. cit. (Towards a European Administrative Space?)*.

³⁶ Pierre Legrand, *Despre singularitatea dreptului*, translation of Raluca Bercea „Pandectele Române” no. 6/2007, p. 29.

same time notes that there is no need for a single administrative system and identical institutions throughout the Union. The EU *acquis* does not create institutions at national level, but only imposes a certain way of thinking about one thing. The way this concept is put into practice is at the discretion of states that are free to create what institutions they want in this respect. That is why we will never find a perfect institutional and functional identity in the Member States.

In general, EU arrangements are compatible with the maintenance of institutional structures and national practices.

Section 3. Trends of harmonization in institutional and decision-making between the Member States of the European Union

There is no support in the European Union to impose a unitary solution that goes into a single form of administration. Internal actors and internal structural diversity persist despite intense interaction between administrations and competition among national models.

However, there is a tendency of institutional and decisional approximation reflected in several concepts: re-launching local autonomy and multiplying decision-making and coordination structures; the outsourcing of public activities and its limits in European Comparative Law; administrative litigation systems in Europe.

§1. Re-launching of local autonomy and multiplying decision-making and coordination structures

Re-launching of local autonomy. One of the major factors common to the evolution of contemporary administrative institutions is the re-launch of local autonomy. This is also spurred by the principle of subsidiarity, of German tradition, but taken over by European primary legislation first by the Single European Act of 1986 and then by the Treaty of Maastricht. It has thus been established that 'in areas which do not fall within its exclusive competence, the Community does not intervene, in accordance with the principle of subsidiarity, only in so far as the objectives of the action envisaged can not be sufficiently achieved by the Member States and can therefore in the light of the scale and effects of the action envisaged, be better achieved at Community level. The Community does not go beyond what is necessary to achieve the objectives of the Maastricht Treaty "(Article 3B). This principle is transposed even before the emergence of the Communities, traditionally and at national level in the relations between the central and the local administration. Thus, in Federal Germany, federalism was consecrated in 1947, in Italy regionalism was introduced by the 1948 Constitution, and in

Spain by the 1978 Constitution. In France, the 1982-1983 reforms created the regions. The same thing happens in Greece, Portugal, the Netherlands, Denmark, Belgium. In a general way, it can be said that in almost all European states, local democracy is a kind of corollary of political democracy³⁷. The preferences of the EU Member States for administrative autonomy must be in line with the effective and uniform implementation of the Union *acquis*³⁸.

Multiplying of decision-making and coordination structures. It is noticeable in the countries of the Union to increase the complexity of administrative problems in certain areas such as economy, environment, innovative process (informatics, biotechnology). There is also a segmentation of the administrative decision-making structures at central level, depending on the technical specialties or the political considerations of the moment, a phenomenon generated by the need to plan the horizontal coordination authorities in order to maintain the coherence of the national policies³⁹. However, although the executive powers are free to establish their governing structures within the democratic framework, the function of the ministries is all the same: to program the activities entrusted to them, to prepare the draft decisions that the Government must present Parliament, to liaise with the executive bodies of the local government.

The emergence of independent administrative authorities towards the Government in various fields. Thus, in the field of citizens' fundamental rights and freedoms, there are authorities that protect the citizen from the administration's actions in order to ensure good administration (Ombudsman, Parliamentary Commissioner, Defensor del Pueblo, Mediator of the Republic etc.). There are also new administrative activities that require more lenient and less formal interventions such as "quangos" (quasi-autonomous nongovernmental organizations) in the UK. Dehousse, however, believes that an increase in autonomous European agencies is combined with unwanted discretionary power, through the dissemination of administrative forces and the loss of coordination and consistency of the administrative act⁴⁰. But the reality of these autonomous authorities suggests that the idea of a single segment that controls the administration is less plausible.

The autonomy of regulating these independent administrative bodies was the subject of a conference of the European Public Administration Group (GEAP), held in Chester, England on 8-10 September 1989, under the leadership of Professor Hugo Van Hassel of the Catholic University of Leuven, Belgium. At this conference, it was attempted to define these bodies, arising from a need for functional decentralization and management improvement in order to respond

³⁷ Ioan Alexandru, *Administrația publică. Teorii. Realități. Perspective*, 2nd edition, Lumina Lex, Bucharest, 2001, p. 610.

³⁸ Johan P. Olsen, *op. cit.* (*Towards a European Administrative Space?*).

³⁹ Ioan Alexandru, *op. cit.* (*Administrația publică. Teorii. Realități. Perspective*), 2001, p. 611.

⁴⁰ R. Dehousse, *Misfits: EU law and the transformation of European governance*. in C. Joerges and R. Dehousse (eds.): *Good Governance in Europe's Integrated Market*: 207-229. Oxford: Oxford University Press, 2002.

rapidly to the needs of the population and sometimes even to save fundamental rights in certain sectors⁴¹. It has been stressed that this process must be depolitized, only to ensure the relative independence of these organisms. There have been a number of issues that have remained open and which may still have the same echo today: to what extent can these bodies be considered truly independent? given that they get rid of government control, what might be their influence on the government ?; as these bodies are entrusted with a regulatory power, how could political control or judicial appeal be guaranteed ?; how will these bodies be financed or whether they enjoy financial independence ?; what will be the degree of bureaucratization of these bodies ?; will they be a source of innovation or, on the contrary, will they tend to guarantee their own survival in the long term?

§2. The outsourcing of public activities and its limits in the European comparative law

2.1. Introductory considerations

The externalization (*outsourcing*) of the administrative functions is defined in the French doctrine as being “the entrustment of the exploitation of an activity by a public authority, temporarily and in exchange for a fee”⁴² or “an administration instrument that allows a public organization to delegate certain non-strategical functions, previously exerted by it, to the exterior services provides”⁴³. In Italy the externalization was defined as “a complex contractual report designated to the acquisition by an exterior supplier, through a medium term contract, of services previously performed through internal public entity means”⁴⁴.

Through the externalization the traditional administrative structures are placed between hierarchy and market. The purpose of the externalization of public activities is the enrichment of the service mean of the citizens’ interests.

⁴¹ See, in this respect, Dreptul No 1-2 / 1990, first year, the 3rd series of Chronicles, Article: The Conference on the Regulatory Autonomy of Administrative Bodies, p. 143.

⁴² Philippe Cossalter, *Les délégations d’activités publiques dans l’Union européenne*, Librairie générale de droit et de jurisprudence, Paris, 2007, p. 3.

⁴³ Paul Lignières, Laurent Babin, « L’externalisation : au coeur des préoccupations de l’Etat », *Droit Administratif (DA)*, May 2002, p. 37.

⁴⁴ Anna De Blasiis, *Outsourcing e Global service*, Unità di Direzione AA.II. Ufficio Studi, http://www.provincia.potenza.it/allegati/Outsourcing_Global_service.doc, Provincia di Potenza (Italie), undated, p. 3 (last consulted on the 15th of July 2017).

In our opinion the externalization does not present an abandonment to the private environment of an activity previously performed by the public authorities⁴⁵. In this meaning we highlight the fact that the transfer of the activity is temporary and the public authority keeps the control right over the way in which the public interest is satisfied by performing the respective activity.

The externalization of the public activities represents a component of the reform of public administration. We mention that numerous questions are asked in the doctrine of the law and management regarding the direction that must be followed in the reform activity – with accent on the administration as public service, according to the French model, or with accent on profitableness, efficiency and market, after the American model – and, in consequence, questions about how the relation public law-private law will evolve⁴⁶. Many times, there is the impression that the public law would have abusively occupied a territory belonging to the private law and that the current tendency of introducing the competition and market rules in the functioning of public service would lead to a fall of the administrative law. We appreciate that the reform of the public administration must be performed through a conciliation between the French and the American models, by introducing market rules within the industrial and commercial services in the limits allowed by the public interests, without fearing that they would lead to a non-structuring of the administrative law. In this meaning we share the point of view expressed by Francis Fukuyama who distinguishes between “*the span of the state’s activities* [our underlining C.S.S.], which refers to the different functions and purposes assumed by governments and *the force of the state’s power* [our underlining C.S.S.] or the possibility of the state to plan and execute policies and to apply the law correctly and transparently – which is currently called the state’s capacity or institutional capacity”⁴⁷. The optimum way of the reform, the author appreciates, “consists of reducing the span by increasing the force in the same time”⁴⁸. Agreeing to the opinion of this author’s we consider that it is imposed, in the current conditions, the reduction of the span of the state’s activities by taking over some of them by the private environment, through the administrative, commercial, civil contracts, etc. concomitantly to performing certain coherent public polities of control and surveillance of the way in which the citizen’s interests is satisfied.

⁴⁵ In the private environment the externalization is presently defined as being “an abandonment of the a branch of an activity developed by an enterprise which ceases it to another enterprise after the latest insured, in exchange, the production or service for which that activity branch has been dedicated” - Jacques Dupouey, „Propos sur l’externalisation”, *Droit et patrimoine*, n°59/avril 1998, p. 42.

⁴⁶ See Ioan Alexandru, *Dreptul și managementul. Dihotomie sau complementaritate. Impactul informatizării*, All Beck, Bucharest, 2004, p. 49-61.

⁴⁷ See Francis Fukuyama, *Construcția statelor. Ordinea mondială în secolul XXI*, Antet, Bucharest, 2004, p. 14.

⁴⁸ Ibidem, p. 23.

We will finally perform a presentation of the public activities that can be externalized in a few representative countries in the Romano-German law system (France, Germany, Spain, Italy) and the Anglo-Saxon law system (Great Britain). Although, in principle, the public activities that involve the exercise of sovereignty (justice, police, army) cannot be performed by the private sector, we will observe that they are different nuances from country to country.

2.2. The limits of the externalization of public activities in Great Britain

On the level of the local collectivities *Local Government Act 1972*⁴⁹ refers in art. 111(1) to the subsidiary powers of the local authorities showing that: *a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions*. We notice that the local authorities have a large competence in performing their mission of serving the public interests. In the doctrine there was the question if these public authorities have the possibility that using the competence showed by art. 111 of *Local Government Act* to conclude contracts for the externalization of the public activities⁵⁰. Based on these laws, the externalization has been encouraged by the Thatcher government⁵¹. In order to achieve efficiency and savings in supplying the public services, this government involved through its public authority in the local administration. Thus, the central government settled the specific competences for the local authorities and transferred the authority to the governmental agencies created in the territory⁵².

The Thatcher government oriented to the market and defined the way in which the public services could be supplied by the private sector. In 1980 *Compulsory competitive tendering* (CCT) was created for the putting in compulsory competition the internal administrative services with the private sector, based on the principle of the best advantages-costs report - the principle *value for money*⁵³.

⁴⁹ Published in <http://www.england-legislation.hmso.gov.uk> (last consulted on the 15th of July 2017).

⁵⁰ Philippe Cossalter, *Le droit de l'externalisation des activités publiques dans les principaux systèmes européens*, online : http://chairemadp.sciences-po.fr/pdf/seminaires/2007/rapport_Cossalter.pdf, 2007, p. 7 (last consulted on the 15th of July 2017).

⁵¹ Margaret Thatcher was in front of the English government for 11 years, since 1979 until 1990 when she resigned. She was the first prime minister who obtained three mandates in a row.

⁵² See Ioan Alexandru, *Administrația publică. Teorii. Realități. Perspective*, 2nd edition, Lumina Lex, Bucharest, 2001, p. 311, 312.

⁵³ George Boyne, "Competitive Tendering in Local Government: A Review of Theory and Evidence", *Public Administration*, Vol. 76, No. 4/Winter 1998, p. 695-712; Danny Frederick, *Why*

Through *Local Government Act 1988* the local authorities were requested to contract and offer the private companies the supply of services such as: collecting the litter, cleaning the buildings, supplying the schools, maintaining the roads, managing the sports and entertainment facilities⁵⁴. These activities were proposed for concession. But the concession as legal institution will appear in the English law with the construction of the railroad tunnel under the English Channel, being taken over from the French law.

Through this procedure the local authorities, conceding the public services to the private sector and monitoring the results, became agencies of the central power. The agency model specific to the British administration is based on the development of a powerful and competitive private sector, as basis for supplying quality public services. Without this competitive private sector the agency model would not be possible. The agency model favors the efficiency in supplying services, mixing the areas of services supply with the political authority and highlights the non-governmental actors as services suppliers.

Meanwhile, the public administration and the agencies adopted different acts used for the delegation of the administration of public services⁵⁵. Thus, in the field of public services regarding the water resources, water supply and purification, *Regional Water authorities* elaborated in 1989 « *Water act* », which includes the main clauses in this field and which the private companies must fulfill regarding the consumers (beneficiaries) of these public services⁵⁶. In the field of public telecommunications services, in 1984, in Great Britain, « *Telecommunications act* » was adopted, which sets the functioning regime for the telecommunication services, under the surveillance of the entity entrusted with their supervision, *Office of telecommunications*. Also, in Great Britain other regulations have been adopted that settle the obligations in the field of methane gas – “*Oil-gas enterprise act*” – adopted in 1982, in the field of electricity supply – “*Electricity act*” in 1989, and related to the concessions for the building and exploitation of the highways – “*New roads act and street Work act*”, adopted in 1991⁵⁷.

compulsory competitive tendering for Local Government services is not as good as privatization, <http://www.libertarian.co.uk/lapubs/econn/econn052.pdf>, 1994, p. 1, 2 (last consulted on the 15th of July 2009).

⁵⁴ Peter John, *The Restructuring of Local Government in England and Wales*, in Richard Batley and Gerry Stoker (editors), *Local Government in Europe: Trends and Development*, MacMillan, London, 1991, p. 58-72.

⁵⁵ See Olivier Raymundie, *Gestion déléguée des services publics en France et en Europe*, Le Moniteur, Collection: L'actualité Juridique, Paris, 1995, p. 47.

⁵⁶ See Andrew Dunsire, „Coûts, progrès et avantages de la privatisation secteur public, secteur privé, l'expérience du Royaume-Uni”, *Revue internationale des sciences administratives*, 1990, p. 102

⁵⁷ Olivier Raymundie, *op. cit.*, p. 150

An impulse regarding “the contractualisation” of the public activities was given by *Deregulation and Contracting Out Act 1994*⁵⁸. This law did not directly authorize the contracting out of public activities, but it gave ministers the ability to adopt a regulatory act (*order*) through which to authorize their contractual delegation. Additionally, the law excludes any possibility of externalization by contract of certain functions provided in art. 71(1): “(a) its exercise would constitute the exercise of jurisdiction of any court or of any tribunal which exercises the judicial power of the State; or (b) its exercise, or a failure to exercise it, would necessarily interfere with or otherwise affect the liberty of any individual; or (c) it is a power or right of entry, search or seizure into or of any property; or (d) it is a power or duty to make subordinate legislation”. In the doctrine these limits of the externalization of the public activities have been discussed⁵⁹. An author highlights that nothing prevents the entrusting to the private sector of the administration of the trade registry or marital status⁶⁰. Another author considers that the exclusions provided by art. 71 of the *Deregulation and Contracting Out Act 1994* do not have an intangible character, a simple amendment being enough to make any jurisdictional functions delegable, including the one exerted by the House of Lords, given the absence of a Constitution⁶¹. Therefore, it results that the protection of the core public functions is mainly based on the exertion of “self-control” from the public authorities, of an internal discipline, and less on constraining written norms⁶².

One of the limits of the externalization of public competences is given in Great Britain by the accentuation of the principle *delegatus non potest delegare* (“the delegated cannot delegate”) – the interdiction of sub-delegation⁶³. This vision opposes to the one developed in the United States, where the field of the public non-delegable activities is seen rather as an ensemble of core non-susceptible functions to be exerted by a private person⁶⁴.

⁵⁸ On this law see: Sue Arrowsmith, *The Law of Public and Utilities Procurement*, 1996, Sweet & Maxwell, London, 1996, p. 26, 27; Mark Freedland, “Privatising *Carltona*; Part II of the Deregulation and Contracting Out Act 1994”, *Public Law*, 1995, p. 21.

⁵⁹ Philippe Cossalter, Bertrand du Marais, *La private finance initiative*, Institut de la Gestion Déléguée, online: www.fondation-igd.org/pdf/Publi/PFI.pdf, Paris, 2001, p. 40-42 (last consulted on the 15th of July 2017).

⁶⁰ Mark Freedland, *op. cit.* (1995), p. 21, 23.

⁶¹ Paul Craig, «The Contract State: Administrative Law Revisited », in Yvonne Fortin, *La contractualisation dans le secteur public des pays industrialisés depuis 1980*, L'Harmattan, Paris, 1999, p. 368.

⁶² Philippe Cossalter, *op. cit.* (*Le droit de l'externalisation...*), p. 9.

⁶³ Paul Craig, *op. cit.*, p. 368

⁶⁴ Philippe Cossalter, *op. cit.* (*Le droit de l'externalisation...*), p. 7.

2.3. The limits of the externalization of public activities in France

In the doctrine an author considered that the problem of externalizing the state's imperial functions cannot be considered, given the incompatibility of the contractual procedure with the administrative police activities⁶⁵.

Currently in the doctrine it is deemed that the public functions involving the exercise of authority prerogatives are not delegable⁶⁶. Also, in the jurisprudence it was appreciated that within the public functions the distinction between the prescription functions that are always non-delegable and the action functions that are delegable when the exercise of authority is not involved must be made⁶⁷.

The French State Council elaborated the distinction between the non-delegable activities in the virtue of legal provisions and non-delegable activities by their nature⁶⁸. The latest may be defined only by referring to the core functions of the state: police, justice, army, normative activity.

Some activities cannot be delegated for a legal regulation attribute the competence of their performance to a determined public institution. Thus, the State Council pronounced regarding the interdiction for French public hospitals to delegate the activity of medical housing to the private environment, expression of the principle that shows that the holder of a competence cannot transmit it unless under the conditions in which the law expressly provides such a possibility⁶⁹.

The Constitutional Council showed that the national public services which have their existence fundament in the dispositions of constitutional nature ("*services publics constitutionnels*,") cannot make the object of privatization⁷⁰. In spite of all these in the recent jurisprudence is appreciated that the sovereignty function performed by the constitutional public services may be decomposed in the core functions and annex functions, with technical character, susceptible of being entrusted to the private persons⁷¹. Thus, for example the Constitutional

⁶⁵ Jacques Moreau, « De l'interdiction faite à l'autorité de police d'utiliser une technique d'ordre contractuel », *L'actualité juridique droit administratif* (AJDA), Paris, 1965, p. 3-17.

⁶⁶ Philippe Terneyre, « Les conventions de délégation globale de stationnement payant », *Bulletin juridique des contrats publics (BJCP)* nr. 5/1999, p. 404.

⁶⁷ The Decisions of the French State Council: *Consort Amoudruz* (23 May 1958), *Dame Verneuil* (4 October 1961), <http://www.conseil-etat.fr/cde/> (last consulted on the 15th of July 2017).

⁶⁸ Conseil d'État, avis de la section de l'Intérieur, 7 octobre 1986, n° 340.609, *Grands Avis du Conseil d'État*, 1^{ère} éd., 1997, n° 24, p. 245.

⁶⁹ L'avis du Conseil d'État, 16 juin 1994, <http://www.conseil-etat.fr/cde/fr/les-grands-avis/> (last consulted on the 15th of July 2017).

⁷⁰ Décision n° 86-217 DC/18 septembre 1986, Loi relative à la liberté de communication; Décision n° 87-232 DC/7 janvier 1988, Loi relative à la mutualisation de la Caisse nationale de crédit agricole ; Décision n° 96-375/9 avril 1996, Loi portant diverses dispositions d'ordre économique et financier – <http://www.conseil-constitutionnel.fr/> (last consulted on the 15th of July 2017).

⁷¹ Décision n° 2002-461 DC/29 août 2002, *Loi d'orientation et de programmation pour la justice*, <http://www.conseil-constitutionnel.fr/> (last consulted on the 15th of July 2017).

Council admitted that art. 49 of the Orientation and Programming Law for justice⁷² that allows the entrusting to the private environment of the electronic surveillance tasks of persons under judicial control, only considers “the technical performance that may be detached from the sovereignty functions”⁷³. This is also the case of art. 53 of the Law regarding the immigration⁷⁴ which allows the entrusting to the private environment of the armed transport of retained persons to/from retaining centers⁷⁵.

The delegation of public service is defined in art. L1411-1 of the General Code of the territorial collectivity (*Code général des collectivités territoriales*) as being a contract by which a moral person of public law entrusts the administration of the public service under its responsibility to a public or private principle, whose fee is substantially related to the service’s exploitation results. The principle may be entrusted to make a paper or to acquire the goods necessary for the service.

It is worth highlighting the fact that the public-private partnership systems have a long tradition in France through the collaboration between authorities and the private sector regarding the concession of public goods, even since the end of the 19th century and the beginning of the 20th century, period in which the French doctrine of public services is formed⁷⁶. In France, the partnership forms between local authorities and community authorities, in the meaning we accept today, appear from the 80s for the prevention and fighting of delinquency, as well as for the insurance of social cohesion⁷⁷. Presently, the administrative contract for public-private partnership is regulated by the Ordinance no. 559/2004⁷⁸.

⁷² Loi n° 2002-1138 du 9 septembre 2002 d'orientation et de programmation pour la justice, « LOPJ », Journal officiel de la République française (*JORF*) n° 211 du 10 septembre 2002, <http://www.legifrance.gouv.fr> (last consulted on the 15th of July 2017).

⁷³ Décision n° 2002-461 DC/29 août 2002, *Loi d'orientation et de programmation pour la justice*.

⁷⁴ Loi n° 2003-1119 du 26 novembre 2003, relative à la maîtrise de l'immigration, au séjour des étrangers en France et à la nationalité, *JORF* n° 274 du 27 novembre 2003, <http://www.legifrance.gouv.fr> (last consulted on the 15th of July 2017).

⁷⁵ Conseil Constitutionnel, Décision n° 2003-484 DC/20 novembre 2003, *Loi relative à la maîtrise de l'immigration, au séjour des étrangers en France et à la nationalité*, <http://www.conseil-constitutionnel.fr/> (last consulted on the 15th of July 2017).

⁷⁶ Mariana Stancu-Țipișcă, *Persoanele juridice de drept public*, C.H. Beck, Bucharest, 2006, p. 251.

⁷⁷ The creation of the Communal Councils for the Prevention of Delinquency (*Conseils Communaux de Prevention de la Delinquance*), and then the Law for the orientation and programming of security (*d'Orientation et de Programmation de la Sécurité* – 1995) and in 1997 the apparition of „*Contrats Locaux de Sécurité*” (CLS), created the premises of developing the public-private partnership between the local authorities and the local partners for the prevention of delinquency and insuring social cohesion (Report of the Seminar Public-Private Partnership, Hague, Netherlands, 16 - 17 December, 2002).

⁷⁸ Journal officiel n. 141/19.06.2004.

2.4. The limits of the externalization of public activities in Germany

In Germany “the contractualisation” of the public action is very advanced, the conclusion of public law contracts through which the provisions of an administrative document are to be replaced being allowed. Thus the Law over the non-contentious federal administrative procedure of 25 May 1976⁷⁹ (*Verwaltungsverfahrensgesetz des Bundes – VwVfG*) dedicates one of its parts (4th Part, art. 54-62) of the public law contracts. The law shows in art. 54 that “a law report in the field of public law may be founded, modified or terminated by public law contract (*öffentlich-rechtlicher Vertrag*), except for the contrary law regulations. In particular, the administrative authority may, instead of edict an administrative act, conclude a public law contract with the one the administrative act is designated to”.

In spite of all these, in Germany the legislation on the level of the lands interdicts the delegation of functions designated to performing “the social welfare” as the sanitation and treating of wastes. On the other side the German state externalized the entire non-military communications system of the Ministry of Defense⁸⁰. Therefore, the problem is to define the imperial functions exerted exclusively by the public authorities, to identify the content of these functions and the eventual existing exceptions. The German doctrine operated a distinction between “the administration as authority” (*Hoheitverwaltung*) and “the administration as enterprise” (*Betriebsverwaltung*), distinction resembling the one between the public functions and the public services the Italian and Spanish doctrine operate with⁸¹. Through *Hoheitverwaltung*, the imperial functions (*jus imperii*) of the state which traditionally are non-delegable (public security, defense etc.) are performed. *Betriebsverwaltung* designated those activities usually exerted in the regime of private law and which can be externalized. The German fundamental law explicitly interdicts the externalization of the public functions exerted by *Hoheitverwaltung*. Thus, art. 33(4) of the German fundamental law (*Grundgesetz für die Bundesrepublik Deutschland*, GG) sets as general rule that “the exercise of power of the public authorities must be entrusted with permanent title to the members of the public function in service and fidelity report of public law”⁸². In practice, it was considered that 40% of the functions of such a prison may be entrusted to the private sector without contravening the dispositions of art. 33(4)

⁷⁹ Consolidated version (14.06.2005), www.bijus.de (last consulted on the 15th of July 2017).

⁸⁰ Philippe Cossalter, op. cit. (*Le droit de l'externalisation...*), p. 8

⁸¹ Fernando Garrido Falla, «El concepto de servicio público en derecho español», *Revista de Administración Pública* Núm. 135/Septiembre-diciembre 1994, p. 12. <http://www.cepc.es> (last consulted on the 15th of July 2017).

⁸² „Die Ausübung hoheitsrechtlicher Befugnisse ist als ständige Aufgabe in der Regel Angehörigen des öffentlichen Dienstes zu übertragen, die in einem öffentlich-rechtlichen Dienst – und Treueverhältnis stehen”.
<http://www.bundestag.de/parlament/funktion/gesetze/Grundgesetz/index .html> (last consulted on the 15th of July 2017).

of the German fundamental law, such an externalization being illicit as long as it does not have a direct connection with the execution conditions of a court of law decision (*Strafvollzug*)⁸³. Starting from such empirical studies, we came to interpret art. 33(4) of the German fundamental law in the meaning of separating the exercise of power (exclusively performed by the public authority) from the technical activities (which may be externalized to the private environment)⁸⁴.

Beyond the existing restrictions on the level of the federation, the lands have an own legislation for the regulation of the administration of public services that illustrates the heterogeneous conceptions over the public activities that may be externalized. Thus, in some lands the interdiction to entrust the private sector with sanitary and social activities is regulated, as well as the water distribution. Also, we notice a tendency to constitute local holdings that allow the financial compensation (*Querverbund*) of the profitable and unprofitable public service activities⁸⁵.

2.5. The limits of the externalization of public activities in Spain

In Spain the doctrine, beginning with the legal provisions, theorized the distinction between the *public functions* and the *public services*⁸⁶. The public functions are the expression of state's sovereignty and they cannot be externalized. The Law No. 7/1985 regarding the regulation of the fundamentals of the local regime (*Reguladora de las bases del régimen local* - « RBRL »)⁸⁷ in art. 92(2) and then the Law No. 7/2007 regarding the fundamental status of the public civil servant (*Ley 7/2007, del Estatuto Básico del Empleado Público*)⁸⁸ in the additional dispositions showed that the public functions are those activity that involve the exercise of authority for the achievement of the general interests of the state and public administrations as the budgetary control functions and economic-financial administration functions, accounting and treasury functions. Additionally, the doctrine showed that there are activities involving the exercise of authority: security of public places; directing the traffic and the persons on the public

⁸³ Christean Wagener, „Privatisierung im Justizvollzug - Ein Konzept für die Zukunft“ *Zeitschrift für Rechtspolitik*, 2000, p. 169-216.

⁸⁴ Philippe Cossalter, *op. cit.* (*Le droit de l'externalisation...*), p. 12.

⁸⁵ Gérard Marcou, « Les modes de gestion des services publics locaux en Allemagne et le problème de l'ouverture à la concurrence », *Revue française de Droit administratif*, nr. 3/1995, p. 476.

⁸⁶ See Fernando Garrido Falla, *op. cit.*, p. 12, 13; Amparo Koninckx Frasset, « La necesaria concreción del contrato de gestión de servicios públicos. Espacial referencia al ámbito municipal », *Revista de Estudios de la Administración Local y Autonómica*, n° 279/enero-abril 1999, p. 177-211.

⁸⁷ Boletín Oficial del Estado (BOE) n. 80/3.04.1985, Consolidated version (29.05.2007), <http://www.csieiro.com/ToDoLeyes/LeyesOrdinarias/Ley%207-1985-LBRL.htm> (last consulted on the 15th of July 2017).

⁸⁸ BOE 13.04.2007, <http://www.csieiro.com/ToDoLeyes/LeyesOrdinarias/Ley%207-2007-del%20EBEP.htm> (last consulted on the 15th of July 2017).

roads, the protection and extinction of fires, the discipline in the field of urbanism. In the jurisprudence it is showed that the service of taxation cannot be externalized, as it is considered a public function involving the exercise of authority⁸⁹.

Regarding the public services with commercial character the Spanish law settles with limits their administration ways. The delegation (externalization) of the public activities cannot manifest except in the field allowed by the legislation. Thus, the regime of contractual ways of administration of public services is regulated through a general law – the Law on public administration contracts No. 13/1995 of 18 May 1995 (*Ley de contratos de administraciones públicas* – LCAP)⁹⁰, reformed by the royal legislative decree No. 2/2000 of 16 June 2000⁹¹. The Law No. 13/2003 of 23 May 2003 will modify and complete the dispositions of LCAP regarding the concession contract for public works⁹².

LCAP distinguishes between the administrative contracts and the private contracts of the administration. In Book I is set that the general regime of the administrative contracts, for then Book II defines the specific regime of each type of administrative contract. Four administrative contracts categories are regulated: works contracts (*contratos de obras*), services contracts (*contratos de servicios*), furnishing contract (*contratos de suministro*) and public services administration contract (*contratos de gestión de servicios públicos*). Within the works contracts we distinguish between the simple acquisition contract for works and the concessions of public works (*concesiones de obras*). The category of the public services administration contract includes four form of indirect administration of public services: concession, *concierto*, interested administration and mixed economy company⁹³. Regarding the limits in which the externalization of the public services supply can be performed, LCAP provides in art. 63 that “the state may indirectly administer, by concluding contracts, all services in its competence that

⁸⁹ Sentencias del Tribunal Supremo de 29.01.1990, *RJ*, n° 561; 5.03.1993, *RJ*, n° 1555; 31.10.1997, *RJ*, n° 7242 <http://www.poderjudicial.es> (last consulted on the 15th of July 2009).

⁹⁰ BOE n. 119/19.05.1995, <http://www.carreteros.org/legislaciona/contratos/lcap/lcap.htm> (last consulted on the 15th of July 2017).

⁹¹ Real decreto legislativo 2/2000, de 16 de junio, por el que se aprueba el texto refundido de la ley de contratos de las administraciones publicas, BOE n. 148, 21.06.2000.

⁹² LEY 13/03, de 23 de mayo, reguladora del contrato de concesion de obras publicas, BOE n. 124, 24.05.2003.

⁹³ Artículo 156 LCAP. Modalidades de la contratación. - La contratación de la gestión de los servicios públicos adoptará cualquiera de las siguientes modalidades: a) Concesión, por la que el empresario gestionará el servicio a su propio riesgo y ventura, siendo aplicable en este caso lo previsto en los apartados 1 y 3 del artículo 232 de la presente Ley. (Letra redactada de conformidad con la LEY 13/03); b) Gestión interesada, en cuya virtud la Administración y el empresario participarán en los resultados de la explotación del servicio en la proporción que se establezca en el contrato; c) Concierto con persona natural o jurídica que venga realizando prestaciones análogas a las que constituyen el servicio público de que se trate; d) Sociedad de economía mixta en la que la Administración participe, por sí o por medio de una entidad pública, en concurrencia con personas naturales o jurídicas.

have an economic content which allows them to be exploited by private enterprisers and which are not the object of the exertion of the sovereign rights (exclusive rights)”.

In 2007 the Law No. 30/2007 of the contract in the public sector (*Ley de contratos del sector público*⁹⁴, LCSP) has been adopted, through which the provisions of the 2004/18/EC Directive are transposed, law that has a larger application sphere than LCAP (is addressed to all public entities) regarding the general collaboration between the public sector and the private sector⁹⁵.

The tendency manifested on the level of the national authorities is in the meaning of the adaptation of “a contractual system” which allows the conclusion of partnerships between the public sector and the private sector regarding the administration of public services with commercial character⁹⁶.

2.6. The limits of the externalization of public activities in Italy

The Italian doctrine, starting from the provisions of the Italian Criminal Code⁹⁷ (art. 357 and 358), operated the distinction between the *public functions* including the non-delegable activities and the *public services* including delegable activities. The two articles that are part of the Title II of the Criminal Code called “Crimes against public administration” (*Dei delitti contro la pubblica amministrazione*) distinguish between the persons entrusted with the performance of “a legislative, administrative or judicial public function” and the two that are entrusted with the performance of a public service”⁹⁸. Art. 357 assimilated to the

⁹⁴ BOE n. 261/31.10.2007, <http://www.derecho.com/l/boe/ley-30-2007-contratos-sector-publico> (last consulted on the 15th of July 2017).

⁹⁵ Alfonso Peña Ochoa, «El nuevo contrato de colaboración entre el sector público y el sector privado en la ley 30/2007, de 30 de octubre, de contratos del sector público», *Revista Aragonesa de Administración Pública* n. 32/junio 2008, Monografías, Zaragoza, p. 87-107, <http://portal.aragon.es/portal/page/portal/IAAP/REVISTA> (last consulted on the 15th of July 2017).

⁹⁶ Carmen Chinchilla Marín, “El nuevo contrato de colaboración entre el sector público y el sector privado”, *Revista española de Derecho Administrativo*, n° 132/2006, p. 609-644.

⁹⁷ Consolidated version (7.04.2009), http://it.wikisource.org/wiki/Codice_Penale (last consulted on the 15th of July 2017).

⁹⁸ **Art. 357 Nozione del pubblico ufficiale.**

Agli effetti della legge penale, sono pubblici ufficiali coloro i quali esercitano una pubblica funzione legislativa, giudiziaria o amministrativa. Agli stessi effetti e' pubblica la funzione amministrativa disciplinata da norme di diritto pubblico e da atti autoritativi e caratterizzata dalla formazione e dalla manifestazione della volontà della pubblica amministrazione o dal suo svolgersi per mezzo di poteri autoritativi o certificativi (1). (1) Articolo così' sostituito dalla L. 26 aprile 1990, n. 86 e successivamente modificato dall'art. 4, L. 7 febbraio 1992, n. 181.

Art. 358 Nozione della persona incaricata di un pubblico servizio

Agli effetti della legge penale, sono incaricati di un pubblico servizio coloro i quali, a qualunque titolo, prestano un pubblico servizio. Per pubblico servizio deve intendersi un'attività disciplinata nelle stesse forme della pubblica funzione, ma caratterizzata dalla mancanza dei poteri tipici di questa ultima, e con esclusione dello svolgimento di semplici mansioni di ordine e della

public function “the administrative function submitted to the public law norms and the authority acts and characterized by forming and manifesting the public administration’s will with the help of the authority and certification powers”. Beginning from this definition, in the Italian doctrine it is appreciated that the public function represent the ensemble of activities designated to fulfilling the essential (core) functions of the state (justice, public security, defense) while the public services are those activities that the state undertakes for the performance of the social welfare⁹⁹. The public function is the expression of direct manifestation of authority, sovereignty of the state. Thus, concretely, the activity of the legislative and judicial powers always compose the content of the public function, while the activity of the administrative power does not form its content unless when its manifestations have, in their ensemble, an authority character, like police activities, military activities, fiscal activities; other manifestations form the content of the public services¹⁰⁰.

Regarding the public services, it is noticed that in Italy the means of administering them are provided with limits by the legislation. On national level in the matter of public concessions, the Law No. 109/11 February 1994 (the Law Merloni - *Legge quadro in materia di lavori pubblici*) modified by the Law No. 415/18 November 1998, with the ulterior modifications, regulated the public works concessions until 2006 when it has been abrogated by the Code of Public Contracts. The community directives in the field of public acquisitions (2004/17/CE and 2004/18/CE) have been transposed in the national law through the Code of the Public Contracts for works, services and furnishings (*Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE*¹⁰¹), adopted by the Legislative Decree No. 163/2006.

On local level the means of administering are expressly determined by art. 113 of the Legislative Decree No. 267/2000 regarding the unique Text of the laws over the organization of the local entities¹⁰² (*Testo unico delle leggi sull'ordinamento degli enti locali* - « T.U.E.L. ») that operate a distinction between the activities with industrial character (delegable) and without industrial character (non-delegable).

The distinction between the public functions and the public services with industrial character is sometimes blurred. Thus in Italy the Legislative Decree

prestazione di opera meramente materiale (1). (1) Articolo così sostituito dalla L. 26 aprile 1990, n. 86.

⁹⁹ Umberto Pototschnig, *I pubblici servizi*, Casa Editrice Dott. Antonio Milani (CEDAM), Padova, 1964, p. 169.

¹⁰⁰ Massimo Severo Giannini, *Diritto amministrativo*, Giuffrè, Milan 1993, 3^{ème} édition, vol. 2, p. 17.

¹⁰¹ http://www.simone.it/appalti pubblici/codice/codice_appalti.htm (last consulted on the 15th of July 2017).

¹⁰² Gazzetta Ufficiale della Repubblica Italiana (*GURI*) n° 227/28.09.2000. Consolidated version (25.03.2017) <http://www.finanzalocale.interno.it/docum/studi/varie/testounico267-2000.pdf> (last consulted on the 15th of July 2017).

No. 112/1999¹⁰³ opened the possibility of delegating by decennial concession of the functions of collecting taxes of any kind from companies, unlike Spain where the Supreme Tribunal interdicted the delegation of these functions¹⁰⁴. Thus in Italy a part of the imperial activities (*jus imperii*) of the state are exerted concretely by the concessionary, but the state keeps the right to control. Besides, in the Italia law, the notion of concession was based on the idea of transfer through unilateral act of the prerogatives of public power¹⁰⁵.

In Italy “the contractualisation process” for the administrative action is very advanced, some German influences being felt. Thus, the Law No. 241/1990 regarding the administrative procedure and the right to access to the administrative document (*Legge 241/90 Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi*¹⁰⁶) allowed the conclusion of agreements (*accordi con gli interessati*) which determine the content of an administrative decision or which substitutes to it (art. 11), like the provision of the German legislation.

¹⁰³ Decreto Legislativo 13 aprile 1999, n. 112 "Riordino del servizio nazionale della riscossione, in attuazione della delega prevista dalla legge 28 settembre 1998, n. 337", *Gazzetta Ufficiale* n. 97 del 27 aprile 1999, http://www.giustizia.it/cassazione/leggi/dlgs112_99.html (last consulted on the 15th of July 2017).

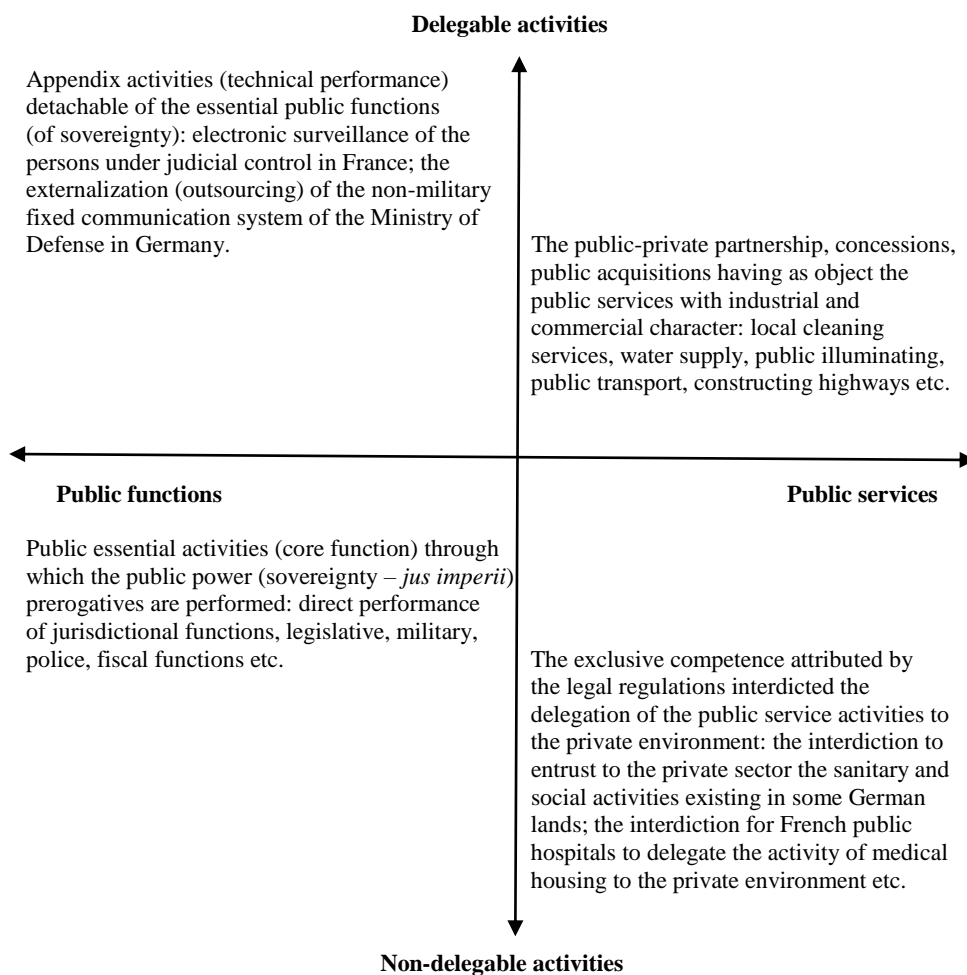
¹⁰⁴ Philippe Cossalter, op. cit. (*Le droit de l'externalisation...*), p. 11.

¹⁰⁵ See for this the Italian theory of the license-concession and the contract- concession developed by the authors Mantellini and Giorgi. These authors start the development of their point of view from an approval of the Italian State Council of March 10th 1879. In essence, the theory recognizes the principle according to which the concession is a unilateral document. But, its nature may be modified depending on certain circumstances, thus becoming contractual. Thus we will have two categories of concessions: on one side the unilateral concessions also called license-concessions and on the other side the bilateral concessions or the contract- concessions. After Mantellini we will be in front of a contract-concession every time the document also contains obligations for administration. But Mantellini shows that “the document will remain a concession document and that the state’s obligations are born more often from laws (or administrative documents) through which the concession is granted, than by contract”. Giorgi includes in the contract-concessions category all the cases in which the concession document is accompanied by a contract or an additional document which imposes mutual obligations and rights – *apud* Ange Blondeau, *La concession de service public*, Librairie Dalloz, Paris, 1930, p. 139-141. See in Jurisprudence: Corte di Cassazione, 12 gennaio 1910, *Rivista del diritto commerciale* (Riv. dir. comm.), 1910, 248; Corte di Cassazione, 1 section, 11 dicembre 1978, *Comune di Castelfranco Veneto c/ Soc. Officine gaz Butano*, *La Settimana Giuridica* 1979.II.509; Corte di Cassazione, 3 sect. civ., 3 settembre 1998, *Soc. Compagnia Cauzioni ed altro c/ Comune di Barletta ed altri*, n° 8768, *Giustizia civile massimario* (Giust. Civ. Mass.) 1998, p. 1849.

¹⁰⁶ Legge 241/1990 come modificata dalla legge 15/2005 e dal decreto legge 35/2005, <http://www.diritto.it/archivio/1/26488.pdf> (last consulted on the 15th of July 2017).

2.7. Conclusions. The convergence limits regarding the externalization of the public activities in the Member States of the European Union

The convergence limits regarding the externalization of the public activities in the analyzed countries may be resumed to the graphic below:



§3. Administrative litigation systems in the Member States of the European Union

3.1. Introductory considerations

The term "contentious" comes from the Latin word *contendere* = to struggle, to confront, and, from a legal point of view, serves to designate the character of judicial acts and proceedings involving contradictory debates, quoting parties, etc., processes before the courts being likened to Long time "of judicial fights where each party is fighting contradictory for the recognition and defense of its law"¹⁰⁷.

The administrative contentious institution comprises all the legal rules governing the settlement of disputes in which at least one of the parties is a public authority, litigation having as its object the violation of a person's right or a legitimate interest by an administrative act or by the failure to resolve within a legal term an application.

Depending on the bodies that deal with administrative litigation, there are four major administrative litigation systems¹⁰⁸:

- a) States with administrative jurisdictions who have the State Council on top, administrative body with consultative and judicial role (the French system);
- b) States with administrative jurisdictions completely separated from the active and consultative administrations (the German system);
- c) States with administrative jurisdictions included in the judicial system;
- d) States with no administrative jurisdiction (English system).

We emphasize that there is a limited number of systematic studies on comparative administrative structures and administrative litigation remedies in comparative law. Worthy to mention are: Jürgen Schwarze, *Droit administratif européen*, 2^e éd. Complétée, Bruxelles, Bruylant, 2009; J. Ziller, *Administrations comparees: les systemes politico-administratifs de l'Europe des Douze*, Montchrestien, Paris, 1993. In Romania we mention the reference volume of professor Ioan Alexandru - *Drept administrativ comparat (Comparative administrative law)*, Lumina Lex, Bucharest, 2000.

¹⁰⁷ See Constantin G. Rarincescu, *Contenciosul administrativ român*, 2nd edition, „Universală” Alcalay & Co., Bucharest, 1936, p. 105, n.s. 1.

¹⁰⁸ See Ioan Alexandru, *Tratat de administrație publică*, Universul Juridic, Bucharest, 2008, p. 664; Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck, Bucharest, 2016, p. 429-435. For an analysis of the courts dealing with administrative litigation in the Member States of the European Union, see the portal https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-ro.do (last consultation on 01.05.2017) and the site of the Association of State Councils and supreme administrative jurisdictions (ACA Europa): www.aca-europe.eu (last consultation on 01.05.2017).

These work points out that although there is no model of public administration and administrative litigation at the level of the EU Member States, public administrations in these states share a set of values and principles that make up the pillars of European administrative law: legality of government action, the principle of tort liability of public administration, ensuring the rights of the defense, trust and predictability, openness and transparency of procedures, the right to a fair trial, the principle of legitimate expectations and legal certainty, the principle of proportionality, the principle of motivating decisions, etc.

The scientific novelty of this article is to capture the historical context that has led to the creation of distinct administrative contentious systems and to the analysis of their latest evolutionary tendencies.

3.2. States with administrative jurisdictions who have the State Council on top, administrative body with consultative and judicial role (the French system)

In **France**, even during the Great Revolution of the eighteenth century, a particular view of the separation of powers in the state was observed. Thus, although France was the first state which, following the desideratum of the revolution, proclaimed the separation of the administrative authority from the judicial authority by the Law of August 16-24, 1790, it also ruled through the Law of September 6-11 of the same year that administrative litigation will be entrusted to the administration, establishing from the beginning a duality of jurisdiction - a judicial and administrative jurisdiction. It is thus clear that the ordinary judge has no right to disrupt in any way the proper conduct of the administration's activity. During the Napoleon Bonaparte period, the State Council would be established as an administrative body, first with advisory functions to the government¹⁰⁹, then by the law of May 24, 1872, also with judicial functions of litigation in which the state administration figured. For a long time, administrative litigation has been settled in two jurisdictions - prefectural councils in each department, as a first instance, and the State Council, both as a court of first instance and appeal. By the Decree-Law of June 17, 1938 were included in the competence of prefectural councils also disputes arising from public contracts. Since 1953, the administrative councils subordinated to the State Council have been set up by reorganizing the former prefect's councils. By Law no. 87-1127 of 31 December 1987 on the reform of administrative litigation, which entered into force on 1 January 1989, three levels of administrative jurisdiction were established - inter-departmental administrative courts, administrative courts of appeal and the State Council.

¹⁰⁹ The State Council is established by the Constitution of December 13, 1799 (*22 frimaire de l'an VIII*) which in art. 52 states: "Under the direction of the consuls, a State Council is charged with drafting the draft laws and regulations of the public administration and solving the difficulties that will arise in administrative matters".

The dualist law system has given rise to conflicts of jurisdiction between the courts (represented by the Court of Cassation and the ordinary courts) and administrative (represented by the State Council and the administrative courts). Hence the necessity of establishing a new institution with jurisdictional powers, namely the Conflict Tribunal¹¹⁰ instituted by art. 89 of the Constitution of 1848 to resolve conflicts of jurisdiction between the two jurisdictions. The Conflict Tribunal was organized in a first form by the regulation of 28 October 1849 and the law of 4 February 1850, but having an ephemeral existence, being abolished during the Bonapartist regime of Napoleon III (1852-1870). He was re-established by the law of 24 May 1872, his duties being consolidated by the law of 20 April 1932 and the decree of 25 July 1960. His powers are also reflected in the organizational structure, the Tribunal being composed of a law-based president in the person of the minister of justice and eight judges, four members of the State Council and four magistrates of the Court of Cassation. The decisions of the Conflict Tribunal have played an important role over the years in shaping the legal regime of administrative law institutions. Thus, in its case-law, the Conflict Tribunal recognized the existence of an administrative contract concluded between two private persons for the purpose of carrying out a public interest mission (the case *Société entreprise Peyrot* of 08.07.1963) and deduced the exclusive jurisdiction of the administrative courts in disputes concerning to the public service delegation contracts (the „*Blanco*” case of 1873).

It is therefore noted that in France the force and tradition of the executive power imposed the creation of administrative bodies with autonomous jurisdictional powers of the judiciary, which did not happen, for example, in England.

The French model for organizing administrative jurisdictions also inspired other countries, such as Belgium, Italy, the Netherlands, Luxembourg, Greece.

In **Belgium**, in 1946, the State Council was created as an administrative body, with a double role as in the French model: the role of government consultative body and administrative tribunal. The State Council judges appeals against decisions of lower administrative jurisdictions and, unlike the French model, its decisions could be appealed against by the Court of Cassation.

In **Italy**, administrative jurisdiction is exercised by the administrative courts (*Tribunali Amministrativi Regionali* or TAR set up in 1971) and by the State Council (*Consiglio di Stato*). The State Council established in 1865 is currently an administrative body with consultative role and jurisdictional role. Conflicts of jurisdiction are settled by the Court of Cassation.

In the **Netherlands** administrative litigations are usually judged by regional courts. In cases involving civil servants and social security issues, the appeal may be brought before a special appeal court - the Central Court of Appeal

¹¹⁰ About the "Conflict Tribunal" see Ioan Leș, *Instituții judiciare contemporane*, C.H. Beck, Bucharest, 2007, p. 623-624.

(*Centrale Raad van Beroep*) - and in most other cases, in addition to the Administrative Jurisdictional Division of the Council of State.

In **Greece**, the State Council first operated between 1835-1844, then for a short period from February to November 1865, and was finally established by the Constitution of 1911 and has been operating since 1929 to date. State Council decisions have provided the highest legal precedent for lower administrative courts and have set standards of interpretation of the Constitution and laws, contributing to the advancement of legal theory and practice¹¹¹.

In the **Romanian Principalities**, Alexandru Ioan Cuza establishes, according to the French model, on February 11, 1864 a State Council with legislative attributions (drafting of draft laws), administrative duties (administrative counseling and a disciplinary forum for civil servants) and contentious attributions administrative. The State Council was abolished by the Law of 12 July 1866 on the division of the various powers of the State Council.

3.3. States with administrative jurisdictions completely separated from the active and consultative administrations (the German system)

The system of administrative jurisdictions in **Germany** has begun to develop on the backdrop of the bourgeois movements of the second half of the nineteenth century, which imposed the establishment of some constitutions of the Länder based on the principle of the separation of powers in the state, equality before the law for all citizens and the recognition of individual freedoms¹¹². Since 1863 autonomous administrative courts, separate from the administration and the ordinary courts, have been established in the provinces. Subsequently, a higher court was established between 1872-1875 - the Prussian High Administrative Court (O.G.V.).

As a result, the German system of administrative jurisdictions developed from bottom to top, unlike the French system that developed from top to bottom, building a whole system of administrative jurisdictions in the territory after being first created by the Council of the State.

Currently, in Germany the administrative courts (*Verwaltungsgericht*), the higher administrative courts (Oberverwaltungsgericht) - existing on the Länder - and the Federal Administrative Court (*Bundesverwaltungsgericht*, established on 8 June 1953) are usually competent to hear disputes of administrative

¹¹¹ See the website of the Greek State Council : www.ste.gr/FL/main_en.htm (last consultation on 01.05.2017).

¹¹² For details see Ioan Alexandru, *Drept administrativ comparat*, Lumina Lex, Bucharest, 2000, p. 36.

litigation. The law on administrative jurisdiction¹¹³ enshrines in the first article the independence of the administrative courts that exercise administrative jurisdiction, distinct from the administrative authority. This system differs in this way from the French system in which the supreme court in the area of administrative contentions - the State Council - is an administrative authority that also has an advisory role for the Government's decisions.

This system of autonomous administrative jurisdictions, separated from the administration and ordinary courts, has been taken over from Germany and other countries, such as Austria, Portugal, Sweden.

In **Austria**, administrative litigation disputes are judged by the High Administrative Court (*Verwaltungsgerichtshof*) which verifies the lawfulness of the public administration and, starting January 1, 2014, the administrative courts. At federal level there is the Federal Administrative Court (*Bundesverwaltungsgericht*) based in Vienna. There is a Regional Administrative Court (*Landesverwaltungsgericht*) in each province.

In **Portugal**, the system of administrative litigation courts includes administrative and fiscal tribunals at first instance set up in 1930, the central administrative courts established in 2003 (north-based in Porto, and south-based in Lisbon) and the Supreme Administrative Court set up in 1870 (*Supremo Tribunal Administrativo*, which has country-wide competence). Conflicts of jurisdiction between courts are settled by a *Tribunal de Conflito*, governed by law in 1933.

In **Sweden** administrative courts are organized into a three-tier system: administrative courts, administrative courts of appeal and the Administrative Supreme Court established since 1909. In addition, a number of specialized courts and tribunals have been set up to resolve certain types of cases and matters.

A particular case is **Luxembourg**, where, following the constitutional reform of 12 July 1996 and the organic law of 7 November 1996, the competence of the State Council was reduced exclusively to the consultative function and administrative tribunals and Administrative Court have been established as independent administrative bodies distinct from the ordinary judiciary¹¹⁴.

3.4. States with administrative jurisdictions included in the judicial system

In some states litigations on administrative disputes are judged by specialized sections of ordinary courts.

¹¹³ Adopted on 21 January 1960, in its consolidated version of 19 March 1991, as amended by Art. 9 of the law of December 9, 2006 of 21, on www.bijus.de (last consultation on 01.05.2017).

¹¹⁴ See the site of the Luxembourg administrative courts : <http://www.justice.public.lu/fr/organisation-justice/juridictions-administratives/index.html> (last consultation on 01.05.2017).

Thus, in **Spain** the administrative litigation is judged by a whole set of administrative jurisdictions integrated into the judicial system¹¹⁵:

- a) administrative litigation judges
- b) central administrative litigation judges
- c) administrative litigation divisions of the Higher Courts of Justice - organized at the level of each autonomous community (there are 17 autonomous communities in Spain)
- d) the administrative audit division of the National Audience (*Audiencia Nacional*) - which exercises judicial review of administrative decisions taken by senior officials (Spanish Government ministers, State secretaries) and certain specialized agencies (Spanish Data Protection Agency, Commission for Competition Protection etc.)
- e) administrative litigation division of the Supreme Court.

In **Romania** the administrative litigation disputes are judged by the Administrative Litigation Sections organized at the level of the tribunals, courts of appeal and the High Court of Cassation and Justice.

3.5. States with no administrative jurisdiction (English system)

There are also states where litigation of administrative disputes are judged by ordinary courts, according to rules specific to common law, without a specialization within distinct sections.

The classic case is the **United Kingdom**, where the subordination of public administration to judicial control has been slow, over several centuries. In the Anglo-Saxon law, there was no French revolutionary context that promptly imposed a limitation on the powers of the sovereign and a clear distinction between public law and private law. For a long time, the dogma of the irresponsibility of the crown and certain agents of the Crown has been applied in the UK. Gradually, the administration's action was subject, within certain limits, to the control of the ordinary courts of justice, according to the same rules applied to individuals, the administration being required to seek the judge's authorization to take certain coercive measures to which the law was entitled only in this way¹¹⁶.

The classical English constitutional theory, as it was exhibited at the end of the 19th century by A.V. Dicey¹¹⁷, does not recognize a separate system of administrative courts (dualist law system) to review the decisions of public bodies

¹¹⁵ See Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa - the document is available online at: http://noticias.juridicas.com/base_datos/Admin/r28-129-1998.t1.html#t1 (last consultation on 01.05.2017).

¹¹⁶ Ioan Alexandru, *Tratat de administrație publică*, Universul Juridic, Bucharest, 2008, p. 657.

¹¹⁷ A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edition with new Introduction) (1915), first edition published in 1885 under title: *Lectures introductory to the study of the law of the constitution*.

(as in France, Germany and many other European countries). Instead, it is considered that the activity of public administration should be subject to the control of the ordinary courts of law (a unitary system of law).

The judicial control of English administration is based on the theory of excess power (doctrine *ultra vires*), which allows ordinary tribunals to decide whether the administration has acted within the limits of its legal power.

However, the theory of excess power (*ultra vires*) must, according to English case-law, be applied reasonably. In principle, it is admitted that everything that can be regarded honestly as an accessory or as a consequence of what is authorized by law is not to be regarded as a legal interpretation, as an excess of power.

In 1965 the Law Commission was created, as an independent statutory body to propose reform strategies, to codify the positive right and to ensure that the laws are fair, modern and clear.

At the initiative of the Law Commission, they were unified, starting with 1977 in England and 1980 in Northern Ireland, through Order 53, the previously existing procedures, establishing the possibility of bringing a request for judicial review (*application for judicial review*) against the action of the administration by which the applicant obtain a *Quashing order*, a *Prohibition order* prohibiting for the future a public administration action (for example, preventing the deportation of a person whose status of immigration was wrongly decided), a *Mandatory order* of the public authority to carry out its tasks (for example, requiring the administration to approve a building plan), a *Declaration* that clarifies the rights and obligations of the parties in the process, an order (*Injunction*) through which, where there is an imminent risk of damage or loss of property, the court may order interim measures to terminate the action of the administration in order to protect the injured party's position, also the possibility of seeking *Damages* under the conditions permitted by law¹¹⁸.

In the English system, court judgments are sometimes based on *natural justice*, discretionary power abuse, or *public interest immunity*, aimed at disclosing or failing to disclose information necessary to hear the case. It was only in 1968 that the House of Lords decided that it was the responsibility of the courts to examine the reality of the public interest invoked by ministers when they refused to provide indispensable documents for the settlement of the cases.

Currently, in the United Kingdom, the ordinary judge of the administration is the tribunal - the *First-tier Tribunal* and the *Upper Tribunal*. Against the decisions of the *Upper Tribunal* may appeal to the Court of Appeal (England and Wales) or the *Court of Session* (in Scotland).

¹¹⁸ Under English law, damages can not be granted solely because a public authority has acted illegally. In order for a court to pay damages, it is necessary: a) to have a cause of "private law", such as negligence or breach of a statutory obligation; b) the injured party's request to be based on European Union law or the 1998 Human Rights Act.

Lately reforms in the legal system tend to specialized bodies with jurisdiction that control the activity of public administration. Thus, in England and Wales the **Administrative Court** was established as a specialized court of the *Queen's Bench Division* of the *High Court of Justice of England and Wales* having jurisdiction over administrative law and exercising control over the courts and tribunals lower and other public bodies.

In addition to these courts, over 50 specialized courts and administrative authorities operate in the UK and have jurisdiction over a wide range of areas (education, labor, pensions, finance and commerce, health, intellectual property, land, transport, construction, Gambling, etc.)¹¹⁹.

Other countries that do not traditionally have specialized administrative litigation courts are **Denmark** and **Norway**. In these countries, the *Ombudsman's Institution* (People's Advocate) played an important role in defending the citizens' rights against the abuse of public administration. The institution of the *Ombudsman* was set up in Sweden in 1809 by Parliament, which introduced the Parliamentary Ombudsman's Bureau in the new Constitution, with the role of overseeing the protection of citizens' rights, by checking through inspections and surveys how public authorities comply with the laws. The institution of the Parliamentary Ombudsman was taken over by Finland through the 1919 Constitution and by Denmark in 1954, later taken over by a number of countries (under the name of mediator, ombudsman or the lawyer of the people).

3.6. Conclusions on Administrative Litigation Systems in the Member States of the European Union

The administrative contentious systems analyzed have developed in line with historical evolution and legal traditions and have been continually adapted to the realities existing in each state.

As a result of this analysis, we notice that in most states there is a tendency to create judges specialized in administrative law. Practically, under the conditions of social complexity of today, it is difficult to accept that a judge can be fully competent in all civil, commercial, criminal, labor law and administrative law¹²⁰. Diversification of regulated social relations has forced the specialization of judges.

The existence of some courts or sections of the courts specialized in hearing certain disputes does not imply a lack of cooperation between them. In France,

¹¹⁹ For a complete list of them, see: https://en.wikipedia.org/wiki/List_of_tribunals_in_the_United_Kingdom (last consultation on 01.05.2017).

¹²⁰ See Ioan Alexandru (coord.), *Drept administrativ*, Omnia, Braşov, 1999, p. 482.

the collaboration between the judge and the administrative judge is commonplace in the case of contentious for the interpretation and appreciation of legality¹²¹.

The manner in which the administrative contentious is regulated in a State reflects the degree of democratization of that country, the extent to which the citizen enjoys legal safeguards to defend himself against abuses by public authorities.

The regulation of administrative contentious should provide the specialized courts with clear procedural rules capable of enforcing the procedural rights of litigants, with the ultimate aim of protecting substantive rights violated by unlawful administrative acts¹²².

§4. Evolution of the level of convergence in the European administrative systems

Today, there is a growing debate about **the level of convergence of administrative systems**, especially with the integration of new states into the Union. It starts from the idea that a certain administrative system can be assessed by establishing the level at which the European administrative principles are applied, both in the legislation and in the daily behavior of public authorities and civil servants. In this respect, these general administrative principles serve as standards for measuring trust in public administration, the degree of accountability of civil servants and public authorities, the effect and viability of procedures used in decision-making, recourse to them, etc.

The level at which different countries share and applies these principles is also relevant for establishing compatibility between their administrative systems. In other words, they serve as prerequisites for better integration on the one hand, and on the other hand, as measures of the capacity of institutional structures of public administration in a country to implement the EU acquis.

The concluding conclusion is the following: the high degree of influence of European administrative principles on national legislation and the presence of these principles in the actual behavior of public actors (ie the level of implementation of the unformalized EU acquis) are representative and are correlated with the country's ability to to adopt and implement the legally formalized EU acquis. It is therefore noted that greater attention needs to be paid to the actions of national public services, as these are the instruments that ensure or prevent the transfer of these legal administrative principles to public actions and decision-making.

¹²¹ See Bernard Pacteau, *Manuel de contentieux administratif*, Presses Universitaires de France, 2^e édition, 2010, p. 119-120, 136; Jean Rivero, Jean Waline, *Droit administratif*, 14^e édition, Dalloz, Paris, 1992, p. 199-200.

¹²² Verginia Vedinaș, Liliana Vișan, Diana Iuliana Pasăre, *Argumentare juridică europeană în favoarea necesității modificării Legii contenciosului administrativ. Succintă prezentare a Legii nr. 262/2007*, „Revista de Drept Public” no. 3/2007, p. 77, 78.

In order for the candidate countries to meet the standards required by the European Union, it is absolutely necessary to reform the material and procedural administrative law and the behavior of public services in order to respect the administrative principles of trust, predictability, accountability, transparency and efficiency. In addition, integration into the European Union is a process of evolution. This means that a candidate country has to demonstrate a sufficient level of progress in order to have a satisfactory comparison with the average level of the Member States of the European Union. The level of transformation in 1986 (when Portugal and Spain joined the European Union) changed in 2007 (when Bulgaria and Romania joined the European Union) and will be different in the future when other candidate countries join the European Union. This means that it is not enough for candidate countries to reach the current average level of government now in the EU Member States. It is necessary for them to reach the average level of the Member States from the time of accession. In other words, a candidate country must be able to overcome the difference between the current level of public administration and the average level of the future Member States when it is a member of the European Union.

The Community legislative evolution requires the candidate country to continually assess the degree of consistency of its own legislation with the *acquis communautaire*. There are different mechanisms that can measure this degree of convergence at some point. Thus, for example, the conformity of Romanian and Community legislation can be achieved through two major processes: the transposition of the Community legislation into the Romanian legislation and the compatibility of the national normative acts transposing the *acquis communautaire* with the provisions of the Community acts¹²³. Corresponding to the two processes, the degree of concordance can be judged on the basis of the calculation of two indices: the degree of transposition (K_T) and compatibility degree (K_{comp}).

In the paper published under the aegis of the European Institute of Romania - "Impact II Studies", under the coordination of professor Augustin Fuerea, the following way of calculating these indices is proposed¹²⁴:

$$K_T = \frac{n_{DT} \times C_{SD} \times n_{DZT} \times C_{SDZ} + n_{AT} \times C_A}{n_D \times C_{SD} \times n_{DZ} \times C_{SDZ} + n_A \times C_A} \times 100$$

Where: K_T = degree of transposition; n_{DT} = number of transposed Directives; n_D = total number of directives; C_{SD} = significance coefficient for the Directives;

¹²³ Augustin Fuerea (coord.), *Evaluarea gradului de concordanță a legislației române cu acquis-ul comunitar, la nivelul anului 2002, pe capitole de negociere. Studii de impact II*, European Institute of Romania, 2004, p. 13

¹²⁴ *ibidem*, p. 12, 13

n_{DZT} = number of transposed decisions; n_{DZ} = total number of decisions; C_{SDZ} = significance coefficient for Decisions; n_{AT} = the number of other Community acts transposed; n_A = the total number of other Community acts; C_A = significance coefficient for other Community acts (recommendations, notices, letters of intent). Depending on their relevance, Community acts were divided into three groups of significance agreed by experts of the Ministry of European Integration: Directives having the significance coefficient (C_{SD}) = 1; Decisions having significance coefficient (C_{SDZ}) = 0.9; Other community acts (recommendations, notices, letters of intent) with significance coefficient (C_A) = 0.2.

$$K_{comp} = \frac{M_t \times C_t + M_p \times C_p + M_{c/in} \times C_{c/in}}{M} \times 100$$

Where: K_{comp} = degree of compatibility; M_t = national normative acts fully compatible with transposed Community acts; M_p = national normative acts partially compatible with transposed Community acts; $M_{c/in}$ = national incompatible or uncomplicated normative acts; M = national normative acts transposing Community acts ($M = M_t + M_p + M_{c/in}$); C = compatibility coefficient; C_t = 1 for fully compatible normative acts; C_p between 0 and 1 for partially compatible normative acts; $C_{c/in}$ = 0 for incompatible normative acts or with unknown compatibility.

European Union legislation is a promoter of the modernization of national laws. The role of the European Union is to act as a means of inspiration and trust, working as a factor for accelerating change in the Member States.

Chapter III

Elements of the European Administrative Space in the primary law of the European Union

Section 1. Elements of the European Administrative Space in the primary legislation of the European Union

We will then look at a few elements of the legal architecture of the European Administrative Space covered by the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TfEU) and the Charter of Fundamental Rights of the European Union.

§1. Premises of administrative cooperation

According to the provisions of art. 197 TfEU the effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, is a matter of common concern.

The Union can support Member States' efforts to improve their administrative capacity to implement Union law. This action may consist, in particular, in facilitating exchanges of information and civil servants, as well as in support of training programs. However, this support is optional, art. 197 (2), providing that no Member State is required to use this support.

The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down the measures necessary for this purpose, with the exception of any harmonization of the laws, regulations and administrative provisions of the Member States.

§2. Approximation of administrative laws

According to the provisions of art. 114 TfEU The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures for the approximation of the laws, regulations and administrative provisions of the Member States concerning the establishment and functioning of the internal market. These provisions do not apply to tax provisions, those on the free movement of persons and on the rights and interests of employed persons.

Art. 114 TFEU also establishes a procedure for authorization by the European Commission of Member States to maintain or introduce national provisions derogating from a harmonization measure.

Article 116 TFEU states that if the Commission finds that a disparity between the laws and regulations of the different Member States distorts the conditions of competition in the internal market and therefore causes a distortion to be eliminated, the Commission consults with Member States concerned. If this consultation does not eliminate the distortion in question, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the relevant Directives. Any other useful measures provided for in the Treaties may be adopted.

§3. Removal of administrative barriers

The four freedoms enshrined in the Treaty of Rome, the freedom of movement of goods, services, people and capital, mean that the public administrations of the Member States, as key elements of implementing and securing these rights, directly derived from the Treaties, act in a direction that will lead to their effective implementation.

With regard to the free movement of workers¹²⁵, Article 46 (b) TFEU provides that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt by means of directives or regulations the necessary measures to achieve the free movement of workers, in particular the abolition of those administrative procedures and practices the maintenance of which would be an obstacle to the liberalization of the movement of workers.

As regards the freedom of establishment of nationals of a Member State in the territory of another Member State, 50 The TFEU provides that, in order to achieve freedom of establishment in respect of a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, may decide, by means of directives, to eliminate those procedures and administrative practices either by national law or by agreements previously concluded between Member States, the maintenance of which would be an obstacle to freedom of establishment.

In the matter of the freedom to provide services art. 56 TFEU states that, in accordance with the provisions of the Treaty, restrictions on freedom to provide services within the Union are prohibited in respect of nationals of Member

¹²⁵ On the notion of "worker" in European Union law see Andrei Popescu, Nicolae Voiculescu, *op. cit.* (*Dreptul social european*), 2003, p. 107-109.

States established in a Member State other than that of the recipient of the services. Also, in the matter of the freedom of movement of the capital art. 63 The TFEU provides that any restrictions on the movement of capital between Member States and between Member States and third countries are prohibited.

The Treaty on the Functioning of the European Union also provides in Art. 74 administrative cooperation for the achievement of the Area of Freedom, Security and Justice. In order to implement this Space, the Council, acting on a proposal from the Commission and after consulting the European Parliament, shall take measures to ensure administrative cooperation between the competent services of the Member States in the relevant areas and between them and the Commission.

§4. Compromise clause in public law contracts

According to the provisions of art. 272 TFEU the Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to a compromise clause in a contract concluded by the Union or on its behalf in a public contract.

§5. Right to good administration

This right first arises in Art. 41 of the Charter of Fundamental Rights of the European Union adopted at the Nice Summit in December 2000. At the Tampere European Council of October 1999, when the methods and institutions that drafted the Charter were put forward, the European Proposer that the Charter should mention the right of citizens to the quality of the benefits provided by the administration. Jacob Söderman, reelected European mediator in 1999, considers that the adoption of this sentence will have very significant repercussions among Member States or the future, causing the 21st century to be the century of good administration.

According to the provisions of art. 41 of the Charter of Fundamental Rights of the European Union, everyone has the right to a fair, equitable and reasonable treatment of the Union's institutions, bodies, offices and agencies in respect of his or her problems. This right mainly includes:

(a) the right of any person to be heard before taking any individual measure likely to affect him / her. This provision is detailed in Art. 16 of the European Code of Good Administrative Behavior adopted on 6 September 2001 by the European Parliament, which states that in cases concerning the rights or interests of individuals, the official shall ensure that the rights of the defense are respected during each stage of the decision-making process. Each member of the public will have the right, in cases where a decision affecting his / her rights or interests is to

be adopted, to submit written notes and, whenever necessary, to make a verbal comment before the decision is taken. The European Court of Justice has held that the observance of the rights of the defense in all open proceedings against a person constitutes a fundamental principle of Community law and must be ensured, even in the absence of any rules on the procedure in question¹²⁶. This principle implies that, before an administrative sanction is imposed against a person, he may be able to use his point of view with regard to the facts in his charge.

(b) the right of any person to have access to his / her own file, respecting the legitimate interests of confidentiality and professional and commercial secrecy;

(c) the administration's obligation to motivate its decisions. This obligation was still provided by the Treaty of Rome through art. 190. The provision is developed by art. 18 of the European Code of Good Administrative Behavior. Thus, any decision taken by the institution, which may adversely affect the rights or interests of a particular person, will state the grounds upon which it is based, clearly indicating the relevant facts and the legal basis of the decision. The official will avoid making decisions based on brief or vague grounds or without individual reasoning. If, due to the high number of persons concerned by similar decisions, it is not possible to communicate in detail the grounds on which decisions are based, and in cases where standard responses are sent, the official will then provide the person who specifically requested it individual reasoning. The European Court of Justice has repeatedly shown that decisions taken by officials in the European Institutions must be motivated in a sufficient way (*motiver la décision de façon suffisante*)¹²⁷. The reasoning must provide the essential elements of the administrative procedure applied and be sufficiently justified to allow the interested party to appeal against the final decision. Motivation must be in fact and in law. "Reasons" should be understood as both the legal provisions that entitle the institutions to take action and the reasons which motivate the institutions to issue the act in question¹²⁸. The mention of the legal provision is necessary given that the Union's institutions can only exercise those powers explicitly provided for in the Treaty.

¹²⁶ Decision T-450/93 - Judgment 06/12/1994, Lisrestal e.a./ Commission, Rec. 1994, p. II-1177.

¹²⁷ see Decision C-269/90, Technische Universität München-Mitte, Rec. p. I 5469 of 21 november 1991; Case T-167/94 [2002] ECR II-2589 of 18 September 1995 - Nölle v Council and Commission; Case C-221/998, ECR I-8255 of 10 December 1998 - Schröder et Thaman v Commission.

¹²⁸ Pierre Mathijsen, *Compediu de drept european*, 7th edition, Bucharest, Club Europa Publishing House, 2002, p. 35.

§6. Transparency of administrative procedures in the institutions of the European Union

The Treaty on European Union (TEU) enshrines the notion of transparency in art. 1, par. 2, pointing out that "this treaty marks a new stage in the process of creating a deeper union among the peoples of Europe, where decisions are taken in full compliance with the principle of transparency and as close as possible to citizens.

According to the provisions of art. 11 (2) TEU The Union institutions maintain an open, transparent and regular dialogue with representative associations and civil society. In order to promote good governance and ensure the participation of civil society, the institutions, bodies, offices and agencies of the Union shall act with due regard for the principle of transparency (Article 15 (1) TFEU). It is also foreseen that any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has a right of access to the documents of the Union institutions, bodies, offices and agencies irrespective of the means of support these documents. The general principles and limits which, for reasons of public or private interest, govern the exercise of the right of access to documents shall be laid down by regulations of the European Parliament and the Council, acting in accordance with the ordinary legislative procedure (Article 15 (3) TFEU).

Transparency of the decision-making process in the European institutions is guaranteed by the provisions of Regulation no. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 *regarding public access to European Parliament, Council and Commission documents*¹²⁹. The preamble to this Regulation states that transparency allows for better citizen participation in decision-making, as well as greater assurance of the legitimacy, effectiveness and accountability of the administration of citizens in a democratic system. Transparency contributes to the strengthening of the principles of democracy and respect for fundamental rights.

§7. Right to compensation for damage caused by the institutions and agents of the European Union

Everyone has the right to reparation by the Union of the prejudice caused by its institutions or agents in the performance of their duties, in accordance with the general principles common to the laws of the Member States (Article 41 (3) of the Charter of Fundamental Rights of the European Union).

¹²⁹ Published in J.O. L154/31.5.2001.

Undertaking the Union's tort liability presupposes that the applicant proves that the conduct complained of was unlawful to that institution, the existence of the damage and the existence of a causal link between that conduct and the damage complained of¹³⁰. On the other hand, the unlawful nature of an act does not automatically render the Union responsible for providing damages repairs. Thus, in the case of legislation involving economic policy measures, the Union assumes no responsibility for non-contractual obligations only in case of a sufficiently serious violation of a higher rule of law to ensure the protection of the injured party¹³¹.

§8. Language of communication with the European Union institutions

Any person may write to the Union institutions in one of the Treaty languages [the languages of the EU Member States, in accordance with Art. 55 (1) TEU] and must be answered in the same language (Article 41 (4) of the Charter of Fundamental Rights of the European Union).

§9. Juridical verification of administrative decisions

The Treaty of Rome stipulated in art. 173 an important legal principle: the right to legal verification of administrative decisions appearing in European Commission judgments. This is also stipulated in Art. 263 TFEU according to which the Court of Justice of the European Union controls the legality of acts of the Council, the Commission and the European Central Bank, other than recommendations and opinions, and acts of the European Parliament and the European Council intended to have legal effects vis-à-vis third parties. It also controls the legality of acts of Union bodies, offices or agencies intended to produce legal effects vis-à-vis third parties. In general, the EU Treaties lay down the principle according to which the acts of the institutions must comply with the provisions of the Treaties. In this respect, for example, the Treaties use expressions such as "in accordance with the provisions of this Treaty" or "under the conditions laid

¹³⁰ arrêts de la Cour du 29 septembre 1982, *Oleifici Mediterranei/CEE*, 26/81, Rec. p. 3057, point 16, et du Tribunal du 13 décembre 1995, *Exporteurs in Levende Varkens e.a./Commission*, T-481/93 et T-484/93, Rec. p. II-2941, point 80, du 11 juillet 1996, *International Procurement Services/Commission*, T-175/94, Rec. p. II-729, point 44, du 16 octobre 1996, *Efisol/Commission*, T-336/94, Rec. p. II-1343, point 30, et du 11 juillet 1997, *Oleifici Italiani/ Commission*, T-267/94, Rec. p. II-1239, point 20.

¹³¹ Pierre Mathijsen, *op. cit. (Compendiu de drept european)*, 2002, p. 157. It is cited here in the ECJ case-law 197/81 joint cases *Ludwigshafener Walzmühle v. Council and Commission*.

down in this Treaty" in respect of the tasks entrusted to the Union and its institutions. At the same time, individual decisions must be consistent with Union regulations and directives.

§10. Equal treatment of citizens in relation with the administration

Due to the high degree of abstraction, the doctrine stated that "equality is its own corollary." Considered rather as a principle of principle than as a principle of equality equality fulfills a function of "right-guarantee". In the comparative law, the principle of equality in its modern variant is rather interpreted as a general prohibition of arbitrariness, imposed equally on both the legislator and the administration¹³².

In the primary legislation of the Union, by art. 124 TFEU shall prohibit any measure which is not prudential and which gives preferential access to the financial institutions of the Union institutions, bodies, offices or agencies, central government authorities, regional or local authorities, other public authorities, or other bodies or public undertakings in the Member States.

This provision is developed by art. 5 of the European Code of Good Administrative Behavior adopted on 6 September 2001 by the European Parliament. Thus, in handling the public's requests and in making decisions, the official will ensure compliance with the principle of equal treatment. People who are in the same situation will be treated in a similar way.

In the event of a difference in treatment, the official shall ensure that this is justified by the relevant objective characteristics of the particular case. The official shall in particular avoid any unjustified discrimination between members of the public based on nationality, sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

§11. Right of petition

The Charter of Fundamental Rights of the European Union enshrines in Art. 44 right of petition. Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament. Also art. 227 TFEU provides that any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to address to the European Parliament, individually or in association with other citizens or other persons, a petition on a subject which

¹³² See Simina Elena Tanasescu, *Principiul egalității în dreptul românesc*, All Beck, Bucharest, 1999, p. 4, 5 and 31.

is of direct concern to the Union's fields of activity. In order to apply these provisions, a Petitions Committee has been set up within the European Parliament¹³³.

According to the provisions of art. 17 of the European Code of Good Administrative Behavior, the official shall ensure that a decision is taken on each claim or complaint addressed to the institution within a reasonable time, without delay, and in any event not later than **two months from the date of receipt**. The same rule applies to replies to letters received from the public and to replies to the administrative notes sent by the official to his superiors, requesting instructions on the decision to be taken. If, owing to the complexity of the issues raised, no decision can be taken on a request or complaint within the abovementioned period, the official shall as soon as possible inform the author thereof. In this case, a final decision must be communicated to the author as soon as possible.

A particular case is the exercise of the right of petition by the Community officials provided for in the Staff Regulations of Officials of the European Union¹³⁴. Thus, any person concerned by the Statute may refer the authority invested with the appointment power by asking him to make a decision on his or her person. The authority invested with the power of appointment shall communicate its decision to the person concerned within four months of the date of the request. Upon expiry of that period, failure to respond to the request is equivalent to the implicit rejection decision which may be the subject of a complaint to the same authority empowered by appointment (Article 90, paragraph 1, of the Statute). By means of the right of petition, the person concerned does not appeal against an act that is unjust, but requires the institution to which he belongs, through the authority entrusted to him with the power of appointment, to make a specific decision on it¹³⁵. Analyzing art. 90 par. 1 final thesis we note the consecration in Community law of the implicit or assimilated administrative act consisting of the refusal of the competent authority to resolve a request.

§12. Inquiry Commission for maladministration set up by European Parliament

Article 226 TFEU provides that, in carrying out its tasks, the European Parliament may, at the request of a quarter of its constituent members, set up a

¹³³ For information on the Committee on Petitions of the European Parliament, see its website: <http://www.europarl.europa.eu/atyourservice/ro/20150201PVL00037/Peti%C5%A3ii> (last consulted on the 15th of July 2017).

¹³⁴ Regulation no 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (JO P 045 14.6.1962, with subsequent modifications), <http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:01962R0031-20140501> (last consulted on the 15th of July 2017).

¹³⁵ Constanța Călinoiu, Verginia Vedinaș, *Teoria funcției publice comunitare*, Lumina-Lex, Bucharest, 1999, p. 189.

temporary committee of inquiry to examine, without prejudice to the powers conferred on it by this Treaty, other institutions, bodies, agencies, alleged violation of law or maladministration in the application of Union law¹³⁶, unless the alleged facts are examined by a court and as long as the judicial proceedings are not completed. The Temporary Committee of Inquiry shall cease to exist by submitting its report. The arrangements for exercising the right of inquiry shall be determined by the European Parliament, acting by means of regulations, on its own initiative, in accordance with a special legislative procedure, after approval by the Council and the Commission.

Investigation by the investigative commission shall not replace actions taken by other institutions or bodies on the basis of the powers conferred by the Treaty. When, for example, the Court of Auditors makes a special report, the latter can not be contradicted by a report of the Committee of Inquiry and, in order to avoid this situation, Parliament must consult the institution concerned before a Commission¹³⁷. The detailed provisions governing the exercise of the Parliament's powers of inquiry are set out in Decision 95/167/EC, Euratom, ECSC of the European Parliament, the Council and the Commission of 19 April 1995 on the detailed rules for the exercise of the European Parliament's right of inquiry¹³⁸.

§13. European Mediator. Good and bad administration

The modern regimes of administrative law affirm the principle that the administration is in the service of the citizens. The Maastricht Treaty established the European Mediator to defend this principle and to investigate possible cases of maladministration in the activities of the institutions and bodies of the European Union. It exercises an administrative control mechanism comparable to that which allows for the control of public authorities at national level by the Ombudsman or the People's Advocate in most member countries. At present, most Member States of the European Union have a national mediator. In Germany, the parliamentary committee responsible for examining petitions plays an analogous role. Italy does not yet have a national mediator, although many draft laws have been tabled. There is also a mediator at regional or communal level in many

¹³⁶ see, for example, Parliament's decision of 17 July 1996 setting up a temporary committee of inquiry to investigate alleged contraventions or maladministration in the implementation of Community law relating to bovine spongiform encephalopathy (OJ C239 / 1) or Decision (EU) 2016/34 of the European Parliament of 17 December 2015 on the constitution, tasks, numerical composition and duration of the mandate of the Commission for the Measurement of Emissions from the Motor Vehicle Sector (published in OJ L 10/2016).

¹³⁷ Pierre Mathijsen, *op. cit.* (*Compendiu de drept european*), 2002, p. 77.

¹³⁸ Published in JO L 113, 19.5.1995.

Member States, for example in the Spanish autonomous regions, the Italian regions and the German Länder.

The first European mediator was appointed in 1995 after the 1994 parliamentary elections.

The institution of the European Ombudsman is now governed by Article 228 of the Treaty on the Functioning of the European Union (TFEU) and by the European Parliament's decision on the regulations and general conditions governing the performance of the Ombudsman's duties¹³⁹.

The European Ombudsman, elected by the European Parliament, is empowered to receive complaints from any citizen of the Union or from any natural or legal person residing or having its registered office in a Member State concerning cases of maladministration in the work of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union in the exercise of its judicial functions. He investigates these complaints and draws up a report on them.

In accordance with his mission, the Ombudsman conducts investigations which he considers justified on his own initiative or on the basis of complaints addressed to him directly or through a Member of the European Parliament, unless the alleged facts are or have been the subject of proceedings court. Where the Ombudsman finds an instance of maladministration, he shall refer the matter to the institution, body, office or agency concerned, which shall have a period of three months to communicate his point of view. The Ombudsman then submits a report to the European Parliament and the institution concerned. The complainant is informed of the outcome of these investigations.

Each year, the Ombudsman presents a report to the European Parliament on the results of his investigations.

The Ombudsman is elected, after each election of the European Parliament, during the parliamentary term. Its mandate may be renewed.

The Ombudsman may be dismissed by the Court of Justice on a complaint by the European Parliament if he no longer fulfills the conditions required for the performance of his duties or has committed a serious misconduct.

The Ombudsman exercises his functions in complete independence. In the performance of his / her duties, he / she does not request or accept instructions from any government, institution, body, office or agency. During the performance of his / her duties, the Ombudsman may not engage in any other occupation, remunerated or not.

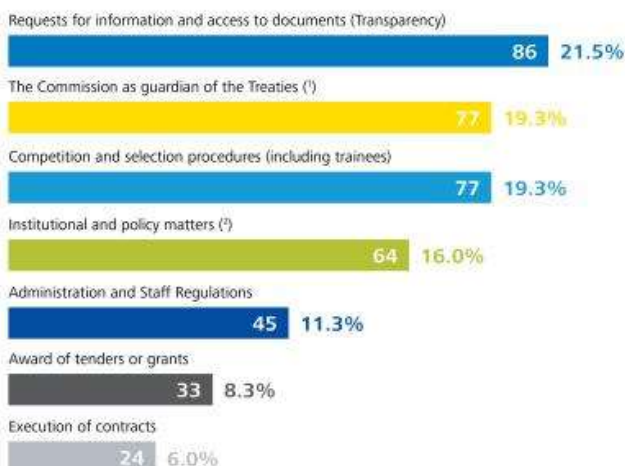
According to the activity report of the European Ombudsman for 2014¹⁴⁰, it is noted that most of the complaints concerning the institutions and

¹³⁹ Adopted by Parliament on 9 March 1994 (OJ L 113, 4.5.1994, p. 15) and amended by its Decisions of 14 March 2002 (OJ L 92, 9.4.2002, p. 13) and of 18 June 2008 (OJ L 189, 17.7.2008, p. 25).

¹⁴⁰ The report can be found here: www.ombudsman.europa.eu/ro/activities/annualreport.faces/ro/59959/html_bookmark (last consulted on the 15th of July 2017).

bodies of the European Union concern: lack of transparency or refusal of access to information; the Commission's work as guardian of the treaties, co-competition and selection procedures, breaches of the Staff Regulations, award and execution of contracts.

Subject matter of inquiries closed by the European Ombudsman in 2014



Note: In some cases, the Ombudsman closed inquiries with two or more subject matters. The above percentages therefore total more than 100%.

⁽¹⁾ Article 17 of the Treaty on European Union (TEU) requires that the Commission "ensure the application of the treaties, and of measures adopted by the institutions pursuant to them".

⁽²⁾ This heading covers a range of complaints made against the institutions with regard to their policy-making activities or their general operation.

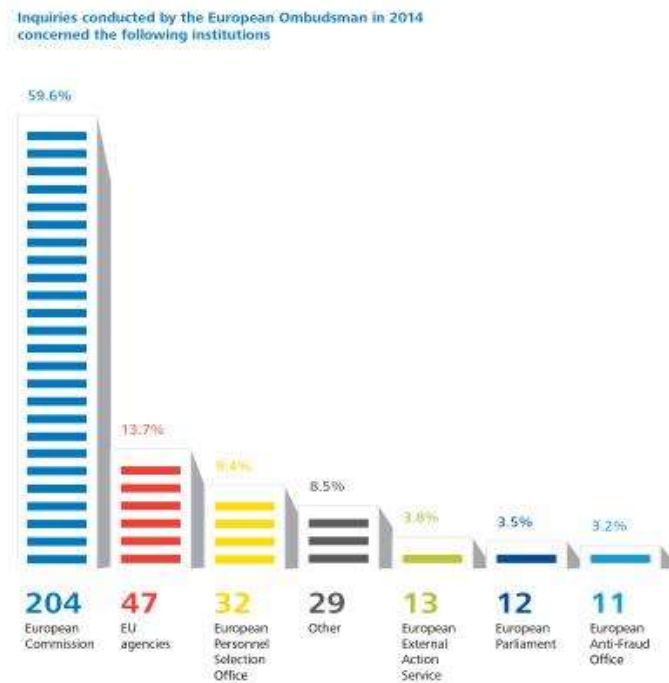


European Ombudsman

www.ombudsman.europa.eu

Source: www.ombudsman.europa.eu/ro/activities/annualreport.faces/en/59959/html.bookmark

In 2014, most of the investigations carried out by the European Ombudsman concerned the Commission (59.6%), followed by EU agencies (13.7%), the European Personnel Selection Office (9.4%) and others, down.



Note: The Ombudsman opened one inquiry in 2016 on her own initiative in connection with more than one institution.
The above percentages therefore total more than 100%.



European Ombudsman

www.ombudsman.europa.eu

Source: www.ombudsman.europa.eu/ro/activities/annualreport.faces/en/59959/html.bookmark

The European Ombudsman can also open an inquiry on his own initiative without the need for a prior complaint. He must, however, use this prerogative with moderation and generally when the frequency of complaints relating to a particular issue allow generalization. The main initiatives they can take are: accessibility of documents, recruitment in the EU institutions, procedures for dealing with citizens' complaints about crimes against EU law and delays in payment by the European Commission.

Almost 70% of complaints to the European Ombudsman go beyond its field of competence because it concerns the national, regional or local governments of the Member States on the implementation of many aspects of Community law and policies. In this case, the European Ombudsman will direct complaints to mediators and similar bodies in the Member States. In fact, individual

rights guaranteed by EU law must of course be respected by public authorities of any rank and national level. That is why, since 1996, the European Mediator has launched cooperation with national mediators and similar bodies in the candidate countries to the European Union.

The Treaty of Amsterdam explicitly outlined the constitutional principles on which the Union is founded: freedom, democracy, respect for human rights and fundamental freedoms, the rule of law. It is important that member countries and candidate countries recognize the contribution of mediators and similar bodies in the application of these principles, the observance of which is an explicit condition of the EU Accession Treaty.

The European Mediator's mission is to attack the "grievous administration" or in other words the mismanagement (*mauvaise administration*). This term is not defined in any text in primary legislation. That is why the European Ombudsman proposed, following consultation with the national mediators in the Member States, the following definition: "there is a bad administration when a public body does not act in accordance with a rule of law or a principle imposed on it" ¹⁴¹. This definition is broad enough because the mediator's competence includes respect for fundamental rights, principles of administrative law and good administration. In 1997, the European Parliament adopted a resolution approving this definition. In order to effectively protect citizens' rights, it is important to explain the rules of good administration in order to know what the deviations from it are. In July 1999, following an inquiry made on its own initiative, the European Ombudsman launched a public Code of Good Administrative Behavior applicable to Community institutions and bodies. The Code was adopted on 6 September 2001 by the European Parliament. This code contains the great principles of European administrative law, such as legality, the right to a prior hearing, proportionality and the protection of legitimate aspirations.

§14. Application of administrative sanctions

The Treaties recognize the Union's direct power of sanction only in exceptional cases. In general, if administrative sanctions are provided for by EU law, it is up to Member States to implement them ¹⁴².

The sanctions applied directly by the Union institutions focus mainly on competition. Thus art. 103 (2) lit. (a) TFEU allows the Council to impose fines and periodic penalty payments to ensure compliance with the Treaty rules on agreements and abuse of a dominant position.

¹⁴¹ Jacob Söderman, *Le Médiateur de l'UE et la bonne administration*, in „Tribune de la Gestion Publique, Bulletin bimestriel pour les praticiens de l'administration publique des pays d'Europe centrale et orientale”, vol. VI, n. 1-2000, SIGMA—OCDE, Paris.

¹⁴² Augustin Fuerea, *Drept comunitar european. Partea generală*. All Beck, Bucharest, 2003, p. 183

The Commission is entitled to impose fines for infringement of procedural or substantive competition rules by undertakings, fines which may amount to up to 10% of the undertaking's turnover in the financial year preceding the decision¹⁴³. Obtaining amounts representing fines may be subject to forced execution by national authorities.

Thus, art. 299 TFEU states that acts of the Council, of the Commission or of the European Central Bank imposing a pecuniary obligation on persons other than the Member States are enforceable. Enforced enforcement is governed by the rules of civil procedure in force in the State in which this procedure takes place. The decision shall be enforceable without any formalities other than the verification of the authenticity of that title by the national authority which the government of each Member State designates for that purpose and the designation of which is brought to the attention of the Commission and the Court of Justice of the European Union. Once these formalities have been completed, the party concerned may, upon application by the party concerned, enforce enforcement by notifying the competent authority directly in accordance with national law. Enforcement may be suspended only on the basis of a decision of the Court. However, review of the legality of enforcement measures is a matter for the national courts.

The administrative penalties applied by the Member States aim to protect the Union's financial interests in the conduct of EU policies (in particular the management of aid under the common agricultural policy)¹⁴⁴. The application of these administrative sanctions enjoys a common regime despite the diversity of national administrative practices, as enshrined in EU regulations¹⁴⁵, the principle of the non-retroactive character of the decision to impose the sanction, the existence of a four-year limitation period, the drawing up of a list of sanctions, when criminal proceedings are initiated, etc.

¹⁴³ Augustin Fuerea, *op. cit.* (*Drept comunitar european*), 2003, p. 183. See Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

¹⁴⁴ *Idem*, p. 184.

¹⁴⁵ see Council Regulation (EC, Euratom) No. Council Regulation (EC) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ No L 312 of 23.12.1995).

Chapter IV

Components of the European Administrative Space in the secondary legislation of the European Union

Components of the European Administrative Space are naturally also found in the **secondary legislation** implementing the European Union treaties (regulations, directives, decisions, recommendations) as well as in the case-law of the Court of Justice of the European Union principles of European Administrative Law. Thus, in secondary legislation we encounter regulations on the legal means of action of the European administration (unilateral administrative acts and administrative contracts for public procurement and concessions) and regulations on staffing (the public function in the institutions of the European Union).

Section 1. The legal means of action of the European Union administration

§1. Unilateral administrative acts in the European Union law. Principles underlying the adoption and application of administrative acts

Unilateral administrative acts emanate from EU institutions, on the basis of the power they have been invested on, based on and for the purpose of implementing treaties, regulations and directives. Paul Negulescu pointed out that international bodies issue *normative*, regulatory (general, objective and impersonal) administrative acts, such as internal staff statutes¹⁴⁶ (for example, the Staff Regulations of the European Investment Bank or the Staff Regulations of the Institute for Security Studies of the European Union¹⁴⁷). These bodies may also issue subjective acts, ie. *individual* administrative acts, which make individual application of a general rule. Through these latter acts it is possible to establish, modify or suppress individual legal situations. Such are: acts of appointment, advancement, disciplinary action or dismissal of officials of these bodies, reports on the finding of contraventions and fines by competent officials.

At EU level there is not yet an overall regulation of unilateral administrative acts. The general framework for the existence of the administrative act is

¹⁴⁶ Paul Negulescu, *Principes du Droit International Administratif*, Académie de Droit International, Librairie du Recueil Sirey, Paris, 1935, p. 94.

¹⁴⁷ Published in J.O. L. 039 of 09/02/2002.

woven around the principles developed especially by the European Court of Justice.

Decisions adopted by the Commission or the Council, sources of EU secondary law, are considered to be "administrative acts" of the European Union because their adoption corresponds to situations in which national administrations are obliging citizens - by adopting an administrative act - to enforce the law to a particular case¹⁴⁸. By such a decision, the EU institutions may require a member country or a citizen to act or not to act, conferring rights or imposing obligations on them.

The decision concerns in particular the application of the provisions of the treaties to particular situations. It is assimilated to national acts and constitutes, in the hands of the Community authorities, an instrument for the practical implementation by Community law of Community law. A decision may establish an objective for one or more States, the achievement of which is due to the adoption of national measures with international influence (eg the decision to accelerate the abolition of customs duties). The decision is presented as an indirect legislative instrument which does not exist without a directive. But, unlike the directive, the decision is mandatory in all its elements according to art. 288 par. 4) TFEU, not only in terms of the result to be achieved, but also the choice of the legal form of implementation within the national legal order.

The European Court of Justice considered that the main criterion for distinguishing between administrative acts and regulations should be sought in the degree of generality of the act in question¹⁴⁹. Thus, administrative decisions contain provisions which directly and individually concern certain subjects (certain natural or legal persons), their essential feature being the limitation of the recipients to whom they are addressed. The normative regulations do not address individualized, designated or identifiable recipients, containing general and abstract provisions, addressing a broad category of persons. An association which represents a category of natural or legal persons (trade union, employer, etc.) can not be individually regarded by an act that affects the general interests of this category (so the act addressed to it will be of a normative nature).

The *implementing regulations* adopted by the Commission for the implementation of the *basic regulations* can be equated with regulatory administrative acts. Thus, through the procedure for implementing acts (Article 291 TFEU), the Commission may be authorized to adopt regulations for the implementation of a

¹⁴⁸ Andrei Popescu, Nicolae Voiculescu, *Dreptul social european*, Romanian Tomorrow Publishing House, 2003, p. 87; Florian Coman, *Drept comunitar european*, 2nd editiona, Universul Juridic, Bucharest, 2003, p. 68; Ion P. Filipescu, Augustin Fuerea, *Drept instituțional comunitar european*, 4th edition, Actami, Bucharest, 1999, p. 38, 39.

¹⁴⁹ Arrêt de la Cour du 14 décembre 1962. Fédération nationale de la boucherie en gros et du commerce en gros des viandes et autres contre Conseil de la Communauté économique européenne. Affaire 19/62 à 22/62. *Recueil de jurisprudence édition française 1962 page 00943*.

legislative act requiring uniform implementation within the EU. The Commission's implementing powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council¹⁵⁰.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, may adopt implementing regulations for the European Social Fund (under Article 164 TFEU) and the European Regional Development Fund Article 178 TFEU).

Implementing regulations are legal acts whose validity depends on a "basic regulation". The basic Regulation lays down the basic rules and the Implementing Regulation lays down certain technical provisions.

In assessing the legal nature of acts issued by the Council or the Commission, not only the official name of the acts (regulation, directive, decision, etc.) is taken into account but, first, the object and content of the act must be taken into account¹⁵¹.

As regards the procedure for drafting administrative acts, rules on the formation and expression of the will of the EU institutions are laid down in the treaties and interpretations of the European Court of Justice and are not left to any Member State or institutions as such.

In the drafting of the administrative act an important part is the motivation of the manifestation of will of the administration. Irrespective of the legislative or individual nature of the act, it must be stated in an explicit, succinct, clear and relevant manner that the addressee or addressees can understand the rationale which led to its issue (Court of Justice judgment No 24/62).

The Administrative Act, once adopted by the competent authority, applies the **principle of intangibility**, which is an essential factor for legal certainty and the stability of legal situations in the Community legal order. The rigorous and absolute observance of this principle makes it possible to obtain the certainty that, prior to adoption, the act can be altered only in accordance with the rules of jurisdiction and procedure and that, as a consequence, the act notified or published constitutes an exact copy of the act adopted, the will of the competent authority¹⁵².

¹⁵⁰ Published in JO L 55, 28.2.2011.

¹⁵¹ Arrêt de la Cour du 14 décembre 1962. Confédération nationale des producteurs de fruits et légumes et autres contre Conseil de la Communauté économique européenne. Affaires jointes 16/62 et 17/62. *Recueil de jurisprudence édition française 1962 page 00901*.

¹⁵² Arrêt du Tribunal de première instance (deuxième chambre) du 27 février 1992. BASF AG et autres contre Commission des Communautés européennes. Concurrence - Notions d'accord et de pratique concertée - Procédure - Compétence - Règlement intérieur de la Commission - Inexistence de l'acte. Affaires jointes T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 et T-104/89. *Recueil de jurisprudence 1992 page II-00315*.

Administrative normative acts shall be signed by the President of the institution which adopts them, shall be published in the Official Journal of the European Union and shall enter into force on the date stated in their text or, in the absence thereof, on the twentieth day following the publication according to art. 297 (2) TFEU

Individual administrative acts are notified to recipients and take effect from the date of notification. The notification shall be deemed to have taken place from the date on which the document was communicated to the addressee and the latter was in a position to become aware of it¹⁵³.

The administrative acts of the European institutions enjoy the presumption of legality in the absence of any indications capable of calling into question that legality¹⁵⁴. By the *Algera* judgment of 12 July 1957, European jurisprudence enshrines the **principle of the proportionality** of the effects of nullity in administrative law, in accordance with the purpose of the law. Thus, it is stated that "the partial illegality of an administrative act does not justify the withdrawal of the act in its entirety [but only of the lawful part of the act] than in the case where the withdrawal of the unlawful part would have the effect of losing the justification of the act thus issued"¹⁵⁵.

The annulment by a European Court of Justice of a decision of an institution on the ground that there is a procedural defect with regard to the way in which it is adopted does not affect preparatory acts (administrative acts prior to the issuance of the act) made by other institutions. These preparatory acts may be used to issue another administrative act¹⁵⁶.

The administrative acts adopted by the EU institutions are subject to the **presumption of validity**¹⁵⁷. All legal subjects have a duty to recognize the full effectiveness of acts of the EU institutions as long as their invalidity has not been established by the European Court of Justice and to enforce the enforceability of

¹⁵³ Arrêt de la Cour du 21 février 1973. Europemballage Corporation et Continental Can Company Inc. Contre Commission des Communautés européennes. Affaire 6-72. *Recueil de jurisprudence 1973 page 00215*.

¹⁵⁴ Arrêt du Tribunal de première instance (juge unique) du 13 juillet 2000. Helga Griesel contre Conseil de l'Union européenne. Fonctionnaires - Refus de promotion - Motivation - Examen comparatif des mérites des candidats. Affaire T-157/99. *Recueil de jurisprudence - fonction publique 2000 page IA-00151; II-00699*.

¹⁵⁵ Arrêt de la Cour du 12 juillet 1957. Mlle Dineke Algera, M. Giacomo Cicconardi, Mme Simone Couturaud, M. Ignazio Genuardi, Mme Félicie Steichen contre Assemblée Commune de la Communauté européenne du charbon et de l'acier. Affaires jointes 7/56, 3/57 à 7/57. *Recueil de jurisprudence édition française 1957 page 00081*.

¹⁵⁶ Arrêt de la Cour (cinquième chambre) du 13 novembre 1990. The Queen contre Minister of Agriculture, Fisheries and Food et Secretary of State for Health, ex parte: Fedesa e.a. Demande de décision préjudicielle: High Court of Justice, Queen's Bench Division - Royaume-Uni. Substances à effet hormonal - Validité de la directive 88/146/CEE. Affaire C-331/88. *Recueil de jurisprudence 1990 page I-04023*.

¹⁵⁷ See also Ovidiu Ținca, *Drept comunitar general*, 2nd ed., Didactic and Pedagogical Publishing House R.A., 2002, p. 228.

acts as long as the Court has not decided to postpone their execution¹⁵⁸. However, an administrative act hit by serious and obvious mistakes loses its presumption of validity and is considered as **non-existent**. Such non-existent acts are, for example, an administrative act which does not establish with sufficient certainty the exact date from which it is likely to produce legal effects (the date from which it is considered to be incorporated in the Union legal order), an act which, due to successive changes has the object of having lost the obligatory content of motivation, an act that can not be defined and controlled without striking the ambiguity of the extent of the obligations imposed on its recipients, an act that does not identify with certainty who the author of the version its definitive. Such acts do not produce any legal effects and can be challenged outside the term of administrative or judicial appeal¹⁵⁹.

The issuing institution may not suspend the validity of an administrative act except by a written manifestation of its clear and unambiguous will¹⁶⁰.

Withdrawal of an administrative act of an institution of the Union may result only from an act of the same institution which either expressly cancels an earlier decision or replaces the precedent¹⁶¹. The Court has held that the retroactive withdrawal of a **legal act** conferring subjective rights or similar advantages is contrary to general principles of law¹⁶². Withdrawal of the **illegal act** is permitted if it occurs under certain conditions strictly specified by the Court: withdrawal of the act within a reasonable time (a period of two months or more from the issue must be considered reasonable and a period longer than two years must be considered excessive compliance - Judgment T-20/96), observance of the principle

¹⁵⁸ Arrêt de la Cour du 21 septembre 1989. Hoechst AG contre Commission des Communautés européennes.

Concurrence - Règlement n. 17 - Vérification - Droit fondamental à l'inviolabilité du domicile - Motivation - Astreintes - Vices de procédure. Affaires jointes 46/87 et 227/88. *Recueil de jurisprudence 1989 page 02859*.

¹⁵⁹ Arrêt du Tribunal de première instance (deuxième chambre) du 27 février 1992. BASF AG et autres contre Commission des Communautés européennes. Concurrence - Notions d'accord et de pratique concertée - Procédure - Compétence - Règlement intérieur de la Commission - Inexistence de l'acte. Affaires jointes T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 et T-104/89. *Recueil de jurisprudence 1992 page II-00315*.

¹⁶⁰ Arrêt de la Cour (première chambre) du 13 juillet 1972. Alo Heinemann contre Commission des Communautés européennes. Affaire 79-71. *Recueil de jurisprudence 1972 page 00579*.

¹⁶¹ on the principle of the revocation of unlawful administrative acts in Community law see Ovidiu Ținca, *op. cit. (Drept comunitar general)*, 2002, p. 228. Cited here is the judgment of the ECJ *Herpels v Commission* of 9 March 1978 in which the Court ruled that, in order to revoke an erroneous decision, very strict conditions must be met, contrary to the repeal of such a decision, with effects for the future, which is always possible.

¹⁶² Arrêt du Tribunal de première instance (cinquième chambre) du 5 décembre 2000. Anthony Gooch contre Commission des Communautés européennes. Fonctionnaires - Recours en annulation - Responsabilité non contractuelle de la Communauté - Lieu de recrutement - Retrait d'un acte administratif - Présomption de légalité d'un acte administratif. Affaire T-197/99. *Recueil de jurisprudence - fonction publique 2000 page IA-00271; II-01247*.

of legal certainty and observance of the principle of the legitimate expectation of the beneficiary of the act which considered the appearance of its legality¹⁶³. The decisive moment from which it is believed that there is confidence in the apparent legality of the act in the conscience of the addressee is the moment of notification of the act and not the date of its adoption or withdrawal¹⁶⁴.

The amendment or repeal of the administrative act is made by the competent body to issue it, unless express regulation confers that competence on another body¹⁶⁵ (Case T-251/00 of the Third Chamber of the Court of First Instance).

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The notion of unilateral administrative act is not understood in the same way in EU member states. Thus, in France, Spain, Portugal, Italy, etc. it encompasses regulatory acts and individual acts, while in Germany, regulatory acts are not considered administrative acts.

§2. Administrative contracts in the European Union law

2.1. Evolution of EU legislation on of public procurement contracts and concessions

The logic of the European Communities was right, since their creation, the economy, the single market, promoting fair competition between markets and services¹⁶⁶.

The administrative contracts of procurement and concessions involving substantial funds, one of the main sources that feed the ongoing process of economic and social development of Member States. The lack of open and effective competition in public contracts was long one of the most obvious obstacles to completing the internal market in the European communities.

¹⁶³ Arrêt du Tribunal de première instance (cinquième chambre) du 21 juillet 1998. John Mellett contre Cour de justice des Communautés européennes. Fonctionnaires - Recevabilité - Titularisation - Confiance légitime - Egalité de traitement. Affaires jointes T-66/96 et T-221/97. *Recueil de jurisprudence - fonction publique 1998 page IA-00449; II-01305.*

¹⁶⁴ Arrêt de la Cour (sixième chambre) du 17 avril 1997. Henri de Compte contre Parlement européen. Fonctionnaires - Décision reconnaissant une maladie professionnelle - Retrait d'un acte administratif - Confiance légitime - Délai raisonnable - Pourvoi. Affaire C-90/95 P. *Recueil de jurisprudence 1997 page I-01999.*

¹⁶⁵ See also Pierre Mathijsen, *op. cit.* (*Compendium de droit européen*), 2002, p. 36-39, with regard to the application and enforcement of Community administrative acts.

¹⁶⁶ See Georges Vlachos, *Droit public économique français et européen*, 2^e édition, Dalloz, Paris, 2001, p. 222.

First Community law which regulated this field was Directive 70/32 EEC of 17 December 1969 on public procurement. This directive only wanted to obtain a coordination of national rules not provide for the removal of inequalities in national laws and has not implemented at the level of public contracts, the Community principles on the free circulation of goods, works and services¹⁶⁷.

A step forward was made by Directive 71/305 of 26 July 1971 concerning the award of public works contracts and Directive 77/62 of 21 December 1976 concerning the award of public contracts. These laws have imposed certain obligations towards the establishment of a common market:

- Announcing the public invitation competitions between entrepreneurs by limiting direct agreement procedures;
- Publication in an official journal of the European public procurement contract notices;
- Inclusion in documents accompanying technical specifications of the contract, which may refer to national or European standards.

This regulation, however, was insufficient, leaving many unresolved issues¹⁶⁸:

- The existence of thresholds for application of the Directives excessively high;
- Non-coercive character of the selection of procurement procedures, technical specifications and criteria for awarding contracts;
- The narrow confines for auctioning, which was detrimental to foreign bidders;
- Limitation to a specific area, given that the regulations did not include service contracts; and defense equipment contracts; public service contracts in the water, energy, transport and telecommunications;
- Contain no appeal procedure, although appeals in national systems are often inadequate and differs significantly specifics law.

Community legislation has evolved further in the following directions¹⁶⁹:

- a) improving existing directives:
 - Directive 77/62 of 21 December 1976 was supplemented by Directive 88/255 of 5 March 1988 concerning the award of public contracts;
 - Directive 71/305 of 26 July 1971 Directive 89/440 was completed July 18 1989 on the awarding of public works;
- b) regulation of sectors that were not previously covered:
 - It was approved Directive 92/50 of 18 June 1992 on the coordination of procedures for the award of public service contracts;

¹⁶⁷ Dumitru Cernei, *Studiu comparativ privind achizițiile publice*, Chișinău, 2002, under the auspices TACIS, p. 3.

¹⁶⁸ Idem.

¹⁶⁹ Ibidem, *op. cit.*, p. 4.

- Directive 90/531 was adopted on 17 September 1990 on the procurement procedures of establishments operating in the water, energy, transport and telecommunications.

At June 14, 1993 were approved three basic directives for the three sectors of government procurement:

- Directive 93/36 / EEC of 14 June 1993 on the coordination of procedures for the award of public supply contracts;
- Directive 93/37 / EEC of 14 June 1993 on the coordination of procedures for the award of public works contracts;
- Directive 93/38 / EEC of 14 June 1993 on the procurement procedures of establishments operating in the water, energy, transport and telecommunications.

These directives have been amended subsequently by other laws.

Review procedures have been regulated by Directive 89/665 / EEC of 21 December 1989 *on the coordination of laws, regulations and administrative provisions relating to enforcement proceedings for the appeal against the award of public supply contracts and public works*¹⁷⁰ and Directive 92/13/EEC of 25 February 1992 *coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications*¹⁷¹. Although they have undergone many changes, Directives 89/665 / EEC and 92/13 / EEC are in effect today.

In 2004 EU legislation on public contracts has been revised and simplified. Thus the whole field of public procurement has been synthesized in two directives:

- Directive 18 / EC / 2004 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, goods and services¹⁷² takes over and completes the provisions of Directives 93/36 / EEC, 93/37 / EEC and 92/50 / EEC, the directives being repealed.
- Directive 17 / EC / 2004 of the European Parliament and the European Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services¹⁷³ which repeals Directive 93/38 / EEC.

The purpose of this review it was to modernize and simplify the Directives, aiming to:

- Unification and consolidation classic directives on supplies, services and works into one with identical rules and procedures for all three sectors;

¹⁷⁰ Published in the Official Journal of the European Communities, series L, no. 395 of December 30, 1989, as amended and supplemented.

¹⁷¹ Published in the Official Journal of the European Communities, series L, no. 76 of 23 March 1992 with subsequent amendments.

¹⁷² Published in J.O. L 134 of 30 April 2004.

¹⁷³ Published in J.O. L 134/1 of 30 April 2004.

- Adapting directives to existing practices in Member States and the European Court of Justice;
- Allow the use of electronic communication, electronic procurement of new technologies and procedures more flexible.

In 2014 the European Union appeared November 3 directive on public contracts:

- Directive 2014/23 / EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts¹⁷⁴;
- Directive 2014/24 / EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 / EC¹⁷⁵;
- Directive 2014/25 / EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services and repealing Directive 2004/17 / EC¹⁷⁶.

Member States have had a period of 24 months to transpose the Directive into national laws.

The new directive redefines the concept of contracting authority, referring to authorities sub-central (regional or local) which will benefit thresholds, rules of advertising and deadlines more flexible, determine the conditions under which it can change public procurement contract, shortening minimum public tender procedure and organization first established general principles to be observed in the award, performance and termination of concessions.

2.2. Considerations about the purpose of EU regulations in the field of administrative contracts

With regard to, EU regulations in the field of public contracts and concessions we make the following remarks¹⁷⁷:

- ***European directives on public contracts establish general principles to give unity of economically European construction***¹⁷⁸: the prohibition provisions and discriminatory practices with respect to foreigners, especially in order to benefit from the concessions or authorizations concession issued State or other public

¹⁷⁴ Published in the Official Journal of the European Union L 94 of 28.3.2014.

¹⁷⁵ Published in the Official Journal of the European Union L 94 of 28.3.2014.

¹⁷⁶ Published in the Official Journal of the European Union L 94 of 28.3.2014.

¹⁷⁷ See Cătălin-Silviu Săraru, *Contractele administrative. Reglementare. Doctrină. Jurisprudență*, C.H. Beck Publishing House, Bucharest, 2009, p. 425-432.

¹⁷⁸ For details see Cătălin-Silviu Săraru, *Contractele publice*, in Ioan Alexandru (coord.), *Dreptul administrativ în Uniunea Europeană*, Lumina Lex Publishing House, Bucharest, 2007, p. 308-314; Martin Trybus, *Public contracts in European Union internal market law: foundations and requirements*, in Rozen Noguellou, Ulrich Stelkens (coord.), „Comparative Law on Public Contracts”, Bruylant, Bruxelles, 2010, p. 81-119.

law (general programs adopted by EEC December 18, 1961); providing guarantees for fair competition through transparent tender procedures and award (Directive 93/37 / EEC); respect for the election procedure of the contractor, the principles¹⁷⁹ of non-discrimination, equal treatment, transparency, proportionality¹⁸⁰ and conclusion of the contract *intuitu personae*¹⁸¹.

- **European legislation in this area aims at opening to competition of procedures for awarding public contracts for all enterprises across the European Union**¹⁸². The role of EU regulation from economic desire is to overcome national boundaries giving freedom of movement and economic operators, on the other hand, to prohibit discrimination between public and private operators¹⁸³. According to **the mutual recognition principle**, the Member States must accept the products and services provided by operators in other EU countries, where products and services are standards set by the law of the Member State of origin¹⁸⁴. **Transparency of procedures for awarding** contracts is an underlying principle of the rules prohibiting discriminations between operators¹⁸⁵. Then, of the EU regulations on public contracts are outlined clearly **the principle of equal**

¹⁷⁹ According to para. (2) of the preamble to Directive no. 2004/18 / EC award of contracts concluded in the Member States of the Union on behalf of the State, local authorities and other bodies governed by public law must respect the principles of the EC Treaty and in particular the free movement of goods, freedom of establishment and the principle of freedom to provide services and the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

¹⁸⁰ See Dumitru-Daniel Șerban, *Principiul proporționalității în domeniul achizițiilor publice*, „Dreptul” no. 9/2007, p. 77-99 where the author analyzes the concept of proportionality in Community law and public procurement law in Romania.

¹⁸¹ See Communication interpretation of Commission on concessions under Community law, published in OJ C 121 of 04.29.2000.

¹⁸² See also Pierre Mathijsen, *Compendiu de drept european*, 7th edition, Bucharest, Club Europa Publishing House, 2002, p. 448-451.

¹⁸³ On EU policy on competition and state aid incompatible with EU internal market see Cătălin-Silviu Săraru, *State Aids that are Incompatible with the Internal Market in European Court of Justice Case Law*, p. 39-48 in Cătălin-Silviu Săraru, *Studies of Business Law- Recent Developments and Perspectives*, Peter Lang, Frankfurt am Main, 2013; on the application of the principles of non-discrimination and equal treatment in the award of public procurement contracts in the EU and the EU Court of Justice to see Martin Trybus, *op. cit.*, 2010, p. 98-102.

¹⁸⁴ For a study on the principle of mutual recognition to see Mădălin Irinel Niculeasa, *Legislația achizițiilor publice. Comentarii și explicații*, C.H. Beck Publishing House, Bucharest, 2007, p. 55-80. Applying this principle in public procurement means that the Member State where the service is provided or the goods delivered must accept the technical specifications, certificates and qualifications obtained in another Member State. Thus, for example, the Member State where the service is provided must accept the equivalent qualifications already acquired by the service provider in another Member State, qualification attesting professional capacities, technical and financial (p. 55, 56).

¹⁸⁵ Martin Trybus, *op. cit.*, 2010, p. 103-109.

treatment of public and private operators¹⁸⁶, under which EU rules apply to public and private enterprises the same conditions. EU law therefore acts as a unifying factor of public and private law. We find that the model public-private partition French legal system is not in EU law¹⁸⁷. Interests and ideals that Europe serves nowadays it seems no longer compatible with the "royalty" of administrative law, the frenchman P. Legendre¹⁸⁸ was talking about.

Unlike the French model, EU law has its source in an opposite-sharing social roles, the promotion of private enterprise and market principles implies a significant reduction in administrative functions and public law that underpins them. French doctrine is estimated that no sector is more difficult to reconcile with freedom of movement or provision of services in the European Union as the administrative contracts, because those contracts are, by their nature, discriminatory, one of the contractors is a public authority acting in pursuit of public interest¹⁸⁹. The European Community has therefore undertaken a sustained effort to progressively towards liberalization of public contracts. This liberalization was applied successively of public works, supplies, services; concessions; certain categories of purchases in particular sectors (water, energy, transport, telecommunications);

- EU law focused on the development of the single market gave rise to living disputes at national level where he often put the question of delimitation of borders between market logic and common mode internal public of any State, or in other words, border demarcation between EU interests and interests national¹⁹⁰. So-called conflict between the logic of the single market private and public logic which was in the national sovereignty of each state was mostly solved judicially. In French jurisprudence for example emphasized that not every concession enters the field of reference of the EEC Treaty – „this being an operation for a national activity on which the hand over, and a public authority, his regime keep right internal. There will be no interference with Community law than when concession creates relationships likely to question the rules of the Common Market”¹⁹¹, particularly competitive conditions for environmental protection in the

¹⁸⁶ Under the influence of this principle we are witnessing today an evolution marked consisting of the progressive abandonment of markets protected operating in traditionally some public enterprises managing public services (mainly in the sectors of air transport and rail, telecommunications and energy) in favor of a effective competition between public and private operators – see in this regard Jean-Philippe Colson, *Droit public économique*, 3^e édition, L.G.D.J., Paris, 2001, p. 333, 334.

¹⁸⁷ See also Ioan Alexandru, Mihaela Cărauşan, Sorin Bucur, *Drept administrativ*, Lumina Lex Publishing House, Bucharest, 2005, p. 399-401.

¹⁸⁸ P. Legendre, *Trésor historique de l'État en France*, Fayard, 1992.

¹⁸⁹ See L. Cartou, J.-L. Clergerie, A. Gruber, P. Rambaud, *L'Union européenne*, Dalloz, 2000, 3^e éd., p. 306.

¹⁹⁰ See Iulian Avram, *Contractele de concesiune*, Rosetti Publishing House, Bucharest, 2003, p. 222, 223.

¹⁹¹ C. Brechon-Moulenes, F. Lorens, M. Bazex; G. Guisolphé, J.-B. Auby, P. Delvolve, *La concession de service public face au droit communautaire*, Sirey, Paris, 1992, p. 59.

Union. Likewise ruled the European Court of Justice judgment of 18 June 1991 on the concession of exclusive rights in broadcasting - "Community law does not preclude the award of a monopoly on television for reasons of public interest, non-economic. However, the organizational arrangements and to exercise such a monopoly must not create any damage Treaty provisions on the free movement of goods and services, as competition rules". We have some reservations about the idea boundary between EU law and national law based primarily on Kelsen's view, widely accepted today that the Roman-Germanic law system is subordinated to the principle of hierarchy of laws and there can not be two parallel systems of law into a country. In jurisprudence and doctrine often meet reflexes of national sovereignty. Thus, we find that although the EC Treaty and ECJ case law [*causes Costa v. ENEL (1964) and Case Simmenthal II (1977)*] have stressed the principle of priority of Community law over national regulations in many Member States law has placed Community law in a position intermediate between the Constitution and other internal regulations, thus consecrating the strong imprint of national sovereignty¹⁹². In this regard remained benchmark German Federal Constitutional Court ruling of May 29, 1974 *Handelsgesellschaft mbH for International against Einfuhr*, known as *Solange I* (repeated and amplified in decisions *Solange II* – 1983 and *Maastricht Decision* - 1993). The Court stated in that judgment that *as long as* (*solange* in German) Community did not eliminate the possible conflict of rules between Community law and national constitutional rights of the German, Constitutional Court could ensure that the latter have priority. The doctrine speaks today about *Solange spirit* in all those decisions falling European constitutional courts, in accordance with the provisions of national constitutions express or implied, limits imposed partial or absolute precedence of Community law to national constitutional provisions. The limits aimed at political and legal values of national identity established by constitutional provisions which are not accepted to be reviewed if their inconsistency with Community law. The Member States meet in two typologies of great *spirit Solange*. In a first typology is found the group of countries (Italy, Germany, Denmark, Belgium, Spain, Sweden, Ireland, UK) who have limited partly precedence of Community law to the Constitution own, assuming the right to check the courts their constitutional constitutionality of Community law only in connection with certain fundamental constitutional values related to cultural identity and political-juridical respective nations. The second typology enter states (France, Greece) have not agreed, in principle, any precedence of EU law over national constitution. But beyond these legal types, reality showed that it would be very difficult to use in a particular state standards and practices for implementing various EU and national legislation¹⁹³. Increasingly, national institutions have applied the same

¹⁹² See Manuel Guțan, *Forme pe un alt fond: transplantul juridic comunitar și cultura juridică românească*, „Pandectele Române” no. 5/2008, p. 28, 29.

¹⁹³ Jürgen Schwarze, *European Administrative Law, Office for official publications of the European communities*, Sweet and Maxwell, 1992.

standards and the same practices used for both. This leads to the idea of a right of public administration jointly developed EU member states. This kind of "contamination" of national legislation to EU law principles contribute to establishing a European Administrative Space.

2.3. The fundamental principles drawn from the Court of Justice of the European Union in the field of public procurement and concessions

2.3.1. Preliminary considerations

The law of the European Union has had, since the creation of the three Communities, an economic logic, aiming to create a single market and promote free competition between markets and services¹⁹⁴. Creating an internal market has involved and creating a competitive and non-discriminatory market in the field of public contracts.

Currently, the EU legislative framework in the field of public contracts has three directions¹⁹⁵:

- regulation by general rules of procedures for the award of public contracts (public procurement contracts and, partly, concessions). Law draws a distinction between public contracts for the supply of goods, the provision of services and execution of works¹⁹⁶.

- regulation of a separate area with exceptional character, depart from general rules presented at the first point, that the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

- regulating procedures for the review when it violated EU law on the award of public contracts.

Court of Justice of the European Union has an important role in the interpretation and uniform application in all 27 Member States of legislation on public contracts.

The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts under art. 19 (1) of the Treaty

¹⁹⁴ Vlachos, G., *Droit public économique français et européen*, 2e édition, Paris : Édition Dalloz, 2001, p. 222; Alexandru, I., *Tratat de administrație publică/Treaty of public administration*, Bucharest, Universul Juridic, 2008, p. 865-873.

¹⁹⁵ Cartou, L.; Clergerie, J.-L. ; Gruber, A. ; Rambaud, P., *L'Union européenne*, 3e édition. Paris : Dalloz, 2000, p. 307

¹⁹⁶ Mathijssen, P., *Compendiu de drept european/Compendium of European Law*, 7th edition. Bucharest: Club Europa, 2002, p. 448.

on European Union (TEU)¹⁹⁷. Court aims to ensure compliance with EU law in the interpretation and uniform application of Treaties which governed the creation of the European Communities and then the European Union. At the request of the Union institutions, a State or private persons directly concerned, the Court may cancel the provisions of the Commission, Council of EU or national governments which would be incompatible with the founding Treaties (now the Treaty on European Union and the Treaty on the Functioning of the European Union¹⁹⁸).

With an experience of almost 60 years, the EU Court of Justice has established by case-law, the guidelines (principles) which the Member States should take into account in the application of European Union law¹⁹⁹.

In the field of public procurement contracts and concessions, the EU Court of Justice concluded a few principles which contribute to the uniform interpretation and application of the provisions of EU directives governing public contracts. These principles derive an essential role, as the sole criterion for reporting, in public contracts are not subject to rules of Directives 2014/23/UE, 2014/24/UE and 2014/25/UE (with a value lower than the threshold specified in Directives or is expressly excluded as happens) or are only partially subject to their. Court of Justice of the European Union stated that these contracts, which are totally or partially excluded from the scope of EU Directives in the field of public contracts, are required, however, to respect the fundamental principles of constituent Treaties relating to: the free movement of goods (Article 34 of the Treaty on the Functioning of the European Union - ex Article 28 of the Treaty establishing the European Community – TEC), the right of establishment (Article 49 of the Treaty on the Functioning of the European Union - ex Article 43 TEC), the freedom to provide services (Article 56 of the Treaty on the Functioning of the European Union - ex Article 49 TEC), prohibition of discrimination on grounds of nationality (Article 18 of the Treaty on the Functioning of the European Union - ex Article 12 TCE), transparency, proportionality and mutual recognition (Case C-59/00, *Bent Moustén Vestergaard*, point 20; Case T-258/06, *Germany/Commission*, point 113 ff.)²⁰⁰. Court clearly stated in many decisions, willingness to appreciate all public contracts in relation to fundamental freedoms recognized and guaranteed by the EC Treaty (now the Treaty on the Functioning

¹⁹⁷ See Art. 19 (1) of the consolidated version of the Treaty on European Union, published in the OJEU no. C 83/30.3.2010, http://europa.eu/documentation/legislation/index_en.htm (last consulted on the 15th of July 2017).

¹⁹⁸ See consolidated version of the Treaty on the Functioning of the European Union, published in the OJEU no. C 83/30.3.2010, http://europa.eu/documentation/legislation/index_en.htm (last consulted on the 15th of July 2017).

¹⁹⁹ Ioan Alexandru, *op. cit.*, 2008, p. 879.

²⁰⁰ Brown, A., Case T-258/06: the German Challenge to the Commission's Interpretative Communication on Contracts not subject to the Procurement Directives, *Public Procurement Law Review*, 2007, p. 84-87.

of the European Union), subjecting their minimum obligations prior to advertising, organizing effective competition and fairness of procedures²⁰¹.

In other cases-law Court has decided that the standards derived from the EC Treaty (now the Treaty on the Functioning of the European Union) apply only to contract awards having a sufficient connection with the functioning of the EU Internal Market (Case C-458/03, *Parching Brixen*, point 49; Case C-231/03, *Coname*, points 16-19)²⁰². In this regard, the Court considered that in individual cases, “*because of special circumstances, such as a very modest economic interest at stake*”, a contract award would be of no interest to economic operators located in other Member States. In such a case, “*the effects on the fundamental freedoms are ... to be regarded as too uncertain and indirect*” to warrant the application of standards derived from primary Union law.

The Commission Interpretative Communication of 2006 indicates that it is the responsibility of the individual contracting entities to decide whether an intended contract award might potentially be of interest to economic operators located in other Member States. In the view of the Commission, this decision has to be based on an evaluation of the individual circumstances of the case, such as the subject-matter of the contract, its estimated value, the specifics of the sector concerned (size and structure of the market, commercial practices etc.) and the geographic location of the place of performance. If the contracting entity comes to the conclusion that the contract in question is relevant to the Internal Market, it has to award it in conformity with the basic standards derived from Union law.

When the Commission becomes aware of a potential violation of the basic standards for the award of public contracts not covered by the Public Procurement Directives, it will assess the Internal Market relevance of the contract in question in the light of the individual circumstances of each case. Infringement proceedings under Article 258 of the Treaty on the Functioning of the European Union (ex Article 226 TEC) will be opened only in cases where this appears appropriate in view of the gravity of the infringement and its impact on the Internal Market.

²⁰¹ Grove-Valdeyron, N., *Marchés publics in Annuaire de droit européen, volume III -2005*. Bruxelles : Bruylant, 2008, p. 404

²⁰² Kotschy, B., Arrêts “Stadt Halle”, “Coname” et “Parking Brixen”, *Revue du droit de l'Union européenne* no. 4/2005, p. 845-853; Idot, L., *Transparence et contrats de concession*, *Europe* no. 338/2005, p.23-24; Brown, A., *The Application of the EC Treaty to a Services Concession Awarded by a Public Authority to a Wholly Owned Subsidiary: Case C-458/03, Parking Brixen*, in *Public Procurement Law Review*, 2006, p. 40-47; Nicolella, M., *Une autorité publique ne peut pas attribuer sans mise en concurrence une concession de service public à une société dont elle détient intégralement le capital mais qui opère de façon indépendante*, *Gazette du Palais*. No. 102-103/2006, p.30.

2.3.2. Fundamental principles applicable in the award of public procurement contracts and concessions drawn from the Court of Justice of the European Union

A. Transparency in the process of awarding public procurement contracts and concessions

The Court of Justice of the European Union stated that the obligation of transparency consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed (Case C-324/98, *Telaustria*, point 62; Case C-458/03, *Parking Brixen*, point 49; Case T-258/06, *Germany/Commission*, point 109)²⁰³. A transparent and objective approach to procurement procedures requires that all participants must be able to know the applicable rules in advance (the award criteria to be satisfied by the tenders and the relative importance of those criteria) and must have the certainty that these rules apply to everybody in the same way (Case T-258/06, *Germany/Commission*, point 109; Case C-87/94, *Commission/Belgium*, points 88 and 89; Case C-470/99, *Universale-Bau and others*, point 99). The role of this principle is to afford all tenderers equality of opportunity in formulating the terms of their applications to participate or of their tenders (Case T-258/06, *Germany/Commission*, point 124)²⁰⁴.

In the absence of publicity and openness to competition in the awarding of concession contracts and public procurement contracts, there is “a potentially discriminatory to the detriment of undertakings from other Member States that are prevented to enjoy freedom to provide services and freedom of establishment covered by the EC Treaty” - ***potential damage criterion*** (Case C-231/03, *Coname*, point 17)²⁰⁵.

The obligation of transparency requires that an undertaking located in another Member State has access to appropriate information regarding the contract before it is awarded, so that, if it so wishes, it would be in a position to

²⁰³ Dischendorfer, M., Service Concessions under the E.C. Procurement Directives: A Note on the *Telaustria* Case, *Public Procurement Law Review*, 2001, p. 57-63.

²⁰⁴ Brown, A., Case T-258/06: the German Challenge to the Commission's Interpretative Communication on Contracts not subject to the Procurement Directives, *Public Procurement Law Review*, 2007, p. 84-87.

²⁰⁵ Noguellou, R., *Revue des Affaires Européennes/Law and European affairs (RAE-LEA)* no. 3/2005, p. 511; Brown, A., Transparency Obligations Under the EC Treaty in Relation to Public Contracts that Fall Outside the Procurement Directives: A Note on C-231/03, *Consortio Aziende Metano (Coname) v Comune di Cingia de' Botti*, in *Public Procurement Law Review*, 2005, p. 153-159; Kotschy, B., Arrêts “Stadt Halle”, “Coname” et “Parking Brixen”, *Revue du droit de l'Union européenne* no. 4/2005, p. 845-853.

express its interest in obtaining that contract (Case C-231/03, *Coname*, point 21)²⁰⁶.

The principles which flow from the EC Treaty cannot impose a requirement of prior publicity where the directives expressly provide for a derogation, or that derogation would be nugatory (Opinion of Advocate General Stix Hackl in Case C-231/03, *Coname*, point 93).

Contracting entities may take measures to limit the number of applicants to an appropriate level, provided this is done in a transparent and non-discriminatory manner. They can, for instance, apply objective factors such as the experience of the applicants in the sector concerned, the size and infrastructure of their business, their technical and professional abilities or other factors. In any event, the number of applicants shortlisted shall take account of the need to ensure adequate competition. Alternatively, contracting entities might consider qualification systems where a list of qualified operators is compiled by means of a sufficiently advertised, transparent and open procedure (section 2.2.2. the Commission Interpretative Communication of 2006²⁰⁷; Case T-258/06, *Germany/Commission*, point 126).

Worth noting that the Court of Justice of the European Union played an important role in shaping the content of the principle of transparency in public procurement, with important consequences for the overall public economic management²⁰⁸. Thus, in Case C-573/07 *Sea* relating to the award of a service of collecting, transporting and disposing of urban waste, the Court noted that it is not contrary to Articles 43 EC and 49 EC (now art. 49 and 56 of the Treaty on the Functioning of the European Union), the principles of equal treatment and of non-discrimination on grounds of nationality or the obligation of transparency arising therefrom for a public service contract to be awarded directly to a company limited by shares with wholly public capital so long as the public authority which is the contracting authority exercises over that company control similar to that which it exercises over its own departments and so long as the company carries out the essential part of its activities with the authority or authorities controlling it. Consequently, without prejudice to the determination by the national court of the effectiveness of the relevant provisions of the statutes, the control exercised

²⁰⁶ Grove-Valdeyron, N., *Marchés publics* in *Annuaire de droit européen*, volume III -2005. Bruxelles: Bruylant, 2008, p. 406-408; Brown, A., *Transparency Obligations Under the EC Treaty in Relation to Public Contracts that Fall Outside the Procurement Directives: A Note on C-231/03, Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti*, in *Public Procurement Law Review*, 2005, p. 153-159; Idot, L., *Transparence et contrats de concession*, *Europe* no. 338/2005, p.23-24.

²⁰⁷ Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (24.07.2006), published in the OJEU No. C 179/1.08.2006,

²⁰⁸ Monjal, P.-Y., *Des précisions importantes sur le droit communautaire applicable aux collectivités territoriales*, LPA no. 149/2006, Paris, p. 6; Brown, A., *op. cit.* (2005), p. 153-159; Idot, *op. cit.* (2005), p.23-24.

over that company by the shareholder authorities may be regarded as similar to that which they exercise over their own departments, when, first, that company's activity is limited to the territory of those authorities and is carried on essentially for their benefit and, second, through the bodies established under the company's statutes made up of representatives of those authorities, the latter exercise conclusive influence on both the strategic objectives of the company and on its significant decisions. The Court also noted that, although it is not inconceivable that shares in a company may be sold to private investors, to allow that mere possibility to keep in indefinite suspense the determination whether or not the capital of a company awarded a public procurement contract is public would not be consistent with the principle of legal certainty. Opening of the capital to private investors may not be taken into consideration unless there exists, at the time of the award of the public contract, a real prospect in the short term of such an opening.

B. Principle of impartiality of adjudication procedures

The Court of Justice has determined that contracting authorities are obliged to respect the rules and principles enshrined in the EC Treaty (now the Treaty on the Functioning of the European Union) which guarantee the impartiality of procurement procedures and fair competition for all economic operators interested in awarding (Case C-470/99, *Universale-Bau AG*, point 93). The guarantee of a fair and impartial procedure is the necessary corollary of the obligation to ensure a transparent advertising (Case T-258/06, *Germany/Commission*)²⁰⁹. This can be best achieved in practice through:

C. Non-discriminatory description of the subject-matter of the contract

This objective follows from the principle of equal treatment, of which the fundamental freedoms embody specific instances (free movement of goods, persons, services and capital). That is why, in its case-law, the Court of Justice held that the lawfulness of a clause in the contract documents for a contract whose value was below the threshold set in Directive 93/37 concerning the coordination of procedures for the award of public works contracts (now replaced by Directive 2004/18/EC), and which therefore fell outside the scope of that directive, had to be assessed by reference to the fundamental rules of the EC Treaty, which include the principle of the free movement of goods, provided in Article 28 EC (Case C-59/00, *Vestergaard*, point 21)²¹⁰.

²⁰⁹ Brown, A., op. cit. (2007), p. 84-87.

²¹⁰ Klages, R., *Marchés publics*. Arrêt "Vestergaard", *Revue du droit de l'Union européenne* no. 1/2002, p. 157-159.

The Member States must describe the subject-matter of the contract in such a way that it may be understood in the same way by all potential tenderers, while guaranteeing equal access to economic operators in other Member States (Case T-258/06, *Germany/Commission*)²¹¹. The description of the characteristics required of a product or service should not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production unless such a reference is justified by the subject-matter of the contract and accompanied by the words “or equivalent” (Case C-59/00, *Vestergaard*, point 21-24; Case T-258/06, *Germany/Commission*; the Commission Interpretative Communication of 2006, p. 9; the Commission Interpretative Communication of 2003²¹², p. 2). According to the case-law on public supply contracts, failure to add the words “or equivalent” after the designation in the contract documents of a particular product may not only deter economic operators using systems similar to that product from taking part in the tendering procedure, but may also impede the flow of imports in intra-Community trade, contrary to Article 28 EC (now art. 34 of the Treaty on the Functioning of the European Union), by reserving the contract exclusively to tenderers intending to use the product specifically indicated (Case C-45/87 *Commission/Ireland*, point 22; Case C-359/93 *Commission/Netherlands*, point 27; Case C-59/00, *Vestergaard*, point 24; Case T-258/06, *Germany/Commission*, point 114)²¹³. It is therefore recommended to use more general descriptions regarding contract performance or functions. Technical specifications for such contracts have to be established prior to selection of a contractor and must be made known or available to potential bidders by means that ensure transparency and place all potential bidders on equal footing (Opinion of Advocate General Jacobs in Case C-174/03, *Impresa Portuale di Cagliari*, points 76-78).

D. Equal treatment of operators involved in awarding

In the internal market conditions, this principle requires first ensuring equal access for economic operators from all Member States. The Court considered that this objective (aim), which is designed to ensure that traders, of whatever origin, have equal access to contracts put out to tender, derives from compliance with the principles of freedom of establishment, freedom to provide services and free competition (the Opinion of Advocate General Léger in Case C-44/96 *Mannesmann Anlagenbau Austria and Others*, point 47; Opinion of Advocate General Mischo in Case C-237/99 *Commission/France*, point 49) and, in

²¹¹ Brown, A., op. cit. (2007), p. 84-87.

²¹² Commission interpretative communication on facilitating the access of products to the markets of other Member States, Official Journal No. C 265/04.11.2003.

²¹³ Fernández, José M., Note on Case C-359/93 *Commission v. The Netherlands* (the “UNIX” case), *Public Procurement Law Review*, 1995, p. 74-79; Terneyre, P., *Marchés publics*. Paris: Recueil Dalloz Sirey, 1989, p. 217-218.

particular, with the principle of equal treatment as expressed in the prohibition of discrimination on grounds of nationality laid down in Article 12 EC (now art. 18 of the Treaty on the Functioning of the European Union).

According to the case-law of the Court of Justice, the principle of equal treatment, of which Articles 43 EC and 49 EC of the Treaty (now art. 49 and 56 of the Treaty on the Functioning of the European Union) reflect specific instances, prohibits not only overt discrimination on grounds of nationality but also all covert forms of discrimination which, through the application of other criteria of differentiation, bring about the same outcome in practice, so that public contracts in the various Member States are open to all undertakings in the Union (Case C-22/80, *Boussac Saint-Frères*, point 7; Case C-3/88, *Commission/Italy*, point 8; Case C-243/89, *Commission/Denmark*, point 23 and 33; Case C-87/94, *Commission/Belgium*, point 51).

The case-law of the Court of Justice of the European Union stresses that to achieve equal access for economic operators from all Member States, contracting entities should not impose conditions causing direct or indirect discrimination against potential tenderers in other Member States, such as the requirement that undertakings interested in the contract must be established in the same Member State or region as the contracting entity (Case C-324/98, *Telaustria*; Case T-258/06, *Germany/Commission*, point 109)²¹⁴.

According to the case-law of the Court of Justice, the general conditions of the contract documents must comply with all the relevant provisions of Union law and, in particular, with the prohibitions flowing from the principles laid down in the EC Treaty (now the Treaty on the Functioning of the European Union) in relation to the right of establishment and the freedom to provide services, and to the principle of non-discrimination on grounds of nationality (Case C-27/86, *CEI/Association intercommunale pour les autoroutes des Ardennes*, point. 15; Case C-29/86, *Bellini*, paragraph 15; Case C-31/87, *Beentjes*, paragraphs 29 and 30).

The procedure for comparing tenders therefore had to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency so as to afford equality of opportunity to all tenderers when formulating their tenders (Case C-87/94, *Commission/Kingdom of Belgium*, point 54)²¹⁵.

²¹⁴Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (24.07.2006), published in the OJEU No. C 179/1.08.2006, p. 9; Dischendorfer, M., Service Concessions under the E.C. Procurement Directives: A Note on the *Telaustria* Case, *Public Procurement Law Review*, 2001, p. 57-63.

²¹⁵Charbit, N., *Le recours de la Commission devant la C.J.C.E. dans les procédures de passation de marchés publics*, *Les petites affiches* no. 87/1995, p.22-27.

It is important that the final decision awarding the contract complies with the procedural rules laid down at the outset and that the principles of non-discrimination and equal treatment are fully respected. This is particularly relevant to procedures providing for negotiation with shortlisted tenderers. Such negotiations should be organised in a way that gives all tenderers access to the same amount of information and excludes any unjustified advantages for a specific tenderer (section 2.2.3. the Commission Interpretative Communication of 2006²¹⁶; Case T-258/06, *Germany/Commission*, points 129 and 130).

The Existence of regulations in the Member State reserving the public procurement contract only to companies of which the State or the public sector, whether directly or indirectly, is a major, or the sole, shareholder, is a violation of the principle of equal treatment (Case C-3/88, *Commission/Italie*, point 30).

The Court also determined that it violated the principle of equal treatment when participants in the procedure for awarding public procurement contract no benefit from an objective analysis of the tenders and when during the course of the procedure is changing conditions and allows a participant to gain advantage over other competitors (Case C-243/89, *Storebaelt*, point 37).

E. Mutual recognition of diplomas, certificates and other evidence of formal qualifications

The principle of mutual recognition makes it possible for the free movement of goods and services to be ensured without there being any need to harmonise the national legislation of the Member States (Case 120/78 *Rewe-Zentral*)²¹⁷.

If applicants or tenderers are required to submit certificates, diplomas or other forms of written evidence, documents from other Member States offering an equivalent level of guarantee have to be accepted in accordance with the *principle of mutual recognition* of diplomas, certificates and other evidence of formal qualifications (Case C-451/08, *Helmut Müller*). In that regard, the authorities of a Member State are required to take into consideration all of the diplomas, certificates and other evidence of formal qualifications of the person concerned, as well as the relevant experience of that person, by comparing the specialised knowledge and abilities thus attested and that experience with the knowledge and qualifications required under the national legislation (Case C-340/89 *Vlassopoulou*, paragraphs 16, 19 and 20; Case C-319/92 *Haim*, paragraphs 27 and 28; Case C-238/98 *Hocsman*, paragraph 23; Case C-31/00 *Dreessen*, paragraph 24)²¹⁸. The Court has

²¹⁶ Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (24.07.2006), published in the OJEU No. C 179/1.08.2006.

²¹⁷ Mattera, A., *L'arrêt "Cassis de Dijon": une nouvelle approche pour la réalisation et le bon fonctionnement du marché intérieur*, Revue du Marché Commun, p.505-514, 1980, p. 505-514.

²¹⁸ Huglo, J.-G., *La reconnaissance mutuelle des diplômes et des titres universitaires dans la jurisprudence communautaire*, Gazette du Palais, 1995, p.668-672.

held that mutual recognition must enable the national authorities to assure themselves, on an objective basis, that the foreign diploma certifies that the holder has knowledge and qualifications which, if not identical, are at least equivalent to those attested by the national diploma (Case C-222/86 *Heylens and Others*, paragraph 13).

The role of European Union legislation, based on economic desideratum, is to overcome national borders, giving the freedom of movement for economic operators and secondly, to prohibit discrimination between public and private operators. ***The principle of mutual recognition*** has been laid down by the Court and gradually defined in greater detail in a large number of judgments on the free circulation of goods, persons and services. According to this principle, a Member State must accept the products and services supplied by economic operators in other Union countries if the products and services meet in like manner the legitimate objectives of the recipient Member State²¹⁹.

The application of this principle to public procurement and concessions implies, in particular, that the Member State in which the service is provided or the good is delivered must accept the technical specifications, diplomas, certificates, qualifications or other written evidence, documents from other Member States and providing an equivalent level of guarantee²²⁰ (Case T-258/06, *Germany/Commission*). For example, the Member States in which the service is provided must accept the equivalent qualifications already acquired by the service provider in another Member State which attest to his professional, technical and financial capacities.

In Romania in this field apply the Law 200/2004 on recognition of diplomas and professional qualifications for regulated professions in Romania²²¹.

F. Principle of equal treatment of public and private operators

Under this principle, EU rules apply to the same conditions for public and private enterprises²²² (Case T-244/94, *Wirtschaftsvereinigung Stahl and Others/ Commission*; Case T-156/04, *EDF/ Commission*). Under the influence of this principle, we are witnessing today a remarkable evolution involving the progressive abandonment of protected markets, where traditionally operated only public

²¹⁹ Huglo, J.-G., op. cit. (1995), p.668-672; Niculeasa, M. I., Legislația achizițiilor publice. Comentarii și explicații/Public procurement legislation. Comments and explanations. Bucharest: C.H. Beck, 2007, p. 55-80.

²²⁰ Săraru, C. S., Contractele publice/Public contracts in Alexandru, I., Gorjan, I., Ivanoff, I. V., Manda, C. C., Nicu, A. L., & Săraru, C. S. Drept administrativ European/European Administrative Law. Bucharest: Lumina Lex, 2005, p. 136.

²²¹ Published in Official Gazette no. 500 of June 3, 2004, as amended.

²²² Săraru, C. S., op. cit. (2005), p. 137.

enterprises (mainly in air and rail transport sectors, telecommunications and energy), for a genuine competition between public and private operators ²²³. Thus found that the model public-private division of the French legal system does not fall under EU law ²²⁴. Interests and ideals which it serves Europe today seems no longer compatible with that the “royalty” of administrative law of which he spoke the French P. Legendre²²⁵.

Unlike the French model, EU law has its source in a manner opposite to share social roles, the promotion of private enterprise and market principles implies a significant reduction in administrative functions and public law behind them. In the French doctrine is assessed that no area is more difficult to reconcile with freedom of movement or the provision of services in the European Union than the administrative contracts, because these contracts are, by nature, discriminatory, one of the contractors being a public authority acting to achieve the public interest²²⁶. Therefore, the EU had undertaken an effort gradually to liberalize public contracts. This liberalization has been successively applied: public works contracts, public supply contracts, public service contracts, concessions, certain categories of acquisitions in particular sectors (water, energy, transport, and postal services sectors).

The case-law of the Court of Justice of the European Union showed that application of EU law on public contracts (public procurement and concessions) does not depend on public, private or mixed structure of the co-contractor (Case C-107/98, *Teckal*, point. 50). However, in Case C-480/06, *Commission/Germany*, concerning a contract relating to the disposal of waste in a new incineration facility concluded between four Landkreise (administrative districts) and the City of Hamburg Cleansing Department without a tendering procedure, the Court held that a contract which forms both the basis and the legal framework for the future construction and operation of a facility intended to perform a public service, namely thermal incineration of waste, in so far as it has been concluded solely by public authorities, without the participation of any private party, and does not provide for or prejudice the award of any contracts that may be necessary in respect of the construction and operation of the waste treatment facility, does not

²²³ Colson, J.-Ph., *Droit public économique*, 3e édition, Paris: Librairie Générale de Droit et de Jurisprudence (L.G.D.J.), 2001, p. 333, 334.

²²⁴ Alexandru, I., Cărauşan, M., Bucur, S., *Drept administrativ/Administrative Law*, Bucharest: Lumina Lex., 2005, p. 399-401; Alexandru, I., *Dreptul şi managementul. Dihotomie sau complementaritate. Impactul informatizării/ Law and management. Dichotomy or complementarity. Impact of computerization*, Bucharest: All Beck, 2004, p. 52-54.

²²⁵ Legendre, P., *Trésor historique de l'État en France*. Paris : Fayard, 1992.

²²⁶ Cartou, L.; Clergerie, J.-L. ; Gruber, A. ; Rambaud, P., *L'Union européenne*, 3e édition. Paris : Dalloz, 2000, p. 306.

fall within the scope of Directive 92/50/EEC²²⁷. A public authority has the possibility of performing the public interest tasks conferred on it either by using its own resources or in cooperation with other public authorities, without being obliged to call on outside entities not forming part of its own departments. In that connection, first, Union law does not require public authorities to use any particular legal form in order to carry out jointly their public service tasks. Under Union law, public authorities are free to pursue economic activities themselves or to assign them to third parties, such as mixed capital entities founded in the context of a Institutionalised Public-Private Partnerships – IPPP (the Commission Interpretative Communication of 18.02.2008²²⁸). Secondly, such cooperation between public authorities does not undermine the principal objective of the Union rules on public procurement, that is, the free movement of services and the opening-up of undistorted competition in all the Member States, where implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned, referred to in Directive 92/50, is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors.

G. Appropriate time-limits in which the undertakings concerned of any Member State are able to prepare their offers

Time-limits for expression of interest and for submission of offers should be long enough to allow undertakings from other Member States to make a meaningful assessment and prepare their offer (Case T-258/06, *Commission/Germany*).

The requirement of reasonable time result from the fact that contracting authorities must comply with the principle of the freedom to provide services and the principle of non-discrimination, which seek to protect the interests of traders established in a Member State who wish to tender goods or services to contracting authorities established in another Member State (Case C-380/98, *University of Cambridge*, paragraph 16; Case C-237/99, *Commission/France*, paragraph 41; Case C-92/00, *HI*, paragraph 43; Case C-470/99, *Universale-Bau and Others*, paragraph 51). Their aim is to avoid the danger of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities (Case C-470/99, *Universale-Bau and Others*, paragraph 52).

²²⁷ Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209/24.7.1992). The provisions of this Directive are currently found in Directive 2004/18/EC.

²²⁸ Commission interpretative communication on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP), (05.02.2008), C(2007)6661, http://ec.europa.eu/internal_market/publicprocurement/key-docs_en.htm

2.3.3. Principles for the execution of public procurement contracts and concession contracts drawn from the Court of Justice of the European Union

Directives 2004/18/EC and 2004/17/EC relate, mostly, the procedure for awarding public contracts (public procurement contracts and partly of concession contracts), not closing procedures, modification and termination of these contracts²²⁹. Also, as noted above, the procedure for awarding public procurement contracts and concessions that fall outside the regulatory scope of both directives, but have a sufficiently close link with the EU internal market, is subject to rules and principles of the Treaty EC (now the Treaty on the Functioning of the European Union). Question is what rules will apply on conclusion procedures, amendment and termination of public procurement contracts and concessions.

Regarding the enforcement of contract conditions, directives states that contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Union law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations (art. 26 of Directive 2004/18/EC and art. 38 of Directive 2004/17/EC).

In the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions adopted in 2004, the Commission states that the contractual provisions governing the phase of implementation are primarily those of national law. However, contractual clauses must also comply with the relevant Union rules, and in particular the principles of equality of treatment and transparency. This implies in particular that the descriptive documents must formulate clearly the conditions and terms for performance of the contract. The case-law of the Court of Justice showed that, in addition, these terms and conditions of performance must not have any direct or indirect discriminatory impact or serve as an unjustifiable barrier to the freedom to provide services or freedom of establishment (Case C-19/00, *SIAC Constructions*, points 41-45; Case C-31/87, *Beentjes/Pays-Bas*, points 29-37).

The success of a contract depends to a large extent on the appropriate assessment and optimum distribution of the risks between the public and the private sectors, and determining mechanisms to evaluate the performance in executing the contract on a regular basis. In this context, the principle of transparency requires that the elements employed to assess and distribute the risks, and to evaluate the performance, be communicated in the descriptive documents, so that tenderers can take them into account when preparing their tenders.

²²⁹ Săraru, C. S., *Contractele administrative. Reglementare. Doctrină. Jurisprudență/Administrative contracts. Legislation. Doctrine. Case-Law*. Bucharest: C.H. Beck, 2009, p. 454-458.

The period during which the private partner will undertake the performance of a work or a service must be fixed in terms of the need to guarantee the economic and financial stability of a project. The duration of the contract must be set so that it does not limit open competition beyond what is required to ensure that the investment is paid off and there is a reasonable return on invested capital. An excessive duration is likely to be censured on the basis of the principles governing the internal market or the provisions of the Treaty on the Functioning of the European Union governing competition (article 101 – ex Article 81 TEC; article 102 – ex Article 82 TEC and Article 106 – ex Article 86 TEC). The principle of transparency requires that the elements employed to establish the duration be communicated in the descriptive documents so that tenderers can take them into account when preparing their tenders.

Contractual relationships must be able to evolve in line with changes in the macro-economic or technological environment, and in line with general interest requirements. The Green Paper adopted in 2004 show that, in general, Union public contract law does not reject such a possibility, as long as this is done in compliance with the principles of equality of treatment and transparency. The descriptive documents transmitted to the tenderers or candidates during the selection procedure may provide for automatic adjustment clauses, such as price-indexing clauses, or stipulate the circumstances under which the rates charged may be revised. They can also stipulate review clauses on condition that these identify precisely the circumstances and conditions under which adjustments could be made to the contractual relationship. However, such clauses must always be sufficiently clear to allow the economic operators to interpret them in the same manner during the tenderers-selection phase.

In general, changes made in the course of the execution of a contract, if not covered in the contract documents, usually have the effect of calling into question the principle of equality of treatment of economic operators. Such unregulated modifications are therefore acceptable only if they are made necessary by an unforeseen circumstance, or if they are justified on grounds of public policy, public security or public health (art. 52 of the Treaty on the Functioning of the European Union - ex Article 46 TEC). In addition, any substantial modification relating to the actual subject-matter of the contract must be considered equivalent to the conclusion of a new contract, requiring a new competition (Case C-337/98, *Commission/France*, points 44 ff.).

2.3.4. Fundamental principles drawn from the Court of Justice of the European Union applied in the review procedures to the award of public procurement and concession contracts

Opening public procurement to competition in the European Union requires the existence of guarantees of transparency and nondiscrimination. For

these guarantees to be effective, tenderers must have the possibility to use review procedure or repair, if a breach of EU law.

The review procedures are covered by Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Union rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. Directive 2007/66/EC amends Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts²³⁰.

Council Directive no. 89/665/EEC (as amended by Directive 2007/66/EC) states in Art. 1(3) that "Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement". Court noted in Case C-129/04, *Espace Trianon* that the wording "any person having or having had an interest in obtaining a particular contract" is to be interpreted as not precluding national law from providing that only the members of a consortium without legal personality which has participated, as such, in a procedure for the award of a public contract and has not been awarded that contract, acting together, may bring an action against the decision awarding the contract and not just one of its members individually.

In accordance with the case-law on judicial protection, the available remedies must not be less efficient than those applying to similar claims based on domestic law - **principle of equivalence** - and must not be such as in practice to make it impossible or excessively difficult to obtain judicial protection - **principle of effectiveness**²³¹ (Case C-46/93, *Brasserie du Pêcheur*, point 83; Case C-48/93, *Factortame*, point 83; Case C-327/00, *Santex*, point 55).

Member States should take necessary measures to ensure that decisions taken by bodies responsible for review procedures can be implemented effectively - **the principle of effectiveness of legal means of action**²³² (Case C-50/00,

²³⁰ Published in the OJEU No. L335/20.12.2007.

²³¹ Belorgey, J.-M., Gervasoni, S., Lambert, Ch., Effectivité des recours. L'actualité juridique ; droit administratif, 2003, p. 2153-2154; Dubouis, L., La responsabilité de l'Etat législateur pour les dommages causés aux particuliers par la violation du droit communautaire et son incidence sur la responsabilité de la Communauté, *Revue française de droit administratif*, 1996, p.583-595; Trifone, L., La responsabilità degli Stati in diritto comunitario: le sentenze nelle cause "Brasserie du Pêcheur", "Factortame III" e "Hedley Lomas", *Diritto comunitario e degli scambi internazionali*, 1997, p. 63-89.

²³² Belorgey, J.-M., Gervasoni, S., Lambert, Ch., Effectivité des recours. L'actualité juridique; droit administratif, 2003, p. 2153-2154; Niculeasa, M.I., *op. cit.* (2007), p. 500 ff; Dubouis, L., *A propos de deux principes généraux du droit communautaire (droit au contrôle juridictionnel*

Unión de Pequeños Agricultores, point 39; Case C-222/86, *Heylens*, point 14). To allow for an effective exercise of the right to such a review, contracting entities should state the grounds for decisions which are open to review either in the decision itself or upon request after communication of the decision - **principle reasons the decision of the contracting authority**²³³ (Case C-222/86, *Heylens*, point 15).

Court of Justice has decided several occasions on review procedures. Thus, in Case C-26/03, *Stadt Halle and RPL Lochau*, the Court stated that the purpose of Directive 89/665 is to enforce EU rules on public procurement by means of effective and rapid remedies, particularly at a stage when infringements can be corrected²³⁴. In another case, C-15/04 *Koppensteiner GmbH*, the Court stated that the decision to withdraw an invitation to tender for a public procurement contract is one of those decisions in relation to which Member States are required under Directive 89/665 to establish review procedures for annulment, for the purposes of ensuring compliance with the rules of Union law on public procurement contracts and national rules implementing that law. National legislation does not meet the requirement of ensuring effective judicial protection if the national court's role is limited to mere finding of unlawful withdrawal of call for tender; national legislation should allow the introduction of an action for damages against the contracting authority. These two decisions illustrate the need to improve the effectiveness of the remedies available for undertakings when are violated EU rules on the procedure for awarding public contracts, particularly at a stage when infringements can be corrected²³⁵.

Mechanisms for review the award procedure has to ensure completion of an impartial monitoring of the procedure and for the unregulated public procurement.

For contracts whose value is below the threshold for applying Directives 2004/17/CE and 2004/18/CE (in present Directives 2014/23/EU and 2014/24/EU) will apply rules and principles of the EC Treaty (now the Treaty on the Functioning of the European Union) and the case-law of the Court of Justice of the European Union (the Commission Interpretative Communication of 2006). The case-law of the Court indicates that in these contracts, tenderers must be able to receive effective legal protection of the rights conferred by EU law²³⁶ (Case C-50/00, *Unión de Pequeños Agricultores*, point 39; Case C-222/86, *Heylens*, point

effectif et motivation des décisions des autorités nationales qui portent atteinte à un droit conféré par la règle communautaire). Revue française de droit administrative, 1988, p. 691-700.

²³³ Dubouis, L., op. cit., 1988, p. 691-700.

²³⁴ Kotschy, B., Arrêts "Stadt Halle", "Coname" et "Parking Brixen", Revue du droit de l'Union européenne no. 4/2005), p. 845-853.

²³⁵ Grove-Valdeyron, N., Marchés publics in *Annuaire de droit européen*, volume III -2005. Bruxelles: Bruylant, 2008, p. 410.

²³⁶ Dubouis, L., op. cit. (1988), p. 691-700.

14). In the absence of relevant Union law provisions, it is up to the Member States to provide the necessary rules and procedures guaranteeing effective judicial protection. To ensure effective legal protection is necessary that the decisions detrimental to a person who has an interest in obtaining a public contract (such as the decision to eliminate a candidate) to be the subject of a review, designed to determine possible violations of fundamental rules arising from the EU primary law.

2.4. Conclusions. Harmonization of the EU Member States procedures in the field of awarding and executing of the public contracts

We believe that the opening made by EU law and common principles developed by the European Court of Justice, operates in favor of the use of contractual techniques and dissipation gradations between public and private. European legislation in this area aims at opening to competition of procedures for awarding public contracts for all enterprises across the European Union²³⁷.

The rules on public contracts were often subject to official interpretation made by the European Commission. Such interpretation can be referred to Commission Communication on concessions under Community law of 04/29/2000 (200 / C121 / 02). Management of the deployment of these contracts involving EU funds is controlled by the European Court of Auditors conducting some reports such as for example „*Special Report No 10/2000 on the public contracts awarded by the Joint Research Centre, together with the Commission's replies*” (2000/C172/01).

Gradually it became clear that freedom of exchange and application of competition rules of the common law can not be sufficient to ensure a genuine internal market for public contracts in the European Union. To these must be added the harmonization of procedures across Member States by means of directives governing: choose the form of adjudication, advertising, conditions for participation of undertakings, conditions for awarding contracts, ways of contesting the proceedings²³⁸.

Cooperation between public authorities and business to provide funding, construction, renovation, management or maintenance of a public infrastructure, or the provision of a public service generally takes the form of public-private partnership.

At European Union level, two types of public-private partnership (PPP) are distinguished²³⁹:

²³⁷ For details, see Pierre Mathijsen, *op. cit.*, 2002, p. 448-451.

²³⁸ L. Cartou, J.-L. Clergerie, A. Gruber, P. Rambaud, *op. cit.*, 2000, p. 308.

²³⁹ See the Green Paper on public-private partnership and Community law on public procurement and concessions (COM (2004) 327 final), 30 April 2004 and the Commission Communication on public-private partnership and Community law on public procurement and concessions [(COM (2005) 569 final] of 15 November 2005.

- contractual PPP where the public-private partnership is based on purely contractual relationships. This partnership covers various arrangements that assign one or more tasks to a private partner, including designing, financing, building, renovating or operating a good or service. These issues are covered by EU directives on public procurement and concessions.

- institutional PPP, involving public-private cooperation within a distinct entity. The implementation of institutional-type PPPs can be achieved either by creating an entity jointly owned by the public sector and the private sector (mixed-capital enterprise), or by taking control of an existing public enterprise by the private sector.

In the EU Member States, public contracts are used as an administrative action, in different ways. Overall, it is noted that, although the development of the contractual process is uneven from country to country, today we are witnessing a continuous growth of the contractual techniques, even between legal persons of public law. This, in the general context in which it talks about the transition from “*Old Public Administration*” (based on the classic Weberian model)” to “*New Public Management*” (NPM) as a factor of convergence between European administrations, based on outsourcing activities through administrative or commercial contracts²⁴⁰.

In this context, the public procurement and concession contracts gaining more ground. The new model of public administration requires a new relationship, radically different, between governments, public service and citizens. Today many public organizations integrate their mission and the overall project in order to honor the role that it plays both at the “macro” (public policy) and at “micro” (satisfaction the needs of citizens). All these issues involve the organizational changes, requiring a new approach to the project in public sector, the overall quality and performance. Public opinion and customer perception is an important part of measuring the performance. The performance of public sector requires, on the one hand, the introduction a market-type behavior in public services and, secondly, transferring of powers to managers and motivate them to improve performance.

To achieve the EU desideratum to create an internal market where goods, services, capital and persons can move freely, was needed and creating a competitive and non-discriminatory market in the field of public contracts. The general framework for market functioning public contracts in the European Union is currently given to the principles found in primary legislation (the Treaty on European Union and the Treaty on the Functioning of the European Union), the Union's rules of secondary legislation (the main such regulations are given in the directives 2014/23/EU, 2014/24/EU, 2014/25/EU, 1989/665/CEE and 1992/13/CEE and subsequent legislation relating to public procurement contracts and partly to

²⁴⁰ Săraru, C. S., *Contractele administrative. Reglementare. Doctrină. Jurisprudență/Administrative contracts. Legislation. Doctrine. Case-Law*. Bucharest: C.H. Beck, 2009, p. 505, 506.

the concession contracts) and the principles drawn from the Court of Justice of the European Union during the interpretation of laws to implement the treaties uniformly in all Member States.

Knowledge of principles drawn from the Court of Justice of the European Union is necessary by national legislators²⁴¹ and contracting authorities for transposition into national law of EU legislation in the field of public contracts and application of these rules in letter and spirit of the EU Treaties. The role of these principles is to increase public sector performance and the degree of convergence of administrative actions at Member States of the European Union.

Section 2. Means of staff: the public function in the EU institutions. Organization principles

Within the European Union bodies, officials are subject to special rules, which represent the right of European civil service²⁴².

The public office in the EU institutions brings together several thousand officials (only in the European Commission, it employs over 23,000 officials from all corners of the European Union) working to serve the general interests of the 500 million citizens of the Union.

Officials of the European Union institutions shall be subject to the provisions of the Staff Regulations of Officials of the European Communities approved by Regulation 31 (EEC), 11 (ECSC) of 18.12.1961 *laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community*²⁴³, as amended.

The intervention of a statute-based regulation had the effect of placing the public office in the so-called closed civil service category, with the civil servant having a legal and regulatory situation based on the premises of the permanent

²⁴¹ Dubouis, L., *La responsabilité de l'Etat législateur pour les dommages causés aux particuliers par la violation du droit communautaire et son incidence sur la responsabilité de la Communauté*, Revue française de droit administrative, 1996, p. 583-595; Trifone, L., La responsabilità degli Stati in diritto comunitario: le sentenze nelle cause "Brasserie du Pêcheur", "Factortame III" e "Hedley Lomas", Diritto comunitario e degli scambi internazionali, 1997, p. 63-89.

²⁴² On the public office and civil servant of the institutions of the European Union Constanța Călinoiu, Verginia Vedinaș, *Statutul functionarului public european*, 2nd edition, Universul Juridic, Bucharest, 2007.

²⁴³ Published in the Official Journal of the European Communities P 045 of 14.6.1962, as subsequently amended. For the consolidated version of this regulation see <http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:01962R0031-20140501> (last consulted on the 15th of July 2017).

office and the existence of an administrative hierarchy. The "career" system in the European public service is thus enshrined.

The status of Community officials applies, of course, only in the institutions of the European Union. We will discuss some ideas about it, given its role as a potential model, structuring on minimum requirements that the public function of the European Union member states must fulfill. We anticipate the shaping of a convergence in the public function of the member countries, sharing common organizational principles that will outline in the future a common administrative office of the civil service.

The European Union official shall be any person who has been appointed, under the conditions laid down in the Statute, to a permanent post of one of the institutions of the European Union by a written instrument of the appointing authority of the institution concerned.

The Staff Regulations regulate the categories of officials of the European Union, their rights and obligations, the career of officials, the conditions of employment, the financial and social security benefits of the official, the disciplinary system, the remedies against acts affecting the rights of officials, special provisions applicable to civil servants The European External Action Service (EEAS) as well as special and derogatory provisions applicable to officials assigned to a third country.

The posts covered by the Staff Regulations are classified, according to the nature and importance of the functions to which they refer, in a function group of administrators ("AD"), a function group of assistants ("AST") and a group secretarial and administrative staff (referred to as "AST / SC"). The function group AD comprises twelve degrees, corresponding to the functions of leadership, conception and study, as well as linguistic or scientific functions. The AST function group shall comprise eleven degrees, corresponding to the functions of executive and technical nature. The function group AST / SC comprises six grades corresponding to the administrative and secretarial functions (Article 5 (1) and (2) of the Statute).

The Statute establishes the rule of principle that "officials belonging to the same function group are subject to identical conditions of recruitment and career development" (Article 5 (5) of the Statute).

The statute prohibits any discrimination against officials in the institutions of the European Union, such as discrimination based on sex, race, color, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, , birth, disability, age or sexual orientation.

An official in the institutions of the European Union is required to exercise his powers and act solely with the interests of the Union without requesting or accepting instructions from any government, authority, organization or person outside his or her institution. The official shall perform the duties entrusted to

him objectively and impartially and with due regard to his duty of loyalty to the Union.

Without the permission of the Appointing Authority, the official may not accept, from any government or any other source outside his or her institution, honorary titles, decorations, favors, gifts or pay, irrespective of their nature, unless they shall be awarded for services rendered either before his appointment or during a special leave for military or national service and as a result of the provision of such services.

The privileges and immunities enjoyed by officials are granted solely in the interest of the European Union.

§1. The recruitment and promotion of European Union officials

The recruitment of officials from the institutions of the European Union should be aimed at ensuring that the most highly independent, competent, efficient and integrity staff are recruited on the broadest possible geographical basis from among the nationals of the Member States of the Communities. No posts can be reserved for nationals of a particular Member State.

The recruitment and promotion of EU officials is dominated by the principle of the competition, which allows for certain exceptions, in the express and limitative cases provided by the Statute (special generalibus derogant). Thus art. Article 29 (2) of the Statute provides that the Appointing Authority may adopt a recruitment procedure other than a recruitment procedure for the recruitment of senior management (general or equivalent directors of grade AD 16 or AD 15 and directors or their equivalents in grade AD 15 or AD 14) and, in exceptional cases, for posts requiring special qualifications.

§2. Principles of public function in the institutions of the European Union

The rights and duties of the European civil servant are governed according to the State by the following principles:

1. the need to achieve absolute independence of the civil servant vis-à-vis any government, authority, organization or person outside his / her institution (Article 11 paragraph 1 of the Statute)
2. the need to ensure independence from the Member States whose nationals are
3. the official must perform his duties and regulate his conduct solely in order to achieve the interests of the European Union
4. privileges and immunities are conferred on officials exclusively in the interest of the European Union (Articles 23, 24 of the Statute)

5. officials are permanently at the disposal of the institution (Article 55 of the Statute). Normal weekly working time is between 40 and 42 hours, the working day hours being set by the Appointing Authority. In addition, as a result of the requirements of the service or of the safety rules at the workplace, an official may be obliged to remain at the institution, at work or at home, outside the normal working hours.

6. officials are trained in the preparation of the regulations to which they are subject and in their implementation.

These principles are often transposed into national public functions, the tendency being obvious to the independence and professionalisation of those involved in the preparation, adoption and enforcement of administrative decisions.

Section 3. Material means. The European Groupings of Territorial Cooperation (EGTC). Case study – EGTC developed by administrative structures in Romania and Hungary

§1. General considerations about the European Groupings of Territorial Cooperation (EGTC)

European Grouping of Territorial Cooperation (EGTC) is a legal entity, non-profit, composed of states, regional authorities and local authorities, bodies governed by public law within the European Union with the objective of facilitating and promoting cross-border, transnational and/or interregional cooperation²⁴⁴ between its members for the purpose of strengthening the economic, social and territorial cohesion of the European Union.

Establishment and functioning of the EGTC is governed by Regulation no. 1082/2006/CE of the European Parliament and of the Council of 5 July 2006 *on a European Grouping of Territorial Cooperation - EGTC*²⁴⁵. Under the provisions of art. 16 (1) of this Regulation which states that "*Member States shall make such provisions as are appropriate to ensure the effective application of this Regulation*", Romania has adopted the Government Emergency Ordinance No. 127/2007 on a European Grouping of Territorial Cooperation²⁴⁶, approved by the

²⁴⁴ See also Spinaci, G., Vara-Arribas, G.: *The European Grouping of Territorial Cooperation (EGTC): New Spaces and Contracts for European Integration?*, EIPASCOPE 2009/2, p. 5

²⁴⁵ Published in OJEU L 210 of 31 July 2006.

²⁴⁶ Published in Official Gazette of Romania no. 769 of 13 November 2007.

Romanian Parliament by Law. 52/2008²⁴⁷. Hungary adopted XCIX Act of 2007 on the European Grouping of Territorial Cooperation²⁴⁸.

Recently Regulation no. 1082/2006/CE was amended by Regulation no. 1302/2013 of the European Parliament and of the Council²⁴⁹, the amendments will apply from 22 June 2014. However, according to art. 2 (1) of Regulation no. 1302/2013 EGTCs established before 21 December 2013 shall not be obliged to align their convention and statutes with the provisions of Regulation (EC) No 1082/2006 as amended by this Regulation.

Until November 26, 2013 was notified to Committee of the Regions the establishment within the European Union a number of 41 EGTC's²⁵⁰.

We emphasize that the EGTC was not created as a tool to replace the existing models of cooperation, but this is rather an alternative in addition to inter-governmental cooperation models available so far²⁵¹. Thus, at the European Union level, the cross-border cooperation between Member States and third countries can also be achieved through *Euroregions* and *Eurodistricts*. But unlike these structures, EGTC has legal personality²⁵², thus having the opportunity to employ staff, to have a patrimony and to participate in the judicial proceedings. This legal stability enhances the decision-making process between partners, their position in the interaction with EU institutions and their ability to launch or improve their international position and efficient management of programs and projects of cooperation²⁵³.

§2. Establishment and functioning of the EGTC

The establishment of an EGTC is optional, can be done in accordance with the constitutional system of each Member State.

May become members of an EGTC, according to art. 3 of Regulation no. 1082/2006/CE amended by Regulation no. 1302/2013, the following entities:

²⁴⁷ Published in Official Gazette of Romania no. 230 of 25 March 2008.

²⁴⁸ In the European Union for EGTC national country specific rules see http://www.interact-eu.net/egtc/national_provisions/495/11672, accessed on April 5, 2014

²⁴⁹ Published in OJEU L-347 of December 20, 2013.

²⁵⁰ For List of EGTCs whose establishment has been notified to the CoR in accordance with Regulation (EC) 1082/2006 see <https://portal.cor.europa.eu/egtc/en-US/Register/Pages/welcome.aspx>, accessed on April 5, 2014

²⁵¹ Janssen, G. (ed.): *Europäische Verbünde für territoriale Zusammenarbeit* (EVTZ) (European grouping of territorial cooperation – EGTC), Berlin (Juristische Schriftenreihe), 2006, p. 109

²⁵² Zapletal, J.: *The European Grouping of Territorial Cooperation (EGTC): a new tool facilitating cross-border cooperation and governance*, *Quaestiones Geographicae* 29(4)/2010, p. 18 and next; Duindam, S., Waddington, L.: *Cross-Border cooperation in the Rhine-Meuse region: Aachen (D) and Heerlen (NLs). Some considerations from a law and economics perspective on a future European Grouping of Territorial Cooperation*, *European Journal of Law and Economics*, vol. 33, issue 2/2012, p. 309.

²⁵³ Spinaci, G., Vara-Arribas, G.: *op. cit.*, p. 5 at 6.

- (a) Member States or authorities at national level;
- (b) regional authorities;
- (c) local authorities;
- (d) public undertakings²⁵⁴ or bodies governed by public law²⁵⁵;
- (e) undertakings entrusted with operations of services of general economic interest in compliance with applicable Union and national law;
- (f) national, regional or local authorities, or bodies or public undertakings, equivalent to those referred to under point (d), from third countries, subject to the conditions laid down in Article 3a introduced by art. 1 Section 4 of the Regulation no. 1302/2013.

Associations consisting of bodies belonging to one or more of these categories may also be members.

An EGTC may be made up of members located on the territory of at least two Member States of the European Union. As an exception in the conditions specified in Art. 3a introduced by art. 1 Section 4 of the Regulation no. 1302/2013, an EGTC may be made up of members located on the territory of only one Member State and of one or more third countries neighbouring that Member State, including its outermost regions, where the Member State concerned considers that EGTC to be consistent with the scope of its territorial cooperation in the context of cross-border or transnational cooperation or bilateral relations with the third countries concerned.

In view to establishing an EGTC, the members will draw up and sign the Convention and Statute.

Convention should include mandatory, according to art. 8 of Regulation no. 1082/2006/CE, as amended by section 10 of the Regulation no. 1302/2013 EGTC: the name of the EGTC and its registered office; the extent of the territory in which the EGTC may execute its tasks; the objective and the tasks of the EGTC; the duration of the EGTC and the conditions for its dissolution; the list of the EGTC's members; the list of the EGTC's organs and their respective competences; the applicable Union law and national law of the Member State where the EGTC has its registered office for the purposes of the interpretation and enforcement of the convention; the applicable Union law and national law of the Member State where the EGTC's organs act; the arrangements for the involvement of members from third countries or from OCTs if appropriate including the identification of applicable law where the EGTC carries out tasks in third countries or

²⁵⁴ They are provided to point b point (b) of Article 2(1) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p.1).

²⁵⁵ They are provided to the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 coordinating procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p 114).

in OCTs; the applicable Union and national law directly relevant to the EGTC's activities carried out under the tasks specified in the convention; the rules applicable to the EGTC's staff, as well as the principles governing the arrangements concerning personnel management and recruitment procedures; the arrangements for liability of the EGTC and its members; the appropriate arrangements for mutual recognition, including for financial control of the management of public funds; the procedures for adoption of the statutes and amendment of the convention.

The statutes of an EGTC shall specify, according to art. 9 para. (2) of Regulation no. 1082/2006/CE amended by section 11 of the Regulation no. 1302/2013 EGTC, as a minimum, the following: the operating provisions of its organs and those organs' competences, as well as the number of representatives of the members in the relevant organs; its decision-making procedures; its working language or languages; the arrangements for its functioning; its procedures concerning personnel management and recruitment; the arrangements for its members' financial contributions; the applicable accounting and budgetary rules for its members; the designation of the independent external auditor of its accounts; the procedures for amending its statutes.

Grouping name consists of a name chosen by the members accompanied by "European Grouping for Territorial Cooperation" or "EGTC". The name of an EGTC whose members have limited liability shall include the word '*limited*', according to art. 12 of Regulation no. 1082/2006/CE.

The registered office of an EGTC shall be located in a Member State under whose laws at least one of the members is formed. Choosing the State, in which the Grouping will have its registered office, is important in terms of²⁵⁶:

- EGTC constitutional documents are prepared, recorded and modified according to the regulations of the State where the Grouping has its registered office. The requirements for the publication of the convention, statutes and accounts of an EGTC whose members have limited liability shall be at least equal to those required for other legal entities with limited liability under the laws of the Member State where that EGTC has its registered office.

- in matters relating to Group unregulated or only partially covered by the provisions of Regulation will be applied the laws of the Member State where the EGTC has its registered office;

- interpretation and application of the Convention and Statute shall be according to EU legislation and the legislation of the Member State where the EGTC has its registered office according to art. Article 8. (2). g) of Regulation no. 1082/2006/CE, as amended by art. 1, section 10 of the Regulation no. 1302/2013.

- control of an EGTC's management of public funds shall be organised by the competent authorities of the Member State where the EGTC has its registered

²⁵⁶ See Săraru, C.-S.: *Cartea de contracte administrative. Modele. Comentarii. Explicații*, C.H. Beck, Bucharest, 2013, p. 355

office. Exceptions are the EGTC actions co-financed by the European Union where is applied the relevant legislation on the control of EU funds and if the authorities of the Member State where the EGTC has its registered office adopt provisions allowing the competent authorities of other Member States to control actions taken on their territory by the EGTC in these states, if their national law permits, under art. 6 para. (2) of Regulation no. 1082/2006/CE;

- as regards liquidation, insolvency, cessation of payments and similar procedures, an EGTC shall be governed by the laws of the Member State where it has its registered office, as provided by art. 12 of the Regulation.

- in terms of art. 15 of the Regulation the EU legislation on jurisdiction shall apply to disputes involving an EGTC. In any case which is not provided for in such EU legislation, the competent courts for the resolution of disputes shall be the courts of the Member State where the EGTC has its registered office. Citizens of Member States of the EGTC retains the right to appeal to the national jurisdictions to exercise the appeals against public bodies that are members of an EGTC in respect of: (a) administrative decisions in respect of activities which are being carried out by the EGTC; (b) access to services in their own language; and (c) access to information.

The objective of an EGTC shall be to facilitate and promote, in particular, territorial cooperation, including one or more of the cross-border, transnational and interregional strands of cooperation, between its members, with the aim of strengthening Union economic, social and territorial cohesion and overcoming obstacles in the internal market.

In order to achieve the objectives, EGTC performs the tasks that have been entrusted to its members in accordance with Regulation no. 1082/2006/CE amended by Regulation no. 1302/2013. EGTC may carry out actions of territorial cooperation between members of the co-financed by the European Union through the European Regional Development Fund, European Social Fund and / or the Cohesion Fund or self-funded.

The tasks given to an EGTC by its members shall not concern the exercise of powers conferred by public law or of duties whose object is to safeguard the general interests of the State or of other public authorities, such as police and regulatory powers, justice and foreign policy.

Where an EGTC carries out any activity in contravention of a Member State's provisions on public policy, public security, public health or public morality, or in contravention of the public interest of a Member State, a competent body of that Member State may prohibit that activity on its territory or require those members which have been formed under its law to withdraw from the EGTC unless the EGTC ceases the activity in question. Such prohibitions shall not constitute a means of arbitrary or disguised restriction on territorial cooperation between the EGTC's members. Review of the competent body's decision by a judicial authority shall be possible.

The grouping may have a lifetime determined with an indication the period expressly or, where appropriate, an unlimited duration.

An EGTC, according to art. 10 of Regulation no. 1082/2006/CE, shall have at least following managing, administration and control organs:

- (a) an assembly, which is made up of representatives of its members;
- (b) a director, who represents the EGTC and acts on its behalf.

The statutes may provide for additional organs with clearly defined powers.

In Europe the EGTCs contribute to local development through the implementation of projects financed from EU funds, grants from the national governments or from their own funds in order to: enhancing of regional economic competitiveness by helping entrepreneurs, creating of jobs and promoting the investment²⁵⁷; conservation and enhancement of the artistic and cultural heritage²⁵⁸; environmental protection²⁵⁹; promoting of the urban²⁶⁰ and rural development²⁶¹; supporting innovation, research and higher education²⁶²; improving waste management²⁶³, improving of medical assistance²⁶⁴, etc.

The EGTCs activity is mainly achieved through:

- identifying the common areas of cooperation and the creation of development programs
- unitary approach to cross border issues through the creation of global strategies for the development

²⁵⁷ see programs developed by the EGTC Abaúj-Abaújban, Arrabona European Grouping of Territorial Cooperation, Bodrogekőzi European Grouping of Territorial Cooperation, Eurocidade Chaves – Verín EGTC, the Euroregion Senza Confini EGTC, the Euroregion Pyrenees-Mediterranean EGTC, EGTC TATRY Ltd, The EGTC Lille-Kortrijk-Tournai, <https://portal.cor.europa.eu/egtc/en-US/CoRAactivities/Pages/welcome.aspx>, accessed on April 5, 2014.

²⁵⁸ see programs developed by European Grouping of Territorial Cooperation Cities of Ceramics, the Espacio Portalet EGTC, <https://portal.cor.europa.eu/egtc/en-US/CoRAactivities/Pages/welcome.aspx>, accessed on April 5, 2014.

²⁵⁹ see programs developed by European Grouping of Territorial Cooperation Duero-Douro, the Parc européen Parco europeo Alpi Marittime – Mercantour EGTC, the ZASNET EGTC, <https://portal.cor.europa.eu/egtc/en-US/CoRAactivities/Pages/welcome.aspx>, accessed on April 5, 2014.

²⁶⁰ see programs developed by European Urban Knowledge Network (EUKN), the EGTC Eurodistrict SaarMoselle, <https://portal.cor.europa.eu/egtc/en-US/CoRAactivities/Pages/welcome.aspx>, accessed on April 5, 2014.

²⁶¹ see programs developed by the EGTC Karst-Bodva, <https://portal.cor.europa.eu/egtc/en-US/CoRAactivities/Pages/welcome.aspx>, accessed on April 5, 2014.

²⁶² see programs developed by the EGTC Euroregion Aquitaine-Euskadi, <https://portal.cor.europa.eu/egtc/en-US/CoRAactivities/Pages/welcome.aspx>, accessed on April 5, 2014.

²⁶³ see programs developed by the Efxini Poli - SolidarCity Network EGTC, <https://portal.cor.europa.eu/egtc/en-US/CoRAactivities/Pages/welcome.aspx>, accessed on April 5, 2014.

²⁶⁴ see programs developed by the Cerdanya Cross-Border Hospital EGTC, <https://portal.cor.europa.eu/egtc/en-US/CoRAactivities/Pages/welcome.aspx>, accessed on April 5, 2014.

- conducting of the studies to ensure a better response to cross-border issues.
- organizing of consultations, debates, conferences, work visits in matters of cross border cooperation
- attracting of the funding sources for projects developed
- facilitating of the management and implementation of the projects.

§3. Contribution of EGTCs established by municipalities from Romania and Hungary to sustainable regional development

Romania and Hungary have established together two EGTC's – *Banat - Triplex Confinium Limited Liability EGTC* and *Gate to Europe Limited Liability EGTC*.

Romania and Hungary have officially communicated its intention to establish in the future *Europe - building common future EGTC*²⁶⁵. Also the two countries have conducted negotiations for the establishment of the *Békés-Arad EGTC*²⁶⁶.

These EGTC's of cross-border cooperation illustrate the conception by Schamp about "functional regions" - "the territorial cooperation should stay and be based on existing links across borders, which together form the "functional regions", respectively interdependent territories that do not necessarily coincide with the political and the administrative territorial units outlined by national borders"²⁶⁷. The functional regions clearly illustrate the link between territorial cooperation and territorial development²⁶⁸. Border regions are usually located in geographical peripheries of their state and are often more underdeveloped than the central regions. Cooperation across borders stimulates development and synergy by encouraging mutual business between regional firms and contacts among local NGOs²⁶⁹.

²⁶⁵ See EGTC Monitoring Report 2012, European Union, April 2013, https://portal.cor.europa.eu/egtc/en-US/discovertheegtc/Documents/Monitoring%20Report%202012/EGTC_MonitoringReport_2012.pdf, p. 97, accessed on April 5, 2014.

²⁶⁶ *Idem*, p. 98.

²⁶⁷ Schamp, E.W.: „Die Bildung neuer grenzüberschreitender Regionen im östlichen Mitteleuropa – eine Einführung”, in Gruber, G., Lamping, H., Schamp E.W. (eds.): *Neue grenzüberschreitende Regionen im östlichen Mitteleuropa*, Frankfurt (Main), Selbstverlag Institut für Wirtschafts- und Sozialgeografie der J.-W.-Goethe Universität, 1995.

²⁶⁸ Boneva S.: *The Danube Strategy and the Energy security of the Danube macro region*, The DRC Summer School on Regional Co-operation, Proceedings 2011, p. 68.

²⁶⁹ *Ibidem*.

The role of regional cross-border cooperation is to foster mutual learning and traditional cultural elements and contributes to increased economic performance and social cohesion²⁷⁰. Implementation of such cooperation depends on the degree of homogeneity of economic, political and institutional conditions, in the administrative structures adjacent of border areas²⁷¹.

Under the influence of EU policies that provide a single economic market by abolishing internal borders and other barriers to trade, economic and social disparities between the border regions of Member States tend to diminish. Cross-border cooperation is no longer strictly an attribute of states, seen as their traditional quality, as the sole actors on the stage of international law²⁷². An important role is played today in cross-border policies by the administrative structures adjacent of the border areas, endowed with legal personality, by development associations created by them, and not least by transnational enterprises²⁷³.

§4. Bánát - Triplex Confinium Limited Liability EGTC

In November 2008 after a conference was born the idea of creating *Banat - Triplex Confinium Limited Liability EGTC* (BTC EGTC) which was established later on January 5, 2011 as a legal person with limited liability governed by public

²⁷⁰ Roper, S.: *Cross-border and local co-operation on the island of Ireland: An economic perspective*, „Political Geography”, vol. 26, Issue 5/2007, p. 554.

²⁷¹ For an analysis of factors to promote the cross-border cooperation among the countries of South-Eastern and Central Europe, see: Alexandru, I. (coord.): *Drept administrativ (Administrative Law)*, Omnia, Braşov, 1999, p. 733-736 (section 16.3.6. Unele aspecte privind promovarea cooperării transfrontaliere în România /Some aspects on promoting of cross-border cooperation in Romania); Stan, D.: *La réglementation juridique de la coopération transfrontalière, dans les documents internationaux de la Roumanie signés avec ses voisins (I) and (II)*, “International Law Notebooks” no. 2/2008 and no. 3/2008; Ibreljic, I., Kulenovic, S.: *Economic regional and cross-border cooperation in the South-East Europe for the purpose of its faster integration in the European Union*, 44th Congress of the European Regional Science Association Porto, Portugal 25-29 August, 2004. Paper provided by European Regional Science Association in its series ERSA conference papers, <http://ideas.repec.org/p/wiw/wiwsa/ersa04p224.html>; Dimitrov, M., Tsiapa, M., Petrakos G.: *Cross-Border Cooperation in South-eastern Europe*, “Eastern European Economics”, vol. 41, no. 6/November-December 2003, p. 5-25; Larion, A., Nedelea, M.-O., Elmazi, L.: *The Process of EU integration, regional development and cross border cooperation*, “The Annals of the “Stefan cel Mare” University of Suceava. Fascicle of The Faculty of Economics and Public Administration”, vol. 8, issue 1, June 2008, p. 44-49.

²⁷² See Săraru, C.-S.: *The cross-border cooperation agreement*, Juridical Tribune, Volume 1, Issue 1, June 2011, p. 107.

²⁷³ See on global reconsideration of the role of the states under the influence of construction of the European Union: Alexandru, I.: *Tratat de administrație publică (Treatise of public administration)*, “Universul Juridic”, Bucharest, 2008, p. 901-912; Apostol-Tofan, D.: *Instituțiile administrative europene (European administrative institutions)*, C. H. Beck, Bucharest, 2006, p. 114-128; Săraru, C.-S.: *Spațiul administrativ European (European Administrative Space)* in Alexandru, I. et al.: *Drept administrativ European (European Administrative Law)*, Lumina Lex, Bucharest, 2005, p. 95-146.

law, constituted on unlimited duration and having its registered office in the city Mórahalom from Hungary.

Banat - Triplex Confinium Limited Liability EGTC members are²⁷⁴ 37 local authorities from Hungary²⁷⁵, 37 local authorities from Romania²⁷⁶ and eight localities from Serbia as members observers²⁷⁷. In 2012, the Hungarian municipalities Csengele, Kistelek, Zákányszék and the Romanian municipalities of Foeni, Giulvăz, Sag have joined at the Grouping.

The *Bánát -Triplex Confinium EGTC* involving 342 000 inhabitants in a 3.500 km²'s area.

Governing bodies of the BTC EGTC are: General Assembly comprising all members, Chairman, Board of Directors composed of five members and supervisory board.

The BTC EGTC was set up to enhance the dynamism of the border areas and to raise their competitiveness through economic and social cohesion activities in agricultural innovation, renewable energy resources, infrastructure, education and training. The main purpose of EGTC is implementation of programs or projects, for territorial cooperation co-financed by the European Union through the European Regional Development Fund, European Social Fund and / or the Cohesion Fund.

In 2012, the budget of the *Bánát -Triplex Confinium EGTC* was 34 000 EUR²⁷⁸. It was made up of membership fees to cover operations. EU funding and Hungarian subsidies may also form part of the budget.

The precondition for an operative structure is the availability of funding. The financial endowments of EGTC reveal huge differences across Europe depending on the numbers of inhabitants of the areas covered as well as the economic standing of the regions involved. Eurométropole Lille-Kortrijk-Tournai, with a comparatively large annual budget of about EUR 1.5 million, stands next

²⁷⁴ For a description of the administrative-territorial component see <http://www.btc-egtc.eu/en/> - local governments.

²⁷⁵ Local authorities, members of Hungary are: Apátfalva, Ambrózfalva, Ásotthalom, Bácsborsód, Bordány, Csanádalberty, Csanádpalota, Csikéria, Domaszék, Ferencszállás, Forráskút, Földeák, Gara, Kelebia, Királyhegyes, Kiskunhalas, Kiszombor, Klárafalva, Kövegy, Kunbaja, Madaras, Magyarcsanád, Makó, Maroslele, Mórahalom, Nagyér, Nagylak, Óföldeák, Öttömös, Pitvaros, Pusztamérge, Röske, Ruzsa, Tompa, Újszentiván, Üllés.

²⁷⁶ Local authorities, members of Romania are: Banloc, Beba Veche, Birda, Cărpiniș, Cenad, Cenei, Checea, Ciacova, Comloșu Mare, Denta, Dădărești, Deta, Gataia, Ghilad, Giera, Gottlob, Iecea Mare, Jamu Mare, Jebel, Jimbolia, Lenaueheim, Liebling, Livezile, Lovrin, Moravita, Nitchidorf, Otelec, Periam, Pesac, Sacalaz, Sanmihaiu Roman, Sannicolau Mare, Sanpetru Mare, Tomnatic, Uivar, Varias, Voiteg.

²⁷⁷ The members observes from Serbia are: Ada, Zitiste, Čoka, Kanjiža, Novy Kneževac, Senta, Nova Crnja, Kikinda.

²⁷⁸ See the portal European Grouping of Territorial Cooperation - <https://portal.cor.europa.eu/egtc/en-US/CoRAactivities/Pages/B%C3%A1n%C3%A1t-Triplex-Confinium.aspx>, accessed on April 5, 2014.

to a large group of EGTCs (about one third of all groupings) that have annual budgets ranging between EUR 25 000 and 75 000²⁷⁹.

Since 2012, the *Bánát-Triplex Confinium EGTC* implemented several cross-border cooperation projects²⁸⁰:

- "Updating of the development strategies of local municipalities and creation of cross-border common sectorial development operational programmes and projects". This project aimed to constitute a modern, developed and competitive economy in the border region, with a 99.800 EUR's budget (85% EU funding).

- "Content development of the SMEs related services and the establishment and operation of a unified business development network" aimed to create cooperation opportunities for SMEs through the development of an agrarian network and a food industry with transport and storage infrastructure. The total budget of the project was EUR 90 128 (85% EU funded). From March 2013 to March 2014.

- The project "Dance and Music without borders" organised several events along the border areas. Total budget of EUR 87 771 (85% EU funded).

- "Strengthening co-operation and network resources in favour of achieving economic growth" was a project supporting the creation of business cooperation, with a total budget of 75 770 EUR (ERDF + National contribution EUR 71 981.96; EGTC contribution EUR 3 788.52). From the 1 March 2012 to 28 February 2013.

- The project "ExpoTrain SME" organised cross-border Expo and Training Sessions to empower SMEs, with total budget of 87 771 EUR (EU contribution of EUR 74 605.35, EGTC contribution EUR 8 764.05). From 1 March 2013 to 28 February 2014.

- The project "0041 ETT", with a budget of 5 000 000 HUF by the Hungarian Ministry of Justice. From 1 November 2011 to 31 May 2012.

So, thanks to the involvement of members of the EGTC BTC were developed in a short period of time, economic and cultural projects, which is a promising start. However, to sustainable economic development in the border area is necessary to develop primary transport infrastructure, the education and the exploitation of renewable energy resources. The transboundary EGTC offers the chance that through joint programs financed by the EU to be created and / or upgraded the infrastructure that will be then the engine of economic development.

²⁷⁹ See EGTC Monitoring Report 2012, European Union, April 2013, https://portal.cor.europa.eu/egtc/enUS/discovertheegtc/Documents/Monitoring%20Report%202012/EGTC_MonitoringReport_2012.pdf, p. 88, accessed on April 5, 2014.

²⁸⁰ See the portal European Grouping of Territorial Cooperation - <https://portal.cor.europa.eu/egtc/en-US/CoRAActivities/Pages/B%C3%A1n%C3%A1t-Triplex-Confinium.aspx>, accessed on April 5, 2014.

§5. Gate to Europe Limited Liability EGTC

Founding members of *Gate to Europe EGTC* are municipalities Nyíradony, Derecske, Hajdúhadház, Újfehértó (Hungary) and Săcueni, Valea lui Mihai, Cherechiu and Carei (Romania). The final decision of the Court of Budapest, on the establishment of the EGTC was given on 4 May 2012. *Gate to Europe EGTC* was established as a legal person with limited liability governed by public law, constituted of unlimited duration and with registered office in Nyíradony city from Hungary.

The management bodies of Grouping are: General Assembly composed of eight mayors who are responsible for making decisions for EGTC; Supervisory Committee composed of three mayors responsible for controlling the financial activities of the EGTC. This committee meets once a year.

The *Gate to Europe EGTC* involving around 88 000 inhabitants in a 808,78 km² area.

In future EGTC wants cooptation of new municipalities in Hungary (Újléta village; Álmosd village; Téglás city; Nyírmártonfalva village; Nyíracád village) and Romania (Tasnad city; Marghita city; Curtuiseni village; Beltiug village; Diosig city, Simian village)²⁸¹.

The EGTC was created as a platform for mayors to work together on joint cross-border projects and programmes. These activities are based on integral territorial investment (ITI).

Gate to Europe EGTC aims reinforce economic and social cohesion between its members as part of cross-border cooperation and the implement regional development plans and projects. The main sector of activities is tourism.

In future *Gate to Europe EGTC* aims to develop policies to provide young local entrepreneurs with new skills, create an agricultural organisation that addresses fragmentation of lending in the area, and develop recognised brands in the area²⁸².

In 2012, the budget of the *Gate to Europe EGTC* was 16 Million HUF (approximately 54 000 EUR)²⁸³.

Between 2 January 2012 - May 31, 2012 *Gate to Europe EGTC* has received the program "Aid budgetary for the European Territorial Associations" conducted by the Local Administration of Town Nyíradony²⁸⁴.

²⁸¹ See EGTC Monitoring Report 2012, European Union, April 2013, https://portal.cor.europa.eu/egtc/en-US/discovertheegtc/Documents/Monitoring%20Report%202012/EGTC_MonitoringReport_2012.pdf, p. 23, accessed on April 5, 2014.

²⁸² *Ibidem*.

²⁸³ See the portal European Grouping of Territorial Cooperation - <https://portal.cor.europa.eu/egtc/en-US/CoRAactivities/Pages/Gate-to-Europe.aspx>, accessed on April 5, 2014.

²⁸⁴ See the site Gate to Europe EGTC - <http://ro.europakapu.eu/Proiecte>, accessed on April 5, 2014.

Gate to Europe EGTC has not implemented yet any EU-funded project. However, it is planning to participate in the European Territorial Cooperation Hungary-Romania Program (ETC HU-RO), the South-East Europe Program (SEE TCP) and the Danube Strategy²⁸⁵.

We observe, therefore, that there is a desire to achieve sustainable joint development programs, but we appreciate that this will be not achieved in the future without the implementation of EU-funded projects and without the attracting of new members in the border region that would increase the administrative capacity required for implementation of tourism programs, agricultural programs, etc.

§6. Analytical presentation of EGTC *Bánát -Triplex Confinium* and *Gate to Europe* EGTC

A comparative analysis of the two EGTC is made in the table below:

| EGTC | Registered office | Date set up | Budget 2012 | Members | Policy area where EGTC is active ²⁸⁶ | Applicable law | Operating time | Languages | Key indicators | URL |
|----------------------------|--------------------|-------------|--|--|--|-----------------------|----------------------|------------------------------|--|---|
| BTC EGTC | Mórahalom, Hungary | 2011 | EUR 34 000. | 37 Hungarian municipalities and 37 Romanian municipalities. 8 Serbian municipalities as observer' members. | Entrepreneurship, start-up & strategy development, culture, sports | Hungarian public law | Undefined, long-term | Hungarian, Romanian, English | Inhabitants: 342 000 Surface area: 3 500 Km2 | www.btc-egtc.eu |
| Gate to Europe EGTC | Nyíradony, Hungary | 2012 | HUF 16 Mil-lion (approximately EUR 54 000) | 4 Romanian municipalities. 4 Hungarian municipalities. | Entrepreneurship; tourism development; education, training (in particular for the youth) | Hungarian public law. | Undefined, long-term | Hungarian, Romanian, English | Inhabitants: 88 000 (approximately half from each country) Surface area: 808.78 Km2 | http://www.europa-kapu.eu/ |

²⁸⁵ See the portal European Grouping of Territorial Cooperation - <https://portal.cor.europa.eu/egtc/en-US/CoRAActivities/Pages/Gate-to-Europe.aspx>, accessed on April 5, 2014 .

²⁸⁶ See EGTC Monitoring Report 2012, European Union, April 2013, https://portal.cor.europa.eu/egtc/en-US/discovertheegtc/Documents/Monitoring%20Report%202012/EGTC_Monitoring_Report_2012.pdf, Annex 2: Fields of activity in detail, accessed on April 5, 2014.

We observe that the two EGTC have both the registered office in Hungary, they are constitute an indefinite period and existing under the rules of public law in Hungary. Establishing of the EGTC registered office in Hungary determines, under the provisions of Regulation no. 1082/2006/CE amended by Regulation no. 1302/2013, the application of Hungarian public law regarding: preparation, modification and interpretation of the EGTC constitutional documents; controlling the management of public funds used by EGTC; the dissolution and liquidation procedures; resolving issues related to Group unregulated or only partially covered by the provisions of the EU Regulation; disputes involving EGTC in cases not covered by EU law and by the jurisdiction of the Court of Justice of the European Union.

Also both EGTC have the official languages Hungarian, Romanian and English and both have sites of presentation.

On the other hand, *Bánát -Triplex Confinium EGTC* has more experience being established a year earlier and with a greater number of members and therefore a greater number of people and a larger territorial area. Despite this, we note that *Gate to Europe EGTC*, benefiting from the "Aid budgetary for the European Territorial Associations" managed to have a bigger budget than the *Bánát -Triplex Confinium EGTC*. This emphasizes the need of involving a financial strength of regional municipalities (cities, districts) to contribute to the budget of the EGTC.

§7. Conclusions

EGTC are designed to help simplify the process of territorial cooperation on the borders of the Member States by providing a clear and coherent framework for interventions at local, regional and national levels, and preventing the constitutional, legal and financial barriers.

The two EGTCs set up by local authorities in Romania and Hungary - *Bánát -Triplex Confinium EGTC* and *Gate to Europe EGTC* - are just starting out. As time passes, Romania and Hungary should establish a network of EGTCs in which are members the administrative units in the border area (villages, towns, counties) and to be sought funding from the structural funds of European Union (European Regional Development Fund, European Social Fund, the Cohesion Fund) to develop joint programs that contribute to improving the transport infrastructure, protection of natural resources, transport and production infrastructure of energy, health care centres', programs enhancing tourism potential and in other areas of common interest.

The EGTCs with an older history have developed outstanding programs through EU funds. Thus it is worth mentioning the "CreaMed" project developed by the Euroregion Pyrenees- Mediterranean EGTC formed by the Mediterranean

regions from France and Spain. With a budget of 1.3 million euros, of which 75% EU Contribution, this project was developed between 2010-2012 and contributed to promote the Mediterranean industry by developing innovative and creative techniques in Mediterranean companies and led to growth in the area²⁸⁷.

The EGTCs experience with an older history shows that for access to the consistent financial sources should be attracted in addition to the villages and cities, also greater administrative territorial units (border counties). We also recommend the creation of programs through which the cross-border EGTCs be supported by the governments of the two countries by providing financing from the national budgets.

Under the terms of Regulation no. 1302/2013 EGTC will be members of an EGTC and undertakings responsible for providing services of general economic interest. Therefore, it opens the way for an EGTC to be used in the future to manage jointly of public services, with a particular focus on services of general economic interest or infrastructure. Consequently, public or private undertakings that provide services of general economic interest alone or through associations (eg. *the intercommunity development associations with the object of activity public utility services*²⁸⁸ in Romania) could become members of the EGTC, thus extending the cross-border and interregional cooperation in education and training, health care, social needs related to health and long-term care, childcare, access and reintegration in the labour market, social houses, support and social inclusion of vulnerable groups etc. So could achieve knowledge transfer at the level of best practice, and would reduce development disparities between different cross-border communities.

Finally, we emphasize that the cross-border EGTCs, operating a “reallocation of authority”²⁸⁹ from the state level to local administrative units’ adjacent border areas, can lead to mitigation of regional imbalances. Thus, EGTCs are away of promoting good neighbourliness, stimulating balanced economic development and social stability by building local and regional resources in joint projects.

²⁸⁷ For details about this project see <http://www.creativity4med.eu/>, accessed on April 5, 2014.

²⁸⁸ About the establishment and functioning of such associations see Săraaru, C.-S.: *op. cit.* (Cartea de contracte administrative), p. 281-370.

²⁸⁹ Alexandru, I., *op. cit.* (Tratat de administrație publică), p. 903.

Chapter V

General principles of European Administrative Law

Section 1. Introductory explanations

In some countries such as Belgium, France, Greece, Ireland and the UK, it is noted that the general principles of administrative law, designed to lay down standards and suggest a behavioral pattern of civil servants, appear in different parts of the legislation in force, of the parliament, specific parts of the delegated legislation or courts of law ruling in disputes involving the public administration. Unlike these, other countries have imposed general codification of the administrative procedure in order to systematize these principles. Thus, Austria (1925), Belgium (1979), Denmark (1985), Germany (1976), Hungary (1957), the Netherlands (1994), Poland (1960), Portugal (1991) and Spain (1958)²⁹⁰.

At national level, these principles are included in administrative institutions and procedures at all levels. Public sector actors are legally obliged to comply with these legal principles and their compliance is controlled by independent control bodies, judiciary systems and judiciary forces, parliamentary scrutiny and, in some cases, authorized individuals²⁹¹.

At European level, it should be noted that most of the general principles of European Administrative Law have been developed by the European Court of Justice, being developed by the practice of the European Mediator and the European Code of Good Administrative Behavior developed by the European Court of Justice. Some of these principles are currently being developed by the Charter of Fundamental Rights of the European Union.

These principles underpin the drafting of the **European Union Administrative Procedure Code**²⁹² by the Research Network on EU Administrative Law (ReNEUAL²⁹³). The draft was presented to the plenary of the European Par-

²⁹⁰ See Cătălin-Silviu Săraru, *Capitolul 3 – Principiile generale ale dreptului administrativ european*, in Ioan Alexandru, Cătălin-Silviu Săraru a.o., *Drept administrativ european*, Lumina Lex, Bucharest, 2005, p. 156-177; Cătălin-Silviu Săraru, *Considerații cu privire la principiile Spațiului administrativ european și la necesitatea includerii lor în proiectul Codului administrativ român*, „Caietul Științific” ISAR no. 7/2005, Section for Legal and Administrative Sciences, 2005, p. 12-41.

²⁹¹ see to that effect Sigma nr. 27, OECD, *Principles for Public Administration*.

²⁹² See Herwig C.H Hofmann, Jens Peter Schneider, Jacques Ziller, Dacian C. Dragos, *Codul ReNEUAL de procedura administrativa a Uniunii Europene*, Universul Juridic, Bucharest, 2016.

²⁹³ For the documents developed by the EU Research Administrative Network research network, see www.reneual.eu.

liament and formed the basis of the European Parliament's resolution of 15 January 2013 calling on the European Commission to submit a proposal for an act on the EU's administrative procedure [2012/2024 (INL)].

The principles of public administration and public service law are often difficult to define, sometimes appearing in some antinomy. Thus, efficiency seems to be non-existent in some procedures; loyalty to the government seems to be in opposition to professional integrity and political neutrality; some decisions seem to be sometimes taken out of positive legislation, etc. That is why the doctrine refers to the existence of "blind concepts" related to the elusive nature of the principles of public administration. "Blind concepts" are frequent concepts, with elusive content or even vague principles that are issued and redefined by courts of law or other public authorities approved in particular cases²⁹⁴. This lack of clarity raises numerous legal disputes, which are subject to trial by the courts of justice, which must correlate their previously defined definitions with social values and perceptions that evolve over time. Consequently, the conceptual outline of these principles remains unclear on a permanent basis. "Blind concepts" are, therefore, those of good faith, reasonableness, pursuit of general good and loyalty. Virtually all legal principles can be categorized as "blind concepts." Attempts to ensure detail in these elusive aspects tend to lead to inconsistency and contradiction. Contradiction and discrepancy also cause difficulties in updating principles by affecting legal influences. From a legal perspective, appealing to "blind principles" seems appropriate due to their malleability in disparate situations. However, from the point of view of the behavior of civil servants and public authorities, it is necessary to develop the general principles established by the Court through a specific doctrine.

In order to undertake a scientific study on a category of social problems, we must first approach the setting of the method of study, namely the determination of the research and reasoning procedures most suited to the study of these problems and allowing in-depth examination of the social facts, varied and multiform, by introducing a principle of unity and order²⁹⁵. The advisable method can not differ from that established for other public law branches²⁹⁶. Therefore, we will have to deal with **observation** and **analysis** work. The manifestations of the legal life that coordinate the administration to uncover the principles through which the relations between the Union, states and individuals are ensured must be examined. On the other hand, the methodological approach to European administrative law must be centered on the **principle of functionality** that seeks the truth behind labels, trying to identify the substance of the rights, powers and legal obligations that are recognized and enforced in various legal systems.

²⁹⁴ Sigma Paper no. 27.

²⁹⁵ Paul Negulescu, *op. cit.* (*Principes du Droit International Administratif*), 1935, p. 28.

²⁹⁶ *Idem*, p. 28.

By applying the **induction**, we can reach with general caution, general conclusions and the formulation of principles. These principles must be applicable to new cases created by social life and which the legislator did not foresee, given that the purpose of any legal reasoning is to find solutions to a human conflict. In this study, contact with social realities must not be lost, which can respond to the need to create European administrative services and the principles that govern them. Studying social reality in principle allows for the discovery of interdependence and the need for cooperation between states, individuals and the Union, making it possible to create bodies to meet these needs and the principles of their organization and functioning.

The major concern in this area is to reconcile the individual legal rights with protection with the requirements of an effective and efficient administration of the Union. That is why, many times, the Court has taken into account, along with the interest of the citizen's protection by law and the so-called "administrative reasons"²⁹⁷.

The general principles of European Administrative Law can be systematized into four groups²⁹⁸:

- 1) trust and predictability;
- 2) openness and transparency;
- 3) responsibility;
- 4) efficiency and effectiveness.

Section 2. Trust and predictability

These goals can also be identified by legal certainty and security in administrative actions and decisions. These principles actually aim at eradicating arbitrariness in public affairs.

A principle of trust and predictability is **the principle of "administration by law"** or of the lawfulness of the administration. Public authorities make certain decisions in accordance with the rules and general principles applied impartially (the principle of non-discrimination) to any person who requests them.

²⁹⁷ Case 39/84 Maizena GmbH v HZA Hamburg-Jonas, paragraph 22, on the deduction of monetary compensatory amounts paid for the basic product for the purpose of calculating monetary compensatory amounts for the by-product.

²⁹⁸ Sigma Paper no. 27, OECD, *Principles for Public Administration*, 1998, document that can be accessed here: <http://unpan1.un.org/intradoc/groups/public/documents/nispacee/unpan006804.pdf> (last consulted on the 15th of July 2017); The General Principles of EU Administrative Procedural Law, study prepared in 2015 under the aegis of the European Parliament which can be consulted here: http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519224/IPOL_IDA%282015%29519224_EN.pdf (last consulted on the 15th of July 2017).

In the French doctrine, Carré de Marlberg emphasizes that the administration must remain *intra legem*, that is to say, within the limits set by the law, and can only be done according to it, namely *secundum legem*, so according to the provisions of the legislative texts and only in their basis. "The law is not only the limit of administrative activity, it is also its condition"²⁹⁹. The regime of the rule of law implies that the limits imposed by the state are in the interest of individuals so that they have the legal possibility to act before a court that is able to cancel or reform the administrative act damaging to the individual.

The public administration must decide according to the laws in force and the interpretative criteria established by the courts of justice, without considering any other aspect. The letter of the law opposes arbitrary power, relationship or any other deviation. This jurisprudential principle is taken over by the European Code of Good Administrative Behavior of 2001, which states in Article 4 entitled "Legitimacy" that "The official shall act in accordance with the law and apply the rules and procedures laid down by Union law. In particular, the official shall ensure that decisions affecting the rights or interests of persons have a legal basis and their content is in accordance with the law. "

The principle of legality relates to the principle that a public authority is not normally entrusted with exclusive decision-making power, which is inconsistent with the laws in force. This principle is considered to be based on the French doctrine which speaks of "preeminence of regulatory acts on individual acts of an official public authority"³⁰⁰.

Another notion of legality is that of **legal competence**. Thus, public authorities can only decide on issues within their legal jurisdiction. Jurisdiction means a collection of legally predetermined tasks for the proper functioning of the public service, by virtue of which the official may decide on a matter of public interest, which not only authorizes the person concerned to make a decision but also compels take responsibility for this. A competent public authority can not waive this responsibility. The notion of competence is strictly defined, so that the decision of an unauthorized, incompetent person is null and will be declared as such by the European Court of Justice. Control of legality of acts issued by EU institutions is carried out through an administrative procedure by the European Ombudsman (Article 228 TFEU) through a political procedure by the European Parliament's Committee on Petitions and by a European Court of Justice (Article 251 et seq., TFEU).

Trust and predictability do not contradict the **discretionary power of the administration** if it is exercised within the limits of the law. Practically, the discretion of the administration is not confused with arbitrariness. In French law, the discretionary power evokes, *lato sensu* "the freedom of decision and action of the

²⁹⁹ Carré de Marlberg, *Contribution à la théorie générale de l'État*, Paris, Ed. Sirey, 1920, vol I, p. 448.

³⁰⁰ SIGMA Papers no. 27.

executive in the law". It represents for the administration "freedom of appreciation, action and decision". In German doctrine, the notion evokes for administration "a margin of possible and necessary conduct in law enforcement." The determination of the mode of action in a specific case is not only influenced by legality causes, but also by considerations of opportunity³⁰¹. The European Court of Justice ruled in its decision no. 280/1980 on the selection of civil servants that "It is up to the administration to designate the selection criteria by virtue of its discretionary power and taking into account the requirements of organizing and rationalizing services". The Court of Justice has repeatedly stressed, and especially in cases with more spectacular aspects, that it seeks to respect the limits of discretionary power and to oppose unlawful clientelism as regards the right of European civil service. When the administrative decision fails to respect the external boundaries that the law establishes for the discretion of the administration, or, in other words, when the administration orders a legal effect unforeseen by law, there is excess power. In general, in the national doctrine, it is appreciated that the more controllable the forms of control of the exercise of the public power exercise, the more the risk that the administration acts with excess power becomes lower³⁰².

Decisions in which discretionary power is manifested therefore relate to issues which, within a legal framework, confer on the public authority some discretion; this in no way implies deviation from the letter of law. The need for discretionary power arises from the fact that the legislation can not foresee any kind of situation that could interfere over time. Therefore, this status is expressly granted to public authorities. The European Court of Justice has developed a case-law of the discretionary power in public administration, setting strictly the framework for its exercise. Thus, public authorities are obliged to act only in good faith, to pursue the public interest in a reasonable manner, to follow the correct procedures, to comply with the requirements of non-discrimination and to pursue the principle of proportionality. In other words, the discretionary power can not operate without respecting the general principles of the public administration law, since they actually create a counterbalance to the decision-making power given to public authorities. By the judgment in Case C-269/90³⁰³, the Court has held that, in cases where the Community institutions have a certain discretion, it is necessary to respect the guarantees afforded by the Community legal order in

³⁰¹ Jürgen Schwarze, *op. cit.* (*Droit administratif européen*), 1994, p. 274-294, cited by Constanța Călinoiu, Verginia Vedinaș, *Teoria funcției publice comunitare*, Lumina-Lex, Bucharest, 1999, p. 121.

³⁰² Dana Apostol Tofan, *Puterea discreționară și excesul de putere al autorităților publice*, All Beck, Bucharest, 1999, p. 18.

³⁰³ Arrêt de la Cour du 21 novembre 1991. Technische Universität München contre Hauptzollamt München-Mitte. Demande de décision préjudicielle: Bundesfinanzhof - Allemagne. Tarif douanier commun - Franchise pour appareils scientifiques - Valeur scientifique équivalente. Affaire C-269/90. *Recueil de jurisprudence 1991 page I-05469*.

administrative proceedings. Those guarantees include, in particular, the obligation for the competent institution to examine with care and impartiality all the relevant elements of the case, to listen to the person who will bear the consequences of the issue of the act, to inquire beforehand as to how the act will be received and to motivate the decision in a sufficient manner.

Other principles that play an important role are the **principle of legitimate expectation**³⁰⁴ and the **principle of legal certainty**. Any individual who finds himself in a situation where the administration has provided him with precise assurances, giving rise to his hopes of well-founded hopes, is believed to have gained legitimate confidence in the action of the administration³⁰⁵. Furthermore, the case-law of the European Court of Justice states that economic operators are not entitled to use legitimate expectations in maintaining an existing situation which can be altered within the discretion of the Community institutions, particularly when it comes to decisions taken with a view to creating the single market, and the subject of the regulation is a permanent adaptation to changes in the economic situation (ECJ judgment 424/85).

The principle of legal certainty concerns the safety of the legal circuit. This principle precludes a Community act from being applied from a date prior to its publication. The principle also implies that a regulation imposing duties on the taxpayer must be clear and precise, so that it can know its rights and obligations unambiguously (ECJ C-337/88). Various institutions of administrative law are organized in accordance with the principles of legitimate trust and legal certainty. The withdrawal of an unlawful act is permissible only if it intervenes under certain conditions strictly specified by the Court: withdrawal of the act within a reasonable time (a period of two months or more from the issue must be considered reasonable and a longer term two years must be regarded as excessive - Judgment T-20/96), observance of the principle of legal certainty and observance of the principle of the legitimate expectation of the beneficiary of the act which appeared to be apparent in its legality³⁰⁶. The decisive moment from which it is

³⁰⁴ See also Sylvia Calmes, *Du principe de protection de la confiance légitime en droits allemand, communautaire et français*, Paris, Dalloz, 2001.

³⁰⁵ Arrêt du Tribunal de première instance (première chambre élargie) du 16 octobre 1996. *Efisol SA contre Commission des Communautés européennes*. Règlement (CEE) n° 594/91 sur les substances qui appauvrissent la couche d'ozone - Attribution de quotas - Licences d'importation - Refus d'octroi - Demande en indemnité - Protection de la confiance légitime. Affaire T-336/94. *Recueil de jurisprudence 1996 page II-01343*.

³⁰⁶ Arrêt du Tribunal de première instance (cinquième chambre) du 21 juillet 1998. *John Mellett contre Cour de justice des Communautés européennes*. Fonctionnaires - Recevabilité - Titularisation - Confiance légitime - Égalité de traitement. Affaires jointes T-66/96 et T-221/97. *Recueil de jurisprudence - fonction publique 1998 page IA-00449; II-01305*

believed that there is confidence in the apparent legality of the act in the conscience of the addressee is the moment of notification of the act and not the date of its adoption or withdrawal³⁰⁷.

Another principle in favor of trust and predictability is the **principle of proportionality**³⁰⁸. This means that the administrative action must proceed in proportion to the objective pursued and the legal completion, respectively, without bringing any aspect of the public that would facilitate the achievement of the proposed and legitimate aim. Proportionality is closely related to the reasonableness. It also means that it is illegal to apply the law only when it comes through an advantage unintentionally omitted by law. This may be what is called **abuse of administrative power**. Proportionality is particularly relevant in cases of administrative inquiries (cases of expropriation) in which individuals are privately owned by the owner in favor of the public interest.

It is generally appreciated that administrative proportionality can be analyzed at least as a result of the combination of three elements (the decision taken, its purpose and the factual situation to which it applies), but equally as part of a wider ensemble, but homogeneous, almost as a key notion of administrative law and administration science³⁰⁹.

J. Ziller points out that, from a European perspective, the principle of proportionality is present in the public law of most EU countries³¹⁰. The author considers that explicit recognition of the principle of written law, jurisprudence or doctrine is increasingly common, but a distinction should be made between countries where this principle applies to administrative law as a whole and those in which its use is limited to the field of application of EU law. At least four countries would enter the first category. Thus, for more than a century, the administrative law in Germany, the one in Portugal, following the adoption of the 1976 Constitution, Austria, 25 years and the Netherlands, for 20 years explicitly enshrines the principle of proportionality as a fundamental principle of public law and it would seem that the Nordic countries could also be included in this cate-

³⁰⁷ Arrêt de la Cour (sixième chambre) du 17 avril 1997. Henri de Compte contre Parlement européen. Fonctionnaires - Décision reconnaissant une maladie professionnelle - Retrait d'un acte administratif - Confiance légitime - Délai raisonnable - Pourvoi. Affaire C-90/95 P. *Recueil de jurisprudence* 1997 page I-01999

³⁰⁸ On the principle of proportionality in EU law and its transposition into Romanian law see Marius Andreescu, Ruxandra Andreescu, *Principiul proporționalității în dreptul comunitar. Propunere de revizuire constituțională*, „Revista de Drept Public” no. 3/2007, p. 25-38. Given the particular importance of this principle in limiting the discretionary power of public authorities and in the exercise of fundamental citizenship rights, the authors propose by law to introduce a new paragraph to art. 1 entitled The Romanian State of the Romanian Constitution stipulating that “*The exercise of state power must be proportionate and non-discriminatory*” - Marius Andreescu, Ruxandra Andreescu, *op. cit.*, p.38.

³⁰⁹ Dana Apostol Tofan, *op. cit.* (*Puterea discreționară...*), 1999, p. 47.

³¹⁰ J. Ziller, *Le principe de proportionnalité en droit administratif et droit communautaire*, in „L’Actualité juridique-Droit administratif”, of 20 June 1996, special number, p. 185.

gory. In other countries, such as Italy, Spain and Ireland, even if an explicit confession has recently occurred, the use of the principle seems limited to the direct scope of EU law. In other countries, such as Luxembourg, Belgium, Greece, but especially in France, although the principle is not explicitly mentioned in legislation or jurisprudence, the doctrine identifies and discovers it applied in one case or another. In the UK, it would also seem that practitioners began to take it into account.

The nature of the proportionality principle varies from one country to another due to its formal origins (in many countries, the only source is case law) and due to the functions it performs³¹¹. According to the same author, the gradual codification of the non-contentious administrative procedure in the European countries could be envisaged. The example of the Dutch regulation of 1992 is eloquent in this respect: "The adverse consequences of a decision for one or more persons must not be disproportionate to the aims of the decision." The principle of proportionality may also be provided for in the Constitution of a State (eg the Portuguese Constitution of 1976) or, even if it is not explicitly provided, doctrine and case-law can be considered unanimously as part of the notion of a state governed by the rule of law, art. 20 and 28 of the Basic Law of Germany. The frequent occurrence of the principle is also found in the contentious function, since proportionality allows the judge to be guided in his appreciation of the exercise of the discretionary power of the administration.

Analyzed in this comparative perspective, the principle of proportionality demonstrates the functioning of the reception mechanisms in European law. It is one of the principles that best illustrates the phenomenon of mutual inspiration of the legal systems of states, belonging to the same Law Union that is currently developing³¹².

At European Community level, the notion of proportionality has been developed by the European Court of Justice, following a line already established by German law³¹³, to be enshrined in Community law and to enter the majority

³¹¹ Idem, p. 186.

³¹² Ibidem, p. 188.

³¹³ The German system has enshrined the principle of proportionality in the field of public order since the nineteenth century. Thus, in Kreuzberg's judgment, the Supreme Court of Prussia first raised the question of whether public action exceeded what was imposed by the intended purpose. In conclusion, the Court has asked the public authority for special approval whenever it violates citizens' freedoms. More recently, the Federal Constitutional Court defined the principle of proportionality in the following terms: "Administration intervention must be appropriate and necessary to achieve its objective. It can not impose excessive burdens on the individual, and therefore must be reasonable in its effect on the individual" - *Collection of Decisions of the Federal Constitutional Court*, vol. 48, p. 402.

of European administrative systems. One example is the European Court of Justice's decisions. Thus, it is clear from the judgments 15/83³¹⁴ and 181/84³¹⁵ that 'in order to determine whether a provision of Community law complies with the principle of proportionality, it is important to ascertain whether the means which implement it are appropriate and necessary to attain the aim pursued. Furthermore, in Case 181/84, when a Community regulation establishes a distinction between a principal obligation, the fulfillment of which is necessary to achieve the objective in question, and a secondary obligation of a primarily administrative nature, it must comply with the principle of proportionality in dosing sanctions for non-fulfillment of the two obligations. Decision 15/83 states that the principle of proportionality is not violated by legislation providing for prior administrative control of the conditions for the use of financial aid if there is a risk of fraud.

The principle is taken over by art. 5 (4) TEU stating that "on the basis of the principle of proportionality, Union action, in its content and form, does not go beyond what is necessary to achieve the objectives of the Treaties". The application of the principle is further detailed in Protocol No 2 to the TEU and the TFUE for the application of the principles of subsidiarity and proportionality.

The *Code of Good Administrative Behavior* stipulates in Art. 6 that in taking decisions, the official shall ensure that the measures taken are proportionate to the aim pursued. In particular, the official shall avoid limiting the rights of citizens or imposing obligations on them if these limitations or tasks are not in a reasonable relation to the intended action. In making decisions, the official will respect the right balance between the interests of private individuals and the interest of the general public.

Another principle advocating "administration by law" is **procedural fairness**. This means procedures that apply the law in a clear and impartial way, to pay attention to social values, such as respect for people and the protection of their dignity. A concrete application of procedural fairness is the principle that no person may be deprived of his / her fundamental rights without being advised in advance and heard in an appropriate manner. Thus, in judgment 234/84³¹⁶, the

³¹⁴ Arrêt de la Cour (deuxième chambre) du 17 mai 1984. Denkvit Nederland BV contre Hoofdprodukschap voor Akkerbouwprodukten. Demande de décision préjudicielle: College van Beroep voor het Bedrijfsleven - Pays-Bas. Marché agricole - Aides au lait écrémé en poudre transformé en aliments pour animaux - Conditions de versement. Affaire 15/83. *Recueil de jurisprudence 1984 page 02171*.

³¹⁵ Arrêt de la Cour (cinquième chambre) du 24 septembre 1985. The Queen, ex parte E. D. & F. Man (Sugar) Ltd contre Intervention Board for Agricultural Produce (IBAP). Demande de décision préjudicielle: High Court of Justice, Queen's Bench Division - Royaume-Uni. Restitutions à l'exportation - Perte de caution - Principe de proportionnalité. Affaire 181/84. *Recueil de jurisprudence 1985 page 02889*.

³¹⁶ Arrêt de la Cour du 10 juillet 1986. Royaume de Belgique contre Commission des Communautés européennes. Aides d'État - Prise de participation dans le capital d'une entreprise - Droits de la défense. Affaire 234/84. *Recueil de jurisprudence 1986 page 02263*.

Court held that 'respect for the rights of the defense in all proceedings brought against a person and liable to cause damage constitutes a fundamental principle of Community law and must be ensured even in the absence of any rules concerning procedure. That principle requires that the person against whom the Commission has commenced an administrative procedure must be able, during that procedure, to make known his point of view of the reality and relevance of the facts and circumstances relied on and of the documents held by the Commission the support of his support when there is a violation of Community law. Where the person concerned is unable to comment on documents containing information covered by business secrets, the Commission can not retain that information in its decision.' In this sense, Art. 41 of the EU Charter of Fundamental Rights - *Right to good administration* (previously analyzed). The Code of Good Administrative Behavior provides (Article 16 - *Right to be heard and to make statements*) that where the rights or interests of citizens are at stake, the official shall ensure that the rights of defense are respected at each stage of the procedure of the decision. Where a decision has to be taken to affect its rights and interests, any person has the right to submit written observations and, if necessary, to make oral submissions before the decision is adopted.

Another element that supports confidence and predictability is the **principle of reasonable procedural term**. Delays in taking decisions or finalizing administrative procedures can cause frustration, injustice, or adversely affect both public and private interests. Delays can result from some inappropriate resources or the lack of a possible political settlement. Often this phenomenon is associated with the inefficiency and incompetence of civil servants. Legal procedures can help solve problems by setting clear time limits for completing each case. On the other hand, a public service with a recruitment and advancement scheme based on merit and requiring permanent training can reduce the incompetence within the public administration, working in favor of true values. The *Code of Good Administrative Behavior* stipulates in art. 17 that the civil servant must ensure that the decision on each application or complaint addressed to the institution is taken within a reasonable time-limit without delay and in any case no later than two months after the date of receipt. The same rule applies to the reply to the letters sent by citizens as well as to the replies to the administrative notes sent by the official to his hierarchical superiors to ask them for instructions on the administrative decisions he has to take. If, in relation to the complexity of the problem raised, the institution can not decide within that period, the official must inform the author of the request as soon as possible. In this case, the applicant must be notified of a final decision within the shortest possible time.

The value of **professionalism** and **professional integrity** in public service influences the trust and predictability of public administration. The professional integrity of the civil service is based on **impartiality** and **professional independence**. The *Code of Good Administrative Behavior* states that the official is impartial and independent (Article 8). He must refrain from any arbitrary action

that affects citizens and from any preferential treatment. The conduct of an official must never be guided by personal, family or national interests or by political pressure. The official will not participate in the adoption of any decision in which he or she, or any close family member, has a financial interest.

Impartiality refers to the absence of personal preferences. In the field of public administration, preference is to favor a particular aspect of a given situation, causing unjustified and unfair harm to the general interest or the rights of other stakeholders. The loss of professional independence is manifested by the loss of objectivity in thought and judgment, so that a case will no longer be appreciated according to its real elements. Bribes, pressures, uncontrolled political ambition, and a strong desire for promotion are the main causes of the loss of professional independence³¹⁷.

It is worth pointing out that a public service whose recruitment and promotion system is primarily based on political patronage or alliances of different types is more exposed to the risk of disregarding professional integrity than a system based on merit.

Section 3. Openness and transparency

Openness suggests that the administration is willing to accept a viewpoint from outside, while transparency means the degree of openness in the case of a vote or a check³¹⁸. These two features allow, on the one hand, that any citizen involved in an administrative procedure be able to follow the course of the procedure and, on the other hand, that the administration can more easily accept and accept an assessment from authorized institutions, or of civil society.

The Treaty on European Union (TEU) enshrines the notion of transparency in art. 1, par. 2, pointing out that "this Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, where decisions are taken with full respect for the **principle of transparency** and as close as possible to citizens."

Article 11 (2) TEU provides that the institutions of the Union maintain an open, transparent and constant dialogue with representative associations and civil society. Article 15 (3) TFEU also provides that any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has a right of access to the documents of the Union institutions, bodies, offices and agencies, of the support on which these documents lie, subject to the principles and conditions established by regulations by the European Parliament and the Council.

³¹⁷ See in this regard SIGMA Papers, no. 27, *op. cit.*

³¹⁸ *Idem.*

Transparency of the decision-making process in the European institutions is guaranteed by the provisions of *Regulation No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents*³¹⁹. The preamble to this Regulation states that transparency allows for better citizen participation in decision-making, as well as greater assurance of the legitimacy, effectiveness and accountability of the administration of citizens in a democratic system. Transparency contributes to strengthening the principles of democracy and respect for fundamental rights.

Beneficiaries of this Regulation are all citizens of the Union and all natural or legal persons residing or having their registered office in a Member State (Article 2 (1)).

"Documents of the European Institutions" on which a right of access is established shall be understood as "any content whatever their medium (written on paper or stored in electronic form, recorded audio, visual or audiovisual) in relation to a related field policies, activities and decisions falling within the competence of the respective institution" (Article 3 of the Regulation).

In principle, all documents of the European institutions must be accessible to the public. The exceptions are strictly stipulated by art. 4 of the Regulation. Thus, institutions may refuse access to a document if its disclosure could undermine protection:

a) the public interest as regards:

- ☐ public security
- ☐ defense and military affairs
- ☐ international relations
- ☐ the financial, monetary or economic policy of the Union or of a Member State

(b) privacy and integrity of the individual, in accordance with Union legislation on the protection of personal data.

Also, under Article 4 (2) of the Regulation, the EU institutions may refuse access to a document if its disclosure could undermine protection:

- ☐ the commercial interests of a particular natural or legal person, including the protection of intellectual property rights
 - ☐ court procedures and legal advice
 - ☐ the objectives of inspection, investigation and audit activities,
- unless an overriding public interest justifies the disclosure of the document concerned.

A Member State may require an EU institution not to disclose a document originating from that State without its prior consent (Article 4 (5) of the Regulation).

³¹⁹ Published in J.O. L154/31.5.2001.

These exceptions to free access to documents apply only during the period during which protection is justified in the light of the content of the document. Exceptions may apply during a maximum period of thirty years. In the case of documents to which public access is refused on grounds of protection of privacy or commercial interests, exceptions to the prohibition may apply, if necessary, beyond that period (Article 4 (7) of the Regulation).

Requests for access to documents shall be made in writing, including by electronic means, in one of the languages of the Member States and in sufficient time to enable the institution to identify the document. The applicant is not required to justify his request (Article 6 (1) of the Regulation). If the application is not sufficiently precise, the institution will not reject the application but will invite the applicant for clarification (Article 6 (2) of the Regulation).

Requests for access to documents must be promptly dealt with by the institutions to which they are addressed. Within 15 business days from the date of filing the application, the institution must grant access to the documents requested and provide these documents. In the case of a total or partial refusal, the institution must provide the applicant with a reasoned written reply and inform him / her of his / her right to file a *confirmatory application* (Article 7 (1) of the Regulation).

European regulation establishes in favor of the applicant the possibility of recourse to graceful appeal. Thus, in the event of total or partial refusal or absence of the institution's response, the applicant may address, within 15 working days of receipt of the institution's response or from the date on which the institution was required to respond, in the in the case of the silence of the administration, a *confirmatory application* for the revision of the position of the institution (Article 7 (2) and (4) of the Regulation). Graceful appeal is a mandatory administrative procedure for recourse to justice.

The *confirmatory request* must be promptly dealt with. Within 15 working days of filing the application, the institution must either grant access to the requested documents and provide these documents or communicate in writing the grounds for its total or partial refusal. If the access is totally or partially refused, the institution will inform the applicant of the possibility of bringing a judicial appeal against the institution and / or submit a complaint to the European Ombudsman (Article 8 (1) of the Regulation). Also, the absence of the institution's response within the legal timeframe is considered as a negative response and empowers the applicant to bring a legal appeal against the institution and / or to submit a complaint to the European Ombudsman (Article 8 (3)).

In order to enable citizens to make effective use of the rights conferred by the Regulation, each European institution is obliged to keep a register of documents accessible to the public. (Article 11 (1) of the Regulation).

Each institution is required to publish an annual report stating the number of refusals of access to documents opposed by the institution and the reasons for such denials (Article 17 (1) of the Regulation).

As a general rule, public administration policy should be one of openness and transparency. Only cases of an exceptional nature, relating to European and national security or similar issues, should be kept secret and confidential. Personal data must also be protected by third parties. Officials working with citizens' personal data must respect the privacy and integrity of individuals, as laid down in Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 *on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data*³²⁰. Officials should, in particular, avoid treating personal data for non-legitimate purposes or transmitting it to unauthorized third parties (Code of Good Administrative Behavior, Article 21).

At a national level, it is often noted that authorities tend to declare some documents more confidential than they are. Thus, with the exception of Sweden, which has been open and transparent since the end of the eighteenth century³²¹, the traditional standard of administration was discretion. It is only from the 1960s that the open style of governance has begun to develop in some democracies, today being considered an essential standard for public administration. Before the 1960s, the only application of the principle of openness in western European democracies was, on the one hand, the principle that the laws entered into force only after they had been published in an official bulletin and, on the other hand, that administrative decisions were applicable only after their communication and acceptance by those concerned.

Openness and transparency can lead to a limitation of bad administration and corruption. They are also necessary to respect individual rights insofar as they provide the necessary reasons for administrative decisions and help stakeholders exercise their right to seek redress.

These principles find their application in European legislation on public administration. Administrative actions must therefore be motivated and carried out by a competent authority. Public registers must be made accessible to the general public, with EU institutions being obliged to keep a register of entries and exits of documents and measures to be taken, in accordance with Art. 24 of the *Code of Good Administrative Behavior*. The agents of the authority must make their identity public, in the reply or acknowledgment of receipt of a request, the name and telephone number of the official dealing with the file and the service to which he belongs (Article 14 (2) of *Code of Good Administrative Behavior*). Civil servants must accept certain private-sector gain restrictions, which must be announced and authorized before they occur.

An important element for openness and transparency in public administration is **the obligation of public authorities to make known the reasons for**

³²⁰ OJ L 8/1, 12.1.2001.

³²¹ See in this regard SIGMA Papers no. 27, op. cit.

their decisions. The European Court of Justice has repeatedly shown that decisions taken by officials in the European institutions must be motivated in a sufficient manner³²². The reasoning must provide the essential elements of the administrative procedure applied and be sufficiently justified to allow the interested party to appeal against the final decision.

Motivation must be in fact and in law. "Reasons" should be understood as both the legal provisions that entitle the institutions to take action and the reasons which motivate the institutions to issue the act in question³²³. The mention of the legal provision is necessary given that the Union's institutions can only exercise those powers explicitly provided for in the Treaty.

Motivation is very important in cases where a stakeholder request is rejected. In this case, the reasoning must clearly show why the arguments put forward by the requesting party could not be accepted.

If a regulation is not sufficiently "reasoned", this deficiency may be the basis for the annulment of the act in question, and it is a breach of an important procedural requirement that may be invoked in an action for review of the lawfulness of that legislation before the European Court of Justice. The Court may and must object, on its own initiative, to any lack of motivation³²⁴.

By sufficient reasoning of the act issued by an EU institution, it is allowed for the parties to defend their rights, the European Court of Justice to exercise its control function and the Member States and all interested citizens to know the conditions under which the institution has applied the Treaty³²⁵.

In France, Italy and in other European countries, the error of reasoning, classified as defective in administrative acts, may be a source of redress for the excess of power before the administrative courts.

Section 4. Tort liability of the European Union administration

In general, responsibility implies that a person or authority must explain and justify its own actions. In administrative law, this would mean that any administrative body must respond to its acts before another administrative, legislative or legal authority. This can be accomplished through several mechanisms: courts of justice, appeal to higher administrative bodies, public opinion polling,

³²² see Decision C-269/90, Technische Universität München-Mitte, Rec. p. I 5469 of 21 november 1991; Case T-167/94 [2002] ECR II-2589 of 18 September 1995 - Nölle v Council and Commission; Case C-221/998, ECR I-8255 of 10 December 1998 - Schröder et Thaman v Commission.

³²³ Pierre Mathijsen, *op. cit.* (*Compendiu de drept european*), 2002, p. 35.

³²⁴ *Idem*, p. 36. See also ECJ Decision 158/80 Rewe v Hauptzollamt Kiel, where Regulation No 3023/77 was declared null as it did not include the statement of the grounds on which it was based.

³²⁵ *Ibidem*, p. 35. See also ECJ Judgment no. 24/62 Germany v Commission

press, control by parliamentary committees or other special commissions. The purpose of control is to determine whether public services perform their functions effectively, efficiently and within the time limits set, and whether the principles and procedures laid down by special or general regulations are respected. Liability is a tool that shows whether principles such as respect for law, openness, transparency, impartiality and equality before the law are respected. At the same time, responsibility is essential for strengthening values such as efficiency, trust or predictability in public administration.

With regard to non-contractual liability, the Union is obliged, in accordance with the general principles common to the laws of the Member States, to make good any damage caused by its institutions or by its servants in the performance of their duties (Article 340 TFEU).

In disputes relating to repairs for damages resulting from non-contractual obligations of the Community, jurisdiction lies with the European Court of Justice³²⁶. Since the creation of the Communities, the EEC Treaty (art. 178 in conjunction with art. 215 (2)) gave the Court of Justice the power to decide on the non-contractual obligations of the Union. In the case of non-contractual obligations, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

The non-contractual liability of the Union institutions presupposes that the applicant proves the unlawfulness of the conduct alleged against that institution, the existence of the damage and the existence of a causal link between that conduct and the damage alleged³²⁷. On the other hand, the unlawful nature of an act does not automatically render the Union responsible for providing damages repairs. Thus, in the case of legislation involving economic policy measures, the Union assumes no responsibility for non-contractual obligations only in the case of a sufficiently flagrant violation of a higher rule of law to ensure the protection of the injured party³²⁸.

³²⁶ for details see Pierre Mathijsen, *op. cit.* (*Compendiu de drept european*), 2002, p. 156-158.

³²⁷ arrêts de la Cour du 29 septembre 1982, *Oleifici Mediterranei/CEE*, 26/81, Rec. p. 3057, point 16, et du Tribunal du 13 décembre 1995, *Exporteurs in Levende Varkens e.a./Commission*, T-481/93 et T-484/93, Rec. p. II-2941, point 80, du 11 juillet 1996, *International Procurement Services/Commission*, T-175/94, Rec. p. II-729, point 44, du 16 octobre 1996, *Efisol/Commission*, T-336/94, Rec. p. II-1343, point 30, et du 11 juillet 1997, *Oleifici Italiani/ Commission*, T-267/94, Rec. p. II-1239, point 20

³²⁸ Pierre Mathijsen, *op. cit.* (*Compendiu de drept european*), 2002, p. 157. It is cited here in the ECJ case-law common cases 197/81 *Ludwigshafener Walzmühle v Council and Commission*.

Decision no. T-113/96³²⁹ states that the omissions of the Community institutions are not capable of incurring the non-contractual liability of the Community only in so far as the institutions have breached a legal obligation resulting from a Community provision. The same decision states that the non-contractual liability of the Community for damage caused either by normative acts adopted by its institutions or by erroneous omissions to adopt certain acts may be committed only in the presence of a violation of a superior rule of law which protects them on individuals. In addition, if an institution has adopted or omitted to enact a normative act under its broad discretionary power, Community liability will only be committed if the violation is manifest and serious, clearly violating the limits of the exercise of its own powers.

If individuals and legal entities are injured by acts issued by Member States under EU law, two situations can be distinguished. Firstly, where the request for repairs concerns the non-compliance of the national implementing measures with the Community rules, the European Court of Justice has no jurisdiction. In this case, Member States may be sued in the national courts for wrongful application of EU law³³⁰. Secondly, if the damage caused by national implementing measures originates in EU legislation, the Union's liability can be determined by the European Court of Justice on the basis of EU law³³¹.

Remedial actions are subject to a temporary limit of five years³³². If the Court orders damages to natural and legal persons injured by an act of EU instruments deemed by the Court to be illegal, the act becomes virtually inapplicable³³³.

The principle of tort liability of the public administration is enshrined in the legislation of all the states of the European Union. Furthermore, political leadership is subject to all the Ministerial Responsibility Law. Interestingly, the provision in the Greek Constitution, where in the final part of art. 85 states that "in any case a written or verbal order of the President of the Republic can not exonerate ministers and state secretaries from their responsibility". Also in this country, under the Ministerial Responsibility Law, government members and state secretaries are jointly responsible for the general government policy, but each is

³²⁹ Arrêt du Tribunal de première instance (cinquième chambre) du 29 janvier 1998. Edouard Dubois et Fils SA contre Conseil de l'Union européenne et Commission des Communautés européennes. Responsabilité non contractuelle - Acte unique européen - Commissionnaire en douane. Affaire T-113/96. *Recueil de jurisprudence 1998 page II-00125*.

³³⁰ Pierre Mathijsen, *op. cit.* (*Compendiu de drept european*), 2002, p. 158 which cites Case 120/87 Asteris v Hellenic Republic and Commission.

³³¹ *Idem*, p. 158. See also Case 126/76 Dietz v. Commission.

³³² Protocol on the Statute of the Court, Art. 43 and Case 5/81 (Birra Wührer v. Council and Commission).

³³³ Pierre Mathijsen, *op. cit.* (*Compendiu de drept european*), 2002, p. 158.

responsible for the actions and omissions committed in the exercise of its competence³³⁴. The Portuguese Constitution regulates the civil liability of civil servants (Article 271) and establishes joint civil liability of the State and other public institutions with the owners of their state bodies, officials or agents for their actions, resulting in violation of rights, freedoms and guarantees or damages for others (Article 22).

Section 5. Efficiency and effectiveness

These are two aspects related mainly to public service management. And within the broader European Union, he maintains the maximum validity of economist Richard Farmer who, in 1988, stressed that "management is one of the key factors explaining why a country is rich or poor."³³⁵ In this area, an ambitious EU project was the adoption in March 2000 of the Lisbon Strategy aiming to make the Union economy the most dynamic and competitive economy in the world by 2010. The targets set out in this strategy were always the subject of intense European debates. Romano Prodi at the end of his term as President of the European Commission talked about a failure of the Strategy by stating amongst his main factors stubbornness of the EU Member States to use their veto against the economic initiatives proposed by the European Commission. The failure was also due to the fact that the Strategy contained a large number of areas ranging from research and education to the environment and employment policy, some of which were impossible to achieve within the proposed deadline.

The commission led by José Manuel Barroso wanted to streamline and relaunch this strategy by reducing targets in three main directions and a few other side-ends. The foreground refers to:

- creating more jobs and improving the quality of working conditions;
- increasing knowledge and innovation
- ensuring that EU space is attractive to business.

As far as the secondary objectives are concerned, they mainly concern the development of greater labor market flexibility, increased investment in research and modernization of social protection. To increase efficiency, Brussels wants each Member State to set up an action plan that contains firm commitments³³⁶.

³³⁴ See also Victor Duculescu, Constanța Călinoiu, Georgeta Duculescu, *Drept constituțional comparat*, 2nd edition, vol. I, Lumina Lex, Bucharest, 1999, p. 464.

³³⁵ Richard Farmer, *Advances in International Comparative Management*, vol. III, 1988.

³³⁶ See also *Lisbon Action Plan incorporating EU Lisbon Programme and recommendations for actions to Member States for inclusion in their national Lisbon Programmes* - SEC(2005)192, Bruxelles, 4 février 2005

In 2010, the European Commission published the Communication "Europe 2020. A European Strategy for Smart, Green and Inclusive Growth"³³⁷ proposing measures to restructure the European Union's economy after the economic crisis.

Europe 2020 proposes three mutually supportive priorities:

- smart growth: developing an economy based on knowledge and innovation;
- sustainable growth: promoting a more efficient economy from the point of view of resource use, more environmentally friendly and more competitive;
- inclusive growth: promoting a high-employment economy labor force, ensuring social and territorial cohesion.

The EU has to define the direction it wants to evolve by 2020. To this end, the Commission proposes the following main EU targets:

- 75% of the population aged between 20 and 64 should have a seat at the work;
- 3% of EU GDP should be invested in research and development;
- meeting the "20/20/20" climate / energy targets to reduce greenhouse gas emissions by 20% by 2020 compared to 1990 levels (and to reach 20% of energy from sources sources);
- the early school drop-out rate should be reduced to below 10% and at least 40% of the young generation should have higher education;
- the number of people at risk of poverty should be reduced by 20 million.

Effectiveness refers to the ratio between the result obtained and the objective to be achieved. This concept involves, on the one hand, the prior definition of an objective and, on the other hand, the measurement (or at least the estimation) of the result obtained³³⁸. Effectiveness is to ensure that public administration performance is headed towards the proposed goals, addressing public issues legally. It is necessary to analyze and evaluate permanent public policies to ensure that they are properly implemented by the public administration and civil servants.

Efficiency is the ratio between the output and the means employed (the ratio between output and input). Today, due to the fiscal constraints existing at national and European level, the effective and efficient performance of the administration in providing public services to society is increasingly in the attention of the authorities and public opinion. Efficiency as managerial value may sometimes conflict with legal restrictions. Public managers often see legal procedures as enemies of efficiency. Everywhere, legislation is a conservative element, and managerial innovations tend to outgrow. The conflict also generates legal institutions and solutions, so it can be said that management is today the "engine of the

³³⁷ The communication can be found here: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:RO:PDF> (last consulted on the 15th of July 2017).

³³⁸ See in this regard Lucica Matei, *Management public*, Economic Publishing House, Bucharest, 2001, p. 195.

remodeling of law in administration."³³⁹ Institutional elements include the process of transferring productive activities to the private sector through contractual procedures (administrative or commercial contracts), while public administration retains the role of a factor designing these contracts and then monitoring them.

The European Court of Auditors has an important role in controlling the financial management of the Union institutions. The object of this control is to verify the legality and the principles of economy, efficiency and effectiveness in managing the organization's money resources and how the assets of the EU institutions are managed. Through its controls, the European Court of Contours highlights and draws the attention of administrators and competent bodies to the gaps, inconsistencies and frauds found or potential, and signals the ambiguities or shortcomings of the applicable control provisions that could favor such negative phenomena³⁴⁰.

The legislation and jurisprudence of the institutions and structures of the European Union provide for the need for an efficient administration, especially in the light of EU directives and regulations. Thus, national administrations have to comply with the deadlines set in the directives for taking concrete measures for their implementation, thus requiring a certain amount of efficiency at the level of the national administration³⁴¹. Member States are therefore obliged to make changes in their internal organization, administrative structures and decision-making procedures, in order to effectively and effectively support European legislation and to ensure effective cooperation between the EC institutions.

In Western European constitutions of a more recent date, such as that of Spain in 1978, efficiency and effectiveness are high on constitutional principles, along with other classical principles such as law enforcement, transparency and impartiality. Legislation on public administration often refers to economy, efficiency and effectiveness ("the three E") and law enforcement, as principles to govern public administration and civil servants.

³³⁹ Ioan Alexandru, *Dreptul și managementul. Dihotomie sau complementaritate. Impactul informatizării*, All Beck, Bucharest, 2004, p. 43 and next.

³⁴⁰ OCDE, *Efectele aderării la Uniunea Europeană*, Economic Publishing House, Bucharest, 2000, Part I – „Proces bugetar și control financiar”.

³⁴¹ see the European Court of Justice, Case 86/81, *Commission v. Belgium* (1982), ECR. 153 - by virtue of Art. 15 of Directive 78/176 on waste from the titanium dioxide industry, Member States had to implement the necessary measures to comply within 12 months of notification.

Chapter VI

Integration of Romanian authorities and institutions into the European Union's system of values

Today, with all the aspirations of the unity of the old continent, reality shows us that it is very difficult to speak in Europe about a mode or model of public administration. A European model of public administration is now at the ideal stage. There is no type of administration that we can refer to as a standard.

Over time, the Member States of the European Union, despite having different legal traditions and different systems of governance, have developed a common body of doctrine and share the same principles of administrative law and good practice standards as well as the need for unitary application and effective EU law. Sharing the same principles and standards has led to some convergence between national administrations. This has been described as the "European Administrative Space".

The integration of Romania into an administrative convergence area of the European Union is difficult to achieve also from the perspective of the fact that there is no European *acquis* that includes the standards set for a universal public administration. The key elements of good governance are set around the principles generated by the work of the European Ombudsman and the European Court of Justice. Finally, the level at which the whole administrative set of Romania complies with the commonly accepted standards, built on the established legal administrative principles, is of prime importance for the integration in the European Union system of values

In order to integrate into the European Administrative Space, Romania needs to undertake a structural and functional reform of the public administration in order to increase the ease, efficiency and consistency of the administrative act, to reduce bureaucracy, to eliminate dysfunctions and overlapping of competencies and to increase the degree of compatibility with other administrations States of the European Union. The core institutional values at European level (functionality, transparency, predictability, accountability, adaptability, efficiency, subsidiarity) must also be implemented within the Romanian public administration at all levels and must be protected by the public authorities empowered by the legislation in force to monitor and to control this process of adaptation to the requirements of the European Administrative Space.

We appreciate that in a future Administrative Code of Romania, the guidelines of the administrative reform should be laid out in the form of basic principles among which are the principles that outline the European Administrative Space.

Romania has the chance that by means of a coherent administrative reform aimed at both the legislative modification and especially the change of the mentality of the participants in the administrative relations, it will become a model to be followed within the European Union. Today we find that, as in Eminescu's time, "all living conditions need to be improved, and for this there needs to be an administration enlightened in truth, untiring and honest." ³⁴²

In today's Romania, with all the Western aspirations, one can talk about an inadequacy of the administrative apparatus in its social environment (the gap between administration and society), which generates a legitimacy, identity and effectiveness crisis in the administration.

The crisis of administration can be defined as an accentuated manifestation of some inconsistencies and contradictions in its functioning, phenomena that generate a period of tension and turbulence accompanied by attempts - most often unsuccessful - to eliminate them ³⁴³.

The polemic on legitimacy is also specific to the transition because any intention of administrative change in a democratic state involves pros and cons. The major problem lies in the government's courage to assume responsibility not only for the development of an administrative reform strategy but also for its implementation.

Against this background, public administration reform depends largely on five aspects ³⁴⁴:

- ☐ external pressure
- ☐ internal dissatisfaction
- ☐ the quality of the reform strategy
- ☐ the reform management mechanism
- ☐ information feedback and evaluation

Public administration has a certain autonomy, it must be perceived as Eminescu said as his own personality that develops just like a human body having a body and a soul. *The body of the state is the land, the earth; - the soul is the people, its organic consciousness is the state in the strict sense of the word, the abstraction from the country and the people - the state as such* ³⁴⁵. It is not possible to apply rupture strategies to this administration, because they would accentuate the crisis. Taking over evolved forms from outside would create a rupture with the Romanian background. So any reform strategy must start from a Romanian reality that it will try to change gradually. Also, "you can not build solidly if you

³⁴² Mihai Eminescu, article „Pe când se discuta...” – „Timpul”, 10 July 1880, *Opere XI*.

³⁴³ See in this regard Ioan Alexandru, *Criza administrației – teorii și realități*, All Beck, Bucharest, 2001, p. 108.

³⁴⁴ SIGMA Papers, nr. 23 – *Preparing Public Administration for the European Administrative Space*, OECD, Paris, 1998.

³⁴⁵ Mihai Eminescu, article [*Personalitatea statului și organismele sale*] – manuscript 2257, *Opere XV*, p.1151 -1159.

do not have a foundation, a strong foundation and especially if you do not use the knowledge accumulated over the years by specialists in various fields." ³⁴⁶

In the process of integration into the EU's system of values, public administration has a dual role: that of an instrument or interface through which financial assistance programs, EU law enforcement and education are carried out in the spirit of "unity in diversity" a united Europe, as well as an autonomous entity with means of action and personnel. Under the first aspect, it is often spoken of about increasing the capacity of public administration to respond to the ever-diversified demands of integration. Under the second aspect, the effectiveness and consistency of the administrative act and the democratization of the public service are being discussed.

As an expression of the rule of law, everywhere in the European Union, the purpose of national administrations is the same: serving the best interests of citizens. But, all over the Union, do citizens have the same interests in dealing with the administration? We believe that although the citizens of each country exhibit conservative individualities due largely to the historical reflex, there is today a philosophy of human rights (humanist) that necessarily implies the democratization of the administration and its proximity to the citizen.

Many times, in Romania, there was a misuse of legislative abundance (inflation), without first establishing clearly the principles that will form the basis of the construction of the new system of organization and administrative action. Or, to build a house, we must first put the foundation and the pillars of resistance in order for the structure to be durable. The principles of the European Administrative Space are the pillars of support for the European building.

³⁴⁶D. Bujor-Buhociu, *Timpul*, no. 2/2004, p. 10.

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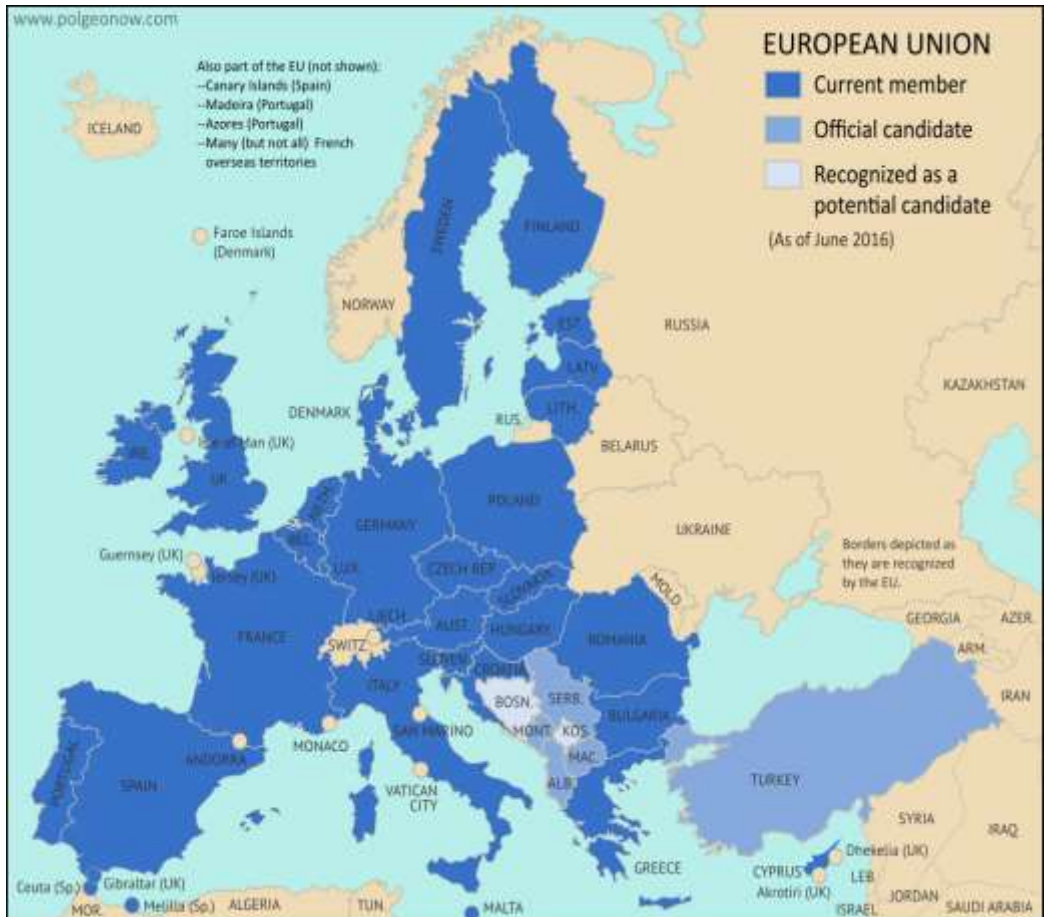
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Map of the European Union



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